

## The crisis governance of the European Union: more responsibility requires more democratic legitimacy

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SWP Research Paper

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*Nicolai von Ondarza*

# The Crisis Governance of the European Union

More responsibility requires more democratic legitimacy



Stiftung Wissenschaft und Politik  
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- Since 2010, amid a series of overlapping crises, the EU has introduced far-reaching instruments both within and beyond the EU treaties that have expanded its responsibilities. These instruments often have a structure-defining character and/or have served as precedents in subsequent crises.
- An analysis of the decision-making processes on three key crisis instruments during the Covid-19 pandemic – vaccine procurement, the SURE programme to support national short-time working schemes and the recovery fund NGEU – reveals deficits in the democratic legitimacy of the EU’s crisis governance.
- The “emergency Article” 122 TFEU, which was used for all three crisis instruments, largely excludes the involvement of the European Parliament. As NGEU was linked to the EU’s Multiannual Financial Framework, the EP was involved but politically marginalised by the member states in the Council.
- Because standard EU procedures were used, the German Bundestag was informed in all three cases and was even able to secure more extensive information rights than the EP. However, this cannot replace European-level parliamentary control.
- As far as the capacity to act in decision-making processes is concerned, Article 122 TFEU with majority voting allowed for very quick decisions to be made regarding vaccine procurement and SURE, but not NGEU. The model of NGEU – with a link to the Multiannual Financial Framework and lengthy national approval procedures – is therefore not suitable as a model for crisis instruments.
- There are clear deficiencies in the transparency of decision-making processes and implementation as well the allocation of political responsibility.
- In the short term, the EU should increase the transparency of crisis instruments; in the long term, it should introduce a clear definition of a “state of emergency”, with appropriate limits, into the EU Treaty, while strengthening the role of the EP.

**SWP Research Paper**

*Nicolai von Ondarza*

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**Stiftung Wissenschaft und Politik**  
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## **The Crisis Governance of the European Union. More responsibility requires more democratic legitimacy**

The European Union (EU) has been in “crisis mode” for more than a decade: From the euro crisis and the so-called migration crisis, to Brexit and the struggle over the rule of law, to dealing with the Covid-19 pandemic and Russia’s war of aggression against Ukraine, crisis mode has become the normal state of European politics. Under pressure from these crises, the Union has taken far-reaching decisions and introduced new instruments that were not, at least explicitly, provided for in the EU treaties.

However, the longer this crisis mode lasts and the more profound and permanent the steps to overcome a crisis are, the more the question of democratic legitimacy arises. This is especially true for the EU, as its political system is still developing, and crisis instruments are often structure-defining and/or serve as precedents for future actions.

Against this background, this research paper examines the decisions to create new EU instruments during the Covid-19 pandemic in terms of their democratic legitimacy using three case studies: First, the joint vaccine procurement, with which the EU for the first time assumed responsibility in the health sector for the purchase, distribution and availability of a pharmaceutical that was central to public health, but indirectly also to economic recovery and personal liberties. The second example is the “European instrument for temporary Support to mitigate Unemployment Risks in an Emergency” (SURE), which was designed to mitigate the economic and social consequences of the pandemic. With it, the EU supported member states with loans of €100 billion. The third instrument, the Next Generation EU (NGEU) recovery fund, is even more substantial, with more than €800 billion, including direct grants to member states with limited conditionality. Despite differences, all three instruments were at least legally defined as temporary crisis measures.

The political significance of these instruments for the development of the EU following the pandemic was demonstrated in 2022/23 in reaction to Russia’s war of aggression against Ukraine. All three instruments were based on a previously rarely used emer-



agency clause in Article 122 of the Treaty on the Functioning of the European Union (TFEU). This was used again several times in 2022, for example to enable joint gas purchases – modelled on the joint vaccine procurement process – and to adopt targets for saving gas and electricity. At the same time, the EU discussed whether new instruments modelled on SURE should be introduced to deal with the financial consequences of Russia’s war against Ukraine. It has also decided to jointly procure ammunition for Ukraine along the lines of the vaccine procurement process. Already, therefore, the experience of the Covid pandemic is helping to shape further EU instruments.

The comparative analysis shows that, in all three case studies, there are deficits in EU-level democratic legitimacy. Nevertheless, it should be noted that, unlike in the euro crisis, for example, the instruments developed during the pandemic were created via procedures within the EU architecture, and thus a minimum level of participation by the European Parliament (EP), national parliaments and the EU Commission was guaranteed. In the individual decision-making processes, this input legitimacy was ensured primarily through the strong role of national governments, whereas the EP had neither co-decision nor control rights (vaccine procurement, SURE) or was politically marginalised (NGEU). This executive overreach could only partially be compensated by the formal participation of the German Bundestag. With regard to output legitimacy, only the ability to act in decision-making processes can be examined within the framework of this study, but not the effectiveness of the instruments themselves. The legal basis chosen in all three case studies even allowed for decisions with qualified majority, and thus – especially in the cases of vaccine procurement and SURE – resulted in a very quick decision-making process, that is, within a few weeks. It took much longer for NGEU to be put in place due to the linkage with the Multiannual Financial Framework (MFF) and the need for national approval procedures. Thus, NGEU is not suitable as a model for short-term crisis instruments because of the decision-making process. Last but not least, all three processes reveal a lack of transparency in the Council and the Commission, as well as the lack of clear political responsibility for the implementation of the new instruments.

Given the precedent-setting nature of these new instruments, the EU should thus strengthen the democratic legitimacy of its crisis governance in order to

prevent a creeping expansion of competences that would not be sufficiently legitimate. In the long term, it is recommended that the Union, in the next treaty amendment, define the proclamation and additional competences of the EU institutions for a state of emergency, as is customary in most national constitutions. The state of emergency should have a duration limit, the EP should be involved and, while maintaining the necessary flexibility, executive competences should be restricted. To this end, it is necessary to determine, among other things, how the EP could be involved when Article 122 TFEU is applied, as it has become the new “all-purpose instrument” of the EU in the crises since 2020. Regarding other decisions made during the Covid-19 pandemic, the EP has proven that it is quite capable of taking quick decisions using emergency procedures, which are then legitimised through parliamentary debate and co-determination.

A second lesson is that Article 122 TFEU is already a very good crisis instrument in terms of capacity to act because it allows for decisions with qualified majority. However, the comparison of SURE and NGEU also shows that the latter’s linkage to the MFF and its lengthy procedures considerably reduce this flexibility. It would therefore be desirable to refrain from further restrictions in the form of national approval procedures when developing the EU’s crisis instruments.

Even below the threshold of treaty changes, which are unlikely to happen for at least a few years, EU and German European policy-makers should work towards improving the democratic legitimacy of crisis decisions. There are possibilities for action, for example, in the area of process legitimisation. Greater transparency in decision-making procedures and implementation is advisable, especially when large sums of European money are involved, such as in the procurement of vaccines and NGEU. Greater transparency must go hand in hand with greater political accountability. This would also mean greater political accountability in case there are issues regarding implementation. For if the EU takes on more responsibility during crises, the principle should apply that the political actors that take on more responsibility should also face more political accountability.

# The increased need for democratic legitimacy of the EU

The question of sufficient democratic legitimacy has driven one of the fundamental debates of the EU and must be discussed anew each time the EU's competences evolve. Although the EU has not carried out any major treaty reforms since the entry into force of the Lisbon Treaty in 2009, it has continued to expand its existing competences and/or used flexibility mechanisms for new instruments to address the various crises. Since 2010, it has operated almost continuously in crisis mode, in some cases with several parallel crises: the economic and financial crisis; the euro and migration crises; the Ukraine conflict and annexation of Crimea as well as Russia's war against Ukraine (from 2022); Brexit; the rule of law crisis; the Covid-19 pandemic; and finally the lasting climate crisis.

To address these crises, the EU has taken on new political responsibilities and created new instruments. Such far-reaching decisions require appropriate democratic legitimacy. In Germany, the Federal Constitutional Court has heard several cases on the extent to which the special instruments created by the EU and its institutions – in particular to contain the euro crisis – are compatible with the competences of the EU and have sufficient parliamentary legitimacy at the EU and national levels. Most recently, the Federal Constitutional Court ruled in December 2022 that the Own Resources Decision on the recovery fund was constitutional, *inter alia* because it was limited in duration and scope and justified by the pandemic emergency as a crisis instrument.<sup>1</sup>

At the same time, the public judges the EU on the basis of its ability to react appropriately to crises and successfully manage them. In recent years, for exam-

ple, the euro and migration crises have had a significant impact on Eurobarometer surveys on the levels of satisfaction with the EU across Europe; especially in hard-hit states such as Italy, support for the EU fell, in some cases dramatically. In Germany, the slower pace of vaccine procurement in the first half of 2021 – compared to Israel, the United States and especially former EU member the United Kingdom – led to a temporary collapse in trust in the Union. For example, in April 2021, scepticism towards the EU institutions was higher in surveys than at any other time in the last decade, higher than during the euro or migration crises.<sup>2</sup>

In purchasing and distributing vaccines during a pandemic, the EU also assumed a new political responsibility at a time when the procurement process was initially stalled – putting lives, social life and economic recovery at risk. In a democracy, political accountability means that citizens can reward or reprimand political leaders through their vote at the next election, and that decision-makers accept consequences and face up to their political responsibilities. But resignations or clear political accountability following the delays in the procurement of vaccines have been absent at the EU level. The same applies to the euro and migration crises and the EU's responses to them.<sup>3</sup>

<sup>2</sup> Institut für Demoskopie Allensbach, "Begrenzter europäischer Impfschaden. Eine Dokumentation des Beitrags von Dr. Thomas Petersen", *Frankfurter Allgemeine Zeitung*, no. 92 (21 April 2021), [https://www.ifd-allensbach.de/fileadmin/kurzberichte\\_dokumentationen/FAZ\\_April2021\\_Europa.pdf](https://www.ifd-allensbach.de/fileadmin/kurzberichte_dokumentationen/FAZ_April2021_Europa.pdf) (accessed 28 October 2022).

<sup>3</sup> No European election has taken place since the pandemic. It remains to be seen to what extent the EU's crisis reactions to the pandemic and then to the Russian war of aggression against Ukraine will play into the debates in the

<sup>1</sup> Bundesverfassungsgericht, Urteil des Zweiten Senats vom 6. Dezember 2022 – 2 BvR 547/21 – [http://www.bverfg.de/ers20221206\\_2bvr054721.html](http://www.bverfg.de/ers20221206_2bvr054721.html) (accessed 10 January 2023).

The overarching questions for the functioning of the Union are therefore: What key features have emerged in its decision-making processes to deal with the crises of the last decade? To what extent were the EU's crisis-driven special measures in response to the Covid-19 pandemic democratically legitimate? What reforms should be envisaged to strengthen the democratic legitimacy of the decisions taken by the EU in the context of its "crisis governance"? The latter question is all the more important in an EU where crises have become the norm and the pressure to respond effectively remains high.

run-up to the 2024 European elections and into electoral decisions.

# Dimensions of democratic legitimacy of the EU

To assess the democratic legitimacy of the EU's crisis governance, three dimensions are considered. The public and academic debates on the democratic legitimacy of EU decisions has a long history. At the latest since the first "no" vote in a referendum on an EU treaty (Maastricht Treaty, 1992 in Denmark), the permissive consensus on European integration is considered to have ended. Although the EU itself is not a state, the member states have over time transferred such far-reaching competences to it that it makes a significant contribution to the provision of public goods. Its decisions go far beyond regulatory effects and have both direct and distributive impacts. Although the EU has undertaken reforms to strengthen its democratic legitimacy with every treaty change since Maastricht, it is said to have a democratic deficit even under regular conditions.<sup>4</sup>

Moreover, the depth of European integration is now a contentious issue in all member states, which has contributed to the emergence and growing influence of EU-sceptical and anti-EU parties. This was most evident in the British people's vote to leave the EU, but EU-sceptical parties also hold about a quarter of the seats in the EP. At the national level, they are represented in most national parliaments and participate in – or even lead – several national governments.

In particular when the EU takes on more responsibility in times of crises, it is therefore not enough to judge whether its responses have been effective, but also to assess to what degree they fulfil the criteria of democratic legitimacy. According to Fritz Scharpf, three dimensions are at the forefront of the debate on the democratic legitimacy and the "democratic deficit" of the EU. The first is *input legitimacy*, according to the

principle of "government by the people", which is based on the principle that collectively binding decisions in a political system should be based on the preferences of the governed, either through direct democracy or representative democracy with general and free elections.<sup>5</sup>

The EU claims to operate according to the principles of representative democracy (Art. 10 Treaty on European Union). Unlike at the national level, this representation is based on two different strands: On the one hand, citizens are directly represented at the Union level in the EP. On the other hand, the member states are represented in the European Council by their respective head of state or government, as well as by their respective government in the Council of the EU. These are democratically legitimised through their respective parliaments or by direct election. However, the chain of accountability from national parliaments through their governments to the EU is weakened if individual states can be outvoted by majority decisions in the Council of the EU.

With a view to input legitimacy, it will therefore be examined to what extent the participation of the two strands in the special decision-making procedures concerning the EU's crisis governance is guaranteed. First, this includes the question about the extent to which the EP has been formally and politically involved in the relevant decisions, or at least been able to control them. Second, it will be analysed which decision-making procedures were applied in the European Council as well as in the Council of the EU, but also to what extent these decisions were scrutinised at the national level, that is, in Germany through corresponding information and/or the participation of the Bundestag.

<sup>4</sup> See, e.g., Andreas Follesdal and Simon Hix, "Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik", *Journal of Common Market Studies* 44, no. 3 (2006): 533–62.

<sup>5</sup> Fritz Scharpf, *Interdependence and Democratic Legitimation*, MPIfG Working Paper, No. 98/2 (Cologne: Max Planck Institute for the Study of Societies, 1998).

The *output legitimacy* of EU decisions is often contrasted with input legitimacy. According to the principle of “government for the people”, collectively binding decisions should serve the common interest and provide public goods. Accordingly, a political system gains legitimacy if it solves problems and challenges better than any alternative system. This is particularly true for a multi-level system such as the EU, in which – in accordance with the principle of subsidiarity – the question must always be asked as to whether it forms a better framework for action than at the national and regional levels or alternative forms of international/European cooperation. The prerequisite for output legitimacy is, on the one hand, that the EU has the capacity to act in such a way that it can govern effectively, with as few veto players as possible, and with procedures that allow for decisions to be implemented effectively. In political theory, effective governance in the common interest can therefore compensate to some extent for deficits due to a lack of participation by citizens in the making of these decisions. On the other hand, Scharpf argues, output legitimacy also requires that the interests of the minority are protected from domination by the majority through institutional mechanisms, such as the protection of fundamental rights, the separation of powers and an independent judiciary.<sup>6</sup>

Traditionally, the EU’s legitimacy has been built on output rather than input legitimacy. Its founding narrative is based on the provision of two key public goods: peace between its member states and the welfare promised by the common market. In view of existing deficits in the right to vote in European elections, the often limited participation of the EP and the distance between national politics and its European decisions, output legitimacy remains a significant factor for the EU to this day. This is all the more true in times of crisis, when time-critical and effective decisions have to be made. In turn, a successful reaction to a crisis can increase the output legitimacy of the EU.

However, the analysis of the output legitimacy of the EU’s crisis governance in the context of this research paper is not intended to assess the effectiveness of the EU’s decisions per se – this would necessitate a whole separate study in and of itself – but only the partial aspect of the extent to which the decision-making procedures have enabled the EU to take effective decisions in a crisis. This includes, in particular,

<sup>6</sup> Ibid., 3.

the capacity of the EU institutions involved to act (majority vs. unanimity), the number of actors involved in the decision-making process and the duration of the procedures.

More recently, analyses of the EU’s democratic legitimacy have been extended to include a third dimension, the so-called *throughput or process legitimacy*.<sup>7</sup> Defined as the “quality of governance processes”, a high level of throughput legitimacy, especially in a multi-level system such as the EU, can lead to the acceptance of collectively binding decisions. In contrast to input and output legitimacy, which are often understood as opposites, a high level of process legitimacy cannot compensate for deficiencies in input or output legitimacy on its own; however, it can contribute towards decisions being more widely accepted at all levels and by the citizens.

With regard to crisis governance, two criteria in particular are relevant for throughput legitimacy: firstly, the transparency of decisions, in particular the question of the extent to which the media, citizens or at least their parliamentary representatives have access to EU decision-making processes. This includes both the negotiations and the underlying positions of the actors involved as well as any voting processes. A high degree of transparency would ensure a chain of delegation and accountability from citizens to their representatives at the EU and national levels. At the same time, total transparency cannot be the norm. Particularly in the EU context, there is a controversial argument about the extent to which too much transparency – for example in the negotiations in the Council or between the Council, the EP and the Commission in the trilogues – can undermine the effectiveness of negotiations. Critical decisions, for example during the euro crisis, were primarily taken confidentially in the European Council, also in order not to worry the financial markets in advance.<sup>8</sup> The analysis of the EU’s crisis governance will therefore also look at the extent to which the minimum requirements for transparency have been or can be met, even under the conditions of crises.

<sup>7</sup> Vivien Schmidt and Matthew Wood, “Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance”, *Public Administration* 97 (2019): 727–40.

<sup>8</sup> Wolfgang Wessels, Lucas Schramm and Tobias Kunstein, *The European Council As a Crisis Manager. The EU’s Fiscal Response to the COVID-19 Pandemic* (Baden-Baden: Nomos, 2022).

Closely related to transparency is the second relevant criterion of process legitimacy: political accountability in decision-making processes. Political accountability includes the obligation of decision-makers to inform a supervisory body and the possibility that the latter will sanction or support actions. Such accountability may be to a parliamentary body – such as that of national governments to their national parliaments – or to technical expert bodies, as is sometimes the case with EU agencies.<sup>9</sup> Thus, a high level of accountability is intended to prevent erroneous policy decisions and abuse of office and, in the case of accountability to political bodies, to ensure that the chain from the electoral decisions of the citizens to the political decisions is actually in place – a critical necessity for input legitimacy. The analysis of the EU's crisis governance thus concludes with the question: To whom are the actors involved accountable?

<sup>9</sup> Daniela Kietz and Nicolai von Ondarza, *Sicherheit delegieren. EU-Agenturen in der inneren und äußeren Sicherheit*, SWP-Studie 6/2016 (Berlin: Stiftung Wissenschaft und Politik, April 2016).

# The flexible expansion of EU responsibilities in times of crisis

Crises are part of the founding myth of the EU. “Europe will be forged in crisis, and will be the sum of the solutions adopted for those crises,”<sup>10</sup> is Jean Monnet’s oft-cited thesis on crises being one of the driving forces of European integration. As is well known, the EU has not lacked crises – some of them existential – in the last decade.<sup>11</sup>

In dealing with them, the EU has left its primary law treaties untouched (with one minor exception),<sup>12</sup> but has substantially expanded its political instruments in a number of decisions. This has not always taken the form of EU legal acts, but sometimes in part or in whole either through intergovernmental coordination and/or international treaties outside its legal framework.<sup>13</sup>

In order to understand how the EU’s decision-making processes and procedures for dealing with such crises work – its “crisis governance”<sup>14</sup> – three

far-reaching decisions and their implementation are analysed below. Decisions were selected in which the EU significantly expanded its scope of action to deal with the Covid-19 pandemic and its aftermath: vaccine procurement by the EU, the SURE instrument to support national short-time working allowance programmes as well as the recovery plan NGEU.

## Vaccine procurement by the EU

One key transfer of additional responsibility to the EU was the joint purchasing of Covid-19 vaccines – pharmaceuticals that were key not only to public health, but also economic recovery and the reinstatement of personal liberties across Europe. As soon as the pandemic spread within the EU, it became clear that even measures such as quarantine rules, the identification of chains of infection, a comprehensive testing strategy and, not least, the drastic restriction of contact (“lockdowns”) would not be sufficient to bring Covid-19 under control in the long term. At the same time, the collateral damage to the economy and the population was enormous. The development, production, procurement and rapid distribution of effective vaccines was therefore a key priority for governments worldwide. In addition, there were early indications that there might be geo-political competition for the first vaccines when then US President Donald Trump attempted to buy out the German vaccine manufacturer CureVac and secure exclusive

**10** Jean Monnet, *Erinnerungen eines Europäers* (Munich, 1980), 528.

**11** Lucas Schramm, “Exit from Joint-decision Problems? Integration and Disintegration in the EU’s Recent Polycrisis”, *European Review of International Studies* 7, no. 1 (2020): 2–27.

**12** In March 2011, the European Council, using the simplified treaty amendment procedure, added a two-sentence paragraph to Article 136 TFEU to give the European Stability Mechanism (ESM) a clearer legal basis in European law. Despite the “simplified Treaty change”, ratification took two years (until April 2013) before the Treaty change could enter into force.

**13** For a broader analysis of the EU’s institutional development since 2019, see the contributions in *The EU Political System after the 2019 European Elections*, ed. Olivier Costa and Steven Van Hecke (Cham: Palgrave Macmillan, 2023).

**14** See also Jonathan White, “Constitutionalizing the EU in an Age of Emergencies”, *Journal of Common Market Studies*

(2022): 1–16, doi: 10.1111/jcms.13415; Stefan Auer and Nicole Scicluna, “The Impossibility of Constitutionalizing Emergency Europe”, *Journal of Common Market Studies* 59, no. S1 (2021): 20–31.

rights in March 2020.<sup>15</sup> CureVac was one of the early front-runners in the vaccine development race, although it was later surpassed by other competitors and did not bring its vaccine to market during the pandemic.

The EU wanted to avoid this form of “vaccine nationalism”, at least among its member states. The key political *motive* was to prevent EU countries from entering into a bidding competition with each other and to avoid an imbalance between the large and/or wealthy countries and the smaller/less wealthy member states. Individual national efforts at the beginning of the pandemic, for example in the form of uncoordinated border closures or national export bans on protective equipment and critical medical supplies, had severely damaged solidarity within the EU. A situation in which individual member states would have vaccinated large parts of their population much earlier at the expense of the others would not only have further damaged EU cohesion, but equally the EU’s internal market.

The Union wanted to use its market power for the joint procurement of vaccines. According to this logic, it should have been able to negotiate better prices and/or conditions with vaccine manufacturers if it directly negotiated large quantities, which would benefit all member states. With a volume purchase guarantee, this should also have given manufacturers planning certainty in developing and building production capacity.

However, it was by no means a given that the EU would play a role in vaccine procurement or pandemic response at all. Legally, the EU has supporting competences in health policy; health remains a core competence of the member states. For this reason, the Union’s main health-related measures up to that point had been linked either to the free movement of goods (e.g. the joint authorisation of medicines, including vaccines, by the European Medicines Agency), the free movement of persons (e.g. the regulation of patients’ rights in cross-border healthcare) or the promotion of research and health programmes, which were then implemented by the member states. A comparable procurement of such critical public goods – the availability of which had a direct impact on the lives of many EU citizens as well as on economic

development – had never been carried out before in the history of the EU.

The *decision-making process* for vaccine procurement was thus primarily based on negotiations conducted outside the usual procedures. At the beginning of the pandemic, individual member states started negotiating with the first vaccine developers. Germany and France agreed on coordinated vaccine procurement as early as April 2020, joined by the Netherlands and Italy. In June 2020, the four states founded an “Inclusive Vaccine Alliance”<sup>16</sup> and emphasised that it was open in principle to other EU members. As a first step in this vaccination alliance, they announced a preliminary agreement with the British-Swedish company AstraZeneca for 300 to 400 million doses of the vaccine then being developed in Oxford.<sup>17</sup> Despite the emphasis on inclusiveness, this alliance of four of the EU’s economically strongest member states triggered fears in the rest of the EU that a two-tier system of vaccine procurement could emerge within the Union.

At the same time, the EU Commission negotiated with national governments as to whether and how vaccines could be procured collectively by the EU. By June 2020, the Commission and member states agreed on the procedure for joint vaccine procurement, including a commitment from member states not to enter into additional individual contracts with vaccine manufacturers.<sup>18</sup> From then on, the Commission had the exclusive role of negotiating and concluding

<sup>16</sup> Government of the Netherlands, “France, Germany, Italy and the Netherlands Working Together to Find a Vaccine for Countries in Europe and Beyond”, press release, 3 June 2020, <https://www.government.nl/latest/news/2020/06/03/france-germany-italy-and-the-netherlands-working-together-to-find-a-vaccine-for-countries-in-europe-and-beyond> (accessed 28 October 2022).

<sup>17</sup> AstraZeneca, “AstraZeneca to supply Europe with up to 400 million doses of Oxford University’s vaccine at no profit”, press release, 13 June 2020, <https://www.astrazeneca.com/media-centre/press-releases/2020/astrazeneca-to-supply-europe-with-up-to-400-million-doses-of-oxford-universitys-vaccine-at-no-profit.html#> (accessed 22 May 2023).

<sup>18</sup> Nevertheless, later on, individual EU states made additional vaccine purchases, such as Hungary from Russia and China, but also Germany, France and Denmark, which bought additional vaccines after the EU doses had been distributed. See Jillian Deutsch, Ashleigh Furlong, Hans von der Burchard and Carlo Martuscelli, “Thanks to Deep Pockets, Germany Snaps Up Extra Coronavirus Jabs”, *Politico Europe*, 7 January 2021, <https://www.politico.eu/article/germany-buys-extra-coronavirus-vaccine-doses-from-eu-countries/> (accessed 28 October 2022).

<sup>15</sup> Katrin Bennhold and David E. Sanger, “U.S. Offered ‘Large Sum’ to German Company for Access to Coronavirus Vaccine Research, German Officials Say”, *The New York Times*, 15 March 2020.



contracts for Covid-19 vaccines; the Inclusive Vaccine Alliance’s pre-contract with AstraZeneca was also transferred to the EU framework.

The *legal basis* for this unprecedented operation is complex. At its core, it is based on EU Council Regulation 2016/369 of 15 March 2016 on the provision of emergency support within the Union (Emergency Support Regulation),<sup>19</sup> created on the basis of Article 122 TFEU. This emergency clause in the Treaty on the Functioning of the European Union allows the Council to adopt mutual assistance measures between member states “without prejudice to any other procedures provided for in the Treaties” (Art. 122 (1) TFEU). This clause was already used in 2010/11 for the support programmes within the Eurozone and the establishment of the European Financial Stabilisation Mechanism (EFSM) and gives the EU institutions relatively wide scope for interpretation. The Emergency Support Regulation adopted on this basis in 2016 allows the Union to provide assistance to affected member states in the event of a natural or man-made disaster. The background in 2016 was the refugee crisis, in which the Emergency Support Regulation was designed to assist member states in receiving refugees. A special budget of €650 million over three years was created for this purpose.<sup>20</sup>

### A legal basis was chosen for vaccine procurement in which the EP would not be involved in any way.

At the beginning of the pandemic, the Council of the EU amended the Emergency Support Regulation. After toxic competition arose between EU states for essential protective equipment — including export bans by individual EU states and the halting of deliveries even to Italy, which was initially hardest

**19** Council of the European Union, “Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union” (Emergency Support Regulation), in *Official Journal of the European Union*, 16 March 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0369&from=EN> (accessed 28 October 2022).

**20** European Parliament, “Activation of the Emergency Support Instrument to Support Healthcare Sector during the COVID-19 Pandemic”, <https://www.europarl.europa.eu/legislative-train/theme-budgets-budg/file-coronavirus-emergency-support-instrument-for-the-covid-19-crisis> (accessed 28 October 2022).

hit<sup>21</sup> — the Commission proposed on 2 April 2020 to activate, and at the same time amend, the Emergency Support Regulation for combating the Covid-19 pandemic. Within less than two weeks, the Council followed this proposal, activated the Emergency Support Regulation on 14 April until 31 January 2022 and adopted an amending regulation.<sup>22</sup> Among other things, it gave the Commission the right to carry out joint procurements on the basis of an agreement with the member states.<sup>23</sup> In April 2020, these were (still) aimed at jointly acquiring protective equipment and critical medical supplies and then making them available to particularly hard-hit member states. A substantial special budget of €1.5 billion was set up for this joint procurement, which had not been mentioned in the EU Commission’s explanatory memorandum of April in the proposal to amend the Emergency Support Regulation.<sup>24</sup>

However, when the political process moved towards the joint procurement of vaccines eight weeks later, in June 2020, a usable legal basis was already in place. Accordingly, on 12 June — less than two weeks after the public announcement of the Inclusive Vaccine Alliance — the health ministers of the member states mandated that the EU Commission procure vaccines for all 27 EU countries. The Commission then agreed with all EU countries on 16 June — on the basis of the amended Emergency Support Regulation<sup>25</sup> — to negotiate on their behalf with vaccine

**21** Leonardo Villani, Martin McKee, Fidelia Cascini, Walter Ricciardi and Stefania Boccia, “Comparison of Deaths Rates for COVID-19 across Europe during the First Wave of the COVID-19 Pandemic”, *Frontiers in Public Health* 8 (2020): 1–5.

**22** Council of the European Union, “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” (Emergency Support Regulation (2020)), in *Official Journal of the European Union*, 15 April 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020R0521&from=EN> (accessed 28 October 2022).

**23** Article 4 Emergency Support Regulation (2020).

**24** European Commission, *Proposal for a Council Regulation Activating the Emergency Support under Council Regulation (EU) 2016/369 of 15 March 2016 and Amending Its Provisions in Respect of the COVID-19 Outbreak*, COM(2020) 175 final (Brussels, 2 April 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0175> (accessed 28 October 2022).

**25** European Commission, *Annex to the Commission Decision on Approving the Agreement with Member States on Procuring Covid-19 Vaccines on Behalf of the Member States and Related Procedures*, C(2020) 4192 final (Brussels, 18 June 2020), <https://commis>

manufacturers and to conclude joint purchase agreements. This agreement also included the institutional procedure for vaccine procurement and was confirmed by a Commission decision.<sup>26</sup>

How are these decision-making processes for vaccine procurement to be evaluated in terms of democratic legitimacy? Looking at *input legitimacy*, the almost complete absence of the EP is striking. With Article 122 (1) TFEU and the Emergency Support Regulation based on it, a legal basis was chosen that would keep the Parliament from becoming involved in any way. Unlike Article 122 (2) TFEU, there is not even an obligation to inform Members of the European Parliament (MEPs). For this reason, the EP had already criticised the use of Article 122 (1) TFEU as being undemocratic in 2016, when the Emergency Support Regulation was adopted in the wake of the migration crisis.<sup>27</sup> Prior to the decision on joint vaccine procurement, neither a briefing of the EP nor a parliamentary debate involving the Commission took place.

A notable exception was the financial underpinning of the procurement measures as a result of the amendment of the Emergency Support Regulation (above-mentioned special budget). These measures required an amending budget, which the Council and Parliament adopted within a few days in April 2020.<sup>28</sup>

sion.europa.eu/system/files/2020-09/annex\_to\_the\_commission\_decision\_on\_approving\_the\_agreement\_with\_member\_states\_on\_procuring\_covid-19\_vaccines\_on\_behalf\_of\_the\_member\_states\_and\_related\_procedures\_.pdf (accessed 28 October 2022).

**26** European Commission, *Commission Decision of 18 June 2020 Approving the Agreement with Member States on Procuring Covid-19 Vaccines on Behalf of the Member States and Related Procedures*, C(2020) 4192 final (Brussels, 18 June 2020), [https://commission.europa.eu/system/files/2020-09/decision\\_#approving\\_the\\_agreement\\_with\\_member\\_states\\_on\\_procuring\\_covid-19\\_vaccines\\_on\\_behalf\\_of\\_the\\_member\\_states\\_and\\_related\\_procedures.pdf](https://commission.europa.eu/system/files/2020-09/decision_#approving_the_agreement_with_member_states_on_procuring_covid-19_vaccines_on_behalf_of_the_member_states_and_related_procedures.pdf) (accessed 1 February 2023).

**27** European Parliament, *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 – New instrument to provide emergency support within the Union*, Strasbourg, 13 April 2016, [https://www.europarl.europa.eu/doceo/document/TA-8-2016-0113\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2016-0113_EN.html) (accessed 28 October 2022).

**28** European Commission, “Amending budget No 2/2020” (Brussels, 2 April 2020), [https://commission.europa.eu/publications/amending-budget-no-22020\\_en](https://commission.europa.eu/publications/amending-budget-no-22020_en) (accessed 28 October 2022).

At that time, however, no joint, exclusive vaccine procurement was planned, but instead the focus was on EU support measures for the purchase of critical medical supplies. Although this is an important project, its political, economic and public health implications are significantly less far-reaching than the procurement of vaccines by the Union. Looking at the subsequent process of vaccine procurement, there has been no relevant involvement of the EP at any time.

The situation was somewhat different at the national level. Since the procurement of vaccines is based on EU legislation, the standard participation rights of the German Bundestag, which were once again strengthened during the ratification of the Treaty of Lisbon, applied. Like all other national parliaments, it was informed by the Commission about the legislative initiative to amend the Emergency Support Regulation.<sup>29</sup> Due to the Covid restrictions on the work of the Bundestag,<sup>30</sup> the initiative was discussed in the Committee on EU Affairs and the Committee on Health. In addition, there were discussions with German Health Minister Jens Spahn in the Committee on EU Affairs on the European dimension of vaccine procurement. However, there was no detailed plenary debate or explicit vote in favour of vaccine procurement by the EU before the Council decision. It was only when major problems arose in the first half of 2021 that a minor interpellation (“Kleine Anfrage”)<sup>31</sup> was submitted on this, and the issue was taken up again in the relevant committees.<sup>32</sup> In ac-

**29** Deutscher Bundestag, *Unterrichtung über die gemäß § 93 der Geschäftsordnung an die Ausschüsse überwiesenen bzw. nicht überwiesenen Unionsdokumente*, Drucksache 19/19077, Berlin, 11 May 2020, <https://dserver.bundestag.de/btd/19/190/1919077.pdf> (accessed 28 October 2022).

**30** Minna Ålander, Anna-Lena Kirch and Dominik Rehbaum, “Germany’s Hour of the Executive – Policymaking during the Covid-19 Crisis”, in *The Effect of Covid on EU Democracies*, EPIN-Report, ed. Sophia Russack (30 April 2021), 16–17, [https://epin.org/wp-content/uploads/2021/04/EPIN-REPORT\\_The-effect-of-Covid-on-EU-democracies-1.pdf](https://epin.org/wp-content/uploads/2021/04/EPIN-REPORT_The-effect-of-Covid-on-EU-democracies-1.pdf) (accessed 28 October 2022).

**31** Minor interpellations are a set of questions by parliamentarians that the government answers in written form. In contrast to the major interpellations, the answers are not debated in the Bundestag. In contrast to the name, however, both questions and answers in minor interpellations can be quite extensive. For instance, the minor interpellation on vaccine procurement included 11 questions, including 26 sub questions (see note 32).

**32** Deutscher Bundestag, *Kleine Anfrage der Abgeordneten Dr. Wieland Schinnenburg et al. und der Fraktion der FDP. COVID-*

cordance with the principles of the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union (EUZBBG), the Bundestag was thus informed beforehand, but it did not make use of the opportunity to issue a statement that would have provided guidelines for the Federal Government's position on the EU decision.

With regard to *output legitimacy*, only the extent to which the decision-making processes applied guaranteed the EU's ability to act will be evaluated. Here, a more positive conclusion can be drawn: All Council decisions to amend the Emergency Support Regulation as well as to use it for joint vaccine procurement were taken on the basis of majority voting procedures. The speed of the decision-making processes was particularly noteworthy. In total, the amendment of the Emergency Support Regulation in April 2020 took less than two weeks from the formal Commission initiative to adoption by the Council. The decision on the joint procurement of vaccines was also taken by the EU health ministers and also within a few weeks time in June 2020. The fact that the EU Commission negotiated the vaccine contracts for all EU member states and in direct contact with the vaccine manufacturers meant that European interests were given high priority by those companies; this helped, among other things, to reduce bottlenecks in the first half of 2021.<sup>33</sup>

When negotiating the vaccine contracts, however, the EU Commission had to continuously seek reassurance from the member states via a steering committee,<sup>34</sup> for example regarding the volume of supplies to be agreed, the conditions and the mix of different vaccines. This led to friction, partly because disagreements between the member states delayed contracts. Economically weaker EU countries in particular initial-

ly favoured the cheaper AstraZeneca vaccine in contrast to the more expensive mRNA vaccines, which subsequently experienced the greatest difficulties in terms of supply and effectiveness. These frictions slowed the joint negotiations by the EU, and thus weakened them to some extent, but they were crucial to engage national governments.

### **The entire vaccine procurement process was characterised by a lack of transparency.**

With regard to the third dimension, *throughput or process legitimacy*, there are also shortcomings. The process of joint vaccine procurement lacked transparency during the decision-making process: When the Emergency Support Regulation was revised in April 2020, joint vaccine procurement was not a public issue. The decision made in June 2020 was not preceded by a major public debate – partly, of course, due to the urgency in the early phase of the pandemic. Unlike many other crisis measures, vaccine procurement was not adopted after a political conflict at an EU summit, but after a relatively short internal debate by the EU health ministers.

The subsequent process of vaccine procurement was also characterised by a lack of transparency. The agreements with the vaccine manufacturers were initially not made public, which was understandable in view of their high economic importance. At the time, however, no parliamentary control or confidential insight into the contracts was granted to MEPs. The former lay exclusively with the member states. When the EU lagged behind Israel, the United States and the United Kingdom in the speed of vaccine roll-out in spring 2021, public and parliamentary pressure grew to disclose the contracts. The EP demanded this as early as January 2021, and shortly afterwards the EU Ombudsman opened proceedings on the same matter against the EU Commission.<sup>35</sup> These demands received further emphasis when, in the wake of the supply difficulties, the CEO of AstraZeneca publicly claimed that the company had made less binding agreements with the EU than the United Kingdom

19-Impfstoffbeschaffung von Bund und EU, Drucksache 19/25926, (Berlin, 15 January 2021), <https://dserver.bundestag.de/btd/19/259/1925926.pdf> (accessed 28 October 2022).

33 Thierry Breton, "European Commissioner Says 420 Million Doses to Be Delivered by July", interview by Markus Becker/Michael Sauga, *Spiegel Online*, 9 April 2021, <https://www.spiegel.de/international/europe/european-commissioner-says-420-million-doses-to-be-delivered-by-july-a-536dfc69-ad27-4317-8790-3c922126c009> (accessed 28 October 2022).

34 The Steering Committee consisted of representatives of all member states involved in vaccine procurement and was chaired by the EU Commission with a chair elected by the member states.

35 European Ombudsman, *Letter to the European Commission in Joint Cases 85/2021/MIG and 86/2021/MIG on the Commission's Refusal to Give Public Access to Documents Concerning the Purchase of Vaccines against COVID-19* (Strasbourg, 22 January 2021), <https://www.ombudsman.europa.eu/en/correspondence/en/137152> (accessed 28 October 2022).

and that supplies to the United Kingdom had been prioritised because of the agreements in place.<sup>36</sup> With reference to economic interests, the EU Commission nevertheless refused to publish its contracts with the vaccine manufacturers. Only as a result of public and parliamentary pressure did it allow first MEPs and then the public to see the contracts in spring 2021, although large parts had been redacted. To this day, however, it refuses to release short messages exchanged by Commission President Ursula von der Leyen with the CEO of Pfizer, among others, in connection with vaccine procurement. In February 2023, the *New York Times* sued the EU Commission to obtain publication of the aforementioned short messages.<sup>37</sup>

Overall, the decision-making processes on vaccine procurement show partial deficits from the point of view of democratic legitimacy: The EP was not involved due to the use of Article 122 (1) TFEU, but the Bundestag was informed. The relevant decisions were taken quickly by majority vote, but at the expense of transparency. Last but not least, problems with vaccine procurement have at least temporarily damaged the legitimacy of the EU – but in view of the shared responsibility between member states and the Commission, no one has ultimately taken political responsibility for these difficulties.

## EU programme for support of short-time work schemes – SURE

Another transformative tool – introduced by the EU during the Covid-19 pandemic – is the European instrument for temporary Support to mitigate Unemployment Risks in an Emergency, or SURE. With this instrument, the EU for the first time provided significant support to member states' social security systems by making loans totalling €100 billion

available to support short-time working schemes during the pandemic. The SURE Regulation also allowed the Commission to issue bonds on the financial markets on a large scale, backed by guarantees from member states, and then pass them on with low interest rates and long maturity periods to those EU states that requested a loan. The conditionality to get the money was very low, unlike with the European Stability Mechanism programmes (see below).

Through the SURE instrument, the EU aimed to help preserve jobs despite major pandemic-related constraints, while not overburdening member states' public finances. Over the course of the programme, a total of 19 member states used SURE funds. In 2020 alone, according to the EU Commission, this has kept an estimated 31.5 million people in work and supported 2.5 million businesses within the EU.<sup>38</sup> SURE is also remarkable because the instrument was adopted within a few weeks, whereas previously there had been a decade of discussions on the introduction of a European component to unemployment insurance.

There were three political *motives* behind the SURE programme: The first was to temper the pandemic-related rise in unemployment. Short-time allowance programmes had been used very successfully in Germany, in particular, during the financial crisis of 2007/08 to cushion the shock on the labour market and at the same time reduce the pressure on social security systems. In the United States, where comparable programmes do not exist, unemployment rose from 3.8 per cent to 13 per cent within three months in spring 2020.<sup>39</sup> A similarly drastic development was avoided in the EU, where unemployment remained below 8 per cent on average throughout the pandemic.<sup>40</sup> The second goal was to maintain competi-

<sup>36</sup> Pascal Soriot, “I Do Believe We Treated Europe Fairly”, interview by Antonello Guerrero, Stefanie Bolzen and Rafa De Miguel, *Die Welt* (online), 26 January 2021, <https://www.welt.de/politik/ausland/article225095715/Astra-Zeneca-CEO-I-do-believe-we-treated-Europe-fairly.html> (accessed 28 November 2022).

<sup>37</sup> Samuel Stolton, “New York Times Sues EU over von der Leyen’s Pfizer Texts. The Messages Could Shed Light on Deals to Buy Billions of Euros Worth of COVID-19 Vaccines”, *Politico Europe*, 13 February 2023, <https://www.politico.eu/article/new-york-times-sue-european-union-ursula-von-der-leyen-pfizer-texts/> (accessed 24 February 2023).

<sup>38</sup> European Commission, “Fourth Report Confirms SURE Success in Protecting Jobs during Pandemic”, press release, Brussels, 26 September 2022, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_5743](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5743) (accessed 28 October 2022).

<sup>39</sup> Rakesh Kochhar, “Unemployment Rose Higher in Three Months of COVID-19 than It Did in Two Years of the Great Recession”, *Pew Research Center*, 11 June 2020, <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/> (accessed 7 November 2022).

<sup>40</sup> However, some EU countries had higher unemployment. See Eurostat, “Unemployment Statistics”, figures up until December 2022, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Unemployment\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Unemployment_statistics) (accessed 2 February 2023).

tiveness. The short-time allowance programmes were intended to enable companies to retain employees so that they could restart work immediately after the pandemic restrictions were eased, rather than having to search for new staff at great expense. In addition to these two basic reasons for short-time allowance programmes, the European motivation was to demonstrate solidarity between the member states and to prevent further divergences.

Conceptually, the SURE Regulation should be distinguished from a European unemployment insurance, the purpose and design of which were debated mainly during the euro crisis. At that time, some economists as well as European politicians demanded<sup>41</sup> that the EU or the Eurozone should introduce a common unemployment insurance, which should act as an automatic stabiliser during asymmetric economic crises. Although various models were discussed, what they had in common was that a European unemployment insurance scheme should automatically – that is, without politically sensitive negotiations – support the social security systems of euro or EU member states that had particularly high unemployment. This would ease the burden on the budgets of the affected member states, give them fiscal leeway to strengthen their economies and reduce divergences in the Eurozone.

**If SURE were to be put on a permanent basis, it could become a building block for a European unemployment insurance scheme.**

The SURE Regulation did provide support for the social security systems of EU members, although this support was not given automatically, but only provided after a request was submitted to the EU Commission and subsequently approved by the Council (see below). Moreover, the programme addressed the unique situation of the pandemic and was thus limited in duration and scope. However, if SURE were to be made permanent, it could become a building block for a European unemployment insurance scheme.<sup>42</sup>

<sup>41</sup> Theresa Kuhn, Francesco Nicoli and Frank Vandembroucke, “Preferences for European Unemployment Insurance: A Question of Economic Ideology or EU Support?”, *Journal of European Public Policy*, 27 (2020) 2: 208 – 26.

<sup>42</sup> See EPC analysis on the sustainability of SURE. Francesco Corti and Cinzia Alcidi, *The Time Is Ripe to Make SURE a Per-*

The *decision-making process* of the SURE programme, unlike the vaccine procurement process, essentially followed the standard procedures of EU legislation in areas where the Council decides without the involvement of the EP. For example, the EU Commission first presented the idea on 2 April 2020 that the EU should support short-time work schemes as part of an economic package to respond to the pandemic.<sup>43</sup> Before that, the European Council had asked it to present a catalogue of proposals with measures to mitigate the economic and social consequences of the pandemic.<sup>44</sup> With its idea for SURE, the Commission built on preliminary work for a permanent European unemployment insurance scheme, for which it actually wanted to make a proposal in 2020; at the same time, it emphasised that SURE was a temporary crisis measure that did not prejudge a decision for a European unemployment insurance scheme. Subsequently, the decision-making process was extraordinarily fast – the basic principles of the SURE Regulation received the support of the Eurogroup on 9 April 2020, and after only three rounds of negotiations in the Council, the Council adopted the regulation on 19 May 2020, that is, in less than seven weeks.<sup>45</sup>

The SURE Regulation also uses the emergency Article 122 TFEU as its *legal basis*. In its explanatory

*manent Instrument*, CEPS Policy Insights, No. PI2021-10 (Brussels: Centre For European Policy Studies [CEPS], June 2021), [https://www.ceps.eu/wp-content/uploads/2021/06/PI2021-10\\_The-time-is-ripe-to-make-SURE-a-permanent-instrument.pdf](https://www.ceps.eu/wp-content/uploads/2021/06/PI2021-10_The-time-is-ripe-to-make-SURE-a-permanent-instrument.pdf) (accessed 24 February 2023).

<sup>43</sup> European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Coronavirus Response Using Every Available Euro in Every Way Possible to Protect Lives and Livelihoods*, COM(2020) 143 final (Brussels, 2 April 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0143&from=EN> (accessed 28 October 2022).

<sup>44</sup> Thus, in three successive videoconferences on 10, 17 and 26 March, the European Council invited the Commission and the Eurogroup to develop proposals. See *Joint Statement of the Members of the European Council* (Brussels, 26 March 2020), <https://www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf> (accessed 22 May 2023).

<sup>45</sup> On the process, see European Commission, *Proposal for a Council Regulation on the Establishment of a European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency (SURE) Following the Covid-19 Outbreak*, COM(2020) 139, 20 May 2020, <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32020R0672> (accessed 28 October 2022).

memorandum, the Commission invoked the emergency nature of the pandemic as a “sudden and exceptional event”<sup>46</sup> that would require the collective solidarity of the member states, even though the creation of a short-time allowance programme is not explicitly provided for in the EU treaties. However, unlike the Emergency Support Regulation, on which vaccine procurement is based, SURE does not draw on the EU budget, but is financed by borrowing from the EU Commission on the basis of guarantees from the member states. Moreover, unlike the Emergency Support Regulation, the SURE Regulation refers to both paragraphs of Article 122 TFEU to set up this guarantee scheme and to secure the Union’s borrowing for the SURE programme.<sup>47</sup>

A major characteristic of the SURE programme is also its lack of conditionality. Particularly during the European debt crisis, the EU and the Eurozone established a number of instruments to provide financial assistance to member states under different conditions and with different terms. In addition to the EFSM, these include the European Financial Stability Facility (EFSF) as well as the permanent European Stability Mechanism (ESM), the first economic adjustment programme for Greece and the macro-financial assistance under the Neighbourhood Policy. Among these programmes, the SURE Regulation stands out in that it almost completely dispenses with conditionality for access beyond pandemic conditions. Moreover, despite its legal basis in EU primary law, it uses guarantees from the member states and not the EU budget for borrowing on the part of the EU Commission.

The decision-making processes created with the SURE Regulation for the disbursement of funds are also relevant to the question of democratic legitimacy. Unlike the EFSF or the later ESM, no separate institutions were established with SURE; instead, the Commission took the central role in the administration and disbursement of the SURE funds, but with the Council as the final decision-making authority. Thus, it was initially the Commission’s task to reach agreements with all member states to provide guaran-

tees for the risk assumed by the Union through the SURE loans (Art. 11 SURE Regulation); this was the prerequisite for the Commission to be able to later issue €100 billion of SURE bonds on the market (Arts. 4–5 SURE Regulation).

To receive SURE funds, interested member states had to apply to the Commission, so disbursement was not automatic. However, after political wrangling between the member states, there was much less conditionality in the context of the pandemic emergency than, for example, for access to ESM programmes during the Eurozone debt crisis. Member states applying for aid only had to prove that their actual or planned public expenditure on short-time allowance programmes and similar measures to mitigate the effects of the pandemic had increased rapidly (Art. 6 SURE Regulation). The SURE Regulation does not stipulate further conditions such as prior debt levels, the design of the programmes or reforms in the social security systems.

The Commission only had to examine the provided information and at the same time ensure that the loans were not too concentrated within individual member states.<sup>48</sup> After this examination, the Commission submitted a proposal for an implementing decision to the Council, including the amount of the loan, the duration, the national short-time allowance measures and other financial details.<sup>49</sup> The final binding decision on whether to grant the loans was made by the Council by qualified majority. This in turn meant that individual member states could be outvoted.

With regard to *input legitimacy*, the SURE Regulation therefore presents a similar picture as with vaccine procurement: If one looks at the role of the EP, it was not substantially involved in either the decision-making or the implementation, despite its competences in budgetary control. The legal basis of Article 122 TFEU only provides that the Parliament is informed of a decision, so that no consultation or even co-determination rights could be derived from it. In

<sup>46</sup> European Commission, *Proposal for a Council Regulation on the Establishment of a European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency (SURE) Following the Covid-19 Outbreak*, COM(2020) 139 final (Brussels, 2 April 2020), 4, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A0139%3AFIN> (accessed 28 October 2022).

<sup>47</sup> *Ibid.*, 4.

<sup>48</sup> Thus, the share of the three highest loans together could not exceed 60 per cent of the total loans (Art. 9 (1) SURE Regulation).

<sup>49</sup> See, e.g., Council of the European Union, *Council Implementing Decision Granting Temporary Support Under Regulation (EU) 2020/672 to the Italian Republic to Mitigate Unemployment Risks in the Emergency Following the COVID-19 Outbreak*, 2020/0219(NLE) (Brussels, 17 September 2020), <https://data.consilium.europa.eu/doc/document/ST-10330-2020-INIT/en/pdf> (accessed 28 October 2022).

the case of the SURE Regulation, the EP is also only involved to the extent that the Commission must submit its biannual report on the implementation of SURE to the EP in addition to the Council and its sub-committees (Art. 14 SURE Regulation). Although the guarantees for the financial risks are provided by the member states, it could be argued that the EP should be involved with managing SURE in view of its functions in budgetary decision-making and control from an overall EU perspective.

Parliament itself has also shown a “permissive tolerance” of the SURE Regulation and has only dealt with it in passing. There was no specific plenary or committee debate on the short-time work allowance programme, even if SURE was discussed in individual hearings with commissioners. In addition, MEPs put a total of 16 questions to the Commission in 2020 with reference to SURE, eight of them in the period between the initiative and adoption of the regulation. The questions were aimed, among other things, at the legal basis and the distribution of loans between the member states.<sup>50</sup> However, they were only answered in the second half of the year – so the EP was not directly involved in the decision-making process.

### **The entire decision-making process for SURE took just under seven weeks.**

Again, the assessment of the input legitimisation on the national level leads to a different conclusion. This took place in several ways in the case of SURE: First, as a member of the Council, the Federal Government, like all national governments, was involved in all decisions, both those on the SURE Regulation itself and all implementing decisions for the disbursement of loans to individual member states. As the Council voted by qualified majority, it could have been overruled. The voting decisions of the member states on the SURE Regulation was not made public; however, because the Federal Government publicly spoke in favour of the programme, it can be assumed that it approved it. Most importantly, it was up to each member state to conclude a guarantee agreement with the Commission, independently of the legislative process. Germany did so in May 2020; without the agreement, the German guarantees for the SURE loans would not have been possible.

<sup>50</sup> Own research on EP questions related to SURE from 2020 and 2021.

In Germany, the Bundestag was also involved in these processes. In accordance with the EUZBBG and the protocol on the role of national parliaments, the EU Commission informed the Bundestag, together with the Federal Government, when the draft SURE Regulation was presented. Despite pandemic restrictions, the draft was discussed in the Bundestag’s Committee on EU Affairs on 13 May 2020, that is, less than a week before its adoption in the Council.<sup>51</sup>

In addition, there were two other forms of involvement of the Bundestag: On the one hand, the agreement with the Commission on the risk guarantees for the loans meant a limited but nevertheless significant risk for the federal budget, and accordingly required parliamentary approval in Germany. With this in mind, the two parliamentary groups of the then governing coalition of CDU/CSU and SPD proposed a SURE Guarantee Act to the Bundestag, which the Bundestag approved by a large majority on 18 June 2020.<sup>52</sup> Only then could the Federal Government conclude the agreement with the Commission on the guarantee. On the other hand, during the EU decision-making process on SURE, a minor interpellation was submitted from the parliamentary group Die Linke<sup>53</sup> as well as a written question from an AfD MP.<sup>54</sup> However, both were answered only after the adoption of the SURE Regulation and the German SURE Guarantee Act.

The verdict on *output legitimacy* in relation to the EU’s ability to act in the underlying decision-making processes is clear: In the case of SURE, it took just

<sup>51</sup> Deutscher Bundestag – Ausschuss für die Angelegenheiten der Europäischen Union, Agenda of 13 May 2020.

<sup>52</sup> All parliamentary groups except the AfD parliamentary group and three other MPs voted in favour. See Deutscher Bundestag, “Ja zu Gewährleistungen zur Minderung von EU-Arbeitslosigkeitsrisiken”, 18 June 2020, <https://www.bundestag.de/dokumente/textarchiv/2020/kw25-de-sure-donnerstag-698620> (accessed 31 October 2022).

<sup>53</sup> Deutscher Bundestag, *Kleine Anfrage der Abgeordneten Jan Korte et al. und der Fraktion DIE LINKE. Einflussnahme von Interessenvertreterinnen und Interessenvertretern auf den Gesetzentwurf der Bundesregierung für ein Gesetz zur Übernahme von Gewährleistungen im Rahmen eines Europäischen Instruments zur vorübergehenden Unterstützung bei der Minderung von Arbeitslosigkeitsrisiken in einer Notlage im Anschluss an den COVID-19-Ausbruch (SURE-Gewährleistungsgesetz – SURE-GewährIG, Bundesratsdrucksache 264/20), Drucksache 19/20403* (Berlin, 25 June 2020).

<sup>54</sup> Deutscher Bundestag, *Schriftliche Fragen mit den in der Woche vom 22. Juni 2020 eingegangenen Antworten der Bundesregierung*, Drucksache 19/20374 (Berlin, 26 June 2020), 16 (question 21).

under seven weeks from the Commission's proposal to its adoption by the Council. Given the usual timeline of EU legislative procedures, but especially in view of the previous political controversy on the issue of an EU unemployment insurance scheme, this was an extraordinarily fast decision-making process. However, this speed is less due to the procedure than to the fact that the EU states were united in the face of the pandemic.

Obtaining the guarantees of the member states was both challenging and at the same time remarkable. As an innovative instrument whose costs could not be secured by the EU budget, SURE needed the guarantees of all member states before the first bonds could be issued and loans disbursed. In the past, such processes, as with the ESM Treaty, might well have taken several years. This time, thanks to close cooperation between the Commission and member states, it was completed within four months, by 22 September 2020, despite pandemic restrictions and the parliamentary decision required for such guarantees in member states. By EU standards, this was extremely fast; nevertheless, by September 2020, the first phase of the pandemic with the toughest lockdown measures was already over. If national short-time allowance programmes had depended solely on EU support, the SURE loans would have come far too late.

In terms of *throughput or process legitimacy*, the SURE Regulation benefits from the standard rules for EU legislation. The Commission presented its proposal publicly, as required, and forwarded it to the national parliaments in good time, including a subsidiarity check. However, a broad public discussion on SURE did not take place because of the severe pandemic situation, although the programme had a total volume of €100 billion, and for the first time the EU took a step towards direct support of national social security systems. This mixed situation was also reflected in the permissive tolerance of the EP. Public transparency about the proposal was thus given, but not about the deliberations nor votes of the Eurogroup and the Council during the decision-making process.

The procedure lacks clear, accountable responsibility for the release of SURE loans. The Commission was responsible for monitoring whether the – very loose – conditions for accessing SURE were being met, while the final approval was given by the member states together in the Council by qualified majority, without the voting decisions being made public. Ultimately, therefore, the EU states as a whole are responsible for the programme. To this end, the SURE

Regulation allows for the European Anti-Fraud Office (OLAF) and the European Court of Auditors to monitor the use of the funds from this programme.

*All in all*, SURE only partially fulfils the requirements of democratic legitimacy. Once again, the use of the emergency instrument Article 122 TFEU has led to the complete exclusion of the EP in the EU decision-making process. This is compensated for at the national level by the fact that the Bundestag was informed and fully involved in the adoption of the SURE Regulation; otherwise, Germany would not have been able to assume the risk for the SURE programme. In terms of output legitimacy, the EU has demonstrated a capacity to act quickly *by its own standards*. However, the need to obtain national guarantees has significantly prolonged the period until SURE becomes operational. If SURE had been a permanent instrument with guarantees already in place, the Union could have acted even faster.

## Recovery fund Next Generation EU

The third major expansion of EU responsibilities that took place during the Covid-19 pandemic and which has far-reaching implications for European integration was the creation of the “recovery fund”, officially called the Next Generation EU. The recovery fund is a new type of financial instrument of the Union that aims to support member states in their economic recovery in light of the deep economic and social disruptions caused by the pandemic. In addition to investments in the member states, especially in the areas of climate, sustainability and digitalisation, the funding for some EU programmes was also increased. A total of about €800 billion is available for this purpose until the end of 2026.<sup>55</sup> Although NGEU funds are linked to the regular Multiannual Financial Framework (MFF) of the EU, legally NGEU was also justified by the pandemic emergency and is therefore limited in duration and scope. The instrument has brought three central innovations.

First, the funds for NGEU do not come directly from existing own resources, but are based on bonds issued by the EU Commission in the financial markets on behalf of the EU. Although the Union has done this before on a smaller scale (including for SURE),

<sup>55</sup> In budgetary terms, Next Generation EU, calculated in 2018 prices, comprises €750 billion; in current prices as of August 2023, it is just under €807 billion.



NGEU is a first, in that the EU has issued bonds on the financial markets independently and on a larger scale, thus also giving investors in the euro area a new anchor of stability.<sup>56</sup> Second, unlike the SURE programme, only €385 billion of the funds provided for the member states consist of loans, while almost €340 billion are given directly in the form of grants. In this way, NGEU reduces the burden on the budgets of the EU member states most affected by the pandemic. Third, NGEU is linked to a rule of law mechanism, which for the first time allows the EU to withhold funds in case of violations of the rule of law.<sup>57</sup>

The NGEU programme was created for the following political *motives*: First, the economic measures to mitigate the economic and social consequences of the pandemic were to be complemented by a European element that could also strengthen the cohesion of the Union. The pandemic, and the measures adopted to contain it, hit all EU member states hard economically. However, it soon became apparent that the extent and depth of these impacts differed significantly between member states. In the Eurozone, for example, differences in the reduction of gross domestic product (GDP) in 2020 compared to 2019 ranged from less than 2 per cent (Lithuania) to almost 11 per cent (Spain).<sup>58</sup> A European recovery fund with a macro-economically relevant volume should help member states to return to pre-Corona economic levels as quickly as possible.

Moreover, not only did the economic consequences of the pandemic differ, but also the fiscal space of national governments to respond to these challenges. For example, Germany alone was responsible for

41 per cent of government support within the EU in the first year of the pandemic, almost double its share of EU GDP. France was responsible for another 25 per cent of the volume of state support measures, bringing the total for the other 26 EU countries to only 34 per cent.<sup>59</sup> This combination of asymmetric shock and different response capacities threatened to become a major economic and political test for the EU and to widen economic divergences massively.

By (also) awarding grants, NGEU is thus intended to relieve national budgets that are already under considerable strain, to send an effective signal of European solidarity and to help EU states recover from the losses caused by the pandemic collectively. This is also why former German Finance Minister Wolfgang Schäuble, who had insisted on tough conditions during the euro crisis, now argued for a recovery fund with grants without strict conditionality: “If Europe is to have any chance at all, it must now prove itself to have solidarity and the ability to act.”<sup>60</sup>

In addition, it was an aim of the von der Leyen Commission to generate additional EU funds and use them for investments for which there was no longer any leeway in the regular EU budget. They are to both benefit member states and top-up EU programmes. According to the plan, more than 50 per cent of NGEU funds will be invested in member states’ measures on climate and digital policy, in the Horizon Europe research programme and in measures to improve the resilience of the EU and its member states.

The *decision-making process* on the recovery fund was much more focussed on the European Council than SURE and vaccine procurement. This is also because NGEU is linked to the regular MFF 2021 – 27, which

<sup>56</sup> Rebecca Christie, Gregory Claeys and Pauline Weil, *Next Generation EU Borrowing: A First Assessment*, European Parliament, October 2021, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/699811/IPOL\\_IDA\(2021\)699811\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/699811/IPOL_IDA(2021)699811_EN.pdf) (accessed 31 October 2022).

<sup>57</sup> See Thu Nguyen, *The Proof of the Pudding. Imposing Financial Measures for Rule of Law Breaches* (Berlin: Jacques Delors Centre, May 2022), [https://www.delorscentre.eu/fileadmin/2\\_Research/1\\_About\\_our\\_research/2\\_Research\\_centres/6\\_Jacques\\_Delors\\_Centre/Publications/20220524\\_proof\\_of\\_the\\_pudding\\_Nguyen.pdf](https://www.delorscentre.eu/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20220524_proof_of_the_pudding_Nguyen.pdf) (accessed 28 October 2022).

<sup>58</sup> Philip Muggenthaler, Joachim Schroth and Yiqiao Sun, “The Heterogeneous Economic Impact of the Pandemic across Euro Area Countries”, *ECB Economic Bulletin*, no. 5 (2021), [https://www.ecb.europa.eu/pub/economic-bulletin/focus/2021/html/ecb.ebbox202105\\_03~267ada0d38.en.html](https://www.ecb.europa.eu/pub/economic-bulletin/focus/2021/html/ecb.ebbox202105_03~267ada0d38.en.html) (accessed 2 February 2023).

<sup>59</sup> Irene Agnolucci, “Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures”, *Journal of European Competition Law & Practice* 13, no. 1 (2022): 3 – 16. As the United Kingdom was still in transition in 2020 and thus part of the EU’s state aid control, it is included here. In this first pandemic year, however, it contributed only 4.8 per cent to the volume of state support measures within the EU.

<sup>60</sup> “Wenn Europa überhaupt noch eine Chance haben will, muss es sich jetzt als solidarisch und handlungsfähig bewähren.” Own translation from Robin Alexander, Tobias Kaiser and Jacques Schuster, “Corona-Krise: Schäuble warnt vor Einbruch, ‘wie wir ihn zu Lebzeiten nicht erlebt haben’”, *Die Welt* (online), 24 May 2020, <https://www.welt.de/politik/article208200731/Corona-Krise-Schaeuble-warnt-vor-Einbruch-wie-wir-ihn-zu-Lebzeiten-nicht-erlebt-haben.html> (accessed 31 October 2022).

had to be agreed in 2020 anyway, and the European Council is always the crucial forum for the MFF negotiations. Structurally, the decision-making process can be divided into two parts, the sequence of which had a great influence on the possibilities for the participation and influence of parliamentary actors at the EU and national levels.

The first phase of the decision-making process took place almost exclusively between the national heads of state and government plus Commission President von der Leyen in the European Council. A crucial backdrop to the negotiations on NGEU are two blockades that fed into each other in the summer of 2020: on the one hand, the stalled negotiations on the MFF, which failed at a special meeting of the European Council in February 2020 due to the usual distribution conflicts, complicated by Brexit and the loss of the United Kingdom as a net contributor.<sup>61</sup> Even before the pandemic hit, the negotiations on the MFF were already in a tough place.

On the other hand, the debate about a separate fiscal instrument for the Eurozone played an important role. During the euro crisis, the German government, among others, rejected the idea of Eurobonds on principle due to – from its point of view – too much risk-sharing and the associated decoupling of government debt and refinancing costs. In March 2020, nine euro-states, including France, Italy and Spain, revived the idea and called for the introduction of “Coronabonds” to jointly finance economic programmes to cushion the costs of the pandemic.<sup>62</sup> Consequently, the pandemic threatened to become a stress test for the cohesion of the Eurozone and reopen the wounds of the debt crisis.

Against this backdrop, EU political actors took advantage of a rather fortuitous window of opportunity in spring 2020 and combined two negotiation processes: the one for the next MFF and the one about the European fiscal response to the disruptions caused by the pandemic. The political breakthrough was achieved through a proposal by then German

Chancellor Angela Merkel and French President Emmanuel Macron. In mid-May, in coordination with the Commission President, they advocated a €500 billion recovery fund to ensure economic recovery and cohesion in the EU.<sup>63</sup>

In quick succession, there was a detailed Commission proposal,<sup>64</sup> a flurry of negotiations and a five-day marathon European Council summit – and the Franco-German proposal became the €800 billion recovery fund in July 2020, which was adopted in addition to the regular MFF. The central players here were Germany and France. In the form of a classic Franco-German compromise, they provided the different economic policy principles of the member states with a common denominator. On the one hand, the recovery fund being put forward by them was to grant direct subsidies to the member states – as proposed by France, Spain and Italy, for example – in a sign of solidarity and to relieve the burden on national budgets. Germany, on the other hand, stood up for the fund’s character of being a temporary instrument that was limited in scope and justified only by the exceptional situation of the pandemic, and that also contained loans and conditionality. Most member states were able to agree to this compromise. There were still some difficult negotiations with the so-called Frugal Four (Netherlands, Denmark, Sweden, Austria) on the relation between credits and grants, and with Poland and Hungary on rule of law conditionality.<sup>65</sup> The EP, however, played no role in this phase, apart from the traditional exchange with the EP President before the start of the European Council meeting.

<sup>61</sup> Ralf Drachenberg, *Outcome of the Special European Council, 20–21 February 2020* (European Parliamentary Research Service, February 2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642815/EPRS\\_BRI\(2020\)642815\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642815/EPRS_BRI(2020)642815_EN.pdf) (accessed 31 October 2022).

<sup>62</sup> Daniel Dombey, Guy Chazan and Jim Brunsten, “Nine Eurozone Countries Issue Call for ‘Coronabonds’”, *Financial Times* (online), 25 March 2020, <https://www.ft.com/content/258308f6-6e94-11ea-89df-41bea055720b> (accessed 28 October 2022).

<sup>63</sup> Nico Fried, “Merkel und Macron planen milliardenschweres Aufbauprogramm”, *Süddeutsche Zeitung* (online), 18 May 2020, <https://www.sueddeutsche.de/politik/merkel-macron-wiederaufbau-eu-1.4911668> (accessed 31 October 2022).

<sup>64</sup> European Commission, “Europe’s Moment: Repair and Prepare for the Next Generation”, press release, Brussels, 27 May 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_940](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_940) (accessed 28 October 2022).

<sup>65</sup> On the positioning of individual member states, see Caroline de la Porte and Mads Dagnis Jensen, “The Next Generation EU: An Analysis of the Dimensions of Conflict behind the Deal”, *Social Policy & Administration* 55, no. 2 (2021): 388–402.

**Despite its participation rights, the EP played no role in the first phase of the decision-making process on NGEU, and a limited role in the second.**

After the agreement that was reached in principle on the MFF and the recovery fund at the summit in July 2020, the second phase followed, in which the political decisions had to be formally implemented. In the case of the MFF, this required not only unanimity in the Council, but also the consent of the EP, which thus came into play for the entire package, including the recovery fund. This shifted the lines of conflict in the second phase, as the EP declared in a resolution just three days after the summit agreement that the decisions of the European Council were “neither viable nor acceptable”.<sup>66</sup> The EP’s criticism focussed on rule of law conditionality, the reversal of the cuts in EU programmes agreed by the European Council, more flexibility in the budget, a more binding commitment for the creation of new EU own resources and greater parliamentary involvement in the implementation of NGEU. These issues were negotiated in detail during a trilogue between the EP, the Council (represented by the German Council Presidency) and the Commission.<sup>67</sup> In particular, rule of law conditionality continued to divide the member states in the Council.

An agreement between the institutions was found in a package solution on 10 November 2020 after intensive negotiations that started in August. Here, the EP was able to achieve a small increase in the funds for the EU programmes (mainly via NGEU), making the distribution of budget titles more flexible and broadening the rule of law mechanism, which was adopted by majority vote – with Poland and Hungary voting against – in November 2020. However, Poland and Hungary subsequently did not want to agree to the MFF as a whole, for which unanimity is required,

resulting in another round of negotiations ahead of the December 2020 European Council meeting.<sup>68</sup> It is worth taking a closer look at this, especially with regard to parliamentary participation in the decision-making process.

Thus, from its point of view, the EP made considerable concessions in its demand that the rule of law mechanism should allow the EU to cut funds if a member state violates its fundamental values and democratic principles. With this issue, it became clear once again that – unlike with vaccine procurement and SURE – NGEU reaches much further into the regular structures of the EU beyond times of crisis. Due to its much longer duration (until 2026), it has significantly changed the EU’s approach to economic governance and the rule of law debate. The final version agreed in November 2020 provides for such reductions only in cases where violations of the rule of law affect the financial interests of the Union, in particular in cases of corruption.<sup>69</sup> This is a much narrower interpretation than the EP had sought.

However, the European Council additionally decided that the Commission would first draft the guidelines for the application of the rule of law mechanism and, furthermore, would only use it once a ruling had been given by the European Court of Justice on the rule of law mechanism, as called for by Poland and Hungary.<sup>70</sup> This political declaration by the European Council, which formally has no legislative powers, was at odds with the directive agreed by the Council and the EP as legislators. It was not until December 2022 that the Council applied the rule of law mechanism for the first time, on a proposal from the Commission: in relation to Hungary. Both Poland and Hungary have taken initial steps to be able to draw down NGEU funds; however, from the Commission’s point of view, they have not fully complied with rule of law conditionality, so funds have not yet been disbursed to either.

<sup>66</sup> European Parliament, *European Parliament Resolution of 23 July 2020 on the Conclusions of the Extraordinary European Council Meeting of 17–21 July 2020* (Brussels, 23 July 2020), [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0206\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0206_EN.html) (accessed 31 October 2022).

<sup>67</sup> Andreas Maurer, *Improving Urgency Procedures and Crisis Preparedness within the European Parliament and EU Institutions. Rationales for Democratic, Efficient and Effective Governance under Emergency Rule* (Brussels: European Parliament, March 2022), 69, [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/730838/IPOL\\_STU\(2022\)730838\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/730838/IPOL_STU(2022)730838_EN.pdf) (accessed 31 October 2022).

<sup>68</sup> Peter Becker, “The Negotiations about the Multiannual Financial Framework 2021–2027: What Happened When with What Result?”, in *EU Policymaking at a Crossroads. Negotiating the 2021–2027 Budget*, ed. Sybille Münch and Hubert Heinelt (Cheltenham/Northampton: Edward Elgar Publishing, 2022), 30–54 (42).

<sup>69</sup> Article 4 (1) Rule of Law.

<sup>70</sup> European Council, *European Council Meeting (10 and 11 December 2020) – Conclusions* (Brussels, 11 December 2020), <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf> (accessed 22 May 2023).

As a *legal basis*, the recovery fund in the “Council Regulation Establishing a European Union Recovery Instrument to Support the Recovery in the Aftermath of the COVID-19 Crisis”<sup>71</sup> also uses the emergency Article 122 TFEU, that is, the same legal basis as SURE and joint vaccine procurement. In its explanatory memorandum, the Commission argues that the pandemic is “unprecedented” and characterised by serious difficulties “beyond the control of the Member States”. Therefore, this article provides an appropriate basis for taking “exceptional temporary measures” to support recovery and resilience across the EU.<sup>72</sup> The recourse to Article 122 TFEU has consolidated its broad interpretation as a flexible “crisis article”.

Moreover, what is important about the legal basis is that the NGEU regulation was adopted as part of a larger package around the MFF 2021 – 27 – including the MFF regulation itself,<sup>73</sup> an inter-institutional agreement between the Council, the EP and the Commission on cooperation in budgetary matters, including budgetary discipline and a roadmap towards new own resources<sup>74</sup> – the above-mentioned rule of law mechanism as well as the Council decision on the EU’s own resources system.<sup>75</sup> In order to implement

the “Recovery and Resilience Facility”, Parliament and the Council jointly decided – via regular legislative procedure – to establish it via regulation in February 2021.<sup>76</sup> This negotiation on the overall package changed the possibilities for parliamentary actors to exert influence, because both the EP and the national parliaments had a say in individual aspects, although Article 122 TFEU does not provide for EP participation.

As with SURE and vaccine procurement, the last relevant factor in the analysis of decision-making processes is how the procedures for implementing NGEU were designed. The recovery fund is closely aligned with the European Semester for economic governance. Accordingly, the member states submit their national recovery and resilience plans to the Commission, which examines them according to the four criteria of relevance, effectiveness, efficiency and coherence. It then submits a recommendation for an implementation decision to the Council, which adopts it within four weeks, but may deviate from the Commission’s proposal.<sup>77</sup> No participation of the EP is foreseen in this process. However, the EP has won information rights in the negotiations, for example that all information received by the Council or its preparatory bodies from the Commission in connection with the implementation of the regulation is also forwarded to it. Building on this information, the EP can request a dialogue with the Commission and the Council on the implementation of the Recovery and Resilience Facility.<sup>78</sup>

Looking at the decision-making process as a whole, it can be argued that, in terms of the *input legitimacy* of the three processes analysed, the EP was most involved in the recovery fund – but nevertheless had only limited opportunities for participation, especially in the crucial first phase. On the one hand, the linkage of NGEU with the MFF and its accompanying legal

<sup>71</sup> Council of the European Union, “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”, in *Official Journal of the European Union*, 22 December 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2094&from=EN> (accessed 31 October 2022).

<sup>72</sup> European Commission, *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/2 (Brussels, 28 May 2020), [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0441R\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0441R(01)&from=EN) (accessed 31 October 2022).

<sup>73</sup> European Commission, “Adopted MFF Legal Acts” (Brussels, 11 January 2021), [https://commission.europa.eu/publications/adopted-mff-legal-acts\\_en](https://commission.europa.eu/publications/adopted-mff-legal-acts_en) (accessed 22 May 2023).

<sup>74</sup> “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 on Sound Financial Management, As Well As on New Own Resources, Including a Roadmap towards the Introduction of New Own Resources”, in *Official Journal of the European Union*, 22 December 2020, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020Q1222\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020Q1222(01)&from=EN) (accessed 31 October 2022).

<sup>75</sup> “Council Regulation (EU) 2020/2094 of 14 December

2020 Establishing a European Union Recovery Instrument” (see note 71).

<sup>76</sup> European Parliament/Council of the European Union, “Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 Establishing the Recovery and Resilience Facility”, in *Official Journal of the European Union*, 18 February 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0241&from=EN> (accessed 31 October 2022).

<sup>77</sup> Articles 18 – 20 of the Regulation Establishing the Recovery and Resilience Facility.

<sup>78</sup> Articles 25 – 26 of the Regulation Establishing the Recovery and Resilience Facility.

acts allowed the EP to influence the negotiations, despite the legal basis of Article 122 TFEU, as these decisions were adopted in a package. In the case of NGEU, the EP was successful in three respects: with rule of law conditionality, in the increase of individual EU programmes compared to what was stipulated in the European Council agreement and by gaining (limited) information rights in the implementation of the recovery fund.

On the other hand, despite its rights of co-decision on the MFF, the EP has been largely bypassed politically by the Council on NGEU. In the crucial first phase of the negotiations on NGEU – in particular when the political breakthrough was achieved at the five-day summit in July 2020 – the heads of state and government deliberately sidelined the demands of the EP. The EP was not involved in the compromise, neither in terms of content nor personnel, and the exchange with the EP President at the beginning of the summit was a mere formality.<sup>79</sup> The political calculation was that the EP, which traditionally demands a more substantial EU budget, would not veto an MFF with a large recovery fund and the prospect of new EU own resources, especially in the critical economic situation in which the Union found itself during the pandemic. This calculation worked out.

In the second phase of the negotiations, the EP focussed on increasing individual EU programmes, the rule of law mechanism and own resources. However, apart from stronger information rights, it was not able to push through many changes to NGEU, that is, it was not able to achieve co-decision or control rights. Finally, the European Council and the Commission reached a political agreement on the implementation of the rule of law mechanism, which contradicted not only the demands of the EP, but also at least the possibilities of the agreed legislation.

Nevertheless, on its own initiative, the EP engaged much more with the recovery fund than SURE or vaccine procurement, in particular with NGEU as part of the overall package around the MFF: During the decision-making process – from the first political initiative by Merkel and Macron in May to the adoption in December 2020 – MEPs presented a total of 14 NGEU-related questions to the Commission.<sup>80</sup> Most importantly, NGEU was on the agenda in several com-

mittees, for example when the Committee on Budgets dealt with the MFF, as well as in the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs. In its resolutions on the MFF, the EP also referred to NGEU and called for parliamentary control to be strengthened.<sup>81</sup> Last but not least, the EP held a plenary debate on the issue of rule of law conditionality in the MFF and NGEU with the Commission and the Council (represented by the then German Minister of State for Europe Michael Roth).

Of greater importance in this third case study is also the input legitimisation by the national level. First of all, the prominent role of the German government in NGEU negotiations must be mentioned: Due to the linkage with the MFF, Germany had a veto right like all other member states; therefore, all decisions on the MFF and NGEU could only come about with the approval of the German government. As the largest net contributor and co-initiator of the recovery fund, the German government – and in particular Chancellor Merkel – played a central role in the crucial negotiations in the first phase, when the political compromise on the design of NGEU and the relationship between loans and grants was negotiated.

The role of the Federal Government in the second phase of the decision-making process was no less prominent, as Germany held the EU Council Presidency in the second half of 2020, and thus led the negotiations in the trilogue with the EP and the Commission on the part of the Council. In addition, the Chancellor led the informal negotiations on rule of law conditionality with Poland and Hungary in the run-up to the December 2020 European Council meeting. In theory, Germany could only be outvoted on the implementation of NGEU and the Council implementing decisions required for individual disbursements.<sup>82</sup>

The Bundestag was also involved in the internal German processes. First, shortly after the Merkel – Macron initiative for the recovery fund, the MPs in the Committee on EU Affairs and the Committee on Economic and Monetary Affairs were informed about the initiative and its significance for the European economy. Due to the parliamentary summer recess, the customary government statement by the Chancel-

<sup>79</sup> Peter Ludlow, *May to July: The MFF and the Recovery Fund*, Leuven, July 2020 (European Council Notes 2020/04 – 05).

<sup>80</sup> Own research based on information from the European Parliament.

<sup>81</sup> See, e.g., European Parliament, *European Parliament Resolution of 23 July 2020 on the Conclusions of the Extraordinary European Council Meeting of 17–21 July 2020* (see note 66).

<sup>82</sup> Article 20 of the Regulation Establishing the Recovery and Resilience Facility.

lor with plenary debate did not take place before the European Council meeting in July 2020.<sup>83</sup> Unlike the EP, the Bundestag was at least partially involved in the first phase of the decision-making process. Subsequently, the MPs submitted three minor interpellations as well as four written inquiries specifically on NGEU, including a detailed minor interpellation on the Bundestag's participation possibilities.<sup>84</sup> Until agreement was reached on the overall package in December 2020, several briefings took place in the Committee on EU Affairs and in other committees concerned.

### In the case of NGEU, the Bundestag has secured more information rights than the EP.

Moreover, the Bundestag – as well as other national parliaments – was involved in the adoption of the Own Resources Decision, which, according to Article 311 (3) TFEU, would only enter into force after the member states vote in favour of it in accordance with their respective constitutional provisions. In Germany, this required an Own Resources Regulation Ratification Act (*Eigenmittelbeschluss-Ratifizierungsgesetz*, ERatG) in accordance with the EUZBBG, which the Bundestag passed in the second reading on 25 March 2021 following standard procedures.<sup>85</sup> The prerequisite for this procedure was that the Council had previously passed its regulation; thus, it was only a matter of the Bundestag's subsequent approval. Here, the Free Democratic Party, which was in opposition at the time, was not able to prevail with a motion calling for an amendment to the EUZBBG: It provided that the Bundestag's Budget Committee should be involved before any vote that the Federal Government would take in the Council on NGEU implementation decisions.<sup>86</sup>

Following internal parliamentary negotiations, however, parliamentary information rights were strengthened in the ERatG; according to this, the Federal Government must inform the Bundestag regularly, promptly and comprehensively about the development of NGEU. This includes biannual reports on the overall development of the instrument, on borrowing by the EU Commission, on the detailed use of NGEU funds, on the discussions in the Council and the European Council about this, as well as an annual report on the state of play of the negotiations on new EU own resources.<sup>87</sup> Thus, the information obligations of the Federal Government to the Bundestag go significantly beyond the obligations of the EU Commission to the EP.

As with vaccine procurement and SURE's short-time allowance programme, the analysis of *output legitimacy* on the NGEU recovery fund focusses on the effectiveness of the decision-making process. Of the decision-making processes examined in this research paper, it was by far the longest – seven months passed from Merkel and Macron's proposal in mid-May 2020 to the adoption of the overall MFF package in December 2020. The necessary national approval procedures took another six months until 31 May 2021, ultimately resulting in the entire decision-making process taking a good 12 months.<sup>88</sup> The first NGEU funds were disbursed in August 2021, when the pandemic had already been ongoing for almost one and a half years and the peak of pandemic-related restriction measures had already passed in most member states. Since the start of Russia's war against Ukraine, there have been ongoing discussion in the EU on how to use NGEU funds for purposes that are

<sup>83</sup> See plenary minutes of the Bundestag from April to July 2020.

<sup>84</sup> Deutscher Bundestag, *Kleine Anfrage der Abgeordneten Otto Fricke et al. und der Fraktion der FDP. Die Beteiligung des Deutschen Bundestages beim Aufbauplan Next Generation EU*, Drucksache 19/21466 (Berlin, 4 August 2020), 2 (question 7), <https://dserver.bundestag.de/btd/19/214/1921466.pdf> (accessed 27 March 2023).

<sup>85</sup> Deutscher Bundestag, "Bundestag stimmt dem Eigenmittelsystem der Europäischen Union zu", 25 March 2021, <https://www.bundestag.de/dokumente/textarchiv/2021/kw12-de-eigenmittel-826488> (accessed 31 October 2022).

<sup>86</sup> Deutscher Bundestag, *Entwurf eines Gesetzes zur Änderung*

*[des] Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union zur Stärkung der Beteiligungsrechte des Bundestages in Angelegenheiten des Aufbauinstrument Next Generation EU*, Drucksache 19/26877 (Berlin, 23 February 2021), <https://dserver.bundestag.de/btd/19/268/1926877.pdf> (accessed 31 October 2022).

<sup>87</sup> Deutscher Bundestag, *Antrag der Fraktionen der CDU/CSU und SPD. Zusätzliche Berichtspflichten der Bundesregierung zum EU-Aufbauinstrument Next Generation EU*, Drucksache 19/27838 (Berlin, 23 March 2021), <https://dserver.bundestag.de/btd/19/278/1927838.pdf> (accessed 31 October 2022).

<sup>88</sup> Council of the European Union, "Green Light from All Member States for EU Recovery Spending", press release, 31 May 2021, <https://www.consilium.europa.eu/en/press/press-releases/2021/05/31/green-light-from-all-member-states-for-eu-recovery-spending/> (accessed 31 October 2022).

not directly related to the original aim of post-pandemic recovery.

Among other factors, the decision-making procedures and the chosen link to the MFF contributed to the long time that passed between idea and implementation. Four aspects came together. First, this linkage required unanimity in the Council and the European Council. The legal basis only for the recovery fund, Article 122 TFEU, allows for a decision by qualified majority, as shown. The MFF and accompanying legislation such as the Own Resources Decision, on the other hand, require unanimity. As a result, all EU states had a veto right in the negotiations on NGEU, which initially made the political negotiations at the marathon summit in July 2020 considerably more difficult, but above all also contributed to further blockades until agreement was reached in December 2020.

Second, the link with the MFF required approval procedures according to national constitutional requirements. This has increased the opportunities for national parliaments to participate, for example by giving the Bundestag the right of co-decision via the ERatG and strengthening its information rights with regard to NGEU. On the other hand, these national procedures extended the duration of the decision-making process by half a year and almost doubled it overall, so that the money from the recovery fund could only be made available at a correspondingly late stage. At the same time, the national procedures have not led to any major political complications in any EU state. Under other political circumstances – for example, if the political crisis in Italy in spring 2021, rather than the one in summer 2022, had led to early elections – further delays would have been conceivable. Decision-making procedures with an obligation for additional national ratification, where the consent of 27+ parliaments must be obtained, are therefore not suitable as a short-term crisis instrument.

Third, by linking the decision-making process to the MFF and the issue of the rule of law, the process was considerably broadened. On the one hand, this has contributed to the successful conclusion of the MFF 2021 – 27 negotiations, which started in 2018 and were still stalled in February 2020, also because the negotiating scope for a package solution was expanded. On the other hand, MFF negotiations are in any case among the most complex and always conflictual at the EU level due to their distributional nature. The fact that the rule of law was involved and

unanimity was required made the negotiations even more difficult.

Last but not least, the link with the MFF and the accompanying legislation meant that, unlike in the cases of vaccine procurement and SURE, the EP had a say in NGEU alongside the Council and the Commission. However, compared to the national vetoes and the need for national consent, the EP involvement has only marginally prolonged the process. Although a trilogue procedure between the EP, the Commission and the Council was needed for the implementation of the package solution in the second half of 2020, the legal implementation in the Council would have taken a similarly long time. This was underlined by the fact that, after the agreement in the trilogue, another month passed before the member states reached an agreement in the Council and the European Council with regard to rule of law conditionality. Nevertheless, it cannot be ascertained here that the stronger input legitimacy would have had a negative effect on output legitimacy – in contrast to the six-month ex-post involvement of the national parliaments.

The last dimension, *throughput or process legitimacy*, is also affected by the link between the MFF and NGEU in the decision-making process. With regard to the transparency of the decision-making process, both the advantages of the regular budget procedure and the disadvantages of negotiations behind closed doors can be seen here. It should be noted that the Commission's regular proposal on the MFF and NGEU created transparency early on as far as the basic procedure was concerned. The Commission presented its proposal only a few days after the Franco-German initiative for a recovery fund, which was still lacking in detail. It already contained all the details important to the public, including a precise financial breakdown of NGEU. This was followed by a meeting of the European Council, whose negotiations take place entirely behind closed doors, especially when it comes to questions of financial distribution.

Remarkably, the latter also applies to the second phase of the decision-making process. For the central negotiations on the amendments requested by the EP and the formal implementation of the European Council's political compromise, the trilogue format was used. Although this format for better decision-making between the EP, the Council and the Commission has made EU legislation more effective by bringing all institutions involved in the legislation together early on, it has rightly been criticised for a

lack of transparency.<sup>89</sup> In the present case, it was neither made public how many trilogue rounds there were or what was actually negotiated in each case, nor what the positions of the individual parliamentary groups in the EP were. Only the final agreement of the EP, the Council and the Commission was presented to the public, with the Council, the Commission and the EP negotiators presenting themselves collectively. All in all, this means that both parts of the decision-making process were characterised by a high degree of non-transparency.

**Politically, many actors were involved in the decisions on NGEU, but there is no clear political accountability.**

This lack of transparency, in turn, has consequences for the question of accountability for the recovery fund. Many actors were involved in the decisions to build and shape NGEU: Macron and Merkel, as French President and German Chancellor, jointly provided the initial momentum; EU Commission President von der Leyen and the responsible Commissioners drew up the detailed proposals; the negotiation strands in the European Council were brought together by its President, Charles Michel – often together with Merkel, Macron and/or von der Leyen – and finally, each individual head of state or head of government had to take national responsibility for the decisions of the European Council. The European Council thus assumed a degree of collective responsibility, while the EP was only able to bring about changes in the details – and the positions of individual MEPs or parties in the Parliament were not made clear. There is also no clearly assignable political accountability during implementation, for example for individual NGEU-funded projects, if money from the recovery fund is misappropriated or if the approach of taking on debt and distributing subsidies proves to be a political mistake for the EU in retrospect.

Overall, justified questions remain about the democratic legitimacy of the recovery fund. These are especially important in view of the materially and symbolically relevant decisions for European integration as well as the long time frame of NGEU, due to which the instrument has impacted the EU's eco-

nomics governance and the rule of law debate. By linking it to the MFF, the usual input legitimacy for the EU budget was ensured, including a right of veto for all national governments, additional national approval (in Germany, e.g., by the Bundestag) and participation of the EP. Politically, however, the EP was largely limited by the heads of state and government and the European Council to an ex-post approval with only minor changes – up to and including a softening of the compromise on rule of law conditionality. In contrast, the evaluation of output legitimacy shows a decision-making process that took a good year due to unanimity and national approval procedures, which, compared to the other two cases examined, underlines that NGEU is not suitable as a model for future crisis instruments.

<sup>89</sup> Christine Reh, “Is Informal Politics Undemocratic? Trilogues, Early Agreements and the Selection Model of Representation”, *Journal of European Public Policy* 21, no. 4 (2014): 822 – 41.



# Conclusions and recommendations

Under the pressure of the Covid-19 pandemic, the EU took profound decisions with which it contributed substantially to containing the social and economic consequences of the pandemic, but also to protecting the health of its citizens. The pandemic was but one of a series of crises – some of which overlapped – with which the EU has been confronted since 2010 at the latest. In each of these crises, it has introduced far-reaching new instruments – both within and outside the EU treaties – with which it has repeatedly expanded its responsibilities, if not its formal competences.

With joint vaccine procurement, the SURE programme to support national short-time working schemes and the NGEU recovery fund, the Union has launched three new instruments in the pandemic, with which the member states have temporarily given it unprecedented responsibility: for procuring and distributing a pharmaceutical critical to public health jointly and in a timely manner, for supporting social security systems, for taking on debt together for SURE (€100 billion) and NGEU (€800 billion)<sup>90</sup> and, finally, for giving large grants to member states as part of NGEU. All these decisions were taken by the EU institutions in just a few months between April and July 2020 – with the exception of the slightly longer period for the implementation decisions on NGEU. The sheer scale of the changes raises the question about the democratic legitimacy of these decisions.

This question is not only relevant in retrospect, but also for the future use of such instruments by the EU. Although all three instruments were limited in their duration and designed for the special situation of the pandemic, the rule also applies here that “the EU is forged in crisis” and that instruments once created can be used again in new crises or used as precedents. In the example of the instruments considered here,

<sup>90</sup> At 2018 prices. As things stand, NGEU comprises just under €807 billion.

this has already been the case in the wake of Russia’s invasion of Ukraine and dealing with its consequences. For example, the EU has set up a mechanism for joint gas purchases; in addition, proposals to introduce a SURE-like mechanism to help member states cope with high energy costs were discussed<sup>91</sup> as well as a re-designation or re-launch of NGEU. In March 2023, the EU decided to initiate a joint procurement of ammunition – modelled on vaccine procurement – to support Ukraine.<sup>92</sup> In view of the EU’s development and its ability to act in coming crises, the question of the democratic legitimacy of decisions concerning vaccine procurement, SURE and NGEU is therefore of paramount importance.

The analysis of the three decision-making processes shows that a new facet of the EU’s democratic deficit is developing in its crisis governance. First of all, it is remarkable that, unlike in the euro crisis, all the instruments examined here were launched on the basis of standard EU legislation. In contrast, differentiated integration into groups of member states within the EU or even – as in the case of the Euro Plus Pact, the Fiscal Compact and parts of the Banking Union – outside the EU framework played no role.<sup>93</sup>

<sup>91</sup> Thierry Breton and Paolo Gentiloni, “Nur eine europäische Antwort kann Industrie und Bürger schützen”, *Frankfurter Allgemeine Zeitung* (online), 3 October 2022, <https://www.faz.net/aktuell/wirtschaft/nur-eine-europaeische-antwort-kann-unsere-industrie-und-die-buerger-schuetzen-18359695.html> (accessed 28 October 2022).

<sup>92</sup> Jacopo Barigazzi, “When Not if: EU Wants to Buy Bullets for Ukraine – Doing It Will Be Harder”, *Politico Europe*, 20 February 2023, <https://www.politico.eu/article/european-union-buying-ammunition-for-ukraine/> (accessed 24 February 2023); Council of the European Union, *Outcome of Proceedings. Delivery and Joint Procurement of Ammunition for Ukraine*, (Brussels, 20 March 2023), <https://data.consilium.europa.eu/doc/document/ST-7632-2023-INIT/en/pdf> (accessed 29 March 2023).

<sup>93</sup> See Nicolai von Ondarza, *Strengthening the Core or Splitting*

This has guaranteed that the institutions provided for in the treaties have been able to perform their tasks – with the EU Commission having the right to make proposals while the Council makes legislation – with or without the participation of the EP, depending on the legal basis.

However, the legal basis for all three crisis instruments was the emergency Article 122 TFEU, which allows the Council to grant financial assistance or adopt other measures if “severe difficulties arise in the supply of certain products, notably in the area of energy” (Art. 122 (1) TFEU) and/or in the event of “natural disasters or exceptional occurrences beyond its control” (Art. 122 (2) TFEU) that cause great hardship to one or more member states. This legal basis has allowed the EU to adopt those crisis instruments without an explicit competence for them in the EU treaties.

If one analyses the input legitimacy of the three decision-making processes, however, the use of Article 122 as a legal basis also meant that the EP was largely left out in all cases. It was not involved at all in the decisions on vaccine procurement. Particularly in the case of procurement, which is so important for public health and economic recovery, and in which the EU initially had massive problems in hindsight, there was no parliamentary involvement at the EU level. In the case of SURE, the EP, despite its regular budgetary competences, was also not involved and was only informed. In the implementation of the instrument, the EP had no rights of control, for example over the issuing of EU bonds by the Commission.

The decision-making process for the NGEU recovery fund was somewhat different. Although this was also adopted on the basis of Article 122 TFEU, it was linked to the decision on the Union’s MFF, for which the EP has co-decision rights. Looking more closely at the decision-making process, however, it was again dominated politically by the member states in the Council/European Council. During the crucial negotiations at the five-day European Council meeting in July 2020, where the foundations for NGEU were agreed together with the MFF, the member states politically sidelined the EP in order to find a compromise among themselves first.

In the second phase, the EP was involved in the negotiation of the implementation decisions on the

MFF, and thus also on NGEU, but was only able to achieve minor changes. What was very important to it politically was rule of law conditionality – but here the European Council weakened the compromise solution negotiated in the trilogue between the EP, the Council and the Commission after pressure was applied from Hungary and Poland, which – from the EP’s point of view – contradicted the agreement. All in all, the EP remained a political spectator in two of three decisions and was largely outmanoeuvred in the third. Although it demanded more say, it did not have a decisive influence in any of the three cases.

At the national level, the picture looks different: The member state governments, with their respective national legitimacy, were significantly involved in all decisions. This is all the more true for Germany, which took a leading role in vaccine procurement, and especially in NGEU. Although the decisions on vaccine procurement and SURE could have been taken by majority vote, in practice all EU states followed the Commission’s proposals. In the case of SURE, there was also the fact that every single EU state, including Germany, had to agree to provide guarantees for the joint bonds.

In addition, the German Bundestag had at least a supervisory role, as it was presented with the Commission’s initiatives at the same time as the Federal Government in each case due to the use of standard EU procedures. In the case of vaccine procurement, the Bundestag’s Committee on EU Affairs raised the issue of the associated amendment to the EU Emergency Support Regulation before the Council decision, despite the Covid restrictions. In the case of SURE, the Bundestag was not only informed, but was also involved in the assumption of risk, which, although limited, represented a substantial threat for the federal budget in view of Germany’s total share of €100 billion. To this end, it passed a SURE Guarantee Act in June 2020.

The Bundestag was also involved in the recovery fund. The MPs were informed from the beginning, there were several briefings in the Committee on EU Affairs and other committees concerned, for example the Budget Committee. In addition, the Bundestag was involved in the adoption of the Own Resources Decision, as were other national parliaments, because it could only enter into force after all member states had agreed to it in accordance with their constitutional requirements, according to the TFEU. In Germany, a ratification law was necessary in order for the Bundestag to enforce additional information rights. These

*Europe? Prospects and Pitfalls of a Strategy of Differentiated Integration*, SWP Research Paper 02/2013 (Berlin: Stiftung Wissenschaft und Politik, March 2013).

include biannual reports on the overall development of NGEU, on borrowing and on the use of funds, as well as reporting obligations on the negotiations about new EU own resources. The Bundestag has thus secured much more extensive information rights than the EP.

Although this form of “subsidiary parliamentary control” satisfies the national requirements of democratic legitimacy, parliamentary participation with a view to the pan-European interest is then lacking. In addition, the EU’s ability to act could be weakened – especially in moments of crisis – if all national parliaments of the member states had a similarly strong control function on the level of the Bundestag.

The results for output legitimacy with regard to the ability to act in decision-making processes are much more positive in the assessment for the crisis instruments. In crisis situations, it is important to be able to take and implement decisions quickly; this is often difficult for the EU in areas where unanimity or other complicated procedures are provided for. This is where important differences between the three crisis instruments became clear: In the case of vaccine procurement, Article 122 TFEU allowed for decision-making by majority, which contributed to speedy decision-making under the pressure of the pandemic. The underlying Emergency Support Regulation was adopted from Commission initiative to Council decision in less than two weeks in April 2020. The subsequent decision on vaccine procurement also took only a few weeks. The procedure for SURE was comparably fast – here, despite the large sum of €100 billion, only just under seven weeks passed from the Commission proposal to the adoption of the SURE Regulation. Almost more remarkably, the process of obtaining guarantees from member states was completed within four months, and the first SURE funds were disbursed at the end of September 2020. By EU standards, this was a rapid pace. Nevertheless, the SURE aid only took effect when the first phase of the pandemic – with the toughest lockdown-related restrictions – was already over.

This tension between the need to decide quickly and the involvement of several decision-making levels is all the more evident in the case of the recovery fund through its linkage with the MFF and the Own Resources Decision. This decision-making process was by far the longest of those examined in this research paper, taking seven months from the initial proposal to the adoption of the overall package. Unanimity was required throughout, which complicated and

prolonged the process several times, for example because conflicts over the rule of law mechanism had to be resolved. In addition, there were the mandatory national approval procedures, which took another six months. The initial payouts from the recovery fund thus did not flow until August 2021, more than a year after the initial idea. As a short-term crisis instrument, the NGEU model is therefore unsuitable.

Lastly, the throughput legitimacy of the decision-making processes for the three crisis instruments must be assessed more critically. In the case of vaccine procurement, transparency was particularly problematic: All EU negotiations on this topic were characterised by a high degree of non-transparency, both for the general public and for parliamentarians. The supervision of the negotiation of the contracts with the vaccine manufacturers lay exclusively with the member states, which resulted, among other things, in the EU Ombudsman opening a case against the Commission. To this day, the details of the contract negotiation are disputed and the Commission refuses to publish SMS text messages on the negotiation of the vaccine contracts, although the Ombudsman has asked it to do so.<sup>94</sup> As a result, there were also significant shortcomings in political accountability. Due to the multi-level design of vaccine procurement, when problems arose in 2021, no one took clear political responsibility. This includes national governments, which tried to shift the blame to the Commission, even though they were fully involved in vaccine procurement decisions through the Steering Committee. In the end, no one took political responsibility for the teething problems in vaccine procurement.

In the case of the SURE Regulation, the balance is somewhat more positive, at least in terms of transparency. Because the standard procedures for EU legislation were used – including a public, comprehensive presentation of the Commission proposal, including a subsidiarity check by the national parliaments – the process was on the one hand more transparent. On the other hand, as with vaccine procurement, the voting decisions of the member states in the Council were not made public; the same applies to the individual implementing decisions for the disbursements

<sup>94</sup> Amalie Holmgaard Mersh, “EU Watchdog: Commission’s Lack of Will to Find Texts with Pfizer Boss Is a Wake-up Call”, *Euractiv.com*, 14 July 2022, <https://www.euractiv.com/section/coronavirus/news/eu-watchdog-commissions-lack-of-will-to-find-texts-with-pfizer-boss-is-a-wake-up-call/> (accessed 11 January 2023).

to the member states. Nor is there any clear political accountability. The Commission has checked compliance with the conditionality – which is not very restrictive – and the member states have taken the decisions for disbursements collectively. At least the SURE Regulation provides for audits by the anti-fraud unit OLAF and the European Court of Auditors.

Similarly, in the case of the recovery fund, the advantages and disadvantages of linking it to the standard EU budget process are apparent. On the one hand, the Commission presented its proposal for NGEU to the public at an early stage and in detail. On the other hand, the decisive negotiations took place behind closed doors: in the first phase in the European Council, and in the second phase in the tria-logue between the EP, the Commission and the Council. In view of the unanimity required and the exclusively non-public negotiations, no one is taking concrete political responsibility for NGEU either; it is divided between the relevant actors in the European Council, the EU Commission and, to a much lesser extent, the EP.

Overall, the EU demonstrated its ability to act during the Covid-19 pandemic with the three new instruments of vaccine procurement, SURE and NGEU, but it has also revealed deficits in the democratic legitimacy of its crisis instruments. It can be noted that the expansion of responsibilities has not been accompanied by an expansion of parliamentary participation. The EP was largely left out of all decisions; even where it had a say according to the treaties, it was only marginally involved in the main political decisions. The German Bundestag also obtained more right to detailed information than the EP in some cases when it comes to the shaping of individual governance structures, for example SURE and NGEU. Although democratic legitimacy was ensured via the national level – in that national parliaments were informed promptly and comprehensively, and national governments held key roles – pan-European parliamentary control is lacking. Last but not least, all three decision-making processes lacked transparency, and the allocation of political responsibility often remained unclear.

Whether at the national or EU level, crises are usually the moments to “rally ’round the flag”, in which the ability to act quickly takes priority over lengthy parliamentary procedures. However, crisis situations do not exempt the need for democratic legitimacy. On the contrary: Democratic legitimacy, both at the national and European levels, is particularly important

because far-reaching decisions are made during crises and new structure-defining instruments with the ability to establish precedents are created. These decisions had a tangible impact on economic and social cohesion as well as the future of the EU. Most national constitutions contain emergency articles and usually specify what must be observed under a state of emergency: For example, the respective national parliaments are to be involved, or duration and legal limits are set if direct parliamentary engagement is not possible in an emergency – such as in the case of defence.<sup>95</sup>

A central recommendation for the further development of the EU is therefore to review the crisis Article 122 TFEU in the next amendment of the EU treaties – as called for by Commission President von der Leyen and the EP, among others, in the aftermath of the conference on the future of Europe. This formed the legal basis for all three crisis instruments examined and has almost become “fashionable” for the EU institutions. Previously hardly used, it has since been drawn upon several times to deal with the effects of Russia’s war of aggression against Ukraine. It is likely that it will also be used in the future, as evidenced by the calls for a SURE-like instrument. Depending on how it is used, the EP is completely excluded (Art. 122 (1) TFEU) or only has to be informed (Art. 122 (2) TFEU) – in either case, the Council decides alone on the proposal of the Commission.

The fact that the Council can decide by qualified majority increases the ability to act, which is particularly necessary in crisis situations.<sup>96</sup> However, this possibility to outvote member states automatically reduces the chain of democratic legitimacy via national governments and their parliaments, since

<sup>95</sup> Maurer, *Improving Urgency Procedures* (see note 67).

<sup>96</sup> For example, in 2022 the Council took on the decision initially voluntary, but in case of doubt binding savings in the gas sector against Hungary’s vote. Compare the statement of the German State Secretary Sven Giegold: “Doch für die Freunde eines geeinten Europas ist der echte Knaller die Rechtsgrundlage: Erstmals wurde europäische Solidarität samt einer Sonderabgabe im Mehrheitsverfahren beschlossen. Der Notfallartikel 122 TFEU hat die Einstimmigkeitsblockade bei Steuern durchbrochen! Bäm!” [“But for the friends of a united Europe, the real bombshell is the legal basis: For the first time, European solidarity including a special levy was decided by majority vote. The emergency Article 122 TFEU has broken the unanimity blockade on taxes! Bam!"]. See Sven Giegold’s post on Twitter, 30 September 2022, [https://twitter.com/sven\\_giegold/status/1575801671493591041](https://twitter.com/sven_giegold/status/1575801671493591041) (accessed 28 October 2022).

individual or even groups of member states can be outvoted. As a rule, therefore, in EU legislation the decision by qualified majority in the Council is compensated by the participation of the EP and its direct democratic legitimacy. This is completely missing in Article 122 TFEU.

Consequently, Article 122 TFEU should be extended to include co-decision by the EP in the next treaty amendment. This would enable the EP to insist on more information and, if necessary, participation rights in the decision-making procedures set up for similar instruments such as vaccine procurement, SURE and NGEU in the future, as the German Bundestag has successfully done. The EP has shown with other decisions during the Covid-19 pandemic that it can implement important legislative or budgetary procedures within a few days by means of emergency procedures. Moreover, in all three cases, longer-term instruments were created where more parliamentary involvement would have been justified: Even if the decision-making processes had been prolonged by a few days as a result, the gain in democratic legitimacy would have outweighed this.

At the same time, one should include in these considerations the question of whether the EU needs a legally defined state of emergency or crisis, as found in many national constitutions. The aim of these regulations in national constitutions is to grant special powers to the executive (and in federal systems to the federal level) so that a rapid and comprehensive crisis response can take place. As a rule, this state of crisis or emergency must be declared by parliament and be limited in duration in order to minimise the risk of an abuse of power and to ensure democratic legitimacy; the actions of the executive remain subject to judicial control. Similarly, in an amendment of Article 122 TFEU, the possibility should be created for the EU to declare a state of emergency – with the consent of the Council and the Parliament – and to transfer special competences to the European Council and/or the EU Commission for a limited period of time. The EP would at least be involved in declaring and defining the state of emergency, while the Union's capacity to act in an emergency situation would also be increased.

Even beyond a treaty change, which is neither guaranteed nor likely to be adopted in the near future, the EU should improve its crisis governance under the Lisbon Treaty. In terms of capacity to act and output legitimacy, one appealing factor of Article 122 TFEU has been the use of majority voting. The

extension of majority voting currently being negotiated in the EU – for example on sanctions in foreign and security policy – can and should therefore also serve to increase the Union's capacity to act beyond Article 122 TFEU.<sup>97</sup> A further lesson from this analysis is that when introducing new instruments for crisis response, combining them with lengthy national ratification measures should be avoided. After all, although the need to obtain national guarantees delayed the launch of SURE by a few months, it was half a year for NGEU. Such delays devalue almost every crisis instrument.

A key measure that requires a change of political culture rather than treaties is the radical expansion of transparency – both for decision-making processes as well as implementation. Unlike in the euro crisis, for example, all three of these new crisis instruments were decided within the framework of standard EU legislative procedures and have thus benefited from the rules for participation of the various institutions. At the same time, they clearly demonstrate the shortcomings in transparency: the non-public nature of the votes and evolution of the negotiated texts in the Council (except for very specific legislative procedures), the non-transparency of the trilogue procedure (in the case of NGEU) and, above all, the lack of transparency of the EU Commission when – as in the case of vaccine procurement or planned gas purchases – it handles critical purchases for the EU member states. Here, transparency should not only be given to the national governments, but also to the EP, with as high a level of confidentiality as necessary, in order to ensure parliamentary control. For the public, there should be clear and detailed transparency on how EU money is being spent, for example on the major recipients of NGEU. This would also contribute towards the fight corruption.

Last but not least, an EU that assumes more responsibility in crisis situations should also assign this political responsibility. This applies to the European Council and its members when they have to take a decision by consensus and present it to the public in their respective countries. But it also applies to the EU Commission and its President; if the Commission carries out additional (critical) tasks for the entire EU

<sup>97</sup> See Julina Mintel and Nicolai von Ondarza, *More EU Decisions by Qualified Majority Voting – but How? Legal and Political Options for Extending Qualified Majority Voting*, SWP Comment 61/2022 (Berlin: Stiftung Wissenschaft und Politik, October 2022).

during crises, it must also be politically accountable to the EP for mistakes. If this form of political accountability were to be established, the EU would already have gained much in democratic legitimacy.

## Abbreviations

EFSF	European Financial Stability Facility
EFSM	European Financial Stabilisation Mechanism
EP	European Parliament
ERatG	Own Resources Resolution Ratification Act ("Eigenmittelbeschluss-Ratifizierungsgesetz")
ESM	European Stability Mechanism
EU	European Union
EUZBBG	Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union ("Gesetz über die Zusammenarbeit von Bundes- regierung und Deutschem Bundestag in Ange- legenheiten der Europäischen Union")
GDP	Gross Domestic Product
MEP	Member of the European Parliament
MFJ	Multiannual Financial Framework
NGEU	Next Generation EU
OLAF	European Anti-Fraud Office
SURE	European instrument for temporary Support to Mitigate Unemployment Risks in an Emergency
TFEU	Treaty on the Functioning of the European Union

