XXXI FIDE Congress

Katowice 2025

Institutional Report

EU EMERGENCY LAW

Emanuele REBASTI, Anne FUNCH JENSEN & Alice JAUME

EU EMERGENCY LAW

II. THE EU EMERGENCY ARCHITECTURE

Introduction: the EU emergency architecture

1. EU law provisions framing Member States' emergency powers

1.1. Escape clauses and derogations

1.1.1 Nature of escape clauses: not a reserve of Member State competences

1.1.2 Conditions for recourse to escape clauses

Concluding remarks

1.2. Coordination of national responses: the case of State Aid control in times of crisis

1.2.1 Article 107(2)(b) TFEU and Article 107(3)(b) TFEU

Temporary Crisis Framework (COVID-19)

Temporary Crisis Framework and Temporary Transition and Crisis Framework – energy crisis

1.2.2. Case-law

Concluding remarks

2. Emergency Competences of the Union: Selected Provisions

2.1. Article 122 TFEU

2.1.1. From Rome to Lisbon: the history of Article 122

2.1.2. Existence of an exceptional situation as a condition for recourse to Article 122(1)

2.1.3. Character of the measures that can be adopted under the provision

The measures must be limited in time

The measures must be appropriate to the situation

The measures must address an economic situation

The measures must be adopted in a spirit of solidarity

The powers must be exercised "without prejudice to any other procedures provided for in the Treaties"

2.2. Article 78(3) TFEU

2.2.1. The history of Article 78(3)

2.2.2. The conditions for recourse to Article 78(3)

2.2.3. Character of the measures that can be adopted under the provision

Broad typology of measures, including derogation from ordinary legislation

Provisional character of the measures

The measures must be limited to what is necessary to respond to the specific crisis

The measures need to give effect to the principle of solidarity

3. The principles of an emerging EU Emergency Constitution

3.1. Conferral and effectiveness

3.2. Solidarity, subsidiarity and responsibility

3.3. Subsidiarity and proportionality – identification of the Union objective

3.4. Judicial control on proportionality and fundamental rights and the role of the precautionary principle

Part II

THE TRANSFORMATIVE EFFECT OF EMERGENCY MEASURES ON THE EU LEGAL ORDER

III. EMERGENCY AND ITS IMPACT ON THE SYSTEM OF UNION COMPETENCES

Introduction

1. Interference? The use of ordinary legal bases to regulate emergency situations

1.1 Use of ordinary legal bases in emergency times: suitability of OLP for crisis response

1.2 Use of ordinary legal bases to set out permanent emergency frameworks: recent practice

1.2.1 Health and medical products

1.2.2 Internal market

1.2.3 Border controls, asylum and migration

1.2.4 Cohesion policy and budgetary instruments

1.3 Limits to the use of ordinary legal bases to regulate emergency situations: the case of Article 114 TFEU

1.4 Relationship between ordinary and emergency legal bases in the response to crisis situations

1.4.1 The coexistence of ordinary and emergency competence

1.4.2 Coherence and coordination between emergency instruments

1.4.3 Effects of the exercise of ordinary and emergency competence on their respective scope

Concluding remarks: the shift towards a legislative model of emergency regulation

2. Interaction? The impact of emergency measures on the shaping of EU policies

2.1 The shaping of EU policies through policy packages

2.1.1 The practice of policy packages

2.1.2 Impact of emergency measures on policy packages

2.2 The shaping of EU policies through the policy cycle

2.2.1 The influence of emergency measures on the evolution of ordinary legislation

2.2.2 A crisis-driven policy cycle

Concluding remarks: a crisisification of Union policies?

IV. EMERGENCY AND ITS IMPACT ON THE UNION INSTITUTIONAL BALANCE

Introduction

1. The European Council: the crisis manager-in-chief

1.1 The enhanced role of the European Council in times of crisis

1.1.1 From agenda-setting to law-making?

1.1.2 A role in the implementation and interpretation of EU law?

1.1.3 Gap-filling role

1.2 The role of the European Council in the assessment of the Court of Justice: a formalistic application of the principle of institutional balance

1.3 European Council and consensual decision-making in times of crisis: constitutional mutation or condition of effectiveness?

2. The European Parliament: more than a Spectator in times of crisis?

2.1 The continued relevance of the ordinary legislative procedure in regulating crisis situations

2.2 The Parliament's control over emergency measures

2.2.1 Budgetary control over emergency measures

2.2.2 Political control over the adoption of emergency measures

2.2.3 Scrutiny of the implementation of emergency instruments

3. The Council: work in the shadow of the leaders and an increasing role in the implementation of EU law

3.1 Council implementing powers for emergency measures

3.2 The legality of conferral of implementing powers on the Council in light of the case-law

3.3 The exercise of the Council implementing powers in practice and its impact on the institutional balance

4. The role of the Commission: erosion or renaissance?

4.1 An apparent erosion of the Commission's prerogatives based on self-restraint and deference

4.1.1 An erosion of the power of initiative due to the deference to the European Council?

4.1.2 An erosion of the power of implementation as a result of the growing role of the Council and the Member States?

4.1.3 An erosion of the powers as Guardian of the Treaties due to self-restraint in the recourse to infringement proceedings

4.2 A significant strengthening of Commission's role

4.2.1 Leveraging the crisis to reinforce existing powers

4.2.2 New instruments, new powers and new domains of action

4.2.3 Preserving the centrality of EU legal order and maintaining a central role outside it

Concluding Remarks

EU EMERGENCY LAW

Emanuele REBASTI, Anne FUNCH JENSEN and Alice JAUME[1]

General introduction – the notion of emergency in EU law

Emergencies are far from new in an EU context, and the Union has been faced with numerous emergencies since its inception. However, there can be no doubt that the Union has faced multiple serious and successive crises in recent years.[2] This report will not delve into the causes of such emergencies but will rather examine the responses that the Union has adopted and the tools available to the Union. As Ester Herlin-Karnell rightly puts it: "the classic underlying question is to what extent the EU is equipped to deal with emergencies and the possible tensions with regard to the proper application of the rule of law and proportionality."[3] This reflects the general perception that exceptional situations require exceptional answers, and that an emergency needs to be accompanied by specific emergency powers which may involve derogating from or interfering with certain rights and obligations to preserve the common interest which is threatened by the emergency. It also reflects the challenges this leads to in terms of balancing such emergency response with upholding the core rights and values upon which the Union is founded. Among those, the principle of conferral – as one of the constitutional pillars of the EU legal order – requires first and foremost clarification of to what extent the Union has been chosen by the drafters of the Treaties as the normative space to regulate the response to emergencies.

Part I of this report aims to address those issues and, in so doing, to present the architecture of EU emergency law.

Its first chapter sets the empirical framework of the study by describing the action of the Union in three of the most pressing recent crises. By illustrating the number and diversity of measures adopted at the Union level and the interactions between them, as well as the role of the institutional actors in

[1] Emanuele Rebasti is Senior Legal Counsellor at the Legal Service of the Council of the European Union. Anne Funch Jensen contributed to this report as Senior Legal Counsellor at the Legal Service of the Council of the European Union up to December 2024 before joining the European Commission as Expert in the Cabinet of Commissioner Serafin. Alice Jaume is Legal Adviser at the Legal Service of the Council of the European Union. The three authors have in their respective areas of responsibility worked on many of the emergency measures which are covered by the present report. The views expressed by the authors are strictly personal and do not engage the institution for which they work.

[2] Since 2008, the Union has responded to the financial crisis, the Ukraine/Russia crisis and the ensuing energy crisis, migration crises, the COVID-19 pandemic and Brexit, as well as tensions in transatlantic relations, growing challenges in respect of competitiveness and an over-arching climate crisis.

[3] Herlin-Karnell, E. *Republican Theory and the EU: Emergency Laws and Constitutional Challenges*. *Jus Cogens* **3**, 209–228 (2021), at p. 211.

defining the emergency response, it makes the case for a comprehensive assessment of the EU response to crises. It analyses specific aspects of the emergency measures adopted in the case studies so as to identify common features, patterns, effects and tensions, and thus lays the ground for the analysis that will be developed in the subsequent chapters.

The second chapter of Part I builds on the case studies to identify the provisions and principles that regulate the emergency powers in the EU legal order and define their limits. It thus sketches out the EU's emergency architecture, which combines the traditional international law approach, for which emergencies are a justification for Member States to derogate from their international obligations, to the conferral in specific fields of emergency powers on the Union, which have been progressively interpreted making full use of the potential powers or, when that was not legally or politically possible, have been supplemented by recourse to intergovernmental instruments.

Chapter II further details the emergency toolbox provided by the Treaties to deal with situations of emergency, focusing on the main emergency competences of the Union. This chapter then turns to the constitutional foundations of emergency law at the EU level that have been emerging in the case-law in particular, and identifies the common values and principles which frame EU emergency law. In this respect, it touches upon the review of emergency law by the ECJ and, in particular, the standard and intensity of review.

In Part II, this report delves into the transformative effect of emergency measures on the EU legal order. In its first chapter we look at the impact of emergency measures on the system of competences of the Union and on the shaping of its policies. Building on the case studies examined in the first part of this report, we will show how emergency and ordinary competence have been concurrently used by the EU institutions to respond to crises but at the same time interfere with each other, in line with the Union system of competence. The chapter further looks at the dynamics of the interaction between emergency measures and ordinary competence. Two phenomena in particular will be analysed: first, the way emergency measures and ordinary ones are often bundled in political packages in order to respond to legal and political needs and the impact that such a bundling has on the way the Union response to crises is shaped and on the role of the institutional actors. Second, we will look at how emergency measures often have provided the EU institutions with a blueprint for permanent changes in Union policies. Beyond their limited period and scope of application, emergency competences interact with the exercise of ordinary ones according to a regulatory cycle which shapes ordinary legislation beyond situations of crisis.

The second chapter of Part II will then turn to the institutional dimension and look at the impact that the emergency response has on the institutional balance of the Union. It is often repeated that crises

alter that balance in fundamental way, raising a number of calls for institutional reform. In light of the case studies analysed in Part I, we will look at how recent emergencies have influenced the role of the main four political institutions (the European Council, the Parliament, the Council and the Commission) and impacted their respective interactions.

We will in particular test the often-repeated claim that the increased role of the Council and of the European Council in times of crisis significantly altered the constitutional allocation of powers among institutions as enshrined in the Treaties, by particularly eroding the role of the Commission to the detriment of the Community method and by undermining the possibility of effective democratic control by the Parliament.

The notion of emergency in EU law

The topic of this report is "EU emergency law" which inevitably leads to the question: What is an emergency? The legal relevance and importance of a proper determination of when an emergency exists is therefore very much linked to the fact that such a situation is usually coupled with the triggering of expanded "emergency powers." As is commonly known, and as national reports amply illustrate, an emergency may lead to the declaration of a *state of emergency*, which in turn tends to trigger exceptional emergency powers often vested in the executive. This cannot be fully transposed to the Union context, which is governed by a specific set of rules, is subject to a different institutional set-up and is limited at all times by the powers conferred under the Treaties. The Union is not equipped with powers to declare a general state of emergency, and – as Bruno de Witte puts it – "EU Treaty rules must be used in good and bad times, in normal times and in crisis times."[4]

That does not mean that the concept of emergency is irrelevant in the Union universe or that the Union is without powers when faced with an emergency. It rather means that the tools available in the context of an emergency, the boundaries for Union action and the scope for exceptions and derogations are governed by additional and sometimes different considerations than at national level, although a number of common features are also present. It remains the case that Union responses, too, in order to be effective, may involve certain interferences in individual rights which need to be carefully balanced against the public interest which the measure is aiming to protect.

Many scholars have provided their thoughts on what the concept of emergency means and which situations it covers.[5] It appears to be generally understood that an emergency – as a concept –

[4] Bruno de Witte, infra footnote 5, at p. 5.

[5] See for example Mark Rhinard, Neill Nugent and William E. Paterson, *Crises and Challenges for the European Union* (Bloomsbury Publishing Plc), in particular p. 6 which provides the following generic definition of the term "crisis,"

comprises elements linked to the urgency or suddenness of the situation, the concreteness of the threat and the inherent risks it represents, as well as its scale and gravity. Some distinguish an "emergency" from a "crisis" arguing that the former is sudden and unexpected, whereas the latter also covers situations which evolve more slowly over time and, therefore, may not require the same immediate and acute action. The concept of suddenness and urgency also finds some support in common definitions of the notion "emergency." For example, Oxford Languages provides the following definition of an emergency: "a serious, unexpected, and often dangerous situation requiring immediate action." Others again distinguish the causes of an emergency, that is, whether it is endogenous or exogenous, and some point to the fact that the existence of an emergency is necessarily in the eye of the beholder, which means that a situation may be an emergency to some but not to others.

There is no one general definition of emergency in EU law.[6] This reflects the architecture of the EU emergency framework and especially the absence of a general competence of the Union to exercise emergency powers. In such a framework the concept of emergency does not lend itself to being circumscribed *in abstracto* to limited or predefined situations. It rather ought to be defined according to the circumstances of the different sectorial legal regimes in which it is included.

Thus, the emergency provisions included in the Treaties adopt different notions of emergency. For instance, Article 122 TFEU refers in its paragraph 1 to an "economic situation" characterised, *inter alia*, by "severe difficulties [...] in the supply of certain products, notably in the area of energy" and in its paragraph 2 to "severe difficulties caused by natural disasters or exceptional circumstances beyond a [Member State's] control."[7] By comparison, another Treaty-based emergency competence that will be analysed in detail in this report, Article 78(3) TFEU, defines emergency as a "situation characterised by a sudden inflow of nationals of third countries," thus identifying very specific circumstances for the triggering of the provision, which specifically relate to the domain of asylum and migration.

---

focusing on how the crisis is being acted upon, how and with what effects: "*A crisis is a perceived threat to collectively held values that quickly changes the priority goals of a decision-making unit and requires unique responses within shortened time-horizons.*" See also Bruno de Witte, EU Emergency Law and its impact on the EU Legal Order, Guest Editorial, *Common Market Law Review* 59: 3–18, 2022 (Kluwer Law International). See also Pavel Ondrejek and Filip Horak, Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures, European Constitutional Law Review, Volume 20, Issue 1, March 2024, pp. 27–51, at 30.

[6] For a reflection on the notion of emergency in EU emergency law, see: G. Bellenghi, "Neither Normalcy nor Crisis: The Quest for a Definition of Emergency under EU Constitutional Law," *European Journal of Risk Regulation*. Published online 2025: 1–20. doi:10.1017/err.2025.17.

[7] On the interpretation of the conditions for the triggering of Article 122 and on the relationship between the first and second paragraph, see the analysis in Chapter II, section 2.1.

The fragmentation of the notion of emergency in EU law is further accelerated by the recent flurry of legislative initiatives which have incorporated crisis response frameworks in a number of sectorial domains of EU law. As the EU model of crisis regulation shifts from a Treaty-based to a legislative one (see on this Chapter III), the definitions of crisis which are associated with the triggering of emergency measures multiply. Thus, it is possible to find a notion of "public health emergency" in the *Cross-border Threats to Health Regulation*,[8] a notion of "large public health emergency" in the *Schengen Borders Code*,[9] a notion of "public emergency" in the Data Act,[10] a notion of "semiconductor crisis" in the Chips Act,[11] the notions of "supply crisis" and "security crisis" in the *EDIP* proposal,[12] and a definition of a "situation of crisis*"* in the context of migratory movements of

[8] Article 23 of Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU, OJ L 314, 6.12.2022.

[9] Article 2, point 27 of Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L, 2024/1717, 20.6.2024: 'large-scale public health emergency' means a public health emergency, that is recognised at Union level by the Commission, taking into account information from competent national authorities, where a serious cross-border threat to health could have large-scale repercussions on the exercise of the right to free movement".

[10] Article 2, point 29 of Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), OJ L, 2023/2854, 22.12.2023: "'public emergency' means an exceptional situation, limited in time, such as a public health emergency, an emergency resulting from natural disasters, a human-induced major disaster, including a major cybersecurity incident, negatively affecting the population of the Union or the whole or part of a Member State, with a risk of serious and lasting repercussions for living conditions or economic stability, financial stability, or the substantial and immediate degradation of economic assets in the Union or the relevant Member State and which is determined or officially declared in accordance with the relevant procedures under Union or national law."

[11] Article 23 of Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 (Chips Act), OJ L 229, 18.9.2023, p. 1–53: "1. A semiconductor crisis shall be considered to occur where: (a) there are serious disruptions in the semiconductor supply chain or serious obstacles to trade in semiconductors within the Union causing significant shortages of semiconductors, intermediate products or raw or processed materials; and (b) such significant shortages prevent the supply, repair or maintenance of essential products used by critical sectors to the extent that it would have serious detrimental effect on the functioning of the critical sectors due to their impact on society, economy and security of the Union."

[12] Article 2 point 18 and Article 44 of Proposal for a Regulation establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products ('EDIP'), COM/2024/150 Final: "'security crisis' means any situation in a Member State, an associated third country or non-associated third country in which a harmful event has occurred or is deemed to be impending which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or requires measures in order to supply the population with necessities, or has a substantial impact on property values, including armed conflicts and wars."

persons in the Crisis Regulation.[13] As a matter of example, the *IMERA* – the general instruments to tackle emergencies in the internal market – adopts the following definition of crisis[14]:

> (1) "crisis" means an exceptional, unexpected and sudden, natural or man-made event of extraordinary nature and scale that takes place within or outside of the Union, that has or may have a severe negative impact on the functioning of the internal market and that disrupts the free movement of goods, services and persons or disrupts the functioning of its supply chains;

Certain legislative instruments introduce a broad – non-sectorial – definition of crisis the relevance of which is, however, limited to the instrument in question. Thus, for instance, the Financial Regulation defines crisis as:[15]

a) a situation of immediate or imminent danger threatening to escalate into an armed conflict or to destabilise a country or its neighbourhood;
b) a situation caused by natural disasters, man-made crisis such as wars and other conflicts or extraordinary circumstances having comparable effects related, inter alia, to climate change, public and animal health, food security and food safety emergencies and global health threats, such as epidemics and pandemics, environmental degradation, privation of access to energy and natural resources or extreme poverty.

While adapted for the specific context to which they refer, and limited in their normative relevance to the legal framework to which they belong, these definitions nonetheless share some common elements that are indicative of the general understanding of the concept of emergency in EU law. First, the exceptional character of the situation is explicitly referred to in most of the definitions or it is implied by mentioning examples of situations that ultimately have that character. Exceptionality is

[13] Article 1 of Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359, 22.5.2024: "4. For the purposes of this Regulation, a situation of crisis means: (a) an exceptional situation of mass arrivals of third-country nationals or stateless persons in a Member State by land, air or sea, including of persons that have been disembarked following search and rescue operations, of such a scale and nature, taking into account, inter alia, the population, GDP and geographical specificities of the Member State, including the size of the territory, that it renders the Member State's well-prepared asylum, reception, including child protection services, or return system non-functional, including as a result of a situation at local or regional level, such that there could be serious consequences for the functioning of the Common European Asylum System; or (b) a situation of instrumentalisation where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security."

[14] Article 3, point 1 of Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No 2679/98 (Internal Market Emergency and Resilience Act), OJ L, 2024/2747, 8.11.2024.

[15] Article 2, point 22 of Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union, OJ L, 2024/2509, 26.9.2024.

often associated with a dimension of suddenness and urgency which further strengthen the difference if compared to "ordinary times," as it excludes any possibility of anticipation of the event. Together, those features point at a limitation in time of the situation of crisis (if not of its effects, which, contrarily can be lasting in time) and in fact several definitions explicitly mention that requirement as well.[16]

Second, all definitions include a certain threshold of gravity/scale of the situation. When the chosen terms do not already include an indication of gravity (such as the reference to "disasters"), this is made explicit by referring to specific thresholds as to their consequences.[17] Often the threshold is qualified in relation to the impact that the exceptional situation has on common goods at the Union level, and in particular on the effectiveness of an existing Union legal framework or common rules.[18]

This latter element underlines another common feature, the Union dimension of the emergency so that a common response at the EU level is deemed necessary. For an emergency to qualify as a Union emergency it would primarily encompass situations which represent a threat – or serious risk of a threat – to core values and structures of the Union and its Member States.[19] A Union emergency would also often entail a cross-border dimension, at least as far as the response to the emergency is concerned. However, the Union dimension can also result from the fact that the crisis affects common rules and impacts the functioning of a common regulatory system, albeit in relation to a specific Member State, as, for instance, in the case of the definition of migration crisis provided by the *Crisis Regulation*. Moreover, whereas an emergency in one region or Member State may not necessarily be perceived as a Union emergency, it is worth noting that the concept of "solidarity among Member States" which permeates the Union's emergency responses, argues against an overly narrow construction of the concept.

Fourth, the categories used to define the crisis remain defined in broad terms and thus allow a wide margin of discretion in the assessment of the situation. That discretion is exercised in the framework of specific decision-making processes, which envisages distinct roles for the Commission, the

[16] See, for instance, the definition of public emergency in the Data Act.
[17] See, for instance, the notion of public emergency in the Data Act which qualifies the exceptional situation as "negatively affecting the population of the Union or the whole or part of a Member State, with a risk of serious and lasting repercussions for living conditions or economic stability." See also: the notion of security crisis in the *EDIP* proposal which requires a situation "which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people."
[18] For instance, *IMERA* refers to the "severe negative impact on the functioning of the internal market," the *Crisis Regulation* requires the situation to be "of such a scale and nature […] that it renders the Member State's well-prepared asylum, reception, […] or return system non-functional," the *Schengen Borders Code* identifies a large-scale public emergency when a serious cross-border threat to health "could have large-scale repercussions on the exercise of the right to free movement."
[19] In line with what is advanced in Bruno de Witte, "EU Emergency Law and its impact on the EU Legal Order, Guest Editorial," *Common Market Law Review* 59: 3–18, 2022 (Kluwer Law International), at page 4.

Council and often for technical bodies providing the relevant expertise, and which will be analysed in Chapter IV of the present report. Such discretion is subject to a lenient standard of review by the Court of Justice, which has applied the standard of the "manifest error of assessment" to assess its legality. According to the Court, in making use of emergency powers "EU institutions must be allowed broad discretion when they adopt measures in areas which entail choices, in particular of a political nature, on their part and complex assessments."[20]

This report will focus on those situations which are characterised by a certain suddenness and urgency, leaving aside crises which evolve over time, such as the climate change crisis and the broader rule-of-law tensions. However, in this report we will refer interchangeably to "emergency" and "crisis" when referring to those situations, for the very reason that the various measures put in place do not consistently use one or the other notion to define the specific situation.

[20] Judgment of the Court of Justice of 6 September 2017 in joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary vs Council of the European Union*, EU:C:2017:631, paras. 123–124.

PART I
THE EU EMERGENCY LEGAL FRAMEWORK

I. THE EU EMERGENCY RESPONSE IN THREE RECENT CRISES

"[We] will do everything necessary to meet
this challenge in a spirit of solidarity."[21]

In order to illustrate the breadth and diversity of the Union's response, this part will provide an empirical overview of the emergency responses in the context of three different crises, namely the migration crisis, the COVID-19 pandemic and the Russian invasion of Ukraine and related energy crisis.[22] It will also briefly describe some of the longer-term responses which were adopted in the aftermath of those crises to address deficiencies identified and exacerbated during those crises. It will then be possible to draw some conclusions so as to identify common patterns and differences in the approach to crisis, the instruments used and the behaviours of the institutions.

1. Migration crises

Since 2015 a series of crises have set migration high on the policy agenda of the Union, posing complex humanitarian, political, and legal challenges, testing the EU's institutional frameworks and its capacity to provide effective responses. After having shown in earlier years a certain reluctance to intervene directly, thus leaving to the Member States (and notably those of first entry) the responsibility to tackle migratory pressure unilaterally, the Union progressively changed its approach as the flux of migrants reached an unprecedented level, posing an immediate threat to the area of free movement of persons and to very idea of European solidarity and cohesion. As of 2015, the Union started engaging with the full range of tools at its disposal: operational, financial, legislative and in the domain of external action. An important component of this action, on which this section will focus, was recourse to emergency measures in the field of migration.

1.1 The 2015 migration crisis

[21] Joint Statement of the Members of the European Council, 26 March 2020, point 12.
[22] The part covering the crisis linked to the Russian military aggression against Ukraine will cover only the energy response and not the various restrictive measures (sanctions) adopted against Russia in the area of the CFSP.

In the years from 1990 onwards, illegal migration to Europe across the Mediterranean Sea and Adriatic Sea steadily increased for both economic reasons (with people travelling from developing countries in Africa and Asia) and as a result of conflict. 2014 was a turning point in terms of scale, with 219 000 people reaching Europe in comparison to 60 000 in 2013. This paved the way for a full-blown migration crisis in 2015 and 2016, when the EU experienced an unprecedented influx of over a million migrants and asylum seekers, primarily due to instability in Syria, Iraq, Afghanistan, and parts of Africa. Most of the arrivals took place through the Eastern Mediterranean maritime route, from Türkiye to Greece. From there, most arrival attempted to travel to Northern and Western European countries, mostly by travelling through the Balkans and re-entering the EU through Hungary and Croatia. The longer central Mediterranean maritime route from Norther Africa to Italy also remained active, entailing a great risk of loss of human life at sea.

Following two particularly deadly shipwrecks on 13 April and on 18 April 2015 off the coasts of Libya, which led to an estimated loss of 550 and 850 lives respectively, the European Council gathered in a special meeting on 23 April 2015 and adopted a statement calling for swift and determined action in response to the human tragedy in the whole Mediterranean.[23] In response to that call, the Commission in May 2015 adopted a Communication on the *European Agenda on Migration*,[24] proposing a basket of measures, both for immediate action in order to tackle the emergency, and longer-term initiatives to propose structural responses, including by legislative reform.

Among the envisaged immediate measures, on 27 May 2015 the Commission put forward a proposal to trigger for the first time the emergency competence under Article 78(3) TFEU in order to relocate 40 000 asylum seekers from Italy and Greece and thus address the situation of crisis generated by the mass influx of migrants in those Member States. The European Council agreed on the principle of relocation in June 2015, clarifying at the same time that Member States would have to agree by consensus on the distribution of the migrants.[25] Despite the failure to reach such a consensus, in September the Council moved on to adopt a Decision introducing a temporary derogation from the Dublin III Regulation on allocation of responsibility for reception and assessment of asylum

[23] Special meeting of the European Council, 23 April 2015, Statement, https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/. See also: European Parliament's Resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP)).
[24] Communication from the Commission of 13 May 2015, A European Agenda on Migration, COM(2015) 240 final.
[25] European Council of 25 and 26 June 2015, Conclusions, point 4(a) and (b), EUCO 22/15.

applications.[26] A second Council Decision was adopted few days later in order to relocate further 120 000 asylum seekers from Italy and Greece.[27]

The Commission intended the two Article 78(3) Decisions to be precursors to a permanent solution, and to that purpose it put forward at the same time a proposal for a permanent relocation mechanism to supplement the rules of the Dublin III Regulation so as to alleviate the pressure on first entry Member States in a spirit of solidarity.[28]

However, the relocation policy remained very controversial and sparked strong opposition. The envisaged consensus on the distribution of migrants among Member States never materialised, which however did not prevent the Commission and the Council from pushing ahead on the 78(3) emergency decisions. As a result, several Member States[29] voted against the adoption of the second relocation decision and two further Member States turned to the Court of Justice to seek its annulment. Despite the rejections of the applications by the Court[30] and various calls by the European Council,[31] the implementation of the relocation Decisions remained unsatisfactory, with a number of Member States refusing or failing to comply with their relocation obligations due to practical and political challenges. The Commission launched infringement procedures against the most egregious cases of violation which were later upheld by the Court of Justice.[32] These legal actions did not change the very modest outcome of the relocation emergency policy: by March 2018, a total of 33 846 asylum seekers (11 999 from Italy and 21 847 from Greece) had been effectively relocated out of the 160 000 envisaged.[33] The proposal for a permanent relocation mechanism also failed to gather adequate support in Council and was finally withdrawn in June 2019.

---

[26] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15/9/2015, pp.146–154.

[27] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24/9/2015, p. 80-94. The original Commission proposal envisaged to extend the relocation scheme to Hungary, in light of the new migratory pressure on the Western Balkans route, but that Member State declined to take part into the scheme. Council Decision 2015/1601 was amended in September 2016 to allow Member States to meet their relocation obligations by admitting asylum seekers of Syrian nationality present in Türkiye. See: Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601, OJ L 268, 1.10.2016, pp. 82–84.

[28] Proposal of 9 September 2015 for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 stablishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, COM/2015/0450 final.

[29] Slovakia, Hungary, Czech Republic and Romania.

[30] Judgment of 6 September 2017, Slovak Republic and Hungary v Council of the European Union, joined cases C-643/15 and C-647/15, EU:C:2017:631.

[31] See, for instance, Conclusions of the European Council of 15 October 2015, point 2 l), EUCO 26/15; Conclusions of the European Council of 17 and 18 December 2015, point 1 c), EUCO 28/15.

[32] Judgment of 2 April 2020, Commission v Poland, Hungary and Czech Republic, joined cases C-715/17, C-718/17 and C-719/17.

[33] E. Guild, C. Costello, V. Moreno-Lax, "Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece," Study for the LIBE Committee, 2017, PE 583132.

A second major consequence of refugee arrivals in 2015 was a series of closures of intra-Schengen border-crossing points, designed to slow down the movement of asylum seekers across the EU. The perspective of some Member States receiving large numbers of asylum seekers was that there should be a more equal distribution of asylum seekers across the Union and that the management of external borders by Member States of first arrival was insufficient. As a result, various Member States unilaterally introduced emergency measures, closing some of their intra-EU borders to deter arrivals.[34] Indeed, unilateral temporary reintroductions of border controls at the internal border on the basis of Article 25 and 28 of the Schengen Border Code have since become a constant feature in situations of migration crisis. The border closures led to various initiatives at the EU level as of October 2015[35] to promote better coordination of national measures, in order to avoid disorderly action, including the activation of the integrated political crisis response arrangements (IPCR) in information sharing mode. The Council further adopted a recommendation in the framework of the Schengen Border Code which acknowledged the necessity of controls at certain internal borders due to the deficiencies existing in the external border management in Greece, but at the same time identified a set of temporal and substantive conditions and requirements for their re-introduction.[36]

A coordinated approach was also promoted to step up humanitarian assistance to migrants within the Union via the Union Civil Protection Mechanism, based on voluntary offers of assistance by Member States, in particular to alleviate the Member States of first arrival and of transit. However, such voluntary support, as well as the existing EU funding instruments, soon provided insufficient or inadequate to provide the necessary support. Following an additional and rapid deterioration of the situation of the migrants in Greece, resulting, *inter alia*, from the adoption of unilateral border closures which prevented them from moving on to other countries,[37] the European Council called for urgent action to establish a capacity for the EU to provide humanitarian assistance internally.[38] This led the Commission to present a proposal based on Article 122(1) TFEU aimed at establishing a permanent emergency support framework – the *Emergency Support Instrument* – to provide financial support via the EU budget to Member States affected by a natural or man-made disaster, where the

[34] Compare the four cases of reintroduction of border controls in 2014 (none of them linked to migration causes), to the nine cases linked to "unprecedented influx of persons" out of the 12 cases in 2015.
[35] See the Meeting on the Western-Balkan Migration route which agreed on a 17-point plan of action. See also: European Council of 18 and 19 February 2016, Conclusions, points 5 and 8 d) and e), EUCO 1/16.
[36] Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, OJ L 151, 08/06/2016, pp. 8–11. The Council recommendation for internal border controls was further prolonged in February and May 2017.
[37] See: Médecins Sans Frontières, EU migration crisis update – February 2016, retrievable at https://www.msf.org/eu-migration-crisis-update-february-2016.
[38] European Council of 18 and 19 February 2016, Conclusions, points 5 and 8 g), EUCO 1/16.

exceptional scale and impact of the disaster is such that it gives rises to severe wide-ranging humanitarian consequences.

The *Emergency Support Instrument*[39] was rapidly adopted by the Council with a few changes to the Commission's proposal, notably aimed at strengthening the residual character of the Instrument (Article 1(1)) and at conferring on the Council the power to activate the support in a specific case on a proposal by the Commission (new Article 2). Contemporaneously with the adoption of the instrument, the Council activated it for a period of three years in order to provide humanitarian support to countries facing large numbers of migrants, and Greece in particular (Article 9(2) and recital 3). Following the activation by the Council, the specific modalities of the Union's support would then be decided by the Commission in the framework of its responsibilities for the implementation of the Union budget. It is interesting to note that the instrument did not specify any budgetary envelope for its activation. This was left to the budgetary authority, which adopted an amending budget proposed by the Commission in conjunction with the presentation of the proposal for the instrument.[40]

Eventually, the number of arrivals of migrants was greatly reduced by the second half of 2016 by a parallel strand of work, which had been strongly advocated since the beginning by a group of Member States and was aimed at reducing flows via cooperation with the countries of origin and of transit. Of particular importance was the political agreement reached between Türkiye and the Member States in March 2016 in the form of a EU-Türkiye Statement,[41] according to which Türkiye agreed to accept returned migrants who had irregularly entered Greece, while the EU Member States committed to resettling one Syrian refugee from Türkiye for each returned individual. At the same time, the Union and its Member States committed to support humanitarian and non-humanitarian assistance for refugees in Türkiye, by allocating EUR 3 billion for the years 2016–2017 via a dedicated Facility financed partially via the EU budget and partially via contributions from the Member States.[42] These arrangements were particularly successful in reducing crossings from Türkiye to Greece by more than

[39] Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70, 16.3.2016, pp. 1–6.

[40] In its resolution approving the draft amending budget 1/2016, the European Parliament welcomed the objective of enabling the Union budget to provide emergency support within the Union to tackle the humanitarian consequences of the refugee crises. However, it also noted that solution proposed as a matter of urgency lacked an overall strategy and did not ensure full respect for the Parliament's prerogatives as co-legislators. The Parliament finally called for a more sustainable legal and budgetary framework in order to allow the mobilisation of humanitarian aid within the future. As part of this call, the 2020 Multiannual Financial Framework Regulation introduced a new thematic special instrument – the Solidarity and Emergency Aid Reserve – meant to finance the ESI and EUSF over and above the MFF ceilings. See European Parliament resolution of 13 April 2016 on the Council position on Draft amending budget No 1/2016 of the European Union for the financial year 2016, New instrument to provide emergency support within the Union (07068/2016 – C8-0122/2016 – 2016/2037(BUD)).

[41] EU-Turkey Statement of 18 March 2016, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/

[42] EU Facility for Refugees in Turkey – FRITT.

98%, but were extremely controversial according to some as their implementation raised significant concerns as to respect for the fundamental rights and the fundamental principles underpinning the EU asylum *acquis*.

As the crisis situation progressively attenuated, the Commission started reflecting on how to move from ad hoc schemes to a stable framework that would better equip the overall regulatory framework to the migratory challenges. In April 2016, the Commission announced in a Communication an overhaul of all of the main legal instruments of the Common European Asylum System, with the objective of addressing the significant structural weaknesses and shortcomings that the crisis had exposed.[43] This notably included a comprehensive reform of the Dublin system, which by design and poor implementation had come to place disproportionate responsibility on certain Member States and encouraged uncontrolled and irregular migratory flows, to move to a fairer system. Between May and July 2016, the Commission submitted a set of seven legislative proposals,[44] which, however, rapidly encountered significant difficulties in Council, notably around the introduction of an automatic corrective mechanism to mandatorily reallocate migrants in the event of Member States having to deal with disproportionate numbers of asylum seekers. Despite the provisional agreement reached on some of the proposals, most of the elements were considered as a political package. The package approach was acknowledged by the European Council which, at its 2018 June meeting, further stressed the need to find consensus on a reform of the Dublin Regulation based on a balance of solidarity and responsibility.[45]

The European Council's political support for a consensual solution on the package made it difficult for the Council to progress on the legislative work, despite the Parliament's attempts to move the legislative negotiations forward and its strong objections[46] to the Council's refusal to proceed on the basis of the applicable qualified majority rule for the voting in Council on all the elements of the package. In an attempt to overcome the stalemate, in September 2020 the new Commission presented its idea for a New Pact on Migration and Asylum[47] that would strengthen controls at the external borders and, crucially, replace the original proposal for reform of the Dublin system with a new concept of flexible solidarity based on a voluntary choice of Member States between relocations,

[43] Communication from the Commission to the European Parliament and the Council: towards a reform of the common European asylum system and enhancing legal avenues to Europe, COM/2016/0197 final.
[44] A proposal on the reform of Dublin III Regulation, a proposal for a revamped Eurodac system, one establishing a European Union Agency for Asylum, and proposals reforming the Asylum Procedures and Qualification Directives as well as the Reception Conditions Directives and a proposal for a Union resettlement and humanitarian admission framework Regulation.
[45] European Council of 28 June 2018, Conclusions, point 12.
[46] See, for instance, the statement by EP President Tajani at the opening of the European Council of October 2018.
[47] Communication from the Commission on a New Pact on Migration and Asylum, COM/2020/609 final.

financial contributions or other forms of support, but mandatory as to the result, so to ensure fair burden-sharing.

In September 2020, the Commission complemented the political package of the New Pact with an additional proposal explicitly designed to introduce an emergency framework applicable in cases of crisis and *force majeure* in the field of migration and asylum.[48] The proposal envisaged the possibility for the Commission to authorise a Member State to derogate from a number of provisions of the asylum management and return management procedures and extend the time limits for registration and processing of asylum requests. The proposal further envisaged specific rules to strengthen the application, in a situation of crisis, of the solidarity mechanism already included in the Pact, by expanding the scope of the compulsory relocation scheme. This proposal was finally merged with an additional proposal aimed at tackling situations of instrumentalisation of migrants and adopted as part of the New Pact on Asylum and Migration (see below).

It is interesting to note that the negotiation of the various elements of the Pact, including the definition of a strategy for identifying a landing zone within and across the various legislative proposals, was essentially handled by the co-legislators. In Council, the rotating presidencies that followed until the end of the political cycle made a coordinated use of their powers of agenda setting and of organisation of the discussions to allow the conclusion of an agreement on the Pact before the European Parliament elections of 2024. In particular, the 2022 French presidency of the Council proposed a "gradual approach" to take forward the negotiations by sequencing the negotiations on the package and brokering partial deals while maintaining a balance within every deal between the various interests at stake, and in particular between responsibility and solidarity. This initiative was followed in September of 2022 by a political agreement between the European Parliament and five rotating Presidencies of the Council (France and the four upcoming Presidencies) on a "Joint Roadmap on the organisation, coordination, and implementation of the timeline for the negotiations between the co-legislators on the CEAS and the New Pact on migration and Asylum". The political agreement defined a working method for the inter-institutional negotiations with a view of adopting the various Proposals of the pact by the end of the legislature. Such a working method was based on the understanding that the various files represent "building blocks of a common system" and that therefore negotiations on the individual files should be organised in a way that respect balance, complementarity and legal coherence of the whole reform. This method and the agreement reached by the co-legislators on the Joint Roadmap was then endorsed by the European Council (paragraph

[48] Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final.

27 of the Conclusions of the European Council on 9 February 2023). Following this method, the co-legislators managed to finalise the adoption of the different components of the Pact in May 2024.

1.2 The 2021 Belarus crisis

While the legislative discussions for the Common European Asylum System were progressing with some difficulty, a new situation of crisis emerged. As difficulties in addressing migratory challenges appeared, the possibility to leverage migratory movements as a tool of political coercion became increasingly attractive for malicious third countries and non-state actors. This was particularly exemplified in what became known as the "Belarus crisis" of 2021.

In the summer of 2021 the government of Belarus began to encourage migrants from the Middle East and Africa to enter EU states through Belarus as a means of retaliating against the sanctions imposed by the Union on the Lukashenko regime following the serious irregularities detected in the 2020 presidential elections and the violent repression of the protests that ensued. Between August and December 2021, tens of thousands of unauthorised border-crossing attempts were recorded at the borders of Poland, Latvia and Lithuania, facilitated by Belarusian border guards.[49]

The Member States concerned adopted a number of unilateral measures to limit the arrivals at their international borders. This included the declaration of a state of emergency in Lithuania and Poland, the construction of physical barriers to control irregular entries and various other legislative measures resulting in the closure of border crossings and the *de facto* suspension of the possibility to apply for asylum at the border. In the case of Lithuania, the national measures[50] were subject to a request for an urgent preliminary ruling. During the proceedings, Lithuania invoked the general derogation clause in Article 72 TFEU and argued that the measures were taken out of its responsibility to safeguard internal security. The Court, however, found the measures incompatible with EU law since they effectively deprived illegal migrants of the opportunity to access the asylum procedure and placed them in detention for the sole reason of their illegal stay on the territory.[51]

[49] Joint Communication to the European Parliament, the Council, the European Economic Committee and the Committee of the Regions Responding to state-sponsored instrumentalisation of migrants at the EU external border (JOIN(2021) 32 final).

[50] On 10 November 2021, the Lithuanian Government declared a state of emergency for part of its territory, on the ground that that Member State was facing a mass influx of migrants, arriving mainly from Belarus. Subsequently, Lithuania passed amendments to the Law on Aliens (Lietuvos Respublikos įstatymas 'Dėl užsieniečių teisinės padėties') which entered into force in January 2022 and introduced a specific regime for the processing of asylum requests and the detention of migrants in the event of a declaration of an emergency due to a mass influx of aliens. As a result of those provisions, in the event of a declaration of emergency due to mass influx of aliens, migrants illegally staying on the Lithuanian territory were effectively deprived of the possibility to have access to the procedure for the granting of asylum and could be placed in detention.

[51] Judgment of 30 June 2022, M.A. v Valstybės sienos apsaugos tarnyba, Case C 72/22 PPU, EU:C:2022:505.

The EU offered immediate support by deploying Frontex to assist Poland, Lithuania, and Latvia in managing the border influx and by activating support from the Asylum and Migration Fund. Lithuania activated the EU Civil Protection Mechanism (UPCM) in July 2021, which led to the voluntary provision of equipment and material from 19 Member States. Additional targeted sanctions were adopted against Belarus.[52] At its October 2021 meeting, the European Council strongly condemned the instrumentalisation of migrants for political purposes and invited the Commission to propose any necessary changes to the EU's legal framework and concrete measures to ensure an appropriate response to the crisis, in line with EU law and international obligations.[53]

Following the invitation of the European Council, the Commission presented a proposal for emergency measures based on Article 78(3) TFEU aimed at providing a number of derogations to the existing asylum acquis so as to "equip the Member States concerned with the legal tools needed to react swiftly in defence of their national security and that of the Union."[54] In particular, the proposal aimed to set up, for the benefit of the three Member States, a temporary emergency migration and asylum management procedure tailored to the crisis situation.[55] The procedure would remain in force for a period of 6 months. In any event, the proposal was finally not adopted by the Council because the the derogations from the asylum *acquis* proposed by the Commission were not deemed sufficient given the challenges faced by national authorities.

It is interesting to note that a few days after the submission of the Article 78(3) proposal, the Commission presented a proposal for a Regulation based on Article 78(2), (d) and (f) and Article 79(2)(c) TFEU for a permanent framework for addressing situations of instrumentalisation in the field of migration, to reinforce the set of proposals under discussion as part of the New Pact on Migration and Asylum, as mentioned above.[56] The proposal was complemented by a related proposal to amend the Schengen Borders Code to allow Member States to introduce emergency measures at the external borders in order to react to situations of instrumentalisation.

In the explanatory memorandum accompanying the instrumentalisation proposal, the Commission noted that the aim of the new instrument was to "provide for a stable and ready to use framework to

[52] Joint Communication to the European Parliament, the Council, the European Economic Committee and the Committee of the Regions Responding to state-sponsored instrumentalisation of migrants at the EU external border (JOIN(2021) 32 final).
[53] European Council of 21 and 22 October 2021, Conclusions, points 19–21. EUCO 17/21.
[54] Proposal for a COUNCIL DECISION on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final.
[55] The emergency procedure included the following derogations: possibility to delay the registration of asylum applications made at the external border by migrants subject to instrumentalisation; possibility to limit the lodging of asylum applications by those migrants only at specific points located in the proximity of the border; possibility to apply the accelerated procedure at the border for all applications; possibility to limit the obligation to ensure material reception conditions to only basic needs; return procedure at the external borders.
[56] Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.

deal with any such situation in the future and thus render unnecessary to resort to ad hoc measures under Article 78(3) TFEU to address situations of instrumentalisation." In fact, the proposed regulation largely incorporated the derogations specifically envisaged for the 78(3) Council Decision for the benefit of Latvia, Lithuania and Poland in a permanent procedural framework that could be activated at a request of any Member State. In a case of instrumentalisation of migrants liable to put at risk essential functions of a Member State including the maintenance of law and order, the Council could, acting upon a proposal by the Commission, adopt an implementing decision authorising the Member State to apply one or more of the derogations envisaged for a given period not exceeding 6 months. The proposal was finally merged with the 2020 Crisis Regulation proposal and adopted together with other elements of the Pact on Asylum and Migration in May 2024.[57]

1.3 The 2022 Ukraine War crisis

The 2022 Russian invasion of Ukraine generated an unprecedented flow of refugees, primarily to neighbouring EU Member States such as Poland, Romania, Hungary, and Slovakia. This mass displacement led to the largest refugee crisis in Europe since World War II, requiring a swift and coordinated response from the EU. For the first time, the Union activated the Temporary Protection Directive,[58] which is (currently) based on Article 78(2) TFEU and allows for the provision of temporary protection in cases of mass influx.

The *Temporary Protection Directive* is an early example of a permanent emergency framework established on an ordinary legal basis, aimed at providing a stable and structured response in the event of a mass influx of displaced persons.[59] Following its activation by a Council implementing decision on a proposal from the Commission, the *Temporary Protection Directive* offers immediate temporary protection to identified group of migrants, as *lex specialis* to the provisions of the EU *acquis* on asylum, establishing minimum standards for the granting of temporary protection and minimum set of rights to be granted by Member States to the beneficiaries of temporary protection. It further introduces a solidarity mechanism intended to balance the efforts of the Member States in receiving and bearing the consequences of receiving displaced persons, notably via financial support and cooperation obligations.

[57] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359.
[58] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 07/08/2001, pp.12–23.
[59] On the multiplication of permanent emergency framework established under ordinary legal bases in the aftermath of the poly-crises that affected the Union in recent years, see Part II, Chapter I, section 1.2 of the present report.

Following the invasion, the European Council, in its conclusions of 24 February 2022,[60] condemned Russia's unprovoked and unjustified military aggression against Ukraine in the strongest possible terms, underlining the gross violation of international law and the principles of the United Nations Charter. In solidarity with Ukraine, the European Council agreed on further sanctions, called for work to be taken forward on preparedness at all levels, and invited the Commission to put forward contingency measures. This led the Council in its home affairs formation to ask for the activation of the *Temporary Protection Directive* on 27 February 2022. The Commission followed up on this by submitting a proposal for a Council Implementing Decision on 2 March 2022. The Council adopted the decision two days later, on 4 March 2022.[61] At the moment of the adoption, the Member States agreed in a statement not to apply Article 11 of the Directive, thus waiving the possibility to return a person enjoying temporary protection to the Member State who first granted it and enhancing solidarity and burden-sharing.[62]

The activation of the *Temporary Protection Directive* provided Ukrainian refugees with immediate residence, employment rights, and access to healthcare and education for an initial period of one year, which would be automatically extended for an additional year in line with the Directive. The Council further extended the temporary protection on two occasions, till March 2026.[63] This measure allowed Ukrainian refugees to bypass traditional asylum processes, thereby relieving pressure on national asylum systems. The EU allocated substantial funding to support host countries and provide humanitarian assistance, using instruments such as the European Social Fund to promote long-term integration for refugees. Resources were channelled towards emergency housing, healthcare, and educational services, facilitating swift and humane reception processes. The activation of the Directive also triggered the coordination obligations of the Member States, which were channelled through the EU Migration Preparedness and Crisis and Management Network and IPCR, with the Commission playing a coordinating role, to facilitate the monitoring of and exchange of information on the reception capacities of the Member States.

2. COVID-19 pandemic

[60] EUCO 18/22, points 1 to 11 and in particular 10.
[61] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022, pp. 1–6.
[62] See recital 15 of the Council Implementing Decision.
[63] Council Implementing Decision (EU) 2023/2409 of 19 October 2023 extending temporary protection as introduced by Implementing Decision (EU) 2022/382, OJ L, 2023/2409, 24.10.2023; Council Implementing Decision (EU) 2024/1836 of 25 June 2024 extending temporary protection as introduced by Implementing Decision (EU) 2022/382, OJ L, 2024/1836, 3.7.2024.

In December 2019, China reported the first cases of a novel coronavirus. The virus rapidly spread to other countries, severely hitting Italy and other EU Member States. On 30 January 2020, the World Health Organisation declared COVID-19 a Public Health Emergency of International Concern. It characterised the outbreak as a pandemic only later, on 11 March 2020. While the cross-border nature of the virus was evident, the role the Union could play was not obvious from the outset.

Early on, the Union activated mechanisms to share information and coordinate the actions of the Member States. As of the end of January 2020, the Commission activated the EU civil protection mechanism for the repatriation of EU citizens that were stranded in China, then the epicentre of the pandemic. The EU civil protection mechanism would continue to be activated, notably via its RescEU capabilities, for multiple purposes throughout the pandemic. Furthermore, the Council established enhanced crisis coordination through the Integrated Political Crisis Response Mechanism (IPCR), an instrument originally approved by Council on 25 June 2013 and later formalised in a Council decision adopted on the basis of Article 222 TFEU – the so-called solidarity clause.[64] In January 2020, the Croatian Presidency activated the IPCR in information sharing mode. On 2 March 2020, the IPCR was escalated to full mode, involving round tables with various stakeholders from affected Member States, the Commission, the EEAS, the office of the President of the European Council and relevant EU agencies and experts. The full mode was only de-activated in May 2023 under the Swedish Presidency.

However, the serious health and socio-economic implications of the pandemic soon made it clear that a coordinated Union response was needed. The response was particularly multi-faceted and also included temporary measures to ensure the continuity of the Union's institutions so that they could take the necessary swift decisions in spite of lockdowns and other restrictions put in place to limit the spread of the virus. In this section we will focus on the four main strands of the Union's action: the financial response to the economic consequences of the lockdowns triggered by the pandemic, the emergency measures adopted to tackle the health emergency, the measures relating to the restriction of the free movement of persons and finally the adaptations to the procedures and working methods of the Institutions to allow them to continue pursuing their functions during the pandemic.

2.1. The Union's financial response to the COVID-19 pandemic

[64] Council Decision 2014/415/EU 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 (consolidated 21.07.2014) and Council Implementing Decision (EU) 2018/1993 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements, OJ L 320, 17.12.2018, pp. 28–34.

The response of the Union to the economic consequences of the pandemic can broadly be divided into three phases.

2.1.1. Facilitating and coordinating Member States' unilateral actions

During a first, early phase, the financial response to the rising economic crisis was left to the initiative of the Member States, which very rapidly implemented a variety of short-term discretionary fiscal measures, notably to mitigate the short-term impact of the lockdowns and falling demand on incomes and employment. In this phase, the EU essentially focused on facilitating and coordinating the actions undertaken by the Member States. As early as 10 March 2020, the European Council stressed the need for a flexible application of the EU rules, in particular State aid rules and the rules of the Stability and Growth Pact, in order to facilitate the tackling of the socio-economic consequences resulting from the pandemic.[65] Following the call of the European Council, the Commission took swift action.

On 13 March 2020 the Commission adopted a Communication[66] providing exceptional policy guidelines for Member States outside the traditional economic coordination processes of the European Semester. The guidelines encouraged immediate fiscal stimulus measures to cushion the impact of the emerging economic crisis, such as short-time work schemes to mitigate job losses and support households' income, liquidity injections and credit/export guarantees to help companies with working capital.

On 19 March 2020 the Commission adopted a temporary State aid framework, using the full flexibility of the State aid rules to enable Member States to provide support, where such support constitutes State aid, and subject to conditions.[67] The frameworks were extended and adapted several times and also allowed for an extraordinarily swift approval of aid provided in line with that framework. Those measures are described in section 2.3 of Chapter II.

Finally, to help Member States create the necessary fiscal space to tackle a crisis of that dimension, without facing consequences under the financial discipline rules of the Stability and Growth Pact (SGP), the Commission, in a Communication of 20 March 2020[68] informed the Council that it considered the conditions for activating the general escape clause to be fulfilled.[69] Finance ministers

[65] See Conclusions by the President of the European Council following the video conference on COVID-19 of 10 March 2020.
[66] Commission Communication, "Coordinated economic response to the COVID-19 Outbreak" (COM(2020) 112 final).
[67] "Communication from the Commission – Temporary Framework for State aid measures to support the economy in the current COVID-19" (OJ C 91 I/01, 20.3.2020).
[68] Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact, COM(2020) 123 final, of 20 March 2020.
[69] The escape clauses are emergency tools enshrined in Union secondary law, namely in Regulations (EC) 1466/97 and 1467/97. The general escape clause may be activated when a severe economic downturn occurs in the euro area or the Union as a whole.

held a video-conference meeting on 23 March, following which they issued a statement indicating their agreement with the Commission's assessment of the situation.[70] This was the first time that the general escape clause was activated. The derogation allowed Member States to depart from the adjustment path towards their medium-term budgetary objectives and engage in large-scale fiscal stimulus policies.

Generally, the measures adopted by the Member States were consistent with EU crisis policy guidelines, focusing predominantly on job retention schemes and State aid to support liquidity for businesses. However, there were notable differences in the composition of fiscal packages across different Member States. In particular, it rapidly became clear that the scale and nature of measures that the Member States could adopt were largely influenced by their individual economic capacity, rather than the severity of the crisis's impact on them. Thus there was a high risk that the pandemic would exacerbate the existing economic disparities among Member States, based on their different fiscal conditions and competitive imbalances, and put their economies on divergent paths. That would have ultimately resulted in a significant strain on the Union, starting from its impact on the functioning of the internal market.

2.1.2. Mobilisation of existing instruments and first set of exceptional measures at the EU level: PEPP, SURE and ESM Treaty

The European Union swiftly started working on a second stream of actions, supplementing coordination measures with the mobilisation of common resources to support the efforts of the Member States.

The Commission proposed the mobilisation of existing instruments and budgetary resources, notably via budgetary reallocations and the use of all available flexibility instruments under the multiannual financial framework (MFF). This entailed the remodulation of existing legislative frameworks, which was done by way of ordinary legislative procedures that were concluded in an exceptionally short period of time. In particular, on 13 March 2020 the Commission proposed to amend the spending rules for cohesion funds through the *Coronavirus Response Investment Initiative* (*CRII*)[71], which was then followed on 2 April 2020 by a second proposal for a *Coronavirus Response Investment Initiative*

[70] Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis – Consilium (europa.eu). The statement underlined that: "The use of the clause will ensure the needed flexibility to take all necessary measures for supporting our health and civil protection systems and to protect our economies, including through further discretionary stimulus and coordinated action, designed, as appropriate, to be timely, temporary and targeted, by Member States."

[71] 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, OJ L 99, 31.3.2020.

Plus (*CRII plus*).[72] The two instruments, adopted in respectively 17 and 21 days[73], redirected available cohesion funds to address the most urgent needs related to healthcare expenditure, support for SMEs and short-term work measures, while allowing a more flexible use of resources, including through a much higher pre-financing rate to provide a cash injection to Member States. In the same vein, on 30 March 2020 the Commission submitted a proposal to amend the existing *European Union Solidarity Fund*,[74] a cohesion fund based on Article 175 TFEU and intended to provide grants to Member States struck by natural disasters, so as to extend its scope to major public health emergencies as well as to define more favourable rules on the financing of specific operations and double the total level of appropriations. The legislative proposal was adopted by the co-legislators in a mere 17 days. Finally, on 2 April 2020 the Commission submitted its first proposal based on an emergency legal basis, Article 122(1) TFEU, to simultaneously amend and activate the *Emergency Support Instrument*[75] which allows the Commission to provide emergency support in the case of natural or man-made disasters (the *ESI* activation will be further discussed below). The *ESI* amendment was adopted in a mere 12 days.

All these initiatives managed to rapidly mobilise up to EUR 70 billion in commitments and EUR 23 billion in payment allocations by exploiting, to the maximum extent possible, redeployments and flexibilities within the limits allowed by the budget and the MFF ceilings. It appeared immediately clear, however, that the volume of the support in question was negligible compared to the overall value of the needs and of the resources that were being mobilised at Member-State level as the lockdowns were prolonged and the impact on the economy grew exponentially (estimated at more than EUR 3 400 billion for 2020).[76] Thus the institutions started working on additional exceptional measures.

The first significant initiative in this sense was taken by the European Central Bank, which on 18 March 2020 decided to launch a temporary *Pandemic Emergency Purchase Programme (PEPP)* with an envelope of EUR 750 billion euros to buy private and public securities on the financial markets in order to keep the financial sector liquid and ensure supportive financing conditions across the economies of the eurozone.

---

[72] Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak, OJ L 130, 24.4.2020, p. 1–6.
[73] See: Part II, Chapter III, section 1.2. for an analysis of the use of ordinary legal bases to adopt emergency measures.
[74] Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency, OJ L 99, 31.3.2020, p. 9.
[75] Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak, OJ L 117, 15/04/2020, p. 3–8.
[76] European Court of Auditors, Review 6/2020, "Risks, challenges and opportunities in the EU´s economic policy response to the COVID-19 crisis," pp 32ff. See also: Annex III.

In parallel, as of 16 March 2020 the Euro Group meeting in inclusive format (i.e. with non-euro-area members present) emerged as the forum for the discussion and elaboration of a coordinated economic response at the European level.[77] Under an express mandate of the European Council,[78] the Euro Group stepped up work on the immediate actions necessary to support growth and employment, engaging to take "all the necessary measures to help the economy recover."[79]

A first result of this work was the presentation on 9 April 2020 of a package of three initiatives aimed at establishing additional safety nets for public finances, businesses and employment at the same time.[80] The package is illustrative of the capacity of the Euro Group to operate across different legal orders and institutional set-ups, taking full advantage of its nature as an informal body.[81] A first initiative was intergovernmental in nature and consisted in repurposing the existing precautionary credit line under the *ESM Treaty*[82] to provide temporary support to the Member States worth EUR 240 billion (e.g., half of the ESM's lending capacity). The credit line would be used to finance direct and indirect medical costs related to COVID-19 and would be subject to adjusted conditionality, to take into account the specific nature – symmetric and external – of the shock induced by the pandemic.[83] A second initiative, taken by the members of the Euro Group in their capacity as stakeholders of the European Investment Bank, was to endorse the EIB proposal to activate a pan-European Guarantee Fund able to mobilise up to EUR 200 billion to help companies, especially SMEs, facing liquidity shortages.

The third initiative was a new emergency measure proposed by the Commission under Article 122 TFEU. The emergency legal basis was once more used to establish a financial instrument to provide support to Member States, this time aimed at providing up to EUR 100 billion in form of loans to finance temporary employment support schemes. The SURE proposal anticipated many of the

[77] Euro Group, "Statement on COVID-19 economic policy response," 16 March 2020, Statements and Remarks 160/20.
[78] Conclusions by the President of the European Council following the video conference on COVID-19 of 17 March 2020, point 4. Joint Statement of the Members of the European Council of 26 March 2020, in particular at its point 14 which tasked the Eurogroup with presenting proposals within two weeks to address the gravity of the socio-economic consequences of the COIVD-19 crisis. The European Council clarified that the "proposals should take into account the unprecedented nature of the COVID-19 shock affecting all our countries and our response will be stepped up, as necessary, with further action in an inclusive way, in light of developments, in order to deliver a comprehensive response."
[79] Euro Group, "Statement on COVID-19 economic policy response," 16 March 2020, Statements and Remarks 160/20.
[80] Euro Group, "Report on the comprehensive economic policy response to the COVID-19 pandemic," 9 April 2020.
[81] Protocol 14 on the Euro Group.
[82] Treaty Establishing the European Stability Mechanism, in particular Article 14 on the Precautionary Financial Assistance Instrument.
[83] Access to a credit line under the ESM Treaty is subject to strict conditionality, which is intended to ensure that support to a Member State under the Treaty remains compatible with the no-bail-out clause included in Article 125(1) TFEU, as clarified in the *Pringle* judgment (e.g. support provided by ESM should ensure that the Member State pursues a sound budgetary policy). The debate in the Euro Group focused on whether the strict conditionality requirement under the Treaty would be compatible with making access to ESM financial assistance conditional only upon compliance with criteria relating to the use of funds (e.g. financing healthcare, cure and prevention costs) without further macro-economic conditions.

innovations that would later be incorporated in the more consequential NGEU scheme: the use of the whole Article 122 TFEU as a legal basis (thus without specifying either of the two paragraphs of the Article, due to the combination of the empowerment to the Commission to issue common debt to finance the instrument and the conferral of implementing powers on the Council to approve requests for financial assistance submitted by the Member States).[84] In other respects, however, *SURE* remained a more traditional instrument. In particular, the borrowing on the markets was used to finance loans to the Member States (back-to-back loans), thus excluding a redistributive effect. Moreover, as the volume of the borrowing exceeded the capacity of the EU budget to guarantee the issuance of debt, a system of Member States' unilateral and voluntary but coordinated guarantees was put in place to support the operation. Ultimately, the instrument allowed Member States that had limited fiscal capacity to gain access through the Union to loans with lower interest rates than they would have paid if borrowing directly on the markets; the direct assumption of additional debt would have further degraded their fiscal position and represented a significant threat to their capacity for recovery and to the stability of the European economy as a whole.

2.1.3. The Next Generation EU financing scheme: An emergency package to finance the economic recovery

As it became manifest that the disparities in the fiscal capacity of the Member States would likely result in divergent economic trajectories, ultimately putting the functioning of the monetary union and the common market in danger, calls for common action at the EU level to finance the economic recovery from the pandemic multiplied at all levels. On 25 March 2020 a group of nine Member States addressed a letter to the President of the European Council advocating for "a common debt instrument issued by a European institution to raise funds on the market on the same basis and to the benefits of all Member States."[85]

The topic remained extremely divisive, however. Member States such as the Netherlands and Germany that were traditionally against a "transfer Union" based on the issuance of common debt on the market (so-called "Eurobonds") remained strongly opposed to exploring solutions that would depart from the traditional paradigm of financial assistance through loans based on strict conditionality, even if their arguments appeared increasingly weak in light of the exogenous nature

[84] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L159, 2020.
[85] Letter of 25 March 2020 of the Heads of State and Government of Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal, Slovenia and Spain to the President of the European Council, retrievable at https://www.governo.it/sites/new.governo.it/files/letter_michel_20200325_eng.pdf

of the economic crisis caused by the pandemic.[86] These tensions are apparent in the 9 April 2020 Report from the Euro Group, which only mentioned the intention to work on a "Recovery Fund," while leaving all the substantive questions – and notably those relating to the size and modalities of financing – open.[87] On 23 April 2020 the European Council endorsed the various initiatives put forward by the Euro Group in its report and confirmed its agreement with the principle of a Recovery Fund, whose main elements, however, remained to be determined. In that regard, the European Council asked the Commission "to analyse the exact needs and to urgently come up with a proposal."[88]

It is in this context that, on 5 May 2020, the German Constitutional Court delivered its judgment on the *ECB's Public Sector Purchase Programme*[89], finding that the ECB programme of quantitative easing during the 2010 public-debt crisis failed to satisfy the principle of proportionality and manifestly exceeded the monetary policy mandate of the Bank, and as a result was *ultra vires* and not applicable in Germany. The German Constitutional Court further found that the judgment of the European Court of Justice concluding that the ECB programme was legal was methodologically incomprehensible and thus also *ultra vires*.[90]

The German judgment opened a major constitutional crisis for EU legal order at the peak of the pandemic, and at the same time cast a serious shadow on the viability of the *Pandemic Emergency Purchase Programme (PEPP)*, which the ECB had adopted only a few weeks earlier and represented till that moment the most consequential measure adopted at the EU level to support the economies of the Eurozone. Therefore, it does not seem a coincidence, therefore, that only a few days after the publication of the judgment, on 18 May 2020, the German Chancellor dramatically changed the position held till that moment and joined the French President in a joint statement stressing their common support for the establishment of an ambitious – albeit temporary and exceptional – Recovery Fund of EUR 500 billion in "EU budgetary expenditure" (e.g. in non-repayable financial support) to

[86] When in early March 2020, the Dutch Finance Minister Hoekstra proposed that the Commission should investigate why some countries did not have enough financial room for manoeuvre to weather the economic impact of the pandemic, his remarks caused an uproar in public opinion and prompted a number of other members of the Council to react strongly (see: Politico, "Dutch try to calm north-south economic storm over coronavirus," 27 March 2020, www.politico.eu/article/netherlands-try-to-calm-storm-over-repugnant-finance-ministers-comments). Ultimately the President of the Eurogroup acknowledged in his remarks following the Eurogroup videoconference of 24 March that "the challenge our economies are facing today is in no way similar to the previous crisis. This is a symmetric external shock. Moral hazard considerations are not warranted here. We must bear this in mind when we consider coronavirus dedicated instruments."

[87] See point 10 of the Euro Group report: "Subject to guidance from Leaders, discussions on the legal and practical aspects of such a fund, including its relation to the EU budget, its sources of financing and on innovative financial instruments, consistent with EU Treaties, will prepare the ground for a decision."

[88] Conclusions of the President of the European Council following the video conference of the members of the European Council, 23 April 2020.

[89] Judgment of the German Federal Constitutional Court (Second Senate) of 7 September 2011 (2 BvR 987/10).

[90] Judgment of the Court of Justice of 11 December 2018 in case C-493/17, *Weiss*, EU:C:2018:1000.

be financed by unprecedented borrowing on the markets on behalf of the EU.[91] As has been already stressed,[92] it would not be too far-fetched to think that the German Constitutional Court judgment has shown the limits of an excessive reliance on the technical and independent supranational institutions of the EU, and notably on the ECB, to provide the necessary response to financial and economic crises, and has prompted political actors to take responsibility and action as necessary to protect the common European project.

Only a few days after the French-German statement, on 28 May 2020, the Commission presented its package of proposals constituting the *Next Generation EU* (*NGEU*) financing scheme for the economic recovery from the pandemic, for an overall amount of EUR 750 billion (EUR 500 billion of non-repayable support and an additional EUR 250 billion in the form of loans) to be borrowed on the market via the issuance of common EU debt. The *NGEU* scheme is a remarkable example of creative legal engineering[93] based on three intertwined main proposals presented from the outset as a political package.

At the centre of the legal construction lies the *European Union Recovery Instrument* (*EURI*),[94] a Regulation to be adopted on the basis of Article 122 TFEU and aimed at supporting the economies of the Member States in their recovery from the pandemic via exceptional funding to be provided in the forms of grants and loans to the Member States. The EURI Regulation is an extremely agile instrument, limited to defining in very broad terms the types of measures to be financed and the amounts to be allocated to various programmes. In doing so, however, it crucially subjects the whole financing scheme to the requirements which are proper to the use of Article 122 TFEU, and in particular to the temporary and exceptional character (e.g. the fact of being necessary to address the crisis situation) of the measures. As we will see, these requirements have played a crucial role in ensuring both the legality of the scheme and the political conditions for its adoption, and notably the necessary reassurances that the instrument was meant to be a one-off arrangement and not a new ordinary way of financing EU expenditure.[95]

---

[91] French-German Initiative for the European Recovery from the Coronavirus Crisis, 18 May 2020, retrievable at https://www.elysee.fr/en/emmanuel-macron/2020/05/18/french-german-initiative-for-the-european-recovery-from-the-coronavirus-crisis

[92] A. De Gregorio Merino, "The Recovery Pan: Solidarity and the living constitution," *EU Law Live*, 2021 (50), p.2.

[93] B. De Witte, "The European Union's COVID-19 Recovery Plan: The legal engineering of an economic policy shift," *Common Market Law Review*, 2021 (58), p. 635.

[94] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I, 22/12/2020, pp. 23–27. See also: proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic, COM/2020/441 final.

[95] The interaction between emergency measures and ordinary legislative acts in the framework of political packages will be analysed in Chapter III, section 2.1 of this report.

The actual rules on how the funds were to be implemented were left to a number of individual legal acts establishing the spending programmes, some of them already proposed by the Commission in the framework of the (then) ongoing negotiations for the 2021–2027 Multiannual Financial Framework and to which EURI financing would provide a top-up, and one completely new one, the *Recovery and Resilience Facility* (*RRF*),[96] presented by the Commission as part of the *NGEU*, and designed to channel the vast majority of funds. Finally, a third essential component of the package was a proposal for a new *Own Resources Decision* (*ORD*),[97] providing the authorisation for the Union to borrow on the financial markets the EUR 750 billion euros necessary to finance the scheme and establishing a dedicated compartment within the own-resources ceiling aimed exclusively at providing the Union with the resources necessary to repay the common debt. As in the case of *EURI*, the content of the *ORD* was shaped by both legal and political necessities: on one hand ensuring that the borrowing was counterbalanced by an appropriate asset so as to avoid the Treaty prohibition of running a budgetary deficit, and on the other hand, ensuring that the authorisation to the Union to enter into common borrowing would be subject to domestic democratic scrutiny through the special legislative procedure provided for in Article 311 TFEU (which requires the *ORD* to be approved by Member States "in accordance with their respective constitutional requirements" in order to enter into force).

The recovery package presented by the Commission was thus naturally part of the broader discussion on the 2021–2027 Multiannual Financial Framework, which was itself a package including the MFF Regulation proper, a number of legal instruments establishing the various spending programmes for the new multiannual financial period and finally the proposal for a *Regulation establishing a general regime for the protection of the Union budget in cases of breaches of the rule of law* (*Rule of Law Conditionality Regulation*).[98] This intricate political and legal architecture explains how the negotiations of the overall MFF-NGEU package were some of the most complex in the history of the Union, culminating in the European Council of 17 to 21 July 2020.

If the new position of Germany had made it impossible to oppose the establishment of a Recovery Fund financed on the issuance of common debt, the Member States that still opposed the idea of a transfer Union[99] pivoted towards a strategy with three different objectives: reducing the overall volume of the MFF-NGEU package and of the respective share of grants and loans; ensuring strict control over the allocation and disbursement of funds, through reinforced governance of the RRF and

[96] Proposal for a Regulation establishing a Recovery and Resilience Facility, COM/2020/408 final.
[97] Amended proposal for a Council Decision on the system of Own Resources of the European Union, COM/2020/445 final.
[98] Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final.
[99] The so-called frugal four including the Netherlands, Austria, Denmark and Sweden, and often supported by Finland.

stricter conditionality; and finally extracting the maximum possible financial advantages in form of rebates or exceptional contributions. After five days of intense negotiations, the European Council finally reached an agreement which was documented in very long conclusions, entering into a very high level of detail on the content of the different acts that were under negotiation.[100] The final deal preserved the essential elements of the original Commission's proposal as well as the overall size of the NGEU, even if the ratio of grants/loans was modified (EUR 360 billion in grants and EUR 390 billion in loans). The governance of the RRF was strengthened, *inter alia* by including a controversial emergency brake allowing a Member State to require a debate at the European Council if it did not consider that the conditions for the disbursement of funds were met. Finally a number of concessions were granted to various Member States, starting from the system of budgetary rebates that the Commission had proposed to abolish as a consequence of Brexit.

The agreement reached at the European Council in July paved the way for the necessary interinstitutional negotiations on the elements of the package that were subject to ordinary legislative procedure (like the *RRF* or the *Conditionality Regulation*) or that anyhow entailed the intervention of the European Parliament (the EP's consent is required for the adoption of the *MFF*, while the Parliament is only consulted in relation to the Own Resources Decision). And in fact, the Parliament managed to leverage its role across the political package and to make an important contribution to the final outcome, regardless of the fact that it had no or limited say in relation to certain elements of the package, notably the *EURI* Regulation to be adopted on the basis of Article 122 TFEU and the *Own Resources Decision*.

This notably included a strengthening of the *Rule of Law Conditionality Regulation*, which was the main final and last-minute obstacle to the adoption of the overall package. Hungary and Poland had constantly opposed the inclusion of the Conditionality Regulation in the MFF package, as they deemed that the instrument was divisive and at risk of politicisation. Now the two Member States threatened to oppose the adoption of the acts subject to unanimity – notably the MFF Regulation and the ORD Decision – thus preventing the entry into force of the overall package.

A final agreement with the two Member States was finally reached at the December 2020 European Council, on the basis of a set of detailed guarantees and concessions as to the way the Conditionality Regulation would be implemented, which made their way once more into very detailed conclusions[101] and were strongly criticised by Parliament and commentators. However, the adoption

[100] See: Conclusions of the Special meeting of the European Council of 17, 18, 19, 20 and 21 July 2020, EUCO 10/20.
[101] See: Conclusions of the European Council meeting of 10 and 11 December 2020, EUCO 22/20.

of those conclusions made it possible to overcome the threat of a veto and opened the way for the adoption of the various legal instruments according to the relevant procedures.

With the adoption of the *RRF Regulation* in February 2021[102] the Union financial response to the pandemic was finally complete and its implementation ongoing. In parallel, the Union institutions addressed other aspects of the COVID-19 crisis which were raising concerns, and notably its public-health dimension.

2.2. Health-related measures

In the field of public health, the Union was already equipped with what can be described as an early cooperation framework in the field of serious cross-border health threats, put in place in 1998 and already revised in 2013. Decision No 1082/2013/EU established reporting, cooperation and coordination mechanisms by setting up a Health Security Committee and an early warning and response system, which Member States' authorities used to report COVID-19 cases.[103] The Union Institutions and the Member States could also rely on two agencies, namely the European Centre for Disease Prevention and Control (ECDC) which monitored the spread of the virus on the basis of figures reported by Member States, and the European Medicines Agency (EMA) tasked with assessing new medicinal products.

Nevertheless, the scale of the threat was however unprecedented. The exponential growth in infections from late February 2020, the high associated mortality of the virus, combined with the absence of an effective treatment or a vaccine, led many countries to implement non-pharmaceutical interventions such as "stay-at-home" policies alongside other community and physical distancing measures such as the closure of educational institutions and public spaces. These measures were highly disruptive to society, both economically and socially. As of 22 April 2020, approximately 988 241 cases had been reported by EU/EEA countries and the UK, including 105,064 deaths.[104] The difficulties encountered by Member States with more fragile hospital facilities and weaker medical infrastructure in controlling the spread of the virus affected the ordinary functioning of national health systems and obviously represented a problem in terms of controlling the pandemic in all other Member States. In this context, supporting Member States' medical infrastructure and procurement for medical countermeasures emerged as key priorities.

---

[102] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, pp. 17–75.
[103] 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, OJ L 293, 5.11.2013, pp. 1–15. This decision was later repealed and replaced by Regulation (EU) 2022/2371.
[104] https://www.ecdc.europa.eu/sites/default/files/documents/covid-19-rapid-risk-assessment-coronavirus-disease-2019-ninth-update-23-april-2020.pdf

2.2.1. Activation of the Emergency Support Instrument

In spite of the measures already put in place early in the COVID-19 crisis under the Union Civil Protection Mechanism ('rescEU') and other EU instruments, the scale and scope of the pandemic required a stronger response, directed especially at the EU healthcare sector. On 2 April 2020, the Commission proposed that the Union activate, on the basis of Article 122(1) TFEU, the Emergency Support Instrument under Regulation (EU) 2016/369 (ESI), for the period 1 February 2020 to 31 January 2022.[105]

Created in 2016 at the peak of the refugee crisis, ESI is itself an instrument based on Article 122(1) TFEU which was designed as a flexible tool to finance humanitarian assistance in the context of the refugee crisis on a needs basis.[106] However, its scope is however much broader than migration crises and includes the provision of financial support in the event of "natural or man-made disasters where the exceptional scale and impact of the disaster is such that it gives rises to severe wide-ranging humanitarian consequences in one or more Member States."[107] The instrument may be activated only in exceptional circumstances where no other instrument available to Member States and to the Union is sufficient.

The Council adopted the decision in a record time, on 14 April 2020.[108] In the course of discussions in the Council, a new Article 4 was crafted and aimed at introducing temporary derogations to allow the rescEU capabilities to be used for procurement and delivery of medical countermeasures as well as to accelerate procurement procedures, including ongoing procedures for medical countermeasures.[109]

With this single instrument, the Council not only activated, for a period of two years, the Emergency Support Instrument to finance expenditure necessary to address the COVID-19 pandemic and adopted temporary measures to facilitate the purchasing of medical countermeasures, but also amended the emergency support legal framework for the future, supplementing its scope of action to address pandemics with large-scale effect. It was notably made explicit that emergency support could also be

[105] COM(2020) 175, 2 April 2020.
[106] Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70, 16.3.2016, pp. 1–6 (ESI Regulation). See Miglio A., "The Regulation on the Provision of Emergency Support Within the Union: Humanitarian Assistance and Financial Solidarity in the Refugee Crisis", European Papers, Vol. 1 (2016) No 3, pp. 1171–1182.
[107] Article 1(1) ESI Regulation.
[108] Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak, OJ 15.4.2020, L 117/3.
[109] Article 4 Council Regulation (EU) 2020/521.

granted to help address needs *in the aftermath* of a disaster or in order to prevent its *resurgence*, provided that actions fall within the activation period.[110]

Exceptionally, the activation was given retroactive effect as of 1 February 2020 "in order to ensure equal treatment and a level playing field for Member States and provide coverage regardless of when the outbreak occurred in a given Member State."[111]

The activation of the ESI proved pivotal in the management of the COVID-19 crisis. It allowed direct support to be provided to national healthcare systems under a needs-based approach.[112] Actions eligible for financing ranged from the reinforcement of the medical workforce, the administration of large-scale medical testing and increases and conversions of production capacities for medical products, to the actual development, purchasing and distribution of medical products.[113]

2.2.2. Joint purchasing of medical countermeasures

The first weeks of the COVID-19 pandemic rapidly led to a global surge in demand for personal protective equipment, medical products and therapeutics used in intensive care units. Their availability became scarce, as Member States were often unprepared and short of stocks.

The Commission deployed a number of measures. On 15 March 2020, it introduced a temporary export authorisation applicable to personal protective equipment.[114] Shortly after, it put in place the first EU stockpile under rescEU: a common reserve of medical equipment, the distribution of which was ensured by the Emergency Response Coordination Centre.[115] The Commission further created a platform to match demand from Member States and supply from producers, the so-called COVID-19 Clearing House for medical equipment, which started operating on 1 April 2020.

In parallel, Member States were joining forces under a joint procurement agreement pursuant to Decision No 1082/2013/EU, to buy personal protective equipment, respiratory ventilators and items necessary for COVID-19 testing. Joint procurements were entered into on a voluntary basis. They were to be preceded by a *joint procurement agreement* and comply with a number of basic

[110] Article 3(1), ESI Regulation.
[111] Recital 23, Council Regulation (EU) 2020/521. See its Article 2 allowing grants to be awarded for actions already completed before the date of adoption provided that the actions started after the date of activation.
[112] Article 3(1) ESI Regulation.
[113] Annex to ESI Regulation.
[114] Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation, OJ L 77I, 15.3.2020, pp. 1–7.
[115] https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_20_476/IP_20_476_EN.pdf

principles.[116] When conducting such joint procurements, the Commission remained in a coordinating role, while the EU countries purchased the items. The first contracts were concluded by Member States as of April 2020. Twelve joint procurement procedures of the kind were run, which resulted in over 200 contracts allowing countries to order essential medical supplies and innovative therapeutics for nearly EUR 13 billion.[117]

Legal hurdles quickly arose, however. First, while the Financial Regulation provided for the possibility for EU Institutions to jointly procure with Member States, it was silent on the possibility for the Commission to procure *on behalf of* the Member States, which would have given real leverage to the Commission. Second, Union public procurement rules were not designed for emergency situations and compliance with these rules was perceived as slowing down the procurement of medical countermeasures, giving rise to public criticism and political pressure.

These two hurdles were addressed by the Council together with the ESI activation on 15 April 2020, in the form of temporary measures based on Article 122(1) TFEU (see section on ESI activation above). The possibility was laid down for the Commission to make purchases on behalf of the Member States, following the rules set out in the Financial Regulation for its own procurement.[118] This temporary solution now became permanent through an amendment of the Financial Regulation.[119]

This procurement model was soon to be used for the purpose of procuring COVID-19 vaccines on behalf of the Member States as from June 2020, giving the Commission unique negotiating power towards vaccine manufacturers.[120] This public procurement presented a number of novel legal features.[121]

First, Member States mandated the Commission to run a single central procurement procedure on their behalf through an administrative agreement approved both by the Commission, in the form of a

[116] Among these principles, participation in the joint procurement procedure is to remain open to all Member States until the launch of the procedure and the joint procurement should not affect the internal market, nor constitute discrimination or a restriction of trade or cause distortion of competition.
[117] Source: https://commission.europa.eu/strategy-and-policy/coronavirus-response/public-health/ensuring-availability-supplies-and-equipment_en#:~:text=The%20voluntary%20Joint%20Procurement%20Agreement%20for%20medical%20countermeasures,with%20the%20EU%20policies%20on%20testing%20and%20vaccination.
[118] Article 4(5) ESI Regulation, as amended by Council Regulation 2020/521.
[119] Article 168(3) of Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast). On this occasion, the ability to procure on behalf of Member States was extended to any EU institution, body or agency as defined in the Financial Regulation.
[120] Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank, "EU Strategy for COVID-19 vaccines," 17 June 2020, COM(2020)245 final.
[121] For a complete overview of the Commission's vaccines strategy for COVID-19, see: https://commission.europa.eu/strategy-and-policy/coronavirus-response/public-health/eu-vaccines-strategy_en

Commission decision, and by the Member States in accordance with their national procedures.[122] Second, in order to run the procurement procedure centrally and efficiently, a Steering Board was set up, composed of representatives of the Member States and the Commission, tasked with appointing a joint negotiating team and with providing guidance throughout the evaluation process, while the Commission retained legal responsibility for the process. Third, the public procurement resulted in the signing of EU-level Advance Purchase Agreements (so called APAs) with vaccine manufacturers, whereby the development phase of vaccines was financed by the Union from the Emergency Support Instrument in order to de-risk investment for manufacturers, while the Commission committed to order a number of initial vaccine doses subject to the successful development and authorisation of the vaccine. These vaccine doses were allocated among the participating Member States according to distribution keys. From August 2020 until the end of 2021, some eleven APAs were signed with eight vaccine manufacturers, totalling 71 billion EUR worth of contracts and securing up to 4.6 billion potential vaccine doses.

As to the second hurdle, flexibilities were introduced to allow contracts to be awarded, finalised and signed within a day, without hampering the immediate delivery of goods or services. The Commission was also given the power to modify contracts in the course of their implementation, as necessary to adapt to the evolution of the ongoing health crisis.[123] This latter prerogative departed from a strict contractual logic and reflected the exceptional and hybrid nature of these contracts aimed at addressing a large-scale public health crisis throughout the Union.

Following a proposal made by the Commission in 2022, crisis emergency provisions have been enshrined on a permanent basis in the public procurement rules applicable to the Union institutions, through targeted amendments of the Financial Regulation that entered into force in September 2024.[124] This was done in a more limited way, however, and subject to a prior declaration of crisis. According to the new rules, a situation of extreme urgency resulting from a crisis may notably warrant the inclusion of additional contracting authorities or may justify a modification of the contract value of up to 100% of the initial contract value. Such changes are to be made in agreement with the contractor and only where justified and strictly necessary to respond to the evolution of the crisis.

[122] Commission Decision of 18 June 2020 approving the agreement with the Member States on procuring COVID-19 vaccines on behalf of the Member States and related procedures, C(2020)4192 final and Annex.
[123] Article 4 Council Regulation (EU) 2020/521.
[124] Articles 163(6) and 175(5) of Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast). The power to procure on behalf of Member States was extended to any EU institution, body or agency as defined in the Financial Regulation (Financial Regulation).

Despite the temporary flexibilities mentioned above, hurdles in producing vaccines and in meeting delivery timetables, storage constraints and the continuous global competition for vaccines posed additional practical challenges. While the Commission achieved a diversified vaccine portfolio in 2021, the Union turned out to be mainly dependent on one supplier for 2022–2023. The close cooperation between the Commission and the Member States throughout the contract implementation was praised but it was also acknowledged that these efforts had limited leverage to overcome supply challenges.[125]

2.2.3. Health crisis legal framework

As from June 2020, the EU institutions took stock of the lessons learned in the early months of the COVID-19 pandemic.[126] The lack of preparedness of the EU was acknowledged. Its response had been mainly reactive, and the Union had not been sufficiently prepared to ensure the efficient development, manufacturing, procurement and distribution of crisis-relevant medical countermeasures, especially in the early phase of the COVID-19 pandemic. The pandemic had also revealed insufficient oversight of research activities and manufacturing capacities as well as vulnerabilities related to global supply chains. The COVID-19 pandemic had laid bare the vulnerabilities of the Union and its dependency on certain suppliers and raw materials. Being dependent on one or few suppliers hampered the delivery of a number of critical products and raw materials during the pandemic.

In her 2020 State of the Union address, the President of the Commission called on Europe to build a "European Health Union." A few months later, in the midst of a resurgence in COVID-19 cases across Europe, the Commission's agenda for a Health Union was presented, together with three legislative proposals aimed at upgrading the existing legal framework.[127] All three were adopted on the basis of ordinary competences following the ordinary legislative procedure.

The first proposal to be adopted extended the powers of the European Medicines Agency (EMA) through a stand-alone Regulation "on a reinforced role for the European Medicines Agency in crisis

[125] ECA Special Report No 19/2022, *COVID-19 vaccine procurement – Sufficient doses secured after initial challenges, but performance of the process not sufficiently assessed* and Council Conclusions on Special Report No 19/2022, ST 15471/22, OJ C 484, 20.12.2022, pp. 15–17.
[126] Commission Communication, "Drawing the early lessons from the COVID-19 pandemic," 15 June 2021, COM(2021) 380 final and Council conclusions on COVID-19 lessons learned in health 2020/C 450/01, IO C 450, 28.12.2020, pp. 1–8.
[127] Commission Communication, Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats, 11.11.2020, COM(2020) 724 final and legislative proposals COM(2020) 725 final, COM(2020)726 final and COM(2020) 727 final. See: McKeea M., de Ruijter A., "The path to a European Health Union," *The Lancet Regional Health – Europe* 2024; 36: 100794.

preparedness and management for medicinal products and medical devices."[128] The Regulation was adopted on the basis of Articles 114 and 168(4), point (c) TFEU, just as its 'mother' regulation establishing EMA. The new rules aim to enable EMA to monitor and mitigate shortages of medicines and medical devices during public health crises and facilitate faster approval of medicines which could treat or prevent a disease causing a public health crisis. The Regulation is based on a gradual response framework. Where the Commission recognises a *major event* in relation to medicinal products in more than one Member State, the Agency moves into the first response phase.[129] The second response phase kicks in with the recognition by the Commission of a *public health emergency*. In such case, an Emergency Task Force (ETF) is convened in order to provide scientific advice on medicinal products that have the potential to address the emergency. The ETF is notably tasked with providing accelerated scientific advice for the purpose of clinical trials.[130]

The other two proposals were based on Article 168(5) TFEU (public health) and were adopted on the same day in November 2022 due to their interrelation. First, the tasks of the European Centre for Disease Prevention and Control were substantially upgraded through an amendment of its founding regulation.[131] Second, Decision No 1082/2013/EU on serious cross-border threats to health, the framework law governing health threats in the Union, was overhauled and transformed into a regulation.[132] The Commission's recognition of a public health emergency at Union level remains the cornerstone of the EU's response to any public health emergency. The main improvements concern the Union's crisis preparedness. A Union prevention, preparedness and response plan is to be drawn up by the Commission, in addition to national plans drawn up by the Member States which are assessed by the ECDC. A Health Security Committee composed of representatives of the Member States is established on a permanent basis, in order to coordinate action with the Commission and adopt opinions and guidance for the prevention and control of threats to health. As to joint procurement of medical countermeasures, the automatic prohibition of parallel procurement initially

[128] Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices, PE/76/2021/REV/1, OJ L 20, 31.1.2022, pp. 1–37.
[129] Articles 2(b) and 4(3) of Regulation (EU) 2022/123. In such a case, the newly established Medicine Shortages Steering Group (MSSG) is to draw up lists of critical medicinal products, the supply and demand of which will be monitored. To this end, Member States and marketing authorisation holders have information and reporting obligations. The MSSG has a central role as it may on its own motion issue recommendations to the Member States and the Commission, but also to marketing authorisation holders and other entities (Articles 6, 8, 10 and 11 Regulation (EU) 2022/123).
[130] Regulation (EU) 2022/123, Article 16.
[131] Regulation (EU) 2022/2370 of the European Parliament and of the Council of 23 November 2022 amending Regulation (EC) No 851/2004 establishing a European centre for disease prevention and control, PE/82/2021/REV/1, OJ L 314, 6.12.2022, pp. 1–25.
[132] Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU, PE/40/2022/REV/1, OJ L 314, 6.12.2022, pp. 26–63.

proposed by the Commission was rejected but turned into a possible condition of the joint procurement procedure.[133]

To complement this permanent legal framework, the Commission proposed a framework of temporary measures on the basis of Article 122(1) TFEU, which provides for a Council-only procedure.[134] These measures aim to ensure the supply of crisis-relevant medical countermeasures and are to be activated in the event of a public health emergency at Union level, for an initial period of six months. Anticipating a possible resurgence of COVID-19 in the winter of 2021, the Council reached political agreement on the text within two months, in December 2021 under Slovenian Presidency.[135]

The Council Regulation is designed as a toolbox of measures that may be activated as necessary to address a crisis. They range from inventories of production facilities to measures ensuring the efficient reorganisation of supply chains and production lines if a risk of shortage arises.

The actual activation of one or several of these measures remains temporary and is to be decided upon by the Council, on the basis of Article 122(1) TFEU, following a proposal by the Commission[136]. The regulation gave rise to the question as to whether, by laying down a toolbox of measures in anticipation of an emergency situation, the Regulation departs from the temporary rationale of measures under Article 122(1) TFEU, thus circumventing the prerogative of the Council to trigger or not to trigger measures under Article 122(1) TFEU. The question will be addressed in Chapter II, when we will analyse in detail the conditions for the triggering of Article 122 TFEU.

Interestingly, the text also caters for an operational crisis governance structure in the form of a temporary Health Crisis Board. The HCB is not to be confused with the Health Emergency Preparedness and Response Board, which is a body set up to assist the Directorate-General for Health Emergency Preparedness and Response (HERA) that was newly established by the Commission.[137] Composed of the Commission and one representative from each Member State, the task of the Health Crisis Board is to advise the Commission and ensure coordination of action by the Council, the Commission, the relevant Union bodies, offices and agencies and Member States during the activation of the emergency measures.

[133] Article 12(3)(c) Regulation (EU) 2022/2371.
[134] Council Regulation (EU) 2022/2372 of 24 October 2022 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, ST 6569/22, OJ L 314, 6.12.2022, pp. 64–78.
[135] Its actual adoption by Council was eventually formalised in October 2022 and its publication was coupled with the Regulation on cross-border threats to health later in December that year.
[136] Article 3 and recital 3 of Council Regulation (EU) 2022/2372.
[137] Commission Decision of 16.9.2021 establishing the Health Emergency Preparedness and Response Authority, (2021) 6712 final.

2.3. Restrictions on travel to the EU and on the free movement of persons

During the early months of the COVID-19 outbreak, Member States took unilateral and uncoordinated measures, reintroducing internal border controls and travel restrictions, such as entry restrictions or requirements for cross-border travellers to undergo quarantine or self-isolation or to be tested for COVID-19 infection. For the first time in the Union's history, the exercise by Union citizens of their right to move and reside freely within the Union was severely impacted. At first, the general understanding that public health policy was first and foremost a matter of national competence slowed down, if not paralysed, any EU response. However, the need for coordination at EU level came to the fore within a few weeks.

2.3.1. Coordination of national travel restrictions

On 13 February 2020, the Council adopted Conclusions on COVID-19 in which it urged Member States to act together, in cooperation with the Commission, in a proportionate and appropriate manner.[138] On 10 March, the Leaders agreed on the need for a joint European approach and common European guidance.[139] As from 16 March, the Commission issued a series of guidance to limit the impact of these measures on free movement.[140] Further, in their joint statement of 26 March, the members of the European Council agreed to apply a coordinated temporary restriction of non-essential travel to the EU as a consequence of the COVID-19 pandemic and to preserve the functioning of the Single Market, based on the Commission's guidance on the implementation of "green lanes." On 17 April 2020, the President of the European Council and the President of the Commission presented a Joint European Roadmap towards lifting COVID-19 containment measures.[141]

[138] OJ C 57, 20.2.2020, p. 4.
[139] Conclusions by the President of the European Council following the video conference on COVID-19.
[140] Commission Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ C 86I, 16.3.2020, p. 1), Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (OJ C 102I, 30.3.2020, p. 12), 'Joint European Roadmap towards lifting COVID-19 containment measures' of the President of the European Commission and the President of the European Council, Commission Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures (OJ C 156, 8.5.2020, p. 1), Commission Communication towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls (OJ C 169, 15.5.2020, p. 30), Commission Communication on the third assessment of the application of the temporary restriction on non-essential travel to the EU COM(2020) 399 final, Commission Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak (OJ C 235I, 17.7.2020, p. 1), Commission Communication on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ C 96I, 24.3.2020, p. 1), Commission Guidelines on Facilitating Air Cargo Operations during COVID-19 outbreak (OJ C 100I, 27.3.2020, p. 1), and Commission Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships (OJ C 119, 14.4.2020, p. 1).
[141] OJ C 126, 17.4.2020, p. 1.

National travel restrictions on grounds of public health raised the question of what form and nature a possible Union action should take in the field.

On the one hand, 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 allows Member States, under specific conditions, to restrict the freedom of movement and residence of Union citizens and their family members, on grounds of public health.[142] Similarly, the Schengen Borders Code in its then applicable form allowed for a person subject to a border check to be refused entry if he or she would constitute a threat to public health. It is on the basis of those instruments that Member States started to impose national restrictions of general application, covering all travellers from third countries and later on also nationals of other EU Member States.

Only later on, in its preliminary ruling in the *NORDIC INFO* Case, did the Court acknowledge that, unlike restrictions on grounds of public policy or public security, restrictions on grounds of public health may, depending on the circumstances and in particular the health situation, be adopted in the form of an act of general application which applies without distinction to any persons, irrespective of their individual behaviour.[143] Nonetheless, no specific mechanism was put in place to monitor, control or coordinate possible national restrictions at EU level.

On the other hand, while the Union has a supporting competence in the field of public health to complement national policies, including by adopting measures concerning monitoring, early warning of and combating serious cross-border threats to health, Article 168(7) TFEU also states that Union action is to respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.

In this context, recommendations adopted by the Council on the basis of Article 292 TFEU, which are non-binding in nature, appeared to be the most suitable and flexible instrument for a coordinated approach to restrictions on free movement in response to the COVID-19 pandemic. The decision on whether to introduce restrictions on free movement to protect public health remained the responsibility of the Member States.

On 25 June 2020, the Commission proposed a Council recommendation on the temporary restriction on non-essential travel into the EU.[144] The Council took just five days to adopt the Recommendation.

[142] Articles 27 and 29, 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 amending Regulation (EEC) No 1612/68, OJ L 158 30.4.2004, p. 77.
[143] Judgment of the Court of 5 December 2023, Nordic Info, case C-128/22, EU:C:2023:951, paragraph 63.
[144] COM(2020)287 final.

Council Recommendation (EU) 2020/912 included a list of third countries for which Member States should start lifting the travel restrictions at the external borders.[145] This list of safe third countries was reviewed every two weeks and regularly updated by the Council.

Further, in September 2020, the Commission tabled a proposal for a Council recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, and then a proposal for a Council recommendation applying the same coordinated approach with regard to the Schengen area, which were rapidly adopted by the Council.[146] The sectorial legal basis of Council Recommendation 2020/1475 combined the free movement of persons and public health policy, that is, Article 21(2) and Article 168(6) TFEU respectively. The Recommendation included detailed common principles, criteria and thresholds for Member States' action. Most importantly, it introduced a mapping of risk areas using a clear colour code drawn up by the ECDC, the "traffic light map," based on a regular evaluation of the risk situation of Member States. This provided Member States with an objective assessment, crucial to the proportionality of national measures.[147] Given that the freedom of movement of persons in the internal market, referred to in Article 26 TFEU, closely coexists with the absence of internal border controls on persons in the Schengen area, Council Recommendation 2020/1632, adopted on the basis of Article 77(2)(c) and (e) TFEU, ensured that Member States apply the same coordinated approach when applying the Schengen acquis on the absence of checks on persons, irrespective of their nationality, at internal borders.

Following the introduction of the EU Digital COVID Certificate, this Recommendation was later replaced in order to reflect the change of paradigm in travel restriction measures, from a region-based approach to a person-based approach.[148]

2.3.2. EU Digital COVID Certificate

The roll-out of vaccination campaigns at the end of 2020 marked a turning point in the EU's response to COVID-19. Many Member States launched initiatives to issue COVID-19 vaccination certificates.

---

[145] 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, OJ L 208I, 1.7.2020, p. 1; later replaced by Council Recommendation (EU) 2022/2548 of 13 December 2022 on a coordinated approach to travel to the Union during the COVID-19 pandemic, OJ L 328, 22/12/2022, p. 146–152.

[146] 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; 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, OJ L 366, 4.11.2020, p. 25–26

[147] In Case 128/22, the Court considered favourably, , in the framework of the proportionality assessment, the fact that exit bans were lifted as soon as the Member State of destination concerned was no longer classified as a high-risk zone on the basis of a regular re-evaluation of its situation (see paragraph 94).

[148] 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, OJ L 018 27.1.2022, p. 110.

In its conclusions of 10 and 11 December 2020, the European Council agreed that a coordinated approach to vaccination certificates should be developed.[149] For vaccination certificates to be used in a cross-border context, an interoperable, secure and verifiable system had to be established at Union level. By contrast to the soft law approach that was favoured to coordinate national travel restrictions, such a system called for a legally binding framework.

On 17 March 2021, the Commission proposed the establishment of a common framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate). Two regulations were put on the table of the co-legislators: one, on the basis of Article 21(2) TFEU, concerning the exercise of the right to free movement by Union citizens, and the other, on the basis of Article 77(2)(c) TFEU, concerning third-country nationals.[150] A few days later and despite the scientific uncertainty about whether vaccinated persons transmitted COVID-19, the common vaccination certificate received political support from the European Parliament[151] and from the members of the European Council, who called for the work on COVID-19 interoperable and non-discriminatory digital certificates to be taken forward as a matter of urgency.[152]

Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates to facilitate free movement during the COVID-19 pandemic was adopted by the European Parliament and the Council just before the holiday season, on 14 June 2021, together with its sister Regulation (EU) 2021/954 concerning third-country nationals legally staying or residing in the territories of Member States.[153]

The EU Digital COVID Certificate quickly became the most widely used tool to foster safe international travel, with 51 third countries and territories connected to the system in addition to all Union Member States. It came to an end on 30 June 2023, with the expiry of Regulation (EU) 2021/953. This was however not the end of what was considered a success story in the EU's response to the COVID-19 pandemic. The EU Digital COVID Certificate's technology was taken up by the

[149] EUCO 22/20.
[150] COM(2021)130 final and COM(2021)140 final.
[151] European Parliament resolution of 25 March 2021 on establishing an EU strategy for sustainable tourism (2020/2038(INI), pt. 5.
[152] Statement of the Members of the European Council, 25 March 2021, SN 18/21.
[153] Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, PE/25/2021/REV/1,
OJ L 211, 15.6.2021, pp. 1–22 and Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic, PE/26/2021/REV/1, OJ L 211, 15.6.2021, pp. 24–28.

WHO in the context of the Global Digital Health Certification Network, becoming a global standard for verifying vaccination, test and recovery certificates.[154]

2.4. Adaptations to the EU Institutions' procedures

Information technology also proved key in ensuring continuity in the EU Institutions' decision-making. In the first weeks of the COVID-19 pandemic, the lockdowns and other restrictions threatened to stifle the Union decision-making process at a moment where it was of crucial importance to be able to react swiftly to the new challenges. The European Parliament, the European Council, the Council and the Commission are used to holding meetings with physical presence. Each institution adopted differing procedural facilitations, enabling decision-making to take place.[155]

Heads of State or Government met regularly via video conference to discuss and assess the situations and coordinate action. The first video conference of this kind was held on 10 March 2020.[156] Online meetings of EU Leaders, however, could not formally replace European Council meetings since, as a rule, the European Council is to meet in Brussels pursuant to its Rules of Procedure.[157] During these video conferences, EU leaders therefore did not formally adopt European Council conclusions. Rather, their outcome was recorded either in statements of the President of the European Council or in joint statements of the members of the European Council.[158]

In the Council, where the presence of members has always been very important for the autonomy of decision-making and mutual trust among the delegations, it was eventually decided to maintain physical meetings of the permanent representatives and deputy permanent representatives, meeting in Coreper I and II. Such physical meetings were facilitated by the fact that those delegates are present in Brussels. For the Council meetings, the situation was different, as many Ministers would not be able to travel and at the same time also had to deal with a difficult situation back home. Ministers therefore held meetings by videoconference. The discussions at such videoconferences were held in public in as far as discussions that would, under the Council's Rules of Procedure, be held in public. The papers which are the subject of such discussions were similarly made public.

---

[154] Council Recommendation (EU) 2023/1339 of 27 June 2023 on joining the global digital health certification network established by the World Health Organization and on temporary arrangements to facilitate international travel in view of the expiry of Regulation (EU) 2021/953 of the European Parliament and of the Council, OJ L 166, 30.6.2023, pp. 177–181.

[155] For a detailed account of the measures taken by the various institutions, see: B. Bodson, "EU Institutions' Operational Resilience in the Time of COVID-19," *L'Europe en formation,* nº 390 Spring–Summer 2020. See also: ECA Special Report 18/2022, *EU institutions and COVID-19 Responded rapidly, challenges still ahead to make the best of the crisis-led innovation and flexibility*.

[156] The members of the European Council met by video conference on a weekly basis, on 10, 17 and 26 March 2020.

[157] Article 1(2) of European Council Decision of 1 December 2009 adopting its Rules of Procedure, OJ L 315, 2.12.2009, pp. 51–51.

[158] See for instance Joint statement of the members of the European Council, 26 March 2020.

Such meetings did not, however, allow Ministers to take legally binding decisions, and a simplified use of written procedure was therefore introduced, according to which Coreper could decide – as a procedural decision – to adopt legal acts by written procedure by the same majority as that required for the adoption of the act itself.[159] That facilitation was important, as the launch of a written procedure had so far required unanimity. That facilitation was later rendered permanent even after COVID-19, and continues to apply to this day.[160]

Coreper and the Council are prepared by working parties consisting of experts, many of whom are based in their national capitals. Since working parties prepare the work of Coreper or the Council but do not take decisions themselves, it was more palatable to organise informal meetings of the members of such working parties in the form ofvideo conferences. A few working parties considered as essential, such as the IPCR or the Working Party on Public Health, continued to hold physical meetings, and some had a mix of video conferences and meetings with physical presence, depending on the topics to be discussed and on the evolution of the pandemic situation.

Contrary to the European Parliament, the Council decided against hybrid meetings, since in-person meetings were considered crucial to the functioning of the Council in light of the Treaty and its Rules of Procedure. Meetings would therefore, at Council level, always involve either the physical presence of all delegates/Ministers in the case of a formal Council, or the remote participation of all in the case of an informal meeting. The Presidency would usually attend remote meetings from the Council building, assisted by the team of the General Secretariat of the Council in charge of the various files, including representatives of the Council Legal Service.

The European Parliament,[161] too, did not have any rules governing remote electronic participation in meetings when the pandemic was declared. On 20 March 2020, the Bureau of the European Parliament supplemented the rules governing voting to establish a system complementary to the system for voting on the premises of the European Parliament, and which did not require the MEPs to be physically present. That decision allowed remote voting only in exceptional circumstances, to be assessed by the President of the European Parliament, namely if normal voting would pose a risk to MEP or staff health or if a Member could not attend due to travel restrictions imposed by Member States. The remote system also included an online tool to take the floor and to vote, although voting

[159] Council Decision (EU) 2020/430 of 23 March 2020 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, OJ L 88I, 24.3.2020, p. 1–2. Initially adopted for a period of one month, this temporary derogation was renewed twelves times and expired on 30 June 2022.
[160] Council Decision (EU) 2022/1242 of 18 July 2022 amending the Council's Rules of Procedure, OJ L 190, 19.7.2022, pp. 137–138.
[161] For an overview of the procedural measures taken by the European Parliament and by some national parliaments, see Parliaments in emergency mode (europa.eu).

did not happen in real time. The decision was temporary and applied until 31 July 2020, but was extended and later laid the foundation for a definitive amendment of the European Parliament's Rules of Procedure, adopted on 17 December 2020. Those permanent rules provide for two situations where exceptions to certain working methods are allowed, including the possibility for remote participation, namely exceptional and unforeseen circumstances beyond the Parliament's control and when the political balance in the EP is severely impaired because a significant number of Members or a political group cannot take part in the EP's proceedings under usual procedures. Contrary to the rules adopted in the Council, the procedural flexibilities allow hybrid meetings, where some Members participate remotely and others are present physically.

In the early days of the pandemic, the European Parliament also decided to hold two extraordinary part-time sessions in Brussels instead of in Strasbourg.

On its side, the European Commission swiftly adopted a full remote work mode as of 16 March 2020, for all staff not performing critical tasks, showing a remarkable adaptability considering its size (around 32 000 permanent and contractual staff). The Commission's Rules of Procedure already provided for the possibility to adopt acts through a flexible written procedure, whereby the text is considered adopted in the absence of a request for suspension.[162] Also the use of the empowerment procedure whereby one Commissioner can take a decision on behalf of the College and the delegation procedure whereby the College delegates the adoption of certain types of decisions to one or more Directors-General, helped to reduce disruption to the Commission's day-to-day work. The Rules of Procedure were however silent on whether Commissioners could meet remotely. On 22 April 2020, the Commission filled this gap by adopting a revision of its Rules of Procedure allowing its President to invite Members of the Commission to meet by means of telecommunication systems "in exceptional circumstances, if part or all of the Members of the Commission are prevented from attending a meeting of the Commission in person" and clarifying that Members participating remotely were to be counted towards the quorum.[163] This revision was not temporary and is still in force today.

In addition to the specific procedural flexibilities, each institution also introduced a number of security measures to protect the health of those present on the premises. Those rules covered, *inter alia*, distancing, health/temperature checks and the requirement to wear masks and to be in possession of a valid EU COVID certificate. Measures also included for example meeting in bigger meetings rooms to allow for distancing and limiting the size of delegations. The lawfulness of the requirement to present a valid EU Digital COVID Certificate to access the Parliament's buildings, which had been

[162] Article 12 of the Rules of Procedure of the Commission (C(2000) 3614), OJ L 308 8.12.2000, p. 26.
[163] Commission Decision (EU, Euratom) 2020/555 of 22 April 2020 amending its Rules of Procedure, OJ L 127I, 22.4.2020, pp. 1–2.

introduced by Bureau of the European Parliament in 2021, was examined in great detail by the General Court in the joined cases *Roos and others*.[164] The General Court concluded that, in view of the epidemiological situation and scientific knowledge at the time of adoption, the measure was necessary and appropriate as far as it allowed the risk of transmission of COVID-19 to be reduced. Its reasoning was later confirmed by the Court.[165]

The above procedural flexibilities demonstrate how each institution managed to quickly adapt its working methods to the situation so as to ensure continuity and efficiency of its decision-making. Although the modalities vary across institutions, they all involve some element of remote participation in meetings.

3. Energy crisis

Russia's unprovoked and unjustified military aggression against Ukraine, following the Russian invasion of Ukraine on 22 February 2022, laid bare the vulnerabilities of the Union resulting from having relied too heavily on energy supplies from one large supplier. These events triggered an unprecedented energy crisis which saw energy prices skyrocket[166] and threatened the security of supply in the Union and the stability of the Union economy as a whole.

The risks associated with over-reliance on Russian fossil fuels were far from unknown or completely unexpected,[167] but Russia's sudden and persistent weaponisation of gas[168] leading up to and following its invasion of Ukraine has rightly been referred to as a "wake-up call."[169]

The Union acted rapidly and decisively through a number of complementary measures which were characterised by an increased level of Union action and coordination as the crisis progressed and deepened. It is not the aim of this report to enter into the details of the crisis response.[170] It is nevertheless relevant to understand the main measures and dynamics in order to assess how those measures fit into the general Union emergency framework.

---

[164] Judgment of the General Court of 27 April 2022, *Robert Roos and Others v Parliament*, joined Cases T-710/21 and T-722/21, EU:T:2022:262.
[165] Judgment of the Court, 16 November 2023, Roos and Others v Parliament, Case C-458/22 P, EU:C:2023:871.
[166] In summer 2022, wholesale gas prices reached historically high levels of above EUR 300 per MWh. This, combined with other factors, exerted additional pressure on the already tight wholesale electricity market. In the third quarter of 2022, the European Power Benchmark was EUR 339 MWh on average which is 222% higher on average than in the third quarter of 2021.
[167] As described by Alberto Vecchio, "Changing the Flow: The European Response to the Russian Weaponisation of Gas," *European Papers*, Vol. 9, 2024, No. 1, pp 39–51, at p. 40 to 41.
[168] By way of example, Russian pipeline gas imports from July to September 2022 were down by 74 % relative to the same period in 2021, necessitating preparedness in case of a full halt in Russian gas deliveries.
[169]Leigh Hancher, "EU Energy Market Regulation after the 2022 Energy Crisis: the reforms so far and the challenges ahead," *Swedish Institute for European Policy Studies*, January 2024, at p. 3.
[170] The topic of energy is already covered as a separate topic of this FIDE conference.

3.1. Early response via coordination measures and legislative reform

The Union's response started shortly before the Russian invasion of Ukraine, against the background of rising energy prices triggered by a variety of factors. Thus, on 13 October 2021, the Commission presented a toolbox of measures to tackle rising energy prices ("toolbox Communication").[171] The European Council, meeting on 21–22 October 2021, welcomed the toolbox and noted, in particular, the impact of price rises on citizens and businesses still striving to recover from the COVID-19 pandemic.[172]

It is interesting to note that the Union's response to the rising energy prices started mainly with a number of communications from the Commission which described action that *Member States* could take within the existing legal framework to address the high energy prices. Such soft law instruments also continued to accompany various binding crisis measures throughout the crisis. In that respect, it is noteworthy that the REPowerEU plan, which became the guiding framework for most of the subsequent Union action, is enshrined in a Commission Communication.[173]

The REPowerEU plan responded to an invitation from the Heads of State or Government, meeting on 10-11 March 2022 in Versailles to "propose a RePowerEU Plan" to frame a number of complementary actions, with the common objective to "phase out our dependency on Russian gas, oil and coal imports as soon as possible."[174] In the same vein, the European Council, meeting on 24 and 25 March, welcomed the intention of the Commission to come forward with a comprehensive and ambitious plan to phase out dependency on Russian gas, oil and coal imports.

Following on from that invitation, and based on the actions presented in a Communication of 8 March 2022,[175] the Commission REPowerEU Plan of 18 May 2022 forms a comprehensive framework structured around the following key strands of action:

– Diversifying energy imports;

---

[171] Commission Communication of 13 October 2021 on Tackling rising energy prices: A toolbox for action and support (COM(2021) 660 final). That Communication explained the various circumstances causing the increase in energy prices: "The current electricity price increase is primarily due to global demand for gas soaring as economic recovery is picking up. Rising demand has not been matched by increasing supply with effects felt not only in the EU but also in other regions of the world. In addition, lower-than-expected gas volumes have been observed coming from Russia, tightening the market as the heating season approaches. Though it has fulfilled its long-term contracts with its European counterparts, Gazprom has offered little or no extra capacity to ease pressure on the EU gas market. Delayed infrastructure maintenance during the pandemic has also constrained gas supply."

[172] European Council conclusions, 21–22 October 2021, paras. 11 to 14.

[173] Communication of 18 May 2022 "REPowerEU plan" (COM(2022)230 final. That communication was preceded by an outline of actions in the Communication of 8 March 2022 "REPowerEU: Joint European Action for more affordable, secure and sustainable energy (COM(2022) 108 final.

[174] Versailles Declaration: 20220311-versailles-declaration-en.pdf (europa.eu).

[175] Referred to in footnote 172.

– Saving energy;

– Substituting fossil fuels and accelerating Europe's clean energy transition.

The REPowerEU plan was accompanied by a number of legislative proposals under ordinary legal bases to increase the ambition in the targets for renewable energy and energy savings, and to facilitate and speed up the uptake of solar energy installations in buildings. Those proposals were discussed in the context of negotiations between the co-legislators on already pending legislative proposals.[176] The regulatory component of the REPowerEU Plan was complemented by a "smart investment component" which was anchored in an amendment of the RRF Regulation so as to direct funds from Next Generation EU towards measures of relevance to REPowerEU objectives. The amendment was adopted in February 2023 through the ordinary legislative procedure.[177]

Additional Union initiatives initially focused mainly on the root cause of the crisis, namely gas shortages, by attempting to contain soaring gas prices and ensure security of supply. Against that background, the Commission proposed, as early as March 2022, amendments to existing rules with a view to introducing a gas storage obligation. The obligation would ensure that the Union would have enough gas in storage for the winter.[178] The same proposal included new provisions on compulsory certification of all gas storage operators with the aim of avoiding external influence over critical storage infrastructure which could jeopardise the security of the EU's energy supply. The proposed amendments were adopted under the ordinary legislative procedure within three months, with the European Parliament having recourse to the urgent procedure provided for in its Rules of Procedure.[179] Whereas the gas storage obligation successfully helped to ensure enough gas was available for the winter, it came at a high price, as the efforts of all Member States to fill their storage facilities at the same time in all likelihood contributed to further spurring an increase in prices. The risk of Member States outbidding each other for gas was subsequently addressed through voluntary demand aggregation and joint purchasing.

[176] Proposal for a Directive of the European Parliament and the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency (COM(2022)222 final of 18 May 2022).

[177] Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC (OJ L 63, 28.2.2023, p. 1).

[178] Since the crisis, winter preparedness has been a recurring item in meetings of the Council, with the Commission providing information about the state of play.

[179] Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No. 715/2009 with regard to gas storage (OJ L 173, 30.6.2022, p.17). The Regulation set the storage obligation for underground gas storage at 80 % of the total aggregate underground gas storage capacity in each Member State for 2022 and 90 % for 2023.

Another important strand of measures linked to gas consisted in actions based on Article 122 TFEU to plan for a possible complete stop of Russian gas supplies by enhancing crisis preparedness, security of supply and solidarity measures,[180] and by reducing gas consumption.[181]

As the crisis continued and deepened, the impact of the high gas prices had also continued to take a toll on energy consumers. Efforts to mitigate the impact on consumers and businesses, including in respect of the affordability of energy, therefore moved to the forefront and were an important component in the Regulation on an emergency intervention to address high energy prices, based on Article 122 TFEU.[182]

The high gas prices also quickly turned out to have a direct knock-on effect on *electricity* prices. The continued need for non-intermittent sources such as gas, oil and coal for the generation of electricity thus led to a corresponding rise in prices on the wholesale electricity market in the hours where such sources were needed to cover electricity demand. The pricing model for wholesale electricity which is at the core of the Union's electricity market design is based on so-called marginal pricing or "pay as clear" pricing. It implies that all sources dispatched into the electricity system receive the same price for the electricity they sell, irrespective of their costs. This meant that whenever it was necessary to dispatch gas to meet demand, generators with lower marginal costs such as renewables, nuclear and lignite ("inframarginal generators") earned the same price, and thus benefited from unexpectedly high revenues (so-called windfall profits). This led to increasing political pressure on the marginal price model which many considered to constitute a flaw in the electricity market design and an inherent unfairness for which energy consumers were left to pick up the tab.

3.2. Speeding up the response via emergency measures

At its meeting on 24–25 March 2022, the European Council had tasked the Council and the Commission to reach out to energy stakeholders to discuss how some of the short-term options presented in the Commission toolbox Communication could contribute to reducing the gas price and addressing its contagion effect on electricity markets.[183] At the same time, as it adopted the RePowerEU Plan, the Commission therefore presented a Communication based on a report drawn up by the European Union Agency for the Cooperation of Energy Regulators (ACER) as well as stakeholder input, setting out "short-term energy market interventions and long-term improvements

[180] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (OJ L 335, 29.12.2022, p. 1).
[181] Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas (OJ L 206, 8.8.2022, p. 1).
[182] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ L 261I, 7:10:2022; p. 1).
[183] European Council conclusions, 24-25 March, para. 16.

to the electricity market design – a course for action".[184] The Communication fell short of the expectations of some Member States and stakeholders in a situation where the soaring prices were increasingly putting a strain on national economies. In its conclusions of 20–21 October 2022, the European Council explicitly invited the Commission to "speed up work on the structural reform of the electricity market, including an impact assessment."[185] [186] The European Council also called for a number of other specific actions which were urgently followed up by the Commission and adopted with incredible speed. Of particular relevance is the series of emergency measures adopted by the Council in the period from July to December 2022.[187] Those measures and the increasingly coordinated Union approach also need to be seen in the context of Member States' hitherto disparate responses to a deepening crisis which threatened to fragment the internal market and the level playing field between Member States. Those emergency regulations were a complementary and coherent response following on from previous toolbox initiatives and RePowerEU objectives and also seeking to preserve and speed up the green transition in line with the Fit-for-55 objectives.

The first emergency measure entailed a voluntary gas demand reduction by 15% which would become mandatory in the case of a Union alert (*Coordinated gas demand-reduction emergency measure*).[188] The Regulation was initially adopted for a period of one year but subsequently extended for one year, until 31 March 2024, in the light of the continued severe situation in the gas markets.[189] Before the end of that period, the Commission presented a proposal for a Recommendation, to continue efforts to reduce gas consumption. The choice of having recourse to a Recommendation reflected the sentiment that although problems persisted on the gas markets, they may not be sufficiently serious and urgent to fulfil the conditions for recourse to Article 122 TFEU. The Recommendation was based on Article 292 in conjunction with Article 194(2) TFEU. That Recommendation was adopted on 25

[184] Communication of 18 May 2022 (COM(2022) 236).
[185] European Council conclusions, 20–21 October, para. 20.
[186] In March 2023 that the Commission – following a stakeholder consultation and on the basis of a Staff Working Document – put forward comprehensive proposals for improving the Union's electricity market design, which were subsequently adopted by the co-legislators: Regulation (EU) 2024/1747 of the European Parliament and of the Council of 13 June 2024 amending Regulations (EU) 2019/942 and (EU) 2019/943 as regards improving the Union's electricity market design (OJ L, 2024/1747, 26.6.2024), Directive (EU) 2024/1711 of the European Parliament and of the Council of 13 June 2024 amending Directives (EU) 2018/2001 and (EU) 2019/944 as regards improving the Union's electricity market design (OJ L, 2024/1711, 26.6.2024) and Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024 amending Regulations (EU) No 1227/2011 and (EU) 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market (OJ L, 2024/1106, 17.4.2024).
[187] Those measures are also further described in the separate Chapter on Article 122 TFEU.
[188] Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas, OJ L 206, 8.8.2022, pp. 1–10. The Commission submitted its proposal on 20 July 2022, and the Council adopted the Regulation on 5 August 2022.
[189] Council Regulation (EU) 2023/706 of 30 March 2023 amending Regulation (EU) 2022/1369 as regards prolonging the demand-reduction period for demand-reduction measures for gas and reinforcing the reporting and monitoring of their implementation (OJ L 93, 31.3.2023, p. 1).

March 2024.[190] The initial emergency Regulation was challenged before the Court of Justice by Poland, supported by Hungary.[191]

The second emergency measure[192] acted to address electricity prices and the affordability of energy through provisions on voluntary and mandatory reduction of electricity consumption as well as provisions allowing public interventions in price-setting (regulated prices) in a more flexible manner due to the crisis (*Emergency intervention for high energy prices*). It addressed affordability through the introduction of a cap on revenue from certain electricity generation and a so-called solidarity contribution based on excess profits from the fossil fuel sector. The latter two measures would enable Member States to mitigate the impact of the high energy prices by generating additional income from windfall profits earned as a direct consequence of the crisis. The revenues from those measures were to be redistributed to energy consumers or used for other specific purposes to mitigate the economic impacts of the crisis. Both the revenue cap and the solidarity contribution have been challenged before the Court of Justice through multiple direct challenges brought under Article 263 TFEU.[193] Questions of validity and/or interpretation also arise in a number of preliminary references brought pursuant to Article 267 TFEU.[194] None of the measures were prolonged beyond their initial period of application.

The third emergency package consisted of a basket of measures, first, to enhance solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks (*Facilitation of joint gas purchases*), second, to establish a market correction mechanism (*MCM)* and third, to deploy renewable energy as a matter of urgency.

One major component of the third Regulation[195] was a clear structure and framework for the joint gas purchasing platform, enabling the aggregation of demand, possible coordinated gas purchasing and an obligation to include at least 15% of the needs to comply with the mandatory gas storage obligation in the platform, however, without an obligation to take off any quantity of gas. It is

[190] Council Recommendation of 25 March 2024 on continuing coordinated demand-reduction measures for gas *(*OJ C, C/2024/2476, 27.3.2024).
[191] Case C-675/22 *Republic of Poland v Council of the European Union* – still pending.
[192] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, OJ L 261I, 07/10/2022, pp. 1–21. The Commission submitted its proposal on 14 September 2022, and the Council adopted the Regulation on 6 October 2022.
[193] See for example cases T-775/22, T-795/22, T-802/22 and case T-803/22 (direct challenges against the solidarity contribution) and T-759/22 (direct challenge against the revenue cap).
[194] C-533/24 and C-358/24 (solidarity contribution) and C-467/24, C-392/24, C-261/24, C-251/24, C-633/23, C-423/23 and 391/23 (revenue cap).
[195] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (OJ L 335, 29.12.2022, p. 1). The Commission submitted the proposal on 18 October 2022 and the Regulation was adopted by the Council on 19 December 2022. The measures were prolonged until 31 December 2024 by Council Regulation (EU) 2023/2919 of 21 December 2023 amending Regulation (EU) 2022/2576 as regards the prolongation of its period of application (OJ L, 2023/2919, 29.12.2023).

interesting to mention that the proposal also included a "frontload" of certain provisions on transparency which were already under discussion between the European Parliament and the Council as part of the so-called gas package. The proposal also included a mechanism to prevent excessive price movements on commodity trading venues (intra-day volatility mechanism), an obligation for ACER to establish an LNG benchmark to enable a more accurate and reliable assessment of the price for LNG deliveries into the Union and a number of important solidarity provisions.

A more controversial aspect was the market correction mechanism which would cap the price of gas, and which many feared would therefore deter deliveries of gas into the Union at a time where it was still dependent on gas.

The *MCM* was eventually split off and adopted shortly after as a separate and fourth Regulation based on Article 122 TFEU.[196] A critical element for the deal was the introduction of a dynamic rather than a static price cap for gas prices, which would better adapt to market developments. The market correction mechanism has never been triggered as the conditions for its activation have not been met. On the same day, the Council also adopted a fifth emergency measure on the basis of Article 122 TFEU,[197] aiming to accelerate the deployment of renewable energy by speeding up and streamlining permitting procedures which act as a major bottleneck for the swift roll-out of renewable energy installations and grids (*Deployment of renewables emergency measure*). Provisions include a presumption that the planning, construction and operations of plants and installations for the production of energy from renewable sources are in the overriding public interest at least in certain areas. The Regulation also includes maximum durations for granting permits linked to the installation of solar energy equipment and to the repowering of existing energy power plants and their connection to the grid. The Regulation allowed certain exemptions from various environmental impact assessments and included provisions on the acceleration of the deployment of heat pumps. The Regulation, the duration of which was limited to 18 months, was challenged by environmental NGOs through the Aarhus Regulation review mechanism, and the review decisions taken in that context have been challenged before the Court of Justice.[198] It should also be noted that an important part of that Regulation was subsequently incorporated, with adaptations, in the Renewable Energy Directive

[196] On 22 November, the Commission presented a separate proposal fleshing out the market correction mechanism in more detail. That proposal was adopted on 22 December 2022, see Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices, OJ L 335, 29/12/2022. That measure was prolonged for a year until 31 January 2025 by Council Regulation (EU) 2023/2920 of 21 December 2023 amending Regulation (EU) 2022/2578 as regards the prolongation of its period of application, OJ L, 2023/2920, 29/12/2023.
[197] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ L 335, 29/12/2022, p. 36.
[198] Cases T-534/23 and T-535/23.

(RED),[199] adopted on 18 October 2023. In spite of this, the Commission tabled a proposal on 28 November 2023 to prolong the application of certain measures of the emergency Regulation by one year until 30 June 2025.[200]

The energy crisis was also accompanied by several sanctions packages which will not be dealt with in this report,[201] as well as by a Temporary State Aid Crisis Framework, facilitating the granting of State aid through a simplified process for the approval of State aid for projects relevant in the crisis context. The latter is dealt with in a separate chapter.

Concluding remarks – Complexity and coherence of the Union crisis response: Actors, tools and common patterns

The description of the measures taken at the EU level to tackle the various migration crises since 2015, the COVID-19 crisis and the energy crisis starting at the end of 2021, allow us to make a number of observations and to identify common patterns.

1. The nature of the crises affects the type and effectiveness of the Union response

At the outset, it is important to stress that the situation of crisis underpinning the three case-studies were heterogeneous in nature. The COVID-19 and energy crises were symmetric crisis, in the sense that it became rapidly clear that they concerned all the Member States, even if they did not necessarily impact them in the same way. The migration crises, on the other hand – similarly to the sovereign debt crisis which is not object of this report – were asymmetric, in the sense that they directly concerned certain Member States only.

[199] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L, 2023/2413, 31/10/2023.

[200] That prolongation was adopted through Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy (OJ L, 2024/223, 10.1.2024). That Regulation contained a number of recitals explaining the interaction of the prolongation with measures on the acceleration of permit-granting introduced in the Renewable Energy Directive, see in particular recital (2): "[…] Some of the measures introduced by Regulation (EU) 2022/2577 were also included in Directive (EU) 2018/2001 by means of Directive (EU) 2023/2413. However, Directive (EU) 2023/2413 did not mirror some of the more exceptional measures contained in Regulation (EU) 2022/2577, thus delimiting exceptional and temporary nature of those measures. Instead, that Directive introduced a stable and long-term permanent regime to accelerate permit-granting procedures which establishes dedicated steps and procedures which require a longer implementation time. Member States have the obligation to transpose Directive (EU) 2023/2413 into their national law by 21 May 2025, with the exception of some of the provisions as regards permit-granting procedures, which have an earlier transposition date, i.e. 1 July 2024, which is immediately after the date of end of validity of Regulation (EU) 2022/2577. Following the transposition of Directive (EU) 2023/2413, renewable energy projects will benefit from the provisions introduced by that Directive to streamline permit-granting procedures."

[201] An overview of the various measures can be found here: https://www.consilium.europa.eu/en/policies/sanctions-against-russia/sanctions-against-russia-explained/

The nature of the crisis was not crucial to trigger a response at the Union level as the Union has also taken action in respect of other asymmetric crises hitting only some Member States or some Member States more than others, such as the financial crisis and the migration crisis.

The need for EU action was rather driven by the understanding that Member States alone could not have effectively tackled the situation, or that competing or diverging national measures would have or were already jeopardising the Union *acquis* and could ultimately undermine its effectiveness. Hence the EU dimension resulted from a risk to common goods, values and rules.

At the same time, however, the nature of the crisis had an impact on the political dynamics in the definition of the Union's response, affected its capacity to find solutions and determined the choice of the type of solutions adopted. Thus, during the migration crises, the strong divisions in Council as to the way to operationalise the principle of solidarity towards front-line Member States, and in particular the confrontation over the idea of a mandatory relocation of asylum seekers, affected the effectiveness of the emergency measures adopted at the EU level and stalled progress in the legislative debate aimed at reforming the existing legal framework, to the point that the Commission had to submit a New Pact to reboot the discussion on the most sensitive issues. Meanwhile, solutions were found in different instruments, notably international arrangements such as the one concluded between Member States and Türkiye to limit arrivals to the borders in the first place.

The same did not happen in the case of the COVID-19 pandemic and the energy crisis. In these cases, opposition by certain Member States did not prevent the adoption of Union emergency measures implying a high degree of solidarity. The scale of the challenges to be faced, the existential threat posed to common goods but also the impossibility of invoking arguments based on moral hazard played a crucial role in shifting the position of certain key actors in favour of this outcome.

2. Primary role of Member States in providing emergency response

In all the case studies analysed in this report, Member States played the first and primary role in reacting to the situation of emergency, be it by rapidly adopting measures to restrict freedom of movement at the outset of the COVID-19 crises or during the various migration crises, or by adopting measures of economic support to tackle the rise in gas and electricity prices during the energy crisis. As it became clear that the uncoordinated reactions by Member States risked undermining Union policies (like the Schengen area or the free movement of persons in the context of the COVID-19 crisis), the Union intervention initially aimed to coordinate national responses or to facilitate them in an orderly way, notably by promoting coordination via soft law instruments or by triggering derogations in escape clauses, often associated with specific conditions and limitations.

Only as a second step, notably when Member States actions proved insufficient to tackle the issue, did the Union step up its intervention by adopting specific measures at the EU level, as shown by the development of coordinated external action towards third countries following the migration crisis or of the joint procurements of medical countermeasures during the COVID-19 crisis. In a similar vein during the energy crisis, the Union action shifted from an initial focus on empowering Member States to address the situation of crisis, to a more centralised approach to limit disparities by means of EU-wide emergency measures (and contextual reform of the ordinary legislative framework regulating the energy sector).

The action at the EU level has thus been triggered reactively and progressively (see below on this specific point). At times it has been criticised as too slow and inappropriate to ensure a timely and effective response in a situation of crisis, although such an approach to EU action appears to appropriately reflect the principle of subsidiarity and proportionality in the exercise of the Union emergency competences.

Also, the different crises highlighted the lack of instruments and processes readily available to deal with the exceptional circumstances. Even the existing Union legal framework on serious cross-border health threats proved largely insufficient to tackle a crisis of the intensity of the COVID-19 pandemic. Similarly, the existing spending instruments to support Member States in crisis situations (*Emergency Support Instrument, EU Solidarity Fund*) did not appear well suited – let alone sufficiently funded – to tackle the diversity and dimension of the challenges raised by the COVID-19 pandemic and thus needed to be swiftly modified before their mobilisation.

3. A complex and multi-faceted EU response

The emergency response of the Union has been a complex one, combining a variety of instruments: political and legal; emergency and ordinary competence. It drew on a variety of tools, which reflected the multi-faceted nature of the crisis itself: from soft law measures to ordinary legislation, from the triggering of escape clause allowing Member States to derogate from EU rules, to emergency measures taken at the EU level, to international instruments relevant to a variety of policy areas. In the context of the energy crisis for instance, the Union response consisted in a mix of soft law, acts adopted under the ordinary legislative procedure, and emergency measures adopted by the Council on the basis of Article 122 TFEU. The Union response was a holistic one, covering several angles relevant for crisis management (diversification through energy savings, accelerating green investments, enhancing energy solidarity, measures linked to the electricity market and affordability measures, restrictive measures in the field of the CFSP and State aid framework). In a similar vein, given the breadth of the challenges faced, the response to the COVID-19 pandemic was also

particularly multifaceted and encompassed soft law measures to coordinate the action of the Member States (e.g. Council recommendations on national restrictions on travel), quick amendments to existing legislative instruments (e.g. *CRI* and *CRI plus*) or adoption of new legislative acts (*COVID-Certificates Regulation)*, as well as emergency measures adopted on the basis of Article 122 TFEU (*SURE*, *EURI*).

It is remarkable that the difference in the competence exercised to adopt crisis-related measures has not hampered the timeliness of the Union's action. Thus, the co-legislators have proved to be able to adopt legislative acts in a very short time frame. Conversely, having recourse to an emergency legal basis has not necessarily meant rapid action (e.g. *EURI*).

The reasons for the complexity of the Union crisis response are various, and both inherent to the system of EU competence and to the political willingness to exercise that competence. As a result of the lack of a general emergency competence in the Union, emergency competences are sectorial. Moreover, the structure of the system of competences of the Union does not allow all measures that may be necessary to be introduced through a single instrument, but instead requires the Union response to be delivered via a number of acts, each based on its own legal basis and subject to its own procedural requirements.

In such a context, the risk of fragmentation is often overcome by recourse to political packages whereby several measures are combined and considered as a single political object for the sake of negotiations within the Institutions. Political packages ensure coherence and effectiveness in Union action and leverage the position of the political actors across the boundaries imposed by legal bases. In so doing, however, they create tensions with the legal requirements resulting from the principle of conferral and institutional balance. The implications for the EU legal order of the practice of political packaging are manifold and will be explored in detail in Chapter III, section 2.1.

4. Graduality in the Union response

Throughout the crises under examination, the Union response followed a sequence characterised by a growing level of normativity and by a shift in focus from Member States' measures to Union ones. That sequence reflects both the evolution of the perceived needs during the crisis and of the political support for the exercise of Union competences. It also confirms that the prime role of the Member States in crisis situations already described above is fully incorporated in the way EU institutions, and notably the Commission, design the EU response to crisis.

The first EU response generally came in the form of soft law tools, for example, through Commission communications suggesting coordinated approaches by Member States in the exercise of their

competences. Such soft law tools can be adopted rapidly, may have a gap-filling function, and have proved effective when combined with the political impetus lent by the European Council, which provides in terms of political authority what they lack in terms of legal force. The Council Recommendations on a coordinated approach to national restrictions on travel to the EU and on the free movement of persons in the context of the COVID-19 pandemic are a remarkable example of effective soft-law coordination of national action, as they were widely followed by national authorities.

Still, soft law tools offer no possibility to derogate from existing provisions and no guarantee that the recommended approach will be respected (by Member States or by economic operators); there is also no guarantee of uniform implementation. Thus in all case-studies analysed in the report, as the risk of divergence between Member States became apparent, soft law instruments were progressively combined, supplemented or replaced by binding acts adopted at the EU level.

As a second step, often combined with soft law tools, the Union triggered escape clauses or greenlighted the recourse to derogating measures and flexibilities allowed under primary or secondary EU law. Good examples of such an approach were the recourse to the general escape clause during the COVID-19 pandemic, or the adoption of temporary crisis frameworks relaxing the conditions for recourse to State aid both during the pandemic and the energy crisis. In these situations, the response to the crisis remains essentially based on Member States' actions, but those are now facilitated and framed by a Union authorisation, which identifies specific conditions and limitations.

When, as a third step, the Union finally took action directly and adopted measures at its level, it started by using the available instruments. Thus it is a common feature in all the case studies we have analysed that a first set of Union measures consisted in the mobilisation or repurposing of existing EU polices and instruments. Typically, this required legislative amendments to the relevant basic acts, which however the co-legislators proved to be able to handle very swiftly (for a critical analysis of the use of ordinary legislation as emergency tool see Chapter III, section 1.1). Thus during the COVID-19 pandemic, the cohesion funds were rapidly repurposed to finance health-related measures in Member States by targeted legislative amendments (*CRI* and *CRI plus*) and the rules on airport slots modified to adapt them to the situation of the pandemic. In a similar vein, the existing spending instruments were mobilised and as necessary amended (*Emergency Support Instrument, EU Solidarity Fund*) to support the Member States.

Only when no instruments were available under the existing legal framework or those available were clearly not sufficient to respond to the situation of crisis did the Union have recourse to emergency competences.

5. *Emergency competences were generally used at a later stage of a broader Union response*

In the case-studies analysed in this report, emergency competences were always part of a broader Union response to crises alongside a number of other instruments based on ordinary competences (see above). In the context of the complex Union response, emergency competences were generally triggered at a later stage, and typically when it became apparent that the existing ordinary tools were not able to provide a response to match the scale of the challenges posed by the crisis, and recourse to the ordinary legislative procedure was not deemed sufficiently effective or timely in light of the urgency of the situation (as in the case of the energy emergency measures).

Thus, in the framework of the energy crisis, the response at the Union level initially consisted in a number of proposals based on the ordinary legal bases, aimed at modifying existing regulatory and financing frameworks to increase the ambition and accelerate the achievement of objectives of energy transition and energy savings. The recourse to emergency measures based on Article 122 TFEU only entered into play in a second phase, when the rise in energy prices and the deepening of the crisis prompted a strong call by the European Council for urgent and exceptional measures. Once adopted, however, they played a central role in shaping the Union's emergency response.

In the context of the COVID-19 pandemic, the recourse to emergency competences followed a similar sequence. Emergency measures based on Article 122 TFEU were only proposed by the Commission after having triggered existing mechanisms and having mobilised all available budgetary resources. Crucially, the timing of the proposals reflected the evolution of the political discussions among the Leaders as to the extent and form of the Union involvement in financing the recovery from the pandemic. The proposal for *SURE*, combining an innovative use of Article 122 TFEU and ambitious joint borrowing with a more conventional form of support for Member States through repayable loans (thus implying a limited redistributive effect), acted as the "canary in the coalmine", whose success opened the way to the more ambitious *NGEU* financing scheme. Indeed, the Commission presented the *NGEU* package – centred on another Article 122 TFEU emergency measure, the *EURI* – only once it had received clear indication that Member States would support its groundbreaking political and legal design: the issuance of common EU debt on an unprecedented scale in order to provide grants to support Member States' recovery.

Once adopted, *SURE* and *EURI* played the central role in the Union response to the economic dimension of the COVID-19 crisis and even ended up symbolising the capacity of the Union to act decisively and boldly in crisis situations. It nonetheless remains true that crucial Union actions taken to address other aspects of the pandemic, notably in the domains of vaccine procurement and restrictions on the movement of persons, were adopted on the basis of ordinary competences or even

based on soft law. Not all instruments adopted on the basis of Article 122 TFEU proved equally relevant for tackling the pandemic: the emergency framework concerning medical countermeasures adopted on the basis of Article 122(1) TFEU was ultimately not even activated for the purpose of the COVID-19 pandemic and remains a dormant framework to date.

The Union response to the 2015 migration crisis seems to mark a departure from this pattern of sequenced recourse to emergency legal bases. The Commission put forward proposals[202] based on emergency competences rather early, as part of its first package of measures aimed at tackling the sudden inflow of migrants from the eastern borders of the Union and its consequences. However, the decision of the Commission to push ahead with the relocation decisions despite the lack of political support amongst Member States significantly undermined their implementation and ultimately their effectiveness. As a result, the two emergency measures played only a secondary if not marginal role in the context of the 2015 migration crises and were surely not decisive to its solution. That precedent further affected the choice of legal basis during that crisis and beyond: despite the recurrence of migration crises since 2015, Article 78(3) TFEU was no longer used to adopt emergency measures at the EU level. Emergency situations were rather tackled by the unilateral measures adopted by Member States on the basis of the existing legal frameworks (e.g. Schengen Borders Code or asylum legislation) or by the recourse to the escape clause in Article 72 TFEU.

In all the case-studies analysed in this report, Article 122 TFEU played a role and indeed proved to be the "emergency clause" *par excellence* of the Treaties. It found early use during the 2015 migration crisis to establish the *Emergency Support Instrument* to provide financial support to front-line Member States struggling with the humanitarian consequences of the sudden mass influx of asylum seekers. It was however in the context of the COVID-19 pandemic and then of the energy crisis that the provision received extensive and innovative applications, leading to the adoption of measures having a very different nature and scope from the ones historically associated with the provision (for an historical analysis see Chapter II, section 2.1).

The extensive use of the provision was however accompanied by a particular attention of the Institutions to compliance with the conditions for its application. During the negotiations in Council on *SURE* and the *NGEU* package, the exceptional and temporary character of the relevant instruments were strengthened. In the context of the energy crisis, the measures adopted on the basis of Article 122(1) TFEU remained genuinely temporary in nature, characterised by short lifespans, whose

[202] Notably the two relocation decisions under Article 78(3) and the provision of emergency financial support via the *Emergency Support Instrument* under Article 122(1) TFEU.

prolongation was subject to a careful assessment of their continued necessity in light of the evolution of the situation.

This did not prevent a certain level of controversy from arising as to the allegedly expansive use of Article 122 and the risk that it would entail both in terms of the principle of conferral – which could be undermined by competence creep driven by emergency – and in terms of dominance of the executive – due to the exclusion of the European Parliament from the adoption of the relevant measures. These concerns will be assessed as part of the analysis carried out in following chapters of this report.

6. A specific role for the Institutions

In times of crisis, the coordination and steering of the response has been shaped significantly by the central role of the European Council. While it always provided a political lead, the degree of its intervention varied, from giving general political impetus, to brokering the final political deal in the case of policy packages or even entering into the detailed determination of the content of the measures as was the case for the financial response to the COVID-19 pandemic (NGEU – MFF– RRF– Conditionality Regulation) or the Relocation Decision (European Council of 25/26 June 2015). The European Council was generally successful in steering certain aspects of the Union action, however with some exceptions. In the field of migration, the strong divergences among its members on the contentious issue of burden-sharing, which was itself the result of the highly asymmetric nature of the crisis, did not allow it to provide impetus to the discussions, notably on the legislative reform of the asylum and migration system before the introduction of a new set of proposals by the Commission under the new Pact on Asylum and Migration..

The Commission, for its part, proved agile and reactive, swifty endorsing soft-law instruments. In certain instances, it anticipated the steering of the European Council, issuing guidance that was later endorsed by the latter. At times, it exercised its power of initiative in the absence of steering from the European Council and put forward proposals that, however, proved to be controversial among Member States. This was notably the case of the two 2015 emergency relocation decisions, which, as a consequence, were immediately attacked in Court by two Member States and largely remained under-implemented. As a result of this negative experience, the Commission retreated into a position of self-restraint, leaving to the Member States to deal with emergency response in the first place, and rather focussing on working on the legislative reform of the asylum and migration system. The emergency action of the Union was therefore limited to coordinating Member States' measures and financial support. A significant exception in the field of migration was the successful activation, for the first time, of the emergency mechanism under the Temporary Protection Directive as a

consequence of the Ukraine war. It is worth noting that the activation of the Temporary Protection Directive was crucially based on a request by the European Council to proceed in that sense.

The Council played a central role in the various crises, by ensuring that the political direction agreed on by the leaders was translated in the text of the many legislative and non-legislative measures adopted to tackle the crises. It also acquired a greater role in the implementation of a number of key crisis instruments such as *SURE* and *RRF* and in the implementation of the 2015 *Relocation decisions.*

In all three crises, the European Parliament played a limited, albeit still central role. It effectively participated in the adoption of the many ordinary legislative acts that were part of the Union emergency response. Its exclusion from the procedure for the adoption of emergency measures under Article 122 TFEU did not prevent it from exercising a form of control through its budgetary powers (e.g., when the *Emergency Support Instrument* was mobilised during the migration crisis and the COVID-19 pandemic) and from leveraging its position when such emergency measures were included in broader political packages (as in the case of *NGEU*). Still such an involvement has been considered by many commentators, and by the Parliament itself, as insufficient to ensure full democratic control over the emergency action of the Union. Beside the fact that both the European Council and the Council also contribute to the democratic legitimacy of the Union, this criticism fails on the one hand to take into account the specificity of the EU emergency legal framework, and its interaction with the ones of the Member States, and the fact that they actually reinforce the safeguards against the risk of executive dominance (see on this Chapter IV, notably in the conclusions). On the other hand, the criticism fails also to consider that the legislative dynamics triggered by the adoption of emergency measures ultimately result in the involvement of the European Parliament (see on this notably part 2 of Chapter III). The impact of crises on the role of the EU institutions and the risk that this may entail a shift in the institutional balance will be analysed in detail in Chapter IV of the report.

7. Solidarity, a central dimension of EU emergency action

Finally, solidarity was a main theme throughout the crises, as reflected in the Union's emergency response.

In the context of the migration crisis, the relocation decisions were driven by a genuine attempt to promote a fairer distribution of asylum seeker than that imposed by geography. Their limited success prompted a rethink of how solidarity was put into practice, in the context of the New Pact on asylum and migration. However, it did not call into question the principle of solidarity, which has particular significance – and Treaty recognition – in this domain.

In the context of the COVID-19 crisis, two initiatives stand out for their unprecedented nature and the extreme unity and solidarity that they testified to. The first one is the Union's financial response to mitigate the enormous socio-economic impact of the pandemic and enable a swift economic recovery and which entailed an unprecedented transfer of resources among Member States. The second is the success of the joint vaccine procurement which ensured swift and equal access for all Member States to safe vaccines at record speed.

In the context of the energy crisis, solidarity took new forms and dimensions, as it found expression in the protection of common goods which would inevitably be impaired by unilateral Member States' action. In such a context solidarity took the form of the imperative need to act jointly, as certain measures would not be efficient or not even possible, unless introduced by all Member States (e.g., introducing a market correction mechanism based on a dynamic bidding limit for gas). Finally, in the context of the energy crisis, the solidarity principle was further operationalised through obligations imposed on individuals, rather than on Member States themselves, such as the introduction of a revenue cap and solidarity contribution from certain market operators, which helped to finance measures supporting those most affected by the rise in electricity prices.

8. Relationship between emergency measures and ordinary law-making

A final common trend in all the case-studies that we have analysed is the close relationship between emergency measures and ordinary law-making.

Often emergency measures were presented jointly with a broader reform of the ordinary legislative framework applicable in the domain, as happened in the migration and energy crises. In those contexts, emergency measures were used to frontload reforms already being discussed or even agreed (as in the case of certain emergency measures); in other cases, they offered an opportunity to accelerate or catalyse reforms already in the pipeline but having met with strong opposition (as in the case of the *RRF*).

The case-studies also show how emergency measures can also drive change and innovation: those provisions which were considered to have shown their worth beyond the specific crisis framework have subsequently been "repatriated" into legislation based on ordinary legal bases, and even "mainstreamed" in other domains.

The complex relationship between emergency and ordinary competences, and the way the two interfere and interact by setting in place complex normative dynamics in the EU legal order will be the object of Chapter III of the report.

II. THE EU EMERGENCY ARCHITECTURE

"Sovereign is he who decides on the [state of] exception."
C. Schmitt[1]

Introduction: The EU emergency architecture

The case studies analysed in the previous chapter have shown that the EU legal order deals with emergencies in an articulated, multi-layered and multi-faceted way. It is multi-layered, because an EU emergency does not always prompt Union action but may – depending on the circumstances – be dealt with in whole or in part at national or even regional level[2] and it is multifaceted because of the number of different legal bases and types of measures which may come into play in response to an emergency.

The way EU law deals with emergencies seems, therefore, to sit at odds with the experience of many States, as underlined in the national reports. States often have in place *emergency constitutions*, understood as a set of clear provisions and procedures that permit a departure from established norms under certain conditions designed to ensure that the departure safeguards the fundamental values and principles of the legal order.

By taking as a reference the emergency constitution of nation States, commentators point to the fact that EU emergency law is fragmentary, lacks coherence and is insufficient. Some argue that, confronted with such limitations, Institutions engage in strategies aimed at overstepping the legal constraints posed by the Treaties by bending the law or working creatively around it, in an exercise of 'competency creep' that ultimately undermines the foundation of the EU legal order. Others apply to the EU's emergency action the same paradigms and categories developed in relation to the State, pointing to the need to identify and strengthen rules that ensure that the exercise of emergency powers at the EU level do not undermine the integrity of the EU legal order and do not subvert the institutional balance, notably by excluding the European Parliament from the law-making process.

We argue that this approach fails to take into account the specificity of the EU as an international organisation, albeit one characterised by a very high level of integration, and notably that its legal

[1] C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, 1922, 7th ed. Berlin: Duncker & Humblot.
[2] In addition, in relation to the financial crisis, a certain prevalence was given to collective international law arrangements between Member States.

order is based on the principle of conferral of powers from Member States, which means that the Union can only act within the limits of the competences that have been conferred upon it in the EU Treaties.[3] Even where powers have been conferred upon the Union, the intensity of its action is determined by the nature of the powers conferred.[4] In a situation where the Union only enjoys the power to support, coordinate or supplement the actions of the Member States, as is generally the case in the field of health,[5] the exercise of powers is more constrained than where the Union operates under a shared competence, such as in the field of energy,[6] or in an area of exclusive competence, such as competition rules necessary for the establishment of the internal market.[7]

The fact that the EU's emergency powers are fragmentary, and not of a general nature, is not an accident but the direct result of the way the EU legal order is structured and of the choices made by the drafters of the Treaties when identifying the areas of competence to be devolved to the Union. This has fundamental repercussions for the EU's emergency architecture and a correct understanding of its underpinning dynamics and tensions.

The EU's emergency architecture

The power to take action in emergency situations is one of the fundamental expressions of State sovereignty, as it is intrinsically related to the preservation of the organised life of the community of which the State is composed, in situations of extraordinary threats.

This is reflected by the way international law and the law of international organisations have traditionally accommodated emergency situations. International conventional regimes often recognise that States remain ultimately responsible for taking action in emergency circumstances and, to that end, they provide for specific derogations or escape clauses that allow for the suspension of conventional obligations. A good example in that regard is found in Article 15 of the European Convention on Human Rights, which provides that "in times of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under the 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."

[3] Article 5(2) TEU.
[4] The division of competences is set out in Article 2 TFEU and further defined in Articles 3–6 thereof (shared, exclusive, or powers to support, coordinate or supplement).
[5] Article 2(5) and 6 TFEU.
[6] Article 4 TFEU.
[7] Article 3 TFEU.

Thus, confronted with emergency situations, sectorial international regimes accept that the normative space for emergency is the one of the State, and adapt accordingly.

The way the EU legal order accommodates emergencies reflects the peculiar nature and evolution of the EU process of integration.

First, the classic international law approach to emergency situations is still very much present in the EU legal order. It is notably reflected by the various escape clauses that in exceptional circumstances allow Member States to derogate from their EU law obligations. Originally quite ubiquitous in the text of the EEC Treaty, a number of these escape clauses were gradually deleted in the course of the various Treaty revisions, as a greater number of competences were transferred to the Union. However, several of them still remain and are further developed in sectorial legislation, which often translates into secondary law the system of derogations laid down in the Treaties. Among the Treaty-based clauses, is Article 347 TFEU, which allows Member States to disapply certain EU law obligations when faced with an emergency situation consisting of "serious internal disturbances affecting the maintenance of law and order" or in the event of war or serious international tensions constituting the threat of war. It is worth noting that Articles 36, 45, 52, 65, 72 and 346 TFEU also enable Member States to apply certain derogations in situations that may also cover situations of emergency (e.g., public order, public security, public health).

At the same time, as we will see in section 1 of this Chapter, the much more advanced integrationist agenda of the EU project has resulted in a strict framing of Member States' emergency powers. On the one hand, the Court of Justice has given a restrictive interpretation of emergency clauses, preventing them from constituting a "reserve of sovereignty" that would allow Member States to have the final say on the derogations. In so doing, the Court has introduced a number of procedural and substantive safeguards limiting the impact of those clauses on common EU rules and in fact introducing an element of solidarity to them.

On the other hand, in certain specific areas, the possibility for Member States to take emergency action is subject to explicit mechanisms for authorisation by the EU institutions. This is notably the case for certain core competences exclusively conferred on the Union, whereby the need to protect the uniformity and effectiveness of common rules requires unilateral derogations by Member States to be vetted *ex ante* or *ex post*. This category includes:

- Article 107 TFEU. If as a matter of principle, State aid is prohibited, pursuant to Article 107(3)(b), State aid to "remedy a serious disturbance in the economy of a Member State" may be considered

compatible with the internal market. In a similar vein, Article 107(2)(b) TFEU provides that State aid to "make good damage caused by natural disasters or exceptional occurrences" shall be compatible with the internal market. In both cases, Member States are enabled to provide aid to mitigate the harmful impact of crises, but subject to a specific authorisation by the Commission. The way in which the Commission has exercised this power to orient Member States' aid towards specific types of projects responding to specific conditions will be analysed in Section 1.2 below.

- Article 144 TFEU allows Member States that have a derogation from participating in the monetary Union and which are experiencing a "sudden crisis in the balance of payments" to take "the necessary protective measures." Such measures are, however, subject to an *ex post* control by the Council, which may decide on the basis of a Commission recommendation and after consultation of the Economic and Financial Committee, that the Member State concerned should amend, suspend or abolish the protective measures.

Finally, a number of Treaty provisions require Member States to support each other in situations of emergency, requiring a coordinated exercise of their national emergency powers. This category of provisions includes:

- Article 42(7) TEU (solidarity in the field of foreign policy) – in the event that a Member State is the victim of an act of armed aggression on its territory, the other Member States shall "have towards it an obligation of aid and assistance by all the means in their power"

- Article 222 TFEU (general solidarity clause) – which provides that 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." This provision also provides for EU level coordination and thus includes components of Union action through coordination.[8]

Second, besides provisions accommodating the exercise of emergency powers by Member States, the Treaties have in a number of specific situations conferred on the Union itself the power to take emergency action. These situations are laid down in several legal bases that require the presence of a situation of exceptionality or urgency in order to be triggered. We will refer to those as "emergency

[8] In the Council, the Integrated Political Crisis Response (IPCR) provides arrangements to support rapid and coordinated decision-making at the EU political level for major and complex crises. The IPCR also supports the arrangements for implementing the solidarity clause in Article 222 TFEU, as provided for in Council Decision 2014/415/EU of 24 June 2014 on the arrangements for implementation by the Union of the solidarity clause (OJ L 192, 1.7.2014, p. 53) and as further detailed in Council Implementing Decision (EU) 2018/1993 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements (OJ L 320, 17.12.2018, p. 28).

legal bases." It is interesting to note that emergency legal bases have often made their appearance alongside escape clauses – and as an alternative to them (see for instance the relationship between Articles 72 and 78(3) TFEU, which were originally part of the same emergency provision[9] and between Articles 143 and 144 TFEU). They reflect the understanding that, even if coordinated or authorised, separate actions taken by Member States do not necessarily guarantee an effective or fair response to a crisis situation and can at the same time threaten the common goods that the progressive transfer of sovereignty has established at the European level. This category includes:

- Article 66 TFEU, according to which the Council, acting on a proposal from the Commission and after consulting the European Parliament, may take temporary safeguard measures with regard to third countries where movements of capital to or from third countries "cause, or threaten to cause, serious difficulties for the operation of economic and monetary Union."

- Article 78(3) TFEU, according to which the Council, on a proposal from the Commission, and after consulting the European Parliament, may adopt provisional measures for the benefit of one or more Member States which are "being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries."

- Article 122(1) TFEU empowers the Council, on a proposal from the Commission, to decide upon the measures appropriate to the economic situation. Such measures may in particular cover cases of "severe difficulties in the supply of certain products, notably in the area of energy" and are to be adopted in a spirit of solidarity.

- Article 122(2) TFEU is a provision enabling the Council, on a proposal from the Commission, to decide to grant – under certain conditions – Union financial assistance to a Member State in difficulties or seriously threatened with *severe difficulties* caused by natural disasters or *exceptional circumstances* beyond its control. The President of the Council must inform the European Parliament of the decision taken.

- Article 143(2) TFEU, which enables the Council, on a recommendation of the Commission, to grant mutual assistance to a Member State that has a derogation from participating in the monetary union and which "is seriously threatened with difficulties as regards its balance of payments […] and where such difficulties are liable in particular to jeopardise the functioning on the internal

[9] For the historical evolution of Article 72 and 78(3) TFEU, see below: Section 2.2.1.

market or the implementation of the common commercial policy." Interestingly enough, if the mutual assistance recommended by the Commission is not granted by the Council or if the measures taken are insufficient, "the Commission shall authorise the Member State to take protective measures, the conditions and details of which the Commission shall determine."

- Article 213 TFEU is a provision enabling the Council, on a proposal from the Commission, to decide on urgent financial assistance to a third country, when the situation in that country so requires. The provision complements the ordinary competence for the provision of assistance, including financial assistance, to third countries laid down in Article 212 TFEU and subject to ordinary legislative procedure.

As the case studies have shown, the inclusion of a number of emergency provisions in the Treaties should not detract from the fact that "ordinary" legal bases have often also been deployed at times to respond to emergency situations, either by means of a direct response or by means of provisions that may be triggered in the event of an emergency. In fact, ordinary legal bases have even enabled very swift responses in crisis situations, for example in the context of the COVID-19 pandemic, in respect of Brexit contingencies and in the context of the energy crisis. Therefore, whether a measure qualifies as an emergency measure cannot depend on the legal basis on which it is adopted. What matters is whether the measure – in terms of its aim and content – sets out to address a situation of emergency. After all, the choice of legal basis is an objective one, which must refer to the aim and content of the measure.[10] The question of whether there is a hierarchy between emergency legal bases and ordinary legal bases in cases where the measure could be covered by both types of legal bases is subject to diverging views and will be addressed in Chapter III.

The multifaceted and multi-layered nature of EU emergency law, and notably the fact that the EU legal order accommodates emergencies on the basis of a complex set of provisions rather than of a general "emergency clause," does not mean that EU emergency law is fragmentary. In fact, the unity of EU emergency law is ensured by a set of common principles that underpin the interpretation and application of the various provisions and which ensure unity and coherence for the system. These principles will be the object of Section 3 of this Chapter.

Underpinning tensions

[10] See, for example, judgment of 19 July 2012, *European Parliament v Council*, C-130/10, EU:C:2012:472, paras. 42 to 45.

The whole debate about emergency powers in constitutional theory focuses on the tension – and the equilibrium to be found – between the greater discretion that is necessary to allow the executive to effectively counter existential threats to the polity and the set of the purposes, conditions and procedures that, according to the emergency constitution, make the recourse to emergency powers legitimate.

In light of the specific features of the EU emergency architecture, these traditional concerns represent a part of the picture and the broader context needs to be taken into account. This is particularly important when classic constitutional theories on emergency powers are used to suggest improvements to the EU emergency constitution *de lege ferenda*.

We argue that a central tension that is triggered by the exercise of emergency powers at the EU level is the one between the allocation of competence for regulating emergency situations between the Union and Member States and the need to preserve the integrity/constitutional identity of the EU legal order. The concern over a possible competence creep of the Union vis-à-vis the emergency competence of the MS is often missing from the analysis of the constitutional theorists.

In fact, as we will see, many of the specificities of the use of emergency powers by the EU are the consequence of such a tension. This concerns in particular:

- The institutional setting of EU emergency law, and notably the central role played by the European Council and the search of a consensual approach to emergency action at the EU level.

- The negotiating dynamics over emergency measures, where it is often the Member States within the Council that insist on strict respect for the limitations on emergency powers, which sits at odd with the traditional concern about the risk of "tyranny of the executive" in the recourse to emergency powers.[11]

- The conferral of powers to implement emergency measures on the Council, rather than on the Commission.

[11] This dynamic can be found in all the case studies we have analysed in this report. In the context of the energy crisis, the scope of certain of the emergency measures was very controversial among Member States and led to lowering the level of ambition of the original of the Commission's proposal; in the case of COVID-19, Member States insisted for having stronger time limitations for *SURE* and clearer conditions for the recourse to joint borrowing in the *EURI/ORD/RRF* package; in the case of migration, the divergence of views among Member States compromised the effectiveness of the 2015 Council relocation decisions and eventually pushed the Institutions to pursue other avenues to address the crises based on unilateral measures of Member States and agreements with third Countries, with the result that the Union emergency competence in the area has remained unused since then.

- The recourse to intergovernmental solutions as a second best, when the political and legal conditions are not met to adopt emergency measures at the EU level.

From this point of view, the corpus of EU emergency law may be seen as a system for limiting and framing the emergency competence of national executives in emergency situations, benefitting common action at the EU level, inspired by the principle of solidarity. Paradoxically, via the mechanisms of control that national parliaments have over executives when acting at the EU level, emergency action at the EU level may ensure greater parliamentary involvement than the adoption of national emergency measures.

This dynamic coexists and overlaps with the traditional tension between executive and legislative powers and needs to be taken into account to fully understand the dynamics of EU emergency law, especially whenreflecting on whether reforms are desirable.

1. EU law provisions framing Member States' emergency powers

The first pillar of EU emergency architecture consists of EU law provisions that frame the exercise of emergency powers by Member States. As we have underlined in the introduction, this approach to emergency regulation moves from the classic international law approach that considers emergency powers to be a fundamental expression of state sovereignty. The EU legal order accommodates this approach by acknowledging the responsibilities of Member States in certain domains but at the same by framing them according to varying levels of intensity, depending on the level of integration pursued in the domain in question.

The first way to accommodate Member States' emergency powers is by means of escape clauses that allow Member States to take action by derogating from EU rules. Designed as safeguards for the transfer of competence to the Union in certain areas, their scope has been clarified by the Court of Justice in the sense of limiting in procedural and substantive terms the possibility for Member States to depart from their EU obligations. These are the object of the first paragraph of this section.

A second possible way to accommodate Member States' emergency powers is to subject their exercise to a specific authorisation mechanism: while the response remains fundamentally a national one, it requires ex ante or ex post vetting by EU institutions. The second paragraph of this section will focus on one example which is of particular significance for the case studies analysed in this report: the case of State aid control in times of crisis.

1.1 Escape clauses and derogations

Escape clauses reflect the classic international law approach to the protection of Member States' fundamental interests, as they allow them in exceptional circumstances to derogate from their EU law obligations. They find their foundation in the general provision of Article 4(2) TEU, according to which, the Union "shall respect [the] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

The Treaty on the Functioning of the European Union then applies Article 4(2) in a number of sectorial escape clauses: Article 36 (internal market), Articles 45, 52, 62 and 65 (free movement of persons, services and capital) and Article 72 (area of freedom, security and justice). Finally, Article 347 TFEU lays down a general provision requiring Member States to consult, with a view to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to fulfil obligations it has accepted for the purpose of maintaining peace and international security.

With the exception of Article 347, which explicitly refers to situations having the character of an emergency, escape clauses have a broader scope than emergency situations, as they generally refer to fundamental State interests, regardless of the circumstances. However, certain State interests they refer to, and notably the notions of "public security," "national security" and "internal security" have a particular relevance in emergency situations, and indeed have been invoked to justify the adoption of unilateral emergency measures by Member States in situations classified as emergencies. This applies in particular to Article 72 TFEU, which has been invoked by Member States to justify unilateral measures to suspend or derogate from provisions of the EU asylum acquis during the various migration crises and has led to some relevant case-law that has clarified the nature and scope of escape clauses.

1.1.1 Nature of escape clauses: Not a reserve of Member State competences

The question of the nature of escape clauses, and in particular of the one embedded in Article 72 TFEU, was at the centre of the infringement proceedings brough by the Commission against Hungary, Poland and the Czech Republic for their failure to effectively implement the *2015 Relocation Decisions* adopted by the Council on the basis of the emergency competence laid down in Article

78(3) TFEU.[12] These cases are particularly meaningful for our analysis because they illustrate the relationship between emergency powers exercised at the national and EU levels.

Before the Court of Justice, the three Member States did not contest that they had failed to comply with the obligations resulting from the *Relocation Decisions* but argued that they were entitled to rely on Article 72 TFEU, read in conjunction with Article 4(2) TEU to disapply the two decisions. They submitted that Article 72 TFEU, as a provision of primary law, had to take precedence over the two Decisions, as acts of secondary law. In their view, Article 72 TFEU was a rule "comparable to a conflict-of-law rule under which the prerogatives of the Member States in the field of maintenance of law and order and safeguarding of internal security take precedence over their obligations under secondary law."[13] According to this understanding of the provision, a Member State could legitimately set aside a norm of EU secondary law each time that its implementation would – or even could – affect the exercise of the Member State's "responsibilities" in the field of internal security. As remarked by one commentator, the Member States pleaded, in substance, that the scope of EU law ends where the necessities of maintaining law and order, as unilaterally understood by each Member State, start.[14]

It is interesting to note that in her opinion on the case, Advocate General Sharpston accepted the argument that Member States retained *competence* in the domain of the maintenance of law and order and of internal security. According to the AG:

> Article 72 TFEU is therefore not — as Poland and Hungary contend — a conflict of laws rule that gives priority to Member State competence over measures enacted by the EU legislature or decision-maker; rather, it is a rule of co-existence. The competence to act in the specified area remains with the Member State (it has not been transferred to the European Union).[15]

The fact that the Member States retained competence, however, did not mean that those areas constituted a "*chasse gardée.*" Member States would remain obliged to exercise their competence under Article 72 TFEU in a way that respects other relevant provisions of EU law.[16]

[12] Judgment of the Court of Justice of 2/4/2020 in joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic*, EU:C:2020:257.
[13] Ibidem point 137.
[14] H. de Verdelhan, "Art.72 TFEU as Seen by the Court of Justice of the EU: Reminder, Exception or Derogation?," *European Papers*, 2024(9:3), pp. 1330–1364, at page 1336.
[15] Opinion of AG Sharpston in case C-715/17, *Commission v Poland,* EU:C:2019:917, point 211.
[16] Ibidem, point 219.

The Court of Justice, however, took a stricter position. According to the Court, Article 72 TFEU could not be interpreted as reserving the domains of the maintenance of internal security for the competence of the Member States:

> Although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of European Union law. As the Court has already held, the only articles in which the Treaty expressly provides for derogations applicable in situations which may affect law and order or public security are Articles 36, 45, 52, 65, 72, 346 and 347 TFEU, which deal with exceptional and clearly defined cases. It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of European Union law and its uniform application.[17]

Thus, the Court makes it clear that Article 72 TFEU is not a competence-conferring provision, nor even a rule of co-existence as suggested by the Advocate General, but is rather a conditional exception that allows Member States to derogate from EU obligations in order to ensure the maintenance of law and order and the safeguarding of their internal security. As a derogating provision, Article 72 TFEU must be interpreted strictly. Consequently, it does not confer on Member States unfettered discretion or a generalised right to derogate from EU obligations. On the contrary, the Court of Justice builds on its previous case-law concerning internal market escape clauses to conclude that the requirements relating to the maintenance of law and order or national security are concepts of EU law. As such, they cannot be determined unilaterally by each Member State on its own, but remain subject to the control of the EU institutions and notably to the judicial review of the Court of Justice.[18]

Ultimately, with the findings the Court asserts a normative claim on the decision around the state of emergency. It is up to the EU legal order, through its procedures and institutions, and not to national legal orders, to define the scope of the allowed derogation.

1.1.2 Conditions for recourse to escape clauses

The determination of the nature of escape clauses paves the way for the Court to identify the conditions for their invocation by Member States.

[17] Judgment in joined cases C-715/17, C-718/17 and C-719/17, supra note 12, point 143.
[18] Ibidem, point 146.

To start with, the case-law identifies a number of conditions that are *procedural*, in the sense that they do not concern the substance as such of the national measures adopted in derogation from EU obligations, but rather the burden of proof, the obligation of motivation and, more specifically, the tests of necessity and proportionality.

As regard the *burden of proof*, the case-law of the Court makes it clear that it falls to the Member State that intends to rely on Article 72 TFEU to prove that it is necessary to have recourse to the derogation in order to exercise its responsibilities in terms of maintaining law and order and safeguarding internal security.[19]

Thus, in a case concerning emergency measures adopted by Hungary in response to the 2015 migration crisis, the Court stressed that is not sufficient for the Member State to merely invoke, in a general manner, the risk of threats to public order and internal security that arrivals of large numbers of applicants for international protection might cause, without demonstrating, to the requisite legal standard, that it was necessary for it to derogate specifically from the relevant provision of the Asylum procedure directive.[20] In the same vein, in a case concerning Lithuania, the Court rejected a defence based on Article 72 to justify the derogations introduced to the EU asylum acquis on the basis of a national state of emergency declared to address the situation of migrants being instrumentalised at the border with Belarus.[21]

On the contrary, the Member State needs to justify its recourse to the escape clause with an appropriate reasoning for the *necessity* to depart from the provisions of EU secondary law due to a specific situation of emergency. The necessity test requires the Member State to show that the situation at stake has an actual impact on the interests protected by the derogating clause. Thus, in both the Hungarian and Lithuanian cases, the Court stressed that the reference to a situation of mass influx of migrants at the borders is not as such a circumstance that shows the actual existence of a threat for the maintenance of public order or the safeguarding of internal security.[22] It must be shown that asylum seekers are actually threatening those interests by engaging in activities of sufficient nature and scale to have such an effect.[23] Such a threat cannot be presumed, as presuming that people will be dangerous simply because they belong to an abstract group would go against the very values of respect for human dignity and freedom on which the EU is founded.

---

[19] Ibidem, point 147.
[20] Judgment of 17 December 2020 in Case C-808/18, *European Commission v Hungary*, EU:C:2020:1029, point 217.
[21] Judgment of the Court of 30 June 2022 in Case C-72/22 PPU, *Valstybės sienos apsaugos tarnyba*, EU:C:2022:505, point 72.
[22] Case C-72/22 PPU, *Valstybės sienos apsaugos tarnyba*, point 72; Case C-808/18, *European Commission v Hungary*, point 218.
[23] Case C-808/18, *European Commission v Hungary*, points 218–220.

Once the Member State has proven the existence of a relevant and actual threat to the interests protected by the derogation, it is also required to respect the principle of *proportionality* in the choice of the derogating measures. This requires first showing that the derogation is suitable for protecting the interests at stake. Thus, in the Hungarian case, the Court stressed that the Member State had not demonstrated how the derogation to the rights provided by EU legislation to asylum seekers could contribute to the safeguard of internal security or the maintenance of law and order.[24]

Second, the Member State also needs to show that there was no alternative for ensuring that the interest at stake could be equally protected, notably via less restrictive measures. In that regard, the existence in the applicable EU legislation of provisions that allow for the protection of the interests at stake is crucial in the reasoning of the Court.

Insofar as EU law already allows for the protection of those interests by means of specific provisions – as is largely the case in relation to the EU legal framework applicable to asylum – it is up to the Member State to prove specifically that the existing EU legal framework does not provide effective safeguards in relation to the specific situation at hand. In doing so, however, a Member State cannot merely rely on its unilateral assessment as to the lack of effectiveness or malfunctioning of the EU legal regime in question, as this would undermine the binding nature of the relevant EU acts, as well as the principle of solidarity.[25]

Thus, in all the cases referred above, the Court took great care in detailing the many EU law provisions already allowing Member States to protect their internal security and law and order, and thus no derogation based on Article 72 TFEU could be accepted. It follows, that when an EU regime already exists, Member States must first exhaust the options provided by EU secondary law before invoking Article 72 TFEU. Article 72 is a last-resort provision, applicable only when measures within the existing legislative framework are demonstrably inadequate.

Finally, while not specifically addressed in the case-law developed to date, recourse to derogating clauses needs also to satisfy *substantive conditions* as to the nature and content of the derogation. In particular, any derogating regime under Article 72 TFEU needs to respect the other relevant provisions of EU law, starting with respect for the fundamental rights laid down in the Charter of Fundamental Rights. As Advocate General Emiliou put it in his opinion on the Lithuanian case:

> When examining the compatibility with EU law of any extraordinary and temporary derogation measure, the fundamental rights of the persons concerned should not be

[24] Ibidem.
[25] Judgment in joined cases C-715/17, C-718/17 and C-719/17, supra note 12, point 180 and 181.

> overlooked. Although in 'exceptional circumstances' more limitations may theoretically be placed on those rights in order to safeguard public order and internal security, the fact remains, first, that a balance must always be maintained between those rights and requirements, secondly, that some limitations are so serious that they are never acceptable in a democratic society and, thirdly, that some rights do not allow for any limitation, whatever the circumstances.[26]

Concluding remarks

Despite their origin in the classic international law approach to States' fundamental interests in situations of emergency, the escape clauses included in the EU Treaties have been strictly interpreted in the case-law of the Court of Justice.

By clarifying that they do not entail a competence reserved for the Member States but rather have the nature of derogations that belong to the EU legal order and need to be applied and interpreted accordingly, the Court asserts a normative claim on the regulation of emergency situations. It is ultimately for the EU legal order, and for the Court itself, to define the conditions for a possible derogation by Member States from EU law provisions in times of emergency.

In practice, in none of the cases submitted to the Court in the area of justice and home affairs has a defence based on Article 72 TFEU succeeded to date in justifying a derogation from EU rules in light of the conditions and standard of review identified in the case-law.

In that regard, it is essential to underline the importance that the Court has given to the existence, in the relevant EU legislation, of provisions that already allow for the protection of the fundamental interests of the Member States. When this is the case, Member States can validly rely on escape clauses only if they demonstrate that the existing regulation is inadequate to offer effective safeguards for the interests at stake in relation to the specific situation of emergency they are facing.

It follows that the scope of the action that escape clauses provide to Member States depends on the evolution of EU law over time. The more EU legislation regulates a given matter to incorporate protection of the relevant interests, the more limited the possibility will be for Member States to invoke a derogation. Ultimately, when EU law has fully addressed the matter and developed provisions and procedures to ensure protection of the relevant objectives, the Member States will no longer be allowed to act unilaterally.

---

[26] Opinion of Advocate General Emiliou of 2 June 2022 in Case C-72/22 PPU, *Valstybės sienos apsaugos tarnyba*, EU:C:2022:431 point 134.

This case-law is particularly significant when applied to situations where the Union has exercised its competences and addressed a situation of crisis at the Union level. In such a case, it may be difficult for Member States to have recourse to unilateral emergency powers, even when declaring a state of emergency, to derogate from common EU rules in order to pursue a higher level of protection of their interests. On the contrary, when the EU has exercised its competence, the balance among the interests at stake is to be formulated at the Union level, while respecting the relevant procedural and substantive rules. Derogating clauses should not become a remedy for Member States outvoted in the Council.[27]

1.2 Coordination of national responses: The case of State Aid control in times of crisis[28]

Emergency situations very often require the swift mobilisation of additional resources to finance immediate policy responses. We have seen in previous chapters how additional financing has been mobilised from the Union budget in response to recent emergencies, in particular through the NGEU.

However, the Union budget remains limited in size[29] and therefore Member States generally have to rely primarily on their own national treasuries for financing emergencies. By no means all national support constitutes State aid but, in crisis situations, the need for *targeted support* to mitigate the effects of the crisis often involves *granting* State aid.[30]

It is the sole prerogative of the Member States to decide whether to grant aid and in what amounts and for which beneficiaries, whereas it is the exclusive competence of the Commission to assess the compatibility of such aid with the internal market.

Rarely has State aid control or even the fundamental market rationale for such control been put under as much pressure as during recent years. Successive crises, as well as events putting pressure on the EU's competitiveness in the global arena,[31] have given credence to voices calling for loosening State

[27] See on this matter the very pertinent reflections of H. de Verdelhan, in the article quoted above, footnote 14.
[28] This section does not address the competition, in particular antitrust, aspects that may arise when emergencies require close coordination, such as through joint purchasing during the energy crisis or business coordination in the context of COVID-19. In some instances, the Commission has provided guidance, see for example: Communication from the Commission Temporary Framework for assessing antitrust issues related to business coordination in response to situations of urgency stemming from the current COVID-19 outbreak (eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0408(04).
[29] Relative to gross domestic product (GDP), the size of the EU Budget has remained stable over time, at around 1% of the EU's income and only around 2% of EU public expenditure, despite the growing number of tasks on which the EU has been asked to deliver (EU budget in the future: questions and challenges (europa.eu). The extraordinary NGEU programme comes on top of the normal EU budget.
[30] A measure constitutes State aid if the following conditions are met: (1) there is an intervention by the State or through State resources, (2) the intervention confers an advantage on the recipient on a selective basis, (3) competition has been or may be distorted and (4) the intervention is likely to affect trade between Member States. See, for example, judgment of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, para. 101 and the case-law cited.
[31] For example, the US Inflation Reduction Act and China's assertive trade policy.

aid control or even for suspending State aid control.[32] Others have called for caution and have highlighted the inherent risks of excessive State aid in terms of upsetting the level playing field.[33]

Throughout recent crises, the Commission has acted swiftly and adapted State aid rules to enable Member States to provide aid necessary to mitigate the harmful impact thereof. Such use of the flexibility offered by the State aid toolbox – even if it applies equally to all Member States – comes with non-negligeable risks of jeopardising the competitiveness of Member States or regions in a situation where not all Member States have the same fiscal space[34] and may lead to harmful subsidy races.[35] All of this places particular responsibility on the Commission[36] in the exercise of its exclusive competence in the field of State aid.

Whereas State aid control is mainly designed to ensure a level playing field between businesses in the internal market, it is less geared towards factoring in more macro-economic considerations linked to the overall capacity of Member States to support their businesses.[37] The Commission has nevertheless monitored the situation closely, and has reported on the amounts of aid respectively approved and granted per Member State under successive crisis frameworks. The fact remains that the real effects of the successive temporary State aid frameworks and other flexibilities put in place can be difficult to separate out from the effects of other measures, such as regulatory measures, and will often only be known in the longer term.

State aid control is founded on the fundamental principle that businesses competing on equal terms will grow, due to their capacity and ability to adapt to market demand. This in turn benefits consumers in the internal market in terms of increased choice and competitive prices. Article 107(1) TFEU therefore sets out the general principle that State aid is incompatible with the internal market. That is

[32] For example, it was reported that in April 2020, Austria wrote to the Commission asking for a suspension of State aid rules (https://library.croneri.co.uk/node/25074358).
[33] More recently, see for example a joint letter from 8 Member States and Iceland (accessible here: https://data.consilium.europa.eu/doc/document/ST-7176-2024-INIT/en/pdf).
[34] Under the Stability and Growth Pact (SGP), the activation of the general escape clause can help Member States in the short term to create fiscal space for undertaking budgetary measures to deal adequately with emergencies. For example, in March 2020, the COVID-19 outbreak led the European Commission and the Council to assume a severe economic downturn of the euro area and the EU as a whole and to consider that the conditions for activating the general escape clause of the SGP were fulfilled (Communication in COM(2020) 123 final).
[35] See also: Alessandro Rosano, "Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law," European Papers, Vol. 5, No 1, in particular pp. 621–631 (European Forum, 7 May 2020), in particular, p. 630.
[36] Hornkohl, Lena: van't Klooster, Jens: With exclusive Competence Comes Great Responsibility: How the Commission's COVID-19 State Aid Rules Increase Regional Inequalities Within the EU, VerfBlog, 2020/4/29, With Exclusive Competence Comes Great Responsibility – Verfassungsblog.
[37] In order to address level playing field concerns, in his report entitled "Much more than a market" Enrico Letta proposes to set up a "State aid contribution mechanism, requiring Member States to allocate a portion of their national funding to financing pan-European initiatives and investments." Report available here:, Enrico Letta – Much more than a market (April 2024) (on State aid, see, in particular, pp. 11, 26 and 39).

subject to specific exceptions, under which State aid shall[38] or may[39] nevertheless be considered compatible with the internal market. Of relevance for this report, Article 107 TFEU contains specific compatibility grounds linked to exceptional situations. This section will explore how the Commission has used the flexibility offered by State aid rules to enable Member States to provide targeted aid in recent emergencies and to speed up the assessment of aid notifications in times of emergency.[40]

1.2.1. Article 107(2)(b) TFEU and Article 107(3)(b) TFEU

Article 107(2)(b) provides that aid to "make good damage caused by natural disasters or exceptional occurrences" shall be compatible with the internal market.

That provision has already been applied in relation to natural disasters.[41] Moreover, during the COVID-19 pandemic, this provision was extensively used to approve aid to compensate for damage suffered by event organisers, as well as carriers (air, train, ferries, etc.) as a result of travel restrictions and lock-downs.[42]

Article 107(3)(b) TFEU provides that aid to "remedy a serious disturbance in the economy of a Member State" may be compatible with the internal market.

In recent crises, the Commission has adopted a series of communications referred to as "temporary State aid frameworks" to facilitate the granting of aid and to ensure a streamlined, coherent and swift decision on the compatibility of aid. Those frameworks have mainly been based on Article 107(3)(b) cited above, but some have also contained elements based on Article 107(3)(c) (aid to facilitate an economic activity or an economic area). The latter is not a specific crisis legal basis, and would appear to cover mainly aid going beyond remedying the immediate serious disruption, for example by supporting projects in the pursuit of more medium- to long-term crisis-related policy objectives. As examples, one could mention aid for green projects in the context of the energy crisis to accelerate the green transition and thereby also phase out dependency on Russian fossil fuels, or investments to help the economy pick up and recover in the aftermath of the COVID-19 pandemic.

[38] Article 107(2) TFEU.
[39] Article 107(3) TFEU.
[40] Speed is of the essence, since Member States are prohibited from putting State aid measures into effect before the aid has been approved pursuant to Article 108(3) TFEU (the "stand-still clause"). This does not apply to measures that comply with the conditions set out in the General Block Exemption Regulation (GBER).
[41] The Commission has provided a checklist for Member States, setting out guidance to facilitate a smooth process in relation to aid notified under that provision (disaster_aid_checklist_en.pdf).
[42] A list of aid measures approved by the Commission can be found here: fd113a0a-9c99-4405-aa4c-4ed52134f657_en (europa.eu).

Aid granted in line with the conditions in those frameworks has generally been subject to a very swift approval process based on a standard template for notification. This was made possible by designing the frameworks with a number of standard conditions and thresholds. The role of those frameworks in orienting Member States towards specific types of projects, responding to specific conditions, is not to be under-estimated. Without such frameworks, State aid in times of crises may have become more disparate and divergent across Member States. The swift process for approving State aid under the temporary crisis frameworks was key, as a lengthier process would hardly have been compatible with the urgency of the matter.

What is characteristic of the frameworks is that they are temporary and time limited. They have regularly been reassessed and then extended and amended several times to align with needs in light of the evolving situation. Given that the Commission is solely responsible for adopting those frameworks (although it always consults the Member States), the frameworks have been very agile and able to adapt swiftly as the crises evolved.

Temporary Crisis Framework (COVID-19)[43]

In the context of the COVID-19 pandemic, the Commission adopted a State Aid Temporary Framework on 19 March 2020,[44] allowing Member States to provide direct support for hard-hit businesses and hence mitigate the economic shocks caused by the pandemic. The framework was amended no less than seven times, with a view, inter alia to: covering support for the research, testing and producing products relevant to fighting the outbreak, as well as support for protecting jobs (first amendment), diversifying the type of aid for companies so as to ease their access to capital and liquidity, enabling support for uncovered fixed costs and for micro- and small enterprises and start-ups, and to incentivising private investment (second, third and fourth amendments) and enabling the conversion of certain repayable instruments into grants (fifth amendment).

The framework was also amended to introduce provisions related to the application of Article 107(2)(b) TFEU.[45]

The sixth amendment comprised a new section to stimulate investment support for a sustainable recovery. That section was based on Article 107(3)(c), as it was geared more towards recovery and

[43] This report does not cover the Temporary Framework adopted in the context of the financial crisis or the four communications to deal with support for ailing banks. A detailed overview of the measures and an analysis of their effects is provided in a Commission Staff Working Document of October 2011 (SEC 2011(1126) final – SEC(2011)1126 cover.doc (europa.eu)).

[44] An overview of the Temporary Crisis Framework and the evolution plus the measures approved thereunder can be accessed here: https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework_en

[45] That provision is covered separately below.

less towards addressing the immediate consequences of the pandemic. In May 2022, the Commission announced that the Temporary Framework was set to expire on 22 June 2022, except for a limited number of measures that continued for an additional six months until 31 December 2022 (investment support) and 18 months until 31 December 2023 (solvency support). However, on 28 October 2022, in light of the Russian invasion of Ukraine, the Commission decided to prolong the investment support measures until the end of 2023 (seventh amendment).

Based on information from the Commission, aid totalling approximately EUR 3.1 trillion was approved under the Temporary Crisis Framework in 2021 and 2022.[46] At the end of 2021, only around EUR 940 billion of the aid approved had been granted. Based on data linked to the actual aid granted, the Commission concluded that "State aid measures actually implemented by Member States seem to be correlated with the economic damage suffered during the crisis. Moreover, there is no evidence of Member States that would have granted an excessively larger amount compared to the others, thus raising concerns on the level playing field in the single market."[47]

Temporary Crisis Framework and Temporary Transition and Crisis Framework – energy crisis

On 23 March 2022, less than a month after the Russian invasion of Ukraine, the Commission adopted the Temporary Crisis Framework (TCF) to enable Member States to support the economy in the context of Russia's invasion of Ukraine. The initial framework comprised measures to *grant limited amounts of aid to companies affected by the crisis or by the related sanctions and countersanctions, to ensure that sufficient liquidity remains available to businesses, and to compensate companies for the additional costs incurred due to exceptionally high gas and electricity prices.* That framework was announced in the Commission "toolbox communication" of 8 March 2022.[48] The framework was extended on 20 July 2022 to complement the Winter Preparedness Package, in line with RePowerEU objectives to cover measures to accelerate the roll-out of renewable energy and the decarbonisation of the industry based on Article 107(3)(c). It was further amended and prolonged on 28 October 2022 to complement the Regulation on an emergency intervention to address high energy prices[49] and a proposal adopted on 18 October 2022 to address high gas prices in the EU and ensure security of supply that winter, both based on Article 122(1) TFEU.[50]

As the TCF was initially designed to mitigate the direct effects of the energy crisis, on 9 March 2022, it was replaced by the Temporary Crisis and Transition Framework (TCTF), as announced in the

[46] Competition State aid brief: state_aid_brief_3_2022_kdam22003enn_coronavirus.pdf (europa.eu).
[47] Competition State aid brief, ibidem.
[48] Supra Chapter I, Section 3.
[49] Council Regulation (EU) 2022/1854, based on Article 122 TFEU, supra Chapter I, Section 3.
[50] Subsequently adopted by the Council as Council Regulation (EU) 2022/2576, supra Chapter I, Section 3.

Green Deal Industrial Plan.[51] That framework goes further, in that it adds a component aimed at accelerating investments in sectors strategic to the transition towards a net-zero economy. To that effect, it enables support for the *manufacturing* of strategic equipment for the green transition, the production of key components and for the recycling of related raw materials. It also allows for so-called matching aid to prevent investments from being diverted away from Europe. Both manufacturing aid and matching aid are traditionally considered to constitute more distortive types of aid. The measures set out in the TCF were closely linked to the energy crisis and the need to reduce dependency on Russian fossil fuels.[52] However, the transitional measures in the TCTF have a less direct link. They were introduced in the wake of the US Inflation Reduction Act and in response to China's trade policy. The TCTF,[53] in its section 2.8, refers to "global challenges posing a threat of new investments in these sectors being diverted in favour of third countries outside the EEA." The TCTF thus becomes an instrument with a pronounced global competitiveness focus.[54]

Regulatory proposals such as the Chips Act, the Net Zero Industry Act and the Critical Raw Materials Act confirm this trend towards a more protective Union policy, with a strong focus on supply chains and global competitiveness. The two latter proposals were announced by the Commission in connection with the Green Deal Industrial Plan. At the same time, the Commission endorsed an amendment to the General Block Exemption Regulation (GBER) to further simplify and speed up support for the EU's green and digital transitions.[55] That amendment was formally adopted on 23 June. The Commission also announced that it would "prepare a Code of Good Practices ("Code") for a transparent, inclusive, and faster design of IPCEIs allowing for a streamlined assessment, and share it with the Member States."[56] That code was adopted in May 2022. All of these developments illustrate how State aid was used to serve policy objectives linked to what was increasingly perceived as a competitiveness crisis.

---

[51] Commission Communication; A Green Deal Industrial Plan for the Net-Zero Age (COM(2023)62 final), see in particular Section 2.2.1.

[52] The sections covering support to accelerate renewable energy deployment and industrial decarbonisation were based on Article 107(3)(c).

[53] Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2023/C 101/03, C/2023/1711.

[54] In that sense, see also Stavros Makis, *Temporary Crisis and Transition Framework: Dealing with Crisis and Transitioning to a Net-Zero Economy – But at What Cost?*, Kluwer Competition Law Blog, April 4, 2023 (Temporary Crisis and Transition Framework: Dealing with Crisis and Transitioning to a Net-Zero Economy - But at What Cost? – Kluwer Competition Law Blog).

[55] Under the GBER, specific categories of State aid are declared compatible with the Treaty if they fulfil certain conditions and are thus exempted from the requirement of prior notification and Commission approval. The Commission estimates that more than 90% of all new State aid measures, excluding crisis measures, are implemented by Member States without the need for prior approval by the Commission (State aid: Commission amends General Block Exemption rules (europa.eu).

[56] IPCEIs are important projects of common European interest, covered by Article 107(3)(b) TFEU and what is known as the IPCEI Communication (OJ C 528, 30.12.2021, p. 10).

On 20 November 2023, the Commission decided to prolong the application of the sections of the TCTF concerning limited amounts of aid and aid to compensate for high energy prices until 30 June 2024, while it announced that provisions on liquidity support in form of State guarantees and subsidised loans and on measures aimed at supporting electricity demand reduction would not be further prolonged beyond 31 December 2023. The transitional part of the framework would apply until the end of 2025, alongside the simplified provisions for support to accelerate renewable energy deployment and industrial decarbonisation. On 2 May 2024, in light of difficulties experienced by undertakings active in the primary production of agricultural products, as well as in the fishery and aquaculture sectors, the section of the TCTF linked to limited amounts of aid was prolonged until 31 December 2024 for those specific sectors.

Based on information from the Commission, a total of around EUR 671 billion in aid was approved under the framework in 2022. By the end of 2022, only about EUR 93 billion had been granted.[57] The information clearly shows that large amounts of aid are concentrated in very few Member States, so that Germany, Spain and the Netherlands had granted a total of 91% of all aid granted. When this is set against national GDP, the specific circumstances and the types of measures (repayable support vs grants), the picture is arguably slightly more nuanced.[58] The Commission conclusion in terms of the possible distortive effect is more cautious here than in the case of the COVID-19 temporary framework.[59]

1.2.2. Case-law

There is a very considerable amount of case-law in relation to aid for air carriers based on Articles 107(2)(b) and (3)(b), due to legal challenges brought by competitors that did not receive any State aid.

In those rulings, the Court has consistently recognised that the COVID-19 pandemic may qualify as an "*exceptional occurrence*" within the meaning of Article 107(2)(b) and as a "*serious disturbance of the economy*" within the meaning of Article 107(3)(b).[60] Faced with claims that measures favouring national air carriers constitutes unlawful discrimination, the Court held that a difference in

[57] Commission State aid brief: state_aid_brief_1_2023_kdam23001enn_TCTF_survey_0.pdf (europa.eu).
[58] See to that effect the figures included in the State aid brief, supra footnote 57.
[59] The State aid brief looks at the aid granted to companies and the potential needs in the energy crisis and concludes that the differing amounts of aid per Member State "[…] may reflect the important disparities that exist within the EU in terms of fiscal ability of Member States to grant support to undertakings, which cannot be addressed by State aid policy and may strengthen the call for EU-level funds to counterbalance national disparities." See State aid brief, supra footnote 57.
[60] Case C-320/21 P, supra footnote 30, in which the Court held that "[…] an event such as the COVID-19 pandemic may be classified both as an 'exceptional occurrence' within the meaning of Article 107(2)(b) TFEU and as an event giving rise to a 'serious disturbance in the economy' within the meaning of Article 107(3)(b) TFEU."

treatment is inherent in the nature of an individual aid scheme.[61] In that respect, it has rejected claims to the effect that aid to compensate for damage pursuant to Article 107(2)(b) can only be deemed compatible with that provision if it is granted to all undertakings affected by the damage caused by the exceptional occurrence.[62] The Court has recalled that Article 18 TFEU (prohibition of discrimination) "is intended to apply independently only to situations governed by EU law in respect of which the TFEU lays down no specific prohibition of discrimination." Since Articles 107(2) and (3) TFEU provide for derogations that allow for differences in treatment, those provisions must be regarded as "special provisions provided for in the Treaties," within the meaning of Article 18(1) TFEU, and therefore the relevant criterion is whether a difference in treatment is justified under that provision.[63]

On the basis of what is indicated above, the Court has therefore generally rejected claims linked to purported breaches of the principle of non-discrimination, as long as the aid measure is necessary to address an exceptional occurrence or a serious disturbance and is appropriate and proportionate. In respect of the appropriateness, the Court has generally accepted aid to national air carriers based on reasons related to their link to and importance in the national economy.[64] This means that competitors have had very little success in contesting the fundamental approach of the Commission in these cases.

Where the Court has struck down State aid measures, this has typically been on more technical grounds, such as failure to provide sufficient justification[65] or an error of assessment in relation to

[61]Case C-320/21 P, supra footnote 30, para. 107 (as regards Article 107(2)(b)) and judgment of 6 June 2024, *Ryanair v Commission*, C-441/21 P, EU:C:2024:477, para. 38 (as regards Article 107(3)(b)).
[62] Case C-320/21 P, supra footnote 30, para. 23.
[63] Case C-441/21 P, supra footnote 61, paras. 40–42 (as regards Article 107(3)(b)) and C-320/21 P, supra footnote 30, para. 111 (as regards Article 107(2)(b)).
[64] The bulk of the cases concerned aid to national air carriers that were recognised as playing an important role in the national economy, for example due to their particular presence on the territory or coverage of several routes in the Member State or which were proven to be more affected on the territory than other flight carriers. See for example, judgment of 18 October 2023, *Ryanair v Commission (Alitalia I; COVID-19)*, T-225/21, EU:T:2023:644, paras. 118 and 119. The Court has even accepted as appropriate a measure which differentiated by covering a company that was subject to French law and a French licence and by virtue thereof was considered to have a "specific, stable link," see: judgment of 17 February 2021, *Ryanair DAC v European Commission*, T-259/20, EU:T:2021:92, paras. 39–41. The judgment of the General Court was upheld on appeal, judgment of 23 November 2023, C-210/21 P, EU:C:2023:908, on the stable link see in particular paras. 55–56.
[65] See, for example, judgment of 24 May 2023, *Ryanair v Commission (Italie; régime d'aide; COVID-19),* T-268/21, EU:T:2023:279 – annulment for failure to state reasons (the judgment is under appeal) and judgment of 19 May 2021, *Ryanair DAC v European Commission*, T-643/20, EU:T:2021:286.

specific aid elements.[66] In doing so, the Court has demonstrated a strict approach to and scrutiny of the causal link between the losses suffered and the exceptional occurrence.[67]

In line with consistent case-law, the Commission, in the area of State aid, is bound by the guidelines and communications that it adopts, insofar as they do not depart from the rules in the Treaty and are accepted by the Member States.[68] The Court has applied the same reasoning to the temporary State aid frameworks adopted in the context of the crisis.[69]

It is important to note that – while the exceptions in paragraphs 2 and 3 of Article 107 TFEU are to be interpreted restrictively[70] – the Court has recognised the existence of a large margin of discretion for the Commission when assessing the compatibility of aid pursuant to Article 107(3) TFEU[71] subject, in particular, to respect for the principle of proportionality.

Finally, the Court has clarified that – contrary to what is the case for Article 107(3)(c) – the Commission is not required to weigh up the beneficial effects and the adverse effects of the aid concerned when acting on the basis of Article 107(3)(b).[72] It follows that: "Aid measures which contribute to the attainment of one of those objectives, provided that they are necessary and proportionate, may therefore be considered to ensure a fair balance between their beneficial effects and their adverse effects on the internal market and are therefore in the common interest of the European Union."[73]

Concluding remarks

[66] See for example judgment of 7 February 2024, *Ryanair v Commission (KLM II ; COVID-19*), T-146/22, paras. 160 and 161 - manifest error of assessment as regards the beneficiaries of the aid (the case is under appeal) and judgment of 10 May 2023, *Ryanair v Commission (SAS II; COVID-19)*, T-238/21, EU:T:2023:247, para. 81 – absence of step-up or alternative mechanism.

[67] See, for example, case C-320/21 P, supra footnote 30, para. 20, where the Court recalled that Article 107(2)(b) is an exception to the principle that State aid is incompatible with the internal market and therefore must be subject to a strict interpretation.

[68] Judgment of 8 April 2014, *ABN Amro Group NV v European Commission*, T-319/11, EU:T:2014:186, para. 29.

[69] See for example T-146/22 (case under appeal), supra footnote 66, where the Court emphasised, in respect of the failure to correctly identify the beneficiaries of the measure, that the obligation to identify the beneficiary was an obligation under the temporary framework. See also case T-238/21, supra footnote 66.

[70] Judgment of 11 November 2004, *Spain v Commission,* C-73/03, EU:C:2004:711, para. 36.

[71] Case T-319/11, supra footnote 68, paras. 27 and 28 and 81 to 82, judgment of 12 December 2014, *Banco Privado Português, SA and Massa Insolvente do Banco Privado Português, SA v European Commission,* T-487/11, EU:T:2014:1077, paras. 82 and 83 (appeal rejected by Order of 15 October 2015, C-93/15 P, EU:C:2015:703) and judgment of 19 September 2018, *HH Ferries I/S, formerly Scandlines Øresund I/S and Others v European Commission,* T-68/15, EU:T:2018:563, paras. 204 and 206. As regards Article 107(3)(b) TFEU, see: judgments of 15 December 2005, *Italian Republic v Commission of the European Communities*, C-66/02, EU:C:2005:768, para. 135 and of 15 December 2005, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*, C-148/04, EU:C:2005:774, para. 71.

[72] Case C-441/21 P, supra footnote 61, paras. 92–97.

[73] Idem, para. 94.

Contrary to many of the policy measures put in place, State aid is merely a supporting tool. It cannot replace regulatory responses and it cannot replace funding from the Union budget.[74] In relation to both the COVID-19 pandemic and the energy crisis, Member States also granted sizable amounts of support to the economy and to households, which did not qualify as State aid, and financing was also provided from the Union budget. It remains a fact that State aid formed an important part of the emergency response.

The Commission has played an important role in providing flexibility and framing the conditions for such flexibility. Whereas other Union emergency measures have been criticised for being "undemocratic" due to the lesser involvement of the European Parliament,[75] the issue does not arise in this context. Emergency provisions enshrined in the relevant Treaty legal basis do not in any way shift competences as compared to those applicable in ordinary times, and the Commission remains in the driving seat through its exclusive competence as regards assessing the compatibility of State aid with the internal market.

The main tension concerns the need to preserve a level playing field and to avoid harmful subsidy races, while ensuring that Member States have adequate tools for mitigating the harmful effects of the crises. Another tension that has become more pronounced in later years is that between using State aid and, in particular State aid flexibilities, as a tool for responding to serious disturbances and using State aid as a tool to expand on broader policy objectives and the Union's political agenda. The link to policy priorities is also reflected in the fact that the Commission extensively used wider policy communications to announce successive initiatives linked to State aid, especially temporary crisis frameworks and their subsequent amendments.

When looking at the measures from a legal perspective, keeping in mind the general conditions that ought to guide emergency measures, a few additional comments are appropriate.

First, the existence of an emergency can hardly be debated. Both the COVID-19 pandemic and the energy crisis resulting from the Russian invasion of Ukraine affected the Union economy as a whole and hit businesses and consumers hard.[76] Nevertheless, a crisis response needs to be limited to what is necessary to address the crisis and must only be applied for as long as needed to address the emergency. We have seen that the Court insists on the need to apply the exception in paragraphs 2 and 3 of Article 107 TFEU strictly, albeit leaving the Commission a wide margin. In that respect, the

[74] That point was made in the State aid Brief, cited supra footnote 30.
[75] This aspect of institutional balance is addressed in chapter IV of this Report.
[76] The effects of the various crises are well reflected in the various economic forecasts issued by the Commission (DG ECOFIN).

principle of proportionality and the necessity and appropriateness of a measure remain of key importance. We have also seen that differentiation is inherent in State aid, and there is consequently little comfort to be sought for competitors, as long as measures are deemed to be necessary, appropriate and proportionate.

Second, as regards the need to keep emergency facilitations time limited, the temporary frameworks have proven to be very agile instruments, which have been constantly monitored and have been defined for short time periods, subject to short extensions and adaptations, always following consultations of Member States. In that way, they have been able to factor in developments as the crises progressed. Nevertheless, it is noteworthy that both the COVID-19 temporary framework and the TCF, followed by the TCTF, contain provisions that were not based on a logic of serious disturbances (Article 107(3)(b)) but on the "ordinary" legal basis for furthering an economic activity, enshrined in Article 107(3)(c). The measures covered by those provisions are measures of a different nature, aimed at kick-starting the economy following the pandemic (COVID-19 framework) or accelerating green investments and even furthering production of net-zero technologies or raw materials and diverting relocation (TCF and TCTF). While those measures were undoubtedly a coherent part of the overall policy response, they can hardly qualify as short-term crisis measures, which is also acknowledged through the use of Article 107(3)(c). The inherent risk is that – by including them in a rather flexible framework – they become the "new normal." The Commission has been very cautious to underline the temporary nature of the measures, but the fact remains that some of the non-crisis facilitations will have been in place for over three years.

In addition, when it comes to ensuring that aid is limited to what is necessary and proportionate in light of the circumstances, it is fair to say that the temporary frameworks, irrespective of whether they are based on Article 107(3)(b) or Article 107(3)(c), give Member States considerable leeway and are based on rather general conditions enabling rapid verification and approval by the Commission. While the relevant provisions certainly do not provide a blank cheque and include limitations and requirements to minimise distortions, such conditions are not comparable to those applicable under the "ordinary" State aid guidelines, which are in place to deal with support for projects in various fields, and the scrutiny cannot – for obvious reasons – be as thorough.

Finally, as regards the notion of solidarity, which permeates emergency law, it is striking that a more flexible use of the State aid toolbox – rather than bringing solidarity between Member States – comes with an increased risk of subsidy races among Member States, which may in turn jeopardise solidarity. This is the case in particular if such a flexible application of the rules leads to approving

badly designed or too generous aid measures, thus enabling inadequate national responses.[77] On the other hand, a well-designed State aid framework can contribute to solidarity by aligning conditions for support, thus orienting Member States towards a certain type of measures that are useful for addressing the crisis.

It is fair to say that in times of crisis, national responses are needed more than in "ordinary times" but this cannot be at the expense of competition in general or result in leaving behind certain Member States or regions with less fiscal capacity. Several Member States consistently called for caution as regards too much flexibility or prolonging the flexibility for too long. Such calls were echoed by the Committee of the Regions[78] and the European Parliament and in academic works. However, one cannot lose sight of the fact that many also called for, and continue to call for, more flexibility in the application of State aid rules. The flexibility offered by the Commission has been endorsed or even prompted by national leaders.[79] The jury is still out as regards the long-term effects on competition, including the competitive structure between Member States, of the extensive flexibility granted under the temporary crisis frameworks.

The trend towards protracted crisis frameworks, coupled with more flexible conditions, inherently involve certain risks. Those risks are even more pronounced when "crisis considerations" spill over into more permanent measures, such as the GBER. That being said, similar trends have also been observed in other crisis measures, such as RePowerEU, where NGEU money, initially intended to deal with the effects of the COVID-19 pandemic, was repurposed to further energy-related objectives in the context of the energy crisis. If anything, developments show how State aid control has closely followed and adapted to political realities, although this has not been without risk to competition and the level playing field. The approach in the field of State aid control is illustrative of the general tension between a strict approach, which may slow down growth and hamper proper recovery and too-flexible emergency management, which may harm competition in the internal market. Finding the middle ground between those two extremes is the hardest of tasks.

The Commission has been presented as a "flexible and generous crisis regulator", granting considerable leeway to Member States,[80] and there is no doubt that its proactive approach and extensive use of the crisis toolbox has contributed to coordinating and framing Member State action

[77] State aid rules have rightly been presented as having a "negative integration logic" aiming at preventing Member States from distorting competition by helping their own undertakings, Stavros Makis, *Temporary Crisis and Transition Framework: Dealing With Crisis and Transitioning to a Net-Zero Economy – But at What Cost?*, supra footnote 25.
[78] Opinion on the 2022 Commission Report on Competition Policy: Report on Competition Policy 2022 | EESC.
[79] For example, the following conclusions of the European Council refer to temporary State aid frameworks: conclusions of 25 March 2022, para. 16(a), of 23 March 2023, para. 17, of 18 April 2024.
[80] Kluwer competition law blog, supra footnote 54.

in times of emergencies. This has enhanced transparency and legal certainty as well as predictability. The "counterfactual" namely a scenario without those facilitations, may have led to more arbitrary and more fragmented national responses. As such, the State aid response has constituted an important complement to the Union's crisis response.

In light of the various continued threats and challenges facing the Union, it is likely that State aid policy will continue to evolve and enter a new era that risks bringing it further away from its original purpose as set out in the Treaties, namely to preserve competition in the internal market, and closer towards a tool of policy response.[81]

2. Emergency Competences of the Union: Selected Provisions

The second pillar of EU emergency architecture consists of those Treaties provisions that confer on the Union itself the power to take action in emergency situations. In the following paragraphs, we will focus specifically on the two emergency legal bases that played a central role in the case studies that we have analysed: Article 122 TFEU and Article 78(3) TFEU.

2.1 Article 122 TFEU

At the core of the Union's emergency competences is Article 122 TFEU, which has been central to the Union's emergency response in recent years. Article 122 TFEU enables the Council to adopt measures "appropriate to the economic situation" (paragraph 1) and to provide Union financial assistance to a Member State in difficulty and under certain conditions (paragraph 2).[82] Article 122(1) TFEU in particular, with its wide coverage, has proven to be a powerful tool in addressing even very diverse emergency situations and will be the focus of this section. However, as will be shown, the triggering of this provision has by no means been automatic but has been subject to strict conditions aiming to ensure, *inter alia*, that its use is "without prejudice to any other procedures provided for in the Treaties," as required under that legal basis.

[81] For example, the Draghi report, *EU competitiveness: Looking Ahead* (EU competitiveness: Looking ahead – European Commission) makes a number of suggestions for using State aid control as a "competition tool for efficiency enhancing industrial policies," p. 301, and the Letta report, supra footnote 37, suggests ensuring a more European approach to investment and industrial strategy by introducing "common conditionalities for disbursement" into the State aid framework, underlining that "The effectiveness and acceptability of State Aid instruments depends crucially on the strategic use of public funds to achieve common public policy objectives," pp. 39 and 40.

[82] This report focuses mainly on Article 122(1) TFEU, including measures adopted on the basis of Article 122 without specifying the relevant paragraph (in particular the Regulation establishing the European Union Recovery Instrument in the context of the Next Generation EU and the COVID-19 pandemic), as this was the provision on which emergency measures were adopted in the context of the three crises we analyse. Article 122(2) was in particular used in the context of the financial crisis to establish the European Financial Stabilisation Mechanism.

While this provision has blossomed[83] in recent years, by virtue of the nature and type of measures adopted on the basis thereof and their qualitative impact,[84] the predecessor Treaty legal bases have been used in numerous cases, largely outweighing – in terms of volume – the number of measures adopted in recent years.[85]

It is against the background of this deepening use of Article 122(1) TFEU that this Chapter will look at the various conditions for recourse to that provision and how they have been taken into account in the design of recent emergency measures. This section will also focus on aspects which have been subject to discussion or controversy and will use specific examples to underpin the assessment.

All of these questions are particularly relevant, given the potentially wide coverage of Article 122(1) TFEU and the broad margin of discretion it encapsulates.[86] This raises questions regarding its relationship with other Treaty legal bases, in particular where such other legal bases are available in parallel to the adoption of a measure based on Article 122(1) TFEU. Moreover, respecting constitutional boundaries is equally important, given that the procedure provided for in Article 122(1) TFEU reserves the decision for the Council alone, acting on a proposal from the Commission. The questions as to whether the emerging emergency acquis has affected the system of ordinary competences and has reshaped the role of their institutions affecting the institutional balance will be addressed in Part II of the report devoted to the transformative effect of emergency measures on the EU legal order.

The analysis in this chapter is also relevant for assessing recent calls for an EU emergency constitution.[87] Depending on where one sets the cursor, Article 122 TFEU could be the centrepiece of an emerging emergency constitution, flexible enough to cater for the necessary action in a Union

[83] Many scholars have pointed to the sudden rise of Article 122 TFEU, calling it for example a "blossoming" (Blute), see: Weber, Ruth, Die Neuordnung der EU-Wirtschaftsverfassung Durch Art. 122 AEUV?, *Archiv des öffentlichen Rechts (AöR)*, Jahrgang 149 (2024) / Heft 1, S. 82–122 (41), published on 9 April 2024. Article 122 TFEU has also been labelled "the sleeping beauty," Alberto de Gregorio Merino, "The EU Treaties as a Living Constitution of the Union in Times of Crisis," *AJIL Unbound*/Volume 118/2024, Published online by Cambridge University Press:18 September 2024, pp. 162–166. Merijn Chamon refers to "The EU's dormant economic policy competence," see Chamon, Merijn, "The EU's Dormant Economic Policy Competence: Reliance on Article 122 TFEU and Parliament's Misguided Proposal for Treaty Revision," *European Law Review*, 15 May 2024, p. 166. More recently, Chamon has further developed his approach in M. Chamon, "The Non-Emergency Economic Policy Competence in Article 122(1) TFEU," *Common Market Law Review,* 2024(61), 1501–1526.

[84] As also noted in the study on the use of Article 122 TFEU carried out by Merijn Chamon for the AFCO Committee of the European Parliament, accessible here: The use of Article 122 TFEU - Institutional implications and impact on democratic accountability.

[85] For an overview of the number of measures adopted per 5-year period since inception of the provision, see the table in the study by Merijn Chamon, supra footnote 84, p. 17.

[86] See, for example, Alberto de Gregorio, supra footnote 83: "This provision, which corresponds to the TFEU title on economic and monetary policy, is certainly the most important crisis clause of the EU Treaties. It grants the Union a very wide power to adopt measures in case of major EU domestic emergencies."

[87] These developments are described in detail later in this chapter.

with expanding competences and ever more varied responsibilities, or – if given a narrow and restrictive interpretation – it could fall short of providing the basis for an adequate Union response, which would in turn give more merit to calls for a comprehensive emergency legal framework.

At the time of writing, a number of acts adopted under Article 122(1) TFEU have been challenged before the Courts[88] and it remains to be seen whether the Court will size this opportunity to further shape the boundaries of the exercise of powers pursuant to this provision.[89]

Before delving into the boundaries for recourse to Article 122 TFEU and possible tensions which may arise, we will look at how this provision has developed with the various Treaty revisions and how recourse to it has varied and intensified over time.

2.1.1. From Rome to Lisbon: The history of Article 122

Article 122 traces its roots back to the Rome Treaty and has been subject to adaptations in the context of successive Treaty revisions. A detailed overview of how this provision has developed is provided in the study on "the use of Article 122 TFEU", drawn up at the request of the European Parliament's AFCO Committee and in a recent contribution by colleagues from the Commission Legal Service.[90]

A number of elements as regards the evolution of the provision are worth highlighting. For example, the provision initially included language on conjunctural policies, which is now enshrined in Article 121 TFEU.[91] That part was split off from the provision in the context of the Maastricht Treaty to become a separate provision, leaving only two paragraphs dealing respectively with "measures appropriate to the economic situation" and "Community financial assistance," as is still the case today. The current Article 122(2) TFEU was introduced with the Treaty of Maastricht.[92]

The Amsterdam Treaty did not bring modifications to that provision. However, with the Treaty of Nice, an important change was made, in that the decision-making in the Council changed from unanimity to qualified majority voting. Up to that point, qualified majority had only applied in respect

[88] Supra Chapter I, Section 3, Energy.
[89] A number of cases have been brought by non-privileged applicants, for which the question of legal standing is yet to be decided upon. See for a reference, chapter I, section 3. and in particular footnote 193.
[90] Supra footnote 84, p. 15. See also the detailed analysis in D. Calleja, T. M. Rusche and T. Shipley, "EU Emergency – Call 122? On the Possibility and Limits of Using Article 122 TFEU to Respond to Situations of Crisis," *Columbia Journal of European Law*, 2024 (29:3), p. 520.
[91] The current Article 121 reads: "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120." With the Maastricht Treaty that provision went from being a provision about economic trends (conjunctural policy) to becoming a more general provision on economic policy.
[92] As many have pointed out, this was likely to counter-balance the no bail-out clause, now to be found in Article 125 TFEU, which prevents Member States that have adopted the euro from benefiting from support mechanisms now included in Articles 143–144 TFEU.

of financial assistance under paragraph 2, where severe difficulties were caused by natural disasters. Of particular interest is the fact that the passage to qualified majority voting was not accompanied by any other change in the provision. There is consequently nothing to suggest that the lighter procedure would come with more restrictive conditions for having recourse to that provision.

Finally, the Lisbon Treaty brought a few additions. It added notably the reference to solidarity and the exemplification of measures, specifying that supply difficulties may cover "notably" the area of energy. The latter must be seen in the light of the frequent use of that provision in the context of threats to the security of energy supply.[93] The condition linked to solidarity was also included in the new legal basis for energy, introduced with the Lisbon Treaty, which can be found in Article 194 TFEU. The "without prejudice" clause was also modified, and now refers in general to "any other procedures provided for in the Treaties" in plural, thus covering both TEU and TFEU.

Article 122 TFEU in its current version reads:

> 1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.
>
> 2. 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. The President of the Council shall inform the European Parliament of the decision taken.

This report will focus on the use of Article 122(1) TFEU in recent times, given that recent measures have taken on a more important and structural role with a somewhat wider scope and impact than has previously been the case.[94] The more recent measures adopted on the basis of Article 122 TFEU are already described in chapter I to which reference is made. Those examples clearly illustrate the breadth of use of Article 122(1) TFEU and its pivotal role in framing and coordinating action through

[93] See among the many examples, Council Directive 73/238 on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products (OJ 1973 L 228/1). For a complete list, see the analysis in the article by D. Calleja, T. M. Rusche and T. Shipley referred to in footnote 90.

[94] For a comprehensive overview of the number and types of measures adopted since the inception of the provision see the study by Merijn Chamon, supra footnote 84, pp. 17–18.

Union measures.[95] Table 1 presents a complete overview of measures adopted on the basis of that provision following the Lisbon Treaty.[96]

Table 1

Overview of measures adopted on the basis of that provision post-Lisbon Treaty

Measures adopted on the basis of Article 122 TFEU post-Lisbon Treaty			
Short title	Reference	Crisis	Area
SURE	Council Regulation (EU) 2020/672	CoVID-19 pandemic	Fical policy
EURI	Council Regulation (EU) 2020/2094	CoVID-19 pandemic	Fical policy
ESI - Emergency Support Instrument	Council Regulation (EU) 2016/369	Permanent - 2015 Migration crisis	Fiscal policy
ESI amendment and activation	Council Regulation (EU) 2020/521	Permanent - Covid-19	Fiscal policy
Supply of Medical Countermeasures - HERA Regulation	Council Regulation (EU) 2022/2372	Permanent	Health
Coordinated gas demand-reduction emergency measure	Council Regulation (EU) 2022/1369	UA Energency Crisis	Energy
Emergency intervention for high energy prices	Council Regulation (EU) 2022/1854	UA Energency Crisis	Energy
Facilitation of joint gas purchases	Council Regulation (EU) 2022/2576	UA Energency Crisis	Energy
Deployment of renewables emergency measure	Council Regulation (EU) 2022/2577	UA Energency Crisis	Energy
Market correction mechanism	Council Regulation (EU) 2022/2578	UA Energency Crisis	Energy
EFSM	Council Regulation (EU) No 407/2010	Permanent - Financial Crisis	Fiscal policy

2.1.2. Existence of an exceptional situation as a condition for recourse to Article 122(1)

As already emphasised, Article 122(1) TFEU empowers the Council to adopt the "measures appropriate to the economic situation," without specifying which situations qualify for recourse to that provision. Article 122(1) TFEU is therefore not particularly restrictive when it comes to the scope or the type of measures that may fall within its remit, and the Council has considerable leeway in that respect.[97] Article 122(1) TFEU is, however, more restrictive when it comes to the conditions under which such a variety of measures may be adopted.

In the following sections, we will look at the specific conditions[98] for recourse to Article 122(1) TFEU and identify certain aspects of recent measures to illustrate the boundaries and possible

[95] Julia Fernandez Arribas, *Regulating European Emergency Powers: Towards a State of Emergency of the European Union,* Jacques Delors Institute Policy Paper, p. 4.

[96] At the time of finalising this report, the Commission proposed measures on the basis of Article 122 TFEU in the field of defence, the so-called SAFE Instrument. See Proposal for a Council Regulation establishing the Security Action for Europe (SAFE) through the reinforcement of European defence industry Instrument, COM(2025) 122 final.

[97] Such a margin of discretion is in line with established case-law. For example, as regards the judicial review of the principle of proportionality, the EU legislature must be given broad discretion in areas that entail political, economic and social choices and in which it is called upon to undertake complex assessments, so that only measures that are arbitrary or manifestly inappropriate in relation to the objective pursued will be held to infringe that principle, see for example, judgment of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 354 and the case-law quoted; judgment of 8 December 2020, *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000, para. 95. Such discretion was also explicitly held to exist in respect of Article 103(2) EEC, a predecessor to Article 122(1) TFEU, see: judgment of 13 June 1972, *Compagnie d'approvisionnement, de transport et de crédit SA and Grands Moulins de Paris SA v Commission of the European Communities*, joined cases 9/71 and 11/71, EU:C:1972:52, para. 33.

[98] The conditions are also analysed in an opinion of the Council legal service of 24 June 2020, on the Proposals on Next Generation EU, ST 9062/20.

tensions which may arise in the application of that provision. The recent measures based on Article 122(1) TFEU are already described in Chapter I and will therefore not be described in detail, except where relevant to illustrate specific points.

Article 122(1) TFEU is an emergency competence and constitutes a specific legal basis for Union action in specific situations. It is not a provision for use in "ordinary times," and therefore requires the presence of a situation of exceptionality or urgency. While this arguably does not follow as explicitly from the wording of that provision as is the case for some other emergency legal bases, there is a significant number of elements that allow us to draw that conclusion. First, a number of textual elements in the wording of the provision point in this direction. The reference to "severe difficulties in the supply of certain products," sets a certain threshold of urgency or exceptionality. While the list is not exhaustive, as denoted by the words "in particular,"[99] the reference to "severe difficulties" supports a clear emergency rationale. The same can be said for the reference to "measures appropriate to the economic situation". It is also reasonable to argue that not every situation of exceptionality or emergency would justify recourse to Article 122(1) TFEU, but only one that is sufficiently serious, as the reference to "severe difficulties" both in paragraph 1 and 2 of Article 122 TFEU seems to suggest. Although paragraphs 1 and 2 are separate provisions, Article 122 TFEU as a whole clearly denotes a context of crisis.

An additional element is that Article 122(1) TFEU applies "without prejudice to any other procedures provided for in the Treaties." It is difficult to see how that condition could be complied with, also having regard to the otherwise wide scope of Article 122(1) TFEU, if it were to be understood as also allowing for action in "ordinary times."

Second, it can be argued that the two paragraphs of Article 122 TFEU need to be read jointly, and that the "emergency rationale" which is explicit in the second paragraph (reference to "severe difficulties caused by natural disasters or exceptional occurrences") also applies to the first. This is the position so far taken by the Council Legal Service, and supported by the Commission, which invokes arguments of systemic nature. Article 122 is part of Title VIII of the TFEU on economic monetary policy. That title (and the specific chapter on economic policy to which Article 122 TFEU belongs) is opened by provisions (Article 119, 120 and 121 TFEU), which make it clear that Member States remain responsible for their economic policies and for their respective debts (Article 125 TFEU) and that the competence of the Union on the matter is one of mere coordination. In that context, the conferral on the Union of the competence to adopt "measures appropriate to the economic

[99] The emphasis on energy supply is likely down to the historically high number of cases where the provision was used to address security of energy supply concerns.

situation" provided for in Article 122(1) TFEU, as well as to provide financial assistance to a Member State according to Article 122(2) TFEU, remains exceptional, and this is ensured by the exceptional nature of the emergency circumstances that can trigger the exercise of those competences. Finally, the same conclusion can be reached having regard to the specific institutional setting of Article 122(2) TFEU, which excludes all involvement of the European Parliament from the decision-making. This again would suggest interpreting the provision so as to restrict its application to situations of emergency where the need for swift action would justify a simplified procedure based on the central role of the Council.

Some scholars have, however, argued that Article 122(1) TFEU is not (solely) an emergency legal basis. Chamon in particular is not convinced by the arguments supporting the idea that the "emergency rationale" would also apply to the first paragraph of Article 122 TFEU. He considers, instead, that both the historical origin of the provision (and the notion of "conjunctural policy" which would be broader than a mere situation of crisis) and its wording would rather point to the idea that Article 122(1) is a broader economic policy competence. According to such an interpretation, the application of Article 122(1) TFEU would instead be delimited by virtue of the specific context of exceptionality (meant as a broader category than emergency), in which the measure is adopted, and that in turn would require a separate justification to be provided, to enable scrutiny of whether the measure was adopted "without prejudice to any other procedures provided in the Treaties."[100] This interpretation has some significant consequences as to the type of measures that can be adopted, as the measures will no longer need to be appropriate to an emergency situation but could address exceptional situations of a broader type – thus including long-term investment or broader "transformative" economic policies (see below on this, in relation to the objectives of NGEU/RRF financing). Thus, the measures adopted under the legal basis would not necessarily need to be limited in time or to be restricted to what is necessary to respond to an emergency. While interesting, this interpretation entails a significant broadening of the scope of the provision. If interpreted as a genuine economic policy competence, the limit resulting from the additional justification as to whether the measure was adopted "without prejudice to any other procedure" would not be operative, as there is no alternative legal basis in the Treaties for the adoption of economic policy measures by the Union. Also, such an expansive interpretation is difficult to reconcile with the exceptional character that the norm has in the system of the Treaties, for the reasons stated above.

[100] See in particular Merijn Chamon, supra footnote 84, classifying Article 122(1) TFEU as "an exceptional but not an emergency clause."

In any event, irrespective of where exactly to put the cursor, it seems to be generally accepted that the conditions for recourse to Article 122(1) TFEU, in particular the "without prejudice" condition, can only be satisfied in exceptional situations. Such situations will often involve a certain element of urgency and "out of the ordinary" as a justification for not having to resort to "ordinary legal bases." The judgment in Balkan Imports goes in the same direction. In that case, the Court emphasised that no other legal basis would have allowed the Union to act with such urgency.[101] This also shows that the discussion is particularly important when there are other legal bases available that could have allowed for the adoption of similar measures "in ordinary times." However, also outside of those cases, it is precisely the existence of a number of strict conditions for having recourse to Article 122(1) TFEU that prevents it from ever becoming the "super-competence" that some scholars criticise it for.[102] Those conditions mean that Article 122(1) TFEU will *de facto* remain a provision reserved for exceptional circumstances such as emergencies.[103]

The debate on the exact situations qualifying under Article 122(1) TFEU, and whether there needs to be urgency or not, also seems to become relatively marginal when considering the types of contexts in which the provision has been invoked in recent times. There can be little doubt that recent measures based on Article 122(1) TFEU were adopted in the context of a genuine emergency. Those emergencies were Union-scale fully fledged crises calling for an immediate response. Three measures were adopted in the context of the COVID-19 pandemic[104] which had deep and profound repercussions for businesses and society at large and seriously affected the Union economy as a whole. Two of those measures, EURI[105] and SURE,[106] set out to mobilise Union financing to address needs arising because of the crisis. Another measure established a framework for securing a supply of crisis-relevant medical countermeasures in the context of a public health emergency.[107] Another

[101] Judgment of 24 October 1973, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof*, case 5/73, EU:C:1973:109, para. 15 (emphasis added): "There being no adequate provision in the common agricultural policy for adoption of the *urgent measures* necessary to counteract the monetary situation described above, it is reasonable to suppose that the Council was justified in making interim use of the powers conferred on it by Article 103 of the Treaty.

[102] See, for example, Leino-Sandberg and Ruffert, "Next Generation EU and its Constitutional Ramifications," Common Market Law Review, Vol. 59, No. 2 (2022), pp.433–472, referring to a "super-competence beyond Article 352 TFEU"; Kube and Schorkopf, "Struktveränderung der Wirtschafts- und Währungsunion", 74 *Neue Juristische Wochenschrift* (2021), 1650–1655, at 1655; Nettesheim, "'Next Generation EU': *Die Transformation der EUFinanzverfassung*",145 AÖR (2020), 381–437, at 409.

[103] The Court's judgment in Balkan Import clearly demonstrates how the Court relies on the various conditions to establish that a situation existed which justified recourse to Article 103 (predecessor to Article 122 TFEU), supra footnote 19 (emphasis added): "Consequently — while the suddenness of the events with which the Council was faced, the urgency of the measures to be adopted, the seriousness of the situation and the fact that these measures were adopted in an area intimately connected with the monetary policies of Member States (the effects of which they had partially to offset) all prompted the Council to have recourse to Article 103 — Regulation No.2746/72 shows that this state of affairs was only a temporary one, since the legal basis for the measure was eventually found in other provisions of the Treaty."

[104] The EURI and SURE measures referred generally to Article 122 as explained in Chapter I.

[105] Council Regulation (EU) 2020/2094, Chapter I, Section 2.

[106] Council Regulation (EU) 2020/672, Chapter I, Section 2.

[107] Council Regulation (EU) 2022/2372 described in Chapter I, Section 3.

five emergency Regulations[108] were adopted on the basis of Article 122(1) TFEU to address the unprecedented energy crisis that unfolded after the Russian invasion of Ukraine. Those five measures formed a comprehensive package, dealing with various aspects of the energy crisis and reflecting the way it evolved. They aimed in particular to tackle security-of-supply risks, including through the reduction of gas and electricity consumption, high energy prices and their impact on energy consumers, bottlenecks in the roll-out of renewable energy and various shortcomings in the electricity and gas markets.[109] Both the COVID-19 pandemic and the energy crisis meet all the criteria to qualify as an emergency, by being urgent, concrete and of a particular scale and gravity.

2.1.3. Character of the measures that can be adopted under the provision

The measures must be limited in time

The measures adopted on the basis of Article 122(1) TFEU must be limited in time to what is necessary to deal with the emergency and must cease to apply once the situation giving rise to the adoption of the measure ceases to exist. This reading, which does not follow explicitly from the provision, has been confirmed by case-law related to Article 103 EEC.[110] Such a condition is also a key criterion under many national emergency regimes, as illustrated by the national reports. If emergency measures were to be stretched beyond what is necessary to address the exceptional situation, this would hamper the normal functioning of the Union system of checks and balances and would risk making emergency a permanent condition, thus circumventing ordinary Treaty legal bases. The time-limited nature of measures adopted on the basis of Article 122(1) TFEU is therefore also in line with the condition that such powers shall be exercised "without prejudice to any other procedures provided for in the Treaties." Article 122(1) TFEU is therefore not a legal basis for regulating matters on an unlimited basis.

All the emergency measures adopted post-Lisbon were limited in time, either by virtue of a clear end date for their application or through specific triggering conditions linked to the requirements of Article 122(1) TFEU. Some measures, notably among those adopted to address the energy crisis, were prolonged one or more times following an assessment of whether prolonging them would be commensurate with the economic situation as it had evolved.[111] An interesting example is the gas demand reduction Regulation, which was prolonged once for an additional year.[112] Upon expiry, it

[108] Supra Chapter I, Section 3.
[109] A detailed account of those measures is provided in Chapter I, Section 3.
[110] Balkan Import, supra footnote 101, paras. 13–17 (concerning Article 103 EEC).
[111] All the emergency measures adopted during the energy crisis were extended at least once, with the exception of Council Regulation 2022/1854 on an emergency intervention to address high energy prices.
[112] Council Regulation (EU) 2023/706, supra Chapter I, Section 3.

was deemed relevant to keep demand reduction as an objective. However, there were certain misgivings as to whether recourse to Article 122(1) TFEU for the specific objectives sought, including a trigger for a mandatory demand reduction, would remain justified. The Council, upon a proposal from the Commission, therefore adopted a recommendation on coordinated gas demand reduction instead.[113] This decision was based on a careful assessment of the fact that the emergency measure had been successful and had overachieved the gas reduction target, but that severe difficulties persisted in the supply of energy, which required keeping the gas demand down to a safe level. It thus appeared that coordinated action at the Union level was still necessary, even if a mandatory target was no longer proportionate.[114]

In some instances, instruments adopted on the basis of Article 122(1) TFEU did not include a specific period of validity. The European Financial Stabilisation Mechanism (EFSM)[115] the Council Regulation on emergency support in humanitarian disasters[116] and the Medical Countermeasures Regulation[117] all establish frameworks without a limit of duration. They identify *ex ante* a toolbox of emergency measures that can be adopted in case of emergency, and define the conditions that allows for the activation of the toolbox, notably by classifying the specific circumstances of the relevant emergency. One may ask whether such a set-up is in line with the requirement of temporary duration referred to above. One factor that favours such an approach is the fact that the framework remains dormant and does not trigger any measure unless it is activated by the Council. Moreover, the activation of the frameworks must be limited in time.[118] In addition, the conditions for triggering the respective frameworks are clearly defined and linked to emergency situations typically covering and reflecting conditions for recourse to Article 122(1) TFEU. Under such circumstances, the technique deployed does appear to ensure respect for the condition of time-limitation, in that the actual measures only apply in justified cases of emergency and are only activated for as long as necessary.

---

[113] Council Recommendation on continuing coordinated demand-reduction measures for gas of 25 March 2024, OJ C, C/2024/2476, 27.3.2024.

[114] See: the Explanatory Memorandum of the Commission Proposal for a Council Recommendation on continuing coordinated demand-reduction measures for gas, COM(2024) 101final.

[115] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ. L 118, 12.5.2010, p. 1. The Regulation is based on Article 122(2) TFEU.

[116] Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70, 16.3.2016, p. 1.

[117] Council Regulation (EU) 2022/2372, supra Chapter I, Section 2.

[118] Whereas the medical counter-measures Regulation provides for an initial duration of six months for activation, which may be prolonged by the Council for successive period of up to six months (Articles 3(4) and 4), the emergency support instrument only provides that the Council may specify "where appropriate the duration of the activation" (Article 2(1)). This is however complemented by an obligation on the Commission to regularly monitor actions receiving financial support and to present, at the latest 12 months after activation, a report to the Council and "where appropriate" proposals to terminate the emergency support (Article 8(1)). Emergency support was activated once in the context of the COVID-19 pandemic and in that respect, some of the provisions of the framework were also amended (Regulation 2020/521). In the context of that activation, the Council did specify a duration for activation, which ran from 1 February 2020 to 31 January 2022 (Article 1).

The fact that the framework – unlike the individual measures – is permanent does not allow for any other conclusion. In fact, one could argue that the power to adopt temporary measures under Article 122(1) TFEU also entails the power to organise the exercise of such a power, notably by adopting rules setting out the conditions for activation and the content of such temporary measures. Such an approach is based on predictability and effectiveness and ensures that when the emergency conditions are met, fast action can be taken by Council without having to design the instrument all over again. This approach is confirmed by the fact that when the Council activates the relevant framework, it is not acting on the basis of implementing powers, but on the basis of Article 122 TFEU itself.[119] Thus, activation is not subject to the limits that apply to implementing acts and which in particular can be combined with an amendment of the relevant framework, so as to adapt it to the circumstances of the case.[120]

Another question is how such "permanent frameworks" may affect the institutional balance by occupying ground where "ordinary" legal bases may be available. That aspect will be addressed in Chapter III.

The measures must be appropriate to the situation

The measures must also be "appropriate" to the economic situation, that is, commensurate with its scale and gravity. This condition reflects the general principle of proportionality, according to which a measure must be appropriate and necessary to achieve its objectives and not impose an excessive burden when balancing the interests at stake. The general principle of proportionality is an important tool for ensuring the appropriate balance between the common interest pursued and the rights of individuals, including their fundamental rights.[121] A related issue is the degree of leeway granted to the legislator, who is called upon to act in a situation of urgency and unpredictability, and the intensity of the Court review of respect for that principle. As the proportionality of a measure requires a substantial case-by-case assessment, this report will not enter into detail as regards the proportionate

[119] In this sense, see for instance recital 3 of the *Hera Regulation*: "In the event of the recognition of a public health emergency at Union level, it should be possible for the Council, upon a proposal from the Commission pursuant to Article 122(1) of the Treaty on the Functioning of the European Union (TFEU), to decide to activate the framework of measures to the extent that those measures are appropriate to the economic situation." None of the emergency regulations that introduce a permanent framework include a recital signalling conferral on the Council of implementing powers to activate the framework.

[120] This was the case for activation of the *ESI* during the COVID-19 pandemic, which at the same time amended a number of the provisions of the original Council Regulation. Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak, OJ L 117, 15/04/2020, pp. 3–8.

[121] See, in that sense, for example: Pavel Ondrejek and Filip Horak, in "Proportionality during times of crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures," *European Constitutional Law Review*, 2024(20), pp. 27–51.

nature of recent emergency measures, but a general overview of the intensity of judicial control exercised by the Court in the event of emergency measures will be given in Section 3 of this chapter.

The temporary nature of measures analysed in the previous paragraph can be considered a specific application of the principle of proportionality to a situation of emergency: proportionality requires the response to be limited to the time of the emergency and to cease to have effect once the situation is back to normal. Yet again, this issue is not limited to being one of duration, but relates to the necessity and appropriateness of the measures as such.

Thus, the scope of the measure at stake needs to be limited to what is appropriate and necessary to respond to an emergency situation. This raises the question of whether measures of a preventive nature can still be validly adopted on the basis of Article 122(1) TFEU. The issue was discussed during the debate leading to the adoption of the Council Regulation on a framework for the supply of crisis-relevant medical countermeasures,[122] as certain Member States expressed interest in also including in the framework a number of measures that would anticipate and reduce the risk of a supply crisis. ` actions would have been adopted outside the context of an ongoing health emergency, in order to avoid a hypothetical future supply crisis. Such a preventive use of emergency powers fails, however, to satisfy the conditions for their exercise in the first place as, rather than responding to exceptional situations, it would in fact make it possible to regulate the matter on a permanent basis in light of a future hypothetical threat. On the basis of an opinion of the Council Legal Service in this sense, the Council did not ultimately include any preparedness measures as part of the framework.[123]

A different conclusion was, however, reached in relation to the possibility of mobilising NGEU funding via the *EURI* to finance preparedness measures in relation to the COVID-19 crisis. In that situation, the key factor was that the pandemic was still in progress and it was not possible to predict its future evolution (such as new strains of the virus and new waves of infection). Thus, if not addressed, persisting problems of supply for certain crisis-relevant products could further undermine the economic situation in the event that the pandemic resurged. On this basis, the Council Legal Service gave a positive opinion on the possibility of including targeted measures for preparedness in the context of the ongoing emergency as appropriate to the situation.[124] The solution was finally adopted by the Council.

[122] Council Regulation (EU) 2022/2372*,* referred above in Chapter I, Section 2.
[123] Opinion of the Council Legal Service of 29 November 2021 on the Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, ST 14328/21.
[124] Opinion of the Legal Service of 24 June 2020 on the Proposals on Next Generation EU, ST 9062/20, in particular para. 132.

Another area of possible tension is linked to the so-called transformative nature of emergency measures. An emergency measure based on Article 122 TFEU may in fact contain features that have effects beyond the time-span of the immediate emergency and which – in spite of the measure being time-limited – has certain "transformative" effects, leading to a return to a new and different normal.

Some academics have criticised emergency measures adopted on the basis of Article 122(1) TFEU for going further than addressing the specific emergency, due to their long-term impact and ability to change the political landscape beyond what is needed to address the immediate emergency.[125] Some have referred to this "competence creep", seeing this as encroaching upon ordinary legal bases and the procedures set out therein. Admittedly, this criticism is not solely about the temporary nature of the measures, but also goes to the heart of whether the responses are proportionate and limited to dealing with the specific situation of emergency. Such criticism has in particular been levelled at Next Generation EU (NGEU). It has been argued that NGEU transforms the entire system of finances, that the debt repayment, to be completed by 2058, goes well beyond the short-term nature intended for such measures and that the some of the purposes for which financing may be used were not limited to dealing with the immediate economic consequences of COVID-19, but also pursued recovery-related objectives. Lastly, the repurposing of funds mobilised in the context of a pandemic, to deal with energy-related issues, through RePowerEU, has also been questioned.

Another example of emergency measures having effects that go beyond the immediate crisis is the permitting facilitations introduced in the context of the energy crisis.[126] Whereas the Regulation introduced a short-term, time-limited acceleration of permit-granting procedures for renewable energy installations (Article 1), such facilitations applied to energy installations, many of which have a life span of several years (for onshore wind, typically between 20 and 30 years).

Some of the criticism that has been levelled seems to build on the assumption that emergency measures may only aim to bring the situation back to normal. However, that is arguably an excessively narrow interpretation of the emergency powers available. If one were to accept that emergency measures may not lead to a "new normal," then one would severely jeopardise the effectiveness and usefulness of emergency responses. For example, in a situation of gas supply shortages driven by over-dependency on one supplier, it seems obvious that an emergency response cannot consist solely of securing enough supply of gas from another supplier, thereby shifting dependencies. Some of the emergency measures therefore focused on facilitating the replacement of fossil fuels by greener alternatives, in order to accelerate the green transition, which is the most effective way of breaking

[125] See: the authors referred to in footnote 102 above.
[126] Regulation 2022/2577, Chapter I, Section 3.

free of fossil-fuel dependency. This, for example, is the driving force behind the permitting emergency Regulation.[127] As regards NGEU, the fact that the debt is scheduled to be paid back gradually over many years is the very element that makes the measure effective and fit for purpose. If one had insisted on an immediate increase in contributions from Member States to the Union budget, instead of resorting to long-term borrowing to finance immediate expenditure, then that would have required Member States to find additional funds in their national coffers. This would in turn have weighed down already strained national economies and led to a further economic downturn, thus compromising the very objective of the emergency intervention. These examples show that an excessively narrow approach to the scope and effects of emergency measures may jeopardise the adequacy and adaptability of the emergency response.

That is not to say that measures can be adopted on the basis of Article 122(1) TFEU without any link to the crisis; what it means is that some latitude needs to be accorded to the legislator in designing the most effective and adequate response, even where the effects of certain measures may reach beyond the duration of the measure itself or may have certain transformative effects. In particular, the fact that an emergency measure is adopted to address a crisis situation does not mean that it cannot *additionally* pursue other objectives which also happen to further the Union policies in ordinary times. In fact, the opening provisions of title VIII of the TFEU on economic and monetary policy, and in particular of its chapter one on economic policy to which Article 122 belongs, make it clear that coordination of the economic policies of the Member States shall "support the general economic policies of the Union" (Article 119(2)TFEU) and contribute "to the achievement of the objectives of the Union" (Article 120 TFEU). Thus, while crisis measures can surely derogate from ordinary legislation as appropriate for addressing the situation, they do not operate in a vacuum or a silo, as they are ultimately meant to pave the way to a return to ordinary policies, possibly adjusted on the basis of the lessons learnt during the crisis, on the basis of a policy cycle that will be analysed in greater detail in Part II of this report. A final and somewhat linked issue relates to the extent to which the Union's response needs to have immediate effects in the light of the urgent situation it aims to address. For example, according to Council Regulation 2022/1854, the solidarity contribution levied on companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors was applicable for the fiscal years 2022 and/or 2023, with the choice left to Member States. As revenues can only be calculated after the close of the financial year, this means that – in particular for the year 2023 – the amounts would not be readily available to finance the relevant measures to mitigate the impact of the energy crisis. Does that mean that the measure is not suitable for addressing the emergency? Similarly, the acceleration of permit-granting according to

[127] Ibidem.

Regulation 2022/2577 may not kick in with the desired urgency, given the lead time for selecting and implementing the renewable energy projects. Does that mean that the permitting regulation is an unsuitable response? And what of the funds from NGEU, which would first need to be committed and then implemented on the ground, with a view to releasing payments between 2023 and 2026? Does such a timeframe still comply with the requirement of urgency? Also in this context, an overly strict approach does not seem warranted. After all, the emergency response must aim to address an economic situation (see below). In such a context, the signals that regulatory responses send to the market are important. In relation to the permitting measure, the facilitations would help encourage investments in renewable energy. For the solidarity contribution, the prospect of having additional income from the solidarity contribution would reassure markets, with a potential positive effect on inflation, and may already enable Member States to take measures, knowing that additional funds would flow in the not-too-distant future. Moreover, the coordinated nature of the response may have dissuaded Member States from taking divergent and uncoordinated initiatives, with the immediate risk of causing lasting damage and even exacerbating certain risk factors. For all those reasons, it appears unwarranted to require that all effects kick in immediately. In respect of the permitting Regulation, it is interesting to note that considerable emphasis was in fact placed on measures with a shorter lead time, such as repowering existing installations and permits for solar installations.

The measures must address an economic situation

The reference to the economic situation, as well as the fact that the provision appears in a Chapter on economic policy, means that measures adopted on the basis of Article 122(1) TFEU need to address an economic situation. Such situations, as previously mentioned, would need to be of a certain gravity and scale. This does not necessarily mean that the measures need to be economic in nature. However, it does mean that the measures need to address a situation that impacts the economy of the Union and its Member States. This condition may also be seen in conjunction with Article 121(1) TFEU, according to which "Member States shall regard their economic policies as a matter of common concern […]."[128]

The COVID-19 pandemic and the energy crisis both had a serious impact on the economy of the Union as a whole, as also shown in the relevant economic forecasts drawn up by the Commission.[129] The COVID-19 pandemic – as described in Chapter I – deeply affected the economy, in particular through successive lock-downs and other restrictions, which led not only to significant losses in major

[128] As mentioned at the beginning of this Chapter, a version of that provision referring to conjunctural measures used to form part of the predecessor provisions to Article 122(1) TFEU, until it was carved out and integrated into what is now Article 121(1) TFEU, a provision that now also has a broader scope.
[129] The forecasts are accessible here: Economic forecasts – European Commission (europa.eu)

sectors of the economy, but also risked delaying important and urgent reforms. It was a multifaceted crisis affecting all Member States, albeit not affecting all Member States alike. Equally, as described in Chapter I, the Russian military aggression against Ukraine, triggered an unprecedented energy crisis that threatened to set the Union economy back to COVID times, from which it was just starting to recover. The energy crisis had a severe impact on the economy, from households to energy-intensive industries, as energy prices surged.[130] Just like the COVID-19 pandemic, the impact was felt in all Member States but not always in the same way, due to very different starting points, in particular in terms of their energy mix. It is therefore clear that those emergencies had an impact on the economic situation, as required under Article 122(1) TFEU.

However, the intensity and gravity of those situations also demonstrate that – conversely – not all emergencies are likely to have such an impact as to justify recourse to Article 122 TFEU, as this is a legal basis contained in the Treaty Chapter on economic policy. This factor is probably one of the more relevant limitations on the use of Article 122 TFEU as the Treaty's "Swiss army knife" for emergency situations.

The question of whether the proposed emergency measure addresses an economic situation within the meaning of Article 122(1)TFEU is relevant in relation to the Council Regulation establishing an emergency framework for ensuring the supply of medical countermeasures in the event of a public health emergency.[131] One could argue that the Regulation in fact addresses a health situation, as the supply of medical countermeasures is aimed at responding to a (future) health emergency. However, if we apply the standard test of the aim and content of the measure, it is clear that the objective pursued is to strengthen the supply of medical countermeasures and related raw materials. It does so by allowing for a series of measures that are economic in nature, as they establish procedures and tools to coordinate and regulate the supply of certain products. This is furthermore underlined by the requirements that the emergency framework may only be activated where that is appropriate to the economic situation.

The measures must be adopted in a spirit of solidarity

The reference to solidarity was added to Article 122(1) TFEU during the latest Treaty revision, together with a specific reference to measures "in the area of energy." In the field of energy, the notion of energy solidarity is enshrined in Article 194(1) TFEU, a legal basis that was also introduced with the Treaty of Lisbon. The notion of energy solidarity has been given shape by the Court of Justice

[130] Reference is made to the detailed outline in Chapter I, Section 3.
[131] Council Regulation 2022/2372, see above Chapter I, Section 2.

in the *OPAL* case, where it held that the notion of energy solidarity entails rights and obligations for the European Union and its Member States.[132]

Article 122(1) TFEU, for its part, constitutes a specific reflection of the general principle of solidarity in the Treaties in the field of economic policy, which must, in our view, be given a meaning that is distinct from the specific meaning it has been given in the field of energy. That is not to say that that the underlying principles governing energy solidarity are irrelevant. In particular, when the Council adopts measures under Article 122(1) TFEU in the field of energy, there is an obligation also to take account of the principle of solidarity in the specific form given to it in the field of energy, as also reflected in many of the emergency energy measures adopting during the energy crisis.

Article 122(1) TFEU requires measures to be adopted "in a spirit of solidarity between Member States." In the Anagnostakis case, the Court held this to mean that the spirit of solidarity between Member States must "in accordance with the wording of Article 122(1) TFEU, inform the adoption of measures appropriate to the economic situation within the meaning of that provision". According to the Court, this indicates that the measures "must be founded on assistance between Member States."[133]

It is not the aim of this report to provide a detailed analysis of the meaning of the concept of solidarity but rather to analyse how it has come to be used in recent emergency measures adopted on the basis of Article 122(1) TFEU.

In that respect, the financing mobilised through the NGEU and SURE Regulations in the context of the COVID-19 pandemic are prime examples of solidarity between Member States. The SURE Regulation involved counter-guarantees by all Member States to enable borrowing which, for many Member States, meant more attractive interest rates than they would have been able to obtain if taking out loans on their own. As regards the NGEU, the lion's share of its funding, including grants, was channelled through the Recovery and Resilience Facility (RRF) on the basis of an allocation key that took into account *inter alia* population, GDP per capita and the unemployment rate. As is usually the case for cohesion-related spending, this key has a redistributive effect among Member States. The introduction of a new allocation key for the additional revenues allocated to the RRF by the REPower amendment to support reforms and investments dedicated to diversifying energy supplies did not

[132] Judgment of 15 July 2021, *Federal Republic of Germany v European Commission*, C-848/19 P, EU:C:2021:598, paras. 49–53. The notion of energy solidarity is a separate topic under the 2025 FIDE conference and will not be further explored in this report.
[133] Judgment of 30 September 2015, Anagnostakis v Commission,T-450/12, EU:T:2015:739, para. 42. This finding has been confirmed by the Court of Justice in appeal, judgment of 12 September 2017, C-589/15 P, para. 71.

alter, but in fact enhanced, the redistributive effect of the Facility and hence the solidarity among Member States.

Some of the energy emergency measures also have a financial rationale. The demand aggregation and joint purchasing mechanism therefore aims to allow for gas to be purchased at more advantageous conditions and prices, while ensuring a fair distribution of the gas purchased.[134] It also aims to help Member States comply with their gas storage-filling obligations[135] without having to outbid each other, which would risk further driving up gas prices.[136] The emergency intervention Regulation[137] aims to mitigate the impact of the high energy prices by ensuring that Member States with fewer resources can also generate revenues that they can use to protect their consumers.[138]

However, Article 122(1) TFEU cannot be read as requiring the solidarity to be financial in nature. There are many other ways in which solidarity may find its expression in an emergency situation when adopting measures appropriate to the economic situation. In the context of the energy crisis, for example, many of the measures are founded *inter alia* on a need to coordinate measures with a view to avoiding fragmentation. A variety of national measures will inevitably lead to fragmentation, which may harm the internal market in energy, due to its considerable interconnectedness. This internal market solidarity rationale can be found, for example, in respect of the gas demand reduction Regulation,[139] and the emergency intervention for high energy prices Regulation.[140]

A linked consideration is solidarity expressed as an imperative need to act jointly. For example, some of the measures would not be efficient or even possible, unless introduced by all Member States. A good example of this is the market correction mechanism Regulation[141], which involves a dynamic bidding limit for gas. It is quite obvious that such a price limit would not work if only applied by some Member States, and one of the major concerns in the Council was also that such a bidding limit would divert gas away from the Union and exacerbate the security of supply risks at a time where the Union and many of its Member States were still highly dependent on gas.

---

[134] Regulation 2022/2576, supra Chapter I, Section 3, recital 10.
[135] Introduced by Regulation 2022/2577, supra Chapter I, Section 3.
[136] Regulation 2022/2576, supra Chapter I, Section 3, recital 11.
[137] Regulation 2022/1854, supra Chapter I, Section 3.
[138] Ibidem, recital 11, as well as recital 12, which provides that "If only some Member States with sufficient resources can protect customers and suppliers, this would lead to severe distortions in the internal market. A uniform obligation to pass on the surplus revenues to consumers would allow all Member States to protect their consumers." In the same vein, recital 14.
[139] Council Regulation 2022/1369, supra Chapter I, Section 3, see recital 14, which also refers to the principle of energy solidarity.
[140] Council Regulation 2022/1854, supra Chapter I, Section 3, see recital 6, which refers to the risk arising from uncoordinated national measures and recital 9, which adds that "Safeguarding the integrity of the internal electricity market is therefore crucial to preserve and enhance the necessary solidarity between Member States."
[141] Regulation 2022/2578, Chapter I, Section 3.

The joint procurement of vaccines is another prime example of solidarity. By adopting a derogation from the Financial Regulation to empower the Commission to procure vaccines on behalf of Member States,[142] a harmful race between Member States was avoided, and a fair distribution between Member States was ensured, as well as prices negotiated centrally. It is worth noting that, upon the launch of the EU's COVID-19 vaccine procurement, Germany, France, Italy and the Netherlands had already been working together as the Inclusive Vaccine Alliance (IVA) since May 2020 to secure vaccine supplies for their citizens and an agreement had been announced between AstraZeneca and the IVA for up to 400 million doses. This agreement was subsequently taken over by the Commission and Member State negotiators and was negotiated with AstraZeneca on behalf of all 27 Member States.[143]

One question that has arisen is whether the reference to solidarity "between Member States" also allows for measures where the solidarity is ensured through obligations imposed on individuals. For example, the revenue cap and the solidarity contribution introduced by the emergency measures adopted during the energy crisis are both based on contributions from certain electricity generators and Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors respectively. Do such redistribution mechanisms between operators in specific sectors and those suffering from the energy crisis constitute "solidarity between Member States"? We would reply to that question in the affirmative. First, it is clear that the sectors that are due to pay the contribution do not act out of solidarity; instead, they act because they are obliged to do so by virtue of a measure established pursuant to Union law. The solidarity therefore stems from the decision of the Council to introduce such an obligation in all Member States. Second, the introduction of such obligations aims to ensure that resources to mitigate the effects of high energy prices are available to all Member States and not just to those with the deepest pockets. Third, uncoordinated national measures would lead to distortions in the internal market; on the contrary, the positive effect of uniform obligations to set a revenue limit and to pass on surplus revenues to consumers would have a positive impact on the interconnected Union energy market, thus benefitting

[142] Such a derogation was included in Council Regulation 2020/521, which activated the Emergency Support Instrument and amended it, to allow for finance actions aimed at addressing the needs stemming from the pandemic, such us the procurement of vaccines and other medical countermeasures. Joint procurement of medical countermeasures was then included in the toolbox established by Council Regulation 2022/2372 (*HERA Regulation*) in the context of a permanent crisis framework to be activated in the event of public health emergencies.

[143] As described in the Special Report 19/2022 by the Court of Auditors, point 20:
Special report 19/2022: EU COVID-19 vaccine procurement.

other Member States. It is therefore perfectly justifiable to consider that solidarity between Member States can also be viewed as indirect solidarity between their citizens.[144] [145]

Finally, the requirement of solidarity "between Member States" raises the question of whether measures can be adopted on the basis of Article 122 TFEU to provide support to third countries. The issue was discussed in relation to the original Commission proposal for the *EURI Regulation,* which contemplated using part of the NGEU funds to provide crisis support to partner countries "in order to restore and enhance their trade and economic relations with the Union and strengthen their resilience."[146] In its opinion on the legality of NGEU, the Council Legal Service flagged up, however, that Article 122(1) TFEU is the manifestation of the particular spirit of solidarity that exists between Member States and which justifies taking exceptional action when some of them experience situations of severe economic difficulties. The position of third countries is fundamentally different in that regard. Thus, while the difficulties that a Member State experiences due to the interdependence it might have with the economies of third countries are relevant for triggering Article 122 TFEU, they cannot justify the provision of direct assistance to third countries for measures aimed at supporting their resilience.[147] Third countries can only be supported to the extent that such support has direct consequences on the economic situation of Member States and is appropriate to address the emergency situation. This could happen for instance, in the case of a particular situation of interdependence with the third country in question, which however would need to be duly justified. This advice was taken on board by the Council, which finally excluded support to third countries from the measures financed by *EURI*.

The powers must be exercised "without prejudice to any other procedures provided for in the Treaties"

One of the more difficult and controversial conditions is that which requires the Council to exercise its powers under Article 122(1) TFEU "without prejudice to any other procedures provided for in the Treaties". Some argue that this wording means that Article 122(1) TFEU is subordinate or residual to other Treaty provisions where such are available, and that priority must be given to the Treaty legal

[144] See, in this sense, recitals 9 to 12 of Council Regulation 2022/1854.
[145] See to that effect also: D. Schiek, "Solidarity in the case-law of the European Court of Justice – opportunities missed?," In H. Krunke, H. Petersen, & I. Manners (Eds.), *Transnational solidarity: Concept, challenges and opportunities,* Cambridge University Press, 2020.
[146] Proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic, COM/2020/441 final, Article 2(1) and Recital 7.
[147] Opinion of the Legal Service of 24 June 2020 on the Proposals on Next Generation EU, ST 9062/20, in particular, paras. 133 and 134.

basis that involves the highest degree of involvement of the European Parliament.[148] Such an interpretation does not appear to be well-founded.

Whereas the "without prejudice" requirement is crucial in avoiding circumvention and institutional overreach, it cannot reasonably be argued that the Council can only act when there is no other legal basis for the action. Such an interpretation would not be in line with case-law related to the choice of legal basis and would ignore that the Treaties use different wording when they aim at that effect (see for instance the wording used in Article 114 FEU, which will be further analysed in Chapter III). Moreover, it would lead to Article 122(1) TFEU losing a lot of its useful effect as a *sui generis* provision aimed at enabling an urgent response to emergency situations. This requirement is intrinsically linked to the constitutional limits of the Council's powers, both vertically (to delineate Union and national competences) and horizontally (as regards the other institutions and, in particular the European Parliament), and will be discussed in Chapter III.

2.2. Article 78(3) TFEU

As part of the common policy on asylum, Article 78(3) of the Treaty provides a specific legal basis to deal with emergency situations.

Based on a proposal by the European Commission, it enables the Council, after consulting the European Parliament, to adopt provisional measures for the benefit of Member State(s) confronted with an emergency situation characterised by a sudden inflow of nationals of third countries into one or more Member State(s). The provisional measures envisaged by Article 78(3) are exceptional in nature. They can only be triggered when a certain threshold of urgency and severity of the problems created in the Member State(s)' asylum system(s) by a sudden inflow of third-country nationals is met.

2.2.1. The history of Article 78(3)

The emergency competence that is now enshrined in Article 78(3) was firstly introduced by the Maastricht Treaty with a much narrower scope, focussing essentially on visa controls. When cooperation was established in the fields of justice and home affairs, visa policy was at the forefront

[148] See references in the study on Article 122 TFEU carried out for the AFCO Committee, supra footnote 84, in particular the sources cited in footnote 23 on page 11, referring to a "democracy-maximizing rationale". The study itself concludes that: "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.", p. 1.

of integration and was already incorporated in the Treaty establishing the European Community in the Chapter on Approximation of Laws, and thus subject to the Community method. Article 100c(1) conferred on the Council acting in unanimity the competence to draw up the list of third countries subject to visa requirements. In this context, Article 100c(2) provided that in the event of an emergency situation in a third country posing the threat of a sudden inflow of migrants, the Council could, acting by a qualified majority, introduce a visa requirement for nationals of the country in question for a period not exceeding six months. This emergency provision was complemented by an escape clause securing the "responsibility incumbent upon the Member States with regard to the maintenance of the law and order and the safeguarding of internal security" (Article 100c(5)).

It is also interesting to note that the arrangements for visa policy represented the model for the further "communitarisation" of justice and home affairs, as Article K.9 of the Treaty on the European Union introduced a bridging measure, according to which Council could decide at unanimity to apply Article 100c (thus including the emergency provision) to certain additional areas in the domain (see also Article 100c(6)).

The emergency provision was however not applied in practice. The Treaty of Amsterdam incorporated the previous third pillar in the Treaty on the European Community and reshuffled the relevant provisions. As a result, the emergency powers and the escape clause were regrouped into a single provision — Article 64 —, whose scope was now extended to all provisions in the area of justice and home affairs. This was reflected by the fact that the new wording dropped all reference to visas, so that in the event of an emergency, the Council could adopt "provisional measures of a duration not exceeding six months for the benefit of the Member State concerned." The conditions for triggering the emergency powers remained the same, however, as they keep addressing "emergency situations characterised by a sudden inflow of nationals of third countries." What is more, this provision has never been applied in practice.

The provision received its current wording with the Lisbon Treaty, which again split the provision. The escape clause was moved as an self-standing article to the general provisions applicable to the area of freedom, security and justice (Title V), becoming what is now Article 72 TFEU. The emergency powers, in contrast, were incorporated into Article 78, dedicated to the common policy on asylum, as its paragraph 3. Still, the provision maintained a general scope, going beyond the area of asylum. The new drafting also removed the six-month time limit for the measures and, more importantly, included an obligation to consult the European Parliament.

In its current drafting, Article 78(3) reads as follow:

> 3. 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, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

The provision does not contain an express reference to the principle of solidarity. Respect for that principle is, however, mandated by Article 80 in relation to the entire chapter on border checks, asylum and immigration, which require that, whenever necessary, Union acts in that domain contain appropriate measures to give effect to the principle.

The emergency competence has been used sparingly to date. Its only application consists of adopting the two relocation decisions adopted in 2015 by the Council to tackle the migration crisis and achieved modest results, for the reasons already analysed in Chapter I above. On another occasion, recourse to the provision was requested by Member States or proposed by the Commission (notably in the context of the 2021 crisis linked to the "instrumentalisation" of migrants by Belarus), but did not result in measures being adopted.

2.2.2. The conditions for recourse to Article 78(3)

The conditions for having recourse to the emergency competence in Article 78(3) TFEU require the existence of an "emergency situation characterised by a sudden inflow" of third-country nationals. The provision therefore establishes a certain threshold of urgency and severity as to the problems created in Member States' asylum system by the sudden inflow of migrants.[149]

The cases brought by Hungary and Slovakia against the second 2015 relocation decision have allowed the Court of Justice to clarify the threshold in question.

First, in relation to the notion of "sudden inflow," the Slovak Republic argued that the inflow of migrants into Italy and Greece was foreseeable and had in fact been steadily increasing for several years, and was thus surely not sudden. The Court noted, however, that, on the basis of statistical data provided by various EU agencies and bodies, the contested decision had identified a sharp increase of the inflow of migrants in Italy and Greece over a short period of time in the summer of 2015.[150] In light of those numbers, the Council did not commit any manifest error of assessment in concluding

[149] As acknowledged by the Commission in its proposal for the first Council relocation decision. See the explanatory memorandum of the Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM/2015/0286 final.
[150] Judgment of the Court of Justice of 6 September 2017 in joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, paras. 116–123.

that the inflow was "sudden" even though the increase represented the continuation of a period in which extremely high numbers of migrants had already arrived.

The Court also clarified the relationship between the "emergency situation" referred to in Article 78(3) and the inflow of migrants. In that regard, the Slovak Republic argued that the contested decision failed to demonstrate the existence of a causal link between the situation in Greece and the migratory influx. The crisis situation should instead be linked to the structural shortcomings of the Greek and Italian asylum systems.

On the basis of a literal interpretation, the Court stressed that the provision requires that a "sufficiently close link" is established between the emergency situation and the sudden inflow of third-country nationals.[151] Referring once again to the statistical data provided in the recitals of the decision, it found that, in the circumstances, it was clear that such a link existed between the exceptional inflow of migrants in the summer of 2015 and the significant pressure on the asylum systems of Italy and Greece. The fact that other factors, such as the existence of structural defects in the asylum system of those countries, may have also contributed to the emergency situation, did not alter the causal relationship.

The measures adopted on the basis of Article 78(3) must respond to a crisis situation that is pre-existing or ongoing at the moment of their adoption, and thus cannot have a mere preventive dimension. However, according to the Court, a mechanism that allows for adapting the emergency measure according to the evolution of the situation is still compatible with the existence of a "sufficiently close link." As Advocate General Bot put it, "responding to the emergency does not exclude the developing and adapted nature of the response, provided that it retains its provisional nature."[152]

The Court further acknowledged that, when assessing the conditions for triggering the emergency powers, the Council must be given broad discretion, as the area in questions entails complex assessment and choices of a particular nature. In such a context, the judicial review of the Court is limited to assessing whether the Council made a manifest error of assessment in evaluating whether the situation classified as an emergency in Article 78(3) exists.[153]

2.2.3. Character of the measures that can be adopted under the provision

[151] Ibidem, para. 125.
[152] Opinion of Advocate General Bot of 26 July 20172017 in joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union,* EU:C:2017:618, para. 130.
[153] Judgment in cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, quoted above, paras. 123 and 124.

Broad typology of measures, including derogation from ordinary legislation

A central question in the applications brought by Slovakia and Hungary against the second 2015 relocation decision was whether emergency powers conferred upon the Council by Article 78(3) should be limited to adopt "support" or complementary measures, or could also derogate from the provisions of legislative acts (and notably the rules laid down by the Dublin Regulation on the Member State responsible for examining asylum applications). The question allowed the Court to clarify the relationship between emergency powers and ordinary legislation and will be discussed in greater detail chapter III below.

For the moment, it is useful to emphasise that the Court found the competence in Article 78(3) to be non-legislative and intended to respond swiftly to a particular emergency situation; it would not serve its intended purpose if it were interpreted too narrowly. Thus, the notion of "provisional measures must be sufficiently broad in scope to enable EU institutions to adopt all provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow" of migrants.[154]

This allowed the Court to conclude that measures adopted under Article 78(3) may take a variety of forms, both regulatory and consisting of financial support and can in principle also derogate from legislative acts.

Provisional character of the measures

Article 78(3) empowers the Council to adopt measures of a provisional nature.

According to the Court, a measure may be classified as 'provisional' in the usual sense of that word only if it is not intended to regulate an area on a permanent basis and only if it applies for a limited period. In that regard, the current version of the provision, unlike its predecessor Article 64(2) TEC, no longer provides for an explicit time limit. Accordingly, Article 78(3) TFEU, while requiring that the measures referred to therein be temporary, affords the Council discretion to determine their period of application on an individual basis, in light of the circumstances of the case and, in particular, of the specific features of the emergency situation justifying those measures.[155]

The provisional character of the measure needs to be assessed in light of its period of application (the duration of its legal effects) as determined in the relevant act, and not in light of the further effects that it may have in practice. In the relocation cases, the Slovak Republic and Hungary had argued that

[154] Ibidem, para. 77.
[155] Ibidem, para. 90ff.

the relocation measures would have produced effects in the long run, since the asylum seekers would have likely remained in the Member State of relocation well beyond the 24-month period of application of the contested decision. The Court considered, however, that if such an argument were to be followed, no relocation mechanism could in fact be put in place on the basis of Article 78(3), and thus its *effet utile* would be greatly affected.[156]

The Council enjoys broad discretion in defining the period of application of the measures adopted and the control of the Court is limited to assessing the existence of a manifest error of assessment.[157] In exercising such discretion, the Council has to take into account the circumstances of the case, and in particular ensure the effectiveness of the measures adopted, notably when they require substantial preparatory work or the setting-up of complex procedures, the coordination of a number of national authorities and the mobilisation of important resources. On the basis of such reasoning, the Court concluded that a period of application of 2 years for the relocation Decision was justified.[158]

The measures must be limited to what is necessary to respond to the specific crisis

The measures adopted on the basis of Article 78(3) TFEU need to be limited to what is appropriate and necessary to respond swiftly and effectively to the specific crisis situation.

According to the Court of Justice, this requirement is of particular importance to avoid the emergency powers circumventing the ordinary legislative procedure and the competence of the legislator to regulate the area of asylum and migration generally and for an indefinite period.[159]

The requirement applies both to the temporal scope of the measures (thus corresponding to the requirement of provisional character) and to their material scope. The Council needs in particular to be satisfied that the measures chosen are appropriate to address the crisis situation and do not go beyond what is necessary to do so. Such an assessment essentially entails political choices and complex considerations, and must furthermore be made within a short time, in order to provide a swift response to the emergency situation: as a consequence, the Court recognises that also with regard to the choice of measures, the Council enjoys a broad margin of discretion and that the judicial review needs to be limited exclusively to the existence of a manifest error of assessment.[160]

[156] Ibidem, para. 99.
[157] Ibidem, para. 96.
[158] Ibidem, para. 97.
[159] Ibidem, paras. 73 and 74.
[160] Ibidem, paras. 208 and 209.

On the basis of these principles, the Court concluded that, in the circumstances of the 2015 migration crisis, the choice of establishing a mandatory mechanism for the relocation of migrants for the benefit of Italy and Greece was appropriate to the situation. The fact that the two beneficiary Member States suffered structural weaknesses in terms of reception capacity and capacity to process asylum applications did not allow for a different conclusion: first, because the number of arrivals was such that it would have disrupted the proper functioning of any asylum system; second, because the relocation decision included complementary measures expressly aimed at enhancing the capacity, quality and efficiency of the asylum systems of the beneficiary Member States.

The assessment of whether a measure is appropriate must be carried out with regard to the situation in place and the information available at the moment of the decision. Thus, when Slovakia and Hungary argued that the relocation system was not appropriate because it had not proven efficient nor had it led to meaningful results in the relocation of migrants, the Court rejected the argument. The legality of an EU act cannot depend on retrospective assessments of its efficacy: "where the EU legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question."[161]

Measures adopted on the basis of Article 78(3) also need to be proportionate, in the sense that the Council should choose those measures that make it possible to achieve the pursued objective in the least intrusive way for the concurring interests at stake. Thus, in the relocation case, Slovakia and Hungary argued that the mandatory mechanism adopted by the Council was not proportionate, since the objective to alleviate the migratory pressure on two Member States could have been achieved by measures less intrusive for the sovereignty of the Member States, such as financial measures or voluntary relocations. The Court rejected that argument, however, having assessed the possible alternatives, by applying the legal threshold of the manifest error of assessment.

An important element considered by the Court when assessing the proportionality of the measure was the temporal and material limitations associated with it. The mandatory relocation mechanism was limited to a two-year period and only concerned a limited number of migrants. Moreover, the binding effect of the decision was also qualified, as the concerned Member States could refuse the relocation of specific applicants where there were reasonable grounds for doing so, related to public order or national security.[162] Finally, various adjustment mechanisms in the relocation decision allowed Member States facing exceptional circumstances to ask for the suspension of their relocation

[161] Ibidem, para. 221.
[162] Ibidem, paras. 244 and 245.

quotas.[163] As a consequence, the relocation decision was designed to take into account, in a proportionate manner, the particular situation of each Member State.

Finally, it is also interesting to note that the Court stressed how the Council has an obligation to give effect to the principle of solidarity when adopting emergency measures. This has an impact on the test of proportionality, since when assessing alternative measures that are equally effective in achieving the objective, the choice of solidarity-based solution – in this case mandatory relocation – cannot be considered to be a manifest error of assessment.[164]

The measures need to give effect to the principle of solidarity

Measures adopted under Article 78(3) need to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, which applies under Article 80 TFEU when the EU common policy on asylum is implemented.

The principle of solidarity was a clear feature of the 2015 relocation decisions, and was substantiated by the obligation of all Member States to accept the relocation of asylum seekers: "When one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy." This fair distribution of the relocated applicants among all the Member States is a fundamental element of the relocation decision. Thus, the Court concludes that "faced with Hungary's refusal to benefit from the relocation mechanism as the Commission had proposed, the Council cannot be criticised, from the point of view of the principle of proportionality, for having concluded on the basis of the principle of solidarity and fair sharing of responsibility laid down in Article 80 TFEU that Hungary had to be allocated relocation quotas in the same way as all the other Member States that were not beneficiaries of the relocation mechanism."[165]

The practice of the institutions does not exclude the possibility that emergency measures adopted under Article 78(3) TFEU could express solidarity in a different form than burden-sharing, for example, not impose an additional burden on other Member States, while still giving an advantage to those concerned by the crisis situation.

[163] Ibidem, para. 295 to 298.
[164] Ibidem, paras. 252 and 253.
[165] Ibidem, para. 293.

An example is provided by the case of the 2021 Commission proposal for emergency measures in the context of the Belarus instrumentalisation crisis (see above Chapter I).[166] The proposed measures essentially consisted of a number of targeted derogations from the Asylum Procedure Directive and of the Material Reception Condition Directive, which aimed to ease the processing of asylum requests and the reception of migrants by lowering the applicable legislative standard. While the proposed derogations were limited in time and only applied to certain Member States and certain borders, they did not entail as such any obligations or material burden for Member States not affected by the emergency situation. A component of solidarity was however still present – albeit secondary – in the form of operational support to be provided by a number of EU agencies (Frontex, Easo and Europol) to the concerned Member States, paid for by the Union budget.

The Commission proposal was never adopted, as the Member States concerned considered that it did not provide sufficient "flexibility", and preferred instead to make use of national derogating measures. Its compatibility with the principle of solidarity was therefore never tested by the Court of Justice. One could, however, argue that the decision to allow derogations from a common regime for Member States that are in an emergency situation, while requiring full compliance from the other Member States, is expression of a certain form of "normative solidarity", and thus complies with the requirements set out in Article 80 TFEU.

3. The principles of an emerging EU Emergency Constitution

Through recent emergency measures, the Union has proved more than ever to be a dynamic entity. Recourse to general principles has often enabled the Court to follow an evolutive interpretation and to be responsive to changes in the economic and political order.[167] General principles of EU law have been described as having a triple function: they have a gap-filling function, they serve as an aid to interpretation and they may be relied upon as grounds for judicial review.[168] Pointing to the gap-filling function of general principles, Tridimas explains that *lacunae* are more likely to arise in Union law, considering that the Treaty "is rampant with provisions overpowering in their generality and uses vague terms and expressions which are not defined."[169]

Far from being exhaustive on the values and general principles of Union law that may be relevant to emergency measures, among which respect for fundamental rights and the rule of law feature

[166] Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final.
[167] Tridimas, Takis. *The General Principles of EU Law*. Second edition. Oxford; New York: Oxford University Press, 2007, p. 18.
[168] Lenaerts, Koenraad, and Gutiérrez-Fons José A., "The Constitutional Allocation of Powers and General Principles of EU Law". *Common Market Law Review.* (2010) 47, p. 1629.
[169] Tridimas, *The General Principles of EU Law*, pp. 17–18.

prominently, this section touches upon the main principles that frame the allocation of powers in the field of EU emergency competences and the way in which this complex fabric of constitutional principles is intertwined.

3.1. Conferral and effectiveness

The principle of conferral of powers laid down in Article 5(1) TEU is a central principle of the EU legal order and of the EU emergency constitution. First and foremost, because it determines whether the Union has competence to act at all and, second, because it determines the scope of the matters for which the Court of Justice of the European Union has exclusive jurisdiction.[170] The principle of conferral therefore determines not only the possibility of the action as such but also sets limits that need to be respected when exercising any powers conferred.

In the context of recent crises, the Union has taken on an increasingly central role as a crisis manager. But a crisis response will inevitably have to rely on and reflect the nature and intensity of the powers conferred. Thus, during the financial crisis, and due to limitations inherent in the powers conferred, the Member States in some instances resorted to intergovernmental arrangements. During the COVID-19 pandemic, the response in the health field was dominated by strong coordinating measures, given that public health policy is first and foremost a national responsibility, and the Union is only called upon to complement national policies. Such restrictions were not at the forefront in the energy crisis, which therefore offered the possibility of a more holistic response. When it comes to State aid, as a supporting tool in times of crises, the Commission has exclusive competence, which gives it a relatively free hand but also great responsibility.

When it comes to emergency action, many of the emergency legal bases are characterised by their broad and open-ended wording, which gives the legislator leeway in defining the exact type of measures. In particular, Article 122(1) TFEU refers to "measures appropriate to the economic situation." Under the pressure of the needs arising from emergencies, the broad scope of emergency provisions has been further combined with recourse to an evolutive interpretation, which has made it possible to adopt creative instruments that further expanded their reach.

While this has ensured the relevance and effectiveness of the Union's emergency action, it has led to tensions, both in relation to the allocation of competences between the Union and Member States and in relation to respect for the respective roles of the institutions within the EU legal order.

[170] See also: Inge Govaere "The application of the principle of conferral also determines whether or not a subject matter comes within the ambit of the autonomous EU legal order, which is characterised by the exclusive jurisdiction of the CJEU, 6 primacy and direct effect." researchpaper_4_2016_inge_govaere_0.pdf (coleurope.eu).

As regards the allocation of competences between the Union and the Member States, we have already seen how the case-law of the Court of Justice has played a determinant role in upholding a normative claim by the EU legal order to regulate emergency action, in particular by interpreting the escape clauses included in the Treaties in a restrictive way, which exclude any *domaine réservé* of the Member States in the matter. The restrictive interpretation of the escape clauses is further enhanced by the test that the Court deploys when checking the legality of their invocation by Member States. As we have seen, in such circumstances, the Court requires sufficient evidence to show that the existence of a genuine and serious threat to the protected interest is based on reasonable grounds, and that the authorities could reasonably take the view that the measures were appropriate and necessary. This test appears much stricter than the one based on a "manifest error of assessment" that the Court uses when controlling the exercise by EU institutions of EU emergency powers.

As we will see in Chapter IV, the tension that this case-law may generate with the competing claim expressed by national constitutional courts and national executives is solved by the institutional practice of acknowledging an enhanced role for the European Council in emergency situations, and by that means, of promoting consensual decision-making. Such an institutional practice is allowed by the lenient approach that the Court has taken to date to policing the principle of institutional balance, which therefore somehow compensates for the strict stance on the matter of competence, providing the system with the required flexibility to defuse tensions and operate effectively.

The second tension exists in relation to the allocation of competences among the Union Institutions. The issue concerns the relationship between ordinary and emergency competences, and will be further explored in Chapter III of this report.

It suffices here to say that where no parallel competence exists in another "ordinary" Treaty legal basis, the main question is whether the Union has competence to act at all. It is well known that the Union does not have "*Kompetenz-Kompetenz,*" that is, the power to confer competences on itself.[171] Even with a very broad and open-ended conferral, this must mean that the Union cannot confer competences on itself on the basis of emergency legal bases. For instance, permanent frameworks that have been adopted on the basis of Article 122 TFEU with a view to possible activation by the Council cannot create a secondary legal basis. This means that the activation of specific measures

[171] Judgments in *Parliament* v *Council*, C-133/06, EU:C:2008:257, paras. 54 to 56; *Parliament* v *Council*, C-363/14, EU:C:2015:579, para. 43.

under such permanent frameworks is subject to fulfilling the general conditions laid down in Article 122(1) TFEU.[172]

On the other hand, it cannot be reasonably argued that the Union can only act on the basis of Article 122(1) TFEU if the measure could have been adopted under a parallel ordinary competence. Such a reading would ignore the fact that an emergency often calls for measures that are very different in scope and nature than measures taken in "ordinary times" and would therefore seriously undermine the useful effect of the Union's crisis instruments.

When a parallel competence does exist by virtue of an "ordinary legal basis", the question is whether a sort of hierarchy would exist between the emergency competence and the ordinary one, based in particular on the need to respect the prerogatives of the ordinary legislator and to avoid emergency powers circumventing the use of other legal bases laid down in the Treaties for use in "normal times."

However, as we will see in greater detail in Chapter III, the idea that a hierarchy exists between ordinary legal bases and emergency ones is supported by neither a teleological nor a contextual reading of the relevant provisions.[173] This can be inferred from the fact that the formulation used by the Treaties for subsidiary legal bases[174] differs from the wording that we find in the emergency legal basis, and notably in Article 122(1), which makes it clear that it applies "without prejudice to any other procedures provided for in the Treaties."

As we will see in greater detail in Chapter III, emergency competences are a parallel and *sui generis* legal basis, and one may even argue that they are a more specific legal basis (*lex specialis*) in case of emergencies, as long as the measures drawn up thereunder do not aim to regulate or have the effect of regulating a matter on a more permanent basis.

Whether an emergency legal basis is appropriate for a given measure therefore boils down to the standard legal basis test, according to which the choice of legal basis is determined by objective factors that are amenable to judicial review, such as the aim and content of the measure to be adopted.[175] Where the genuine objective of a measure is to respond to an emergency situation with measures appropriate to the economic situation, then the emergency provision is an appropriate legal basis,

[172] Those permanent frameworks are the Emergency Support Instrument (Regulation (EU) 2016/369), activated in relation to the COVID-19 pandemic (Regulation - 2020/521) and the medical counter-measures framework (Regulation (EU) 2022/2372). The EFSM was based on a similar logic.
[173] Our analysis will mainly focus on Article 122(1) and Article 78(3) TFEU.
[174] Such as Articles 21, 77(3) or 352 TFEU, for which it is necessary to establish that the Treaties have not provided the necessary powers, or Article 114 TFEU, for which it is necessary to establish that another, more specific, legal basis could not be used.
[175] See, for example, judgment of 11 June 1991, Commission v Council ("Titanium dioxide"), C-300/89, EU:C:1991:244, para. 10; judgment of 5 May 2015, Spain v Council, C-147/13, EU:C:2015:299, para. 68 and the case-law cited.

irrespective of whether another legal basis may be available for a similar type of measure in "normal times." In particular, Article 122(1) TFEU therefore establishes a concomitant competence, which the Council may resort to, provided the conditions for action established therein, as described in Chapter III, are fulfilled. That reading is fully supported by the Court's ruling in *Balkan Imports,* where the Court held that – despite the existence of a legal basis which could have allowed for the adoption of the measure – there "was no other legal basis allowing a response by such urgency".[176]

In light of the above, there is also no justification for holding that the legal basis with the highest degree of involvement of the European Parliament should be chosen with a view to enhancing the democratic legitimacy of the Union's action.[177] As the Court has consistently held, "it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure."[178]

In relation more specifically to Article 122(1) TFEU, the hierarchical approach that some are arguing for does not find support in the historic development of the provision either. Hence, the reference to difficulties in supply "notably in the area of energy" was introduced into Article 122(1) TFEU at the same time as a brand-new legal basis was added covering the field of energy, which also refers specifically to security of supply, see 194(1)(b) TFEU. Had it been the wish to limit Article 122(1) TFEU to areas not covered by other legal bases, then the addition to Article 122(1) TFEU would have made no sense, given that the matter would already be covered by Article 194 TFEU, which was being introduced at the same time.

This approach has been confirmed by the Court of Justice in relation to the use of the emergency powers provided by Article 78(3) TFEU in the area of migration. One of the arguments raised by Hungary and Slovakia in the cases concerning the legality of the 2015 second relocation decision was precisely that emergency powers could not result in a derogation from legislative provisions, as this would have resulted in circumventing the competence of the ordinary legislator, and would in particular have undermined the role of the European Parliament. It was in other words the argument of a hierarchical relationship between legal bases based on the principle of democratic legitimacy.

The Court, however, took a different approach and relied on the principle of effectiveness of Union action when interpreting Article 78(3). According to the Court, an interpretation that would limit

[176] Our emphasis.
[177] A thorough analysis and argumentation for why Article 122(1) TFEU cannot be read as being subordinate to other legal bases can be found in European Parliament, The use of Article 122 TFEU – Institutional implications and impact on democratic accountability, study requested by the AFCO Committee (2023), https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU(2023)753307_EN.pdf
[178] Case C-130/10, Parliament v Council, EU:C:2012:472, para. 80.

emergency measures only to those that supplement – but do not derogate from – legislative acts would significantly reduce the effectiveness of the provision at stake, given the extent to which the matter had been regulated in secondary law. Thus "the concept of 'provisional measures' within the meaning of Article 78(3) TFEU must be sufficiently broad in scope to enable the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of nationals of third countries."[179]

In the approach followed by the Court, respect for the prerogatives of the ordinary legislator remains ensured by policing respect for the conditions for recourse to the emergency power and – even more importantly – for the principle of proportionality of the measures adopted:

> both the material and temporal scope of such derogations must nonetheless be circumscribed, so that the latter are limited to responding swiftly and effectively, by means of a temporary arrangement, to a specific crisis.[180]

3.2. Solidarity, subsidiarity and responsibility

Solidarity is a constitutional principle enshrined in the preambles to the TEU and the TFEU and in Article 2 TEU as a value of EU law. Also pursuant to Article 3 TEU, the Union is to promote economic, social and territorial cohesion and solidarity among Member States. The Preamble of the Charter of Fundamental Rights of the European Union further mentions it as part of the "indivisible, universal values" on which the Union is founded. The Court has held solidarity to be "one of the fundamental principles of Union law"[181] that underpins the entire legal system of the European Union.[182]

In emergency situations, the risk of fragmentation and unilateral action is increased, hence making the need for unity and solidarity between the Member States particularly great. More than that, it is in emergencies that both the *raison d'être* and the objective of the European project are tested. As Advocate General Bot put it in his opinion in the relocation case, "how would it be possible to deepen

[179] Para. 75.
[180] Para. 78.
[181] Judgment of 15 July 2021, *Germany v European Commission*, C-848/19 P, EU:C:2021:598, para. 38.
[182] Idem, para. 41: "It follows that, as the General Court correctly noted in paragraph 69 of the judgment under appeal, the principle of solidarity underpins the entire legal system of the European Union (see, to that effect, judgments of 7 February 1973, Commission v Italy, 39/72, EU:C:1973:13, paragraph 25, and of 7 February 1979, Commission v United Kingdom, 128/78, EU:C:1979:32, paragraph 12) and it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In that regard, the Court has held, inter alia, that that principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States (judgment of 8 October 2020, Union des industries de la protection des plantes, C-514/19, EU:C:2020:803, paragraph 49 and the case-law cited)."

the solidarity between the peoples of Europe and to envisage ever-closer union between those peoples, as advocated in the Preamble to the EU Treaty, without solidarity between the Member States when one of them is faced with an emergency situation?" [183]

Thus, the conferral of emergency competences on the Union is often associated with a clear reference to solidarity as a means of exercising them. As we have seen, solidarity is an explicit requirement for the two emergency competences on which this report focuses, Article 122(1) TFEU and in Article 78(3) TFEU (via Article 80 TFEU). But the requirement of solidarity remains relevant in relation to Article 122(2) TFEU and Article 143(2) TFEU, as the notions of "financial assistance" and "mutual assistance" referred to in those two provisions implicitly incorporate a solidarity dimension, as well. Finally, the principle of solidarity is at the core of the reciprocal obligations of the Member States to support each other in the emergency situations identified in c (solidarity in the field of foreign policy) and Article 222 TFEU (general solidarity clause).

The express reference to solidarity as a modality for the emergency action of the Union or as a qualification of the reciprocal obligations of Member States confers on the principle particular legal force in EU emergency law. In particular, it becomes a condition, and thus a parameter of legality, of the emergency measures adopted by the Union or of the reciprocal obligations of the Member States.

Thus, in the *Anagnostakis* case, the Court held that the spirit of solidarity between the Member States must "in accordance with the wording of Article 122(1) TFEU, inform the adoption of measures appropriate to the economic situation within the meaning of that provision". According to the Court, this indicates that the measures "must be founded on assistance between Member States." [184]

This also implies that solidarity needs to inform the design of the 122(1) emergency measures. This concern is very much present in the practice of the institutions. For instance, during the negotiations for the NGEU financing scheme, it was discussed whether the criteria proposed by the Commission to allocate the financial contributions to Member States under the principal spending instrument, the *RRF*, were compatible with the solidarity rationale of Article 122 TFEU. While the institutions enjoy a wide margin of appreciation in determining the relevant criteria, it was nonetheless necessary that the allocation did not merely respond to a logic of *juste retour* but that it reflected to a certain degree the needs of the Member States in a spirit of solidarity. [185]

[183] Opinion of Advocate General Bot, 26 July 2017, *Slovak Republic, Hungary v Council*, Cases C-643/15 and C-647/15, EU:C:2017:618, see: paras. 16 to 24.
[184] Judgment of 30 September 2015, Anagnostakis v Commission, T-450/12, EU:T:2015:739, para. 42. This finding has been confirmed by the Court of Justice in appeal, judgment of 12 September 2017, C-589/15 P, para. 71.
[185] The question was examined by the Council Legal Service in its Opinion on the NGEU package, Opinion of the CLS of 24 June 2020, Council doc ST 9062/20, points 143 and 147.

The Court has further confirmed that the requirement of solidarity needs to be taken into account when assessing the proportionality of emergency measures. Thus, in its judgment on the legality of the Relocation decisions, the Court rejected the argument that, since the same results could have allegedly been achieved by a voluntary commitment, which would have been less prejudicial to Member States' sovereignty, a binding relocation mechanism was disproportionate. The Court in particular recalled that "the Council, when adopting the contested decision, was in fact required, […] to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."[186] As a consequence,

> there is no ground for complaining that the Council made a manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take – on the basis of Article 78(3) TFEU, read in the light of Article 80 TFEU and the principle of solidarity between the Member States laid down therein – provisional measures imposing a binding relocation mechanism.[187]

In similar terms, the Court rejected the assertion that the choice to include Hungary in the mandatory relocation scheme, regardless of the significant migratory pressure on its borders, was disproportionate. Faced with Hungary's refusal to benefit from the relocation mechanism as the Commission had proposed, the Council could not be criticised, in terms of the principle of proportionality, for having concluded on the basis of the principle of solidarity that Hungary had to be allocated relocation quotas in the same way as all the other Member States.[188]

In addition to its role in the choice/design of the emergency measures, the principle of solidarity is also relevant when deciding whether the emergency response should be taken at the EU level at all, or rather left to the Member States. There is in fact a correlation between solidarity and subsidiarity, as solidarity would require the action to be taken at the supranational level – where solidarity is most effectively expressed. When there are common goods at the EU level at stake, as the functioning of the internal market, of the single currency, or of the area of freedom, security and justice, measures adopted unilaterally by Member States will hardly be satisfactory, due to the risk of fragmentation that they would inevitably entail. The preservation of those common goods cannot be achieved by coordination of unilateral measures alone. In order to address the emergency while preserving those

[186] Judgment of the Court of Justice of 6 September 2017 in joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, point 252.
[187] Ibidem, point 253.
[188] Ibidem, point 293.

European common goods, action at the EU level that is informed by the principle of solidarity is necessary.[189]

Finally, the preservation of European common goods requires that the principle of solidarity is associated with the necessary level of responsibility. Respect for the common values and rules on which the EU legal order is built is a condition for the enjoyment of all the rights Member States derive from the application of the Treaties. Thus, implementation of the principle of solidarity is based on the reciprocal commitment of the Member States to comply with their obligations under EU law. As Advocate General Sharpston put it effectively in her opinion in the relocation decisions case,

> Solidarity is the lifeblood of the European project. Through their participation in that project and their citizenship of European Union, Member States and their nationals have obligations as well as benefits, duties as well as rights. Sharing in the European 'demos' is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also requires one to shoulder collective responsibilities and (yes) burdens to further the common good.[190]

The case studies that we have analysed in Chapter I have shown that reconciling solidarity and responsibility has been at the centre of the political discussions leading to the adoption of EU emergency measures and is thus central in shaping EU emergency law.

3.3. Subsidiarity and Proportionality – Identification of the Union objective

The subsidiarity and proportionality principles seem crucial when the Union exercises exceptional competences in times of emergency, as they are a guarantee that use of the emergency competence remains limited to what is necessary and, in this way, contribute to ensuring that the institutional balance is respected. Under the principle of subsidiarity, the Union is to act only if and insofar as *the objectives of the proposed action* cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. As commentators have observed, the said objectives must be *Union* objectives, otherwise the Union action could not be justified in the first place.[191] Similarly, the proportionality of Union action is defined by reference to what is necessary to achieve the *objectives of the Treaties* (Article 5(4) TEU).

---

[189] In this sense, see: Chamon, "The Non-Emergency Economic Policy Competence in Article 122(1) TFEU", quoted above footnote 83.
[190] Opinion of Advocate General Sharpston in case C-715/17, *Commission v Poland,* EU:C:2019:917, point 253.
[191] Catherine Barnard and Steve Peers, eds. *European Union Law*. Third ed. Oxford: Oxford University Press, 2020, p. 118.

The first step in the subsidiarity and proportionality test is therefore to identify the Union objective pursued by emergency measures.

Identification of the Union objectives pursued may, however, not be straightforward in the case of emergency competences. In the previous section, we saw that emergency legal bases often define the powers of the Union by reference to an exceptional situation and the need to address this situation, rather than by reference to a specific objective. One may therefore legitimately ask, what are the Treaty objectives against which EU emergency measures should be tested?

We have established above that emergency competences are parallel with, not subordinated, to ordinary competences. In the same vein, the subsidiarity and proportionality of Union emergency action should not be gauged against the objectives laid down in the corresponding ordinary legal basis – if any, as this would undermine the useful effect of the emergency competence. Also, to acknowledge that the subsidiarity and proportionality of an emergency measure adopted on the basis of the Treaty may be tested solely against the specific objectives established by the Institutions when adopting the said measure is tantamount to giving the Institutions the power to set Union objectives, which would disrupt the system of Treaty-based competences. Rather, it is argued that the fundamental principle of solidarity – and possibly other Union values – provide an expression of the *raison d'être* and objectives of Union emergency competences. In the framework of the subsidiarity and proportionality tests, emergency measures may thus have to be gauged against the fundamental principle of solidarity in particular.

3.4. Judicial control on proportionality and fundamental rights and the role of the precautionary principle

According to settled case-law, the principle of proportionality requires a three-step analysis: it must be verified that the measures first, are appropriate for attaining the objective of general interest pursued (the suitability test), second, are limited to what is strictly necessary, in the sense that the objective could not reasonably be achieved in an equally effective manner by other means that are less prejudicial to the rights and freedoms guaranteed to the persons concerned (the necessity test), and, third, are not disproportionate to that objective, which implies, in particular, a balancing of the importance of the objective and the seriousness of the interference with those rights and freedoms (proportionality *stricto sensu)*.[192]

[192] Judgment of the Court (Grand Chamber), 5 December 2023, NORDIC INFO, Case C-128/22, EU:C:2023:951, para 77.

The assessment of each of these conditions by the Court concerning crisis measures reveals specific features. In a comparison of various cases concerning measures adopted in times of crisis, that is, in the *Pringle* case[193] (Eurozone crisis, 2009), the *Jafari* case[194] (migration crisis, 2015), the *Wightman and Others* case[195] (Brexit, 2016) and the *Nordic Info* case[196] (COVID-19 pandemic, 2020), Constantinou already demonstrated common features in the Court's assessment. On the one hand, the Court exercises judicial restraint and defers to political choices in times of crisis and on the other hand, the balancing of interests performed by the Court is highly contextual, which plays a key role in upholding the contested measures.[197]

Among these judgments, the preliminary ruling issued by the Court in Grand Chamber in the *Nordic Info* case[198] deserves special attention, as the Court offered what has been described as a manual of Union law applied to a sanitary crisis.[199] Nordic Info, a travel agency operating in Sweden, sought compensation from the Belgian State following the adoption of a Ministerial Decree on 10 July 2020 prohibiting non-essential travel to and from countries classified as red zones. On 12 July, Sweden was classified as red zone and Nordic Info accordingly cancelled its trips to Sweden. Three days later, Sweden was, however, reclassified as an orange zone. The case indirectly questions the excessive reliance on the colour-coding system recommended at EU level. While the ruling is rich in lessons also concerning the publicity and procedural guarantees that should accompany restrictions on fundamental freedoms, this section focuses on the proportionality assessment made by the Court.

It is worth noting at the outset that the existence of an emergency or the exercise of emergency powers by national authorities do not appear to be relevant to the Court's reasoning. Commentators have questioned whether it would not have been preferable to acknowledge that COVID-19 constituted an exceptional situation, or even to activate the safeguard clause laid down in Article 347 TFEU, rather than to interpret ordinary exceptions to free movement so broadly.[200] Despite the emergency nature of the measures, the Court does not depart from its standard of review applicable to ordinary measures and subjects the measures at stake to a detailed three-stage proportionality test.

---

[193] Judgment of the Court (Full Court), 27 November 2012, *Thomas Pringle v Government of Ireland and Others*, Case C-370/12, EU:C:2012:756.
[194] Judgment of the Court (Grand Chamber), 26 July 2017, *Jafari*, Case C-646/16, EU:C:2017:586.
[195] Judgment of the Court (Full Court) of 10 December 2018, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, Case C-621/18, EU:C:2018:999.
[196] C-128/22, *op. cit.*
[197] Constantinou, E. "A Tale of Four Crises: The European Court of Justice's Response to Crises." European journal of risk regulation (2025): 1–16.
[198] Judgment of 5 December 2023, NORDIC INFO, Case C-128/22, EU:C:2023:951.
[199] Warin, C., "Arrêt 'Nordic Info': petit manuel de droit de l'Union appliqué à une crise sanitaire (CJUE, 5 December 2023, C-128/22)," *J.D.E.*, 2024/4, pp. 176–179.
[200] Carlier J.-Y. and E. Frasca "Libre circulation des personnes dans l'Union européenne," *Journal de Droit Européen*, 2024, p. 191.

The specificity of the Court's assessment lies instead in the acceptance of a degree of uncertainty, with respect both to the suitability condition and to the necessity condition. To do so, the Court assesses the proportionality of the national measure in the light of the precautionary principle.

First under the suitability condition, the objective of the measure may relate to a situation that is anticipated but has not yet occurred, that is, the existence or extent of risks to human health. Under the precautionary principle, says the Court, a Member State must be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. This includes any measure capable of reducing a health risk.[201] In other words, the precautionary principle may justify preventive measures.

Further, the Court clarifies the burden of proof on public authorities when imposing restrictive measures: "[…] Member States must be able to adduce appropriate evidence to show that they have indeed carried out an analysis of the appropriateness, necessity and proportionality of the measures at issue and to present any other evidence substantiating their arguments."[202] The burden of proof should thus be evidence-based. The Court specifies that this does not, however, go as far as requiring positive proof that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions.

More specifically, the appropriateness of the measures for attaining the pursued objective will have to be ascertained in light of the scientific data commonly accepted at the time of the facts, taking into consideration the degree of uncertainty and the context that prevailed at the time, be it epidemiological (spread of the virus), organisational (health system) or legal (similar measures taken by other Member States and coordinated by the EU).[203]

Second, with respect to the necessity condition, the Court approves of the fact that the restrictions targeted non-essential travel and travel to Member States regarded as high-risk zones, and were temporary.[204] As to the existence of measures that were less restrictive but equally effective, the Court acknowledges *the measure of discretion* enjoyed by the Member States in the field of the protection of public health "on account of the precautionary principle". The Court exercises judicial restraint by considering that judicial review must confine itself to ascertaining whether it is evident that, in light of the available information and context at the time of the facts, other measures would have sufficed to achieve the same result as the restrictive measures at stake.[205] In a context marked by epistemic

[201] Ibidem, para. 79 and the case-law cited therein.
[202] Ibidem, para. 80 and the case-law cited therein.
[203] Ibidem, paras. 82 and 83.
[204] Ibidem, paras. 88 and 89.
[205] Ibidem, para 90–91.

uncertainty, it will undoubtfully be difficult to bring such evidence before a court and rebut the necessity of a measure.

Third, should emergency measures entail interference with fundamental rights and principles, the proportionality test in the strict sense includes balancing the importance of the objective pursued and the seriousness of the interference of the fundamental rights affected by the measures.[206] According to the Court, an objective of general interest, such as the objective of protecting public health, "may not be pursued by a national measure without having regard to the fact that it must be reconciled with the fundamental rights and principles affected by that measure as enshrined in the Treaties and the Charter, by properly balancing that objective of general interest against the rights and principles at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued."[207] Such balancing is done (i) by measuring *the seriousness of the interference* which such a limitation entails and (ii) by verifying that *the importance of the objective of general interest pursued* by that limitation is proportionate to that seriousness.[208]

In just a few paragraphs, the Court strongly suggests that the contested measures satisfy this test, subject to verification by the national court.[209] As regards legal persons such as Nordic Info, for example, whose freedom to conduct a business was restricted, the Court concludes that "in view of the serious public health context resulting from the COVID-19 pandemic, it did not seem unreasonable to prohibit on a temporary basis non-essential travel to such Member States until their public health situation improved in such a way as to prevent exits from the national territory and, as the case may be, the return of sick persons to that territory and, consequently, the uncontrolled spread of that pandemic between the various Member States and within that territory."[210] The Court does so without engaging in the scientific evidence or in the complexity of the question as to whether travel restrictions contributed to limiting the spread of the virus at a time where it had already widely circulated, showing the difficulty for the judiciary to rule on the complex and uncertain situations that characterise emergency measures.[211]

---

[206] Ibidem, para 92.
[207] The referring court will have to ascertain whether the restrictive measures at stake were disproportionate in relation to the objective pursued, "having regard to the impact that those measures may have had on the free movement of Union citizens and their family members, on the right to respect for their private and family life guaranteed by Article 7 of the Charter and on the freedom to conduct a business, enshrined in Article 16 thereof, of legal persons".
[208] Ibidem, para. 93. See also to that effect, judgments of 22 November 2022, Luxembourg Business Registers, C-37/20 and C-601/20, EU:C:2022:912, para. 64 and the case-law cited, and of 26 April 2022, Poland v Parliament and Council, C-401/19, EU:C:2022:297, para. 66 and the case-law cited.
[209] C-128/22, para. 94–97.
[210] C-128/22, para. 95.
[211] See in this sense, Delhomme, op. cit., pp. 322–223.

The Court's analysis has left commentators strongly divided. Dabrowska-Klosinska described this analysis as prioritising risk and uncertainty over clear references to medical and scientific knowledge and as being detrimental to a rights-based approach.[212] In her account, this risk and uncertainty approach made it possible to lower the burden of proof for national authorities, thus shifting the standard of lawfulness of human rights limitation. Delhomme, by contrast, considered that the judgment strikes a convincing balance between the various interests at stake, preserving the capacity for public authorities to act and react swiftly to a public health emergency.[213] Ondrejek and Horak further argued that proportionality analysis is the best standard of constitutional review for times of crisis, provided that each component in its standard structure is adjusted to the precautionary principle.[214]

Although the case concerns the review of Member States' measures in the context of the Citizenship Directive and the Schengen Border Code, the principles and tests applied by the Court may be equally relevant to emergency measures adopted by the Union. While EU emergency measures will not necessarily derogate from a common framework, they must be proportionate to the objective pursued and may also involve restrictions to fundamental rights and freedoms, such as the freedom to conduct business. Following the *Nordic Info* ruling, EU institutions will be able to rely on the precautionary principles when justifying the suitability and necessity of emergency measures with regard to the objective pursued. Should EU emergency measures entail interferences to the freedom to conduct a business, to the right to respect for private and family life, or to any other fundamental right or principle of the Union, they will in addition be expected to balance interests and provide appropriate justification.

[212] Dabrowska-Klosinska P., "The EU Court of Justice on Travel Bans and Border Controls: Deference, Securisation and a Precautionary Approach to Fundamental Rights Limitations", *European Law Review*, 2025, Volume 50, Issue 1, pp. 107–124.
[213] Delhomme V. N. "The Legality of COVID-19 Travel Restrictions in an 'Area without Internal Frontiers': Court of Justice (Grand Chamber) 5 December 2023, Case C-128/22, Nordic Info", *European Constitutional Law Review*, 2024;20(2): pp. 307–328.
[214] P. Ondrejek and F. Horak, "Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures," *European Constitutional Law Review*, 20: 27–51, 2024, pp. 29, 44.

PART II
THE TRANSFORMATIVE EFFECT OF EMERGENCY MEASURES ON THE EU LEGAL ORDER

III. EMERGENCY AND ITS IMPACT ON THE SYSTEM OF UNION COMPETENCES

"J'ai toujours pensé que l'Europe se ferait dans les crises,
et qu'elle serait la somme des solutions qu'on apporterait à ces crises"
Jean Monnet[1]

Introduction

The often repeated statement by Jean Monnet that Europe will be forged in crises suggests that crises not only show the need for an emergency response at the European level, but also provide the opportunity and political momentum for the evolution of the European project in a wider sense.

The second part of this report aims to test this idea on the legal ground, by looking at the transformative effect that the exercise of emergency competence has on the EU legal order in light of the recent practice of the EU institutions. This chapter looks in particular at the impact of emergency measures on the system of competences of the Union and on the shaping of its policies.

The analysis of the measures deployed by the European Union to address the series of recent crises has shown that emergency and ordinary competences have been concurrently used by the EU institutions to respond to crises: far from being limited to the adoption of measures under an emergency legal basis, the Union has made full use of the instruments that the Treaties put at its disposal. Emergency measures adopted to derogate from existing regulatory frameworks have been supplemented by measures adopted under ordinary legal bases to (re)shape existing Union policies so as to allow them to tackle the new needs posed by the crises. In other words, ordinary Union policies have been redesigned as crisis instruments. In the aftermath of the

[1] J. Monnet, Mémoires, Paris, Fayard, p. 448.

crises this phenomenon has further accelerated as the co-legislators have taken stock of the lessons learnt and incorporated a number of crisis response frameworks in sectorial legislation as part of the regulatory regime for those sectors.

In a system based on the principle of conferred powers, the phenomenon calls into question the respective role of the ordinary and emergency legislators and exposes an overlap between their respective competences. The first section of this chapter therefore looks at the possible interference between emergency and ordinary powers from the standpoint of the Union system of competences.

The interaction between emergency measures and Union policies has a dynamic dimension as well. The impact of emergency measures often does not wane with the end of a crisis. Rather than being an exceptional regulatory regime meant to address the crisis situation and then to cease to have any effect in favour of the previously existing legal framework, emergency measures often anticipate solutions which are then incorporated in ordinary legislation. In such cases, the exercise of emergency powers operates as an accelerator to bring about change in the fabric of the ordinary legislation and shapes Union policies for ordinary times.

The second section of this chapter looks at this dynamic interaction between emergency measures and Union policies. It shows that in many instances the reciprocal interactions between emergency measures and ordinary legislation have resulted in a complex regulatory cycle whereby the innovations introduced in times of crisis receive political validation by incorporation in ordinary legislation. As a driver of dynamism and transformation of the EU legal order, however, the interaction between emergency and ordinary powers raises a number of questions concerning the shaping of EU law through the lens of crisis measures ("crisisification" of the regulatory framework) and the resultant impact on the institutional balance.

1. Interference? The use of ordinary legal bases to regulate emergency situations

1.1 Use of ordinary legal bases in emergency times: Suitability of OLP for crisis response

As the case studies described in Part I have shown, the Union's response to recent crises has combined measures based on emergency provisions with the adoption under ordinary legal bases of quick legislative fixes to the existing regulatory frameworks. In the process, ordinary Union policies have been redesigned as crisis measures.

A good example is provided by the intensive use of cohesion policy legal bases during the COVID-19 pandemic. The adoption by ordinary legislative procedure of the *Coronavirus Response Investment Initiative* (*CRII*)[2] and the *Coronavirus Response Investment Initiative Plus* (*CRII plus*)[3] amended the spending rules for cohesion funds to allow a rapid mobilisation of the existing cohesion funds to provide financial support for the immediate response to the pandemic. At the same time, the *European Solidarity Fund*, a relatively small cohesion instrument that has existed since 2002 to provide grants to Member States struck by natural disasters, was activated and modified so as to extend its scope to major public health emergencies and to double the total level of appropriations for the fund. Moreover, the Commission proposed an additional legislative amendment to the Common Provisions Regulation, the *Recovery Assistance for Cohesion and the Territories of Europe* (*REACT-EU*),[4] to supplement the cohesion funds legislation with a new thematic objective, enabling the additional resources made available thanks to the NGEU borrowing scheme to be used in support of crisis-response and crisis-repair measures. Finally, the most consequential measure to respond to the economic consequences of the COVID-19 pandemic was set up under a ordinary cohesion legal basis (Article 175 TFEU) as a fully fledged new instrument, the *Recovery and Resilience Facility* (RRF), aimed at supporting the recovery by financing national reform and investment plans (see Chapter I, section 2.1.3 above for a brief description of the main features of the RRF).

Outside cohesion policy, other examples of the use of ordinary legal bases to adopt emergency measures are the *Regulation on an EU Digital COVID Certificate*[5] and the amendment to the Regulation on common rules for the allocation of slots at Community airports (*Airport slots*

[2] 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, OJ L 99, 31.3.2020.
[3] Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No. 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak, OJ L 130, 24.4.2020, pp. 1–6.
[4] Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) No. 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU), OJ L 437, 28.12.2020, pp. 30–42.
[5] Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, OJ L 211, 15.6.2021, p. 1.

rules amendment).[6] Adopted on the basis of Article 21(2) TFEU (freedom of movement of persons), the *Regulation on an EU Digital COVID Certificate* was aimed at introducing mutually accepted certificates on COVID-19 vaccination, testing and recovery that citizens could use when travelling, so as to avoid problems linked to the acceptance of Member States' documents and thus facilitate the exercise of free movement. The *Airport slots rules amendment* was adopted on a transport legal basis (Article 100(2)) in order to temporarily suspend the airport slot requirements which oblige airlines to use at least 80% of their take-off and landing slots in order to keep them the following year.

Ordinary legislation has also been used to respond to the challenges raised by the reduction of gas supplies and the soaring prices during the energy crisis provoked by the Russian aggression of Ukraine. Indeed, the first package of measures at the EU level proposed by the Commission as part of its REPowerEU Plan did not include any proposal based on emergency competences, but rather proposals for amending existing regulatory or spending frameworks, together with a number of soft law instruments. In particular, the Commission proposed under Article 175(3)TFEU a *REPowerEU amendment* of the *Recovery and Resilience Facility*[7] in order to allow the use of Next Generation EU funds to finance measures aimed at pursuing REPowerEU objectives and increase the resilience of the Union's energy system by reducing dependence on fossil fuels and diversifying energy supplies. The Commission further proposed to the co-legislators amendments to an existing regulatory framework via a *Regulation on Gas Storage*[8] based on Article 194(2) TFEU. The Regulation introduced gas storage obligations for the Member States so that sufficient gas reserves could be available for the winter. It also set out provisions for compulsory certification of gas storage operators aimed at ensuring that existing storage capacities are used effectively, and providing for a range of measures, including the expropriation of the storage system, that could be taken if operators refused to undergo certification.

From the point of view of the system of competence of the Union, the recourse to ordinary legal bases to adopt emergency measures *in the context of a crisis* raises the same issues that exist

[6] Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EEC) No. 95/93 on common rules for the allocation of slots at Community airports, OJ L 99, 31.3.2020, pp. 1–4.
[7] Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans, OJ L 63, 28.2.2023, pp. 1–27.
[8] Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No. 715/2009 with regard to gas storage, OJ L 173, 30.6.2022, p. 17.

when those bases are used to set up permanent crisis frameworks *pro futuro*. We will analyse those issues in the next paragraph. It is however necessary to reflect here on the appropriateness and limits of the use of ordinary legal bases to address emergency situations from the point of view of the procedural framework for decision making.

Crisis situations require swift and decisive action. That is the argument traditionally invoked to support the idea of emergency competence in the first place. This is reflected in the simplified governance design for the emergency provisions of the Treaties, where the role of Commission and Council is central: acts are adopted by the Council by a qualified majority (sometimes reinforced, as in the case of Article 143 TFEU) on the basis of a Commission proposal (or recommendation, as in the case of Article 143 TFEU) and without involvement of the Parliament in the process (Article 78(3) TFEU exceptionally provides for Parliament to be consulted). In practice this design has allowed the Union to react particularly fast to situations of crisis and to adopt acts sometimes in a matter of days only, as, for instance, in the case of the EFSM Regulation, adopted at the height of the sovereign debt crisis of 2010 in just two days (Article122(2) TFEU legal basis), the activation and amendment of the Emergency Support Instrument at the outset of the COVID-19 crisis which took 12 days only (Article 122(1) TFEU legal basis), the adoption of the first Regulation on coordinated demand-reduction measures for gas in 16 days (Article 122(1) TFEU legal basis) and the adoption of the second 2015 Relocation Decision under Article 78(3) TFEU in a mere 13 days (see Table 2).

Table 2

Measures adopted during the COVID-19 Pandemic

List of measures adopted during the COVID-19 Pandemic				
Short title	Reference	Days for adoption	Area	Legal basis
SURE	Council Regulation (EU) 2020/672	47	Fical policy	122
EURI	Council Regulation (EU) 2020/2094	200	Fical policy	122
RRF	Regulation (EU) 2021/241	260	Cohesion	175(3)
CRII - Coronavirus Response Investment Initiative	Regulation (EU) 2020/460	17	Cohesion	43, 177, 178
CRII plus	Regulation (EU) 2020/558	21	Cohesion	177, 178, 322(1)(a)
REACT-EU	Regulation (EU) 2020/2221	209	Cohesion	177, 178, 322(1)(a)
EUSF Amendment	Regulation (EU) 2020/461	17	Cohesion	175, 212(2)
COVID certificates	Regulation (EU) 2021/953	89	Freedom of circulation	21(2)
Airport Slots rules amendment	Regulation (EU) 2020/459	17	Transport	100 (2)
ESI amendment and activation	Council Regulation (EU) 2020/521	12	Fiscal policy	122(1)

On the contrary, it is commonly understood that the democratic safeguards associated with the ordinary legislative procedure translate in a number of procedural steps, deadlines and

requirements[9] that inevitably expand the time for decision-making well beyond the temporal horizon of a pressing crisis. The average length of time taken for the adoption of a legislative file during the 9th Parliamentary term (July 2019-April 2024) – that is, the term during which the crises analysed in this report unfolded – seems to confirm this assumption: the average length for the adoption of a file at first reading was of 17 months, while it reached 39 months for files adopted at second reading.[10]

However, the average length of OLP files does not do justice to the capacity of the co-legislators to act very swiftly in situations of urgency. This was for instance the case of the *CRII* and *CRII plus* Regulations mentioned above, which at the outset of the COVID-19 pandemic were adopted respectively in only 17 and 21 days. Similarly, the activation of the *European Solidarity Fund,* together with its amendment in order to extend its scope to major public health emergencies, was concluded in just 17 days. The *Airport slots rules amendment* was also adopted in 17 days.

Such a rapid adoption is particularly remarkable if one takes into account the significant restrictions on travel and on meetings in person that were in force at the time, and that severely affected the usual working methods of the institutions. In fact, a number of procedural arrangements were put in place in order to ensure swift action. Parliament convened extraordinary plenary sessions,[11] in which it made use of a temporary alternative voting procedure by email.[12] Moreover, Parliament triggered the use of the urgent procedure provided for in rule 163 of its Rules of Procedure with the effect that no reports on the proposals were allowed from the committees responsible, with the Commission's proposals passing directly to the plenary for a vote, although it remained possible to table amendments.[13] The Council

[9] Definition of Parliament's position; trilogue negotiations between Parliament, Council and Commission; system of readings for the adoption of the act under Article 294 TFEU, involvement of national parliaments via the procedural safeguards and deadlines under the protocols on subsidiarity and proportionality; involvement of consultative bodies as required by the relevant material legal basis; involvement of the public in the form of enhanced transparency of the decision making process.
[10] European Parliamentary Research Service, *European Parliament: Facts and Figures*, PE 766.234, November 2024, retrievable at EPRS_BRI(2024)766234_EN.pdf.
[11] On 26 March 2020 and again on 16 and 17 April 2020.
[12] According to a new procedure decided by the Parliament's Bureau.
[13] Rule of Procedure – 9th Parliamentary term – July 2019, OJ L 302, 22.11.2019, pp. 1–128. Rule 163 has been modified in the recent 2024 amendment of the Parliament's Rules of Procedure, adopted on the first day of the Parliament's 10th term. The new rule 170 tightens the conditions for having recourse to urgent procedure by restricting the possibility to have recourse to the procedure only to cases when the proposal is the result of unforeseen developments. Moreover, for requests to use the urgent procedure made by the Commission or the Council, the statement of reasons will have to contain a detailed justification of each proposal and, where appropriate, a precise indication of legally required deadlines for the adoption or entry into force of the proposed legally binding act.

adopted its position and thus the relevant acts at first reading by written procedure, which became the normal working method of the Institution during the pandemic.[14] Finally, it was necessary to derogate from the requirement for an eight-week period between the draft legislative act being made available to national Parliaments and the vote in Council referred to in Article 4 of Protocol I on the role of national parliaments, as reflected by the recitals of the various acts.

These procedural arrangements were further combined with remarkable self-restraint demonstrated by the co-legislators, who decided not to modify the proposals presented by the Commission. In fact, while a number of amendments were tabled both in Parliament and in the Council, they were finally dropped on the understanding that had one institution requested changes to the Commission proposal, the other would have done the same in light of its own priorities. This would have made inter-institutional negotiations indispensable and in turn would have certainly delayed the adoption of the measures.[15]

It is interesting to note that this was indeed the case of the Commission's other proposals for emergency instruments to be adopted under ordinary legal bases: they were amended during the legislative deliberations in the Parliament and the Council, leading to the usual inter-institutional negotiations (trilogues). Even if still much shorter than the duration of the average legislative file during the 9th Parliamentary term, *REACT-EU* took 209 days to adopt, the *Recovery and Resilience Facility* took a full 260 days and the *Regulation on a EU Digital COVID Certificate* took 89. It is also interesting to note that, unlike the instruments described above – which essentially consisted in crisis related amendments to existing legal frameworks – two out of the three instruments (*RRF* and *EU Digital COVID Certificate Regulation*) were completely new and all introduced new significantly innovative features. A similar pattern can

[14] As it was impossible or extremely difficult for Council members to travel with a view to being physically present at Council meetings held at the Council's seat, and therefore to ensure the quorum required by Article 11(4) of the Council's Rules of Procedure, the Council decided to make it easier to have recourse to written procedure (which would normally require unanimity according to Article 12(1)) by allowing COREPER to decide to use written procedure in accordance with the voting rule applicable for the adoption of the Council act concerned. See: Council Decision (EU) 2020/430 of 23 March 2020 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, OJ L 88I, 24/03/2020, pp. 1–2 and subsequent 12 extensions. In 2022, the Council finally decided to amend its rules of procedure to make it a standard possibility for COREPER to decide to use written procedure with the voting rule applicable for the adoption of the act concerned in cases of urgency. See: Council Decision (EU) 2022/1242 of 18 July 2022 amending the Council's Rules of Procedure, OJ L 190, 19.7.2022, pp. 137–138.

[15] In the case of the *Airport slots rules amendment* a single amendment was requested by the Council, in order to extend the suspension of the airport slot requirements so as to cover the full summer season, e.g., an extension of a few more months if compared to the proposal from the Commission. The amendment was informally agreed with Parliament, which incorporated it in its first reading position.

be found in the case of emergency measures adopted under ordinary legal bases in the framework of the energy crisis. The *REPowerEU amendment* of the RRF took 285 days to adopt, while the *Regulation on Gas Storage*, for which Parliament triggered the use of the urgent procedure under rule 163, took 98 days.

In light of this practice it is possible to draw some conclusions. First, the Institutions have been able to equip themselves with the procedural adjustments necessary to remain open for business and maintain a capacity for swift action under ordinary legal bases when this is required by the urgency of the matter. Procedural adjustments are not sufficient, however, as a rapid adoption of the act can only be ensured if the co-legislators exercise a high level of self-restraint and give up or greatly limit the possibility to make amendments to the Commission's proposal. This, in turn, will be easier to achieve when the proposed measures are targeted and aim to introduce specific amendments to an existing legal framework, rather than seeking to introduce ambitious new instruments whose architecture is innovative, possibly controversial, and has never been discussed by the legislators.

Second, the practice exposes a paradox in the use of ordinary legal bases in emergency situations. The possibility to act swiftly under the ordinary legislative procedure comes at the price for the co-legislators of not really being able to introduce substantive modifications to the text under discussion. The Parliament and Council are in practice only left with the choice to accept or reject the Commission proposal – or to open a legislative discussion that inevitably would undermine the timeliness and thus the effectiveness of the emergency measure. In such a scenario, the safeguards of democratic control normally associated with the ordinary legislative procedure are significantly lessened, which leaves the procedure open to the objection traditionally levelled at to the use of emergency legal bases, that is, the lack of parliamentary control and the risk of dominance of the executive power.

Third, the situation strengthens the role of the Commission significantly. As the co-legislators are mutually deterred from modifying the proposal due to the shared aim of acting quickly, the Commission ends up being the real policy-maker rather than the usual honest broker between the co-legislators. The Commission's role is particularly enhanced if compared to the situations where the Council acts alone under the emergency competences provided for in the Treaties, as in this case the absence of Parliamentary involvement makes it significantly easier for the

Council to exercise its scrutiny over the Commission's proposal effectively and introduce amendments to the proposed instrument in a swift manner[16].

Most importantly, through the exercise of its power of initiative the Commission remains the gatekeeper, ultimately deciding whether a certain measure is proposed on the basis of an emergency legal basis or rather on an ordinary one, in situations where both options exist. Once a proposal is set on an ordinary legal basis, one could argue that the attempt by the Council to change the legal basis and adopt it as an emergency measure would amount to a denaturation of the original proposal[17] and would thus be excluded even at unanimity, without the agreement of the Commission. In exercising its discretion, the Commission would have of course to satisfy the conditions that emergency legal bases require for their use, but could also take into account reasons of expediency. For instance almost all of the instruments adopted to support Ukraine in its war effort against Russia have been proposed on ordinary legal bases, despite the urgency of the situation. This is in particular the case of the *Act in Support of Ammunition Production (ASAP)*, which is based on Article 114 and 173 TFEU.[18] As it has been stressed by authoritative members of the Commission Legal Service,[19] the reasons for such a choice are linked to the important budgetary implications of the Act in question, and in particular the question of how to interpret Article 41(2) TEU, which prohibits the use of the Union budget for expenditure arising from operations having military or defence implications. By proposing the Act on the basis of ordinary legal bases the Commission ensured that the European Parliament could be involved in the debate and could support a legal construction qualifying the measure as one supporting the adaptation of national defence industry to the structural changes required by the war of aggression against Ukraine and based on a restrictive interpretation of Article 41(2) TEU. The Parliament made use of the arrangements to accelerate the legislative procedure, and the act was finally adopted in 78 days.

[16] Of course Article 293 TFEU would still apply in these cases, with the effect that the Council will need to act unanimously if the Commission does not accept the envisaged amendment. Moreover, the need to act swiftly will also stymie the possibility of amendments in Council, notably to avoid a situation whereby the inclusion of changes requested by certain Member States would in turn prompt others to require additional modifications and thus open lengthy negotiations. Ultimately, the Commission's role will be strengthened as a result.

[17] Such a modification would entail a fundamental change in the content of its provisions, and most likely require a re-design to comply with the specific conditions which are associated with recourse to emergency competences.

[18] Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP), OJ L 185, 24/07/2023, pp. 7–25.

[19] D. Calleja, T. M. Rusche and T. Shipley, "EU Emergency – Call 122? On the Possibility and Limits of Using Article 122 TFEU to Respond to Situations of Crisis," *Columbia Journal of European Law*, 2024 (29:3), p. 557.

In conclusion, while recourse to ordinary legal bases in emergency times remains a viable option, notably in light of the procedural adjustments that the institutions had been able to put in place, it remains fully effective mainly in those cases where the co-legislators are required to adjust an existing regulatory regime via a quick fix. If the crisis requires an innovative or complex legal and policy response, an "emergency use" of the ordinary legislative procedure involves a real risk of not being able to deliver with the urgency required.

1.2 Use of ordinary legal bases to set out permanent emergency frameworks: Recent practice

Beside the use of ordinary legal bases to design emergency measures *during* a crisis, ordinary legal bases are also used to incorporate in sectorial legislation permanent crisis response and preparedness frameworks aimed at tackling future crises. Sometimes the two dimensions can coexist: for instance, during the COVID-19 pandemic the co-legislators activated and at the same time modified the *European Solidarity Fund*, which is a permanent instrument adopted on the basis of Article 175 TFEU.[20]

However, the phenomenon takes on its full significance when the legislator acts in ordinary times, for example, outside the heat of a crisis. A significant illustration is represented by the number of legislative initiatives presented by the Commission in the aftermath of the recent sequence of crises, from the various dimensions of the COVID-19 pandemic to Russia's invasion of Ukraine.[21] These initiatives were prompted by the call of the European Council for lessons to be drawn from the pandemic and for remaining fragmentation, barriers and weaknesses in the Single Market in facing emergency situations to be addressed, as well as by the call for European strategic autonomy to be achieved,[22] in particular by mitigating economic dependence on foreign supply chains in certain key sectors. This has led to a multiplication of initiatives proposing the establishment of crisis response frameworks in sectorial legislative instruments, with negotiations still ongoing in some cases. The proposed frameworks are built on and further developed many of the innovations introduced as *ad hoc* emergency measures during the recent crises. In certain cases, the emergency measures adopted in a given domain were wholly or partially "repatriated" in ordinary legislative instruments in the same domain,

[20] See: above. Similarly, the Council at the same time activated and modified the Emergency Support Instrument, which, however, was adopted under Article 122(1) and thus falls outside the scope of the present chapter.
[21] For a detailed list of the initiatives brought forward by the Commission see Commission Staff Working Document of 19 September 2022, Impact Assessment Report accompanying the proposal for a Single Market Emergency Instrument and related proposals, SWD/2022/289 final, Part I and Part II.
[22] Conclusions of the European Council of 1–2 October 2020, paras. 3 and 4, EUCO 13/20. See also more recently Conclusions of the European Council of 18 April 2024, para. 16, EUCO 12/24.

to make them available in future crises. In other cases, the solutions adopted as emergency measures in relation to specific domains have been mainstreamed and exported to other sectors which may face similar challenges (e.g., supply crisis).

The crisis response frameworks are generally designed around the same model: the activation of an "emergency mode" in the relevant domain allows for the adoption of pre-defined emergency measures at the European level, including market intervention measures often associated with financial penalties in the event of non-compliance by operators. In addition, the activation of the emergency mode can entail enhanced obligations for Member States, particularly if they adopt unilateral emergency measures. Unlike measures adopted under emergency competence (which are essentially reactive in nature) such crisis *response* frameworks are often supplemented by a crisis *preparedness* framework aimed at anticipating and identifying possible crises, in line with the much broader scope of the ordinary legal bases upon which they are based.

It is useful to mention here the most significant of these new legislative developments by area of Union policy and to sketch out their main features. It will then be possible to address the legal issues raised by the use of ordinary legal bases to regulate emergency situations.

1.2.1. Health and medical products

The *Regulation on Serious Cross-border Threats to Health*[23] was adopted on 23 November 2022 on the basis of Article 168(5) TFEU (public health). The new Regulation overhauls the permanent framework on communicable diseases, first established in 1998 with the creation of the *Early Warning and Response System*, and already revised in 2013.[24] Although the Union is precluded from adopting harmonising measures in the area, the Regulation now provides a full-fledged crisis preparedness and management framework. The preparedness phase has been significantly enhanced with the creation of a Union prevention, preparedness and response plan, to be drawn up by the Commission, and the coordination of national plans at Union level (see Chapter II). The Commission's recognition of a *public health emergency at Union level* remains the cornerstone of the EU's response in a public health emergency. That recognition in turn triggers the possibility to activate measures under other Union instruments, such as mechanisms

[23] Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No. 1082/2013/EU, OJ L 314, 6.12.2022, pp. 26–63.
[24] 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, OJ L 293, 5.11.2013, pp. 1–15.

to monitor shortages of medical countermeasures pursuant to the Regulation on a reinforced role for EMA. [25] Further, an Advisory Committee on public health emergencies composed of independent experts is established to support decision-making during the crisis.

The *Regulation on a reinforced role for EMA*, adopted on the basis of Articles 114 and 168(4)(c) TFEU (quality and safety of medicinal products and internal market), creates a gradual response framework. [26] If the Commission recognises a *major event* in relation to medicinal products in more than one Member State, the Agency moves into the first response phase.[50] The newly established Medicine Shortages Steering Group (MSSG) is to draw up lists of critical medicinal products, the supply and demand of which will be monitored.[51] This triggers information and reporting obligations on Member States and marketing authorisation holders concerned by the listed medical products.[52] The MSSG has a central role as it may on its own motion issue recommendations to the Member States and the Commission, but also to marketing authorisation holders and other entities.[53] The second response phase kicks in with the recognition by the Commission of a *public health emergency*. In that event, an Emergency Task Force (ETF) is convened in order to provide scientific advice on medicinal products that have the potential to address the emergency, notably with a view to accelerating clinical trials.[54]

Interestingly, in the context of the reform of the Union's pharmaceutical legislation currently under discussion, [27] the Commission proposed, through the introduction of a new chapter dedicated to the availability and security of supply of medicinal products, mechanisms to monitor and manage shortages of medicinal products even outside crisis situations. The mechanisms are inspired by the measures introduced in 2022 (information obligations, shortage prevention plans, identification of critical medicinal products and critical shortages, recommendations by the MSSG). One of the highly debated provisions in this context concerns the powers of the Commission to impose contingency stock requirements and other relevant

[25] Articles 23 to 25 of Regulation (EU) 2022/2371 and Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices OJ L 20, 31.1.2022, pp. 1–37.
[26] Regulation (EU) 2022/123, *op. cit*.
[27] Proposal for a Regulation of the European Parliament and of the Council laying down Union procedures for the authorisation and supervision of medicinal products for human use and establishing rules governing the European Medicines Agency, amending Regulation (EC) No. 1394/2007 and Regulation (EU) No. 536/2014 and repealing Regulation (EC) No. 726/2004, Regulation (EC) No. 141/2000 and Regulation (EC) No. 1901/2006, COM(2023) 193 final.

measures required to improve security of supply on marketing authorisation holders, wholesale distributors or other entities.[28]

1.2.2. Internal market

The *Internal Market Emergency and Resilience Act (IMERA)*[29] is a Regulation adopted on 9 October 2024 on the basis of Articles 21, 46 and 114 TFEU (free movement of persons, workers and internal market) establishing a framework to anticipate for and respond to the impact of crises on the internal market. In the event of a crisis,[30] the framework aims to safeguard the continued free movement of goods, services and persons, to ensure the availability of goods and services of critical importance and ultimately to prevent the creation of obstacles to the proper functioning of the internal market.[31] It does so by establishing measures for contingency planning (e.g., an early warning system, training, stress tests),[32] a vigilance mode which entails the monitoring of the supply of strategic goods and services which are under threat of a crisis,[33] and finally an internal market emergency mode.[34] It is the latter that deserves particular attention for the purposes of the present report.

The internal market emergency mode can be activated when a crisis creates obstacles to the free movement of goods, services or persons, having an impact on at least one sector of vital societal or economic importance. In the case of disruption of supply chains, it should be additionally assessed whether the goods, services or workers concerned can be diversified or substituted. The existence of a crisis needs to be assessed by the Commission and then the Council on the basis of a set of quantitative and qualitative indicators[35]; the internal market emergency mode is activated by means of a Council implementing act on the basis of a Commission proposal.[36] The Council implementing act must specify the duration of the activation, which in any event

[28] COM(2023) 193 final, Article 134.
[29] Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No. 2679/98, OJ L, 2024/2747, 8.11.2024.
[30] According to Article 3(1) of IMERA, "crisis" is intended to refer to an exceptional, unexpected and sudden, natural or man-made event of extraordinary nature and scale that takes place within or outside of the Union, that has or may have a severe negative impact on the functioning of the internal market and that disrupts the free movement of goods, services and persons or disrupts the functioning of its supply chains.
[31] Article 1(1) and (2) of IMERA.
[32] Title II of IMERA, articles from 9 to 13.
[33] Title III of IMERA, articles from 14 to 16.
[34] Title IV of IMERA, articles from 17 to 36.
[35] Article 17 of IMERA, laying down the criteria for activation of the internal market emergency mode.
[36] Article 18 of IMERA.

cannot be longer than six months.[37] The Council act may also lay down a list of crisis-relevant goods and services, as a condition for the further adoption of emergency response measures concerning them.[38]

The activation of the internal market emergency mode entails specific obligations for the Member States aimed at framing their recourse to national measures in reaction to a market crisis, when this is allowed under EU law.[39] In particular, national measures restricting free movement need to satisfy requirements concerning their limited duration, their lifting and the prior information to be provided to affected stakeholders,[40] and Member States are under an obligation to communicate the measures at stake, once adopted, to the Commission, to the other Member States and to the public.[41] Certain types of restrictions on the right to free movement are expressly prohibited as they are deemed manifestly disproportionate.[42] The Commission is also empowered to adopt mitigation measures for the free movement of persons, such as providing digital tools and templates to facilitate the identification of categories of persons and the verification of relevant facts.[43]

The activation of the internal market emergency mode also allows the Commission to adopt specific emergency response measures in relation to the crisis-relevant goods and services identified by the Council in the activation decision. The Commission can request information from economic operators concerning the production capacities and possible existing stocks of the crisis-relevant goods as well as expected production output and relevant disruptions.[44] It can further activate the emergency procedures included in sectorial instruments relating to specific products subject to an EU harmonised regime which entails various derogations from

[37] *Ibidem*. According to Article 19 of IMERA, if the Commission considers that the reasons for activating the emergency mode remain valid, it can propose to the Council an extension of the emergency mode for additional six months. If the Commission considers that the reasons no longer exist, it shall propose to the Council, without delay, the deactivation of the internal market emergency mode.
[38] Article 18 and 26 of IMERA. Emergency response measures can only be adopted in relation to specific crisis-relevant goods and crisis-relevant services among those identified in the Council implementing act activating the emergency mode.
[39] See, for instance, Chapter VI of 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. Recitals 39 and 40 make it clear that IMERA does not purport to provide additional grounds for the limitation of the right to free movement beyond those provided in sectorial instruments.
[40] Article 20 of IMERA.
[41] Article 23 of IMERA laying down specific transparency obligations on national emergency measures.
[42] Article 21 and recital 43 and following of IMERA.
[43] For example, the Commission can establish templates in order to identify the categories of persons involved in the production or supply of crisis-relevant goods and services for which it is necessary to facilitate free movement. See: Article 22 of IMERA.
[44] Article 27 of IMERA.

the harmonised rules with the aim of accelerating the placing on the market of those products.[45] The Commission can finally issue non-binding priority-rated requests asking economic operators to prioritise the production or supply of crisis-relevant goods in cases of severe and persistent shortage.[46] If the economic operator accepts the request for a priority-rated order, the Commission implementing act issuing the order will provide for a waiver of the operator's liability under prior contractual obligations. In the event of non-compliance with the information requests or accepted priority-rated orders, the Commission can impose fines on economic operators.[47]

Moreover, in the event of shortages the Commission can coordinate the distribution of crisis-relevant goods or services in a spirit of solidarity among Member States, by issuing recommendations. In the same vein, it can recommend to Member States measures to ensure the availability of crisis-relevant goods or services across the Union by the efficient reorganisation of supply chains, production lines and the use of existing stocks, as well as the acceleration of authorisation and product approval procedures.[48] Finally, when the internal market vigilance mode or emergency mode is active, the Commission can be requested by Member States to procure crisis-relevant goods and services on their behalf or can carry out a joint procurement procedure with the relevant authorities of the Member States. When Member States procure crisis-relevant goods and services autonomously, they are subject to obligations of information, consultation and coordination in a spirit of solidarity.[49]

The *Chips Act*[50] is a Regulation adopted on 13 September 2023 on the basis of Article 173(3) and 114 TFEU (industry and internal market) with the objective of strengthening Europe's semiconductor ecosystem. One important pillar of the instrument is a mechanism for coordinated monitoring and response to shortages in the supply of semiconductors, aiming to anticipate and swiftly respond to any future supply chain disruptions, through a dedicated emergency toolbox.

[45] Article 28 of IMERA, the emergency procedures allow, in the event of activation of a single market emergency, authorisation of the placing on the market of products that have not undergone the conformity assessment procedures required by EU legislation.
[46] Article 29 of IMERA.
[47] Articles 30 to 33 of IMERA.
[48] Articles 34 and 35 of IMERA.
[49] Articles 36 to 41 of IMERA.
[50] Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694, OJ L 229, 18.9.2023, pp. 1–53, (Chips Act).

Under the mechanism, in the event of a semiconductor crisis characterised by a serious disruption in the semiconductor supply chain or serious obstacles in the trade of semiconductors within the Union causing significant shortages which would have a serious detrimental effect on the functioning of identified critical sectors, the Council can, on a Commission proposal, activate the crisis stage. The Council specifies the duration of the crisis stage, which may not exceed 12 months but may be prolonged upon a proposal of the Commission if the conditions for the activation persist. [51]

When the crisis stage is activated, the Commission may have recourse to one of the measures included in the "emergency toolbox": it can require information from economic operators in the semiconductor supply chain on production capabilities, capacities and current disruptions[52]; it can adopt priority-rated orders, which mandate economic operators to prioritise crisis-relevant product orders over other legal obligations[53]; and, in response to requests from two or more Member States, it can act as a central purchasing body for the procurement of crisis-relevant products for critical sectors.[54] In the case of non-compliance with the information requests and the priority-rated orders, the Commission can impose fines on economic operators according to Article 33 of the Act.

It can finally be mentioned here the Commission Proposal for a European Defence Industry Programme (*EDIP Regulation*), based on Article 114(1) and 173(3) TFEU (industry) is currently in negotiations between the co-legislators.[55]

One of the key elements of the proposal is the establishment of a crisis framework aimed at ensuring the functioning of the internal market for defence products under any circumstances. The proposal provides for the possibility of activating two distinct crisis states. The first is the supply crisis state (Article 44), which occurs if: (a) there are serious disruptions in the provision of non-defence products, or serious obstacles to trade in such products within the Union causing their significant shortage; and (b) such significant shortages prevent the supply, repair or

[51] Article 23 of Chips Act, which defines in its first paragraph the situation of "semiconductor crisis" and lays down in the following one the procedure for the activation of the crisis stage. Annex IV enumerates the critical sectors that are protected by the mechanism due to their impact on society, the economy and the security of the Union. They include energy, health, baking, water, food, defence, security, space and public administration.
[52] Article 25 of the Chips Act.
[53] Article 26 of the Chips Act.
[54] Article 27 of the Chips Act.
[55] Proposal for a regulation of the European Parliament and of the Council establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products ('EDIP'), COM(2024) 150 final.

maintenance of defence products to the extent that it would have a serious detrimental effect on the functioning of the Union's defence supply chains impacting the society, economy and security of the Union. The second is the security-related supply crisis state, which can be activated if serious disruptions in the provision of defence products or serious obstacles to trade in defence products occur within the Union simultaneously to a security crisis,[56] causing significant shortages (Article 48).

Following the activation of a supply crisis state by a Council implementing act, the Commission may take, as appropriate, emergency measures defined in a "supply-crisis" emergency toolbox. These notably include information requests concerning production capabilities, production capacities and current primary disruptions. The Commission can also adopt prioritisation measures consisting of "priority-rated orders" related to non-defence products under the supply crisis state (Article 47) and "priority-rated requests" related to defence products under the security-related supply crisis state (Article 50).[57]

1.2.3. Border controls, asylum and migration

The incorporation of emergency frameworks in sectorial legislation in the aftermath of the recent crises has not been limited to internal market instruments. Also of particular significance are the legislative developments in the domains of border controls, asylum and migration.

The 2024 amendment of the *Schengen Borders Code*,[58] adopted on the basis of Articles 77(2)(b) and (e) and 79(2)(c) TFEU (borders and illegal immigration), responds to the shortcomings in the Union's management of the external and internal borders exposed during the 2015 refugee crisis and the COVID-19 pandemic. In particular, it addresses the issues raised by the disorderly reintroduction by Member States of travel restrictions for third-country nationals and internal border controls as well as the lack of appropriate tools to ensure

[56] Defined as a situation in which a harmful event has occurred or is deemed to be impending which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or requires measures in order to supply the population with necessities, or has a substantial impact on property values, including armed conflicts and wars – Article 1(18).

[57] The Council may activate additional measures under the security-related supply crisis state, mainly consisting of facilitating intra-EU transfers of defence products (Article 51); triggering the eligibility of a list of "innovation actions" under the Programme (Article 52); facilitating the certification of defence products (Article 53); and requiring Member States, where possible under national law, to fast-track permit granting processes (Article 54).

[58] Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L, 2024/1717, 20.6.2024.

coordinated Union action in the first days of the COVID-19 pandemic and during the peaks of the migration crisis. It does so under three different regulatory approaches.

First, it confirms the general principle that under the Code Member States remain responsible for exceptionally reintroducing border controls as a last resort in cases of serious threats to public policy or internal security, and it further details the situations in relation to which such threats may be considered to arise (and thus justify the reintroduction of border controls).[59] At the same time, the 2024 amendment strengthens the procedural safeguards associated with the reintroduction of border controls by Member States,[60] particularly by expanding the list of elements that must be assessed in order to demonstrate that the border control is necessary and proportionate,[61] by providing for a mandatory Commission opinion on the proposed border controls in certain instances[62] and by requiring the application of mitigating measures. The central role of the Member States is also confirmed in relation to the introduction of restrictions at the external borders. Besides the general derogations already provided in Article 5 of the Borders Code, Member States are now explicitly allowed to adopt the necessary emergency measures (e.g., closure of specific crossing points) in situations where large number of migrants attempt to cross their external borders in an unauthorised manner, *en masse* and using force,[63]

[59] Article 25(1) (a) to (d). In particular, the 2024 amendment includes a reference to terrorist incidents or threats, threats posed by serious organised crimes, large-scale public health emergencies, and large-scale international events (e.g., sporting events). The list also includes a reference to large-scale unauthorised movements of third-country nationals between the Member States which put a substantial strain on the overall resources and capacities of well-prepared competent authorities and are likely to put at risk the overall functioning of the area without internal border controls.

[60] See: Article 25, 25a and 27a Schengen Borders Code. As today, Member States are under an obligation to notify measures reintroducing border controls and the Commission and any other Member States may at any time adopt an opinion on the necessity and proportionality of the reintroduced controls.

[61] See: Article 26. New requirements include the need to assess the appropriateness of the measure of reintroducing border controls at an internal border (notably in light of alternative measures, such as checks carried out in the context of the lawful exercise of public powers by competent authorities in the border region and police cooperation) and the likely impact of such a measure on movement of persons within the area without internal border control and on the cross-border regions. In addition, prolongations concerning foreseeable threats exceeding six months should also include a risk assessment.

[62] Article 27a. The opinion of the Commission is mandatory if the Member State intends to prolong border controls for 12 months or more. The Commission opinion must include recommendations and be discussed in the framework of a consultation process. However, the procedure falls short of an authorisation mechanism and any infringements of the Borders Code's requirements by the Member State reintroducing border controls could only be contested by the Commission by way of the standard infringement procedure.

[63] Article 5(3). The provision aims to codify in the EU legal order the case-law of the European Court of Human Rights in the *Melilla* case, limiting the applicability of the prohibition of collective expulsion (Article 4 of Protocol 4 to the European Convention of Human Rights) in the event of an attempt by a large number of migrants to cross that border in an unauthorised manner and *en masse*. In that case, the Court considered that the applicants had in fact placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. They had not made use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen area's external borders. Consequently, the Court considered that

or in cases of instrumentalisation of migrants,[64] provided that those measures are proportionate and take full account of the rights recognised by EU law (notably the right of free movement and the rights of asylum seekers).

Second, in the exceptional case of a large-scale public health emergency affecting several Member States and putting at risk the overall functioning of the area without border controls, the introduction of border controls by Member States may be subject to an authorisation at Union level. More specifically, if available measures are not sufficient to address the large-scale public health emergency, the Commission may make a proposal to the Council to adopt a decision authorising the reintroduction of border controls by Member States and laying down appropriate mitigating measures. The Council decision may cover a period of up to six months and may be renewed for further six months upon a proposal from the Commission.[65] Once the Council has adopted the decision, Member States can reintroduce or prolong border controls only on the basis and according to the terms of the Council authorisation.[66]

Third, still in the case of large-scale public health emergencies, temporary restrictions at the external borders can be decided on at the EU level so as to ensure a uniform regime on travel to the Union. To this purpose, the 2024 amendment confers on the Council the power to adopt, upon a proposal of the Commission, an implementing regulation setting out temporary travel restrictions for third country nationals at the external borders.[67] Temporary restrictions on travel may include temporary restrictions on entry to the Member States and other measures considered necessary for the protection of public health in the area without internal border control, such as testing, quarantine and self-isolation. The Council regulation, where appropriate, identifies categories of persons to be exempted, the geographical areas or third countries from which travel may be subject to restrictions, the conditions under which non-essential travel may be restricted or exempted and the conditions under which essential travel

---

the collective expulsion (lack of individual removal decisions) could be attributed to the fact that the applicants had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct. Accordingly, there had been no violation of Article 4 of Protocol No. 4. Grand Chamber judgments of the ECtHR of 13 February 2020 in Case *N.D. and N.T. v. Spain* (no. 8675/15 and 8697/15).

[64] Article5(4). The definition of instrumentalisation under the new Schengen Borders Code cross-refers to Article 1(4)(b), first sentence, of the Crisis Regulation.

[65] Article 28 Schengen Borders Code.

[66] Article 29 of the Schengen Borders Code already provided for a specific procedure where the overall functioning of the Schengen area is put at risk due to persistent and serious deficiencies relating to the management of the external border in a Member State. In such a case, the Council may, on a proposal from the Commission, adopt as a last resort a recommendation addressed to one or more Member States to reintroduce border controls so as to protect the common interests within the Schengen area. Under this procedure, however, Member States remain free to decide whether to follow the Council recommendation.

[67] New Article 21a of the Schengen Borders Code.

may be exceptionally restricted.[68] Member States are allowed to adopt stricter restrictions, but need to comply with EU law and need to show that the national measures have no negative impact on the functioning of the Schengen area.[69]

The *Crisis Regulation* was adopted on 14 May 2024 on the basis of Article 78(2)(d) and (e) TFEU (asylum)[70] as an integral part of the New Pact on Migration and Asylum. The Pact aims to substantially reform the entire Union legal framework for asylum and migration management to address the challenges and dysfunctions highlighted by the various migration crises that have affected the Union since 2015 (see Part I, Chapter 1). In the framework of this overall reform, the Crisis Regulation caters for the possibility to derogate from certain rules concerning the normal handling of asylum requests and provides for an enhanced solidarity mechanism in specific situations of crisis. The *Crisis Regulation* is actually the result of the merging of two proposals presented by the Commission at different stages of the migration crisis and based upon the experience of ad hoc emergency measures: a proposal aimed at supplementing the rules of the Pact with a set of derogations applicable in situations of mass influx of migrants and *force majeure* and a proposal aimed at tackling situations of instrumentalisation of migrants.

The emergency framework set out by the adopted Regulation thus applies to three types of situations: migration crises provoked by an exceptional situation of mass arrivals of third country nationals on a scale that renders the Member State's asylum system non-functional and could thus entail serious consequences for the functioning of the Common European Asylum System[71]; migration crises provoked by a situation of instrumentalisation of migrants by a third country or hostile non-state actor which encourages or facilitates migratory movements with the aim of destabilising the Union or a Member State and liable to put at risk essential functions

[68] *Ibidem.* The provision identifies categories of persons to be exempted from restriction on entry in relation to their status (e.g., persons enjoying the right of free movement) or in relation to the purpose of their travel (e.g., essential travel identified according to two separate subcategories in Annex XI).
[69] Article 21a (3) of the Schengen Borders Code.
[70] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU), OJ L, 2024/1359, 22/5/2024.
[71] Article 1(4) (a) Crisis Regulation

of a Member State[72]; and, finally, situations of *force majeure* which prevents the Member States from complying with the relevant EU law on asylum.[73]

When any of those situations occurs, the Member State concerned may submit a request to trigger the emergency framework to the Commission which, if it considers that the conditions are met, determines the existence of a situation of mass arrival of migrants, *force majeure* or instrumentalisation within the meaning of the Regulation.[74] At the same time as this determination, the Commission is to submit to the Council a proposal for an implementing decision authorising the Member State to apply the derogations and the solidarity measures provided for in the Regulation.[75] The measures will remain in force for three months, automatically renewable once. After that, further prolongations will need to be expressly decided on by the Council on a proposal of the Commission, up to a maximum possible duration of 12 months.[76]

The Council implementing decision can authorise the Member State concerned to derogate from a number of obligations under the Asylum Procedure Directive, and notably to derogate from deadlines for registration and duration of the border procedure as well as for take-back notifications and transfers.[77] The use of the border procedure can also be extended to a greater number of arrivals, or even to all of them in situations of instrumentalisation.[78]

The Council decision can also trigger enhanced solidarity measures (additional to those provided for in the *Asylum and Migration Management Regulation* (AMRR) in a situation of crisis due to mass influx of migrants and instrumentalisation (but not in the case of *force majeure*). In particular, the Council decision can lay out a Solidarity Response Plan identifying the total amount of relocation contributions and other solidarity measures needed to address the situation of crisis as well as the indicative contributions of each Member State to contribute

[72] Article 1(4) (b) Crisis Regulation
[73] Article 1(5) Crisis Regulation defines *force majeure* as abnormal and unforeseeable circumstances outside a Member State's control, the consequences of which could not have been avoided notwithstanding the exercise of all due care, which prevent that Member State from complying with obligations under the Asylum and Migration Management Regulation and the Procedures Regulation.
[74] Article 3 of the Crisis Regulation. It is interesting to note that when determining the existence of a situation of instrumentalization the Commission will have to "consider whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants" according to recital 28. The impact of this provision on the institutional balance will be analysed further below in Section 1, Chapter IV of Part II.
[75] Article 4.
[76] Article 5.
[77] Articles 10, 11 and 12.
[78] Article 11.

their fair share.[79] If relocation pledges from Member States remain insufficient, more stringent rules kick in, including mandatory offsetting of responsibility for asylum applicants following a secondary movement, derogating from the "first country of entry principle."[80] Finally, in a situation of crisis due to extraordinary mass arrivals, a Member State may be further relieved of its obligations to take back an applicant for whom it is responsible under the "first country of entry" principle.[81]

1.2.4. Cohesion policy and budgetary instruments

Finally, the incorporation of emergency frameworks in sectorial legislation has also involved cohesion policy and budgetary instruments. In these cases, too, the legislative interventions have incorporated and generalised emergency solutions hastily adopted in the heat of a crisis.

A good example of the interaction between emergency response and adaptation of the ordinary legal regime to situations of crisis is offered by financial rules for the implementation of cohesion funds. A little more than a month after the adoption of the *CRII* and *CRII plus* Regulations (see above), the Commission tabled an amendment to its proposal for the *Common Provisions Regulation* for the implementation of the cohesion funds for the period 2021–2027 in order to incorporate similar crisis-related derogations in the future legislation. As in the case of *CRII* and *CRII plus,* the amendment was aimed at facilitating the use of the cohesion Funds in exceptional situations of economic shock.[82] The Commission also proposed a governance mechanism whereby the derogations could be decided on by the Commission once the Council had recognised, in the framework of the Stability and Growth Pact, the occurrence of an unusual event outside the control of one or more Member States which had a major impact on the financial position of the general government, or a severe economic downturn in the euro area or the Union.

[79] Article 4 (2)(b) and Article 8.
[80] Article 9.
[81] Article 13.
[82] According to the explanatory memorandum accompanying the proposal: "it is also imperative that the legal framework for cohesion policy provides for mechanisms that can be quickly invoked should further shocks strike the Union in the coming years. Correspondingly, measures for the use of the Funds are proposed in response to exceptional and unusual circumstances to ensure that under such circumstances […] derogations to certain rules may be provided to facilitate response to such circumstances." Amended proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM/2020/450 final.

It is interesting to note that the co-legislators adopted the amendment as part of the new Common Provisions Regulation[83] but introduced a number of amendments, notably restricting the scope of the derogations to certain funds, limiting the duration of the derogations and including the possibility for the Parliament (or the Council) to invite the Commission for a structured dialogue on the application of the provision.[84]

A second example is provided by the amendment of the *European Solidarity Fund* mentioned above, which was adopted by the co-legislators at the outset of the COVID-19 crisis in order to extend the scope of the fund and allow its mobilisation in response to major public health emergencies, and to define more favourable rules on the financing of specific operations. In this case the legislative intervention pursued a double aim: to allow an immediate emergency response, and to modify the legislative framework for future crises.[85]

Finally, we can mention the 2022 amendment of the *Financial Regulation* which adapted the applicable procurement rules in crisis management situations to allow an EU institution or body to procure on behalf of Member States or to act as a central purchasing body in order to donate or resell supplies and services to Member States, as well as to launch joint procurement procedures despite the EU institutions not acquiring services and supplies for themselves. It also updated the definition of a crisis to include public health emergency situations and provided for the crisis provisions to be triggered in line with applicable internal procedures.

1.3 Limits to the use of ordinary legal bases to regulate emergency situations: The case of Article 114 TFEU

The use of ordinary legal bases to regulate emergency situations needs to be reconciled with the principle of conferral, according to which the Union acts only within the limits of the competence conferred upon it in the Treaties by the Member States to attain the objectives set out therein (Article 5(2) TEU). In order to enable a proper legal review of these principles, any given Union act must be based on the appropriate legal basis, and in so doing must respect the

[83] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, pp. 159–706.
[84] Article 20 of the Regulation.
[85] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 2012/2002 in order to provide financial assistance to Member States and countries negotiating their accession to the Union seriously affected by a major public health emergency, COM/2020/114 final.

scope, nature and features of the underpinning Union competence (the purpose, scope and form of permissible action; limits to the Union's action in the matter; the institutional balance of powers; and the relationship with the exercise of national competence).

It follows that the use of ordinary legal bases to regulate emergency situations raises two distinct questions relating to the Union's system of competence:

– whether ordinary legal bases are appropriate to establish a regulatory regime for situations of emergency;

– what the relationship is between emergency regimes established in ordinary legislative instruments and the emergency legal bases– and, in particular, whether the use of an ordinary legal basis encroaches upon the competence (and related prerogatives and procedures) that the Treaties have codified in the emergency legal basis – and how to ensure coherence of action between the two.

The answer to the first question depends very much on the traditional doctrine on choice of legal basis as established by the case-law of the Court of Justice. According to that doctrine, the choice of the legal basis must be determined in accordance with objective factors amenable to judicial review, in particular having regard to the aim and content of the act in question in relation to the scope, nature and features of the underpinning Union competence.[86] It results that the answer to the question will depend on a case-by-case analysis of whether the envisaged emergency regime, as defined by its aim and content, can be deemed to fall within the chosen ordinary legal basis.

Without entering into a granular assessment of the various instruments recently adopted by the legislators to bring in emergency frameworks, it is useful to make some general remarks. First, as far as a legal basis allows the Union to regulate a given matter, there is no compelling reason to confine the regulatory competence to the definition of a general regime and thus exclude the possibility of regulating specific situations or circumstances as a matter of *lex specialis*. This

[86] See, *inter alia*, judgment of 11 June 1991, *Commission v Council (Titanium dioxide)*, C-300/89, EU:C:1991:244, para. 10; judgment of 17 March 1993, *Commission v Council*, C-155/91, EU:C:1993:98, para. 7; judgment of 29 April 2004, *Commission v Council*, C-338/01, EU:C:2004:253, para. 54; judgment of 10 January 2006, *Commission v Parliament and Council*, C-178/03, EU:C:2006:4, para. 41; judgment of 23 October 2007, *Commission v Council*, C-440/05, EU:C:2007:625, para. 61; judgment of 6 November 2008, *Parliament v Council*, C-155/07, EU:C:2008:605, para. 34; judgment of 19 July 2012, *Parliament v Council*, C-130/10, EU:C:2012:472, para. 42.

possibility falls in principle within the wide margin of discretion that the co-legislators enjoy in the exercise of their responsibilities, provided that such *lex specialis* complies with the principle of equality before the law set out in Article 20 of the Charter.[87] The proper identification of objective situations of emergency in the legislative instrument will be crucial to justify a difference of treatment. The main concern for the co-legislators will be to ensure that the measures envisaged by the emergency framework can satisfy the test of necessity and proportionality in relation to the aim pursued (see Part I, Chapter 2, section 3.4).

This approach is for instance well reflected in the Commission's proposals for a specific regime on asylum procedures, reception conditions and returns of migrants in situations of crisis and *force majeure* and in cases of instrumentalisation. Both proposals were presented as an integral part of the regulatory framework of the New Pact on Migration and Asylum, the fundamental idea of which is to establish a comprehensive approach to migration and asylum management. The two proposals were meant to complete and complement the general regime of the Pact with specific rules applicable in identified emergency circumstances (*lex specialis*). According to the Commission this would justify recourse to the same legal bases on which the other relevant components of the Pact are based. This rationale was confirmed by the co-legislators, which merged the two proposals and confirmed the choice of the legal bases for the adoption of the *Crisis Regulation* (see above).

Of course, the limitations which are inherent to the nature and scope of material legal bases as defined by the Treaties must be taken into account. In certain areas which have proven to be particularly relevant for emergency situations (e.g., health), the competence of the Union is one of providing coordination and support for the activities of the Member States and thus in principle unsuitable for emergency frameworks introducing harmonised and binding measures for undertakings.[88] Moreover, the scale and nature of the problems raised by a crisis situation may well straddle several areas of Union policy and legal bases. This explains why the Commission and the co-legislators have turned towards legal bases that, due to their horizontal scope and wide application, allow greater leeway for action. This is in particular the case of internal market legal bases, and in particular Article 114 TFEU on approximation of laws which has been recently used to propose – or has already led to the establishment of – permanent

[87] See, for instance, judgment of the Court of 17 October 2013 in case C-101/12, *Herbert Schaible v Land Bande-Wurttemberg*, point 77 and the case-law referred to therein.
[88] Article 168(5) TFEU allows for binding obligations on Member States, such as information and reporting obligations. Common procedures are laid down for fulfilling such obligations.

emergency frameworks like *IMERA,* the *Chips Act* and *EDIP,* as mentioned above. This is also the case of cohesion policy and in particular of Article 75(3) TFEU, which has been used to mobilise the Union budget to address crisis situation through existing or brand new spending instruments (*RRF, REPowerEU, CRII, CRII plus, EUSF*).

The recourse to ordinary legal bases which have specific objectives (removing obstacles to the functioning of the internal market; promoting economic, social and territorial cohesion) to establish emergency frameworks raises a number of delicate legal questions which have already fuelled an intense academic debate. Are those legal bases compatible with the different purpose of an emergency response, or would that purpose inevitably entail an expansive interpretation of the relevant Union competence, overstretching the boundaries of the relevant Treaty provisions? What are the implications in terms of design of the emergency framework resulting from the choice of ordinary legal basis? It is useful to briefly touch on those aspects in order to illustrate the Institutions' approach to the matter. We will focus on the case of Article 114 TFEU.

Article 114 TFEU is the central Treaty provision for harmonising or approximating the laws and administrative actions of the Member States with the aim of ensuring the establishment and functioning of the internal market, as set out in Article 26 TFEU. In so doing, the provision introduces an alternative to mutual recognition, which constituted the primary means for EU market integration before the Single European Act. Since then, harmonisation has progressively grown in importance to become the driving force in pursuing the objective of the internal market. As harmonising measures progressively impacted policy areas in which the EU has no or only complementary legislative competence, Article 114 TFEU has led to a significant amount of case-law and has been subject to increasing controversy as to whether it leads to a creeping expansion of the competence of the Union. These trends have further accelerated in recent times and notably during the 9th Parliamentary term, when a number of acts were adopted under Article 114 TFEU but also pursued particularly prominent general interest objectives not strictly related to the internal market, such as the protection of democracy and media freedom..[89]

[89] See, for instance, Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising, OJ L, 2024/900, 20.3.2024, Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ L, 2024/1083 and the Proposal for a Directive of the European Parliament and of the Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries, COM/2023/637 final, which is still being discussed by the co-legislators.

The growing trend towards an expansive use of Article 114 TFEU finds its limits, however, in the conditions defined by the Court of Justice as to the possibility to have recourse to that legal basis. The Court has in fact made clear that Article 114 TFEU does not confer upon the Union legislature a general power to regulate the internal market.[90] Rather, in order to rely upon Article 114 TFEU as a legal basis, a Union measure needs to satisfy three conditions:

– Disparities exist or are likely to emerge between national laws which are such as to obstruct the fundamental freedoms or cause significant distortion of competition and thus have a direct effect on the functioning of the internal market;

– The genuine purpose of the measure must be to eliminate these obstacles and thus to improve the conditions for the establishment and functioning of the internal market by harmonising national rules[91];

– No other legal basis under the Treaties is appropriate for the adoption of the measures.

For the sake of our analysis, it is important to stress that the Court has accepted that the legal basis can be used to prevent the emergence of future obstacles to trade resulting from divergent national provisions, provided that the risk is not just an abstract one. The Court has also held that the expression "measures of approximation" intends to confer on the Union legislature a discretion as regards the method of approximation most appropriate for achieving the desired result and this may include empowering institutions to take decisions directed at market operators in the framework of an appropriate harmonised mechanism so as to counter specific threats to the orderly functioning and integrity of the market in question.[92] Thus, the choice of Article 114 TFEU appears in principle appropriate to set up regulatory frameworks for the adoption of individual monitoring and intervention market measures such as the ones we have described in paragraph 1.2, provided that the other conditions identified in the case-law are satisfied.

[90] See judgment of 5 October 2000, *Germany v Parliament and Council* (*Tobacco advertisement*), C-376/98, EU:C:2000:544, para. 83.
[91] See judgment of 5 October 2000, *Germany v Parliament and Council (Tobacco advertisement*), C-376/98, EU:C:2000:544, para. 84; judgment of 8 June 2010, *Vodafone and others*, C-58/08, EU:C:2010:321, para. 32 and case-law cited; judgment of 2 May 2006, *UK v Parliament and Council (ENISA*), C-217/04, EU:C:2006:279, para. 42; Judgment of 10 December 2022, *British American Tobacco*, C-491/01, EU:C:2002:741, para. 60.
[92] Judgment of 22 January 2014, *UK v Parliament and Council (ESMA*), C-270/12, EU:C:2014:18, paras. 97-117.

In that regard, however, a tension may exist between the objective of addressing malfunctions of the market in a situation of crisis (e.g., shortages or disruption in the supply chain) and the scope of Article 114 TFEU as defined by the case-law.

As a matter of example, the emergence of crisis-induced shortages or disruption of supply chains which are the focus of *IMERA,* the *Chips Act* or the *EDIP* proposal cannot *as such* be considered obstacles to the free movement of goods in the internal market that would justify recourse to Article 114 TFEU as confirmed by the Court. Indeed, when the Court refers to the elimination of obstacles to the free movement of goods, it has so far referred to the removal of disparities between national rules that products must otherwise satisfy and not just to objective market conditions. Similarly, measures aimed at securing the production or the procurement of goods (e.g., priority-rated orders, joint procurement, stockpiling measures) may not at first sight appear relevant for cross-border trade or pertinent in relation to the risk of divergence between national rules, unless further conditions are specified. Lacking those conditions, such measures have a broader focus on ensuring the availability of goods in the internal market in a situation of scarcity rather than solely on ensuring their free movement. More generally, an emergency response to market crises based on the adoption at EU level of restrictions to the freedom of economic operators would appear to create obstacles to the free movement of goods rather than remove them, and needs therefore to be adequately justified and qualified in order to be compatible with Articles 114 and 26(2) TFEU.

The above considerations were very well in the mind of the co-legislators during the negotiations of the legislative instruments mentioned in paragraph 1.2 above. They explain a number of changes that were introduced in the final texts if compared to the proposals as originally submitted by the Commission, in order to refocus the proposed emergency frameworks on an internal market rationale based on divergence of national provisions, which could justify their adoption on the basis of Article 114 TFEU.

A good example of such redrafting is provided by *IMERA*, which also illustrates the contribution of the Legal Services to the legislative work of the Institutions. Following the presentation of the Commission's proposal, the Council working party in charge of the proposal requested an opinion from the Council Legal Service as to the appropriateness of the legal bases proposed by the Commission for the adoption of the act. The opinion of the CLS identified a number of shortcomings in the Commission's proposal and guided work to re-focus and redraft certain elements of the proposal. This in particular concerned:

– The objective of the proposal (Article 1), which was clarified and tied more closely to ensuring the proper functioning of the internal market, by preventing the creation of obstacles to the proper functioning of the Market and by preventing the application of divergent measures by Member States;

– The definitions, and notably the definition of crisis and internal market emergency mode (Article 3), which were made more specific by adding a reference to their impact on the functioning of the internal market and freedom movement as well as the risk of divergent national measures which may impact the functioning of supply chains;

– The conditions for the triggering of the internal market emergency mode (Article 17) were clarified and further framed, so as to include an assessment by the Commission and the Council of the fact that the crisis creates obstacles to the free movement, having an impact on a vital sector in the internal market, in line with Article 114 TFEU;

– The provision on prior rated requests was further framed (Article 29) while the provision on strategic reserves was dropped altogether;

– The rationale and objective of the instrument, which was recentred around the risk that disruption of supply chains and shortages of goods and services may pose for the proper functioning of the internal market, notably through a careful redrafting of the recitals.[93]

While the strengthening of the internal market rationale provides a more solid justification for the choice of Article 114 TFEU,[94] it comes at a cost linked to the inherent limitations of this legal basis.

Apart for the reframing of the instrument through the lens of the internal market and redefinition of the parameters of its activation as explained above, this is particularly relevant in relation to

[93] Compare recital 6 of the Commission proposal, which did not link the situation of shortages and supply chain disruption with obstacles in the free movement in the internal market, with the new drafting of recital 8: "The impact of a crisis on the internal market can hinder the functioning of the internal market in two ways. It can give rise to obstacles to free movement or it can cause disruptions to supply chains. Disruptions to supply chains can exacerbate shortages of goods and services in the internal market and hinder production, which leads to additional barriers to trade and to the distortion of competition between Member States and between private operators, thereby disrupting the proper functioning of the internal market. Disruptions to supply chains can also lead to the emergence or likely emergence of diverging national measures to address those supply chain issues, leading to the activation of an internal market emergency mode. This Regulation should address these types of impacts on the internal market and introduce measures to avoid obstacles to free movement or supply chain disruptions that create shortages of crisis-relevant goods or services."

[94] A similar reframing of the instrument also took place during the legislative negotiations on the *Chips Act*.

the solidarity dimension of the crisis framework. As a matter of fact, while the element of solidarity is a key principle of the Union emergency competences (see Part I, Chapter 2, Section 3), it is not among the objectives of the internal market as defined in Article 26 TFEU and operationalised in Article 114 TFEU.

This does not exclude the possibility that harmonisation measures under Article 114 TFEU can additionally pursue an objective of solidarity among the Member States. The Court of Justice has indeed confirmed that measures adopted under Article 114 TFEU can pursue general interest objectives in addition to internal market ones, even when those other policy objectives are a "decisive factor" in the choices to be made.[95] Although this case-law has been developed in relation to the general interests explicitly mentioned in Article 114(3) TFEU (high level of health, environmental or consumer protection), it is inherent in the logic of Article 114 TFEU that harmonisation is not an end in itself but is meant to respect the specific public interest objectives pursued in the policy area concerned. This requires us to consider that the very rationale of handling emergencies at the EU level – rather than leaving to Member States the responsibility to act unilaterally – is to promote solidarity.

Finally, solidarity is recognised as an essential attribute of society in Article 2 TEU, which sets out the values on which the Union is founded. In that regard, the Court of Justice in its landmark judgment on the rule of law conditionality regulation has ruled that "*the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.*"[96] Thus the co-legislators are empowered to ensure the protection of the values mentioned in Article 2 TEU wherever they have an appropriate legal basis for taking legislative action.

It remains, however, that the pursuit of solidarity should not undermine the pursuit of the internal market objective which needs to remain genuine and underpin the whole regulatory framework. Moreover, since the pursuit of solidarity is not a requirement under Article 114 TFEU, the extent to which the emergency frameworks established under that legal basis pursue a solidarity rationale will depend very much on the choice of the co-legislators in the exercise of their wide margin of discretion.

[95] See: judgment of 4 May 2016, *Philip Morris*, C-547/14, EU:C:2016:325, para. 60 and case-law quoted there; judgment of 8 June 2010, *Vodafone*, C-58/08, EU:C:2010:321, para. 36.
[96] Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 127.

It results therefore that the choice of Article 114 TFEU as a legal basis entails a possible reduction of the level of solidarity pursued by the emergency framework. This is indeed reflected by the final outcome of the legislative work on *IMERA*,[97] which has weakened the solidarity dimension of the original Commission's proposal, for instance, by ditching the possibility for the Commission to issue mandatory priority orders to economic operators[98] and mandatory requests to Member States to build up strategic reserves for goods of strategic importance.[99]

A last condition for recourse to Article 114 TFEU is that the envisaged measure cannot be adopted under any other legal basis under the Treaties. This requirement raises the issue of the relationship between ordinary and emergency legal bases, which will be discussed in the next paragraph.

1.4 Relationship between ordinary and emergency legal bases in the response to crisis situations

In a legal order characterised by the principle of attributed powers, the use of ordinary legal bases to introduce permanent emergency frameworks raises questions as to the possible overlap with the exercise of emergency competence and respect for the prerogatives and procedures that the treaties have codified in emergency legal bases. Is there a "preserve" of emergency competence that cannot be encroached upon? Or, conversely, is the emergency competence subsidiary in nature, so that it can no longer be exercised once that the ordinary legislator has occupied the ground? To what extent can the two competences coexist, and if they do, how can it be ensured that they are exercised in a coordinated way?

1.4.1 The coexistence of ordinary and emergency competence

Both the case-law of the Court of Justice and the practice of the institutions play against interpreting the emergency provisions of the Treaties as establishing a *domaine reservé* for the management of crisis situations in favour of the specific procedures and specific role for certain

[97] Similar considerations apply to the *Chips Act*.
[98] According to Article 27(4) of the proposal, economic operators could refuse to comply with priority-rated orders only by invoking "duly justified reasons", failing which they would face fines according to Article 28(1)(b). In the final text of *IMERA* the measure in question becomes voluntary and is therefore renamed "priority-rated requests."
[99] See: Article 12(6) of the proposal. Both elements are aimed at operationalising the principle of solidarity in practice, by conferring on the Commission the power to operate mandatory reallocation of scarce resources. Without those elements, the regulatory framework shifts towards a cooperative model, based on the voluntary acceptance of measures by Member States (use of reserves) and economic operators (priority-rated requests).

institutions (notably the Council) provided therein; in fact, in the logic of the Treaties emergency competences are rather conceived as existing in parallel to ordinary competence. While emergency competences would overlap with (and, as necessary, derogate from) ordinary legislation, they could never have the effect of pre-empting the exercise of ordinary competence. This is well illustrated by the case-law as well as the practice in relation to the two most relevant emergency competences analysed in this report: Article 122 TFEU and Article 78(3) TFEU.

In the case of *Article 122 TFEU*, the relationship between the provision and other legal bases under the Treaties is defined by the "without prejudice" clause which opens the first paragraph and which has already attracted much academic attention.[100] The expression is admittedly difficult to interpret, as commentators have already remarked. The meaning usually given to the expression in legislative acts – namely "without affecting" or "independently of" – works well to describe the relationship between two substantive rules: it indicates that the rule to which reference is made remains fully applicable and in the case of conflict, prevails over the rule containing the clause. Such an interpretation, however, does not fit well with provisions containing a legal basis, that is, defining the scope of competences.

In such a situation, the "without prejudice" clause can have two distinctive meanings: it could mean that one legal basis is subsidiary, for example, it could only be used if no other legal basis applies. It could also mean that the two legal bases apply in parallel, and independently from each other. What would then differentiate the recourse to the two legal bases would be the circumstances of their use, which in the case of Article 122(1) are characterised by the existence of a situation of emergency.

This second interpretation is the one that the Court of Justice has upheld in relation to the predecessor of Article 122(1) TFEU, Article 103 of the Treaty of Rome. In its judgment in the *Balkan Import* case,[101] the Court reflected on the relationship between the said provision and other ordinary ones that "in normal times" would have justified the adoption of the contested measures:

[100] Chamon, "The use of Article 122 TFEU – Institutional implications and impact on democratic accountability," study requested by the European Parliament's AFCO Committee, PE 753.307, 21–23; Weber, "Die Neuordnung der EU-Wirtschaftsverfassung durch Art. 122 AEUV?." 149 AÖR (2024), 82–122, at 88; Chamon, "The EU's dormant economic policy competence: Reliance on Article 122 TFEU and Parliament's misguided proposal for Treaty Revision," 49 EL Rev. (2024), 166–187, at 175;
[101] Judgment of the Court of 24 October 1973, *Balkan Import*, case C-5/73, EU:C:1973:109.

"14. […] These measures, intended to compensate temporarily for the harmful effects of national monetary measures, so that the process of economic integration may meanwhile continue its progress, are of an essentially transitory nature and would normally have had to be adopted by virtue of the powers conferred on the Council by Articles 40 and 43 and in accordance with the procedures set out therein, in particular after consulting the Assembly.

15. However, owing to the time needed to give effect to the procedures laid down in Articles 40 and 43, a certain amount of trade might then have passed free of the regulations, and this could jeopardise the relevant common organizations of the market.

There being no adequate provision in the common agricultural policy for adoption of the urgent measures necessary to counteract the monetary situation described above, it is reasonable to suppose that the Council was justified in making interim use of the powers conferred on it by Article 103 of the Treaty.

Consequently – while the suddenness of the events with which the Council was faced, the urgency of the measures to be adopted, the seriousness of the situation and the fact that these measures were adopted in an area intimately connected with the monetary policies of Member States (the effects of which they had partially to offset) all prompted the Council to have recourse to Article 103 – Regulation no 2746/72 shows that this state of affairs was only a temporary one, since the legal basis for the measure was eventually found in other provisions of the Treaty."[102]

The Court's approach is, without mentioning it, based on a teleological interpretation of the then Article 103 TEC, and more specifically a "consequentialist interpretation,"[103] which focuses on the consequences that would ensue from the alternative interpretation of Article 103 TEC as a residual legal basis: if that was the case, the provision would not ensure the capacity

[102] *Balkan Import*, points number 14 and 15.
[103] Lenaerts and Gutierrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice," EUI Working Papers, AEL 2013/9, p. 25; J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford, Clarendon, 1993).

for the Union to react effectively to a situation characterised by its "suddenness… urgency… and seriousness," thus compromising its useful effect.[104]

Despite the evolution of the provision in the various iterations of the Treaties, that reasoning remains pertinent today.[105] As such, it has informed the practice of the Institutions in recent uses of the provision.[106] It results therefore that Article 122 TFEU allows the adoption of "measures" that could in principle also be adopted under another, ordinary, legal basis, were it not for the emergency context in which they are to be adopted. Conversely, the ordinary legal bases are not pre-empted by the exercise of the emergency competence, which remains limited to adopting "measures appropriate to the situation," and thus by definition temporary. In this sense, Article 122(1) TFEU is without prejudice to ordinary legal bases, even when those are used to set up a permanent framework for regulating emergency situations.

The interpretation of Article 122 as a parallel and contextual emergency competence allows for clarification of its relationship with Article 114(1) TFEU and the condition laid down there that the harmonisation legal basis can only apply "save where otherwise provided in the Treaties." While being parallel, competences under Article 122 and 114 TFEU rest on divergent paradigms as far as their triggering conditions differ significantly. In the case of Article 122, which is an emergency competence, the trigger for recourse to that legal basis is defined in light of the needs in a specific context (see the words "measures appropriate to the economic situation"). By contrast, the competence under Article 114 TFEU may be exercised "for the achievement of the objectives set out in Article 26." This means that nothing would prevent reliance on Article 114 TFEU for the adoption of measures that could have similar content provided that the conditions for the application of Article 114 were met; this also includes the

[104] The teleological reasoning was made more explicit in the of opinion Advocate General Roemer in the *Balkan Import* case. Advocate General Roemer underlined that the *"*speedy effectiveness of measures of conjunctural policy" would have been compromised if the Union had to act according to different procedures. Advocate General Roemer thus concluded that "one ought therefore to take the view that Article 103 can be used independent of other Treaty provisions and *parallel* to them, provided there is a goal in conjunctural policy to be aimed for."
[105] The shift from the notion of "conjunctural measures" in Article 103 TEC to the notion of "measures appropriate to the economic situation" does not affect the logic of the reasoning, even if it may have consequences when defining the features of the measures that can be adopted. On this see: Part I, Chapter II, section 2.1.
[106] In its opinion on the compatibility with the Treaties of the Next Generation EU scheme, the Council Legal Service clearly links the "without prejudice" clause to the emergency nature of the provision (and thus its operating in parallel to ordinary legal basis, when the conditions are met): "The introductory words 'without prejudice to any other procedures provided for in the Treaties' underscore the exceptional and temporary nature of measures under Article 122(1) TFEU, as recourse to that provision may not undermine or circumvent the use of other legal basis laid down in the Treaties for use in 'normal times.'" Opinion of Legal Service of 24 June 2020, "Proposals on Next Generation EU," ST 9062/20, p. 49.

possibility to establish permanent emergency frameworks such as those recently introduced by *IMERA* and the *Chips Act*.

Moving to Article 78(3) TFEU, while this provision does not include an explicit "without prejudice" or similar clause clarifying its relationship with ordinary legal bases in the area of migration, it does include a clear definition of its triggering situation, which is associated with an emergency context: the Council is empowered to adopt provisional measures "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."

Thus the contextual nature of the legal basis reflects the purpose of the provision (addressing a situation of emergency) and at the same time defines its relationship with ordinary legal bases. This is the logic that the Court of Justice followed to clarify how Article 78(3) relates to the ordinary legislative competence for establishing a permanent policy on asylum:

> 73. They are in fact two distinct provisions of primary EU law pursuing different objectives and each having its own conditions for application, which provide a legal basis for the adoption, in the case of Article 78(3) TFEU, of provisional, non-legislative, measures intended to respond swiftly to a particular emergency situation facing Member States and, in the case of Article 78(2) TFEU, legislative acts whose purpose is to regulate, generally and for an indefinite period, a structural problem arising in the context of the European Union's common policy on asylum.
>
> 74. Accordingly, those provisions are complementary, permitting the European Union to adopt, in the context of the common policy on asylum, a wide range of measures in order to ensure that it has the necessary tools to respond effectively, both in the short term and in the long term, to migration crises.

The qualification of the two legal bases as "complementary" echoes the notion of "parallelism" identified above, while also stressing the interconnection existing between them, as they both concur in defining a common policy. The conclusion is the same: the existence of a competence which allows the Union to "respond swiftly to a particular emergency situation" leaves unfettered the possibility for the ordinary legislator to set up permanent frameworks to "regulate, generally and for an indefinite period" (recurring) situations of crisis. The two

examples show that unlike ordinary competences that are *objective-driven*, emergency competences are rather circumstantial and *needs-driven* under the Treaties.

1.4.2 Coherence and coordination between emergency instruments

Once clarified that emergency and ordinary legal bases can concur in regulating emergency situations, the question arises of how to ensure coherence and coordination between different emergency instruments. The question is all the more relevant as the two sets of legal bases provide for different procedural requirements, which could enhance the risk of divergence.

This concern is at the root of a number coordinating provisions that the co-legislators have introduced in permanent emergency frameworks established under ordinary legal bases. These coordinating safeguards relate both to the material scope and to the governance of the emergency frameworks.

In the field of migration, a good example of scope coordination is provided by recital 11 of the *Crisis Regulation*, which makes clear that "the adoption of measures under this Regulation in respect of a particular Member State should be without prejudice to the possibility to apply Article 78(3)," which possibly opens the door to a cumulative adoption of measures both under the Regulation and the emergency legal basis (see below for further reflections on the interaction between the two).

The *IMERA Regulation* goes to great lengths in ensuring coordination with other Union emergency frameworks. In fact, due to the wide and horizontal scope of *IMERA* and the existence of a number of crisis-related instruments at the EU level, and notably within the internal market, the issue of their interactions and indeed of the added value of the proposed instrument was at the centre of the legislative debate.[107] The solution chosen in the proposal, and then in the final legislative act, is to exclude altogether from the scope of IMERA certain domains (such as financial services, medicinal products, medical devices or other medical countermeasures, food safety products, defence-related products)[108] and then clarify that the *IMERA* framework will apply without prejudice to the provisions of other existing and more

[107] The point was raised already as critical in the opinion (positive with reservations) of the Regulatory Scrutiny Board on the Impact Assessment Report of the Commission Proposal. The Regulatory Scrutiny Board notably stressed that the Report "should better explain and analyse with examples the hierarchy and interaction of these measures/instruments that would apply in a crisis situation." Regulatory Scrutiny Board Opinion of 17 August 2022, SEC(2022) 323 final.
[108] Article 2(2) and recitals 11, 14 and 15.

targeted instruments, which are to be considered as *lex specialis* and thus prevailing in the event of conflict.[109] The Regulation also explicitly reiterates that it is the responsibility of the Member States to safeguard national security and confirms their power to safeguard other essential state functions, including ensuring the territorial integrity of the state and maintaining law and order.[110] Such a reference to the general safeguard clause of Article 4(2) TEU is of dubious added value, since it does not appear sufficient to avoid the limiting effect that the adoption of a EU regime for the protection of certain interests ultimately has on the possibility for Member States to adopt unilateral action in pursuit of the same objective.[111]

Coordination between emergency measures and ordinary legislation can also be ensured by delimiting the temporal scope of application of the two sets of rules, to avoid their overlapping. This approach has been followed for instance in the domain of energy, where various emergency measures hastily adopted to face the gas supply crisis due to the Russia's war of aggression against Ukraine were then "repatriated" in the permanent framework under ordinary legislation, because they were deemed to be useful in ordinary times too. For instance, the *Renewable Energy Directive (RED)*[112] incorporated several provisions for accelerating the permit-granting procedure for renewable energy technologies already included in the emergency Council Regulation 2022/2577 based on Article 122(1) TFEU.[113] To avoid overlapping or a gap between the two regimes, the *RED* set the deadline for the transposition of the relevant provisions as the date of expiry of the emergency Regulation.[114] Similarly, the

[109] The term is used in the explanatory memorandum accompanying the proposal. Article 2(3) as adopted clarifies that the Regulation is without prejudice to a number of existing crisis response or crisis management mechanisms such as the Union Civil Protection Mechanism, the IPCR, the EU Health Security Framework. See also: recitals 16 to 21.

[110] Article 2(6) and recital 11.

[111] The emphasis on the prerogatives of the Member States as well as the explicit recognition that they could adopt emergency measures in an internal market emergency, subject to certain limitations and information requirements (see above), has led to criticism as to the real added value of the proposal. See, for instance, the declaration of Luxembourg upon adoption of the Regulation: "*Unfortunately, Luxembourg has serious doubts as to whether the 'Single Market Emergency Instrument' (SMEI) will live up to these principles. At a time when the EU needs to strengthen the integration and resilience of the internal market, an instrument like the SMEI runs the risk of allowing Member States to impose additional restrictions in a crisis situation. The lessons learned following the numerous restrictions introduced by Member States during the pandemic show that obstacles must be addressed at source and in accordance with the Treaties. However, the SMEI – or IMERA (Internal Market Emergency and Resilience Act) – merely treats symptoms rather than causes, while adding new layers of bureaucracy likely to hamper crisis management.* " Council doc. ST 13030/24 ADD1.

[112] Directive (EU) 2023/2413 of the European Parliament and the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 (OJ L 2023/2413, 31.10.2023).

[113] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ L 335, 29.12.2022, p. 36.

[114] Council Regulation 2022/2577 was finally prolonged and thus an overlapping between the two regimes did occur. The possible interferences between the two regimes – and thus between the emergency and ordinary competence – will be discussed in the next paragraph.

Gas Market Package Reform[115] transformed some of the crisis measures introduced by emergency Council Regulation 2022/2576, also based on Article 122(1) TFEU,[116] into permanent features of the natural gas market.[117] However, in order to avoid an overlap between the two regimes, the application of the permanent rules was deferred until expiry of the temporary emergency framework.[118]

In other cases, the coordination can be achieved by the inclusion of provisions that establish a principle of subordination, so that the measure adopted under an emergency competence becomes available only where the ordinary instruments are not sufficient. This is, for instance, the case of the *Emergency Support Instrument*, which established, on the basis of Article 122(1) TFEU, a framework for the provision of emergency support in the event of a natural or man-made disaster. Article 1 of the *ESI Regulation* provides that such emergency support can only be provided where a certain threshold of gravity is reached, and most importantly only "in the exceptional circumstances where no other instrument available to Member States and to the Union is sufficient."[119] This provision confers a subsidiary character to *ESI:* while, as explained above, that characteristic is not a requirement resulting from the emergency legal basis, its inclusion reflects the choice of the Council to ensure the exceptional character of the emergency measures.

Coordination can otherwise be achieved via the governance structures of the sectorial crisis management frameworks. In some instances, crisis measures are triggered when the existence of a state of crisis is determined according to a sectorial procedure referred to in the legislative act. This is for instance the case of the emergency regime for the use of cohesion funds introduced during the negotiations on the *Common Provisions Regulation* for the programming period 2021–2027 (see paragraph 1.2.4 above). Article 20 links the possibility for the Commission to adopt derogations from the general regime for the implementation of the funds where the Council has recognised that a situation of economic crisis has occurred, in the cases

[115] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009, OJ L, 2024/1789, 15.7.2024.
[116] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders, OJ L 335, 29.12.2022, p. 1.
[117] That concerned in particular the mechanism for demand aggregation and the joint purchasing of natural gas, measures to enhance the use of LNG facilities and natural gas storage, as well as additional solidarity measures in the event of a natural gas emergency.
[118] See: recital 111 Regulation (EU) 2024/1789, quoted above.
[119] Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70, 16.3.2016, pp. 1–6.

and according to the procedures set out in the Stability and Growth Pact. The mechanism thus ensures the coordination between the two different regimes, by incorporating in one the determination made by the Council in the other.

In most cases, however, the crisis framework defines a specific triggering event (e.g., a crisis affecting the sector in question) and an autonomous governance mechanism. These governance mechanisms are based on different designs, but all envisage a central role for the Council in the implementation of the crisis framework. While we will analyse the different alternative governance designs in more detail in Section 3 of Chapter III, it is important here to stress that the conferral of implementing powers on the same institution that is empowered to act under the emergency provisions laid down in the Treaties helps to ensure coherence and coordination in the emergency action of the Union. Crucially, the centrality of the Council in the governance of the Union response also promotes coherence and coordination with the emergency action of the Member States, which remain the main actors in emergency situations.

1.4.3 Effects of the exercise of ordinary and emergency competence on their respective scope

One final issue concerns the reciprocal interference resulting from the exercise of ordinary and emergency competences. Even if the complementary/parallel nature of emergency competence excludes an effect of pre-emption when ordinary legal bases are used to adopt crisis response frameworks and *vice versa*, the occupation of the normative space may well have consequences on the subsequent exercise of the competence. Two situations deserve further reflection.

The first situation concerns the setting up of permanent emergency frameworks under ordinary legislation and its relevance for the adoption of measures under Treaty-based emergency provisions. Consider for instance the framework of derogations established by the *Crisis Regulation* in the case of instrumentalisation of migrants. Could the Council adopt on the basis of Article 78(3) TFEU a different set of derogations to the asylum *acquis* or a completely different type of emergency measure than the ones envisaged by the *Crisis Regulation* to react to the same situation?

While the wording of recital 11 of the *Crisis Regulation* mentioned above leaves open such a possibility in abstract terms, in practice the existence of a normative framework established under secondary legislation will inevitably affect the assessment of the conditions for having recourse to Article 78(3) TFEU. This is the position maintained by the Commission, which in

the explanatory memorandum accompanying its proposal for a permanent Regulation addressing situation of instrumentalization of migrants has clarified the relationship of that instrument with emergency decisions based on Article 78(3) TFEU as follows:

> "A permanent framework on which the Union can consistently rely tailored to this situation is necessary, which would also allow maintaining the exceptional nature of provisional measures under Article 78(3) TFEU and thus render unnecessary to resort to Article 78(3) TFEU to address situations of instrumentalisation that fall under this proposal."[120]

Thus, the fact that a specific emergency "situation" is already regulated by ordinary legislation renders it unnecessary in principle to resort to the emergency competence.

The interaction between ordinary and emergency measures has been tested during the energy crisis, when emergency measures were prolonged and thus overlapped with the introduction of a new legislative framework. The *Renewable Energy Directive (RED)* integrated a number of the provisions included in emergency Council Regulation 2022/2577 to accelerate the deployment of renewable energies, specifically by removing bottlenecks linked to permits for renewable energy projects and related grid connections.[121] Those provisions had to be transposed by the date when Council Regulation 2022/2577 based on Article 122(1) TFEU was initially to cease to apply (30 June 2024). In the light of the situation on the energy markets, the Council nevertheless decided to prolong, for another additional year (till 30 June 2025), the application of part of the emergency rules which the co-legislators had not integrated into the *RED* by means of another emergency Regulation.[122] This prolongation thus happened shortly after the co-legislators had reached agreement on the *RED* with an integration of a more limited set of permitting facilitations. In the specific case, it is relevant to note that the co-legislators had not come out strongly against the provisions the application of which was prolonged on the basis of Article 122(1) TFEU. Those provisions had not been considered pertinent in the context of a more permanent framework based on Article 194 TFEU, notably in light of the extensive derogation from EU environmental rules that they entailed.

---

[120] Explanatory memorandum accompanying the proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.
[121] See:footnotes 112 and 113 above.
[122] Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy, OJ L, 2024/223, 10.1.2024.

The decision of the Council not to follow the choice of the ordinary legislator and keep in place provisions that the latter had not included creates a certain tension with the principle of institutional balance and sincere cooperation, and raise issues of democratic legitimacy. These tensions were, however, defused by a detailed justification in the recital of the acts, which explained for each of the prolonged measures why the conditions were met to keep them in place regardless of the adoption of the new legislation. In particular, the justification focussed with a great level of detail on why the measures were necessary in light of both the continued existence of a situation of energy crisis and their positive effect as shown on the occasion of their first application; it further balanced the prolongation of the measures against the interest of ensuring a level of environmental protection adequate to the situation. Finally, the measures were prolonged for a strictly limited period of time (one year), thus further stressing their contingent character.[123]

In light of those explanations, rather than pointing to any institutional overreach, the case illustrates how "ordinary" and crisis measures are each based on distinct circumstances and require different responses which is then also reflected in their content and their effects, since the former are designed for a longer time horizon and the latter for more immediate needs.

In conclusion, the fact that a given situation has already been regulated by the ordinary legislator reduces the Council's margin of discretion in adopting measures under an emergency competence, as the institution will have to make a strong case that ordinary legal framework is not sufficient to address the crisis situation, and that the adoption of different set of exceptional

[123] See: recitals 12 to 22 of Council Regulation 2024/223. A good example of the level of detail of the motivation is provided by recital 14: "[…] Article 3(2) of Regulation (EU) 2022/2577 requires priority to be given to projects that are recognised as being of overriding public interest whenever the balancing of legal interests is required in individual cases and where those projects introduce additional compensation requirements for species protection. An analogous provision is not present in Directive (EU) 2018/2001. The first sentence of Article 3(2) of Regulation (EU) 2022/2577 has the potential, in the current urgent and still unstable energy situation on the energy market which the Union is facing, to further accelerate renewable energy projects since it requires Member States to promote those renewable energy projects by giving them priority when dealing with different conflicting interests beyond environmental matters in the context of Member States' planning and the permit-granting process. The Commission's report demonstrated the value of the first sentence of Article 3(2) of Regulation (EU) 2022/2577 which recognises the relative importance of renewable energy deployment in the current difficult energy context beyond the specific objectives of the derogations foreseen in the Directives referred to in Article 3(1) of Regulation (EU) 2022/2577. Given the particularly severe situation in the supply of energy which the Union is currently facing, it is appropriate to prolong the application of Article 3(2) of Regulation (EU) 2022/2577 in order to appropriately recognise the crucial role played by renewable energy plants to fight climate change and pollution, reduce energy prices, decrease the Union's dependence on fossil fuels and to ensure the Union's security of supply in the context of the balancing of legal interests carried out by permit-granting authorities or national courts. At the same time, it is also appropriate to keep the environmental safeguard that, for projects recognised as being of overriding public interest, appropriate species conservation measures, underpinned by sufficient financial resources, are adopted."

measures remains necessary and proportionate.[124] Thus despite being "parallel" in the sense indicated above, the possibility of effectively exercising an emergency competence is de facto restricted by the inclusion of emergency frameworks in ordinary legislation.

At the same time, Treaty-based emergency powers provide flexibility to the system as they allow the Council to act "outside the box" and address novel situations through novel means. Since, as we have seen, the Treaty does not create any hierarchy of norms between legislative acts over non-legislative acts adopted by the Council under emergency powers, the latter acts may derogate from existing legislative acts and will prevail over more general legislative acts in the event of conflict because they will in essence constitute a *lex specialis* addressing a specific situation.

A second, reciprocal, situation concerns the normative "drag" that the exercise of an emergency competence may have on ordinary ones. An example is provided by the impact that the adoption of emergency measures may have on the external action of the Union, and notably on the determination of whether or not an area has already been occupied by Union law. In such a case, the conclusion of an international agreement on the same subject matter (for instance, to allow a third country to join a given emergency scheme) could affect or alter the scope of the common rules adopted via the emergency measure and thus establish the competence of the Union to conclude the agreement alone.

The situation is far from being remote. The temporary and contingent character of emergency measures does not exclude the possibility that their temporal horizon or scope can be of relevance to the conduct of international relations. Moreover, as we have seen above, emergency competences can be used to adopt a procedural framework for the future exercise of emergency measures in a given case. In that regard, a case in point is the current negotiation with EEA countries of an agreement on health emergency measures in area of medical countermeasures aimed at ensuring the participation of those countries in the emergency framework set out in Council Regulation 2022/2372. The question which arises here is whether

[124] The situation seems here similar to the one occurring when Member States invoke derogation clauses to exclude the application of an EU legal framework to protect a specific public interest which already receives protection within that framework. In the case of Article 72 TFEU, the Court of Justice has stressed that a Member State which intends to rely on Article 72 TFEU needs to prove that it is necessary to have recourse to the derogation in order to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security. That necessity has to be assessed in relation to the applicable EU legislation: as far as such legislation already allows for the protection of those interests by means of specific provisions it is up to the Member State to prove specifically that the existing EU legal framework does not provide effective safeguards for the interests at stake in relation to the specific situation of emergency that the national derogating regime aims to address.

the exercise of an emergency competence can have the effect of expanding the external competence of the Union by occupying the normative space.

Concluding remarks: The shift towards a legislative model of emergency regulation

Following the intense recourse to Treaty-based emergency provisions during the crises of recent years, the co-legislators have turned to ordinary legal bases to include crisis prevention and crisis response frameworks in a number of sectorial instruments, notably in the domains of the internal market and of migration and asylum.

The need for legislative intervention has been justified[125] by the importance of taking stock of the lessons learnt during the recent crises in order to better equip the Union with "stable and ready-to-use frameworks"[126] to deal with emergency situations quickly and in a consistent way and thus render it unnecessary to resort to *ad hoc* responses. The new legislative frameworks have therefore been built upon the experience of the recent crises: they generalise and expand solutions that have proven successful (e.g., joint procurement) or politically imperative (e.g., to react to the instrumentalisation of migrants) while trying to fill the gaps that were exposed by the handling of the crises (e.g., lack of a centralised mechanism for the coordinated introduction of border controls and travel bans in a health emergency).

The development represents a shift from a constitutional (Treaty-based) to a legislative model of emergency regulation under which emergencies are no longer dealt on the basis of a constitutional empowerment (Treaty provisions) but rather through ordinary legislation, by "enacting ordinary statutes that delegate special and temporary powers to the executives".[127]

The shift to a legislative model of emergency regulation entails some significant advantages. Besides providing stable and predictable solutions, it allows the fragmentation of EU emergency competences to be overcome (see above Part I, Chapter II): ordinary legal bases have wider material scope and flexibility, which allows the legislators to introduce EU-wide emergency frameworks in areas where until now emergencies have been handled by Member

[125] Conclusions of the European Council of 1–2 October 2020, paras. 3 and 4, EUCO 13/20.
[126] Along these lines see the explanatory memorandum accompanying the proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.
[127] J. Ferejohn and P. Pasquino, "The law of the exception: A typology of emergency powers," *International Journal of Constitutional Law*, Vol. 2, No. 2 (2004), pp. 210–239.

State's taking unilateral measures (borders, freedom of movement). It also brings the matter back into the ambit of ordinary law-making, with all the guarantees that this entails.

Recourse to a legislative model of emergency regulation also entails drawbacks.[128] When used in times of crisis to provide an emergency response, ordinary legal bases have proved to be a viable option, but with some significant limitations, linked notably to the fact that the possibility to respond swiftly comes with a trade-off, limiting the co-legislators' capacity to exercise scrutiny on the proposed measures (see Section 1.1 above). When used in ordinary times to establish permanent crisis response frameworks, ordinary legal bases come with a number of inherent restrictions which influence the design and features of the measures that can be adopted. Depending on the chosen legal basis, these restrictions can thus affect and in fact weaken certain dimensions of the emergency response at the Union level, notably its solidarity dimension, which in turn could call into question the added value of Union emergency action in the first place (see Section 1.3 above on the limitations associated with the recourse to Article 114 TFEU).

Moreover, and perhaps most importantly, having permanent "stable frameworks" for crisis response established under ordinary legal bases entail the co-legislators defining in advance the set of emergency measures that can be adopted at Union level in relation to a given crisis situation. While the pre-defined set of measures generally codify and generalise measures that have already proved successful in recent crises, there is indeed no guarantee that future crises will raise the same challenges: the unpredictability of crises and the need to respond rapidly may mean that the legislative frameworks are insufficient to deal with the crises.[129]

Thus the shift to a legislative model of emergency regulation does not exhaust the need for Treaty-based emergency provisions: emergency competence remains essential to provide flexibility to the system and ensure that effective action is possible when required by the circumstances. This essential role is ensured by the complementary/parallel nature of emergency competence which excludes any possibility of pre-emption when ordinary legal bases are used to adopt crisis response frameworks and *vice versa*. It is further guaranteed by

[128] In their work, Ferejohn and Pasquino identify a number of limitations inherent in the legislative model of emergency regulation in relation to national legal orders. Some of these appear of particular relevance to the EU legal order and indeed are confirmed by the analysis of the recent practice as carried out in this section of the report.
[129] O. Gross and F. Ní Aoláin, *"Law in Times of Crisis: Emergency Powers in Theory and Practice,"* (Cambridge, United Kingdom: Cambridge University Press, 2006).

the inclusion in secondary law instruments of clauses and governance arrangements to ensure the coordination between different crisis frameworks and Treaty-based emergency competence. Our analysis has, however, also shown that the multiplication of crisis frameworks in EU secondary legislation may well have consequences on the subsequent exercise of emergency competence, notably by restraining the discretion of the Council to justifying the recourse to a given emergency measure.

Moving to the substance of the new legislation, the multiplication of emergency frameworks has not entailed a paradigm shift in the allocation of emergency competence within the Union: Member States remain at the core of the crisis response and the first actors in emergency situations. However, the new legislative instruments aim to address the shortcomings exposed during the recent crises in the uncoordinated recourse to national emergency measures. They do so along two main lines: on the one hand, there is a significant strengthening of the procedural and transparency obligations that Member States need to respect when adopting unilateral emergency measures. In certain instances, substantive conditions or limitations are added, so that certain types of unilateral emergency measures are prohibited altogether,[130] or the discretion of the Member States is appropriately framed.[131]

On the other hand, the "new generation" of emergency legislation reflects a more expansive use of the competence of the Union in two ways. First, it incorporates emergency regimes in new domains of secondary law: crisis response frameworks are mainstreamed beyond areas traditionally characterised by particularly high or well-known risks (e.g., chemical products, environment, agriculture), and are considered as an inherent element of a comprehensive regulatory regime.[132] New regulatory spaces are occupied at the EU level, which may trigger the usual effect of pre-emption. In that regard, the developments in the domain of health are particularly relevant, particularly in light of the narrow scope of the original Treaty competence on the matter.

[130] See, for instance, Article 21 of the *Crisis Regulation*.
[131] See: Article 20 of the *Crisis Regulation* which lays down minimum requirements for Member States' emergency measures and Article 22 which requires the adoption of mitigation measures. See also: Article 5(4) of the *Schengen Borders Code* which allows Member States to adopt certain emergency measures in the case of instrumentalisation of migrants, subject to a number of conditions and limitations.
[132] See, in this sense, the explanatory memorandum to the Proposal for a Crisis Regulation in the field of migration. See also: the explanatory memorandum and the impact assessment report accompanying the proposal for a Single Market Emergency Instrument.

Second, the instances where Union institutions are empowered to adopt emergency measures as an integral part of an EU regulatory framework have significantly increased, thus introducing a trend towards a more centralised approach to crisis response. As a result, the space left to Member States for regulating crisis situations is significantly narrowed. When combined with the interpretative approach to derogation clauses followed by the Court of Justice and described in Part I, the legislative developments analysed in this part are ineluctably bound to further restrict Member States' ability to successfully invoke a derogation.

This trend is supported and justified by a narrative according to which certain types of emergencies are better addressed at the European level than by Member States alone: crises expand the range of issues considered to be European (not just supranational) and needing to be addressed through the institutional setting of the Union and its policies.

The recent multiplication of crises response frameworks in ordinary legislation is thus ultimately indicative of the decisive influence of crisis situations and emergency measures on the development of Union policies. The dynamics of this interaction, and in particular the way this influence plays out in practice, will be the focus of the next chapter.

2. Interaction? The impact of emergency measures on the shaping of EU policies

Emergency measures adopted in a situation of crisis interact with the exercise of ordinary powers to create dynamics in the EU legal order that go beyond the legal effect of those measures. In other words, emergency measures shape EU policies beyond the crises they are meant to address.

The practice developed in the aftermath of or during the crises analysed in present report shows that the phenomenon can take two different forms.

The first form of interaction between emergency and ordinary powers takes place via the creation of policy packages, whereby emergency measures and ordinary instruments are considered as a single whole for the sake of providing an effective response to the crisis or for political reasons. Policy packages create connections beyond the strict individuality of the legal acts constituting the package, which in practice have played an important role in ensuring the political and legal conditions for the Union to act. They have also provided an effective, yet unorthodox, way to exercise political control by actors that would normally be excluded from the decision-making (such as the EP or national parliaments) and thus helped to achieve greater

legitimacy for emergency action. At the same time, policy packages remain controversial as they may impact the decision-making procedure as laid down in the Treaties and thus raise issues of institutional balance.

A second form of interaction relates to the dynamics that emergency measures bring to the legal order, by influencing the way EU policies are shaped *pro futuro*. The way this may happen will be analysed in the second section of this chapter, on the basis of a number of examples taken from recent practice. These examples show that the relevance of emergency measures hardly remains confined to emergency situations. In most cases, they are rather part of a complex regulatory cycle whereby the innovations introduced in times of crisis receive political validation by incorporation in ordinary legislation. A focus on the cycle, rather than on the individual emergency measure, offers a better understanding of the way emergency powers shape the action of the Union and raises important questions as the implications that such a "crisisification" of EU law may have in terms of policy-making, protection of fundamental rights, and institutional balance.

2.1 The shaping of EU policies through policy packages

2.1.1 The practice of policy packages

Crisis situations may raise challenges of such a scale and complexity that they straddle several Union competences and policies and require broader policy action. However, this practical reality meets with the limitations that are proper to a legal order established on the principle of conferred powers.

The principle of conferral notably requires that any individual legal act must identify the appropriate legal basis for its own adoption under the Treaties. According to the Court of Justice this is a choice of constitutional significance[133] that needs to be made by the legislator on the basis of objective conditions amenable to judicial review, having regard in particular to the aim and content of the relevant act. When the act might be potentially based on two or more legal bases, the institutions must choose the provision that reflect the predominant purpose/content of the act. The recourse to joint legal bases must be limited to cases where the act genuinely pursue various purposes in equal way, provided that the decision-making procedure of the

[133] Opinion 2/00, *Cartagena Protocol on Biosafety*, EU:C:2001:664; Opinion 1/19, *Istanbul Convention*, EU:C:2021:832.

relevant legal bases are compatible with each other. Therefore, the legal basis requirement forces the legislator to cut through the complexity and breadth of the challenges as they present themselves in the real world along the boundaries of the policy areas for which competence is conferred on the Union and of the nature and extent of that competence.

Further complexity is added by the need to take into account the variable geometry that applies to certain area of the EU Treaties, particularly to Title V of the TFEU on the area of freedom, security and justice and to Title VIII on economic and monetary policy. Here, the effect of the system of protocols ensuring specific exclusions, and granting Member States opt-in or opt-out rights under primary law further induce fragmentation of the Union's action in order to safeguard the integrity of the domain in question and the different procedural rights of the Member States.

The need to reconcile these legal constraints with the demand for effective action at the Union level leads to a policy strategy whereby multiple instruments are proposed, negotiated and adopted as a part of a single, unitary package. The various elements of the package remain legally distinct and formally independent, each based on its appropriate legal basis, but they concur in pursuing a regulatory and political rationale.

The functional and political connections established between the elements of the package induce specific policy dynamics[134]: the overall political and regulatory balance will be played for and reached at the package level, with the consequence that nothing will be agreed until everything is agreed and that the negotiations of the different elements will have to be temporally synchronised[135]; the connections between the separate legal acts will leverage the role of institutions beyond the limitations of the legal bases associated with each one of them, and in particular will give the European Parliament a say on elements on which its role would otherwise be more limited[136] and will extend the relevance of the European Council's role of providing general political direction to the action of the Union[137]; conversely, the fact that one

[134] For an analysis of the phenomenon of policy packages and the challenges it raises for EU legal order and the principle of conferral, see: M. Dougan, "EU Competences in an Age of Complexity and Crisis: Challenges and Tensions in the System of Attributed Powers," *Common Market Law Review*, 2024 (61), pp. 93–138.
[135] This phenomenon was very much evident in the negotiation of the New Pact on Asylum and Migration, where the acknowledgment that all the instruments at issue were part of a unitary package prevented the adoption of the less controversial proposals, on which negotiations among legislators were substantially completed. The Pact was finally adopted as a whole.
[136] As happened in the NGEU package negotiations, as illustrated below.
[137] See: the examples in Chapter I of Part I above on the key role played by the European Council in steering the response of the Union in crisis situations. For an assessment of this role, see: the analysis in Section 1 of Chapter IV in the present Part.

major component in a package is subject to unanimity in the Council will raise the bar for the decision-making in relation to other elements, regardless of the fact that they may be subject to qualified majority, as Member States leverage their veto power across the package.

These dynamics are essential to understand the rationale of legislative negotiations and of their outcome but create tensions with the legal requirements resulting from the principle of conferral as developed in the case-law, as those requirements remain essentially linked to the individual act.[138] Thus, the expansion of the normative reach of the whole package beyond the scope of individual legal bases could be seen as a case of competence creep; in a similar vein, the way the policy actors leverage their procedural role in relation to a single act across the whole package could be considered as infringing the principle of institutional balance. Finally, judicial control (to review either validity or a possible infringement) is also fragmented and focussed on the individual elements of the package, with the risk of altering the balance pursued at package level and compromising the effectiveness of the overall regulatory scheme or, conversely, of providing only partial and ineffective remedy. Ultimately, there appears to be a trade-off between strict legality and effectiveness as two concurring forms of legitimacy of the Union's action.

These dynamics are not specific to the action of the Union in situations of crisis as the phenomenon of policy packages is generally linked to the structure of the Union's competence. However, in situations of crisis, policy packages gain a particular relevance, since the urgency, complexity and scale of the challenges to be faced on the one hand and the limited scope of emergency provisions in the Treaties on the other make it particularly pressing to structure the Union's response as a set of measures based on different legal bases.

The best example of a policy package built to address a crisis situation is that set up to support the recovery from the economic consequences of the COVID-19 pandemic through a number

[138] The case-law of the Court of Justice recognises a certain limited relevance to the overall policy context when assessing the legality of an individual legal act in light of the principle of conferral. A first case is the doctrine of ancillarity which accepts that the choice of the legal basis needs to rest on the "predominant purpose" of the instrument at stake, and thus accepts that the instrument may also pursue other policy objectives at the same time, and possibly straddle areas covered by other legal bases. Similarly, when the policy objectives are of the same relevance, the Court exceptionally admits the possibility of having recourse to two or more legal bases, provided that the respective decision-making procedures are compatible and would not undermine the prerogatives of the institutions. Finally, the overall package of which a legal act is part can be taken into account as part of the broader context in the framework of a contextual interpretation of its aim and content for the sake of establishing whether the legal act could be validly adopted on a given legal basis. It remains nonetheless that reference to the policy context remains a secondary factor, which does not alter the need to assess the legal act in its individuality.

of spending instruments financed by the issuance of common debt under the *Next Generation EU* scheme (*NGEU*) (see Part I, Chapter 1, paragraph 2.1.3. above).

The centrepiece of *NGEU* is the *European Union Recovery Instrument* (*EURI*),[139] a Regulation adopted on the basis of Article 122 TFEU and aimed at countering the risk of an uneven economic recovery, due to the varied impact that the pandemic had on the economies of the Member States and to their different abilities to absorb the economic and fiscal shock. In order to do that, *EURI* provides exceptional funding to various existing and new EU programmes in the form of grants and loans and in a spirit of solidarity among Member States (e.g., entailing a redistributive effect). In fact, the *EURI* Regulation is a very lean instrument, as it essentially defines in broad terms the type of measures that can be supported, identifies the amounts of resources to be allocated to the various programmes in the form of externally assigned revenues or loans to the Member States, and set out various derogations to the Financial Regulation for the implementation of the funding. The actual rules on how the spending takes place are left to a number of individual legal acts establishing the spending programmes, some of them already proposed by the Commission in the framework of the (then) ongoing negotiations for the 2021–2027 Multiannual Financial Framework and to which *EURI* financing would provide a top-up,[140] and a completely new one, the *Recovery and Resilience Facility* (*RRF*), proposed by the Commission at the same time as *EURI* and designed to channel the vast majority of funds. Finally, a third essential component of the package was a proposal for a new *Own Resources Decision* (*ORD*), also presented on the same day, providing for the authorisation for the Union to borrow on the financial markets the EUR 750 billion necessary to finance the scheme and establishing a dedicated budget line within the own-resources ceiling aimed exclusively at providing the Union with the resources necessary to repay the common debt.

This recovery package was then negotiated as part of the already ongoing negotiations on the 2021–2027 MFF, which was itself presented and negotiated as a package, including the *MFF Regulation* proper, a number of legal instruments establishing the various spending programmes for the new multiannual financial period and finally the proposal for a Regulation establishing a general regime for the protection of the Union budget in cases of breaches of the rule of law (*Rule of Law Conditionality Regulation*). This intricate political and legal

[139] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I, 22.12.2020, pp. 23–27.
[140] These includes in particular the cohesion Funds as repurposed to address the challenges of the pandemic via the new *REACT-EU* Regulation, *Horizon Europe*, *Invest EU*, the *Rural Development Fund*, the *Just Transition Fund* and the spending measures included in the *RescEU* programme.

architecture explains how the negotiations of the overall MFF-NGEU package were among the most complex in the history of the Union, culminating in a five-day European Council in July 2020 at which the Member States managed to reach an agreement on most of the issues through reciprocal concessions across the package. The pending issues (including the contentious *Conditionality Regulation*) and the need to negotiate certain components of the package with the European Parliament delayed a final agreement till a last minute December 2020 European Council which opened the way for the formal adoption of the various legal instruments, in accordance with the relevant procedures.

2.1.2 Impact of emergency measures on policy packages

It is interesting to stress that the dynamics identified above in relation to policy packages in general were all very much present in the negotiations on the NGEU package. In particular, the presence in the package of various instruments requiring unanimity in the Council (*ORD, MFF Regulation*) immediately created leverage for Member States to seek concessions across the package and among the various legal instruments.[141] However, the presence at the centre of the package of an instrument based on an emergency legal basis added some peculiar dynamics that need to be underlined.

To start with, the connections between the elements of the package – *ORD, EURI* and *RRF* – are not merely political – as generally happens in policy packages – but have a legal relevance as well. This is the result of how the architecture of the financing scheme is designed: as *EURI* mobilises resources borrowed on the financial market on the basis of the empowerment set out in the *ORD*, its Article 3(3) makes the availability of the resources contingent on the entry into force of the *ORD*; similarly, the timeline defined in *EURI* for the entering into legal commitments for the grant part of the financing and for the granting of the loans, and the final deadline for the payments are then reflected in the implementation rules for the various spending instruments, and in the *RRF* in particular.

The legal relevance of the relationship between the elements of the package is also a very specific consequence of the fact that measures taken under Article 122 as an emergency legal

[141] In particular, the strong opposition of Hungary and Poland to the adoption of the *Conditionality Regulation* – an instrument based on Article 322 TFEU and thus subject to ordinary legislative procedure and qualified majority in Council – resulted in their opposition to reaching a final agreement on the *MFF Regulation* and *ORD*. The stalemate was finally solved at the December 2020 European Council where agreement was reached on a number of additional reassurances concerning the way the Conditionality Regulation was to be implemented, thus paving the way for the adoption of the whole package.

basis need to satisfy specific conditions. As seen in Chapter II, section 2.1 above, measures adopted on that legal basis have to be designed to address the situation of crisis (thus having an exceptional character), have to be temporary and finally have to be economic in nature. Since *EURI* relies on a number of autonomous spending programmes to pursue the objective of economic recovery from the pandemic, it is thus necessary that the essential characteristics of those programmes also duly translate the requirements that the measures adopted under Article 122 TFEU must respect. In other words, the legality of *EURI* cannot just be assessed in light of its own aim and content, but also in light of those of the spending instruments through which the resources are used.[142]

At the same time these very requirements for the financing scheme based on Article 122 TFEU to be exceptional and temporary, as further reflected in the design of the individual spending instruments, are the condition for ensuring that the use of external assigned revenues in such a sizeable amount remains compatible with the integrity of the own resources system as provided for in Article 311 TFEU and with the fundamental budgetary principles of unity and universality.[143] In other words, the conditions associated with recourse to Article 122 TFEU as a legal basis for *EURI* are also instrumental to ensure the legality of the spending under the NGEU financing scheme as a whole.

Second, the conditions associated with recourse to Article 122 TFEU were also instrumental in political terms, notably to ensure support for the whole NGEU package. In particular, the exceptional and temporary character of the instrument, as embedded in the legal requirements for the triggering of the legal basis, was crucial in providing the necessary guarantees to reassure those Member States that were very much afraid that the scheme could establish a permanent

[142] The compatibility of the spending instrument with the crisis rationale underpinning Article 122 was one of the points analysed in the opinion of the Council Legal Service on the Proposals on Next Generation EU. The opinion of the CLS led to reconsideration of the inclusion of certain spending instruments among the beneficiaries of the NGEU funding; this was in particular the case of funds aimed at supporting the recovery in third countries, which for the Legal Service of the Council was difficult to reconcile with the principle of solidarity that should inform the measures adopted under Article 122 TFEU and that only applies to Member States. See: Opinion of the Legal Service, 24 June 2020, *Proposals on Next Generation EU*, Council document 9062/20.

[143] See: Opinion of the Council Legal Service, 24 June 2020, *Proposals on Next Generation EU*, Council document 9062/20. Article 311 TFEU provides that the budget shall be financed wholly from own resources "without prejudice to other revenue." While that provision makes clear that revenues other than own resources – such as external assigned ones – are a possibility, it also underlines that this should remain an exceptional occurrence. The reliance on own resources as the primary source of finance for the budget is also a corollary of the requirement for sufficient means to be granted to the Union for the attainment of its objectives and thus of its financial autonomy. Thus, in order to be compatible with the treaties, external assigned revenues must remain additional or complementary to own resources. According to the Legal Service, such a complementarity or additionality is not just to be assessed in quantitative terms, but must also take into account qualitative elements and safeguards that are in place to avoid recourse to external assigned revenues subverting the integrity of the own resources system.

fiscal capacity for the Union, by opening the door to future operations of "borrowing for spending."

In that regard, it is interesting to observe how the institutions made use of their discretion to place certain elements of the overall scheme in one legal act rather than in another to create the conditions for a broader support. This is for instance the case of the inclusion in the *Own Resources Decision* of the empowerment to the Union to borrow on the financial market the resources to finance the overall NGEU scheme, as well as the inclusion of a general prohibition for the Union to have recourse to borrowing in order to finance operational expenditure outside the case of NGEU. It has to be stressed that the empowerment to the Commission to borrow on the financial market to finance a spending instrument had previously been considered as an ancillary financial rule to that instrument and therefore systematically introduced in the relevant basic act.[144] This practice is justified in light of the very nature of borrowed money. Proceeds from borrowing can hardly be considered a category of own resources as they establish a liability that needs to be repaid rather than an asset. Since both the special empowerment and the general prohibition to borrow relate more to the establishment of a common debt rather than to its repayment, they do not appear to fall within the scope of *ORD* and Article 311 TFEU. They can be considered ancillary elements to the arrangements for financing the repayment of the borrowed amounts.[145] Yet, the inclusion of these elements in the Own Resources Decision, which is adopted by Council at unanimity and enters into force only once approved by the Member States in accordance with their respective constitutional requirements, has made it possible to ringfence the perimeter of the final deal in an instrument subject to a very demanding decision-making procedure, while at the same time ensuring that its crucial aspects (creation of common debt but only on an exceptional basis) could be submitted to the national parliaments for their approval.

In a similar vein, while merely consulted for the adoption of the *ORD,* the European Parliament managed to leverage its role as co-legislator in the negotiations of the spending instruments, and notably of the *RRF*, as well as its power of consent to the *MFF Regulation*. The negotiation of the Interinstitutional agreement on budgetary discipline among the three institutions as part of the package provided a further opportunity for the Parliament to leverage its position.[146] As

[144] This is the case of *SURE* and all instruments providing for macro financial assistance to third countries.
[145] See the opinion of the Legal Service of the Council quoted above.
[146] Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and

a result, if its influence on the overall size of the MFF-NGEU package was limited to few top-ups to specific programmes,[147] its participation in the negotiations significantly shaped the objectives and priorities of the recovery scheme as well as the spending arrangements. This in particular led to the inclusion of additional procedural mechanisms to ensure the Parliament's involvement in the use of NGEU external assigned revenues and new budgetary powers in the event of any crisis mechanisms based on Article 122 TFEU being set up in future.[148]

The dynamics that the design of the NGEU policy package has introduced raise eyebrows from the point of view of the principle of institutional balance, as the practice of the negotiations significantly impacted the decision-making processes as envisaged for individual legal acts. At the same time, the Court of Justice has acknowledged that in so far as the voting procedures are respected, nothing precludes the institutions from taking into account broader political considerations - such as the importance to achieve the greatest possible majority in Council in relation to a certain matter - when organising the timing and modalities of their discussions (and thus, for instance, to wait for the "common accord" of the Member States when deciding on the conclusion of an international agreement by the Union – see in that regard para 252 and 253 of Opinion 1/19, *Istanbul Convention*). Moreover, the complex design of NGEU played a crucial role in ensuring that, beyond the substantive and procedural conditions for the legality of the individual legal acts, the overall scheme was politically acceptable and received the broadest possible democratic support, via the involvement of the Council voting unanimously, the European Parliament and the national parliaments in key aspects of the construction.

Ultimately, the example of the NGEU policy package illustrates well how the setting up of a political package around an emergency measure generates legal and political linkages that expand the emergency rationale proper to that measure well beyond its scope and, in so doing, shape the overall policy response by framing the ordinary legal instruments included in the package.

---

on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ L 433I, 22.12.2020, pp. 28–46.

[147] See in particular, Article 5 of the MFF Regulation, introducing a mechanism allowing for an increase in the ceilings for commitment and payment appropriations equivalent to the amount of fines collected by the EU, with a cap of EUR 11 billion over the MFF period. Additional resources were secured via an agreement with the Council on the use of return flows in the domain of aid to development and the possibility to make available again certain decommitted appropriations in the area of research.

[148] See, in particular, Part H of Annex I to the Interinstitutional Agreement on budgetary discipline on "Cooperation as regards the European Union Recovery Instrument" and the Joint declaration of the European Parliament, the Council and the Commission of 16 December 2020 on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget, OJ C 444, 22.12.2020, p. 5. These mechanisms of control will be further analysed in the following section.

2.2 The shaping of EU policies through the policy cycle

2.2.1 The influence of emergency measures on the evolution of ordinary legislation

The case-studies examined in this report show that emergency measures deployed in situations of crisis to tackle specific and contingent needs are often intertwined with the evolution of ordinary legislation. Rather than remaining isolated normative events – as their immediate purpose and legal effect would suggest – they induce, contribute to or reshape Union policies according to a variety of patterns.

First, crisis situations are occasions when existing legislation is put to the test, as they expose drawbacks, gaps, and flaws in the regulatory regime. The adoption of emergency measures offers an immediate and temporary *ad hoc* response to such shortcomings but at the same time makes an argument for additional reform. In the aftermath of a crisis, an assessment of the lessons learnt may prompt legislative initiatives aimed at fixing the identified shortcomings through a further development of the regulatory framework.

A good example of this dynamic is provided by the shortcomings exposed by the adoption in the early phase of the COVID-19 pandemic of uncoordinated national emergency measures relating both to free movement of persons and to the supply of goods and services of critical importance for responding to the crisis.

As the recitals of the *IMERA Regulation* make clear, the existing rules at the Union level were not sufficient to avoid those problems. In particular, the emergency actions carried out unilaterally by Member States exacerbated some of the difficulties.

> "Ad-hoc measures taken by the Commission in order to re-establish the functioning of the internal market, based on the existing rules, were not sufficient. The Union was not sufficiently prepared to ensure efficient manufacturing, procurement and distribution of crisis-relevant non-medical goods, such as personal protective equipment. Measures to ensure the availability of crisis-relevant non-medical goods during the COVID-19 crisis were necessarily reactive. The COVID-19 crisis also revealed insufficient information sharing and an insufficient overview of manufacturing capacities across the Union, as well as vulnerabilities related to intra-Union and global supply chains.

> Furthermore, uncoordinated measures restricting the free movement of persons had a particular impact on sectors that rely on mobile workers, including workers in border regions, who played an essential role in the internal market during the COVID-19 crisis."[149]

The recourse to *ad hoc* emergency solutions, like triggering the Integrated Political Crisis Response arrangements to coordinate Member States' action within the Council, provided some responses but was ultimately not sufficient. This finding allows the co-legislators to build the case for a shift in the model of emergency response: from the existing one based on a decentralised approach whereby Member States are responsible for addressing situations of crisis by unilateral emergency measures to a more centralised approach, where additional obligations are laid down and emergency powers are allocated at the Union level:

> "It emerged that there is a need for arrangements between the Member States and Union institutions, bodies, offices and agencies as regards contingency planning, technical level coordination and cooperation, and information exchange. Additionally, it became clear that the lack of effective coordination between Member States exacerbated the shortages of goods and created more obstacles to the free movement of services and persons."[150]

These needs have been now addressed in specific provisions of the *IMERA Regulation*, which has introduced new obligations on exchange of information about unilateral national measures, has prohibited certain types of measures and has introduced specific requirements to be complied with when adopting measures that are not prohibited.

The introduction of the mechanism of priority-rated requests in *IMERA* followed the same dynamics. As the COVID-19 pandemic unfolded, the issue of prioritisation in the procurement of vaccines emerged as particularly pressing. Given the lack of a specific regulatory mechanism to that effect, the issue was approached by the Commission on a contractual basis, by introducing provisions aimed at ensuring and in certain cases prioritising the delivery of vaccines to the Union. That solution, however, fell short of the much stronger framework provided for in other legal orders, such as the US one, where the government had the possibility to invoke statutory provisions to conclude priority-rated contracts with economic operators,

[149] Recitals 2 and 3 of the *IMERA Regulation*.
[150] Recital 4 *IMERA Regulation.*

taking automatic precedence over any other contractual engagement.[151] As a result of this experience, the Commission proposed to introduce in *IMERA* a similar mechanism of priority-rated orders, even if ultimately the co-legislators opted for a less stringent system of priority-rated requests (see Section 1.2.2. of this Chapter above).

Similarly, the 2024 amendment of the Schengen Borders Code has strengthened the procedural safeguards associated with the re-introduction of border controls by Member States. Moreover, in the specific case of a large-scale public health emergency, the Code now confers on the Council the power to authorise the adoption of internal border controls or to adopt binding rules on travel to the Union (travel bans), which is a significant departure from the traditional regulatory approach to border management whereby Member States remain responsible for adopting emergency measures.

A second type of dynamic occurs when innovative emergency measures adopted in times of crisis have proved to be successful and effective, and that success prompts an argument for them to be incorporated permanently in the ordinary regulatory framework.

An example of this is provided by the introduction of a mechanism for the joint procurement of medical countermeasures during the COVID-19 pandemic. As the Council noted in April 2020, "existing EU instruments are limited in scale and therefore do not allow a sufficient response or make it possible to address effectively the large-scale consequences of the COVID-19 crisis within the Union." These limitations in particular concerned the absence of a system allowing the Commission to procure vaccines on a large scale on behalf of the Member States.[152] The issue was addressed by means of an emergency measure, adopted on the basis of Article 122(1): in April 2020 the Council adopted an amendment to the Council Regulation on emergency support within the Union that, besides extending the instrument to the financing of actions immediately relevant to the COVID-19 pandemic, introduced a number of temporary derogations to the Financial Regulation to allow the Commission to negotiate contracts on

[151] See: European Court of Auditors Special Report 19/22, "EU COVID-19 vaccine procurement – Sufficient doses secured after initial challenges, but performance of the process not sufficiently addressed," at points 22 to 26, 43 and 44.

[152] At the time of the adoption of the Council amending decision of the Crisis Support Instrument, the Financial Regulation only allowed the possibility for a joint procurement between Institutions and the Member States, but not allowed the Commission to handle procurement procedures on behalf of the Member States, e.g., having the Member States as final beneficiaries. Article 5 of the existing Decision 1082/2013 on serious cross-border threats to health did allow for joint procurements of medical countermeasures by Member States, but the instrument was designed as preparedness instrument and thus did not provide the flexibility and speed to respond to the extreme urgency of the unfolding pandemic. Finally, the Emergency Support Instrument did not allow the Commission to fund the purchase of supplies on behalf of Member States.

behalf of the Member States for the implementation of relevant actions (and notably the procurement of vaccines).[153] In the aftermath of the pandemic, the conferral on the Commission of the power to jointly procure vaccines on behalf of the Member States was considered a success story,[154] and led to the inclusion in a number of ordinary legislative instruments of the possibility for the Commission to organise joint procurement procedures in various sectors, including a general residual provision in the *IMERA Regulation.* At the same time the Financial Regulation (see section 1.2.4. of this Chapter) was amended to permanently accommodate the rules for the implementation of these new possibilities.

A second example is provided by the experience of the *EU Digital COVID Certificate Regulation*, which although adopted on an ordinary legal basis, was in fact conceived as a crisis instrument of limited duration (see Part I, Chapter I, section 2.3.2). The Regulation was designed to address difficulties for the freedom of movement of persons during the pandemic and to that end it introduced common rules for the issuance, verification and acceptance of COVID-19-related certificates. The instrument proved extremely effective in facilitating travel and in contributing to the lifting of unilateral measures restricting the movement of persons, as Member States moved from early restrictions based on the health risk in the geographical area of origin to restrictions based on the health condition of the individual as shown by the certificate (see Part I, Chapter I, section 2.3).[155] Following the success of the measure, it is not surprising that the ordinary legislator introduced similar mechanisms (e.g., empowering institutions to adopt digital templates and tools aimed at facilitating the identification of categories of persons or the verification of certain facts) both in the *IMERA Regulation*[156] and in the *Schengen Borders Code* reform.[157] [158]

---

[153] Article 4(5) (b) and (c) of the *Emergency Support Instrument* as amended. See also European Court of Auditor Special Report 19/22 quoted above, points 22–26.
[154] *Ibidem*, point 73.
[155] For an assessment see European Court of Auditors Special Report 1/23, "Tools facilitating travel within the EU during the COVID-19 pandemic – Relevant initiatives with impact ranging from success to limited use," in particular points 69 to 74.
[156] See: Article 22 on mitigation measures for the free movement of persons: during the internal market emergency mode and for the purpose of facilitating the free movement of certain categories of persons, the Commission is empowered to provide Member States with digital tools to facilitate the identification of the categories of person and verification of the relevant facts.
[157] See: Article 21a of the amended Borders Code and Recital 9 of the Amending Regulation, which empower the Council in the event of a large-scale public health emergency to adopt an implementing regulation setting out temporary restrictions on travel to the Union, and which clarify that in that Regulation the Council can specify the conditions under which travel might be permitted, including the requirement to use digital certification systems.
[158] A third example of situation where a measure adopted to address a contingent situation of crisis is then generalised for the future is the inclusion in the Common Provisions Regulation for the period 2021–2027 of a number of the crisis-related derogations already adopted in the framework of the *CRII* and *CRII plus* as a reaction to the COVID-19 pandemic. See section 1.2.4 of this Chapter above.

These two examples – the joint procurement of medical countermeasures and the COVID-19 certificates – also show another interesting interplay between emergency solutions and ordinary legislation: once a solution found in a specific domain proves to be effective during a specific emergency, it is then generalised and mainstreamed across different domains, even if they are completely unrelated to the situation to which it was first applied (e.g., joint procurement rules or priority-rated requests/orders applied to defence contracts).

It is to be noted that impetus for legislative reform can also be prompted by difficulties experienced in the implementation of emergency measures. A clear example of this situation is offered by the two *2015 Relocation Decisions* adopted on the basis of Article 78(3) (see Part I, Chapter I, section 1.1 above). The very modest outcome of the relocation programme envisaged by the two Decisions contributed to convincing the Commission to withdraw its original 2015 proposal for a permanent mandatory relocation mechanism[159] and instead to opt for a more flexible solution in the framework of a new proposal presented as part of the New Pact on Migration and Asylum.[160]

A third type of dynamic concerns situations where the crisis and the emergency measures adopted to respond to it operate as accelerators of legislative reforms that were already in the making but had encountered political or other difficulties which prevented their adoption.

A first example of this situation is offered by *SURE,* a temporary financing scheme established at the outset of the COVID-19 crisis to mitigate the unemployment risks linked to the pandemic. Before *SURE,* the possibility to establish a European unemployment reinsurance scheme had been debated since the 1970s as part of the debate on the establishment of a Monetary Union. In the aftermath of the 2008 financial and economic crisis the idea gained a new momentum, notably in studies and resolutions[161] of the European Parliament which strongly advocated for the introduction of a common unemployment insurance scheme for the euro area. The Commission put forward the idea again as part of its 2017 reflection paper on the deepening of the Economic and Monetary Union[162] and finally incorporated it as one of the possible

[159] Proposal of 9 September 2015 for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism, COM/2015/0450 final.
[160] Proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final.
[161] European Parliament, Resolution of 16 February 2017 on budgetary capacity for the euro area, 2015/2344(INI).
[162] European Commission, Reflection Paper on the deepening of the economic and monetary union, COM(2017) 291.

applications of the proposed European Investment Stabilisation Function.[163] Due to the strong reluctance from Member States, however, the proposal failed to gain traction in Council. The pandemic dramatically changed the political context, leading to the rapid adoption of *SURE,* which was adopted on the basis of Article 122 TFEU and can be considered as the emergency operationalisation of a European unemployment reinsurance scheme.

Another example is provided by the *Recovery and Resilience Facility,* whose architecture was largely borrowed from a different instrument being discussed at the moment when the COVID-19 pandemic struck: the proposed *Budgetary Instrument for Convergence and Competitiveness* (*BICC)*.

The *BICC,* which itself evolved from the Commission proposal for a *Reform Support Programme*,[164] was meant to be a spending instrument aimed at providing financial incentives for the implementation of structural reforms and public investments necessary to foster the convergence and competitiveness of the members of the euro area. The instrument aimed to strengthen the monetary union by complementing the system of budgetary surveillance and strict economic policy requirements with a budgetary instrument that should support the euro area members in their efforts to achieve economic reform. Proposed on the basis of Article 175(3) TFEU (cohesion) like the *RRF*, the BICC envisaged the submission by the Member States of a "package" of reform and investment which should respond to the challenges identified in the European Semester. Following the approval of the package by the Commission, Member States would receive financial support upon the achievement of milestones and targets laid down in the package. The financing would take the form of grants financed by the Union budget for a modest amount; however, the envisaged budget could be supplemented by voluntary contributions from the Member States to provide a critical mass to the instrument.[165]

While the *BICC*′s main objective was quite different from economic recovery from the pandemic, it is interesting to note that its legal and financial architecture already contained the fundamental elements that would then characterise the *Recovery and Resilience Facility* proposal (submission of a package/plan of reforms and investments; coordination with the

[163] Proposal for a Regulation on the establishment of a European Investment Stabilisation Function, COM(2018) 387.
[164] Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme, COM(2018)391 final.
[165] Unlike the case of the *RRF* a major legal and political problem in the negotiation of the *BICC* was to design a (quantitively) meaningful instrument to be financed via the EU budget but fundamentally aimed at the needs of the euro zone members only.

priorities identified in the European Semester; financing linked to the achievement of milestones and targets and not the usual cohesion model of reimbursement of costs); crucially, the idea of an instrument aimed at supporting the reforms and investments necessary to strengthen the economies of the Member States remained fundamentally the same.[166] After more than two years of difficult negotiations in Council, the Commission finally withdrew the proposal for the RSP/BICC at the moment it presented the *RRF* proposal which was successfully agreed upon in less than nine months.

A final example is provided by some of the emergency measures adopted on the basis of Article 122(1) TFEU to react to the energy crisis prompted by the Russia's war of aggression against Ukraine. At the moment when the war broke out, the co-legislators were already discussing the reform of the regulatory framework for gas and hydrogen markets, as part of the so-called gas package. While the discussions continued and finally led to the adoption of the new ordinary framework in July 2024, certain of the elements of the reform were "frontloaded" by incorporating them in emergency measures already adopted in 2022. This was notably the case of certain provisions on transparency for the energy market, adopted in the framework of the emergency Council Regulation 2022/2576 on the facilitation of joint gas purchases.[167]

These three examples show that the political pressure created by the need to provide responses to the crisis can be effectively used by the Commission to overcome existing political resistance and thus push forward a pre-existing regulatory agenda. In particular, the urgent and provisional nature of the measures to be adopted can help to promote the acceptance of innovative and controversial solutions that would be opposed if presented as definitive. At the same time, if the emergency measures ultimately prove to be effective, the argument for pursuing the original legislative proposal would in turn be strengthened.

It is important to stress that according to the dynamics identified in the previous paragraphs, emergency measures have an impact on the legal order which is broader than their (temporally) limited legal effects. The above examples show that in many cases the exercise of emergency powers is in a dialogic relationship with ordinary legislation and ultimately contributes to the

[166] Indeed, one of the criticisms levelled at the RRF is its strong connotation as an instrument of broader economic policy geared towards the convergence of Member States' economies rather than being a cohesion instrument aimed at providing support in facing the immediate consequences of the pandemic.
[167] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (OJ L 335, 29.12.2022, p. 1). See, in particular, the measures enhancing the transparency and access to LNG terminals and gas storage facility, as clarified in recital 31.

latter's evolution. Rather than a factor of mere rupture from the ordinary regulatory framework, emergency powers operate as a vehicle for change in the fabric of the ordinary legislation.

One important effect of this normative dynamic is that the area subject to an emergency regime is eventually brought back to the ordinary law making procedure and the co-legislator becomes fully involved according to the relevant material legal basis, thus having the opportunity to exercise a form of control *ex post* on the emergency powers adopted at the EU level.

Thus, certain of the emergency measures adopted to face the gas supply crisis due to Russia's war of aggression against Ukraine were then "repatriated" in the permanent framework under ordinary legislation, often after an intense legislative debate as to whether those measures had proved effective and whether it was appropriate to apply them in "ordinary" times, notably in relation to their impact on other protected interests. For instance, this was the case for several measures for accelerating the permit-granting procedure for renewable energy technologies (e.g., the introduction of a presumption that the deployment was in the public interest) introduced in the emergency Council Regulation 2022/2577 and then incorporated in the *Renewable Energy Directive (RED)*, while other measures were not considered appropriate for permanent inclusion in the ordinary regime. Similarly, the *Gas Market Package Reform*[168] transformed some of the crisis measures introduced by emergency Council Regulation 2022/2576 into permanent features of the natural gas market.[169]

It is interesting to note that in certain cases the Commission anticipates this form of legislative control by submitting at the same time – or within a very short time frame – both a proposal for emergency measures and a proposal for a corresponding change in the ordinary legal framework, thus allowing the two procedures to run in parallel.

[168] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No. 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No. 715/2009, OJ L, 2024/1789, 15.7.2024.

[169] That concerned, in particular, the mechanism for demand aggregation and the joint purchasing of natural gas, measures to enhance the use of LNG facilities and natural gas storage, and additional solidarity measures in the event of a natural gas emergency.

A good example of this approach is offered by the practice of emergency measures in the area of migration. Both in 2015[170] and again in 2021,[171] the Commission complemented its proposals for temporary emergency measures for the benefit of specific Member States under Article 78(3) TFEU with legislative proposals for permanent changes in the ordinary legal framework applicable to all Member States. On both occasions, the Commission made clear that the adoption of provisional emergency measures was exceptional and did not remove the need for broader legislative intervention; in fact the Commission stressed that, once adopted, the permanent framework would render it unnecessary to resort to Article 78(3) in the same circumstances.

A similar pattern can be found in the recent application of Article 213 TFEU, on urgent financial assistance to Egypt. On 15 March 2024, the Commission proposed a package of assistance in the form of two macroeconomic financial assistance (MFA) operations: a short-term MFA operation of EUR 1 billion, to address Egypt's particularly urgent financing needs, to be adopted as an emergency measure via a Council decision based on Article 213 TFEU and a regular MFA operation of EUR 4 billion over 2.5 years, to be adopted according to Article 212 TFEU (ordinary legal basis for MFA, subject to ordinary legislative procedure). The ex ante evaluation statement accompanying the two proposals clarifies the relationship between the two instruments according to the Commission:

> Using Article 213 TFEU is clearly a second-best option, but a first disbursement still in 2024 in response to Egypt's particularly acute financing needs this year would appear impossible if the decision was to be adopted by both the Parliament and the Council in accordance with Article 212 TFEU […]. The recognition of the second-best nature of relying on Article 213 motivates the split of the package into two proposals, rather than one proposal under Article 213 for the entire support, where the limited share of the first part within the overall volume of support under the package has been calibrated taking this into account, in addition to Egypt's urgent financing needs.

[170] See Part I, Chapter I, section 1 on migration crises. During the 2015 migration crisis, the Commission submitted a proposal for a Regulation establishing a crisis relocation mechanism based on Article 78(2)TFEU on the same day as the submission of the second Relocation Decision for the benefit of Italy an Greece based on Article 78(3)TFEU, that is on 9 September (the first Relocation Decision had already been submitted on 27 May).
[171] During the 2021 Belarus migration crisis, the Commission submitted a proposal for a Regulation addressing situations of instrumentalisation based on Articles 78(2) and 79(2) only 13 days after having presented a proposal for a decision for the benefit of Latvia, Lithuania and Poland based on Article 78(3)TFEU.

In all these cases, by submitting at the same time a proposal for emergency measures and a proposal for an instrument under the ordinary legal basis, the Commission shows to the co-legislators – and to the Parliament in particular – that it takes seriously the exceptional nature of measures adopted under emergency legal bases, by clarifying that they are not meant to regulate the matter on a permanent basis. It, however, also creates the conditions for the legislator to immediately start a legislative debate – and possibly to intervene – on the merit of the policy choices underpinning the proposed emergency measures.

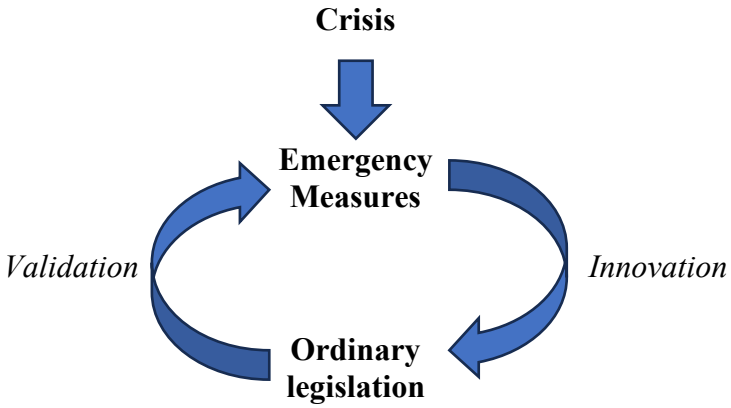
2.2.2 A crisis-driven policy cycle

The various patterns of interaction between emergency measures and ordinary legislation identified in the previous paragraph in relation to the situations of crisis examined in this report are illustrative of a policy dynamic whereby emergency measures provide a crucial input for work of the ordinary legislator and the shaping of EU policies for the future. At the same time, the ordinary legislative discussion allows for a broader debate on the scope and effectiveness of the measures adopted under the pressure of emergency.

The reciprocal interactions between emergency measures and ordinary legislation therefore lead to a normative cycle that shapes EU lawmaking and that can be illustrated as follows (Figure 1):

Figure 1

Emergency measures and the EU normative cycle



Situations of crisis raise challenges and allow the identification of contingent needs that justify the adoption of emergency measures derogating from or supplementing existing regulatory regimes on a temporary basis. The innovations introduced by emergency measures may prompt reflections as to their effectiveness and whether it would be opportune to introduce a permanent change in the ordinary regulatory framework. When this materialises in a proposal for new legislation, the legislative debate offers an opportunity for the co-legislators to validate the solutions introduced with the emergency measures or, conversely, to challenge them in favour of different policy choices.

This policy cycle complements (and can also overlap with) the mechanism of cross-validation occurring in the case of policy packages, as explained in the previous chapter. Together, the two dynamics help to address the shortcomings usually associated with recourse to emergency competence – the dominance of the executive and the lack of sufficient democratic scrutiny – by allowing the relevant institutional actors to validate the policy outcome in a broader context than the adoption of the emergency measures individually considered.

It is thus interesting to note that, while not providing for formal arrangements like the ones that can be found in several national constitutions and that require the legislator to validate the use of emergency powers by the executive,[172] the informal mechanisms identified in this section give the Union ordinary legislator a certain degree of control over the exercise of emergency powers.

As the holder of the right of initiative, the Commission plays a central role in ensuring the smooth functioning of these supplementary validation mechanisms. In particular, the tempo and

[172] See, for instance, Article 77 of the Italian Constitution.

design of the legislative proposals that the Commission brings forward is essential in ensuring that the legislative debate is triggered in a timely and effective manner.

It would therefore be possible to enhance the scrutiny of the Union legislator over the exercise of emergency powers by strengthening the dynamics identified in this section, and notably by giving them a certain level of formality and predictability. This could be achieved without the need for Treaty change but by appropriate arrangements among the institutions. For instance, an interinstitutional agreement could be concluded engaging the Commission to supplement where appropriate its proposal for emergency measures to tackle a specific crisis situation with the appropriate legislative proposals so as to equip the ordinary legal framework to address similar situations on a more permanent basis. In addition, measures adopted on the basis of emergency provisions could include enhanced reporting obligations for the Commission, requiring it to assess the need to adapt the ordinary legal framework in light of the lessons learnt from the implementation of the emergency measures.

This solution would have the advantage of contextualising the use of emergency powers and placing them in a broader normative cycle, leading to mutual reinforcement of the roles of the ordinary legislator and of the emergency decision-maker. The engagement would provide the necessary reassurances that the Commission and the Council take seriously the exceptional character of emergency measures and that the space for a democratic debate on the content of the measures is safeguarded. This would in turn increase the legitimacy and acceptability of the emergency action at the EU level, while preserving its effectiveness.

Concluding remarks: A crisisification of Union policies?

This section has looked at emergency measures and at their relationship with ordinary legislation beyond the dimension of individual legal acts. Taking a broader perspective, it has focussed on the way they interact in the framework of complex policy packages or concur in activating a normative cycle which provides impetus to the Union's policymaking.

The shift of focus from the individual emergency measure to the broader policy dynamics within the EU legal order provides a better understanding of the role that emergency powers play beyond the situations of crisis they are meant to address and of the underlying institutional tensions. It also allows to take a fresh look at the classic problems associated with recourse to emergency measures – notably the need to avoid the dominance of the executive – and to propose pragmatic solutions that leverage those dynamics to ensure that the role of the ordinary

legislator is safeguarded and that the policy choices made during the emergency are subject to democratic scrutiny.

However, the dynamics we have identified also raise important questions as to the consequences of having a policy cycle driven by crises and emergency response.

In institutional terms, one can wonder whether the involvement of the ordinary legislator in a crisis-driven process, whereby solutions introduced by emergency measures are generalised and incorporated in the ordinary legal framework, really allows for a meaningful democratic debate. The risk exists that the co-legislators, and notably the Parliament, will find themselves faced with a *fait accompli*: the political pressure to "ratify" solutions already proven to be successful, demonstrating the capacity and effectiveness to address a situation of crisis, will ultimately leave the legislators with a limited margin of manoeuvre when negotiating changes to the ordinary legal framework. In that regard, however, it is interesting to note that it is sometimes the Parliament that pushes the hardest for certain emergency provisions to be integrated into permanent rules, as has been the case of the emergency provisions adopted under Article 122 TFEU in the framework of the energy crisis.

Even if this risk does not seem confirmed by the practice analysed in this report – as the Parliament managed to make a relevant contribution in the design of the ordinary legislative instruments adopted in the aftermath of the crises analysed – the fact remains that the involvement of the ordinary legislator in the forms described in this chapter can only ensure *ex post* control of the exercise of emergency powers.

Such a form of scrutiny will be of little relief in the case of emergency measures that have entirely exhausted their effect and are not intended to be incorporated in a permanent legal framework. This is for instance the case of emergency spending instruments, and notably some of the most relevant emergency measures adopted under Article 122 TFEU (e.g., *SURE, EURI, ESI*) for which, however, other forms of parliamentary control can enter into play, as we will see in the next section.

In substantive terms, as the numerous examples described in this chapter have shown and academic literature has already underlined,[173] the "crisis approach" simultaneously shapes the

[173] M. Rhinard, "The Crisisification of Policy-Making in the European Union," *Journal of Common Market Studies*, 2019 (57), p. 616; J. White, "Constitutionalizing the EU in an Age of Emergencies," *Journal of Common Market Studies*, 2023 (61), p. 781.

agenda, the process and the content of policy-making. Crisis-based solutions are taken as a blueprint for the design of ordinary regulatory frameworks, while crisis modes become generalised and multiply across the different policy areas falling under Union competence.

This approach is associated with an expansion of the notion of crisis which goes well beyond the specific and limited situations covered by the emergency provisions of the Treaties. Secondary legislation multiplies the type of crises which trigger emergency regimes to include situations that – far from being exceptional – are inherent in the (mal)functioning of the market, such as the disruption of supply chains, shortages and obstacles in trade (as in *IMERA,* the *EDIP* proposal or the *Chips Act*). In other cases, an eminently political element is introduced in the definition of crisis, as in the case of the notion of instrumentalisation of migrants under the *Crisis Regulation*.[174]

All this results in a progressive "crisisification" of substantive EU law, which introduces into the logic of ordinary regulation the exceptionalism which characterises recourse to emergency measures. The presentation of certain events as "crises" justifies recourse to extraordinary regimes that suspend or supplement the application of the ordinary legal framework in relation to a targeted situation or a targeted group of individuals upon the occurrence of certain situations. So, a form of "permanent exceptionalism" takes shape, which is integrated in ordinary law, altering its scope and becoming the new normal.[175]

This dynamic is particularly problematic in relation to areas where the upholding of individual rights and freedoms is at stake: as the number of crisis frameworks multiplies, the scope of ordinary rules is eroded and the restriction of rights and freedoms becomes a permanent feature of the regulatory regime.[176] This entails the risk of moving from one emergency regime to another and precluding any possibility to restore in full and rapidly the rights and freedoms that have been restricted.

---

[174] The definition of instrumentalisation in Article 1(4)(b) of the *Crisis Regulation* requires it to be established that the encouragement or facilitation of migratory movements by a third country or a hostile non-state actor was carried out with the aim of destabilising the Union or a Member State. Recital 28 clarifies that "it is relevant to consider whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants."

[175] T. Houghton, "Is Crisis the New Normal? The European Union in 2015," *Journal of Common Market Studies*, 2016 (54), p. 5.

[176] In relation to the area of migration, Moreno-Lax critically underlines how "crisis" has become a mode of governance enabling new policy dynamics and decision-making processes, and ultimately leading to the normalisation of fundamental rights limitations via a permanent reshaping of ordinary legislation via crisis framework modes. V. Moreno-Lax, "The "Crisification" of Migration Law: Insights from the EU External Border," in S. Burch Elias, K. Cope and J. Goldenziel (eds), *The Oxford Handbook of Comparative Immigration Law*, Oxford University Press, 2023.

Here again, the institutional lawyer is called upon to play a crucial role in ensuring that the necessary guarantees are in place so that the multiplication of crisis regimes across legislative instruments remains compatible with the Charter. This explains the particular attention paid by the legal advisors of the institutions to frame and provide sufficient justification for any envisaged interference with fundamental rights in situations of crisis as part of their advisory role during the legislative process. In particular, the advice of the institutional lawyer will be particularly important to ensure that the legislators assess with due care whether the limitations of rights and freedoms by the measures to be adopted under the permanent crisis framework are appropriate for ensuring the protection of a relevant public interest, do not exceed what is necessary to attain that objective, and do not affect the essence of the right or freedom in question.

IV. EMERGENCY AND ITS IMPACT ON THE UNION INSTITUTIONAL BALANCE

"In times of crisis, the limits of institutions built on attributed competence are quickly reached"
E. Van Rompuy[1]

Introduction

This Section will look at whether the balance of powers between the Union institutions has been affected by recent emergencies. The Union derives its powers from the Treaties, and competences not conferred upon the Union in the Treaties remain with the Member States.[2] When it comes to interactions between the Union's institutions, each institution must act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions must practice mutual sincere cooperation.[3] Those basic principles are the foundation of the specific constitutional set-up of the EU.

Emergency situations, however, may require the institutions to adapt the ways in which they function and interact, creating the opportunity – some would argue even the need – for activism by some, while others would suffer an erosion of their prerogatives. This chapter looks in greater detail at how crises have shaped the action of the four main institutions of the EU – the European Council, the Council of the European Union, the European Parliament and the Commission – and whether this has resulted in a shift in the institutional balance.

In all case studies analysed in this report, the European Council has emerged as the driving force in times of crisis, pushing the boundaries of its prerogatives under the Treaties. This role has, however, been criticised by many as an example of executive dominance in times of emergency, and as a development accelerating the erosion of the role of purely supranational institutions, to the advantage of the those operating in the limelight of intergovernmentalism.

The central role that the Council has played in adopting emergency measures reflects the allocation of powers as laid down in the Treaties and could thus be expected. Major measures have thus been adopted on the basis of emergency legal bases that confer decision-making authority on the Council, with little or in some cases no involvement of the European Parliament. The centrality of the European

[1] H. Van Rompuy, *Europe in the storm: promise and prejudice*. Leuven: Davidsfonds Uitgeverij nv, 2014.
[2] Article 4(1) TEU. See also: Article 5 TEU laying down the principle of conferral of powers.
[3] Article 13(2) TEU.

Council in defining the Union's emergency response has not replaced the Council as the forum where the technical aspects of emergency measures are negotiated and their design and specific features are agreed. Other developments are, however, more controversial. In particular, the Council has expanded its role in the implementation of crisis instruments, intervening in areas that were traditionally the preserve of the Commission and, to a lesser extent, of the Member States.

The Parliament is often described as a mere spectator in times of crisis and its limited involvement in the adoption of emergency measures has prompted an intense debate on the risk that increasing recourse to emergency measures would undermine direct democratic control.

Finally, the impact of the crises on the Commission's role seems to be ambivalent. On the one hand, it was instrumental in shaping the Union's emergency response through rapid and decisive initiatives. In situations of urgency, one may argue that the Commission gains substantial power though its right of initiative, as the lead time between proposal and decision is short, thus leaving less time for in-depth scrutiny and discussion. At the same time, it has been questioned whether the enhanced role of the European Council, and its degree of intervention in shaping the emergency response of the Union, undermines the Commission's prerogatives. Moreover, it is interesting to note that, at national level, crisis management tends to involve a more predominant use of executive powers, as illustrated in the national reports. It is therefore relevant to look closer at how the role of the Commission, as the main Union institution implementing EU policy, has shaped up and whether – despite the unique institutional set-up of the European Union – some common denominators are present when compared against the handling of crises at the national level.

This chapter will look more closely at all of these developments and assess whether they have altered the balance of powers as laid down in the Treaties. When carrying out this assessment, it is useful to keep in mind that a shift in the balance of powers – if any – is only legally problematic if it has happened in breach of Treaty provisions. In fact, the institutional balance is not fixed across the Treaties, but it varies depending on every individual legal basis. In that regard, the case-law developed by the Court of Justice to police respect for the principle of institutional balance and to control the overreach of political institutions is one that appears to walk a thin line between safeguarding the constitutional integrity of the Union's legal order and respecting the need to ensure that the institutions have sufficient political space to take effective action.

1. The European Council: The crisis manager-in-chief

Since its establishment as an Institution by the Treaty of Lisbon, the European Council has played a central role in the management of crises affecting the Union. The academic literature underlines that

this function emerged as a key feature of the new institution during the "permanent state of crisis" that has characterised the Union since 2008, and even argues that "the original *raison d'être* of the European Council was as a crisis management body."[4] It is fair to say that in the situations of crisis analysed in this report, the crisis manager function of the European Council has been confirmed, albeit with varying intensity, and has helped increase the relevance of the institution. Indeed, the role played by the European Council during the COVID-19, migration and energy crises has established its position at the "centre of political gravity" of the Union (see above Chapter I).[5]

Despite this relevance, there is no explicit reference in the Treaties for the European Council to solve crises. Nevertheless, the Treaties define in very broad and yet flexible terms the powers of the European Council, as the institution providing the Union with the necessary impetus for its development and defining the general political directions and priorities thereof (Article 15(1) TEU). This situation has been perceived as creating a certain tension between the formal powers of the European Council and its actual role, and it has been argued that it exposes a "a significant gap between the power exercised by the European Council and the role it formally plays in the EU's Treaty framework."[6] Such an alleged gap has led some commentators to argue that the crisis management role of the European Council has developed fully outside the framework of the Treaties[7] and to question the compatibility of some of its most extreme actions with the Treaties and especially the institutional balance defined therein. Others have reacted to such a gap by putting forward a number of policy recommendations aimed at ensuring that the crisis management function of the European Council is properly reflected and limited in the Treaties, and by advocating for stronger accountability and transparency mechanisms to match the greater power with appropriate safeguards.[8]

In light of this ongoing debate, it is useful to look at the practice of the European Council's action during the different crises analysed in this report. After identifying the different dimensions of the enhanced role played by the European Council, we will assess whether such a role is compatible with the one that the Treaties envisage for the institution in light of the well-established case law of the Court of Justice, and we will come to a clearly positive reply. Beyond a test of strict legality, the

[4] D. Dinan, "Governance and Institution: Implementing the Lisbon Treaty in the Shadow of the Euro Crisis, " *Journal of Common Market Studies*, Vol. 49, 2011, pp. 103–121.
[5] U. Puetter, "Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance," *Journal of European Public Policy*, Vol. 19:2, 2012, pp. 161–178.
[6] A. Akbik, M. Dawson, "The Role of the European Council in the EU Constitutional Structure," Study requested by the EP AFCO Committee, February 2024, PE 760.125, pp. 6 and 28.
[7] In these terms, see, for instance: S. Anghel and R. Drachenberg, "The European Council under the Lisbon Treaty," Study by the European Parliamentary Research Service, November 2019, PE 642.806, p. 27.
[8] See, in this sense, the study by Akbik and Dawson referred above in footnote 6 at page 36ff.

reasons why such a development took place and whether there is a need for a reform will also be explored.

1.1 The enhanced role of the European Council in times of crisis

The case studies analysed in this report confirm that in times of crisis, the European Council has been playing an increasingly prominent role. The phenomenon has three different dimensions: first, the European Council's intervention in policymaking deepens in times of crisis, so that it becomes the main driver, and in certain cases even the designer, of the emergency response; second, its role seems to expand beyond policymaking to other areas of EU action, such as implementing EU law, which are normally the preserve of other actors; finally, the European Council can provide the forum where the Member States may consider to act beyond the framework of the EU legal order and have recourse to intergovernmental instruments when this is necessary to complement the instruments available at the EU level. These phenomena are not limited to crisis situations.

1.1.1 From agenda-setting to law-making?

As regards the first phenomenon, it has been argued that the involvement of the European Council in shaping the policy response to crises goes beyond its role of providing direction to the Union's action. It is true that, in the early days of each crisis, the European Council intervenes in line with its task of setting the political priorities and agenda for Union action. This was indeed the purpose of the extraordinary Council meetings convened at the height of the migration crisis in 2015, at the outset of the COVID-19 pandemic and in the immediate aftermath of Russia's invasion of Ukraine.

However, the European Council continued to remain significantly involved after its initial intervention, as is clearly shown by the number of meetings that took place during the three crises analysed in this report.

In ordinary times, the European Council is supposed to meet twice per semester[9] in March, June, October and December. Additional meetings are labelled as "extraordinary" or "special" and are convened at the initiative of the President of the European Council when circumstances so require.[10] Informal meetings are also used when they are deemed appropriate to achieve progress on a sensitive issue by holding informal discussions among leaders, or, as happened during the early phase of the COVID-19 pandemic, circumstances prevent a physical meeting: in such cases, conclusions are not

[9] See: Article 15(3) TEU and Article 1(1) of the European Council Rules of Procedure.
[10] Ibidem.

adopted by the European Council but its President may issue a press statement or conclusions in his or her own name.

It is interesting to note that recourse to extraordinary, special or informal European Council meetings significantly increases in times of crisis. In 2015, the year when the migration crisis hit and the European Council scrambled to find solutions against a backdrop of deep divisions among the Member States, the European Council met eight times, six of which on the topic of migration (three regular meetings, one special and one informal). In 2020, the first year of the COVID-19 crisis, the European Council met a record 13 times, discussing COVID-19 related issues on 12 occasions (two regular meetings, two special meetings and eight informal meetings, including meetings via videoconference). Finally, the number of meetings in 2022 at the peak of the energy crisis were nine, eight of which focussed on energy issues (four regular meetings, two special meetings and two informal).[11]

The high degree of European Council involvement during crises can be explained by the need to adapt the response to the fast-changing situation on the ground, which required adjusting the political priorities and thus frequent new steering from the leaders. This is very clear in relation to the COVID-19 crisis, as the health emergency morphed into an economic crisis and internal market crisis, thus prompting a redefinition of the emergency response and the setting of new priorities (see above Chapter I, Section 2).

However, the active approach of the European Council is also the result of the institution establishing itself as the forum where emergency policies are defined, negotiated and finally agreed at political level, often as part of complex political packages. An analysis of the relevant conclusions of the European Council shows that the frequency of its meetings was often coupled with further intervention in the policy debate at an increasingly granular level.

To start with, the European Council made extensive use of the practice of addressing requests to the other EU institutions, notably to the Commission, asking them to come up with policy options or strategies and, eventually, with the relevant legislative proposals. The constitutional law doctrine refers to these requests as "political instructions" (see the contributions listed above in footnotes 4 to 7), which however should not lead to the impression that the European Council requests are meant to have legally binding effect, as it is made clear by the wording used (the requests are often formulated as "calls" and "invites" addressed to other institutions). Once legislative proposals are submitted, the European Council can follow up with further specific requests, either on the substance or on the

[11] See Timeline – Council actions in response to the COVID-19 pandemic, https://www.consilium.europa.eu/en/policies/coronavirus-pandemic/timeline/

process, in particular by validating, or requiring adjustment to, the measures proposed and/or requesting the co-legislators to speed up adoption of the relevant piece of legislation, including by setting deadlines. In so doing, the European Council's instructions can at times highlight specific aspects of the measures to be discussed, by providing guidance as to the landing zone for a political compromise, as well as indicating the nature of the instrument (and legal basis) that should be used for its adoption.

The sequence of European Council conclusions leading to the presentation of the proposals for the *Next Generation EU* scheme to finance the recovery from the economic impact of the COVID-19 pandemic crisis is a good example of the steering role of the European Council (see Chapter I, Section 2.1.3): as early as 26 March 2020, the European Council acknowledged the gravity of the socio-economic consequences of the pandemic and expressed the political will to "do everything necessary to meet this challenge in a spirit of solidarity." In the same conclusions, the European Council invited the Eurogroup to present proposals which "should take into account the unprecedented nature of the COVID-19 shock affecting all our countries."[12] On 9 April 2020, the Eurogroup presented a report detailing a number of measures on which agreement had been reached. This was not yet the case for the establishment of a Recovery Fund, on which further discussions on crucial issues such as its relation to the EU budget, its sources of financing and recourse to innovative financial instruments were necessary. On those points, the Eurogroup expressly sought guidance from leaders.[13] On 23 April, the European Council finally agreed to work "towards establishing a recovery fund, which is needed and urgent. This fund shall be of a sufficient magnitude, targeted towards the sectors and geographical parts of Europe most affected, and be dedicated to dealing with this unprecedented crisis." The European Council thus asked the Commission to "urgently come up with a proposal that is commensurate with the challenge."[14] The conclusions of 23 April were thus a major breakthrough in the process: the leaders had recognised the need for the fund. From that moment on, the question was no longer about "whether" but about "how" that Fund should be designed.

Another example is to be found in the detailed conclusions adopted by the European Council during the energy crisis. At the informal meeting in Versailles on 11 March 2022, the European Council agreed on the strategic objective of phasing out dependency on Russian gas, oil and coal as soon as possible, and identified various strands of action. It called on the Commission to propose a plan by the end of March to ensure security of supply and affordable energy prices during the following winter

[12] Joint Statement of the Members of the European Council of 26 March 2020, point 14.
[13] Euro Group, "Report on the comprehensive economic policy response to the COVID-19 pandemic, 9/4/2020, point 19.
[14] Conclusions of the President of the European Council following the video conference of the members of the European Council, 23 April 2020.

and, by the end of May, a plan on the other measures.[15] Following that initial political guidance, the European Council followed up on specific measures at a number of meetings in the course of 2022, setting out more detailed indications as to their content and the timeline for their adoption and adjusting the priorities as required by the evolution of the situation and by the result achieved. Thus, in its Conclusions of 24 and 25 March 2022, for instance, the European Council focussed on the recent OLP proposal presented by the Commission on gas storage, instructing the legislators to examine it, duly taking into account and addressing "the interests of the Member States with significant storage capacity in order to ensure a fair balance."[16] That call resulted in a number of Council amendments to the proposal to accommodate the situation of specific Member States, which were finally incorporated in the final text agreed with the European Parliament. As the crisis progressed and the measures under discussion under the Repower EU plan presented by the Commission did not appear sufficient or rapid enough to respond to the rising emergency prices, the European Council called for further exceptional actions. In its Conclusions of 20 and 21 October 2022, the European Council "agreed that in light of the ongoing crisis, efforts to reduce demand, to ensure security of supply, to avoid rationing, and to lower energy prices for households and businesses across the Union need to be accelerated and intensified, and the integrity of the Single Market has to be preserved." It consequently called on the Council and the Commission to "urgently submit concrete decisions [...] as well as Commission proposals" on additional emergency measures, to be adopted under Article 122.[17] It further stressed its commitment to closely coordinating the policy response and common European-level solutions. Once it had set clear guidance for action, the European Council left to the relevant EU institutions – and, in particular, Commission and Council – the task of defining the specific content of the various measures, in line with their responsibilities under the Treaties (and indeed this is shown by the impressive number of meetings of the TTE (energy) Council, held in the reference period). See above Chapter I, Section 3.

In specific cases, the European Council went significantly further than addressing requests to the Commission and the co-legislators and its conclusions directly defined in great detail certain relevant features of the measures to be adopted, in particular with the aim of finding a landing zone for political agreement among the Member States through reciprocal concessions on a complex policy package.

An example is provided by the Conclusions of 20 and 21 October 2022 mentioned above, where the European Council reached an agreement on additional emergency measures to respond to the energy crisis generated by the Russian aggression against Ukraine. The conclusions go to great length in

[15] Versailles Declaration, 10 and 11 March 2022, paras. 16 to 18.
[16] Conclusions of the European Council meeting of 24 and 25 March 2022, EUCO 1/22, in particular point 17.
[17] Conclusions of the European Council meeting of 20 and 21 October 2022, EUCO 31/22, in particular, points 18–20.

defining the main elements to be incorporated into acts to be adopted on the basis of Article 122(1), including a mechanism for the joint purchase of gas, a mechanism to prevent excessive price volatility, measures to increase market transparency, a series of energy solidarity measures in the event of gas supply disruptions in the absence of bilateral solidarity agreements, the fast-tracking of simplifying permitting procedures to speed up the rollout of renewables and a market correction mechanism capping the price of gas.[18]

An even more significant case is represented by the European Council conclusions of July 2020 on the *Next Generation EU*. In this specific case, the conclusions of the European Council defined the central features of at least four legislative acts,[19] and in particular: the financing mechanism based on the authorisation to the Union to borrow the necessary funds on the financial market, as well as its exceptional and temporary character and the arrangements for repaying the borrowed amounts and for ensuring that the borrowing would be counterbalanced by an appropriate asset; the overall amount of the grants and loans to be provided to Member States and their allocation to different EU spending instruments; the main features of the most important of these spending instruments, namely the *Recovery and Resilience Facility*, including the key for allocating the amounts to the Member States; the architecture of the instrument, based on recovery and resilience plans to be submitted by Member States and to be aligned with the country-specific recommendations identified in the European Semester; the rules for payments, to be linked to an assessment by the Commission as to the satisfactory fulfilment of milestones and targets set out in the national plan, including the possibility of triggering an emergency brake involving the European Council.[20]

The level of detail of the conclusions on NGEU is particularly remarkable, as it directly defines key aspects of the legislative instruments at the time of negotiation. At the same time, detailed conclusions are not unprecedented or specific to crisis situations, as the European Council has shown the same degree of involvement in previous negotiations on the Multiannual Financial Framework. Thus, the presentation of NGEU as part of the broader MFF negotiation had the effect of attracting the negotiation of a crisis instrument under the working method already established for that very specific

[18] The various measures were finally adopted as three distinct Article 122(1) instruments: Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders, Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy and Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy.

[19] The *European Union Recovery Instrument, Multiannual Financial Framework Regulation, Own Resources Decision* and the *Recovery and Resilience Facility Regulation*.

[20] See: points A.1 to A.21 of the Conclusions of the special meeting of the European Council of 17, 18, 19, 20 and 21 July 2020, EUCO 10/20.

domain.[21] It remains, nonetheless, that the crisis situation consolidated and further expanded recourse to a working method that has proved particularly appropriate to achieve consensus on complex policy decisions in the given emergency situations.

1.1.2 A role in the implementation and interpretation of EU law?

An important dimension of the criticism addressed by the doctrine and political actors to the role of the European Council in times of crisis concerns its alleged involvement in implementation of EU law. In particular, this concerns the implementation of legislative instruments, both by means of detailed policy instructions on how the implementation should take place and by the introduction in the relevant legislative texts of procedural devices allowing for possible intervention by the European Council in relation to the implementation of the instrument.

A good example of the first situation is provided by the European Council Conclusions of December 2020, which made it possible to reach a final agreement on the NGEU package, which had been previously blocked by the threat of a veto on the legislative files subject to unanimity vote in Council (the MFF Regulation and ORD decision) by two Member States that opposed the adoption of the Rule of Law Conditionality Regulation. In order to overcome the objections of the two Member States, the European Council negotiated a number of reassurances concerning the way in which the Conditionality Regulation would be interpreted and implemented, including specific prescriptions as to the material and temporal scope of application of the regulation, its subsidiary character compared to other instruments for the protection of the budget and the need for the Commission to adopt guidelines on the way it would apply the Regulation (with the additional instruction that if an action for annulment was to be introduced against the Regulation, the Commission would finalise the guidelines only after the judgment of the Court of Justice).[22]

[21] These working methods are based on the practice established prior to the entry in force of the Treaty of Lisbon in a context where the Treaties did not envisage the Multiannual Financial Framework as a typical legal act. In such a context, the leaders meeting in the framework of the European Council had since 1988 held negotiations to agree on a stable and predictable budgetary framework to implement the objectives of the (then) Communities over several years. Such negotiations consisted of a policy package covering the ceilings for maximum expenditure per year and per area of action, the own resources legislation and the "national envelopes" pre-allocated to each Member States under sectoral funding legislation (especially under the cohesion and agricultural policy). The result of such a negotiation would be contained in a detailed European Council Conclusions to then be incorporated into an inter-institutional agreement between Parliament, Council and Commission, which would have given legal effect to the leaders' deal. With the entry into force of the Lisbon Treaty, this informal procedure was replaced by the introduction of a specific legal basis for the adoption of a Multiannual Financial Framework Regulation, to be adopted by the Council by unanimity with the consent of the European Parliament (Article 312(2) TFEU). The new procedure does not provide for a role for the European Council. Nonetheless, the importance of the topic discussed, the difficulty in reaching an agreement at the ministry level, and the weight of the pre-existing practice resulted in the Council entrusting the European Council with the task of reaching the final agreement on the main elements of the MFF package (MFF Regulation proper, the necessary adjustments to the Own Resources Decision, and the essential policy decision as to the spending instruments), on the basis of the preparatory work carried out in the Council and aimed at defining a "negotiating box" setting out the main elements of a possible final deal.

[22] Conclusions of the European Council meeting of 10 and 11 December 2020, EUCO 22/20, in particular at points 2c), 2d), 2f), and 2k).

The second situation mentioned above is exemplified by the inclusion in legislative texts of so-called "emergency brakes": the conferral of implementing powers on the Commission or the Council is combined with provisions that introduce the possibility of a discussion in the European Council on certain elements that are relevant to the adoption of the implementing decision and that delay the adoption of the decision until after the discussion in the European Council has taken place. A significant example is the emergency brake laid down in recital 52 of the *RRF Regulation* in relation to the payments for which implementing powers are conferred on the Commission. If, before the adoption of the relevant Commission implementing decision, a Member State exceptionally considers that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets, it can request a discussion in the European Council. In such exceptional circumstances, no decision authorising disbursement should be taken until the following European Council has exhaustively discussed the matter.[23]

It must be stressed that the "emergency break" was introduced by the co-legislators at the request of the Council during the legislative negotiations leading to the adoption of the relevant legislative act, on the basis of the indications resulting from previous European Council conclusions.[24] Such a request addresses the political need to ensure that matters that are of particular relevance and sensitivity for Member States are ultimately considered at the highest political level, which is the ordinary decision-making rule for the European Council (Article 15(4) TEU). Despite the reasons of political expediency that may explain the proliferation of "emergency brakes," the phenomenon has been strongly criticised by the European Parliament and in the doctrine as a step too far, fundamentally altering the institutional balance laid down in the Treaties, as well as the ordinary voting rules for adoption in Council. As it will be shown below in Section 1.2 of the present section, these concerns have proven unfounded and the Court has acknowledged that the careful drafting of the emergency break, and notably its inclusion in the preamble of the act, excluded that the involvement of the European Council had any legal effect on the procedure for the implementation of the Regulation.

A final example concerns the domain of migration. The *Crisis Regulation* provides for a permanent emergency framework that allows the adoption of temporary derogations from the ordinary rules on

[23] A similar, but narrower, provision can also be found in recital 26 of the Conditionality Regulation to complement a governance framework that confers on the Council the powers to take the implementing measures for the protection of the Union budget. According to recital 26, in case of breach of the principles of objectivity, non-discrimination and equal treatment in the procedure for the adoption of the measures, a Member State can request a referral of the matter to the next European Council for a debate. In such exceptional circumstances "*no decision concerning the measures should be taken until the European Council has discussed the matter.*"

[24] In the case of the RRF Regulation, see: point A.19 of the Conclusions of the special meeting of the European Council of 17, 18, 19, 20 and 21 July 2020, EUCO 10/20.

the processing of asylum requests and asylum seekers' reception conditions in certain specific circumstances, including cases of instrumentalisation of migrants (see Chapter III, Section 1.2.3 above). While Article 3 of the Regulation confers on the Commission the power to determine the existence of a situation of instrumentalisation of migrants by a third country or hostile non-State actor with the aim of destabilising the Union or a Member State, recital 28 also makes it clear that such a determination must take into account the view of the European Council in that regard:

> To ensure a high level of political scrutiny and support and expression of the Union's solidarity, it is relevant to consider whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants. The instrumentalisation of migrants is liable to put at risk the essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security.

1.1.3 Gap-filling role

A third dimension in which the European Council plays an extended role in times of crisis relates to providing a forum to discuss solutions that go beyond the framework of the EU Treaties. In so doing, the European Council plays an important "gap-filling" role that makes it possible to overcome the lack of appropriate competences, instruments or the necessary political support at the EU level and still ensure the possibility of a coordinated response in times of crisis.

A good example of this is the role played by the European Council in conferring political authority on soft-law measures adopted by the Commission in the absence of a stronger regulatory framework under the pertinent legislation. This is for instance what happened in the early days of the COVID-19 pandemic and during the 2015 migratory crisis, when the Commission adopted a number of recommendations under the Schengen Borders Code to promote the coordination of national unilateral measures reintroducing internal border controls or prohibition of entry at the external border. The endorsement of the recommendations by the European Council[25] resulted in a high degree of compliance and conformity by the Member States, thus compensating for the chosen instrument's lack of mandatory legal effect.

A second example is provided by recourse to intergovernmental instruments. Due to its membership made up by representatives of the Member States at the highest political level, the European Council can in *extrema ration* shift its action from the instruments and processes offered by the EU legal

[25] As described above in Part I, Chapter I, para. 2.3.1.

order to intergovernmental solutions, whenever this is made necessary by political or legal obstacles to action at Union level. This strategy was widely used during the 2010 sovereign debt crisis to overcome limits inherent in the system of Union competences and the political reluctance of certain Member States to use EU-wide instruments in light of the asymmetric nature of the shock and moral hazard considerations.[26] In relation to the situations of crisis analysed in this report, recourse to intergovernmental tools was much more limited, as the response was essentially based on EU law instruments and on the Community method. However, intergovernmental solutions were occasionally deployed to complement and support Union action. For instance, in the framework of the 2015 migration crisis, the so-called EU-Turkey statement, which was instrumental in reducing the migratory influx from the Middle East, was in fact classified as an agreement between the representatives of the Member States and Turkey,[27] and thus an intergovernmental tool; in the same context, the *EU Facility for Refugees in Turkey* (*FRIT*) supplemented the resources available via the Union budget through an intergovernmental mechanism of coordinated supplementary contributions by the Member States. In relation to the COVID-19 crisis, one of the early measures adopted to tackle the emerging economic consequences of the pandemic was the amendment of the *ESM Treaty* and the activation of a specific credit line for the Member States (even if the facility was in fact never used and in substance lost relevance with the adoption of the EU-based *NGEU* recovery programme).

More generally, the mere existence of a "second best" but still viable intergovernmental alternative reduces the leverage that Member States may have for the adoption of acts that require unanimity in Council, and can thus help break the deadlock in negotiations on a political package. One of the reasons that allowed to reach the required unanimity on the MFF Regulation and thus to adopt the various elements of the NGEU package was the understanding that the financing scheme to support the recovery from the pandemic could have been redesigned via an intergovernmental facility limited to the participating Member States.

1.2 The role of the European Council in the assessment of the Court of Justice: A classic application of the principle of institutional balance

According to some commentators, the enhanced role that the European Council has played in times of crisis represents a shift in the institutional balance of the Union towards a greater executive dominance that is not reflected in the framework of the Treaties.[28] This view is also shared by the

[26] This led, for instance, to the conclusion of the *ESM Treaty* to provide financial assistance to the euro zone members, with strict rules for conditionality. This is also the case of the *Treaty on Stability, Convergence and Growth* (the so-called *Fiscal Compact*) in order to supplement the Stability and Growth Pact under the EU Treaties with reinforced budgetary obligations.
[27] See: Order of the General Court of 28 February 2017 in case T-192/16, *NF v European Council*, ECLI:EU:T:2017:128.
[28] See, for instance, the studies mentioned above in footnotes 6 and 7.

European Parliament, which has on a number of occasions strongly criticised the interventions of the European Council and in particular its alleged interference in the prerogatives of the co-legislator or of the Commission.

A good example is the reaction of the Parliament to the European Council's conclusions of December 2020 referred to above, in which the European Council made a number of remarks concerning the way in which the Conditionality Regulation would be interpreted and implemented. In a Resolution adopted few days after the European Council, the Parliament contested the interference in the prerogatives of the legislators and of the Commission, as the institution responsible for implementing the Regulation, and threatened legal action. In particular, the Parliament

> 5. Recalls that in accordance with Article 15(1) TEU, the European Council shall not exercise legislative functions; considers, therefore, that any political declaration of the European Council cannot be deemed to represent an interpretation of legislation as interpretation is vested with the European Court of Justice (CJEU);
>
> [...]
>
> 8. Recalls that in accordance with Article 17(8) TEU, the Commission shall be responsible to the European Parliament; recalls that Parliament has several legal means at its disposal to make sure that the Commission respects its treaty obligation, including the discharge procedure, in order to assess the proper management of Union funds; stresses, furthermore, that Parliament has several legal and political means at its disposal to make sure that the law is enforced by everyone and by EU institutions in the first place; stresses that the conclusions of the European Council cannot be made binding on the Commission in applying legal acts.[29]

In fact, the criticism – as well as the threat of legal action – has generally failed to materialise in any meaningful litigation introduced by the Parliament – or any other institution – to promote respect for their prerogatives from alleged interference by the European Council. This is all the more significant since the establishment of the European Council as one of the EU institutions by the Treaty of Lisbon has made it subject to the system of judicial remedies generally applicable to the acts of the institutions and thus has brought its action under the control of legality by the Court of Justice.

The reasons for such institutional self-restraint appear in part political. They are the expression of a certain deference that the institutions have shown towards the highest political body at the EU level,

[29] European Parliament Resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP)).

especially when acting in situation of crisis. Under the pressure of an emergency, the need to ensure an effective response and show unity in face of adversity pushes considerations about institutional prerogatives into second place.

Other reasons are linked to the conditions for the exercise of jurisdiction by the Court of Justice, and especially to the action for annulment in particular, which make it as resulting from its well established case law. First, the action for annulment laid down in Article 263 TFEU is limited to acts intended to produce legal effects, which, in the interpretation followed by the Court of Justice, means acts that, whatever their nature or form, produce legally binding effects. This naturally excludes acts of mere political guidance, no matter how great their practical consequences and their impact on the conduct of the institutions.

Second, sin addition to its action as an institution of the Union, the meetings of the European Council can operate as a forum where Heads of State or Government act collectively in their national capacity. When this is the case, the acts adopted are intergovernmental in nature and are as such excluded from the review of legality by the Court, which is limited to acts of the institutions of the Union. This was, for instance, the case of the controversial EU-Turkey statement concluded at the height of the migration crisis. When an action for annulment was brought against the "statement" – which the applicant deemed to be a binding international agreement between the Union and Turkey – the General Court found that,[30] despite its title and some textual elements referring to the EU and to the "members of the European Council," a close analysis of its content and of the circumstances linked to its adoption (in particular the documents exchanged in preparation of the meeting with the Turkish counterparts) would instead suggests that the statement was concluded between the representatives of the Member States in their capacity as Heads of State and their Turkish counterparts.[31] The General Court thus concluded, and the Court of Justice confirmed, that there was a lack of jurisdiction.

Despite these hurdles, a case law regarding the role of the European Council in the institutional set-up of the Treaties has slowly developed, essentially on the basis of cases brought by Member States to challenge the legality of legislative acts in cases where the co-legislators have failed to respect the European Council's political indications. This case law has clarified the relationship between the

[30] Order of the General Court of 28 February 2017 in case T-192/16, *NF v European Council*, ECLI:EU:T:2017:128.

[31] For a critical assessment of the reasoning of the General Court, see: E. Cannizzaro, "Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council," *European Papers* 2017(2), pp. 251–257. Cannizzaro considers that the reasoning of the General Court is affected by two major flows: first, they do not take into account that the *Statement* concerns matters that fall within an area heavily regulated at the EU level and that, when acting in areas occupied by EU law, Member States do not have unfettered power to select the capacity in which they are acting. Second, the findings of the General Court would sit at odds with the rules of international law on attribution, which refer to whether the organ is vested with the power of representation and it appears from the circumstances that it is exercising it.

European Council's role to define the "general political directions and priorities" of the Union and the role of the other institutions when acting on the basis of the prerogatives conferred to them by the Treaties.

In case C-5/16, Poland contested the legality of the market stability reserve, a mechanism introduced to correct imbalances in – and therefore essential for the functioning of – the EU´s emissions trading scheme.[32] Among the arguments raised, Poland stressed that the market stability reserve had been phased in two years earlier than the date agreed by the European Council and that this represented binding instructions for the co-legislators. The Court recalled in that regard that Article 15(1) TEU specifies that the European Council "*shall not exercise legislative functions*": in the institutional framework set up by the Treaties; that role was in fact conferred by Articles 14(1) TEU and 16(1) TEU on the Parliament and the Council. It is therefore for those two institutions alone to decide the content of a legislative measure. Any attempt to infer from EUCO's power of policy guidance an obligation for the co-legislators to follow the indications of the European Council would imply direct interference in the legislative sphere by the latter institution and therefore a breach of the principle of the conferral of powers.[33]

In joined cases C-643 and 647/15 concerning the second relocation emergency decision adopted during the 2015 migration crisis (see above Chapter I, Section 1.1),[34] Slovakia and Hungary argued that by deciding on the relocation of an additional 120 000 asylum seekers by qualified majority, the Council had infringed the European Council's conclusions of 25 and 26 June 2015. In those conclusions, the European Council had only agreed on the adoption by the Council of a relocation decision for 40 000 persons and had made it clear that the Council would agree on the distribution of such persons by consensus, reflecting Member States' specific situations. The Court, however, firmly rejected the arguments of the applicants. The principle of institutional balance prevents the European Council from interfering with the right of initiative of the Commission, which is responsible for determining the subject matter, objective and content of a proposal, including of an emergency decision to be adopted under Article 78(3).[35] Moreover, the principle of institutional balance prevents the European Council from altering the voting rules laid down in the Treaties, and thus from imposing the adoption by consensus of a decision that is subject to qualified majority voting in Council.[36] The

[32] Judgment of the Court of Justice of 21 June 2018, Case C-5/16, *Poland v Council and Commission*, ECLI:EU:C:2018:483
[33] Ibidem, para. 85.
[34] Judgment of the Court of Justice of 6 September 2017, joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the EU*, ECLI:EU:C:2017:631.
[35] Ibidem, paras. 146 and 147.
[36] Ibidem, para. 148: "Secondly, Article 78(3) TFEU allows the Council to adopt measures by a qualified majority, as it did when it adopted the contested decision. The principle of institutional balance prevents the European Council from

Court also clarified that the alleged effect of the "political" nature of the EUCO conclusions on the prerogatives of the Council and of the Commission cannot be a ground for annulling decisions taken in exercise of those prerogatives.[37]

Finally, in case C-156/21 concerning the Conditionality Regulation, [38] Hungary challenged the compatibility with the Treaties of the involvement of the European Council (emergency brake) in the implementation of the Regulation (see above Chapter I, Section 2.1.3). In that regard, the Court stressed that no role is envisaged for the European Council in the procedure established by Article 6 of the Regulation for the adoption of measures, and that this is consistent with its powers of policy guidance pursuant to Article 15(1).[39] As far as a specific role is envisaged for the European Council in recital 26 of the Regulation, the Court simply underlined that the preamble to an EU act has no binding force, and thus cannot be relied on as a ground for derogating from the operational part of the legislative text. Thus,here was consequently no need to further discuss whether the role envisaged for the European Council is compatible with the powers conferred on it by Article 15(1) TEU. As Advocate General Campos made clear in his opinion in the case, such a solution confirms the political and non-binding nature of the "emergency brake" but at the same time does not conclude its illegality and thus preserves its *effet utile*.

This case-law attempts to strike a delicate balance. On the one hand, it reiterates the principles of conferral and institutional balance and, in so doing, it ringfences the role and prerogatives of the various institutions – and of the co-legislators in particular. On the other hand, however, the exclusion of any legally binding effect of the conclusions of the European Council, combined with the limitations on the scope of the action for annulment, give to the European Council a considerable leeway in the exercise of its political role of guidance.

Thus, in accordance with its established case law on the matter, the Court of Justice finds the solution in the adoption of a formal approach to the principle of institutional balance, whereby only the existence of a binding legal effect can undermine the prerogatives of other institutions. As Bruno de Witte elegantly puts it, *"*[…] the Court has consistently used the term 'institutional balance'; as shorthand for the set of Treaty rules that happen to apply to any EU decision or set of decisions." [40]

altering that voting rule by imposing on the Council, by means of conclusions adopted pursuant to Article 68 TFEU, a rule requiring a unanimous vote." See also: para. 149.

[37] Ibidem, para. 145.

[38] Judgment of the Court of Justice of 16 February 2022, Case 156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97.

[39] Ibidem, para. 190.

[40] Bruno de Witte: The European Union's COVID Recovery Plan: the legal engineering of an economic policy shift."

The approach of the Court is clearly demonstrated by the remarks of Advocate General Campos on the conclusions of the European Council of December 2020 mentioned above, in his opinion in the cases concerning the legality of the Conditionality Regulation.[41] Campos recalled that according to the EUCO conclusions "the Regulation does not relate to generalized deficiencies." In his view, however, such a statement "is not consistent with the content of the recital and therefore cannot affect the interpretation of Regulation 2020/2092."[42]

The finding that the European Council conclusions are (at least on the point at issue) incompatible with the Regulation does not have any consequence in point of law – not even from the point of view of the principle of sincere cooperation between institutions – as, in any event, those conclusions have no binding legal effects. On the contrary, in terms of compatibility with the Regulation, the Advocate General stresses that they constitute an authoritative interpretation of the legislative instrument (possibly because they provide a direct account of the context in which it was adopted):

> "While the European Council has no legislative powers in this area, its conclusions reaffirm procedural and substantive guarantees for Member States included in Regulation 2020/2092 and offer an interpretation (which, in view of the source, could be classed as authoritative, although not binding) of the meaning and scope of various of its elements. In any event, I should point out that interpretation of Regulation 2020/2092 is a matter for the Court."[43]

Ultimately, it will be for the other institutions to decide whether or not to follow such an authoritative interpretation in the exercise of their respective prerogatives and to do so under their own responsibility. This explains why, in the case at hand, the European Parliament finally abandoned the idea of directly challenging the European Council's conclusions and opted instead to bring an action against the Commission for failure to apply the Conditionality Regulation in application of those conclusions.[44]

1.3 European Council and consensual decision-making in times of crisis: Constitutional mutation or condition of effectiveness?

The approach followed by the Court of Justice in enforcing the principle of institutional balance in relation to the expanded role of the European Council has been criticised as too narrow. According

[41] Opinion of Advocate General Campos Sanchez-Bordona of 2 December 2021 in case C-156/21, *Hungary v Parliament and Council,* EU:C:2021:974. The Court of Justice did not mention the EUCO conclusions in its judgments.
[42] Footnote 53 of the Opinion. Campos refers here to recital 15 of the Conditionality Regulation, which makes it clear that the Regulation applies in cases of "individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities."
[43] Point 90 of the Opinion.
[44] Case C-657/21, *European Parliament v Commission*, ultimately discontinued at the request of the Parliament.

to the critics, the strict separation between the separate worlds of law and political reality does not ensure effective protection of the prerogatives of the institutions with regard to pervasive institutional practices that escape any judicial control. The same doctrine stresses that the fact that certain acts are not binding does not really protect the integrity of the legal order, as those acts still shape the behaviour of the institutions. Once established in institutional practice, these behaviours set up parallel structures of power superimposed on those defined in the Treaties.

According to some commentators, the unimpeded expansion of the role of the European Council would even be indicative of a constitutional change to the Union's institutional system. The growing role of the institution beyond the one envisaged in the Treaties would reveal the emerging dominance of an intergovernmental approach based on consensual decision-making. The pursuit of consensus on major decisions at the Leaders level would signal a waning acceptance of majority decision-making in accordance with the applicable Treaty rules and ultimately undermine the legitimacy and the autonomy of the EU political and legal order. The EU's legitimacy would only be seen as secondary and derivative and require the mediation of national political processes in order to produce acceptable results. Ultimately, the Community method would be dramatically eroded as the Union is progressively deconstructed into a sum of separate parts, no longer autonomous. [45]

Based on this diagnosis, the same authors underline the need to redress the institutional balance laid down in the Treaties and put forward a number of proposals to that effect. The Court of Justice should reconsider its case-law on "legal effects," to extend its jurisdiction to European Council conclusions insofar as, if not formally binding, they are substantially aimed at such an effect; in exercising such a jurisdiction, the Court should apply a standard of strict judicial review; the opportunistic use of voting rights in Council, and notably the recourse to vetoes for reasons unrelated to the act under discussion, should be challenged on the basis of the principle of sincere cooperation; more generally, institutions should engage in more aggressive strategic litigation to protect their prerogatives. [46] Other authors, however, insist on the need to increase the accountability and transparency of the European Council to match its enhanced role with greater democratic control. [47]

This criticism is serious and cannot be taken lightly. However, the opposition it describes between the correct functioning of the Community method and the political practice of pursuing consensus on major decisions fails to consider that the two dimensions are interconnected.

[45] J. Baquero Cruz, "Unstable structures: The institutional balance and the European Court of Justice," in M. Dawson, B. de Witte and E. Muir, *Revisiting Judicial Politics in the European Union*, Elgar, Cheltenham, 2024, pp. 142– 170.
[46] Ibidem, in particular at pages 163ff.
[47] A. Akbik, M. Dawson, "The Role of the European Council in the EU Constitutional Structure," Study requested by the EP AFCO Committee, February 2024, PE 760.125, notably at pages 37ff.

The autonomy and effectiveness of the EU legal order ultimately depend on the continued acceptance by the Member States to be bound by decisions taken through the Community method, and on their continued acceptance of the judgments of the Court of Justice. When that acceptance is called into question for reasons pertaining to essential national interests or the protection of fundamental elements of their constitutional identity, the domestic implementation of common rules is no longer ensured by the tools available at the EU level, as Member States and their supreme jurisdictions maintain a claim to the last word. This explains why, throughout the evolution of the process of integration, appropriate mechanisms of a political, legal or judicial nature have been put in place to help defuse tensions by accommodating on an exceptional basis Member States' concerns beyond the empire of majority rule.[48] The establishment of the European Council by the Treaty of Lisbon as a Union institution reflects a further evolution in that regard, as it formalises the most important of those coordination mechanisms by incorporating into the institutional setting of the Union the highest political forum for the pursuit of consensus among Member States.

A redefinition of the principle of institutional balance in the terms mentioned above would only offer an illusory safeguard for the EU's autonomy and legal order and the integrity of the Community method. It would not remove the need to find ways to defuse the tensions between the national and the supranational dimensions but would only displace the pursuit of consensus in the intergovernmental dimension or move further towards informality. In the worst-case scenario, it would magnify the risk that the common rules will ultimately not be accepted and thus not implemented, creating the risk of a constitutional crisis.

An example of this is the saga of the relocation decisions during the 2015 migration crisis. The decision of the Commission – and of the Council – to push through the adoption by qualified majority of a second relocation decision beyond the political agreement reached at the European Council (see above) led to the explicit refusal by two Member States to implement that decision, while many more dragged their feet and failed to follow up effectively. The recourse to infringement proceedings by the Commission led to very strong condemnation of the two recalcitrant Member States by the Court of Justice, but did not result in any greater compliance with the common rules. Ultimately, the standstill seriously compromised the Union's ability to adopt emergency measures in the area of migration, as the Commission avoided presenting new proposals. When it did, the proposals were ultimately not adopted, as the Member States largely preferred to use national derogating measures

[48] This is the case of the Luxembourg Compromise reached in 1966 to settle the 'empty chair' crisis, triggered by the extension of qualified majority in Council voting. Other examples are the Ioannina compromise and Ioannina bis. The emergency brakes included in certain provisions of Title V of the TFEU, allowing for a matter to be brought to the European Council for discussion is a good example of an arrangement that has received legal formalisation in a specific procedure.

rather than common EU measures. The conflict further polluted the ongoing debate on the reform of the legislative regime on migration and asylum, as the case of the relocation decision had made clear that without broad acceptance, the effectiveness of the new rules would have been compromised *ab origine*. This led to the much-criticised June 2018 conclusions, where the European Council acknowledged that reform of the asylum regime could only be achieved on a consensus based on a balance of solidarity and responsibility.[49] (see above Chapter I, Section 1.1).

This example shows *a contrario* that the pursuit of a consensual approach at the European Council level is of particular importance to ensure the effectiveness of Union action in situations of crisis. It corroborates the findings reached in the other case studies examined in this report, which have shown how the Union response to crises has been shaped by the ability of the European Council to identify priorities for action and to reach an agreement on solutions.

In fact, the greater involvement of the European Council (EUCO) brings several notable advantages in the context of crisis management. One of the primary benefits lies in its ability to leverage various tools across legal orders (national via coordination measures; EU measures; intergovernmental solutions), providing a degree of flexibility that makes it possible to overcome the legal and political obstacles that could limit action at the EU level. This flexibility is especially critical in crisis situations when rapid responses are required and ordinary tools are not immediately available.

In that regard, the handling of the crises analysed in this report shows that the centrality of the European Council and recourse to consensual decision making have not resulted in a push towards a greater intergovernmentalism to define the response to the crisis. Intergovernmental solutions did feature,[50] but they remained largely secondary, as the agreements reached in the European Council managed to create the support, sometimes through a complex legal engineering and an evolutive interpretation of the relevant Treaty provisions, for solutions based entirely within the EU legal order.

Second, in cases of complex political packages that included decisions by unanimity and touched upon fundamental policy choices, intervention by the leaders appears the most effective way to reach a landing zone, by facilitating cross-file negotiations and allowing for concessions that would not be imaginable at a lower political level. Certain matters become a *Chefsache*, as the compromises which

[49] European Council of 28 June 2018, Conclusions, point 12.
[50] See, in particular, the establishment of a dedicated credit line under the ESM Treaty in the framework of the COVID-19 pandemic (which was ultimately not requested by any Member States) and the conclusion of the "statement" between the Heads of State and Turkey in the context of the 2015 migration crisis.

are required to reach a deal and to propose it to the national electorate require the unique political capital of national leaders.[51]

Moreover, the European Council's central role sends a powerful signal of unity and collective ability to respond to challenges. This is of particular importance in relation to economic measures that impact the fiscal capacity of the Member States or are based on common borrowing. In a context where the Union budget essentially depends on GNI contributions from the Member States, including for reimbursing the resources commonly borrowed on the financial markets, a sign that all Member States are on board is essential to ensuring the political and economic credibility of the Union measure and therefore a good rating of Union bonds on the financial markets.

Ultimately, however, the centrality of the European Council and of the pursuit of consensus is due to reasons of constitutional order. As shown in Chapter II of this report, crisis response remains fundamentally a Member State responsibility, which can rely on a number of derogatory clauses under the Treaties to that effect. The increasingly wide and deep action of the Union in emergency situations creates tension with this fundamental Member State' claim to emergency sovereignty. In that regard, the involvement of the European Council responds to the essential need to defuse a possible tension with a Member State's role and ensure at the same time the possibility of an effective EU response. It carries out the necessary arbitrage between Member State' and Union action, especially in those domains that have not yet been affected by action at EU level or which raise particularly problematic new challenges (e.g., the assumption of common debt on an unprecedented scale to finance operational expenditure; the expansion of Union action to domains – such as health – where its action is limited; the paradigm shift in energy sector regulation). The criticism of the European Council's role and the resulting proposals for reform often overlook this essential political reality, which ultimately explains the real added value of European Council involvement in ensuring the effectiveness of the crisis response at the Union level.

2. **The European Parliament: More than a spectator in times of crisis**

Much has been written about what some see as a (too) limited role of the European Parliament in times of crisis, and a fair amount of criticism has been directed, in particular, against the recent uses of Article 122 TFEU, a provision that does not provide for any involvement of the European Parliament as regards paragraph 1 or for information to the European Parliament in the case of paragraph 2. That criticism has been sparked by the increasing significance and impact of measures

[51] On the concept of *Chefsache* applied to the European Council, see: L. van Middelaar and U. Puetter, "The European Council. The Union's supreme decision-maker" in D. Hodson, U. Puetter, S. Saurugger and J. Peterson, *The Institutions of the European Union*, 5th ed., Oxford University Press, 2021.

adopted on that legal basis. Some call this a fundamental shift in the balance of powers, and others refer to 'competence creep' or institutional overreach.[52]

This criticism needs to be placed in a broader context. While not at the forefront of the emergency response in the different situations of crisis analysed in this report, the European Parliament can certainly not be considered a mere spectator. In that regard, some of the criticism mentioned above seems to diminish the role actually played by the institution. It is not enough to look at the specific and isolated crisis measures that did not involve the European Parliament and to focus only on the formal participatory rights provided for by the emergency legal bases, as this would only give a partial picture. Rather, it is necessary to consider the role that the Parliament has played in the context of the broader Union response to crises, as described in Chapter I of this report. This includes looking at both cases where the Parliament has fully exercised its legislative role, both during and after the crisis and the cases where it leveraged its broader prerogatives to have a say in emergency measures. It is in light of this broader picture that it will be possible to assess some of the proposals for reform concerning greater involvement of the European Parliament in emergency situations.

2.1 The continued relevance of the ordinary legislative procedure in regulating crisis situations

As the analysis in Chapter I has shown, in all of the crises covered by this report (the COVID-19 pandemic in its various dimensions, the migration crises and, lastly, the energy crisis) the Union response has encompassed a broad spectrum of legal instruments, including a number of measures adopted under the ordinary legislative procedure or under other procedures involving either the consultation or consent of the European Parliament. In that sense, the European Parliament has been involved in its role as a co-legislator in shaping emergency measures.

The number of OLP measures adopted as part of the Union's emergency response is by no means negligible (see the examples described in Chapter 1, Section 2 above: *CRII*, *CRII Plus*, *REACT-EU*, *RRF*, *Airport slots Regulation*, *COVID-19 certificates Regulation*, all adopted in the context of the COVID-19 pandemic; *Repower Amendment*, *Gas Storage Regulation* in the context of the energy crisis), and the co-legislators have shown the ability to adopt them in a very short time. In particular,

[52] See among the critical voices: Nettesheim, "'Next Generation EU': *Die Transformation der EUFinanzverfassung*," 145 AÖR (2020), 381–437, at 409; Kube and Schorkopf, "*Struktveränderung der Wirtschafts- und Währungsunion*," 74 *Neue Juristische Wochenschrift* (2021), 1650–1655, at 1655; Leino-Sandberg and Ruffert, "Next Generation EU and its constitutional ramifications: A critical assessment," 59 *Common Market Law Review* (2022), 433–472; Panascì, "Unravelling Next Generation EU as a transformative moment: From market integration to redistribution," 61 *Common Market Law Review* (2024), pp. 13–54. For an accurate account of the various academic positions on the growing use of Article 122 TFEU, see: Chamon, "The Non-Emergency Economic Policy Competence in Article 122(1)TFEU," 61 *Common Market Law Review* (2024), 150–1526.

in order to ensure swift action in line with the urgency of the situation, the Parliament made extensive use of the flexibilities allowed in its rules of procedures and introduced new ones.[53]

In fact, as we have also underlined, recourse to ordinary legislative instruments in emergency situations is generally used to introduce targeted amendments to adapt existing regulatory regimes to the crisis situation. While in that regard, recourse to the OLP has proved effective, it is limited in scope. Moreover, as we have already underlined in Chapter III, use of the OLP in times of crisis exposes a paradox, as the possibility of acting swiftly under the ordinary legislative procedure often comes at the price of the co-legislators renouncing to introduce substantive modifications to the text under discussion and of boosting the role of the Commission, which is therefore subject to a lower level of scrutiny (on this point, see Section 1.1 of Chapter III). When the co-legislators did engage in meaningful negotiations on the content of the proposed measures and tabled amendments, this generally resulted in a much longer adoption time. Thus, for instance, in the case of the COVID-19 pandemic, the centrepiece of the economic measures for the recovery, the *Recovery and Resilience Facility,* is a Regulation adopted on the basis of Article 175(3) TFEU under an ordinary legislative procedure. This allowed for meaningful participation of the Parliament in the design of the instrument: even if Parliament ultimately accepted the Council's position as regards the overall amount and financing design of the Facility, as well as its governance – which had been central points in the political agreement reached by the leaders at the 2020 July European Council – it managed to shape the priorities and objectives of the instrument, in particular by requiring a better focus for the national recovery plans on six policy areas identified as being of European relevance.[54] Parliament also managed to secure a greater role of political scrutiny in the form of a periodic recovery and resilience dialogue on the implementation of the Facility.[55] However, the adoption of the Regulation took a full 260 days.

These dynamics surely explain why, despite the repeated reassurances provided by the Parliament as to its ability to act swiftly under the OLP in emergency situations,[56] recourse to the ordinary legislative procedure was not used for some of the most relevant and pressing measures adopted in the crisis situations analysed in this report. Where rapid action was deemed essential, recourse to the ordinary legislative procedure was not always considered sufficiently timely, as sometimes directly

[53] See, for details in Chapter I, Section 2.4 above.
[54] See: Article 3 of the *RRF Regulation.*
[55] See: Article 26 of the *RRF Regulation*.
[56] Parliament often reiterated its readiness to act swiftly on pressing issues, by making use of the flexibilities allowed by its rules of procedure, to allow for rapid legislation in an emergency. See for instance, the emergency measures taken in 2022 to tackle the energy crisis prompted by the Russia´s war of aggression against Ukraine, resolution 2022/2830(RSP) of 5 October 2022, where the Parliament expressed its support for the measure at stake while regretting the use of Article 122(1) TFEU as a legal basis, as it stood ready to act swiftly on legislative proposals "as it requires full democratic legitimacy and accountability" (point 33).

reflected in the recitals.[57] This has recently prompted the European Parliament to modify its internal procedures for urgent decision-making, to be able to provide additional guarantees that decisions under the ordinary legislative procedure can be taken rapidly in emergencies, and also when inter-institutional negotiations have to take place.[58]

Even when not directly involved in formulating the emergency response via the ordinary legislative procedure, the European Parliament has, however, played its full role as a co-legislator *in the aftermath* of the various crises by appropriately following up the emergency measures adopted by Council.

As we demonstrated in Chapter III, the adoption of emergency measures triggers a normative cycle whereby, in the aftermath of a crisis, the innovations introduced by emergency measures are reviewed on the basis of the lessons learnt and prompt the necessary adjustment in the relevant ordinary regulatory framework, thus allowing the co-legislators to be involved *a posteriori*. In that respect, we stressed how a number of emergency measures adopted or proposed on the basis of emergency legal bases have subsequently been integrated into more permanent legislation with the necessary adaptations.[59]

In certain cases, some of those measures were already part of pending OLP proposals but were fast-tracked using emergency legal bases, only to be "repatriated" into a more permanent framework after the crisis measures had exhausted their effects. In many cases, emergency measures explicitly acknowledged the need to integrate specific parts into legislative acts adopted under "ordinary procedures" as soon as the immediate crisis had passed. Such an approach has been acknowledged by the Court in the *Balkan-Import* ruling,[60] where it emphasised that the rules at issue had subsequently been integrated into an act adopted on the legal basis of the common agricultural policy.

---

[57] When assessing the conditions for having recourse to Article 122(1) as a legal basis, a number of the emergency measures adopted in the energy domain the second half of 2023 explicitly refer to the need "to take into account the approaching end of the mandate of the European Parliament, the time required to adopt legislation under the ordinary legislative procedure, as well as the need for Member States and investors to have predictability and legal certainty about the legal framework. See, for instance, recital 25 of Council Regulation 2024/223 extending the application of Regulation (EU) 2022/2577 on the deployment of renewable energy.

[58] The revision was part of the overhaul of the Rules of Procedure that took place at start of the Parliament's 10th term in 2024. See: revised Rule 170 on urgent procedure which, following a justified request from the Commission or Council, entails a number of simplifications: a debate becomes optional; the committee report may be exceptionally skipped or replaced by an oral report; simplified rules for the preparation of interinstitutional negotiations apply.

[59] See: the number of examples mentioned in Chapter III, Section 2 above.

[60] Judgment of 24 October 1973, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof*, case 5/73, EU:C:1973:109 C-5/73, See para. 15: "Consequently while the suddenness of the events with which the Council was faced, the urgency of the measures to be adopted, the seriousness of the situation and the fact that these measures were adopted in an area intimately connected with the monetary policies of Member States (the effects of which they had partially to offset) all prompted the Council to have recourse to Article 103 – Regulation No. 2746/72 shows that this state of affairs was only a temporary one, since the legal basis for the measure was eventually found in other provisions of the Treaty."

It is also of interest that some of the legislative acts containing such "repatriated" emergency measures were agreed between the co-legislators and were ready to enter into force and apply *before* the expiry of the related emergency acts based on Article 122(1) TFEU. In such cases, the co-legislators cooperated on defining *transitional provisions* to ensure a smooth transition and avoid an overlap of rules (i.e., the ones set out in exercise of emergency competence and the ones agreed would be integrated into future legislative acts). [61]

The technique of integrating parts of emergency-related provisions into ordinary legislative acts obviously only works where there is a legal basis to be found for it in the "*ordinary*" Union toolbox,[62] but that is arguably also the area where the most tension lies when it comes to institutional balance. If the action is not covered by ordinary legal bases, the focus shifts to how it interacts with the balance between the Union and the Member States and whether the Treaty confers sufficient powers on the Union for the action in the first place.

Beyond the cases of "repatriation" of emergency measures in ordinary legislation adopted in the same domain, we have also underlined how experience gained from emergency measures in a given area has inspired the establishment of permanent crisis framework in relation to other areas that may in the future be subject to similar challenges (e.g., shortages in relation to other strategic products). Thus, the co-legislators agreed to extend mechanisms firstly introduced during the COVID-19 crisis to address supply risks in respect of chips, net-zero technologies, raw materials and medical supplies.[63] The co-legislators also adopted IMERA (a general emergency instrument) and reformed the electricity market design to fix some of the deficiencies identified during the crisis. Last but not least, an impressive amount of legislative action was taken in the field of energy to accelerate the green transition and reducing energy consumption, thereby also reducing dependencies on imported fossil fuels, such as the gas and hydrogen package, the Renewable Energy Directive, the Energy Efficiency Directive, the Energy Performance in Buildings Directive and a host of legislative measures related to the area of transport, to mention just a few. The co-legislators also continued to follow up key measures identified to improve the ability to respond to health emergencies.[64]

This intense legislative activity, in areas much broader than the ones originally covered by the emergency measures and sometimes totally unrelated to them, shows that, in the aftermath of the crises, the co-legislators have not only reviewed the solutions adopted on the basis of emergency competences but have also taken the opportunity to push forward a wider regulatory agenda aimed at

[61] See: the example mentioned in Chapter III, Section 1.2.
[62] In the area of health, the Union's competence is limited – with a few exceptions – to a coordinating role.
[63] For an analysis of the various instruments, see: Chapter III, Section 1.2 of the present report.
[64] See: Communication from the Commission "Drawing the early lessons from the COVID-19 pandemic," COM/2021/380 final.

incorporating emergency frameworks into ordinary legislation. The result is a progressive shift from a constitutional to a legislative model of emergency regulation, whereby the ordinary legislator occupies the normative space for the regulation of emergencies and has taken over the role of defining the Union's response to crises for the future. As we have seen, this extension has the effect of reducing the discretion of the Council's prerogatives under Treaty-based emergency competences, as the Council will be required to show that the ordinary legal framework is not sufficient to address the situation of crisis (see above Chapter III).[65]

Thus, far from being a spectator, the European Parliament does use its legislative powers to contribute to the framing of EU emergency law, notably by providing the necessary stability and predictability by establishing crisis frameworks as part of ordinary legal regimes, in a broader logic of crisis prevention and response. In so doing, the legislative intervention of the ordinary legislator complements and at least *ex post facto* scrutinises the exercise of the emergency competences provided for in the Treaties, taking stock for the future from the lessons learnt from the response to the crisis.

2.2 The Parliament's control over emergency measures

In addition to the relevance of its legislative powers in the context of emergencies, the Parliament has also managed to exercise a certain level of scrutiny of emergency measures adopted under legal bases that do not provide for any Parliamentary involvement. It has done so by making an extensive – and often creative – use of its prerogatives under the Treaties and of its position in the framework of complex policy packages. Two of these are the avenues that the Parliament has explored: the use of its budgetary powers and the leveraging of its power of political scrutiny to enhance its participatory rights in the decision-making process for the adoption of emergency measures.

2.2.1 Budgetary control over emergency measures

Insofar as emergency measures have a spending nature and are financed through the EU budget, the Parliament can make use of its budgetary powers to exercise a degree of control over the act adopted. As a matter of fact, the adoption of spending instruments is generally accompanied by corresponding budgetary decisions over which the Parliament has full control: given the need to adopt both acts at the same time, Parliament is therefore in a position to leverage its budgetary powers to exercise control over the emergency measure. This avenue has been used in particular with regard to measures

[65] Even if most ordinary legislation still confers on the Council the powers to act in situations of emergency, those powers are conferred as implementing powers, and thus need to be exercised within the limits of the empowerment and in full respect for the policy choices made by the ordinary legislator. They are therefore not comparable with the discretion exercised by Council under primary emergency competences.

adopted under Article 122 TFEU and gave rise to interesting developments during the COVID-19 crisis, when recourse to emergency spending instrument took on both a new dimension and a new form.

One example is the establishment of the *Emergency Support Instrument* during the migration crisis and its amendment and activation during the COVID-19 crisis. In both cases, the proposal to activate the instrument, based on Article 122(1) TFEU, was accompanied by a corresponding proposal for an amending budget,[66] which was necessary to mobilise the relevant resources and notably to use the special instruments under the MFF Regulation, given the limited availabilities under the margins of the relevant MFF headings. In both cases, the Parliament therefore had occasion to exercise ultimate control over the financing of the instrument. Even if it ultimately decided to approve the amending budgets as proposed by the Commission, it did so having exercised full scrutiny over the type of actions being financed, as also reflected in the budgetary statements included in the decisions approving the amending budget.[67] [68]

The Parliament's budgetary powers are seriously constrained if the spending instrument is financed by resources that are externally assigned to a specific item of expenditure. While appearing in the budget, the resources in questions are not subject to the budgetary procedure laid down in Article 314 TFEU, as they are directly generated and assigned on the basis of a specific legal act. In this situation, therefore, the budgetary scrutiny of the Parliament is only exercised at a later stage through the discharge procedure, when the accounts are closed. This limitation risked seriously undermining the budgetary powers of the Parliament in relation to the most important emergency spending measure adopted during the COVID-19 crisis on the basis of Article 122 TFEU, the *EURI*,[69] which channels to various spending instruments resources borrowed on the market in the form of externally assigned revenues.[70]

---

[66] Draft Amending Budget No. 2 to the General Budget 2020 Providing emergency support to Member States and further reinforcement of the Union Civil Protection Mechanism/rescEU to respond to the COVID-19 outbreak, COM/2020/170 final.

[67] See, for instance, Definitive adoption (EU, Euratom) 2020/537 of Amending budget No. 2 of the European Union for the financial year 2020, OJ L 126, 21.4.2020, pp. 67–96.

[68] The self-restraint exercised in approving the amending budget did not prevent the Parliament from strongly criticising the establishment of the ESI in 2016. The Parliament strongly criticised the creation of an ad hoc financing mechanism without an overall strategy to address the refugee crisis and without ensuring the full observance of Parliament's prerogatives as co-legislator. The Parliament pointed to the problem that the *ESI* was established under article 122 TFEU and not on the basis of an ordinary legislative procedure, despite the fact that Parliament had always acted constructively and swiftly to support all initiatives in connection with the refugee crisis. See European Parliament resolution of 13 April 2016 on the Council position on Draft amending budget No. 1/2016 of the European Union for the financial year 2016, New instrument to provide emergency support within the Union, P8_TA(2016)0113, point 2.

[69] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I, 22.12.2020, pp. 23–27.

[70] See: Article 3(1) of Regulation 2020/2094.

This explains why a major element of the policy package built around the *EURI,* the *Own Resources Decision* and the *MFF Regulation,* was the inclusion requested by Parliament of additional rules that could enhance its budgetary control, despite its recourse to external assigned revenues.

A first set of rules was incorporated into the usual inter-institutional agreement that the three institutions conclude when adopting the MFF Regulation, and which *inter alia* sets out the arrangements for their cooperation during the budgetary procedure.[71] In that framework, the three institutions agreed on an additional procedure aimed at ensuring "an appropriate involvement" of the budgetary authority in the governance of the external assigned revenues under the EURI. The procedure provides in particular for extensive obligations of information by the Commission as regards the estimates and the implementation of the external assigned revenues, regular inter-institutional meetings to assess the state of implementation and outlook of those revenues, and the Commission's commitment to "take utmost account" of the comments received by the budgetary authority throughout the process.[72]

A second set of rules is laid down in the *Joint declaration on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget*,[73] also adopted as part of the overall MFF/NGEU policy package. The declaration, which in fact has the legal nature of an inter-institutional agreement, confers on the budgetary authority the faculty of requiring a "constructive dialogue" whenever the Commission submits a proposal for a Council act based on Article 122 TGEU, which may have appreciable implications for the Union budget. The dialogue takes place within a Joint Committee, before the Council adopts the measure "with a view to seeking a joint understanding of the budgetary implications" of the act. The discussions should be finalised within two months or in the shorter time limit fixed by the Council in light of the urgency of the matter. In any event, the procedure is without prejudice to the Council acting under the powers and prerogatives conferred on it by the Treaties.[74]

The Joint procedure has to date been activated only once, when the Commission presented its proposal to set up, under Article 122 TFEU, a framework for the adoption of measures for the supply of crisis-relevant medical countermeasures in the event of a public health emergency at the Union

[71] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ L 433I, 22.12.2020, pp. 28–46. See, in particular, Annex I on Inter-institutional cooperation during the budgetary procedure.
[72] See: points 40 to 46 of Annex I.
[73] Joint declaration of the European Parliament, the Council and the Commission on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget, OJ L 444I, 22.12.2020, p. 5.
[74] See: point 5 of the Joint Declaration.

level[75] (then adopted as the so-called *HERA Regulation*). In that occasion, the two branches of the budgetary authority concluded that establishing the framework itself did not have immediate budgetary implications, but that those would be quantifiable when it was activated in the event of a crisis. They remained committed to launching the scrutiny procedure as soon as possible after the tabling of a Commission proposal to activate the emergency framework.

The two inter-institutional budgetary arrangements are a clear manifestation of the Parliament's ability to leverage its position in the context of broader policy packages (in this case its consent, required for the adoption of the MFF Regulation under Article 312 TFEU) in order to protect and enhance its prerogatives. In fact, the importance of the arrangements in question cannot be underestimated in terms of safeguarding the Parliament's budgetary role.

However, it is also clear that the power of budgetary control only allows for limited control over emergency measures. First, whenever the emergency measure is essentially regulatory in nature, it will escape any form of control under the mechanisms identified. Thus, for instance, the many Article 122 measures adopted to tackle the energy crisis did not trigger any budgetary scrutiny procedure, despite their significant financial implications for private operators. Second, even when the scrutiny procedure can be triggered, in principle, its scope remains strictly limited to the budgetary implications of the emergency measures. While one can expect the Parliament to try to leverage its budgetary powers to the fullest extent to scrutinise the substance of the measures adopted under Article 122 TFEU, such an attempt will inevitably be resisted by the Council. As the careful framing of the *Joint Declaration* shows, the Council will in principle insist on a strict demarcation between its powers to define an emergency policy under Article 122 TFEU and the prerogatives of the budgetary authority, and thus will not agree to enter into discussions on the substance of the measures proposed and would instead strictly limit the scrutiny procedure to only considering their budgetary implication. The first application of the procedure in the *HERA* case seems indeed to confirm this approach: despite the misgivings of the Parliament as to the use of Article 122 TFEU to set up a permanent framework for the supply of medical countermeasures (see above Chapter I, Section 2.2.3), the discussion was strictly limited to noting that no immediate budgetary consequences existed. Third, the mechanisms introduced by the two IIAs are by their very nature not participatory rights in the adoption of the measures, as they only ensure enhanced information obligations and the possibility for the Parliament to make its voice heard on the budgetary aspects of the proposal.

[75] Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, COM/2021/577 final.

This explains why, despite having secured these additional budgetary guarantees, the Parliament has explored further ways to exercise political control over emergency measures.

2.2.2 Political control over the adoption of emergency measures

In addition to strengthening its budgetary powers, the European Parliament has tried to leverage its power of political control over the Commission in order to enhance its *ex ante* involvement in the adoption of emergency measures under Article 122 TFEU.

The most relevant example in this regard is the recent 2024 amendment of the Parliament's rules of procedure, which introduced a new Rule 138 on the use of Article 122 as a legal basis.[76] By building on the Parliament's power to submit questions and request to hear members of the Commission (Article 230 TFEU), the rule provides for the European Commission President to be invited to make an explanatory statement whenever the Commission plans to adopt a proposal on the basis of Article 122 TFEU. The explanatory statement shall in particular explain the main objectives and elements of the proposal and the reasons why the Commission intends to use that legal basis, and shall be made prior to formal adoption of the proposal by the Commission.[77] If this timing is not respected, the statement must be included in the draft agenda of the first session following adoption of the proposal by the Commission, unless the Conference of Presidents decides otherwise. While the Rule does not mention it explicitly, it is clear that the reference to a parliamentary debate on the measure implicitly refers to the possibility that the Parliament may trigger the political responsibility of the Commission, in the forms provided for by the Treaties and that ultimately find expression in the power of censure (Article 17(8) TEU and Article 234 TFEU).

The rule further provides that the proposal is referred to the Parliamentary committee responsible for legal affairs for verification of the legal basis. If the Committee decides to challenge the validity or appropriateness of the legal basis, it reports back to the Parliament and undertakes the necessary steps to bring an action before the Court of Justice.[78]

Finally, the rule provides for a periodic review mechanism, which requires at the earliest three months after the entry into force of the Article 122 act, and at appropriate intervals thereafter, that the Commissioner responsible reports back on the implementation of the measure and on the need to maintain its provisions in light of the requirements of the Treaties.[79]

[76] Rules of Procedure of the European Parliament, 10th Parliamentary term, July 2024.
[77] Rule 138(1).
[78] Rule 138(2).
[79] Rule 138(4).

The new rules undoubtedly represent a good example of self-empowerment and institutional engineering. They have generated a debate leading the Council to express its formal concern as to their impact on the institutional balance.[80] In fact, one might wonder whether the Parliament is still respecting its power of internal organisation and the Treaties when it sets up additional procedural steps for the exercise by the Commission of its power of initiative in relation to proposals based on Article 122 TFEU. Moreover, as Rule 138 aims to ensure that the Parliament is consulted on the substance of the proposed Article 122 measures, and that it can provide its input even before the involvement of the Council, one could argue that it directly contradicts the special legislative procedure set out in Article 122 TFEU, which does not envisage any role for the Parliament in its first subparagraph and only an obligation for the Parliament to be informed in its second.

However, such a conclusion does not seem to consider the approach followed to date by the Court of Justice when policing respect for the institutional balance (see above Section 1.2 of this Chapter). In line with that approach, it would be difficult to conclude that the rule in question is illegal. After all, the rule is drafted in such a way that it does not legally impose an additional step in the procedure leading to the adoption of a proposal under Article 122 TFEU, but only sets out an obligation of information. Moreover, no consequences are envisaged should the Commission fail to comply with that obligation and proceed to adopt the proposal under Article 122, other than – of course – the possibility of political consequences or the risk of litigation. In any event, the power of internal organisation on which the Rules of Procedure are based cannot be relied upon to establish obligations as to the way other institutions exercise their powers. In conclusion, the rule in question does not have the kind of "binding legal effect" that the Court considers necessary to establish the existence of interference with the principle of institutional balance. The situation is therefore similar to the inclusion in the recitals of a legislative text of an emergency brake mechanism giving the European Council a say during the procedure for the adoption of certain implementing decisions under an emergency instrument, as we have discussed above (see Chapter III above).

It remains, that even if not challengeable in legal terms, Rule 138 raises questions as to its workability in practice. In particular, given the emergency rationale that characterises the use of Article 122, one could wonder whether a mechanism of prior information and impulsion by the Parliament is compatible with the logic of the legal basis and the tempo imposed by the circumstances and whether in such a context, effective *ex ante* scrutiny by the Parliament is realistic.

[80] The reaction of the Council was not limited to new Rule 138, but included a number of other innovations aimed at influencing the organisation of the Commission via strengthened confirmation hearings (new Annex VII), at expanding the scrutiny powers through enhanced hearings and scrutiny sessions (Rule 141) and at strengthening the Parliament's right of inquiry outside the legal framework laid down in secondary law for its exercise (Rule 215).

In any event, the Commission seems to have accepted the principle of greater parliamentary involvement in the procedure leading to the adoption of proposals based on Article 122 TFEU. On 21 October 2024, that is, before the election of the new Commission according to Article 17(7)TEU and even before the hearings of new Commissioners-designate in Parliament, the Presidents of the Parliament and of the Commission announced the revision of the inter-institutional framework agreement on relations between the two institutions,[81] based on a set of nine political principles aimed at strengthening their cooperation and at ensuring better dialogue.[82] Two of those principles relate to increased cooperation in emergency situations:

> 3. The commitment to provide comprehensive justification and information on the exceptional cases where the proposals by the Commission are based on Article 122 TFEU.
>
> 4. Commitment to define a clear mechanism for use of urgent/fast-track decision-making.

At the time of writing, the Parliament and Commission are still negotiating the revised inter-institutional agreement that will put the two principles into practice. It already appears clear, however, that the Parliament has seized the moment of maximum political leverage over the (still to be confirmed) new Commission to extract from its President a commitment to "justify and inform" regarding proposals based on Article 122 TFEU; a commitment that mirrors the changes already introduced by Parliament in its 2024 Rules of Procedure. The important difference is, however, that the obligation to "justify and inform" contained in the third political principle is no longer unilaterally imposed by Parliament but is accepted by the Commission.

It is also interesting to note that the additional commitment to define "a mechanism for the use of the urgent/fast-track decision-making" for the adoption of acts under the ordinary legislative procedure applies to both the Commission and the Parliament. By agreeing to such a mechanism, the Commission would further restrict its margin of discretion as to the use of emergency competences (Article 122 TFEU, but also Article 78(3) TFEU, 213 TFEU, etc.): faced with an emergency situation, the Commission would need to explain why it considers that the agreed fast-track procedure is not sufficient to ensure swift action and that an alternative procedure is preferred.[83] This additional requirement seems to address the Parliament's longstanding grievance that better account should be

[81] Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304 20.11.2010, p. 47 and subsequent amendments.
[82] Joint Statement by European Parliament President Metsola and European Commission President von der Leyen on the revision of the Interinstitutional Framework Agreement, 21/10/2024, https://www.europarl.europa.eu/news/en/press-room/20241021IPR24772/european-parliament-and-european-commission-agree-on-strengthening-cooperation
[83] Many of the justifications so far used in the preamble to Article 122 TFEU act to justify recourse to the emergency legal basis and which generally refer to the "the time required to adopt legislation under the ordinary legislative procedure," would no longer be sufficient in light of an agreement setting up a mechanism to fast-track decisions under the ordinary legislative procedure.

taken of its ability to act swiftly on the basis of the OLP in selecting the legal basis for acts to be adopted in crisis situations.[84]

The exact impact of the political principles agreed on 21 October 2024 will very much depend on the final wording of the revised inter-institutional agreement when and if concluded. The establishment of additional procedural obligations for using Article 122 TFEU by means of an interinstitutional agreement cannot however alter the institutional balance as resulting from the legal basis. As a matter of fact, the principle of sincere cooperation on which inter-institutional agreements are concluded finds a limitation in the need to respect the prerogatives of the institutions as defined in the Treaties, since they are the expression of the constitutional structure of the Union as reflected in its institutional balance.

2.2.3 Scrutiny of the implementation of emergency instruments

A final form of control exercised by Parliament over emergency measures is through mechanisms that ensure its scrutiny of the implementation of emergency instruments. This form of control is of a political nature and is used in parallel to the power of budgetary scrutiny exercised through the discharge and the mechanisms identified in Section 2.2.1.

The scrutiny mechanisms are provided for in legislative acts adopted according to the ordinary legislative procedure and are typically the result of amendments made at the request of the Parliament. The Parliament generally considers their inclusion in the text as one of its priority objectives during the inter-institutional legislative negotiations (trilogues). In that regard, the original opposition of the Council to any form of involvement of the Parliament in the implementation of EU law – which is a domain that the Treaties reserve for the Member States and the Commission and in duly justified cases for the Council but never for the Parliament – has progressively softened.

As a result, the scrutiny mechanisms have progressively multiplied across sectorial legislation. The first type of mechanism is the "structured dialogues" that have been incorporated into a number of crisis instruments. A good example is the *RRF Regulation*,[85] which includes two forms of parliamentary dialogue: one relating to the application of the macroeconomic conditionality[86] and, a more general, "recovery and resilience dialogue," concerning the state of implementation of the facility.[87] In both cases, the competent Parliamentary committee may invite the Commission to

[84] See, for instance, the Parliamentary resolutions quoted in footnotes 58 and 71.
[85] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, pp. 17–75.
[86] See: Recital 29 Article 10(7) RRF.
[87] See: Recital 61 and Article 26 RRF.

discuss the relevant matters in a "structured dialogue." The Commission shall then take into account any element arising from the view expressed by the Parliament through the dialogue, including parliamentary resolutions, if provided.

Similar mechanisms can be found in Article 20 of the *Common Provisions Regulation*,[88] which provides for a "structured dialogue" in relation to the adoption of temporary measures for the use of cohesion funds in response to exceptional circumstances, and in Article 19(14) for the triggering of the macroeconomic conditionality in the context of the implementation of the cohesion funds. Similarly, the *IMERA Regulation*[89] provides for an "emergency and resilience dialogue" that can be triggered by the European Parliament in relation to the activation and deactivation of the internal market vigilance or emergency modes under the Regulation. To that purpose, the Parliament must be informed as soon as possible "of any Council implementing acts proposed or adopted" pursuant to the Regulation.[90] Another example is offered by the *Rule of Law Conditionality Regulation*,[91] which also requires the Commission to timely inform the Parliament in good time of any notification to a Member State that starts the procedure under the Regulation. On the basis of this information, "the Parliament may invite the Commission for a structured dialogue on its findings."[92]

It is interesting to note that the "structured dialogues" are often provided for in cases where implementing powers are conferred on the Council (e.g., macroeconomic conditionality under the *RRF* and *CPR*, the activation of emergency mode under the *IMERA*, the adoption of measures under the *RoL Conditionality Regulation*), and can be understood as the condition imposed by Parliament during legislative negotiations to accept such a governance mode. In that regard, the provisions in question are designed to ensure that the dialogue takes place *before* the Commission submits its proposal for a Council implementing act, so that the input of Parliament can be taken into account in the preparation of such a proposal (in the case of the RRF, the structured dialogue is not linked to specific decisions on implementation, but it is periodical – every two months – which, having regard to the frequency of payments to Member States, allows the Commission to take into account the views of the Parliament for the subsequent decisions).

---

[88] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, pp. 159–706.

[89] Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No 2679/98, OJ L, 2024/2747, 8.11.2024.

[90] Recital 26 and Article 6 *IMERA Regulation*.

[91] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10.

[92] Article 6(2) of the *RoL Conditionality Regulation*.

A second form of scrutiny of implementation is exercised through the possibility of the Parliament's involvement in appointing an observer in consultative bodies that assist the Commission in the implementation of crisis instruments. Another example is the *IMERA Regulation*, Article 4 of which provides that the European Parliament can appoint a representative as a permanent observer on the Internal Market Emergency and Resilience Board, sitting alongside representatives of each Member State and of the Commission. A similar solution has been adopted by the *HERA Regulation,* which similarly provides that a representative of the Parliament must be invited as an observer to the meetings of the Health Crisis Board, a body that provides advice to the Commission on the preparation and implementation of the measures that can be adopted when the Council activates the emergency framework in the event of a public health emergency..[93]

The presence of a Parliament observer on advisory boards does not as such grant the possibility to directly shape the implementation of emergency measures. However, by providing a seat in the "room where it happens," it ensures that the Parliament is informed properly and in good time of the development. This greatly enhances its power of scrutiny, notably over the Commission, which may then be held accountable in line with the mechanisms provided for in the Treaties.

3. The Council: Work in the shadow of the Leaders and an increasing role in the implementation of EU law

According to the institutional set-up laid down in the Treaty, the Council plays a central role in shaping the Union's response to a crisis. It is on the Council that the Treaties explicitly confer a number of emergency competences including, in particular, Article 122 TFEU. Moreover, as the institution composed of the representatives of the Member States, the Council naturally constitutes the forum where the Member States can coordinate their action and thus identify the need for measures at the Union level. Finally, as co-legislator, the Council is also perfectly poised to follow up emergency measures, by agreeing on shaping ordinary legislation for the handling of future crises on the basis of the lessons learnt.

The case studies analysed in this report largely confirm that the Council has been fully playing those roles in practice. On closer look, however, two phenomena deserve attention, as they may raise questions as to the institutional set-up laid down in the Treaties.

The first is the impact of the increased role of the European Council that we have described above on the role and ordinary functioning of the Council. There is no doubt that, when the European Council is seized of a matter and directly shapes the political agreement around complex political packages,

[93] Article 5 of Council Regulation 2022/2372.

this produces a chilling effect on the action of the Council, which will wait for the political instructions of the leaders. When an agreement is finally reached by the European Council, the Council then operates as the chain of transmission for ensuring that the political choices of the leaders inform the legislative deliberations. As we have seen, the intervention of the European Council can go as far as indicating that Council should continue negotiations and seek consensus on a given matter, regardless of whether a lower voting rule applies for the adoption of a given act.[94]

This state of affairs is, however more the result of the structural relationship between the Council and European Council than a dynamic proper of emergency situations. In fact, the relationship between the two institutions is defined by their composition and by the organisation of their work. Thus, the fact that the Council is composed of ministers who are politically subordinate in their respective national systems to the leaders who sit at the European Council naturally results in a hierarchical dynamic. This is accentuated by the composition of the General Affairs Council, that is, the Council configuration that ensures consistency and coordination in the action of the Council (Article 2(2) of the Council Rules of Procedure) and the preparation and follow-up of European Council meetings (Article 16(6) TEU).[95] This composition (Ministers of European Affairs, or even under-secretaries of State, in charge of the coordination of the Member State's positions at the EU level, but not of the substance of the files being discussed) ensures that the relevant political matters are ultimately left for discussion by the leaders and that preparations in Council are limited to a preliminary discussion, as the General Affairs Council would generally lack the political authority to go further. Finally, the conferral on the President of the European Council of the power to draw up the agenda of the European Council[96] further contributed to defining the relationship between the two institutions, as it is ultimately up to the President of the European Council (and not to the rotating presidency of the Council) to act as the gatekeeper deciding which policy items move between the Council and the European Council (and *vice versa*). In light of the above, the compression of the role of the Council by the role played by the European Council is not really indicative of a shift in the institutional balance in the context of emergencies, but rather an illustration of the normal dynamic between the two institutions.

[94] As has for instance happened in the case of the negotiations on the Pact on Asylum and Migration, see Chapter I, Section 1 above.
[95] The ministers sitting in the General Affairs Council are the Ministers for European Affairs, who in most Member States are junior ministers or even under-secretaries of state.
[96] According to Article 3 of the Rules of Procedure of the European Council, the President of the European Council must draw up the provisional agenda, in light of the discussion at a final meeting of the General Affairs Council, to be held within five days of the European Council. The President of the European Council has further developed the practice to send an invitation letter to the members of the EUCO ahead of each meeting to frame the discussions that are planned.

Moreover, the role played by the European Council in steering the discussion and determining the direction and tempo of the negotiations in relation of specific files shall not overshadow the instances where that role has rather been played by the co-legislators, and the Leaders have limited themselves to endorse an approach already taken. The case of the Pact on Asylum and Migration is particularly telling in this regard. As it has been shown in Chapter I, the strategy for solving the stalemate in Council was the result of the initiative of various rotating Presidencies, which first adopted a "gradual approach" to the negotiations, so to sequence them in partial deals (2022 French Presidency) and then agreed with the European Parliament a "Joint Roadmap" which defined the methodology for the inter-institutional negotiations with a view of adopting the various Proposals of the pact by the end of the legislature. It is remarkable here that only when those approaches were agreed and started proving successful in practice, the European Council endorsed the approach in its Conclusions of 9 February 2023 (paragraph 27).

The second phenomenon is more unexpected. In addition to its natural role as emergency law maker, the Council has also been playing an increasing role in the *implementation* of EU law in crisis situations. As the cases of conferral on the Council of implementing powers multiply across crisis instruments, and the reach of those powers both widens and deepens, the question arises as to whether the phenomenon is altering the set-up provided for in the Treaties and is eroding a role traditionally exercised by the Commission.

3.1 Council implementing powers for emergency measures

In the system of the Treaties, implementation is a matter left first and foremost to the Member States and, where uniform conditions for implementation are needed, to the Commission. Only in duly justified and specific cases, can implementing powers be conferred on the Council by the legislator (Article 291(1) and (2) TFEU). This possibility has been used in the past, but has remained generally confined to domains which, albeit progressively falling under Union competence, touch the core of

Member States' sovereignty[97] or to matters where the Council has specific responsibilities under the Treaties.[98]

In that regard, acts adopted on the basis of Article 122 TFEU that establish a permanent framework (rather than an individual measure) leave to the Council the decision to trigger the framework in a specific crisis situation. This applies to the crisis frameworks laid down in the *EFSM,* which can be activated to provide financial assistance in the form of loans to Member States experiencing severe economic or financial disturbance or in the *ESI,* which allow for the provision of emergency support in the event of a natural or man-made disaster through emergency support operations financed by the budget and implemented by the Commission. A third example is the permanent framework established by *HERA* which, in the event of a public health emergency, provides for a set of emergency measures to be chosen from a dedicated toolbox in order to ensure the supply of crisis-relevant medical countermeasures.

In all of these cases, the activation of the relevant framework – which entails both a technical assessment of the crisis-specific conditions for the adoption of Union measures and a political evaluation of the opportunity to activate – is specifically left to the Council. Such a governance system is not surprising after all, as it reflects the fact that the Treaties confer the emergency competence on the Council in the first place: when this competence is exercised through a permanent framework, it is appropriate – and indeed respectful of the principle of conferral – that its activation in a specific case is reserved for the Council itself. In fact, as we have already underlined in Chapter II, Section 2.1, the activation of a permanent framework does not fall into the category of implementing powers

[97] This is typically the case of areas falling within the former third pillar and now covered by Title V of TFEU (the area of freedom, security and justice), and notably in relation to border controls and visas. See for instance the implementing powers conferred on the Council by Articles 21a, 28 and 29 of the Schengen Borders Code, Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L 077 23.3.2016, p. 1; see also: Article 42 of Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard, OJ L 295, 14.11.2019, pp. 1–131; Article 25a of the Visa Code, Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas, OJ L 243 15.9.2009.
Another area where implementing powers are traditionally conferred on the Council is taxation. See for instance, Article 397 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347 11.12.2006, p. 1.
In areas of exclusive EU competence, the conferral of implementing powers on the Council remains exceptional but can nonetheless occur when based on an assessment which touches domains close to Member States' sovereignty. See, for instance, the Regulation on protection from economic coercion by third countries, which confers on the Council the powers to determine the existence of a situation of economic coercion by a third state and the appropriateness of requesting reparation. While adopted on the basis of Article 207(2) TFEU on common commercial policy, it is clear that the instruments have an essential foreign policy dimension. The determination that a third country is engaging in economic coercion is already an act of foreign policy, as it will form the Union's policy vis-à-vis that particular country. See Article 5 of Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries, OJ L, 2023/2675, 7.12.2023.

[98] This is, for instance, the case of the coordination of economic policies, where the implementing role of the Council is defined in Articles 121, 126 and 136 TFEU. See, for instance, the specific role conferred on the Council within the various instruments of the Stability and Growth Pact, and in particular Regulation (EU) 2024/1263 on the effective coordination of economic policies and on multilateral budgetary surveillance, OJ L 30.4.2024, Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 209 2.8.1997, p. 6, 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, OJ L 306, 23.11.2011, pp. 1–7, Regulation (EU) 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, OJ L 306, 23.11.2011, pp. 8–11, 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, OJ L 306, 23.11.2011, pp. 25–32.

according to Article 291 TFEU, but rather represents the exercise, in a specific case, of the Treaty emergency competence.[99]

In addition to this specific situation, the conferral of implementing powers on the Council has significantly expanded in the context of the instruments adopted by the Union in response to crises. First, implementing powers have been conferred on the Council in relation to policy areas that were traditionally left to the Commission to implement – such as cohesion policy and macro-financial assistance to third countries. These are areas where the action of the Union normally takes the form of spending programmes that mobilise resources from or assigned to the Union budget and where the central implementing role of the Commission derives directly from its Treaty competence to implement the Union budget, according to Articles 17 TEU and 317 TFEU.

Second, the conferral of implementing powers on the Council has deepened, in the sense that it has expanded beyond the adoption of specific key decisions with a particular relevance (such as the activation of a framework), to include decisions relating to the granular and individual implementation of a policy instrument.

An initial example of this dynamic is provided by *SURE,* an instrument adopted on the basis of Article 122 TFEU to provide temporary support to Member States with the aim of mitigating unemployment risks in the emergency situation created by the COVID-19 pandemic (*SURE*).[100] Unlike the *EFSM, ESI* or *HERA*, *SURE* does not establish a permanent crisis framework but rather a specific measure adopted as a reaction to a specific ongoing crisis. Thus, its adoption already entailed an assessment by the Council that the conditions for emergency action under Article 122 TFEU were satisfied.[101] Following that assessment, nothing would have prevented the Council from giving the Commission the task of implementing the instrument in relation to individual requests for support submitted by the Member States. However, the Commission proposed a different solution: the financial assistance would be made available via Council implementing decisions, following a positive assessment by the Commission of the requests submitted by Member States (Article 6 of Council Regulation(EU) 2020/672). The justification for such an approach was identified by the

[99] When activating the crisis framework, the Council is not merely implementing it, but it is exercising in a specific case its emergency competence based on Article 122. This seems confirmed by the practice according to which activation of the framework is accompanied *in the same act* by a modification of that framework to expand the conditions for activation or support arrangements (this was the case of the *ESI* activation and amendment during the COVID-19 pandemic – see Chapter I, Paragraph 2). This also seems confirmed by recital 3 of the *HERA Regulation* which makes it clear that the framework is activated by the Council "upon a proposal from the Commission pursuant to Article 122(1) TFEU." Logically, if the activation was considered an implementing act, the proposal of the Commission should be based on the basic act (the *HERA Regulation* itself) and not on the Treaty provision.

[100] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L159, 2020.

[101] See, in particular, recitals 2 to 6 of the *SURE* Regulation, providing the justification for the recourse to Article 122 TFEU.

Commission's proposal with reference to the particular financial implications for the Member States linked to the decisions to grant financial assistance. The approach was confirmed by Council upon adoption of the Regulation.[102] Admittedly, the need to have recourse to Member States' voluntary guarantees to cover the market borrowing of the funds needed to finance the instrument, played an important role in the choice of a governance mechanism that gave the Member States the highest possible degree of control.

A second example is provided by the main spending instrument established to support the recovery of Member States' economies from COVID-19, the *Recovery and Resilience Facility*.[103] The *RRF* was designed around the idea of a reform and investment agenda to be negotiated between each Member State and the Commission and ultimately incorporated in a Recovery and Resilience Plan, setting milestones and targets for the disbursement of financial support. In the original Commission proposal, both the adoption of the Plan and the individual decisions on payments following a positive assessment of the achievement of the milestones and targets were meant to be left to the Commission, as is normally the case for other spending instruments based on Article 175 TFEU (the legal basis for cohesion).[104] However, following a request by the Council in legislative discussions, the governance shifted towards a greater role for the Council, which was ultimately given the power to adopt the plans following a proposal of the Commission based on its positive assessment of the plans submitted by the Member States.[105] The decision on individual payments, based on the fulfilment of the milestones and targets set out in the Member States' Plans, was instead left to the Commission,[106] but supplemented by the requirement to seek an opinion to the Economic and Financial Committee and, most importantly, by an "emergency brake" mechanism, which would allow for the possible involvement of the European Council.

It must be stressed that the conferral of implementing powers on the Council also remains a central feature of the crisis frameworks that have been adopted (or are currently still under negotiation) on

[102] See, Recital 13 of the Regulation.
[103] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L57, 2021.
[104] In ordinary cohesion instruments, Member States negotiate and then submit programmes that the Commission adopts by means of implementing decisions. See: Article 23 of the Common Provisions Regulation (CPR), Regulation (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231 30.6.2021, p. 159.
The CPR Regulation (and its predecessor) exceptionally provides for giving implementing powers to the Council in the framework of macroeconomic conditionality, a conditionality mechanism that allows the Council to suspend commitments or payments under the funds in the case of failure to take corrective action in response to Council recommendations and decisions under the corrective arm of the Stability and Growth Pact: see: Article 19 CPR.
[105] See: Article 20 and Recital 45, which does not, however, provide an explicit justification for the conferral of implementing powers on the Council.
[106] Article 24 and Recital 52.

the basis of ordinary legal bases in the aftermath of the crises and that we have briefly described in Chapter III, Section 1.2 of the report.

In some instances, the role of the Council in implementing a permanent framework mirrors the role that the institution was already playing in the context of emergency measures. This is for instance the case of the gas package and the electricity market act, which have generalised and made permanent the regime of regulated prices in the event of an electricity or gas price crisis that was originally introduced by the emergency measures adopted under Article 122 TFEU.[107] The role of the Council can here be explained in light of the normative drag exercised by the preceding measures.

However, the conferral on the Council of implementing powers is also a constant feature in new crisis response frameworks introduced by the ordinary legislator in areas where no emergency measures had been previously adopted (and therefore where the Council had never played a role on the basis of emergency powers under the Treaties). It is interesting to note that, even when the Commission's original proposal did not originally envisage a role for the Council in implementing the instrument (as in the case of *IMERA*), such a role was then introduced or expanded at the request of the Council in the legislative discussions.[108] This pattern is all the more remarkable given that the instruments at stake are subject to the ordinary legislative procedure, and thus require the simultaneous agreement of the European Parliament.

The recognition of a specific role for the Council in implementing crisis frameworks, even when they are adopted as part of an ordinary EU competence, can be explained in light of the rationale underpinning the Council's role in the Union emergency competences as described in part I, Chapter II of this report.[109] However, unlike the Treaty-based emergency provisions, where both the assessment of the conditions and the adoption of measures fall within the Council's remit, the crisis

[107] This is the case of Article 5 of Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, which introduces a regime of regulated prices in the event of a natural gas price crisis, on the model of the emergency measure already introduced by Council Regulation 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

[108] Some of the instruments analysed in this Report were initially proposed with a governance system exclusively based on the Commission's implementing role, which however was reconsidered during legislative negotiations. See for instance the original proposal for the Chips Act (for the activation of the Crisis Mode), *IMERA* (for the activation of the internal market vigilance mode), the *RRF* (for the adoption of Recovery and Resilience Plans), the *Emergency Support Instrument* (no Council decision originally envisaged for the activation of the instrument).

[109] As Member States are traditionally vested with the primary responsibility for dealing with emergency situations, any limitation on such a role would be accepted only if accompanied by the guarantee of preserving sufficient control. This explains the central importance of the Council in cases where emergency competences are exceptionally centralised at Union level. In fact, the conferral of emergency competence on the institution which represents the Member States offers the best institutional design for ensuring (a certain degree of) control by Member States over Union emergency measures, and as such it is the trade-off typically required by the Council during legislative negotiations for accepting the establishment of crisis instruments at the EU level.

frameworks established in secondary law allocate the two between the Council and the Commission, following two alternative governance models.

The first model is the one adopted in the internal market instruments (*IMERA*, Chips Act, proposal for *EDIP*) whereby the Council determines the existence of a crisis situation and activates the crisis mode on a proposal from the Commission. Following such a decision, the Commission is then empowered to adopt the specific emergency response measures appropriate to the situation among those identified in a specific toolbox by the legislative instruments.

The second model is the one adopted in the area of asylum and migration, and notably in the *Crisis Regulation*. Here, the logic seems reversed: the Commission is in charge of determining the existence of one of the crisis situations of provided for by the Regulation (a mass influx of migrants, *force majeure* or situation of instrumentalisation of migrants). Such a decision then paves the way for the Council to adopt an implementing decision authorising a Member State to apply derogations to the asylum acquis and triggering the solidarity measures provided for in the Regulation. A similar approach appears to be followed in the 2024 amendment of the *Schengen Borders Code* in relation to a situation of large-scale public health emergency. In this case, the definition of "large-scale public health emergency" in Article 2(b)(27) refers to a "public health emergency, that is recognised at Union level by the Commission […]," thus clarifying that the Commission is in charge of carrying out the assessment. Where the Commission establishes the existence of the emergency,[110] it may then propose that the Council authorise the reintroduction of internal border controls and decide on temporary travel restrictions for third-country nationals.

The combination of the different roles that the Council and Commission play in the governance of the crisis framework (assessment of the state of crisis versus adoption of measures) reflects the different level of integration in EU policy areas. In areas where integration is advanced, such as in the internal market, the Commission is given the power to adopt the appropriate emergency measure, while Council establishes the existence of a crisis situation. In areas where Member States hold the central role in implementing Union policy (such as border management or migration), the Commission becomes the gatekeeper assessing the existence of the conditions for adopting emergency measures, which are then *authorised* by the Council (and ultimately implemented by the Member States).

3.2 The legality of conferral of implementing powers on the Council in light of the case-law

[110] This is the language used in Article 28(1): "Where the Commission establishes that there is a large-scale public health emergency that affects several Member States, putting at risk the overall functioning of the area without internal border control, it may make a proposal to the Council […]."

The expanding role of the Council in the implementation of EU law needs to be assessed in light of the legal framework applicable to the conferral of implementing powers and to the practical arrangements for exercising them according to the Treaties.

In that regard, the Court of Justice has consistently noted that in the system provided for by the Treaties, *"*when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power."[111] It follows that, when the co-legislators intend to confer implementing powers on the Council instead, they are required to duly justify their choice and provide a detailed statement of reasons.[112] In particular, the Court has made it clear that the co-legislators "must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that, under the system established by the treaty."[113]

In light of this case-law, the General Court has recently annulled a Single Resolution Board decision adopted in application of a Council implementing act[114] specifying the methodology for the calculation of ex ante contributions by banks to the Single Resolution Fund on the basis of Article 70(7) of Regulation 806/2014.[115] The General Court noted that the recitals of the implementing act merely set out the purpose and content of the implementing act to be adopted, "without however providing the slightest indication of the reasons why the implementing power was conferred on the Council rather than the Commission for those purposes."[116] In the absence of any textual element from which it would be apparent that the conferral of implementing powers on the Council was justified by the specific role that it is called on to perform in the specific field at stake, the justification could not be simply inferred by the context in which the conferral was made.[117] Nor, according to the General Court, could such a justification be found either in a general reference to "political reasons," since such a reference is neither detailed nor related to the nature or the content of the relevant basic act.[118] These findings are challenged by the Council which considers that the choice of the legislator as to conferral of implementing powers would result by the broader context of the

[111] Judgment in case C-440/14 P, *NIOC v Council*, point 50 and 60 and the case law quoted there.
[112] Judgment of the Court of 24 October 1989 in case C-16/88, *Commission v Council*, EU:C:1989:397, point 10; judgment of the Court of 18 January 2005 in case C-257/01, *Commission v Council*, EU:C:2005:25, point 50; judgment of the Court of 16 July 2015 in case C-88/14, *Commission v Parliament and Council*, EU:C:2015:499, point 30; judgment of the Court of 1 March 2016 in case C-440/14 P, *NIOC v Council*, EU:C:2016:128, point 49; judgement of the Court of 28 February 2023 in case C-695/20, *Fenix*, EU:C:2023:127, para. 37.
[113] Judgment in case C-440/14 P, NIOC v Council, point 50
[114] Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation No 806/2014 with regard to ex ante contributions to the Single Resolution Fund, OJ 2015 L 15, p. 1.
[115] Regulation (EU) No 806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ 2014 L 225, p. 1.
[116] Judgment of the General Court of 29 May 2024 in case T-395/22, *Hypo Vorarlberg Bank v. SRB*, ECLI:EU:T:2024:333, point 32 and following. The judgment is currently under appeal.
[117] *Ibidem,* points 37 to 40.
[118] Ibidem, point 41.

act and by the general reference to the sensitivity of the matter as required by the case law. The appeal is currently pending.

When the basic act contains an explicit justification of the conferral of implementing powers on the Council, the Court has shown a great deal of deference to the discretional choices that the co-legislators make on this matter. Thus, it has accepted justifications generally referring to the significant impact that the measures may have either on the Member States[119] or on the individuals that may be concerned by the measures at stake or on the need to ensure consistency in light of the allocation of competences between institutions, notably in light of the role played by the Council in related areas.[120] The Court has also considered that a "general and laconic" reference to the sensitivity of the matter would suffice to provide the required justification (see, for instance, the Judgment of 18 January 2005, Commission v Council, C-257/01, EU:C:2005:25, paras. 52, 53).

Taking account of this case-law, the short but clear justification provided in recital 13 of the *SURE* Regulation, which refers to the "particular financial implications" notably for the Member States whose voluntary guarantees assist the borrowing on the market of the necessary resources, appears to meet the loose standard of review that the Court has used to assess the justification of the conferral of implementing powers on the Council.

The same cannot be said of the RRF Regulation, recital 45 of which does not provide an explicit justification as to why implementing powers should be conferred on the Council for the adoption of the recovery and resilience plans, but merely describes the relevant procedure. The choice of the legislator can, however, be derived from the broader context as captured by other recitals of the Regulation, and notably by the many references to the European Semester for economic policy coordination as the relevant framework for identifying national reform priorities on which the national resilience and recovery plans will be based,[121] and for the central role played by the Council in that context.[122] The need for coherence and consistency with the Semester process is thus key for pursuit of the RRF objectives and therefore justifies conferring powers on the Council to adopt the recovery and resilience plans, which aim to provide direct financial support linked to the implementation of reforms and investment that responds to the challenges that the same Council has identified in the Semester.

[119] Judgement of the Court in case C-695/20, *Fenix*, quoted above, paras. 39 and 40.
[120] Judgment of the Court of 1 March 2016 in case C-440/14 P, *NIOC v Council*, ECLI:EU:C:2016:128, paras. 52ff.
[121] See: recitals 4, 5, 17, 32, 39 and 58.
[122] See, in particular, recital 36.

The analysis of the justifications provided by ordinary law instruments establishing permanent crisis frameworks leads to variable outcomes: while the reference to just the "politically sensitive nature"[123] of the decision to be taken does not appear to meet the standard of the case-law, a broader reference to the "*potential and far-reaching consequences*" of the measures to be taken for the individuals or for the functioning of an area of EU policy (e.g., the internal market) appears more solid.[124] A particularly convincing justification is the one developed in recital 31 of the *Crisis Regulation,* which links the conferral on the Council of the power to authorise derogations from the EU asylum regime and to apply an enhanced solidarity regime to the objective of strengthening mutual trust between Member States and to improve coordination at Union level. Such a justification clearly reflects the logic of the conferral on the Council of implementing powers in the first place, namely, the need to ensure the effectiveness (through acceptance) of a centralised emergency regime, which often coexists with individual Member State measures.

Beyond the obligation of motivation, the conferral of powers on the Council also needs to respect the prerogatives that the Treaties confer on the Commission, as the institutions who are in principle tasked with ensuring the application of EU law (Article 17(1) TEU). This is particularly relevant to instruments that entails the mobilisation of resources from the Union budget, given the specific responsibility that is conferred by the Treaties on the Commission for implementing the budget (Article 17(1) TEU and 317(1) TFEU). In that regard, however, the Court has followed a restrictive interpretation of the reserve of competence of the Commission. According to old but established case-law, the competence that Article 317 TFEU confers on the Commission for implementing the budget is limited to the power of committing appropriations and payments from the EU budget (budget execution *stricto sensu*).[125] As a consequence, the Court has recently confirmed that the complex assessments linked to triggering the horizontal conditionality mechanism established by the Conditionality Regulation "*forms part of a conception of budget implementation that goes beyond that which* […] falls within the Commission's powers in cooperation with the Member States"[126] and could therefore validly be conferred on the Council without infringing the Commission's prerogatives.

In light of this case-law, the conferral on the Council of the power to approve individual Member States' plans under the *RRF*, *SURE* of *EFSM* Regulations, while very much a precursor of the acts implementing the budget *stricto sensu*, still appears to respect the role of the Commission. As a matter

[123] See: recital 8 of the *2024 Schengen Border Code Amendment*. See also recital 58 of the *EDIP* proposal.
[124] See: recital 36 of *IMERA*. See also recital 58 of the *EDIP* proposal.
[125] Judgment of the Court of 24 October 1989 in case C 16-88, Commission v Council, ECLI:EU:C:1989:397, paras. 16ff.
[126] Judgment of the Court of 16 February 2022 in case C-156/21, Hungary v. European Parliament and Council, ECLI:EU:C:2022:97, paras. 186–189.

of fact, in all cases, the Council's implementing decisions approving national plans must be followed by the conclusion of dedicated agreements between the concerned Member State and the Commission, which set out the individual legal commitments for the grants and detail the borrowing conditions from the loans. It is the conclusion of this additional agreement that constitutes the act of budget execution *stricto sensu*, thus preserving the Commission's prerogatives as defined in the case-law. The Commission, however, expresses strong reserves as whether this case law applies in relation to the conferral on the Council of even more far-reaching powers such as the one authorising individual payments envisaged in the Ukraine Facility.[127]

In conclusion, when considered individually, the many new instances where the Council is vested with implementing powers in the framework of emergency instruments do not seem to raise a problem of compatibility with the Treaties in light of the case-law. Still, based on the sheer size of the phenomenon, one could argue that the conferral of implementing role on the Council is no longer an exception and that a shift towards a more "executive" and implementing function for the Council is indeed taking place. In order to test this assumption, it is useful, however, to look at how the Council exercises its newly acquired implementing powers in practice.

3.3 The exercise of the Council implementing powers in practice and its impact on the institutional balance

It is clearly too early to assess the implementation of the various permanent crisis frameworks that have been only recently adopted and that in some cases are not yet being applied, let alone those that are still in negotiation. However, the practice developed under the emergency instruments adopted during the past crisis already offers some useful indications as to how the Council exercises its implementing powers.

The first remark in that regard is that despite the importance that Council had attached during the legislative negotiations to the objective of securing a key role in the implementation of crisis

[127] Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, OJ L 792, 2024. The Ukraine Facility is a macro-financial assistance instrument adopted on the basis of Article 212 TFEU to provide Ukraine with both immediate budget support and medium-term support for reconstruction. The Ukraine Facility was initially proposed by the Commission on the basis of the RRF model of governance but during the legislative negotiations, the Council managed to extend its control over implementation of the instrument and most notably obtained control over the assessment of the satisfactory fulfilment of the qualitative and quantitative conditions linked to individual payments. The need for urgent adoption of the Facility to provide to Ukraine with much-needed support explains the fact that the Commission accepted the amendments to the governance of the instrument without obliging the Council to proceed with unanimity as required by Article 293 TFEU. Nonetheless, the Commission issued a unilateral declaration regretting the choice of the legislators and stressing that the decisions related to payments to Ukraine under the Ukraine Facility belong to the power of budget implementation that is part of its institutional prerogatives under the Treaties. Summary Record of COREPER (part 2) meetings of 7, 8 and 9 February, Council ST doc. 6412/24 ADD1 of 1 March 2024.

instruments, the same Council has so far made little use of the possibilities that the newly acquired powers have offered. In none of the many instances in which the Council had to adopt implementing decisions under SURE or the RRF did it decide to reject or even amend the Commission's proposal, or to request its modification as a condition for adoption. Rather, the proposal for implementing decisions put forward by the Commission has systematically been confirmed after relatively short deliberations in Council.

The factors that explain this situation are manifold.[128] The framework for the exercise of Council implementing powers presents some inherent constraints that impact on the decision-making. This concerns in particular the default voting practices that apply to the exercise of implementing powers whenever the basic act does not provide for specific arrangements. In particular, the need for unanimity in order to amend the Commission's proposal[129] prevents the Council from modifying such a proposal if the Member States to which that decision is addressed vote against.[130] This ultimately precludes the possibility of the Council adopting more stringent conditions for the concerned Member State unless the Commission agrees. However, such an agreement does not appear likely in those cases where the Commission's proposal is based on a Recovery and Resilience Plan that has been thoroughly negotiated with the Member State concerned. In such cases, the application of the default rule on the approval of amendments to the Commission's proposal *de facto* limits the action of the Council to a mere approval/rejection alternative.[131]

Another factor is the Commission's power of initiative, which significantly frames the exercise of the Council's implementing powers, both in terms of the possibility for the Council to act and in terms of determining the content of the decision, which will have to be based on the assessment carried out in the Commission's proposal. In other words, the Commission also remains the gatekeeper of the Council's powers in the domain of implementation. This is particularly relevant where the assessment

[128] For a more detailed analysis, see: E. Rebasti, "Shifting the Institutional Balance in Times of Crisis? The Expanding Role of the Council in the Implementation of EU Spending Instruments," *Jean Monnet Working Paper Series* No. 3/24, retrievable at: https://jeanmonnetprogram.org/paper/shifting-the-institutional-balance-in-times-of-crisis-the-expanding-role-of-the-council-in-the-implementation-of-eu-spending-instruments/

[129] As Article 291(2) TFEU does not set out specific rules for the exercise of the Council´s implementing powers, the default voting rules and arrangements applicable to decision-making in the Council under the Treaties applies by analogy, unless the basic act regulates the matter differently. The default rules include the need for the Council to act on the basis of a Commission proposal (Article 17(2) TEU), the vote by qualified majority as defined in Article 238(3) TFEU (Article 16(3) TEU), the need for unanimity in order to amend the proposal unless the Commission supports the amendment (Article 293(2) TFEU), and the absence of deadlines for the Council to act.

[130] This problem is of course relevant when the implementing act is addressed to a specific Member State or specifically concerns its interests.

[131] This is why certain basic acts expressly provide the possibility for the Council to modify the Commission's proposal at qualified majority, regardless of the Commission's position. For instance, such a rule has been provided for the adoption of the decision approving the Ukraine plan (Article 19(1) of the Ukraine Facility) as well as for the adoption of measures for the protection of the budget under the Conditionality Regulation (Article 6(11) of the Conditionality Regulation.

to be carried out is of a highly technical nature and is combined with a narrow timeframe to adopt the Council's decision.

Finally, other limitations are linked to the internal organisation and working methods of the Council: while both the Commission and the European Parliament have set up specific administrative structures to prepare and control the implementation of the spending instruments, the Council has not established any specific preparatory body (working parties) to prepare the implementing decisions that it is requested to adopt, nor has it strengthened its administrative services to support those activities. Rather, the additional work strand generated by the conferral of implementing powers has been accommodated within the existing structures and resources.

In conclusion, the practice for the implementation of SURE and RRF shows that once presented with the result of lengthy and complex negotiations between the Commission and individual Member States on drafting the respective national plans, and required to act within a very limited timeframe, the Council has had little margin or appetite for reopening an agreement that had already been reached bilaterally. The overall impression is that the Council remains satisfied with a role of political oversight over the implementation of the spending instruments rather than seeking to actively shape the relevant decisions.

This leads us to an important observation. Even where implementing powers are conferred on the Council, the Commission continues to play the key role in implementing the spending instruments via its power of initiative. It is the Commission that identifies the relevant facts and carries out the technical assessments (on the quality of the plans, the conditions for payments, etc.) on which the Council implementing decisions are taken. When necessary, it is the Commission that negotiates with the concerned Member State the content of the measures to be adopted and incorporates the result of such negotiations into its proposals. In practice, the Council does not interfere with the technical assessments and negotiations carried out by the Commission. Ultimately, it is the Commission that exercises discretion and shapes the implementing decisions submitted to the Council for adoption.

A second remark follows from the previous one: the conferral of powers on the Council does not seem to undermine the Commission's role, but – on the contrary – enhances it. And it does so in two different ways.

First, the need for the Commission to obtain the adoption of the Council obliges it to provide a very solid statement of reasons and a convincing narrative for its proposals. While the Commission is normally accountable to the European Parliament, when acting in the framework of its right of initiative for the adoption of Council implementing powers, it becomes accountable to the Council,

too. Paradoxically, the conferral on a political body of the final decision makes the process more objective and more democratically accountable.

Second, and perhaps most importantly, the conferral of implementing powers on the Council gives it legal and political responsibility for the acts that are adopted. This assumption of political responsibility has the effect of also providing political backing for the action of the Commission in areas where it enjoys exclusive implementing responsibility but for some reason is reluctant to act.[132]

4. The role of the Commission: Erosion or renaissance?

Emergency situations of have also reshaped the role played by the European Commission, requiring it to adapt its actions to circumstances and to the new institutional dynamics that have been emerging. These adjustments prompt a reflection on whether "crisis mode" has in fact resulted in an erosion of the Commission's prerogatives, as it would appear in light of the deference and self-restraint that the Commission has exercised vis-à-vis the European Council and the Member States in order to secure a consensual and effective European response. On closer look, however, the strategy followed by the Commission seems to have ultimately strengthened its role by increasing its influence and ability to shape the crisis response. This, in turn, has led to a significant expansion of its powers, of the instruments at its disposal and of the reach of its action.

4.1 An apparent erosion of the Commission´s prerogatives based on self-restraint and deference

The analysis of the conduct of the Commission during the crises considered in this report points at an apparent erosion of its institutional prerogatives. This erosion seems manifest in three areas that are central to the institutional mission of the Commission: its power of initiative, its role in implementing EU law and finally its role as guardian of the Treaties.

4.1.1 An erosion of the power of initiative due to the deference to the European Council?

As regard the power of initiative, one constant element that has emerged from the case studies analysed in Chapter I is the deference paid by the Commission to the European Council when

[132] An example of this phenomenon is the adoption of measures to protect the budget in relation to the Rule of Law situation in Hungary. The discussions and then adoption by the Council of measures under the Conditionality Regulation and the adoption of the RRF plans for the two Member States, which included super-milestones related to the rule of law, has paved the way for the Commission to activate on the same grounds the different conditionality mechanism based on the Common Provisions Regulation to implement the cohesion funds (CPR). It must be stressed that under the CPR, the horizontal enabling conditions are activated by the Commission on its own; however, the Commission has been very reluctant to use its powers under CPR conditionality (and its predecessors) to suspend payments to Member States. It is thus remarkable that once the Council showed its support for imposing the other set of budgetary conditionality under the Conditionality Regulation and the RRF, the Commission finally decided to follow up and to make full use of its prerogatives.

formulating policy responses to crises. At first sight, it may seem that the Commission has stepped back and left the leaders the role of taking the policymaking initiative, setting out priorities, defining the direction of action and even shaping the content of specific emergency measures. This raises the question of how to reconcile the European Council's power to define the general political directions and priorities of the Union (as laid down in Article 15(1) TEU) and the Commission's power to "promote the general interest of the Union and take appropriate initiatives to that end" (Article 17 TEU).

Such ostensible erosion of the power of initiative of the Commission seems in most cases to be the result of a form of self-restraint, prompted by the lessons learnt in situations where initiatives proposed without clear support from the European Council have failed to gather sufficient support and have resulted in a significant setback for the action of the Union.

The migration crisis serves as a pivotal case study here. The Commission struggled to shape the agenda and to identify consensual solutions to address the sudden influx of migrants. It put forward proposals for emergency measures aimed at the mandatory relocation of migrants, which were supported by a majority of Member States but strongly opposed by others. Two Member States refused to comply with the measure, while several more dragged their feet in its implementation. The divergence among Member States' positions was so acute and conflictual that the work of the Council on the package of legislative measures to tackle the migration crisis was paralysed. This led the European Council to agree that an accord on those legislative texts would need to be based on consensus. The Commission readjusted its proposals to take account of the new political context but the agreement on the new Asylum and Migration Pact remained difficult and slow to achieve. In the meanwhile, the Member States adopted a number of unilateral derogating measures to tackle the situation (see Chapter I, Section 1 above).

The energy crisis offers another example. The legislative response proposed by the Commission in reaction to the surge in energy prices as a result of Russia's war of aggression against Ukraine was deemed insufficient by the European Council, which insisted that a number of additional measures be taken, and in particular emergency measures based on Article 122 TFEU. The Commission followed the suggestion and submitted proposals for a number of emergency measures as requested by the leaders (see Chapter I, Section 3 above).

The two examples are testimony to the risk that exercising the power of initiative may entail if proposals are brought forward without having sufficient political support. This explains why, in other cases, the Commission has instead agreed to follow the lead of the European Council and waited for a consensus to emerge on the type of measures to be taken, before submitting formal proposals to that

effect. Paradigmatic in that sense is the case of the economic measures taken during the COVID-19 crisis, as shown in Section 2.1 of Chapter I.

The perceived erosion of the Commission's power of initiative needs, however, to be seen in the broader context of its relationship with the European Council. As a member of the European Council, the President of the Commission is present in the "rooms where it happens." With her technical expertise, and the ability to activate tools at the EU level and mobilise the Union administration, the President of the Commission is in a position to steer the debate among the leaders and to contribute decisively to shaping any agreed solution. Ahead of the European Council, the Commission contributes to the preparations in terms of input, and given that the Commission will be holding the pen on the actual follow-up initiatives, this is an opportunity to do a reality check of the envisaged direction. Among many examples, we can mention here the decisive contribution of the Commission in shaping the political agreements on the broader NGEU/MFF package during the European Council meetings of July and December 2020. For instance, the much-criticised guarantees as to how the Conditionality Regulation would be implemented, which were crucial in overcoming the stalemate on the overall package during the 2020 December European Council, can only be understood in light of the endorsement provided by the President of the Commission through the participation in the consensus at the European Council.[133] As the body entrusted with the task of initiating proceedings under the Regulation, only the Commission could validly provide workable guarantees, by committing to act in a certain way when applying the Regulation.

4.1.2 An erosion of the power of implementation as a result of the growing role of the Council and the Member States?

The second area where the age of crises seems to have eroded the role of the Commission is the one relating to its responsibility for implementing EU law and executing programmes (Article 17(1) TEU). This is evident in relation to the multiplication of instances where the Commission has increasingly had to cede implementing powers to the Council, which may grant implementing powers to itself in "duly justified cases" pursuant to Article 291(2) TFEU. As we have seen, this phenomenon concerns both decisions relating to the implementation of spending instruments (see the examples of *SURE,* the *RRF*, the *Ukraine Facility*, the *RoL Conditionality Regulation*, analysed in the previous section) and decisions for the activation or adoption of measures under emergency modes in the context of permanent crisis frameworks (see, for instance, the cases of *IMERA*, the Chips Act mentioned above in Chapter III, Paragraph 1.2), where the Council is now playing a crucial implementing role.

[133] See: Conclusions of the European Council meeting of 10 and 11 December 2020, EUCO 22/20.

Even when implementing powers are conferred on the Commission, the exercise of those powers is often framed by the proliferation of mechanisms that ensure a certain degree of involvement of representatives of the Member States in addition to, and beyond the set of procedures laid down in the Comitology Regulation (Regulation 182/2011). An example is provided by the role of the Economic and Financial Committee which, under the *RRF Regulation,* should provide an opinion on the satisfactory fulfilment of milestones and targets before the Commission decides on payments to be made to Member States,[134] or of the emergency brakes that can trigger a debate in the European Council if concerns emerge as to the implementation of the *RRF Regulation* and the *RoL Conditionality Regulation*. In the context of emergency frameworks set up under ordinary sectorial legislation, another example is offered by the systematic establishment of specialised boards composed of representatives of the Member States, which assist the Commission in the preparation and implementation of measures to be adopted in the event of a crisis (e.g., the Internal Market Emergency and Resilience Board under *IMERA*, the European Semiconductor Board under the Chips Act and the Health Crisis Board under the *HERA Regulation*).

Yet, for all of these institutional arrangements and procedural devices, no real setback in the role played by the Commission in the implementation of crisis instruments has been noted in practice. On the one hand, we have already found that the conferral of implementing powers on the Council has had few, if not positive, consequences on the role played by the Commission in implementation spending instruments such as the *RRF* or the *Ukraine Facility* (see the findings reached in the previous section). On the other hand, several of the procedural arrangements introduced to frame the powers of the Commission, such as the European Council emergency brake, have not been used in practice to date, thus showing that they had more of a role to play in establishing a landing zone for reaching a political agreement than in the actually implementing the instrument. Finally, the multiplication of "emergency boards" to assist the Commission in implementing crisis frameworks can also be seen as an inversion of the trend towards greater "agencification" – the proliferation of EU agencies to undertake specific regulatory tasks. In fact, as the example of HERA shows,[135] the crisis situation seems to have given the Commission the opportunity to re-centralise the Union administration, to the

[134] See: Recital 52 and Article 24 of the *RRF Regulation*.

[135] The Health Emergency Preparedness and Response Authority (HERA) was established as a Commission service under the authority of the Head of HERA – ranked as a Commission's Director-General and the political steering of a Coordination Committee composed of the competent Commissioners. The HERA Board, composed of representatives from the Member States, assist and advise the Commission in the formulation of strategic decisions concerning HERA. The nature of HERA was controversial, with the Parliament insisting on its establishment as an independent Union agency. Ultimately, the Commission decision establishing HERA provides for a review that requires the Commission to assess by 2025 the implementation of HERA's operations, including its structure and governance. See: Commission Decision of 16/9/2021 establishing the Health Emergency Preparedness and Response Authority, C(2021) 6712 final.

detriment of independent bodies and with the effect of increasing the influence and powers of the central authority.

4.1.3 An erosion of the powers as Guardian of the Treaties due to self-restraint in the recourse to infringement proceedings

The final area where it can be wondered whether an erosion of the role of the Commission has taken place concerns the exercise of its powers as guardian of the Treaties. The case studies analysed in this report show that in crisis situations, the Commission has clearly avoided strictly policing the many unilateral emergency measures adopted by the Member States, even when they raised issues of compatibility with existing regulations or posed a risk for the coherence and functioning of key Union policies (be it the single market, freedom of movement or the asylum and migration policy). This phenomenon is part of a more general trend in which the number of infringement proceedings has fallen in recent years,[136] and has already attracted some academic interest,[137] but which in a context of crisis takes on a new dimension.

The migration crisis again offers a classic example. When in 2015, the Member States reacted to the surge in the inflow of illegal immigrants with a flurry of internal border closures and controversial derogations from the common rules on asylum, the Commission did not trigger infringement proceedings in a significant way, even in relation to the most controversial national measures. The same approach was then followed in the 2021 Belarus crisis, where the Commission did not take action with regard to the unilateral measures adopted by certain Member States to limit arrivals at the international borders. While the Court of Justice finally intervened in relation to the measures adopted by Lithuania, this was the result of a preliminary ruling on the interpretation of EU law (compatibility with EU law of the national measure) rather than of an infringement proceeding. Where, however, the Commission did take infringement action, however, notably in relation to the declared intention of Hungary, Poland and the Czech Republic not to implement the Council emergency relocation decisions, the result was underwhelming: the judgment of the Court declared that the infringement[138] did not change the very modest outcome of the mandatory relocation policy, which remained largely under-implemented.

[136] For the most recent data, see: the Report from the Commission, Annual Report on monitoring the application of EU law – 2023 Annual Report, COM(2024) 358 final. Year 2023 recorded the lowest number of new cases in a decade, with 529 new infringements, compared with the peak of 986 in 2016.
[137] R. D. Kelemen, and T. Pavone, "Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union," 27/12/2021. Available at SSRN: https://ssrn.com/abstract=3994918 or http://dx.doi.org/10.2139/ssrn.3994918
[138] Judgment of 2 April 2020, Commission v Poland, Hungary and Czech Republic, joined cases C-715/17, C-718/17 and C-719/17.

This latter example is also illustrative of the reasons that possibly underpin the self-restraint of the Commission in having recourse to infringement proceedings. First, the conflictual approach underpinning the recourse to infringements does not appear appropriate at a time when it is paramount to show solidarity and support from the Union institutions. In such a context, a certain understanding is expected as to the fact that emergency measures are temporary and address contingent needs without necessarily taking full account of their impact at the EU level. Moreover, additional caution is required in relation to matters which relate to an area where the sovereignty reflex of the Member States′ remains particularly high, in relation to borders, healthcare and internal security. This explains why the Commission has preferred to handle the problems posed by the Member States' unilateral action through a number of soft-law instruments (such as communications and guidelines), encouraging coordination among the Member States rather than sanctioning potential breaches of EU law. Second, in times of crisis, the recourse to infringement proceedings does not appear particularly effective either. The procedure may take years and thus does not ensure any meaningful result at the time when a solution is needed the most. Moreover, even when the proceedings result in a judicial finding declaring an infringement, the legal settlement will not necessarily solve the political conflict leading to the infringement in the first place but could even exacerbate it and thus further jeopardise other policy initiatives. Several academic authors have pointed out that, by embracing dialogue with governments over robust enforcement, the Commission has sacrificed its role as guardian of the Treaties to safeguard its role as an engine of integration and an effective manager of crisis.[139] More than a shifting of the institutional balance, the practice is thus indicative of a strategic use of Commission's prerogatives to enhance its influence on policymaking.

4.2 A significant strengthening of Commission's role

Whereas some elements may give the impression that there has been an erosion of the Commission's prerogatives, the case studies analysed in this report point to a very real strengthening of the Commission's role in times of crisis. This strengthening operates on three dimensions: reinforcement of the powers that the Treaties confer on the Commission by leveraging the crisis to enhance its influence; expansion of its prerogatives to new areas; and, finally, recognition of its central role, even when, exceptionally, solutions are sought outside the EU legal order.

4.2.1 Leveraging the crisis to reinforce existing powers

The Commission has been able to leverage crisis situations to reinforce in practice both its power of initiative and its role in implementing EU law.

[139] Ibidem.

As regards the power of initiative, the need for rapid action that is typical of emergency situations reduces the level of scrutiny exercised by decision-makers, thereby affording the Commission greater room for manoeuvre in the presentation of proposals. In situations where there is less time for reflection and where urgent action is required, it is plausible that the direction proposed by the Commission is more likely to prevail, and that proposals may be subject to fewer changes than in situations with time for in-depth assessment. As a matter of fact, as we have seen (see Chapter III above), the condition for the very rapid adoption of a crisis-related legislative act under OLP is often to adopt the Commission's proposal without amendments, since any modification by one of the co-legislators could prompt the other to do the same and thus require time-consuming inter-institutional negotiations.

As in the famous Churchill's quote, the Commission has shown great ability to never waste a good crisis to advance its policy agenda. Thus, in a number of examples examined in this report, the Commission has taken advantage of the crisis situation to overcome resistance to policy ideas or legislative instruments that up to that moment had encountered decisive opposition.

The *RRF Regulation*, that is, a re-incarnation of the then moribund idea of a budgetary instrument for the Euro area – the *BICC* – is perhaps the most spectacular example of this kind. After years of inconclusive negotiations in Council characterised by a limited level of ambition for the proposal for the *BICC* (itself a reframing of the previous proposal for a *Reform Support Programme*), the Commission repurposed the idea and the architecture behind that instrument to develop its proposal for a *Recovery and Resilience Facility*, which immediately gained traction (on the negotiations of the NGEU package, see Section 2.1.3). In the same vein, the Commission managed to leverage the crisis to push forward the establishment of common debt instruments, an unemployment benefit scheme, banking union reforms, and energy-related emergency measures – such as speeding up the installation of renewables or stronger interconnections and transparency in the energy market – that had been strongly resisted up to that point. Crises have also allowed the Commission to accelerate ongoing reforms and policies, as in the case of the Repower Plan presented to respond to the energy crisis and which brought forward the reform of the energy market for completing the establishment of the energy Union and the pursuit of the environmental objectives of the Fit for 55 agenda (see, for instance, the frontloading of a number of legislative measures to simplify the installation of renewable sources of energy). Through REPowerEU, the Commission managed to break the Union free from Russian gas dependency, against which the Commission had been advocating for a long time, but had faced heavy resistance on the matter in several Member States.

Finally, the Commission's power of initiative is amplified by the discretion that it enjoys as a gatekeeper to the emergency competence provided for by the Treaties. The choice as to whether an emergency response shall be framed via the adoption (or amendment) of acts under the ordinary legislative procedure or rather via measures based on emergency competences is in many instances a discretionary one, and one that rests with the Commission. In choosing one solution over another, the Commission has certainly shown a degree of deference to the requests provided by the European Council. It has, however, also taken account the calls for greater involvement coming from the European Parliament and has thus limited or specifically framed the recourse to emergency competences. In other words, the Commission has played a crucial role in defining the balance between the effectiveness of the crisis response and respect for the constitutional principles of the EU legal order.

As regards the Commission's role in implementing EU law, the crisis situations have undoubtedly offered an opportunity to leverage respect for EU rules against the pressing needs imposed by the emergency. The most relevant example here is the role that budgetary conditionalities have been playing in promoting coherence and compliance with the policies and rules of the Union, in basically every domain of its action, from environmental protection to energy reform, from economic and structural reforms to respect for the rule of law.

While budgetary conditionalities are not linked per se to crisis situations and in fact were already at the centre of negotiations for the 2020–2027 MFF, their incorporation into the spending instruments established to support the recovery from the economic consequences of the COVID-19 crisis, especially in the *RRF*, has unquestionably given them a completely new dimension and reach.

Through the negotiation and the policing of milestones and targets defined in the RRF Plan,[140] the Commission has developed an extremely effective new compliance instrument, which gives it much more room for manoeuvre vis-à-vis the Member States when compared with the standard legal remedies – which ultimately depend on the final say of the Court of Justice.

4.2.2 New instruments, new powers and new domains of action

The second dimension in the strengthening of the Commission's role concerns the expansion of its prerogatives in areas that have to date been out of reach, either due to political resistance to certain

[140] As we have seen, the fact that formal approval of the Plans is a prerogative of the Council under a RRF Regulation has not in practice weakened the role of the Commission, which on the contrary takes advantage of the legal and political backing for enhancing its action even further.

matters being regulated at Union level or to the constraints imposed by the existing legal bases as traditionally used.

The pressing needs and sense of urgency associated with the unprecedented crises that the Union has been facing have, however, created the conditions to overcome these limitations. In political terms, as the downsides and the risks of uncoordinated unilateral national emergency measures became increasingly apparent, support for EU-wide solutions has gained decisive weight in all of the crises that we have analysed in this report. This has allowed the Commission to push through several innovative EU instruments that confer powers upon the Commission in previously uncharted domains. A few examples among the many resulting from the case studies analysed in the present report offer a useful illustration of the progressive expansion of Commission's prerogatives through emergency-related measures.

A first example is provided by the role that the Commission has acquired in the procurement of vaccines and other crisis-relevant medical countermeasures. Initially coordinating demand and public purchases by Member States, the Commission later procured COVID-19 vaccines directly on behalf of Member States and other countries that joined the joint procurements, through the amendments made to the *Emergency Support Instrument*, which gave it new powers in that regard.

We have also seen how in the aftermath of the COVID-19 emergency crisis, frameworks have multiplied in sectorial ordinary legislation, expanding joint procurement schemes, together with a number of other crisis-relevant measures. While those give the Council a special role in activating the emergency mode (see Chapter III), the fact remains that the Commission plays the central role in their implementation. The shift towards a legislative model of emergency regulation has thus entailed the consolidation and expansion of the Commission's role as emergency manager.

A second telling example is the increased role that the Commission has acquired in coordinating the Member States' economic policies via the establishment of the *Recovery and Resilience Facility* in the context of the economic recovery from the COVID-19 crisis. While in the domain of economic policy, the role of the Commission and indeed of the Union is limited, developing a financing scheme that links funding for recovery to the attainment of reforms and investments identified in the European Semester has significantly empowered the Commission. It is for the Commission to negotiate with the individual Member States the recovery and resilience plans that translate the broad objectives and reforms identified in the country-specific recommendations in concrete and very specific economic and legislative actions identified in milestones and targets for the implementation of the plan. In so doing, the Commission will be required to assess the merits of the reforms and investments presented by the Member States and to discuss the priorities of their action; in other words, it will negotiate

with Member States the structural reforms to organise their economies and the State and more broadly the content of their economic policies. As we have seen, the fact that final approval of the plans is reserved for the Council has not undermined the central role played by the Commission, as the Council has to date limited its role to one of political oversight.

A third example is offered by the decision to raise common debt on an unprecedented scale in order to support the recovery from the COVID-19 pandemic through the *NGEU* financing scheme (and later on to provide financial assistance to Ukraine in the context of Russia′s war of aggression). The relevant legal acts have empowered the Commission to manage borrowing operations on the capital market and, given the size of the borrowing, the Commission has rapidly become one of the main issuers of bonds on a part with many sovereign issuers. In order to better manage its borrowing operations, the Commission proposed as part of the 2022 package of emergency measures to support Ukraine[141] a little-noticed, but nonetheless momentous modification of the financial regulation, empowering it to implement a diversified funding strategy.[142] Such a strategy makes it possible to decouple the timing and the maturity of single funding transactions from the disbursements to beneficiaries. A common liquidity pool financed by the issuance of short-term funding is established and enables the Commission to organise payments in accordance with a regular schedule, independently of the exact timing of the long-term bond issuance. This allows payments to be made to beneficiaries independently of the market conditions prevailing at the time of the disbursement, as borrowing operations are carried out independently from the payment and feed into the common liquidity pool. An annual borrowing decision offers transparency and predictability to investors as to the Union's upcoming borrowing operations. While these rules allow for the orderly management of borrowing operations with a view to reducing their costs, they in fact lay the foundation for an embryonic treasury for the Union and give responsibility for its management to the Commission.

4.2.3 Preserving the centrality of the EU legal order and maintaining a central role outside it

Unlike what happened during the financial crisis, the emergency response in the case studies analysed in this report has been firmly based on EU, rather than intergovernmental, instruments. The Commission has played a crucial role in preserving the centrality of the EU legal order as the

[141] The measures of financial assistance to Ukraine in 2022 and 2023 are not covered in this report. The 2022 package, in addition to the reform of the financial Regulation mentioned in the text, included an Instrument providing support to Ukraine for 2023 (macro-financial assistance plus) and an amendment to the Multi Financial Framework Regulation, necessary to extend the option to use the "headroom" available above the MFF ceilings up to the limits of the own resources ceiling as a budgetary guarantee for loans to third states, and notably to Ukraine (the MFF already provided such a use of the headroom for loans to Member States).

[142] Regulation (EU, Euratom) 2022/2434 of the European Parliament and of the Council of 6 December 2022 amending Regulation (EU, Euratom) 2018/1046 as regards the establishment of a diversified funding strategy as a general borrowing method, OJ L 319, 13/12/2022, pp. 1–4.

normative space for crisis response, even in cases where the Treaties confer only limited powers on the Union. This in turn has further strengthened its role as a crisis manager.

This result has been achieved thanks to a great deal of creativity in handling the legal constraints imposed by the system of attributed powers, which is a key aspect of the EU legal order.

First, the Commission has relied on an evolutive interpretation of a few crucial legal bases. For instance, as we have seen, Article 114 TFEU – a core internal market provision which empowers the co-legislators to adopt measures for the approximation of national laws – has been used to establish crisis response frameworks that do not directly harmonise or approximate national substantive laws but instead prevent risks of fragmentation in the event that unilateral national measures are adopted (see Chapter III, Section 1.3 above).[143] Another example is the broad and evolutive interpretation of the principle of budgetary balance laid down in Article 310 TFEU and of the principle of integrity of the own resources systems laid down in Article 311 TFEU, which were instrumental in establishing the NGEU financing scheme during the COVID-19 pandemic. Finally, a broad interpretation of the concept of financial rules for establishing and implementing the Union budget under Article 322 TFEU has made it possible to put in place budgetary conditionality that links the disbursement of Union funds to broader respect for Union rules and values, including the Rule of Law.[144]

While it is up to the co-legislators to uphold the proposed evolutive use of the various legal bases – and ultimately for the Court of Justice to validate it – the fact remains that the role of the Commission as a driver has been key to opening up new avenues for the use of Union competences.

In the same vein, using its power of initiative, the Commission has played a central role as gatekeeper of the emergency provisions contained in the Treaties. It is the institution that must be credited with the "rediscovery" of Article 122 TFEU and with having proposed an evolutive interpretation of the provision, allowing its application in a number of previously unexpected forms (see the analysis carried out in Chapter II, Section 2.1.). Such a use has allowed for a rapid and effective Union response to a number of crisis-related challenges that could not be solved at the national level or via other legal bases, and thus ensured the relevance of action at the Union level.

Finally, the Commission took advantage of the flexibility provided by soft-law instruments (see the conclusions of Chapter I) to act swiftly in times of crisis, while at the same time accommodating

[143] An expansive use of Article 114 TFEU was also at play during the banking crisis, to establish the main elements of the banking Union, including the setting-up of centralised bodies such as the Single Resolution Board, or the European Supervisory Authorities, which the legislator has entrusted with tasks of regulation and intervention in exceptional circumstances affecting financial stability.

[144] The recourse to an evolutive interpretation of these provisions has already been confirmed in a number of judgments of the Court of Justice.

uncertainty and national diversity. In all the early phases of the crises analysed in this report, faced with divergent unilateral actions by Member States, the Commission promoted convergence through recourse to an increasingly significant body of soft-law instruments. And indeed, some of the Communications adopted by the Commission ended up playing a key role in defining the Union's action. This is particularly the case for the Commission's REPowerEU communication[145] and a number of communications in the context of the COVID-19 pandemic, such as its Communication on a coordinated economic response to the COVID-19 outbreak.[146] Other relevant examples include the so-called temporary frameworks in the area of State aid, described in Chapter II.[147]

Compared to the evolutive interpretation of ordinary legal bases or emergency provisions, the extensive recourse to soft-law instruments raised some additional issues. In particular, the lack of transparency and little stakeholder consultation due to the simplified procedures, the absence of any involvement of the European Parliament in the formulation of soft rules, and the exclusion of of direct judicial review must be highlighted as particularly problematic in a context where the use of soft norms is expanded and touch upon particularly sensitive issues (such as finding the right balance between privacy and public health, as in the rules on the use of contact-tracing apps).[148]

The fact remains, however, that due to the recourse to soft law, the Commission has been able to rapidly provide European responses in situation of crisis. As soft-law instruments have by definition

[145] The Commission issued a substantial number of soft-law instruments and guidance in the context of the energy crisis.
[146] Communication COM(2020) 112 final of 13 March 2020 from the Commission on a coordinated economic response to the COVID-19 outbreak. During the pandemic, the Presidents of the European Council and of the Commission also issued documents referred to as roadmaps.
[147] In the context of State aid, however, the use of such instruments is in line with standard practice.
[148] See, for example, O. Stefan, "COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda" *European Papers*, 2020(1), pp. 663–670. See also: the Opinion of Advocate General Bobek of 12 December 2017, in case C-16/16 P, *Kingdom of Belgium v Commission, ECLI:EU:C:2017:959*. Bobek very effectively points out how recourse to soft law may result both in a short-term and long-term pre-emption of ordinary legislative procedure and therefore may undermine the institutional balance:
"93. What is perhaps the greatest strength of recommendations may also then be the greatest danger. They could be used as more than just tools for advancing policies that are politically (lack of consensus) or legally (no specific powers to that effect) gridlocked. They could also potentially be used as a tool to circumvent the same legislative processes.
94. That creates two types of pre-emption: a short and a long-term one. The immediate problem of circumvention of the other institutions normally participating in the legislative process has already been recognised and discussed. It is therefore clear that a recommendation may have an impact on institutional balance, and so also on the separation of powers within the EU. Yet, if recommendations were excluded from a review of legality on the sole ground that they are not binding, the principle of institutional balance could never be upheld.
95. There is, however, another type of pre-emption that is likely to be present in particular for pre-legislative recommendations: the ability to articulate the norms before the actual legislative process takes place, which may even translate into unilateral pre-emption of the legislative process. It is not disputed that a recommendation has the ambition to induce compliance on the part of its addressees. Now if it is even partially successful, it will shape the range of conceivable (acceptable) normative solutions for the future. If, based on a recommendation, a number of EU institutions or Member States already comply, those actors will, in the legislative process that may potentially follow, naturally promote the legislative solution that they had already embraced. In this way, the soft law of today becomes the hard law of tomorrow."

no binding legal force,[149] they give Union action a broader reach. They thus ensure the continued centrality of the EU legal order, taking account of the Union's competences, while still allowing Member States to develop national responses in accordance with their specific features and needs. Thus, for instance, soft law has allowed the Commission to intervene in areas beyond the reach of the Union legislator, as they are excluded from harmonisation through binding instruments, such as public health policy. Moreover, as we have already underlined, when backed by the political endorsement of the European Council, soft-law instruments reach a level of compliance that is in fact no different to that of binding instruments.

Finally, in those instances where the Treaties were not able to provide solution to crises, notably where an evolutive interpretation of the relevant provisions would still not overcome legal constraints or was excluded by political context, and recourse to intergovernmental solutions was required, the Commission still played a central role in shaping and then implementing intergovernmental instruments.

While this occurrence has been only marginal in the cases analyzed in this report (reference can be made to the repurposing of the ESM Treaty credit line to provide assistance during the COVID-19 pandemic – which was, however, not activated; or to the so-called EU-Turkey statement during the migration crisis), it was of great significance during the financial crisis.

In that context, the setting-up of crisis instruments outside the EU Treaties has been accompanied by a number of safeguards to ensure that recourse to the intergovernmental method does not undermine the autonomy of the Union legal order and the Community method. This has allowed intergovernmental solutions to develop as a useful supplement to the EU Treaties and thus defuse fears that the EU legal order might be deconstructed.

Among these safeguards, a crucial one, together with the conferral on the Court of Justice of the jurisdiction on disputes concerning application of the relevant intergovernmental agreement, is the key role bestowed on the Commission in the implementation of the crisis instruments. The continued centrality of the Commission in intergovernmental instruments ensures that they remain coherent with Union action and ultimately guarantees their compatibility with the EU legal order.

Concluding remarks

[149] Soft law may, however, may produce legal effects, in particular by binding the actions of the institution that has authored it, as reflected in the Court's case-law linked to state aid control. See above: Chapter II.

Recent crises have increasingly shown the Union's ability to act and to act swiftly. Whereas the financial crisis was characterised by a high degree of intergovernmental action, the response to recent crises has been firmly grounded in the EU's legal order. Even in the area of health, where the Union's competences are more limited, the Union-level coordination, in particular when it comes to vaccine procurement, was instrumental. The financing mobilised through the NGEU was unique in nature. Whereas Treaty limitations drove the Member States to act outside of the Treaties in the context of the financial crisis, the Member States demonstrated solidarity and unity as the COVID-19 pandemic progressively gained ground, and the Union used the set of tools which were available to roll out a coordinated response. The energy crisis was not characterised by the same limitations in terms of the powers conferred under the Treaties, which facilitated Union action. As many have acknowledged, such swift and decisive action has put the Union more firmly on the map, instead of often sub-optimal national measures or international arrangements. Whereas the measures taken have affected the policies in question and possibly also on a more permanent basis, this seems to mirror the usual trend that crises – when successfully managed – lead to greater integration.

The Union response in emergency situations has entailed a number of adaptations in the functioning and interaction of the institutions. These adaptations are to a certain extent the consequence of the classic dynamics inherent in emergency powers and which result from the need to ensure rapid and effective action for the preservation of the polity in times of crisis. The prominence of the executive and the secondary role of the ordinary co-legislator also feature in EU emergency law and reflect the same logic that we see in action in national legal orders.

At the same time, however, the positioning of the EU institutions in times of emergency reflects the specificities of the EU emergency law architecture and notably the underpinning tension resulting from the principle of conferral and the competing normative claims to regulate emergencies advanced both by the EU legal order and by the legal orders of the Member States.

As the cases analysed in this report have shown, this tension has been addressed in procedural terms, notably by promoting consensual decision-making as a condition for the acceptance and effectiveness of Union emergency action. This is first and foremost reflected by the central role played by the European Council in defining both the priorities and the detailed content of emergency measures. The difference paid by the Commission to such a role has allowed it to gather the support of Member States for the adoption of measures at the Union level and to ensure their successful implementation. When such support has not been achieved, and the Commission has nonetheless decided to push forward proposals for emergency measures, this has led to a setback in terms of effective

implementation and in terms of future use of emergency powers, as clearly shown by the migration crises.

The role that the Council has been granted to implement emergency measures or to activate emergency frameworks reflects the same approach. By ensuring the possibility of control by the Council, these solutions facilitate acceptance by the Member States of Union emergency solutions. The fact that in the practice analysed in this report the Council tends to follow the proposals submitted by the Commission and thus does not make significant use of its discretion when exercising its implementing powers confirms that its role is limited to one of political control in exceptional situations and that, in practice, implementation remains firmly in the hands of the Commission.

Finally, the recourse to complex legal constructions in the design of certain emergency instruments (see Next Generation EU) and the practice of political packages, has made it possible to involve national parliaments and strengthen democratic support at national level for the most ambitious measures, thus creating the basis for their widest possible acceptance, even if challenges remain in the judiciary, as the case-law of several national constitutional courts shows.

All of these strategies for consensual decision-making at the European Council seems to leave a limited role for the European Parliament, which is often described as a mere spectator in times of crisis. However, as we have also seen, the Union response has been very varied, and in addition to the recourse to emergency powers, a substantial number of measures have been adopted by the Council and the European Parliament as co-legislators. Political packages have not just benefited from the involvement of national parliaments but also from that of the European Parliament. Moreover, in cases where emergency competences were used, the Parliament has shown a remarkable ability to develop mechanisms to ensure its involvement and scrutiny in addition to the formal procedural setting laid down in the Treaties. Finally, the European Parliament has played a central role in the aftermath of crises, when it has actively supported the incorporation of permanent crisis frameworks into a number of sectorial legislation, and has given its agreement to their design.

Finally, the Commission has emerged strengthened from the times of crisis. The self-restraint it has applied in accepting (and actually supporting) the enhanced steering role of the European Council and in choosing a progressive and non-confrontational approach to coordinate and police the recourse to unilateral emergency measures by Member States has not resulted in an erosion of its prerogatives. On the contrary, as has been shown in detail, this approach has allowed the Commission to leverage the crises to reinforce its existing powers and to acquire new instruments and prerogatives, while expanding the actions of the Union into new domains.

All in all, there seems to be no substantial evidence that the role that the institutions have played during the crises analysed in this report have brought about a more permanent or fundamental shift in the institutional balance or in the balance between Member States and the Union. Whereas certain aspects may be reflected upon, this report has identified no convincing element showing that the measures adopted were done so in breach of the Treaties, in light of the case-law developed by the Court of Justice. And indeed, by adhering to a strictly formal view of the principle of institutional balance, the Court of Justice has managed to strike a delicate balance between preserving the prerogatives of the institutions and giving the political actors the room for manoeuvre that they need to defuse underpinning tensions between the EU and the Member States' legal orders.

Undoubtedly, these dynamics have combined to move the cursor towards greater involvement of the Union in times of crisis. While there is no shift in the institutional balance of the Union, there is certainly a shift of the Union towards an increasing role as a reliable and efficient crisis manager, be it through the exercise of scarcely used emergency powers in the Treaties or through the multiplication of emergency frameworks in sectorial legislation.

This development reflects the increased level of integration and interdependency of national economies and societies, which in turn calls for a higher degree of solidarity in times of emergency. As the case studies have shown, a certain level of solidarity in the design of emergency measures is necessary to ensure the effective protection of common European goods and the sustainability of the project of integration in the long term.

In legal terms, the successful expansion of the EU's emergency role reinforces the normative claim of the EU legal order to regulate emergencies but also prompts a debate on whether constitutional or legislative adjustments are necessary or desirable. In this respect, any initiative aimed at ensuring greater coherence in EU emergency action and European Parliament's involvement by further expanding the EU's emergency powers (e.g., by means of a generalised emergency power in the form of a "state of emergency" of the Union) should be carefully assessed – and subject to proper democratic debate – for its consequential constitutional implications in terms of further ceding of emergency sovereignty from the Member States.

As the ability to act swiftly is key to any emergency response, it seems important that potential future initiatives to reform the current set-up do not depend on procedures which risk stifling decision-making but instead preserve the agility and adaptability of the Union's emergency response.