



The EU Decision-Making Process during the Covid-19 Pandemic

An Analysis in light of the Principle of Legality's Requirement of Transparency

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I. List of abbreviations

Article / Articles	Art / Arts
Charter of Fundamental Rights of the European Union	Charter
Commission Decision (EU) 2024/3080 establishing the Rules of Procedure of the Commission and amending Decision C(2000) 3614 [2024] OJ L 3080	Commission RoP
Committee of Permanent Representatives in the European Union	COREPER
Council Decision adopting the Council's Rules of Procedure [2009] OJ L 325/35	Council RoP
Council of the European Union	Council
Council Regulation (EU) 2016/369 on the provision of emergency support within the Union [2016] OJ L 70/1	Emergency Support Regulation
Court of Justice of the European Union	CJEU
C-39/05 P and C-52/05 P <i>Sweden and Turco v Council</i> [2008] EU:C:2007:721	<i>Turco</i>
C-280/11 P <i>Council of the European Union v Access Info Europe</i> [2013] EU:C:2013:671	<i>Access Info Europe</i>
C-57/16 P <i>ClientEarth v Commission</i> [2018] EU:C:2018:660	<i>ClientEarth</i>
European Commission	Commission
European Parliament	EP
European Parliament's Rules of Procedure	EP RoP
European Union	EU
European Union Recovery Instrument	EURI
Interinstitutional Agreement	IIA
Multiannual Financial Framework	MFF
NextGenerationEU fund	NGEU
Ordinary Legislative Procedure	OLP
Own Resources Decision	ORD
Paragraph(s)	Para(s)
Recovery and Resilience Facility	RRF

Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43	Access Regulation
Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433/1	Regulation 2020/2092
Rules of Procedure	RoP
Treaty of Nice amending the Treaty on European Union, The Treaties establishing the European Communities and certain Related Acts [2001] OJ C 80/1	TEC
Treaty on the European Union	TEU
Treaty on the Functioning of the European Union	TFEU
T-540/15 <i>De Capitani v European Parliament</i> [2018] EU:T:2018:167	<i>De Capitani</i>
T-163/21 <i>De Capitani v Council of the European Union</i> [2023] EU:T:2023:15	<i>De Capitani v Council</i>
T-689/21 <i>Auken and Others v Commission</i> [2024] EU:T:2024:476	<i>Auken</i>
T-761/21 <i>Courtois and Others v Commission</i> [2024] EU:T:2024:477	<i>Courtois</i>
T-36/23 <i>Stevi and the New York Times v Commission</i> [2025] EU:T:2025:483	<i>Pfizergate</i>
Working documents	WK documents

II. Introduction

The European Union (EU) has experienced a series of crises that put to the test the safeguards of its foundational values including the Rule of Law, in particular because crises expect a quick and effective response from the EU institutions. Among others, the Covid-19 pandemic still has repercussions on the functioning of the EU.

This thesis investigates the EU institutions' response to the Covid-19 pandemic, zooming into the EU decision-making process from a value-oriented perspective and focusing on the principle of legality, one of the six core elements of the EU's Rule of Law. The principle of legality requires a transparent and accountable EU decision-making process. Therefore, the main research question of this thesis is the following: How to reconcile the EU institutions' decision-making process during the Covid-19 pandemic with the principle of legality – a core element of the EU's Rule of Law – requiring a transparent EU decision-making process?

The main objectives of this thesis are, first, to evaluate the consequences of the Covid-19 pandemic on the transparency level of the EU decision-making process and, second, to illustrate the difference between the EU institutions' approach and the letter of the Treaties, in light of the principle of legality which, amongst others, demands a transparent EU decision-making process.

A. Structure

I answer the main research question of this thesis by analyzing three research sub-questions in three corresponding Chapters. Chapter 1 describes what the principle of legality is. The definition of the EU's Rule of Law is dissected (1.1.) to then look into the principle of legality requiring a transparent and accountable EU decision-making process (1.2.). Section 1.3. focuses on the transparency of the EU decision-making process. Lastly, Section 1.4. explores the EU's competences in the public health sector. Chapter 1 argues that transparency is an essential characteristic of the EU decision-making process.

Chapter 2 investigates the EU decision-making process during the Covid-19 pandemic answering the following research sub-question: To what extent were the changes to the decision-making process of the European Commission (Commission) (2.1.), the Council of the European Union (Council) (2.2.) and the European Parliament (EP) (2.3.) made during the Covid-19 pandemic compatible with the principle of legality's requirement of a transparent EU decision-making process? This Chapter argues that the Commission risks circumventing the principle of legality by adopting soft law; that the use of the written procedure by the Council decreases its legislative transparency; and that it is difficult to argue that the EP must be excluded from the EU decision-making process during crises.

Chapter 3 addresses two examples of EU decision-making during the Covid-19 pandemic, namely the joint vaccine procurement by the Commission (3.1.) and the creation of the NextGenerationEU fund (3.2.). In particular, Chapter 3 examines how to reconcile these two examples with the principle of legality requiring a transparent EU decision-making process. It concludes that the decision-making process for the creation of the NextGenerationEU fund is easier to reconcile with the principle of legality's requirement of a transparent EU decision-making process than the Commission's joint vaccine procurement.

Both examples were adopted through the decision-making procedure of Article 122 Treaty on the Functioning of the European Union (TFEU), a decision-making procedure that was frequently used during the Covid-19 pandemic to provide a quick and effective response to the Covid-related concerns.

Lastly, Chapter 4 issues a recommendation on how to minimize the transparency gap of the decision-making procedure of Article 122 TFEU. The transparency gap of the Article 122 TFEU decision-making procedure is the consequence of the fact that the Commission makes the legislative proposal, the Council approves it by qualified majority, but the EP plays no role and therefore cannot guarantee transparency in this procedure. This Chapter recommends to minimize the transparency gap of the Article 122 TFEU decision-making procedure by changing the practice of the Council and of the Commission when they use such procedure to introduce decision-making power for the EP in this procedure without requiring amendments to the Treaties.

B. Methodology

The present thesis is a combination of evaluative research and normative research. Evaluative research aims to evaluate whether a certain legal construct is in line with a legal norm¹. My research applies this methodology since I evaluate whether the EU institutions' decision-making process during the Covid-19 pandemic in general and more specifically for the creation of the NextGenerationEU fund and the Commission's joint vaccine procurement was in line with the principle of legality's requirement of a transparent EU decision-making process.

The evaluative analysis concludes that the EU decision-making procedure during the Covid-19 pandemic embodied in Article 122 TFEU is not transparent within the meaning

¹ Lina Kestermont, *Handbook on Legal Methodology: From Objective to Method* (1st ed, Intersentia 2018), 17.

of the principle of legality, since the EP plays no role in this procedure and thus cannot represent the EU citizens nor guarantee legislative transparency.

Therefore, Chapter 4 makes a recommendation on how to minimize the transparency gap of the decision-making procedure of Article 122 TFEU². To this purpose, I carried out normative research aiming to make recommendations on how the legal construct should be³.

During the writing of this thesis, I used the following Artificial-Intelligence tools: DeepL Translate and Google Translate. These tools were used for translations of sentences and words from Dutch to English and vice versa, and for spelling and grammar checks.

III. Chapter 1 - Theoretical Framework

Chapter 1 answers the first research sub-question: What is the principle of legality – a core element of the EU's Rule of Law – requiring a transparent (and accountable) EU decision-making process? First, Chapter 1 provides a definition of the EU's Rule of Law for the purposes of this thesis (1.1.). Second, it describes the benchmarks of analysis, i.e. the principle of legality (1.2.) and the transparency of the EU decision-making process (1.3.). Lastly, this Chapter describes the EU's competences in the public health sector, providing the legal framework for the EU decision-making process during the Covid-19 pandemic (1.4.).

A. EU's Rule of Law

The EU's Rule of Law, on which the EU legal order is based⁴, is defined in Article 2(a) of Regulation 2020/2092⁵:

[T]he rule of law refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.' (emphasis added)

² Ibid., 18.

³ Ibid., 17 and 63.

⁴ 294/83 *Les Verts v European Parliament* [1986] ECR 1986-01339, para 23.

⁵ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433/1 [Regulation 2020/2092].

It follows that the principle of legality is a core element of the EU's Rule of Law calling for a transparent, accountable, democratic and pluralistic EU decision-making process.

Article 2(a) of Regulation 2020/2092 crystalizes that the Rule of Law is a foundational value of the EU, enshrined in Article 2 of the Treaty on the European Union (TEU)⁶. Therefore, the Rule of Law is a part of the identity of the EU legal order⁷.

In addition, Article 2(a) of Regulation 2020/2092 embodies the six core principles defining the EU's Rule of Law: the principle of legality; the principle of legal certainty; the principle of prohibition of arbitrariness of the executive powers; the principle of effective judicial protection; the principle of separation of powers; and the principle of equality before the law⁸.

To the purposes of this thesis, Section 1.2. elaborates on the principle of legality as the first benchmark of analysis.

B. Principle of Legality

In its resolution of 2007, the EP emphasized that the actions of the EU institutions always need to be in conformity with the principle of legality⁹. This means that the EU institutions can only act in a certain field of law when there is a legal basis in the Treaties that makes them competent to act in that field of law, and if they exercise their competence within its limits¹⁰. The requirement of a legal basis in the Treaties that designates the EU institutions as actors is further enshrined in the principle of conferral, clarifying that the EU institutions only have conferred competences¹¹.

⁶ Laurent Pech & Joelle Grogan, 'The crystallization of a core EU meaning of the rule of law and its (limited) normative influence beyond the EU' (*Reconnect*, 22 April 2021) <<https://reconnect-europe.eu/wp-content/uploads/2021/04/D7.3.pdf>> accessed 12 November 2024, 60.

⁷ C-156/21 *Hungary v Parliament and Council* [2022] EU:C:2022:97, para 127; C-157/21 *Poland v Parliament and Council* [2022] EU:C:2022:98, para 145.

⁸ Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 HJRL 107, 112.

⁹ European Parliament Resolution 2007/2028 on institutional and legal implications of the use of "soft law" instruments [2007] OJ C 187E/75, I.

¹⁰ *Ibid.*

¹¹ Art 5(1)-(2) TEU.

The definition of the EU's Rule of Law outlined above clarifies that the principle of legality requires a *transparent* and *accountable* EU decision-making process¹². In turn, transparency and accountability are necessary for a democracy based on the Rule of Law¹³.

Transparency entails that the EU citizens can have access to information about the decision-making process, the content of the decisions as well as the decision-makers¹⁴. Otherwise, the EU citizens cannot hold the decision-makers accountable¹⁵. Hence, transparency is a prerequisite for accountability¹⁶.

The anchors for transparency in the Treaties are laid down in the articles on the principle of democracy. According to Article 10(3) TEU: '*Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.*' (*emphasis added*)

It follows that the principle of transparency is based on the principle of openness¹⁷. The principle of openness is a wider principle composed of transparency and participation, which ensures that decisions are made by legitimate and democratic institutions that are accountable to the EU citizens¹⁸.

¹² See marginal 10.

¹³ Roberta Panizza, 'Transparency, integrity and accountability in the EU institutions' (*Policy Department for Citizens' Rights and Constitutional Affairs: European Parliament*, March 2019) <[www.europarl.europa.eu/RegData/etudes/BRIE/2019/608873/IPOL_BRI\(2019\)608873_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/608873/IPOL_BRI(2019)608873_EN.pdf)> accessed 4 December 2024, 1.

¹⁴ Joelle Grogan, 'Extraordinary or extralegal responses? The rule of law and the COVID-19 crisis' (*re:constitution Democracy Reporting International*, May 2021) <<https://democracyreporting.s3.eu-central-1.amazonaws.com/images/3168Extraordinary%20or%20extralegal%20responses%20%20The%20rule%20of%20law%20and%20the%20COVID-19%20crisis.pdf>> accessed 11 November 2024, 28; Francesco Luigi Gatta, 'Migration and Rule of (Human Rights) Law in the EU: A "Constitutional" Crisis' (*re:constitution Forum Transregionale Studien*, March 2022) <www.forum-transregionale-studien.de/fileadmin/bilder/re_constitution/Neuigkeiten/FINAL_DOI_____Working_Paper_03-2022_Gatta.pdf> accessed 6 November 2024, 7.

¹⁵ Panizza, 'Transparency, integrity and accountability in the EU institutions' (n13) 1.

¹⁶ Vivien Schmidt, 'Democracy and legitimacy in the European Union Revisited: Input, Output and 'Throughput' (2013) 61(1) *Political Studies* 2, 6.

¹⁷ Stéphanie Novak, 'Barriers to Implementing Transparency in EU Institutions' (2023) 2 *Revue Action Publique, Recherche et Pratiques* 49, 49. See also Art 1, second para TEU.

¹⁸ C-157/21 *Poland v Parliament and Council* [2022] EU:C:2022:98, para 52; Alberto Alemanno, 'le principe d'ouverture en droit européen: d'un instrument de lutte contre l'opacité institutionnelle à un outil de démocratie participative' (2012) 4 *Revue du Droit de l'Union Européenne* 627, 627 and 629-630.

Article 11 TEU embodies the participation component of the principle of openness, namely the right of EU citizens to participate in the EU's democracy as enshrined in Article 10(3) TEU¹⁹. An instrument bringing this right into practice is the transparency register²⁰. Via this register, the EU citizens can acquire information about the decision-makers and the decision-making process²¹. In addition, Article 11(4) TEU encapsulates the citizens' initiative, a tool for the EU citizens to invite the Commission to initiate the legislative process²².

The principle of legality also requires that the EU decision-making process is accountable. The EU citizens or their representatives in the EP must be able to hold the EU institutions accountable for their decisions (political accountability)²³. In the EU, most decisions are taken by the EP and the Council as co-legislators and proposed by the Commission²⁴. The Commission is accountable to the EP through the discharge procedure²⁵ and the power of the EP to dismiss the Commission with a motion of censure²⁶. The EP is accountable to the EU citizens as it is directly elected by them²⁷. There are little possibilities to hold the Council to account for its decisions²⁸.

Likewise, the acts of the EU decision-makers must be subject to review by independent judges (judicial accountability)²⁹. This illustrates the link between the principle of legality and the principle of effective judicial protection as core elements of the EU's Rule of Law.

Finally, legitimacy can be subdivided into input, throughput and output legitimacy³⁰. Input legitimacy is a synonym for a representative democracy enshrined in Article 10 TEU,

¹⁹ Alemanno, 'le principe d'ouverture en droit européen' (n18) 638-639.

²⁰ *Ibid.*, 640. See also Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register [2021] OJ L 207/1.

²¹ Alemanno, 'le principe d'ouverture en droit européen' (n18) 640.

²² *Ibid.*, 641.

²³ Yannis Papadopoulos, 'Political accountability in EU multi-level governance: the glass half-full' (Swedish Institute for European Policy Studies, October 2021) <www.sieps.se/globalassets/publikationer/2021/sieps_2021_4.pdf> accessed 7 February 2025, 8.

²⁴ Art 294 TFEU. See also marginal 22.

²⁵ Art 319 TFEU; Rule 101 European Parliament's Rules of Procedure of the 10th parliamentary term [2024] <www.europarl.europa.eu/rules/rules20240716/Rules20240716_EN.pdf> [EP RoP].

²⁶ Arts 17(8) TEU and 234 TFEU, and Rule 131 EP RoP; Panizza, 'Transparency, integrity and accountability in the EU institutions' (n13) 1.

²⁷ Panizza, 'Transparency, integrity and accountability in the EU institutions' (n13) 1.

²⁸ Vivien Schmidt & Matthew Wood, 'Conceptualizing throughput legitimacy: Procedural mechanisms of accountability, transparency, inclusiveness and openness in EU governance' (2019) 97(4) Public Administration 727, 731.

²⁹ Caterina Molinari, 'The EU and its perilous journey through the migration crisis: informalization of the EU return policy and rule of law concerns' (2019) 44(6) European Law Review 824, 828.

³⁰ Schmidt, 'Democracy and legitimacy in the European Union Revisited' (n16) 9-10.

requiring that decisions answer to the needs of the EU citizens voiced by the EP³¹. Therefore, it is participation-oriented³². Throughput legitimacy reviews the quality of the decision-making process based on the principle of legality, namely by analyzing how transparent the decisions are made, how accountable the decision-makers are, and how inclusive the decision-making process is to the EU citizens³³. Lastly, output legitimacy looks into the effectiveness of the decision-making³⁴.

To conclude: Section 1.2. analyzed the principle of legality. First, the EU institutions should have a legal basis in the Treaties making them competent to act in the relevant field of law. Second, the principle of legality requires a transparent EU decision-making process, entailing that the EU citizens can acquire information about the EU decision-making process. The anchors for transparency are embodied in Articles 10(3) and 11 TEU. Lastly, an accountable EU decision-making process should be foreseen, allowing the EU citizens and judges to hold the EU decision-makers to account.

Section 1.3. describes the transparency requirement of the principle of legality for the EU decision-making process, aimed at enabling a comparison with the transparency level of the EU decision-making process during the Covid-19 pandemic and essential to answer the research sub-question of Chapter 2: To what extent were the changes made during the Covid-19 pandemic to the decision-making process of the EU institutions compatible with the principle of legality's requirement of a transparent EU decision-making process?

C. Transparency of the EU Decision-making Process

Section 1.3. investigates the second benchmark of this thesis: the transparency of the EU decision-making process. First, the ordinary legislative procedure (OLP) is dissected; second, Article 15 TFEU is investigated, describing the transparency requirements of the EU decision-making process.

1. Ordinary Legislative Procedure

The OLP is the main legislative procedure for the adoption of EU legislation provided for in Articles 289 and 294 TFEU. The OLP starts when the Commission submits a legislative

³¹ Nicolai von Ondarza, 'The Crisis Governance of the European Union: More responsibility requires more democratic legitimacy' (2023) SWP Research paper RP 10, 9; Schmidt & Wood, 'Conceptualizing throughput legitimacy' (n28) 728.

³² Schmidt, 'Democracy and legitimacy in the European Union Revisited' (n16) 5.

³³ Nicolai von Ondarza, 'The Crisis Governance of the European Union' (n31) 10-11; Schmidt & Wood, 'Conceptualizing throughput legitimacy' (n28) 728 and 730.

³⁴ Schmidt & Wood, 'Conceptualizing throughput legitimacy' (n28) 728.

proposal to the EP and the Council³⁵. The EP provides its position on the Commission's proposal to the Council³⁶. This is a guarantee for the transparency of the EU decision-making process, because the EP is the first to provide its position on the legislative proposal³⁷. Subsequently, the Council may decide to approve the EP's position by which the legislative act is adopted based on the EP's position³⁸. If instead the Council does not approve the EP's position, it adopts its own position and provides it to the EP³⁹.

In the second reading, the EP approves, amends or rejects the Council's position⁴⁰. If approved, the legislative act is adopted, if rejected or amended, the legislative act is not adopted⁴¹.

In case the Council does not approve all amendments by the EP, a Conciliation Committee is convened, tasked with providing a joint text⁴². The EP and the Council must approve the act

in the light of that joint text⁴³. The Council cannot adopt acts without the EP's approval in this stage of the OLP, representing an additional transparency safeguard in the OLP⁴⁴. Nevertheless, the Conciliation Committee writes the joint text behind closed doors, making it difficult for the EU citizens to know what is going on during the meetings of the Conciliation Committee⁴⁵.

However, the OLP guarantees that the EU citizens (the EP), the Member States (the Council) and the EU's general interest (the Commission) are represented during the legislative negotiations⁴⁶.

³⁵ Arts 17(2) TEU and 294(2) TFEU; Koen Lenaerts, Piet Van Nuffel & Tim Corthaut, *EU Constitutional Law* (1st ed, OUP 2022), marginal 17.021. Before providing a legislative proposal, the Commission may carry out an impact assessment elaborated on in European Union, 'How EU policy is decided' (*European Union*, s.d.) <https://european-union.europa.eu/institutions-law-budget/law/how-eu-policy-decided_en#:~:text=EU%20decision%2Dmaking%20process,representing%20the%20EU's%20overall%20interests> accessed 4 December 2024.

³⁶ Art 294(3) TFEU.

³⁷ Lenaerts, Van Nuffel & Corthaut (n35) marginal 17.021.

³⁸ Art 294(4) TFEU.

³⁹ Art 294(5) TFEU.

⁴⁰ Art 294(7) TFEU.

⁴¹ Art 294(7) TFEU.

⁴² Art 294(10) TFEU.

⁴³ Art 294(13) TFEU.

⁴⁴ Lenaerts, Van Nuffel & Corthaut (n35) marginal 17. 029.

⁴⁵ Myriam Augustinus, 'Het spanningsveld tussen openbaarheid en onafhankelijkheid in de besluitvorming van de instellingen van de Europese Unie' (Thesis, KUL 2013-2014), 10 and 19-20.

⁴⁶ European Union, 'How EU policy is decided' (n35).

When the Council looks into the legislative proposal of the Commission, the proposal goes through the preparatory bodies of the Council⁴⁷. First, it passes through the relevant working party⁴⁸. Second, the results of the negotiations in that working party pass on to the Committee of Permanent Representatives in the European Union (COREPER)⁴⁹. Proposals which reach no agreement at working party or COREPER level or that are politically sensitive advance to the Council's ministerial level⁵⁰.

Finally, during the OLP the EU institutions can organize 'trilogues'⁵¹. Trilogues are an established practice in the EU decision-making process and are recognized as a decisive phase of that process⁵². They are informal confidential meetings on legislative proposals between the representatives of the Commission, the Council and the EP, that can be organized at any stage of the OLP and aim at resulting in an informal agreement⁵³. Thus, trilogues solve the shortcoming of the OLP, which only provides direct negotiations between the EU institutions in its third stage⁵⁴. Instead, direct negotiations can take place during or between earlier stages of the OLP with trilogues, hence resulting in faster adoption of the legislation⁵⁵. Nevertheless, there are no reports on the trilogue negotiations⁵⁶. That being so, the EU citizens do not know how the informal agreement was reached⁵⁷. Additionally, only a few representatives of the EU institutions are present

⁴⁷ Ondrej Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (2024) 25(5) European Politics and Society 745, 746.

⁴⁸ *Ibid.*

⁴⁹ Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (n47) 746; Sophia Russack & Drew Fenner, 'Crisis decision-making: How Covid-19 has changed the working methods of the EU institutions' (2020) 17 CEPS Policy Insight, 6.

⁵⁰ Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (n47) 747.

⁵¹ Council of the European Union, 'The ordinary legislative procedure' (*Council of the European Union*, s.d.) <www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/> accessed 1 February 2025.

⁵² T-540/15 *De Capitani v European Parliament* [2018] EU:T:2018:167, para 70 [**De Capitani**]. See also Rule 75 EP RoP and C-409/13 *Council v Commission* [2015] EU:C:2015:217, paras 18-26.

⁵³ *De Capitani* (n52) para 68; Anaïs Berthier, 'Transparency in EU law-making' (2016) 17(4) ERA Forum 423, 431; Novak, 'Barriers to Implementing Transparency in EU Institutions' (n17) 54.

⁵⁴ Lenaerts, Van Nuffel & Corthaut (n35) marginal 17.020.

⁵⁵ *De Capitani* (n52) para 68; Piet Van Nuffel, 'The European Union Co-Legislator in Action: Some Thoughts on Trilogues, Transparency and the Trias Politica' in *Semper perseverans. Liber amicorum André Alen* (1st ed, Intersentia 2020), 10; Päivi Leino-Sandberg & Deirdre Curtin, 'In search of transparency for EU law-making: trilogues on the cusp of dawn' (2017) 54(6) Common Market Law Review 1673, 1681.

⁵⁶ Päivi Leino-Sandberg, 'Transparency and Trilogues: Real Legislative Work for Grown-Ups?' (2023) 14(2) European Journal of Risk Regulation 271, 276.

⁵⁷ Leino-Sandberg, 'Transparency and Trilogues' (n56) 290; EU Monitor, 'Transparantie van de Europese Unie' (*EU Monitor*, s.d.) <www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7doulm2bwl> accessed 17 February 2025.

during the trilogue negotiations, resulting in an incorrect representation of the EU institutions during these negotiations⁵⁸.

In practice, trilogues are often used by the EU institutions in the EU decision-making process

- despite their commitment to guarantee transparency in the OLP⁵⁹ - resulting in the EU legislation not going through the formal stages of the OLP⁶⁰.

2. Article 15 TFEU and the Access Regulation

The present section describes the transparency safeguards in the EU decision-making process provided for by Article 15 TFEU and by Regulation No 1049/2001 (Access Regulation)⁶¹.

(a) Article 15(1) TFEU

Article 15(1) TFEU obliges all EU institutions to conduct their work as openly as possible. Thus, this obligation does not only apply to the Council and the EP, the co-legislators of the OLP, but also to the Commission.

The Court of Justice of the European Union (CJEU) confirmed this understanding in *ClientEarth*, a case about the refusal of the Commission to provide access to impact assessment reports⁶². The CJEU emphasized in this case that the Commission is a key player in the EU decision-making process as the legislative initiator and therefore it must guarantee transparency when it is exercising its legislative function⁶³. It follows that the Commission cannot refuse access to impact assessment reports - because when carrying out those assessments - the Commission acts as the legislative initiator of the EU decision-making procedure⁶⁴. *ClientEarth* illustrates that legislative transparency is essential even

⁵⁸ Leino-Sandberg, 'Transparency and Trilogues' (n56) 271; Augustinus, 'Het spanningsveld tussen openbaarheid en onafhankelijkheid in de besluitvorming van de instellingen van de Europese Unie' (n45) 45.

⁵⁹ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L 123/1, para 38.

⁶⁰ Leino-Sandberg, 'Transparency and Trilogues' (n56) 277; Russack & Fenner, 'Crisis decision-making' (n49) I.

⁶¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43 [**Access Regulation**].

⁶² C-57/16 P *ClientEarth v Commission* [2018] EU:C:2018:660, paras 10-11 [**ClientEarth**].

⁶³ *Ibid.*, paras 88 and 108.

⁶⁴ *ClientEarth* (n62) para 94; Maarten Hillebrandt & Päivi Leino-Sandberg, 'Administrative and Judicial Oversight of Trilogues' (2021) 28(1) Journal of European Public Policy 53, 63.

in the beginning of the EU decision-making procedure⁶⁵. The EU citizens must have timely access to these documents to influence the EU decision-making process when it is still ongoing⁶⁶.

(b) Article 15(2) TFEU

According to Article 15(2) TFEU, the EP and the Council need to meet in public when discussing or voting on a draft legislative act⁶⁷. The meetings of the Council and the EP are open to the EU citizens, that may look at the agenda of the meetings, the minutes, the voting results and the statements made by the Member States (when in the Council)⁶⁸. The EU citizens can also attend the plenary meetings of the EP and the meetings of the EP's committees (the preparatory bodies of the EP), if they have permission of the EP to do so⁶⁹. In contrast, the meetings of the working parties and the COREPER, the preparatory bodies of the Council, are not open to the EU citizens⁷⁰.

(c) Article 15(3) TFEU

Article 15(3) TFEU enshrines the EU citizens' right of access to documents of the EU institutions; requires the EU institutions to guarantee that their procedures are transparent and to regulate in their Rules of Procedure (RoP) on the right of access to their documents; and obliges the EU legislators to publish legislative documents. The right of access to documents is recognized as a fundamental right in Article 42 of the Charter of Fundamental Rights of the European Union (Charter) and set out by the Access Regulation. Therefore, Article 15(3) TFEU provides the legal skeleton to guarantee transparency in the EU decision-making process⁷¹.

⁶⁵ *ClientEarth* (n62) para 92; Laurens Ankersmit, 'Case C-57/16P ClientEarth v Commission: Citizen's participation in EU decision-making and the Commission's right of initiative' (*European Law Blog*, 22 October 2018) <www.europeanlawblog.eu/pub/case-c-57-16p-clientearth-v-commission-citizens-participation-in-eu-decision-making-and-the-commissions-right-of-initiative/release/1> accessed 4 February 2025.

⁶⁶ *ClientEarth* (n62) paras 84 and 92; Daniel Wyatt, 'Is the Commission a "lawmaker"? On the right of initiative, institutional transparency and public participation in decision-making: ClientEarth' (2019) 56(3) *Common Market Law Review* 825, 834. The inclusion of impact assessments in the right of access to documents is also confirmed by Art 63 Commission Decision (EU) 2024/3080 establishing the Rules of Procedure of the Commission and amending Decision C(2000) 3614 [2024] OJ L 3080 [**Commission RoP**].

⁶⁷ See for the Council Art 16(8) TEU and Art 7 Council Decision adopting the Council's Rules of Procedure [2009] OJ L 325/35 [**Council RoP**].

⁶⁸ Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (n47) 746.

⁶⁹ Rule 124(3) EP RoP; Panizza, 'Transparency, integrity and accountability in the EU institutions' (n13) 3; Augustinus, 'Het spanningsveld tussen openbaarheid en onafhankelijkheid in de besluitvorming van de instellingen van de Europese Unie' (n45) 9.

⁷⁰ Panizza, 'Transparency, integrity and accountability in the EU institutions' (n13) 4; Jarne De Geyter, 'Conditionaliteit in het Licht van het Uniebudget' (Thesis, Ghent University 2021-2022), 49.

⁷¹ Alemanno, 'le principe d'ouverture en droit européen' (n18) 634.

The Access Regulation envisages the widest possible right of access to documents of the EU institutions for the EU citizens⁷². Moreover, this Regulation recognizes the importance of legislative documents by indicating that legislative documents should be *automatically* accessible for the public⁷³.

Nevertheless, the Access Regulation describes exceptions to the right of access to documents⁷⁴. An often-used exception by the EU institutions is the 'space to think' exception provided for in Article 4(3), first subparagraph of the Access Regulation⁷⁵. Providing a 'space to think' to the EU institutions is essential, because imposing too much transparency obligations on the EU institutions will result in the EU institutions resorting to more informality when negotiating, not allowing the EU citizens to scrutinize the EU decision-making process and therefore reducing the input and throughput legitimacy of the EU decision-making process⁷⁶. Nevertheless, these exceptions must be interpreted restrictively as they derogate from the principle of the widest possible access to documents for the EU citizens⁷⁷.

The CJEU installs a high standard of transparency for legislative documents⁷⁸. In *Turco*, the CJEU clarified that access to legislative documents is a prerequisite so that the EU citizens can exercise their democratic rights efficiently⁷⁹. Thus, there is a direct link between the principle of the widest possible access to documents (or the principle of

⁷² Recital 4 and Art 1 Access Regulation; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] EU:C:2007:721, para 33 [**Turco**].

⁷³ See recital 6 and Art 12(2) Access Regulation; *Turco* (n72) para 46; C-280/11 P *Council of the European Union v Access Info Europe* [2013] EU:C:2013:671, Opinion of AG Cruz Villalon EU:C:2013:325, para 63; Anais Berthier, 'Transparency in EU law-making' (n53) 424.

⁷⁴ Recital 11 and Art 4 Access Regulation.

⁷⁵ Deals with the protection of the EU decision-making process in case that no decision has yet been provided by the EU institutions explained in Päivi Leino-Sandberg, 'Secrecy, Efficiency, Transparency in EU Negotiations: Conflicting Paradigms?' (2017) 5(3) *Politics and Governance* 6, 8.

⁷⁶ European Ombudsman, 'Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues' (*European Ombudsman*, 12 July 2016) <www.ombudsman.europa.eu/en/decision/en/69206> accessed 4 February 2025, paras 6, 29-31 and 69.

⁷⁷ *Turco* (n72) para 36; C-280/11 P *Council of the European Union v Access Info Europe* [2013] EU:C:2013:671, paras 30 and 35 [**Access Info Europe**]; *De Capitani* (n52) para 61; T-163/21 *De Capitani v Council of the European Union* [2023] EU:T:2023:15, para 68 [**De Capitani v Council**]. See also C-761/18 P *Leino-Sandberg v Parliament* [2021] EU:C:2021:52, paras 45-46 entailing that the EU institutions do not fulfil their obligation to disclose a document when the document has been released by a third party and the requesting EU citizen accessed the document accordingly.

⁷⁸ Leino-Sandberg, 'Transparency and Trilogues' (n56) 272.

⁷⁹ *Turco* (n72) para 46.

transparency) and the principle of democracy⁸⁰. The EU citizens must be able to follow the EU decision-making process through all its stages, including the informal ones⁸¹.

In *Access Info Europe*, the CJEU established a high threshold for the EU institutions to rely on the exceptions to the right of access to their documents⁸². In addition, the individual positions of the Member States on the legislative document need to be accessible⁸³.

To conclude: Section 1.3. described the OLP and the legislative transparency safeguards provided for in Article 15 TFEU.

The OLP consists of three formal stages and foresees transparency safeguards throughout these stages. Nonetheless, in practice, decisions are often developed in trilogue negotiations, informal negotiations between the EU institutions that are not open to the EU citizens.

Article 15 TFEU holds that all EU institutions need to carry out their work as openly as possible, including the Commission as confirmed in the *ClientEarth* case; that the EU legislators must meet in public when voting or negotiating on a legislative proposal, clarifying that the preparatory bodies of the Council work behind closed doors; and that the EU citizens have a right of access to documents of the EU institutions.

The right of access to documents is further safeguarded by the Access Regulation, based on the principle of the widest possible access to documents for the EU citizens and including a right of *automatic* access to legislative documents.

Finally, the CJEU established a high level of legislative transparency and a high threshold for the EU institutions to utilize the exceptions to the right of access to documents.

D. Interim Conclusion

Sections 1.1. till 1.3. respectively looked into the EU's Rule of Law; the principle of legality; and the transparency of the EU decision-making process. Based on these three sections, Chapter 1 argues that transparency is an essential characteristic of the EU decision-making process. The pillars on which this argument is based are the following.

⁸⁰ *Ibid.*, paras 45-46.

⁸¹ Emanuele Rebasti, 'Return to De Capitani: The EU Legislative Process between Transparency and Effectiveness' (2021) 9(1) Politics and Governance 296, 297.

⁸² *Access Info Europe* (n77) paras 38-40; Leino-Sandberg, 'Secrecy, Efficiency, Transparency in EU Negotiations' (n75) 11.

⁸³ *Access Info Europe* (n77) para 63.

First, Section 1.1. established that the principle of legality is a core element of the EU's Rule of Law, which is one of the foundational values of the EU. Therefore, the requirement of a transparent EU decision-making process of the principle of legality is also a core element of the EU's Rule of Law. That being so, the absence of a transparent EU decision-making process may be incompatible with a foundational value of the EU.

Second, Section 1.2. clarified that the principle of legality also requires an accountable EU decision-making process. The decision-makers can only be held responsible for their decisions if it is clear who those decision-makers are. Hence, if there is no transparent EU decision-making process, there is also no accountable EU decision-making process, which may contrast with the foundational values of the EU.

Third, the OLP installs the EP as co-legislator and provides additional transparency safeguards.

Fourth, Article 15(1) TFEU obliges *all* EU institutions to be transparent when exercising their legislative functions. The *ClientEarth* case confirms that this obligation for the EU institutions applies from the beginning of the EU decision-making procedure so that the EU citizens can influence the EU decision-making process when it is still developing. Article 15(2) TFEU compels the EU legislators to meet in public when voting or negotiating on a draft legislative act. Article 15(3) TFEU and the Access Regulation foresee that the EU legislators need to *automatically* provide legislative documents to the EU citizens. Exceptions to the right of access to documents are to be interpreted narrowly because, in principle, the EU citizens have the widest possible right of access to documents.

Lastly, the CJEU established a high legislative transparency standard and a high threshold for the EU institutions to use the exceptions to the right of access to documents.

Section 1.5. elaborates on the EU's competences in the public health sector, providing a legal framework for the analysis of the EU decision-making procedure during the Covid-19 pandemic.

E. EU's Competences in the Public Health Sector

The present section describes the EU competences in the public health sector in the Treaties by looking at, first, the EU's supporting competence in the public health sector; second, Article 168 TFEU providing the EU's health policy; and third, Article 122 TFEU

including the decision-making procedure applied by the EU institutions during the Covid-19 pandemic.

Article 6(a) TFEU provides that the EU has a supporting competence in the public health sector. Consequently, the Member States are the ones in charge in the public health sector⁸⁴. The EU only complements the public health competence of the Member States⁸⁵. As exception to the rule enshrined in Article 6(a) TFEU, Article 4(2)(k) TFEU bestows the EU with a shared competence for *'common safety concerns in public health matters'*.

Article 168 TFEU encapsulates the EU's health policy⁸⁶. First, Article 168(1) TFEU provides for the mainstream obligation, implying that the EU is required to guarantee a *'high level of health protection'*⁸⁷. Second, Article 168(4) TFEU describes the public health matters for which the EU institutions can adopt binding EU measures via Article 4(2)(k) TFEU. Third, Article 168(5) TFEU clarifies the areas in which the EU institutions can adopt incentive measures that do not result in harmonization of the Member States' health regimes. Fourth, Article 168(7) TFEU requires the EU to respect the Member States' health policies. Lastly, Article 168 TFEU applies the OLP⁸⁸. Hence, the EP is involved as co-legislator.

Finally, the present section looks into the decision-making procedure of Article 122 TFEU. Article 122 TFEU is relevant to discuss as it was the legal basis for the EU institutions' actions during the Covid-19 pandemic analyzed in this thesis, namely the decision-making procedure for the creation of the NextGenerationEU fund (NGEU) and the Commission's joint vaccine procurement.

Article 122 TFEU:

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

⁸⁴ Council of the European Union, 'EU health policy' (*Council of the European Union*, s.d.) <www.consilium.europa.eu/en/policies/eu-health-policy/#:~:text=EU%20member%20states%20are%20responsible,the%20health%20of%20EU%20citizens> accessed 5 February 2025.

⁸⁵ *Ibid.*

⁸⁶ Attila Virag & Gergo Turi, 'The impact of the COVID-19 pandemic on the European Union's public health policy' (2021) 17(4) *Politics in Central Europe* 651, 655.

⁸⁷ Kai P. Purnhagen, Anniek De Ruijter, Mark L. Flear, Tamara K. Hervey & Alexia Herwig, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak' (2020) 11(2) *European Journal of Risk Regulation* 297, 303. See also Arts 9 TFEU and 35 Charter.

⁸⁸ Art 168(4)-(5) TFEU.

Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.' (emphasis added)

It follows that the Article 122 TFEU decision-making procedure has two main players: the Council and the Commission. It is the Commission that proposes and the Council that decides by qualified majority⁸⁹. The EP does not have a role in this decision-making process, being informed only. Therefore, the decision-making process of Article 122 TFEU is executive in nature, because the Commission is the EU's executive organ and is together with the Council in charge of this decision-making process⁹⁰. Moreover, the absence of a role for the EP in the decision-making process of Article 122 TFEU results in a less transparent decision-making process as the EP is the EU institution that represents the EU citizens in the EU decision-making process and thus guarantees legislative transparency. Hence, the Article 122 TFEU decision-making procedure does not guarantee input legitimacy. Additionally, the throughput legitimacy of the Article 122 TFEU decision-making procedure may be lower than that of the OLP, because this procedure does not install the EP as co-legislator nor provides transparency safeguards.

Article 122(2) TFEU can be relied upon in exceptional circumstances that are *force majeure* and is limited to times of crisis⁹¹. Therefore, it can only be used as a temporary legal basis to provide an answer to the specific crisis going on⁹². Article 122(1) TFEU has a wider scope of application because it can be used as a permanent legal basis for action, allowing the EU legislator to answer to long-term concerns⁹³.

⁸⁹ Merijn Chamon, 'The use of Article 122 TFEU: Institutional implications and impact on democratic accountability' (*Policy Department for Citizens' Rights and Constitutional Affairs: European Parliament*, September 2023) <[www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU\(2023\)753307_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU(2023)753307_EN.pdf)> accessed 5 February 2025, 21 and 24. See also Art 100 TEC mentioning that the Council decides by qualified majority.

⁹⁰ Bruno De Witte, 'Guest Editorial: EU emergency law and its impact on the EU legal order' (2022) 59(1) *Common Market Law Review* 3, 10.

⁹¹ Chamon, 'The use of Article 122 TFEU' (n89) 23.

⁹² C-370/12 *Pringle* [2012] EU:C:2012:756, para 65; Chamon, 'The use of Article 122 TFEU' (n89) 23.

⁹³ Chamon, 'The use of Article 122 TFEU' (n89) 6 and 19.

F. Conclusion

Chapter 1 dealt with the following research sub-question: What is the principle of legality – a core element of the EU's Rule of Law – requiring a transparent (and accountable) EU decision-making process?

According to the principle of legality, there should always be a legal basis in the Treaties conferring a competence on the EU institutions to act in a specific field of law. Moreover, the principle of legality requires a transparent and accountable EU decision-making process. The EU citizens must be able to acquire information about the decision-making process, the decisions and the decision-makers. The decision-makers must be accountable to the EU citizens, the EP and the judges. Lastly, input, throughput and output legitimacy were discussed, which are concepts important for Chapters 2 and 3.

Afterwards, Chapter 1 looked into the transparency of the EU decision-making process. First, the OLP has three formal stages and guarantees a level of legislative transparency by installing the EP as co-legislator and by providing additional transparency safeguards. Despite this, most decisions are taken through trilogues which are informal meetings among the EU institutions taking place behind closed doors. Second, Article 15 TFEU describes the transparency safeguards in the EU decision-making process. The right of access to documents enshrined in Article 15(3) TFEU finds concrete expression in the Access Regulation, providing the widest possible right of access to documents and a right of *automatic* access to legislative documents for the EU citizens.

Chapter 1 argues that transparency is an essential characteristic of the EU decision-making process. I base my argument on the following: the principle of legality, requiring a transparent and accountable EU decision-making process, is a core element of the EU's Rule of Law which is a foundational value of the EU; a transparent EU decision-making process is a prerequisite for an accountable EU decision-making process; in the OLP the EP is co-legislator and additional transparency safeguards are provided for; *all* EU institutions must be transparent when exercising their legislative function, also when the legislative process is in its first stages; the EU legislators need to meet in public when negotiating or voting on a draft legislative act; the Access Regulation is based on the principle of the widest possible access to documents and encapsulates a right of *automatic* access to legislative documents; exceptions to the right of access to documents need to be interpreted narrowly; and the CJEU established a high legislative transparency standard and a high threshold for the EU institutions to rely on the exceptions to the right of access to documents.

Finally, Chapter 1 clarified that the EU has a supporting competence in the public health sector with the exceptions of Articles 4(2)(k) and 168 TFEU. In addition, the decision-making procedure of Article 122 TFEU was discussed, a decision-making procedure

frequently used by the EU institutions during the Covid-19 pandemic (see Chapter 2), such as for the creation of NGEU and the Commission's joint vaccine procurement (see Chapter 3). In the decision-making procedure of Article 122 TFEU, the Commission makes the legislative proposal and the Council decides on it by qualified majority, but the EP plays no role and therefore cannot represent the EU citizens in this procedure.

Chapter 1 provided us with the two benchmarks of this thesis, the principle of legality and the transparency of the EU decision-making process, allowing us to proceed to the evaluation of the transparency in the EU decision-making process during the Covid-19 pandemic. Chapter 2 illustrates the difference between the EU institutions' approach to the Covid-19 pandemic and the letter of the Treaties, focusing on the principle of legality's requirement of a transparent EU decision-making process.

IV. Chapter 2 - EU Decision-Making Process during the Covid-19 Pandemic

On the basis of the following benchmarks: the principle of legality and the transparency of the EU decision-making process, Chapter 2 answers the following research sub-question: To what extent were the changes made during the Covid-19 pandemic to the decision-making process of the EU institutions compatible with the principle of legality's requirement of a transparent EU decision-making process? I will focus on the Commission, the Council and the EP.

A. European Commission

The Commission reacted to the Covid-19 pandemic by installing telecommunication and remote voting for its internal procedures⁹⁴. Nevertheless, the Commission mainly responded to the Covid-19 pandemic by adopting soft law. Soft law measures are '*rules of conduct having no legally binding force but producing legal and practical effects*'⁹⁵.

⁹⁴ Benjamin Bodson, 'Rethinking EU institutions' rules of procedure after COVID-19' (2020) 62 European Policy Brief, 1-2.

⁹⁵ Stefan Oana, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (2020) 5(1) European Papers 663, 663. Examples of soft law are recommendations, opinions and Commission communications (see Art 288(5) TFEU).

Soft law can adapt quickly to changing circumstances⁹⁶. Moreover, soft law does not go through the formal stages of the OLP, making it easier to adopt it⁹⁷. In addition, soft law often clarifies what binding legislation requires the EU citizens to do, contributing to the effectiveness of that legislation in the society⁹⁸. Therefore, soft law measures may contribute to output legitimacy.

However, soft law may not be in line with the principle of legality requiring a transparent EU decision-making process.

First, soft law is not adopted through the OLP⁹⁹. Therefore, there are no transparency safeguards in the procedure for the adoption of soft law for the EU citizens to exercise their right to contribute to the EU decision-making procedure¹⁰⁰. Moreover, the procedures for the adoption of soft law do not have a formal framework in the Treaties, hence not ensuring the involvement of the EP and the Council¹⁰¹. This results in weakened input and throughput legitimacy¹⁰². In addition, MOLINARI argues that the Commission does not act accountable when adopting soft law as the EU citizens (or their representatives) cannot control the adoption of soft law because there is no legal basis in the Treaties providing the procedure for the adoption of soft law¹⁰³. GARBEN also clarifies that it is not convincing to argue that the crisis situation justifies the indefinite use of soft law, as it would result in an indefinite use of untransparent decision-making procedures¹⁰⁴.

Second, it has been observed that soft law does not provide the EU citizen with effective judicial protection required by the EU's Rule of Law¹⁰⁵. Article 263 TFEU provides for judicial review of legally binding acts. However, soft law is not legally binding and therefore not subject to judicial review¹⁰⁶. UTRILLA and SHABBIR are of the opinion that the choice of the EU legislature to not subject soft law to judicial review because it is not

⁹⁶ *Ibid.*, 663.

⁹⁷ *Ibid.*, 663.

⁹⁸ Wolfgang Weiss, 'Pandemic and Administrative EU Soft Law: Persistent Challenges to the Rule of Law in the EU and Possible Solutions' (2022) 15(1) REA Law 7, 9.

⁹⁹ Oana, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate?' (n95) 663.

¹⁰⁰ Weiss, 'Pandemic and Administrative EU Soft Law' (n98) 9; Mariolina Elia Antonio & Stefan Oana, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12(1) European Journal of Risk Regulation 159, 159 and 169.

¹⁰¹ Weiss, 'Pandemic and Administrative EU Soft Law' (n98) 21; Elia Antonio & Oana, 'The Elusive Legitimacy of EU Soft Law' (n100) 159 and 169.

¹⁰² Weiss, 'Pandemic and Administrative EU Soft Law' (n98) 21.

¹⁰³ Molinari, 'The EU and its perilous journey through the migration crisis' (n29) 837. See also marginal 17.

¹⁰⁴ Sacha Garben, Inge Govaere & Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (1st ed, Hart Publishing 2019), 404.

¹⁰⁵ Arts 19(1), second subpara TEU and 47 Charter; Dolores Utrilla & Anjum Shabbir (eds), *EU Law in Times of Pandemic* (1st ed, EU Law Live Press 2020), 42.

¹⁰⁶ Utrilla & Shabbir (n105) 43.

legally binding is not justified¹⁰⁷. According to those authors, the fact that soft law has legal effects should justify subjecting it to judicial review¹⁰⁸. The absence of judicial review of soft law also results in a less accountable Commission, free to adopt soft law in whatever form and whenever without being held accountable for its mistakes¹⁰⁹. Nevertheless, this reasoning must be weighed against the fact that soft law can be challenged through the preliminary ruling procedure¹¹⁰.

Third, WEISS clarifies that the use of soft law by the EU institutions is common in areas of law where the EU only has a supporting competence, such as in the public health sector¹¹¹. Nonetheless, the EU can adopt measures in the public health sector while ensuring that both EU-legislators are involved in the decision-making process via Article 168(4)-(5) TFEU. In addition, Article 168 TFEU does not provide the Commission with the power to adopt soft law in the public health sector¹¹². Therefore, the Commission risks circumventing the principle of legality requiring a legal basis in the Treaties providing the Commission with a competence to act in that area of law¹¹³.

I deduce that the adoption of soft law by the Commission in an area of law where it does not have the competence in the Treaties to do so has consequences on the transparency of soft law, because then there are no transparency safeguards foreseen in the Treaties.

Fourth, the definition of soft law discussed above clarified that soft law has legal effects, but it is unclear what those legal effects are¹¹⁴. This unclarity is detrimental to the transparency of the EU decision-making process as the EU decision-making process requires that its results are transparent¹¹⁵.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* See also marginal 50 for the definition of soft law.

¹⁰⁹ Molinari, 'The EU and its perilous journey through the migration crisis' (n29) 836. See also marginal 17.

¹¹⁰ Art 267 TFEU; C-911/19 *FBF* [2021] EU:C:2021:599, para 57; Oana, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (n95) 666.

¹¹¹ Weiss, 'Pandemic and Administrative EU Soft Law' (n98) 19-20. See also marginal 37.

¹¹² *Ibid.*, 20.

¹¹³ *Ibid.*, 17. See also marginal 13.

¹¹⁴ Oana, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (n95) 663. See also marginal 50 for the definition of soft law.

¹¹⁵ See marginal 15.

Lastly, OANA claims that the effectiveness of soft law measures increases when the EU citizens can participate in the making of those measures¹¹⁶. It illustrates that transparency and effectiveness can boost one another.

B. Council of the European Union

The present section describes the two main changes in the Council's decision-making during the Covid-19 pandemic. First, decisions were taken at working party or COREPER level instead of at ministerial level of the Council (1.). Second, the Council introduced informal virtual meetings (2.).

1. Preparatory Bodies in Charge

As illustrated in Chapter 1, legislative proposals can go through three internal levels in the Council: the working party level; the COREPER level; and the ministerial level¹¹⁷. Nevertheless, during the Covid-19 pandemic, most decisions were taken at working party or COREPER level¹¹⁸. This was the result of the derogation by the Council from Article 12(1), first subparagraph of the Council RoP, implying that the written procedure¹¹⁹ could be applied via the voting rule (unanimity, qualified majority voting or majority voting) applicable to the act itself¹²⁰. It follows that the preparatory bodies of the Council had more opportunities to rely on the written procedure for the adoption of decisions, because it was no longer required to have unanimity to apply the written procedure¹²¹. Therefore, if the working party or the COREPER fulfils the applicable voting rule, which is often lower than unanimity, the decision is taken on that level and does not reach the Council's ministers, replacing the ministerial negotiations by written votes¹²².

It is argued that this derogation led to less transparency in the decision-making process of the Council, because normally decisions are taken at ministerial level, ensuring public

¹¹⁶ Oana, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (n95) 670.

¹¹⁷ See marginal 23.

¹¹⁸ Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (n47) 745 and 752.

¹¹⁹ *Ibid.*, 747. Dolezel clarifies that the written procedure is a procedure where '*the Member States vote by written votes addressed to the General Secretariat of the Council*'.

¹²⁰ Council Decision (EU) 2020/430 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union [2020] OJ L1 88/1; Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (n47) 747.

¹²¹ Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (n47) 747.

¹²² *Ibid.*, 747 and 756.

negotiations as required by Article 15(2) TFEU¹²³. Instead, the meetings of the working parties and the COREPER take place behind closed doors¹²⁴.

However, the increased use of the written procedure during the Covid-19 pandemic also improved the transparency of the working parties because the Member States negotiated and voted by paper, producing more documents on the working parties' meetings¹²⁵. Unfortunately, the working parties classified these documents as 'Working documents' (WK documents), which are informal documents that are not separately and immediately mentioned in the public register of the Council¹²⁶. Moreover, the WK documents are not reviewed before the meetings of the working parties take place¹²⁷. Therefore, these documents are detrimental to the transparency of the Council. Nonetheless, the CJEU decided that the working parties of the Council must provide access to the WK documents when discussions are still in progress so that the EU citizens can truly participate in the EU decision-making process¹²⁸. The EU citizens can understand that the position of the Council on a legislative proposal changes through its preparatory bodies¹²⁹. The fact that the working party does not establish the Council's final position does not mean that the documents of the working party are not part of the legislative procedure¹³⁰.

2. Informal Virtual Meetings

¹²³ Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (n47) 745; Bodson, 'Rethinking EU institutions' rules of procedure after COVID-19' (n94) 3.

¹²⁴ See marginal 28.

¹²⁵ European Ombudsman, 'Decision in strategic inquiry OI/4/2020/TE on the transparency of decision making by the Council of the EU during the Covid-19 crisis' (*European Ombudsman*, 24 March 2021) <www.ombudsman.europa.eu/fr/decision/en/139715> accessed 5 February 2025, para 42; Paul Culley, Derk Oldenburg & Sophie Vanhoonacker, 'The European Council and Council of the EU: What Lessons from Covid-19 Decision-Making?' (2022) 21 CEPS Policy Insight, 8.

¹²⁶ European Ombudsman, 'Decision in strategic inquiry OI/4/2020/TE' (n125) paras 33-35 and 43; X, 'Meijers Committee publishes note on proliferation of 'WK' documents in the Council' (*Open Government in the EU*, 10 June 2021) <www.eu-opengovernment.eu/?p=2531> accessed 4 February 2025.

¹²⁷ European Ombudsman, 'Decision in strategic inquiry OI/4/2020/TE' (n125) para 36.

¹²⁸ *De Capitani v Council* (n77) paras 84 and 96-97.

¹²⁹ *Ibid.*, para 79.

¹³⁰ *Ibid.*, paras 94-95.

The Council also introduced informal virtual meetings during the Covid-19 pandemic so that it could keep on functioning¹³¹. These virtual meetings were not a full-fledged alternative for the physical ministerial meetings as they were informal and adopting decisions during those meetings was impossible¹³².

Moreover, the informal virtual meetings in the Council were criticized for their lack of transparency. First, their informality makes it difficult to acquire information about them¹³³. Second, the transparency safeguards provided for in the Council RoP are not applicable to informal virtual meetings¹³⁴. Third, the informal virtual meetings that took place in the beginning of the Covid-19 pandemic were held in contrast to Article 15(2) TFEU, obliging the EU legislators to meet in public when voting or negotiating on a draft legislative act¹³⁵. However, as of July 2020 the Council took measures to warrant that these meetings would be public and that their agenda would be accessible for the EU citizens¹³⁶.

C. European Parliament

The EP is composed of 705 Members of Parliament that come from different Member States, making it impossible for the EP to function during the Covid-19 pandemic without any changes to its practices¹³⁷. Therefore, the EP relied on Rule 163 EP RoP (now Rule 170 EP RoP) providing the urgency procedure¹³⁸. If necessary, this rule allows the EP to

¹³¹ Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (n47) 747.

¹³² European Ombudsman, 'Report on the inspection of documents and meeting of the European Ombudsman's inquiry team concerning Council transparency during the COVID-19 crisis' (*European Ombudsman*, 7 July 2021) <www.ombudsman.europa.eu/fr/doc/inspection-report/en/136827> accessed 2 December 2024.

¹³³ Dolezel, 'Decision-making in the Council of the European Union during the Covid-19 pandemic' (n47) 751; European Ombudsman, 'Decision in strategic inquiry OI/4/2020/TE' (n125) para 24.

¹³⁴ European Ombudsman, 'Report on the inspection of documents and meeting of the European Ombudsman's inquiry team' (n132); European Ombudsman, 'Decision in strategic inquiry OI/4/2020/TE' (n125) para 13.

¹³⁵ European Ombudsman, 'Decision in strategic inquiry OI/4/2020/TE' (n125) paras 13 and 26. See also marginal 28.

¹³⁶ Council Note 9188/20 regarding modalities on the convening, preparation and organization of informal videoconferences of ministers during the COVID-19 crisis [2020] 9188/20; European Ombudsman, 'Report on the inspection of documents and meeting of the European Ombudsman's inquiry team' (n132); European Ombudsman, 'Decision in strategic inquiry OI/4/2020/TE' (n125) paras 27-28.

¹³⁷ Cristina Fasone, 'Fighting back? The role of the European Parliament in the adoption of Next Generation EU' (2022) 28(3) *Journal of Legislative Studies* 368, 370.

¹³⁸ Culley, Oldenburg & Vanhoonacker, 'The European Council and Council of the EU' (n125) 13.

take decisions without a report¹³⁹. In addition, the EP introduced remote voting¹⁴⁰ and transferred the decision-making power to the EP's President¹⁴¹.

MECHTHILD and JACOBS rightly point out that these changes have negative consequences on the quality of the EP's decision-making process¹⁴². Chapter 1 explained that the quality of the decision-making process (throughput legitimacy) is reviewed by looking at how transparent and accountable the decision-making process is¹⁴³. Therefore, if the EP's decision-making process has a lower quality, the decision-making process is less transparent and accountable. Nevertheless, these adjustments were necessary so that the EP could guarantee transparency in the EU decision-making process during the Covid-19 pandemic by representing the EU citizens¹⁴⁴.

Besides, decisions were often taken via the decision-making procedure of Article 122 TFEU during the Covid-19 pandemic, for example for the creation of the NGEU. Article 122 TFEU does not provide a role for the EP¹⁴⁵.

On top of that, Chapter 1 illustrated that even when the OLP applies, such as for the instruments adopted on the basis of Article 168 TFEU, trilogues were frequently used to fasten the OLP, decreasing the clarity about the roles of the EU institutions in the EU decision-making process and the options for the EU citizens to participate therein¹⁴⁶.

Therefore, the use of the Article 122 TFEU decision-making procedure and of trilogues marginalized the EP in the EU decision-making process during the Covid-19 pandemic, resulting in a less transparent EU decision-making process because the EP guarantees legislative transparency by representing the EU citizens in the EU decision-making process.

¹³⁹ Rule 170(6) EP RoP.

¹⁴⁰ Rule 237 a) and d) European Parliament's Rules of Procedure of the 9th parliamentary term [2021] <www.europarl.europa.eu/doceo/document/RULES-9-2021-01-18-RULE-237-1_EN.html>; Culley, Oldenburg & Vanhoonacker, 'The European Council and Council of the EU' (n125) 13.

¹⁴¹ Francis Jacobs & Roos Mechthild, 'The European Parliament and the COVID-19 crisis' (2024) 31(2) *Journal of Legislative Studies* 428, 433.

¹⁴² *Ibid.*

¹⁴³ See marginal 18.

¹⁴⁴ Jacobs & Mechthild, 'The European Parliament and the COVID-19 crisis' (n141) 433 and 435.

¹⁴⁵ See marginals 40-41.

¹⁴⁶ See marginals 24 and 38.

Finally, FASONE and VON ONDARZA assert that the absence of the EP in the EU decision-making process during the Covid-19 pandemic is not justified¹⁴⁷. As explained above, the EP adjusted to the Covid-19 pandemic by installing the urgency procedure; by establishing remote voting; and by transferring the decision-making power to the EP's President, demonstrating that it has the capacity to act swiftly when necessary¹⁴⁸. Moreover, there are examples such as Finland which illustrate that involving the national parliament in the decision-making procedure can be successful in times of crisis¹⁴⁹.

It can be concluded that, although the changes introduced by the EP during the Covid-19 pandemic decreased the throughput legitimacy of the EP's decision-making process, these changes were necessary for the EP to represent the EU citizens in the EU decision-making process during the Covid-19 pandemic and thus to guarantee legislative transparency. These changes illustrate the capacity of the EP to act swiftly when necessary and therefore make the marginalization of the EP in the EU decision-making process during the Covid-19 pandemic unjustified.

D. Conclusion

Chapter 2 discussed the research sub-question: To what extent were the changes made during the Covid-19 pandemic to the decision-making process of the EU institutions compatible with the principle of legality's requirement of a transparent EU decision-making process?

The Commission reacted to the Covid-19 pandemic by adopting soft law. Soft law may not be in line with the principle of legality requiring a transparent EU decision-making process since it does not pass through the formal stages of the OLP. Besides, soft law does not provide the EU citizen with effective judicial protection. I share the opinion of UTRILLA and SHABBIR that soft law should be subject to judicial review because it produces legal effects. Furthermore, the Treaties do not confer a competence on the Commission to adopt soft law in the public health sector. Therefore, in case soft law is adopted in such sector, it might be argued that the Commission circumvents the strict requirements set by the principle of legality. The adoption of soft law by the Commission in the public health sector may also result in less legislative transparency as the

¹⁴⁷ Fasone, 'Fighting back?' (n137) 371; Nicolai von Ondarza, 'The European Parliament's Involvement in the EU Response to the Corona Pandemic: A Spectator in Times of Crisis' (2020) SWP Comment C 45, 7.

¹⁴⁸ von Ondarza, 'The European Parliament's Involvement in the EU Response to the Corona Pandemic' (n147) 7.

¹⁴⁹ Oana, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate?' (n95) 666; Martin Scheinin, 'The COVID-19 Emergency in Finland: Best Practice and Problems' (*Verfassungsblog*, 16 April 2020) <<https://verfassungsblog.de/the-covid-19-emergency-in-finland-best-practice-and-problems/>> accessed 6 March 2025.

Commission is acting in an area of law where the Treaties only provide a supporting competence for the EU and do not foresee transparency safeguards. Additionally, OANA's argument is persuasive, stating that the effectiveness of soft law can be boosted by providing a transparent procedure for the adoption of soft law, because the EU citizens will then be more willing to live by those measures. Effectiveness and transparency can thus boost one another.

The Council derogated from its RoP resulting in the preparatory bodies of the Council taking most decisions. It is argued that this derogation may not be in line with the principle of legality's requirement of a transparent EU decision-making process, because the EU citizens cannot acquire information about the negotiations and the decision-makers in the working parties and the COREPER, meeting behind closed doors.

However, the transparency of the working parties improved due to increased documentation of their work following the application of the written procedure during the Covid-19 pandemic. Additionally, the CJEU decided that the working parties need to provide access to the WK documents when the negotiations are still developing.

In addition, the Council introduced informal virtual meetings during the Covid-19 pandemic. This adjustment might be in contrast with the legislative transparency requirement of the principle of legality as the transparency safeguards provided for in the Council RoP are not applicable to informal virtual meetings and their informality makes it difficult for the EU citizens to acquire information.

The EP introduced the urgency procedure; remote voting; and decision-making at the level of the EP's President. It can be argued that these changes are irreconcilable with the legislative transparency requirement of the principle of legality as they reduce the throughput legitimacy of the EP's decision-making process. Nevertheless, these adjustments were necessary so that the EP could guarantee transparency in the EU decision-making process during the Covid-19 pandemic by representing the EU citizens.

In addition, during the Covid-19 pandemic, the decision-making procedure of Article 122 TFEU and trilogues were applied. These developments may be incompatible with the principle of legality's requirement of a transparent EU decision-making process. The EP is not included in the decision-making procedure of Article 122 TFEU, which means that there was no representation of the EU citizens in the majority of the decisions that were taken during the Covid-19 pandemic. Besides, it is unclear what the role is of the EP in

trilogue negotiations. This thesis argues - in line with FASONE and VON ONDARZA - that the EP can act swiftly in times of crisis, making the marginalization of the EP in the EU decision-making process during the Covid-19 pandemic unjustified.

Chapter 3 analyzes two examples of EU decision-making during the Covid-19 pandemic. I chose these two examples because they represent the core of the EU's reaction to the Covid-19 pandemic and because they are based on the decision-making procedure of Article 122 TFEU.

IV. Chapter 3 – Commission's Joint Vaccine Procurement and NextGenerationEU Fund

Chapter 3 encapsulates two examples of EU decision-making during the Covid-19 pandemic: the Commission's joint vaccine procurement and the NGEU. Both examples are analyzed against the benchmarks described in Chapter 1. Therefore, Chapter 3 answers the following research sub-question: How to reconcile the joint vaccine procurement by the Commission and the NGEU with the principle of legality – requiring a transparent EU decision-making process?

A. Joint Vaccine Procurement by the Commission

Following the Covid-19 pandemic, the Member States allowed the Commission to be their central provider of vaccines¹⁵⁰. The Commission negotiated and concluded the vaccine contracts with the vaccine manufacturers on behalf of the Member States¹⁵¹.

Moreover, the joint vaccine procurement by the Commission was based on Regulation 2016/369 on the provision of emergency support within the Union (Emergency Support Regulation)¹⁵², and activated during the Covid-19 pandemic by the Council Regulation 2020/521¹⁵³. The Emergency Support Regulation was created on the basis of Article 122(1) TFEU¹⁵⁴.

¹⁵⁰ von Ondarza, 'The Crisis Governance of the European Union' (n31) 12-13.

¹⁵¹ *Ibid.*, 13-14.

¹⁵² Council Regulation (EU) 2016/369 on the provision of emergency support within the Union [2016] OJ L 70/1 [**Emergency Support Regulation**]; von Ondarza, 'The Crisis Governance of the European Union' (n31) 14.

¹⁵³ Council Regulation (EU) 2020/521 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak [2020] OJ L 117/3; von Ondarza, 'The Crisis Governance of the European Union' (n31) 14.

¹⁵⁴ First sentence Preamble Emergency Support Regulation.

1. Transparency Guarantees in the Decision-Making Process

VON ONDARZA states that applying Article 122(1) TFEU as the legal basis for the Commission's joint vaccine procurement provides more transparency in the EU decision-making process when compared with the instruments applied during previous crises, for example the European Stability Mechanism established during the euro crisis¹⁵⁵. These instruments were outside the EU legal order, which automatically results in no involvement of the EP and a decision-making procedure under the leadership of the Member States¹⁵⁶. Therefore, establishing instruments that are instead within the EU legal order, such as the joint vaccine procurement by the Commission based on the decision-making procedure of Article 122 TFEU, guarantees that the EP *can* be involved in the decision-making procedure as well as ensures judicial review of the decisions and upon the decision-makers¹⁵⁷. Nevertheless, the Article 122(1) TFEU decision-making procedure does not provide a role for the EP¹⁵⁸.

However, in my opinion, the decision-making procedure of Article 122 TFEU has a lot of similarities with an instrument outside the EU legal order, because this procedure places the Commission and the Council (which means the Member States) at its head, and it does not involve the EP. The only advantage of relying on the Article 122 TFEU decision-making procedure is that it can be amended or that decision-making powers can be informally provided to the EP¹⁵⁹.

2. Transparency Gaps in the Decision-Making Process

The decision-making process to attain the vaccine contracts and the content of these contracts were placed under a smokescreen¹⁶⁰. Moreover, the Commission's joint vaccine procurement was the result of an informal confidential debate on ministerial level¹⁶¹.

¹⁵⁵ Treaty establishing the European Stability Mechanism (2 February 2012); von Ondarza, 'The Crisis Governance of the European Union' (n31) 6; Elise Muir, 'Lecture 17: Institutional Responsiveness to Crises' (*KUL Constitutional Law of the European Union – Outline*, November 2024), 1-2.

¹⁵⁶ von Ondarza, 'The Crisis Governance of the European Union' (n31) 6.

¹⁵⁷ *Ibid.* Elaborated on by Prof. Dr. Elise Muir during lecture 17 of the course Constitutional Law of the European Union regarding the institutional responsiveness to crises.

¹⁵⁸ See marginals 40-41.

¹⁵⁹ See Chapter 4 for the possible solutions to the absence of the EP in the Article 122 TFEU decision-making procedure.

¹⁶⁰ Jane Arroyo, 'Being prepared is all that's needed to address the European Commission's transparency woes' (*CEPS*, 10 March 2023) <www.ceps.eu/being-prepared-is-all-thats-needed-to-address-the-european-commissions-transparency-woes/> accessed 5 February 2025.

¹⁶¹ von Ondarza, 'The Crisis Governance of the European Union' (n31) 16.

Additionally, the EP was not briefed by the Commission about the vaccine contracts¹⁶². Only after exercising pressure, the EP and the EU citizens were provided with a redacted version of the vaccine contracts¹⁶³.

First, the Commission has a duty to be as open as possible about the vaccine contracts, enshrined in Article 15(1) TFEU and confirmed by the *ClientEarth* case¹⁶⁴. Moreover, Chapter 1 clarified that transparency is a prerequisite for accountability, making the transparency of the Commission's conduct on the vaccine contracts essential to hold the Commission accountable for its actions in the joint vaccine procurement¹⁶⁵.

Second, it is regrettable that Article 168 TFEU was not used as legal basis, because it applies the OLP and therefore guarantees the EP's involvement as co-legislator as well as more legislative transparency since the EP is the representative of the EU citizens and would be able to scrutinize the actions of the Commission¹⁶⁶.

Third, the CJEU elaborated on this perceived lack of legislative transparency in the joint vaccine procurement by the Commission.

First, cases *Auken* and *Courtois*¹⁶⁷ were about a request for access to the vaccine contracts negotiated by the Commission, which was partly rejected by the Commission based on the exceptions of Article 4 of the Access Regulation¹⁶⁸. The CJEU decided that the Commission did not provide sufficient reasons to rely on these exceptions and that it did not illustrate that providing access to the vaccine contracts would result in a foreseeable risk regarding the exception of Article 4(2), first indent of the Access Regulation¹⁶⁹. However, the CJEU clarified that it always carries out a careful case-by-case assessment to decide whether the

¹⁶² *Ibid.*, 15-16.

¹⁶³ *Ibid.*, 17.

¹⁶⁴ See marginals 26-27.

¹⁶⁵ See marginal 15.

¹⁶⁶ European Parliament Resolution 2021/2678 on EU transparency in the development, purchase and distribution of Covid-19 vaccines [2021] OJ C 184/99, S.3 and S.11. See also marginal 22.

¹⁶⁷ T-689/21 *Auken and Others v Commission* [2024] EU:T:2024:476 [**Auken**]; T-761/21 *Courtois and Others v Commission* [2024] EU:T:2024:477 [**Courtois**].

¹⁶⁸ *Auken* (n167) paras 5-7.

¹⁶⁹ *Auken* (n167) paras 31, 34, 46 and 168-169; Court of Justice of the European Union, 'Monthly Case-Law Digest July 2024' (CJEU, July 2024) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-08/bulletin_en_-_07_2024.pdf> accessed 6 February 2025, 12-17.

transparency of the EU decision-making process is of greater importance than the reasons provided by the Commission to not disclose a certain document¹⁷⁰.

Second, recently the General Court ruled in the *Pfizergate* case¹⁷¹ that the right of access to documents for the EU citizens should be guaranteed in an efficient manner and that, in principle, the EU citizens should have access to all the documents of the EU institutions¹⁷². The *Pfizergate* case was about a request for access to the text messages exchanged between the Commission's President von der Leyen and the Chief Executive Officer of Pfizer in the context of the vaccine negotiations¹⁷³. The Commission rejected the request, arguing that it does not possess these documents nor is aware of their existence¹⁷⁴. The General Court annulled the decision of the Commission to reject the request, because the Commission did not provide '*plausible explanations*' for why it could not supply the applicant with the requested documents¹⁷⁵. Furthermore, the General Court clarified that the EU institutions need to ensure the effective exercise of the right of access to documents¹⁷⁶, must guarantee documentation of their activities¹⁷⁷, and must carry out searches for requested documents with due diligence¹⁷⁸. With this judgment, the CJEU confirms that the right of access to documents covers informal and digital forms of communication, such as text messages, that are part of the EU decision-making process¹⁷⁹. Therefore, the right of access to documents relates to the content and not to the form of the document¹⁸⁰.

Following the *Pfizergate* case, a motion of censure was tabled by the EP against the Commission¹⁸¹. As discussed in Chapter 1, the EP can hold the Commission accountable

¹⁷⁰ *Auken* (n167) para 214.

¹⁷¹ T-36/23 *Stevi and the New York Times v Commission* [2025] EU:T:2025:483 [*Pfizergate*].

¹⁷² *Ibid.*, para 36.

¹⁷³ *Ibid.*, para 2.

¹⁷⁴ *Ibid.*, para 8.

¹⁷⁵ *Ibid.*, paras 60, 67-68 and 73.

¹⁷⁶ *Ibid.*, paras 36 and 41.

¹⁷⁷ *Ibid.*, para 59.

¹⁷⁸ *Ibid.*, para 59.

¹⁷⁹ Zuzanna Nowicka, 'Von der Leyen's lost Phone: a Case for greater EU Transparency (T-36/23)' (*EU Law Live*, 23 May 2025) <<https://eulawlive-com.kuleuven.e-bronnen.be/op-ed-von-der-leyens-lost-phone-a-case-for-greater-eu-transparency-t%E2%80%9136-23/>> accessed 27 June 2025; Ilaria Fevola, 'Stevi and The New York Times v. Commission' (*Global Freedom of Expression* Columbia University, s.d.) <<https://globalfreedomofexpression.columbia.edu/cases/stevi-and-the-new-york-times-v-commission/>> accessed 2 July 2025.

¹⁸⁰ Fevola, 'Stevi and The New York Times v. Commission' (n179).

¹⁸¹ European Parliament, Motion of censure on the Commission B10-0319/2025 (2025/2140, 3 July 2025) <www.europarl.europa.eu/doceo/document/B-10-2025-0319_EN.html>.

with a motion of censure, embodied in Articles 17(8) TEU and 234 TFEU, and Rule 131 EP RoP¹⁸². With this motion of censure, Member of Parliament Piperea and others argue that the principles of transparency and accountability enshrined in Article 10(3) TEU are violated because of the secrecy about the text messages exchanged between the Commission's President and the Chief Executive Officer of Pfizer in the context of the vaccine negotiations¹⁸³. They conclude that the Commission no longer has the confidence of the EP and therefore must resign¹⁸⁴. If a motion of censure is successful, requiring a two-thirds majority of votes cast which stands for a majority of the component Members of Parliament, the Commission shall resign¹⁸⁵. Nevertheless, this motion of censure was not successful¹⁸⁶. However, the initiation of a motion of censure by the EP illustrates that there is a level of distrust for the Commission in the EP following the secrecy about the exchanged text messages during the vaccine negotiations¹⁸⁷. Moreover, many Members of Parliament chose to abstain to emphasize their discontent with the untransparent working pattern of the Commission¹⁸⁸. Additionally, although unsuccessful, this motion of censure will help guarantee the Commission's compliance with the *Pfizergate* case¹⁸⁹. Finally, the initiation of a motion of censure shows that the EP is prepared to hold the Commission accountable in case of no transparency in its decision-making.

B. NextGenerationEU Fund

The NGEU consists of several financial instruments established by the EU to support the Member States for their recovery from the Covid-19 pandemic¹⁹⁰. It is mainly composed of the Own Resources Decision (ORD)¹⁹¹, which authorizes the Commission to raise money through borrowing activities on the financial markets; the European Union Recovery

¹⁸² See marginal 17.

¹⁸³ European Parliament, Motion of censure on the Commission B10-0319/2025 (n181) point H. See also marginal 16.

¹⁸⁴ *Ibid.*, Conclusion: points 1 and 5.

¹⁸⁵ Arts 17(8) TEU and 234(2) TFEU; Rule 131(7) EP RoP.

¹⁸⁶ European Parliament, Motion of censure on the Commission B10-0319/2025 (EP Minutes Item 6.1., 10 July 2025) <www.europarl.europa.eu/doceo/document/PV-10-2025-07-10-ITM-006-01_EN.html>; European Parliament, 'MEPs reject motion of censure against the European Commission' (*News European Parliament: Press Releases*, 10 July 2025) <www.europarl.europa.eu/news/en/press-room/20250704IPR29455/meps-reject-motion-of-censure-against-the-european-commission> accessed 15 July 2025.

¹⁸⁷ Vincenzo Genovese & Maïa de la Baurne, 'EU Parliament confidence vote: Where do parties stand on von der Leyen?' (*Euronews*, 8 July 2025) <www.euronews.com/my-europe/2025/07/08/eu-parliaments-centre-parties-back-von-der-leyen-but-will-their-meps> accessed 8 July 2025.

¹⁸⁸ Sophia Russack, 'This week's motion of censure in the European Parliament was a proxy war' (*CEPS*, 11 July 2025) <www.ceps.eu/this-weeks-motion-of-censure-in-the-european-parliament-was-a-proxy-war/> accessed 15 July 2025.

¹⁸⁹ Alberto Alemanno, 'Von der Leyen Faces the Vote: A Tale of Parliamentary Control' (*Verfassungsblog*, 9 July 2025) <<https://verfassungsblog.de/von-der-leyen-faces-the-vote/>> accessed 15 July 2025.

¹⁹⁰ von Ondarza, 'The Crisis Governance of the European Union' (n31) 21.

¹⁹¹ Council Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L 424/1 [ORD].

Instrument (EURI)¹⁹², which is based on Article 122 TFEU¹⁹³ and indicates how to allocate the borrowed money to different spending programmes; and the Recovery and Resilience Facility (RRF)¹⁹⁴, a spending programme based on Article 175(3) TFEU¹⁹⁵ to which the majority of the EURI money goes¹⁹⁶.

1. Transparency Guarantees in the Decision-Making Process

The Multiannual Financial Framework (MFF) is a budgetary framework of seven years organizing the expenditure of the EU within the limits of the ORD¹⁹⁷. The NGEU is strongly linked to the MFF via the ORD¹⁹⁸. The legislative proposals for the MFF and the NGEU were launched on the same day by the Commission and were considered by the European Council during the same summit¹⁹⁹. On top of that, linking the NGEU to the MFF is mandatory to fulfil the conditions of Articles 310-312 TFEU and of Regulation 2024/2509 on the financial rules applicable to the general budget of the Union²⁰⁰.

Article 312(2) TFEU, providing the legislative procedure for the adoption of the MFF, prescribes that *[...] the Council shall act unanimously after obtaining the consent of the European Parliament [...]*. It follows that Article 312(2) TFEU ensures the involvement of the EP in the MFF by providing it with a power of consent.

In addition, the procedure for the adoption of the ORD, which links the NGEU to the MFF, guarantees that the EP will be consulted by the Council in this procedure²⁰¹.

¹⁹² Council Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433/23 **[EURI]**.

¹⁹³ First sentence preamble EURI.

¹⁹⁴ Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility [2021] OJ L 57/17 **[RRF]**.

¹⁹⁵ First sentence Preamble RRF.

¹⁹⁶ Bruno De Witte, 'The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift' (2021) 58(3) Common Market Law Review 635, 636-637.

¹⁹⁷ De Witte, 'The European Union's COVID-19 recovery plan' (n196) 644; Elise Muir, 'Lecture 5: EU Decision-Making (II) – Finances of the EU' (*KUL Constitutional Law of the European Union – Outline*, October 2024), 2.

¹⁹⁸ De Witte, 'The European Union's COVID-19 recovery plan' (n196) 645-646.

¹⁹⁹ *Ibid.*, 645.

²⁰⁰ Regulation (EU, Euratom), 2024/2509 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union [2024] OJ L 2024/2509; Fasone, 'Fighting back?' (n137) 372; Utrilla & Shabbir (n105) 106-107.

²⁰¹ Art 311, third para TFEU; Arts 5-6 ORD; De Witte, 'The European Union's COVID-19 recovery plan' (n196) 646.

The RRF was created through the OLP as per Article 175(3) TFEU and thus guarantees the involvement of the EP as co-legislator²⁰². Therefore, for the majority of the NGEU's money²⁰³, the EP was involved as co-legislator. Moreover, Article 175(3) TFEU may be used as a permanent legal basis to answer to long-term concerns not per se related to the Covid-19 pandemic²⁰⁴.

2. Transparency Gaps in the Decision-Making Process

The present section focuses on three transparency gaps in the NGEU decision-making process: the NGEU negotiations in the European Council; the use of trilogues; and the qualification of the NGEU as external assigned revenue.

The nature of the NGEU was decided upon by and large at the political headquarters of the EU: the European Council²⁰⁵. The NGEU *'brought into being a "shadow budget" for the Union, alongside the MFF'*²⁰⁶. Likewise, the RRF exemplifies the political character of the NGEU, because it aims to advance political goals that are not limited to the Covid-19 pandemic²⁰⁷.

The NGEU negotiations in the European Council took place away from the public eye and the EP did not play a meaningful role in these negotiations²⁰⁸. Additionally, there is no tool for the EP to hold the European Council responsible for its actions²⁰⁹.

Chapter 1 explained that trilogues are informal negotiations between the EU institutions taking place behind closed doors²¹⁰. Moreover, the case *De Capitani* of the CJEU clarified that the transparency requirements of the EU decision-making process are applicable to trilogues as they are a decisive phase of the EU decision-making process through which excluding them from the transparency requirements would undermine the transparency level of that process²¹¹.

²⁰² See marginal 22.

²⁰³ See marginal 81.

²⁰⁴ Art 175(3) TFEU is a part of the EU's Cohesion Policy (Title XVIII TFEU); De Witte, 'The European Union's COVID-19 recovery plan' (n196) 658.

²⁰⁵ von Ondarza, 'The Crisis Governance of the European Union' (n31) 23. See also European Council Conclusions on the Special meeting of the European Council [2020] EUCO 10/20 <www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>.

²⁰⁶ De Witte, 'The European Union's COVID-19 recovery plan' (n196) 668.

²⁰⁷ Päivi Leino-Sandberg & Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59(2) Common Market Law Review 433, 446.

²⁰⁸ von Ondarza, 'The Crisis Governance of the European Union' (n31) 23-24 and 28.

²⁰⁹ von Ondarza, 'The European Parliament's Involvement in the EU Response to the Corona Pandemic' (n147) 4.

²¹⁰ See marginal 24.

²¹¹ *De Capitani* (n52) paras 75, 83-84 and 109.

During the NGEU decision-making process trilogues took place, where there was ambiguity about how many there were; how the negotiations went; and what the positions were of the EU institutions in the trilogues²¹².

Therefore, this thesis argues that the NGEU negotiations might not be in line with the CJEU case-law on trilogues, requiring that the four-column tables of the trilogues²¹³ are made available to the EU citizens in a timely manner so that they can contribute to the decision-making process²¹⁴.

Lastly, the NGEU is external assigned revenue²¹⁵. Hence, the NGEU is not an integrated part of the MFF or the EU budget²¹⁶. Therefore, the EP does not have the power of consent in the decision-making process for the creation of the NGEU²¹⁷. The interinstitutional agreement (IIA) on budgetary discipline clarified that this needs to change by increasing the powers of the EP over external assigned revenue²¹⁸. Furthermore, the EU institutions committed themselves in this IIA to provide full transparency in the NGEU decision-making process²¹⁹. The absence of the EP in the NGEU is problematic because the NGEU is a big part of the EU's expenditure²²⁰. Therefore, the involvement of the EP in the RRF is a welcome improvement of the transparency of the NGEU decision-making process²²¹.

C. Reconciliation with the Principle of Legality

To provide an all-encompassing answer to the research sub-question - how to reconcile the joint vaccine procurement by the Commission and the NGEU with the principle of legality, requiring a transparent EU decision-making process – I must now look into if and how

²¹² von Oндarza, 'The Crisis Governance of the European Union' (n31) 28-29.

²¹³ Benjamin Bodson, 'To What Extent Can the CJEU Contribute to Increasing the EU Legislative Process' Transparency?' (2021) 9(1) Politics and Governance 272, 276. Bodson clarifies that the four-column document is the document that provides the positions of the EU institutions on the legislative proposal and the possible agreement on that proposal.

²¹⁴ *De Capitani* (n52) paras 83-84 and 109.

²¹⁵ Fasone, 'Fighting back?' (n137) 374.

²¹⁶ De Witte, 'The European Union's COVID-19 recovery plan' (n196) 646; Fasone, 'Fighting back?' (n137) 374.

²¹⁷ See marginal 83.

²¹⁸ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources [2020] OJ L1 433/28, Annex I, part H, para 39.

²¹⁹ *Ibid.*

²²⁰ Chamon, 'The use of Article 122 TFEU' (n89) 35.

²²¹ Diane Fromage & Menelaos Markakis, 'The European Parliament in the Economic and Monetary Union after COVID: towards a slow empowerment?' (2022) 28(3) Journal of Legislative Studies 385, 393.

these two examples of the EU decision-making process during the Covid-19 pandemic can be reconciled with the principle of legality.

The Commission's joint vaccine procurement, providing the Commission with the power to negotiate and conclude the vaccine contracts on behalf of the Member States, was based on the Emergency Support Regulation, that was activated during the Covid-19 pandemic by Regulation 2020/521 and was based on Article 122(1) TFEU²²². The Article 122(1) TFEU decision-making procedure does not provide a role for the EP and thus is probably less transparent than the OLP where the EP is the co-legislator and additional transparency safeguards are provided for²²³. On top of that, the joint vaccine procurement by the Commission was decided upon in a confidential circle and only a redacted version of the

vaccine contracts was provided to the EU citizens and the EP²²⁴. Therefore, it may be argued that the Commission violated its transparency duty under Article 15(1) TFEU²²⁵. In addition, these characteristics of the Commission's joint vaccine procurement make it challenging to reconcile its decision-making process with the principle of legality, requiring that not only the decision-makers but also the content of the decisions (the content of the vaccine contracts) and the decision-making process (how the vaccine contracts were negotiated) are transparent²²⁶.

Besides, the new Commission RoP confirm the potential incompatibility of the Commission's joint vaccine procurement with the principle of legality's transparency requirement²²⁷. These RoP for example provide an obligation to delete text messages that are part of the EU decision-making process²²⁸ and restrict the right of *automatic* access to legislative documents for the EU citizens by providing that, in contrast to the *ClientEarth* case, *automatic* access to legislative proposals will only be ensured from the moment of their adoption²²⁹. An action has been brought before the CJEU against the Commission RoP, alleging that they violate Article 15(3) TFEU, the Access Regulation and the fundamental right of access to documents²³⁰.

²²² See marginals 72-73.

²²³ See marginals 22 and 40-41.

²²⁴ See marginal 75.

²²⁵ See marginals 26-27.

²²⁶ See marginal 15.

²²⁷ Nowicka, 'Von der Leyen's lost Phone: a Case for greater EU Transparency (T-36/23)' (n179).

²²⁸ Art 5(4) Annex regarding Regulation No 1049/2001 Commission RoP.

²²⁹ Art 3 Annex regarding Regulation No 1049/2001 Commission RoP; Päivi Leino-Sandberg, 'WARNING. Confidential documents. Not to be disclosed to anyone (Part 1)' (*EU Law Analysis*, 26 June 2025) <<https://eulawanalysis.blogspot.com/2025/06/warning-confidential-documents-not-to.html>> accessed 2 July 2025. See also marginal 27.

²³⁰ T-146/25 *De Capitani and Others v Commission* [2025] OJ C/2025/2410. See also Art 42 Charter.

The Commission argues that the economic relevance of the vaccine contracts justifies its refusal to provide full access to the content and the decision-making procedure of the vaccine contracts²³¹. The CJEU clarified that a case-by-case assessment must be carried out to decide whether the transparency of the EU decision-making process is of greater importance than the reasons provided by the Commission to not disclose certain documents²³².

However, the CJEU case-law analyzed above confirms the wide scope of the right of access to documents of the EU institutions²³³. Therefore, the Commission's choice to maintain full secrecy over the vaccine contracts may be seen as disproportionate, overemphasizing the effectiveness of the joint vaccine procurement and not ensuring its transparency.

On the one hand, the NGEU is linked to the MFF²³⁴. The legislative procedure for the MFF gives a power of consent to the EP²³⁵. Without its consent the decision-makers cannot proceed. In addition, the RRF was created via the OLP²³⁶. Thus, the decision-making procedure for the adoption of the NGEU foresees some transparency safeguards. Moreover, the NGEU decision-making process illustrates that there are legal bases, such as Article 175(3) TFEU, on which the EU can rely in times of crisis and that guarantee more legislative transparency than Article 122 TFEU.

On the other hand, first, the EURI, one of the main components of the NGEU, is based on Article 122 TFEU, an article that prescribes a decision-making procedure that does not include the EP and therefore does not ensure input legitimacy²³⁷.

Second, the link between the NGEU and the MFF in practice does not have many advantages for the legislative transparency of the NGEU, because the power of consent for the EP in the MFF procedure does not solve the fact that the NGEU negotiations took place in the European Council behind closed doors and that in those negotiations the EP did not play a meaningful role²³⁸. Hence, this power of consent translates in a power for the EP to approve or reject already established decisions²³⁹.

²³¹ von Oндarza, 'The Crisis Governance of the European Union' (n31) 16.

²³² See marginal 79.

²³³ See marginals 79-80.

²³⁴ See marginal 82.

²³⁵ See marginal 83.

²³⁶ See marginal 85.

²³⁷ See marginals 18, 40-41 and 81.

²³⁸ See marginals 82-83 and 87.

²³⁹ von Oндarza, 'The Crisis Governance of the European Union' (n31) 24.

Third, trilogues were used in the NGEU decision-making process which did not fulfil the transparency requirements of the CJEU case-law²⁴⁰.

Fourth, the EP does not have authority over the NGEU because the NGEU is external assigned revenue²⁴¹.

These four characteristics of the NGEU decision-making process undermine the ability of the EP to represent the EU citizens and to ensure transparency in this decision-making process²⁴².

If we compare the Commission's joint vaccine procurement with the NGEU decision-making process, it seems possible to conclude that the NGEU decision-making process is more compatible with the principle of legality's requirement of a transparent decision-making process rather than the Commission's joint vaccine procurement.

D. Conclusion

Chapter 3 answered the last research sub-question of this thesis: How to reconcile the joint vaccine procurement by the Commission and the NGEU with the principle of legality - requiring a transparent EU decision-making process?

The decision-making procedure of the joint vaccine procurement by the Commission may have provided less legislative transparency than the OLP as the Article 122(1) TFEU decision-making procedure does not provide a role for the EP. Additionally, the Commission kept its vaccine contracts hidden and the CJEU confirmed that the vaccine negotiations were not transparent. Therefore, it may be argued that it is difficult to reconcile the decision-making process of the joint vaccine procurement by the Commission with the principle of legality's requirement of a transparent decision-making process.

The NGEU is linked to the MFF, providing a veto power to the EP in its legislative procedure, and one of its components is the RRF, created through the OLP. Nonetheless, the NGEU is mainly based on the decision-making procedure of Article 122 TFEU, not providing a role for the EP. Furthermore, the NGEU negotiations mostly took place in the European Council and trilogues were used in a way that may contrast with the transparency requirements of the CJEU case-law. Finally, the EP does not have authority over the NGEU, qualified as external assigned revenue.

²⁴⁰ See marginals 88-89.

²⁴¹ See marginal 90.

²⁴² Leino-Sandberg & Ruffert, 'Next Generation EU and its Constitutional Ramifications' (n207) 455.

On the basis of the legal analysis above, it may be argued that the NGEU decision-making process is compatible with the transparency requirement of the principle of legality if the link between the NGEU and the MFF, and the application of the OLP for the creation of the RRF would be emphasized. However, on the basis of the legal analysis above, it might as well be argued that the NGEU decision-making procedure is not compatible with the principle of legality's transparency requirement, by for example raising the fact that the EP was sidelined in the NGEU negotiations or the fact that the EP could not rely on its power of consent in the MFF procedure when considering the NGEU.

Lastly, if compared with each other, the NGEU decision-making process may be seen as more transparent than the joint vaccine procurement by the Commission because the decision-making procedure for the creation of the NGEU provided some transparency safeguards.

V. Chapter 4 - Recommendations regarding Article 122 TFEU

Finally, I will make a recommendation to the EU legislator on how to minimize the transparency gap of the decision-making procedure of Article 122 TFEU. The aim of this recommendation is to ameliorate the transparency of the decision-making procedure of Article 122 TFEU. My recommendation will be established by way of explaining the main positions on how this gap should be minimized²⁴³.

I recommend to minimize the transparency gap of the Article 122 TFEU decision-making procedure by changing the practice of the Council and of the Commission when using such procedure (i); to use the alternatives to the Article 122 TFEU decision-making procedure during crises (ii); and ultimately to amend the Treaties to provide a role for the EP in the decision-making procedure of Article 122 TFEU (iii).

I limit my recommendation to the Article 122 TFEU decision-making procedure because it was the main decision-making procedure relied upon by the EU institutions during the Covid-19 pandemic. As described above, Article 122 TFEU does not include the EP in its decision-making procedure resulting in a lack of legislative transparency as the EP represents the EU citizens²⁴⁴²⁴⁴.

²⁴³ Kestermont (n1) 17-18 and 73.

²⁴⁴ See marginals 40-41.

First, the transparency gap of the decision-making procedure of Article 122 TFEU goes against my argument in Chapter 1: transparency is an essential characteristic of the EU decision-making process. Second, the application of the Article 122 TFEU decision-making procedure during the Covid-19 pandemic contrasts with the opinion of FASONE and VON ONDARZA – supported by this thesis – that the EP can act swiftly in times of crisis. Third, the decision-making procedure of Article 122 TFEU was the legal basis for the two examples of EU decision-making during the Covid-19 pandemic discussed in Chapter 3: the Commission's joint vaccine procurement and the NGEU decision-making process. Lastly, in my opinion, the decision-making procedure of Article 122 TFEU is in urgent need of change as it does not provide a role for the EP but might be relied upon again in future crises because it permits the Council to act by qualified majority, guaranteeing a high level of legislative effectiveness. First, the transparency gap of the Article 122 TFEU decision-making procedure can be minimized by changing the way the Council and the Commission use such procedure. The Commission and the Council can pay more attention to sufficiently motivating their choice to rely on Article 122 TFEU, safeguarding the EP's power and respecting the default nature of Article 122 TFEU²⁴⁵. In October 2024, the EP and the Commission agreed to revise the IIA on their relations based on, amongst others, the commitment to provide sufficient information on the cases where the Commission chooses to rely on Article 122 TFEU for its proposal²⁴⁶. In addition, the habit of the Council to consult the EP can be generalized²⁴⁷.

The approach to minimize the transparency gap of the Article 122 TFEU decision-making procedure by informally providing decision-making powers to the EP in that procedure has already gained some foothold, as the EP RoP provide that the Commission must state the reasons for choosing Article 122 TFEU as legal basis *ex ante* to the adoption of the legislative proposal²⁴⁸.

Second, it is proposed to amend Article 168 TFEU to provide more competences for the EU in the public health sector²⁴⁹. Article 168 TFEU applies the OLP and thus, in contrast with Article 122 TFEU, allows the EP to act as co-legislator²⁵⁰. The EU citizens propose to make the public health sector a shared competence of the EU²⁵¹. Articles 4 and 6 TFEU would

²⁴⁵ Chamon, 'The use of Article 122 TFEU' (n89) 6 and 34.

²⁴⁶ European Parliament, 'European Parliament and European Commission agree on strengthening cooperation' (*News European Parliament: Press Releases*, 21 October 2024) <www.europarl.europa.eu/news/en/press-room/20241021IPR24772/european-parliament-and-european-commission-agree-on-strengthening-cooperation> accessed 24 March 2025.

²⁴⁷ Chamon, 'The use of Article 122 TFEU' (n89) 34 and 37-39.

²⁴⁸ Rule 138 EP RoP; Merijn Chamon, 'The non-emergency economic policy competence in Article 122(1) TFEU' (2024) 61(6) *Common Market Law Review* 1501, 1525.

²⁴⁹ Juuso Jarvinemi, Robert Scholz & Kalojan Hoffmeister, 'From Covid-19 towards a European Health Union: Proposals for Treaty reform on health' (*Young European Federalists*, May 2022) <<https://jef.eu/wp-content/uploads/2022/06/From-COVID-19-towards-a-European-Health-Union-Proposals-for-Treaty-reform-on-health.pdf>> accessed 5 February 2025, 15.

²⁵⁰ See marginals 38 and 40-41.

²⁵¹ Conference on the Future of Europe, 'Report on the Final Outcome' (*CoFoE*, May 2022) <[CoFE_Final_Report_EN_full.pdf](#)> accessed 24 March 2025, recommendation 49.

have to be amended to remove the clear delineations of the EU's competence in the public health sector²⁵². In addition, it would be necessary to amend Article 3 TEU, containing the objectives of the EU legal order, by adding a European Health Union as an EU objective²⁵³. Finally, Article 168(7) TFEU would have to be amended because it limits the EU to complementing the health policies of the Member States²⁵⁴.

Furthermore, it is possible to include in Article 168 TFEU an EU competence for joint procurement of medical supplies²⁵⁵. Article 122(1) TFEU starts with '*without prejudice to any other procedures provided for in the Treaties*'. It illustrates that Article 122(1) TFEU is the default option, allowing us to include a specific EU competence in Article 168 TFEU for joint procurement of medical supplies²⁵⁶. In doing so, the role of the EP can be secured²⁵⁷.

Third, it is suggested to amend Article 122 TFEU by including the EP as co-legislator in this provision²⁵⁸.

Fourth, CHAMON proposes to include a special legislative procedure providing a power of consent for the EP²⁵⁹. This special legislative procedure would provide a balance between the involvement of the EP (and thus legislative transparency), and swift action during crises by allowing the Council to decide by qualified majority²⁶⁰.

Fifth, DERMINE recommends making Article 122 TFEU a general emergency clause²⁶¹. This solution is supported by the EP, proposing to replace Article 122 TFEU by an emergency clause guaranteeing the EP's involvement²⁶².

²⁵² Jarviniemi, Scholz & Hoffmeister, 'From Covid-19 towards a European Health Union' (n249) 3 and 17. See also marginal 37.

²⁵³ *Ibid.*, 3 and 16. The EP also made clear that a European Health Union would provide more transparency and democratic scrutiny if it develops into an independent EU agency provided with sufficient funding (see EP Resolution 2022/2076, para 72).

²⁵⁴ Jarviniemi, Scholz & Hoffmeister, 'From Covid-19 towards a European Health Union' (n249) 3.

²⁵⁵ *Ibid.*, 15 and 19.

²⁵⁶ *Ibid.*, 19.

²⁵⁷ *Ibid.*, 19.

²⁵⁸ von Ondarza, 'The Crisis Governance of the European Union' (n31) 34. This group is joined by the EP (see EP Resolution 2022/2076, paras 364 and 596).

²⁵⁹ Chamon, 'The use of Article 122 TFEU' (n89) 6.

²⁶⁰ *Ibid.*

²⁶¹ Paul Dermine, 'Op-Ed: "Article 122 TFEU and the Future of the Union's Emergency Powers" by Paul Dermine' (*EU Law Live*, 25 January 2024) <<https://eulawlive.com/op-ed-article-122-tfeu-and-the-future-of-the-unions-emergency-powers-by-paul-dermine/>> accessed 24 March 2025.

²⁶² European Parliament Resolution 2022/2051 on proposals of the European Parliament for the amendment of the Treaties [2023] OJ C 2024/4216, para 24.

I share the opinion that the best way to minimize the transparency gap of the Article 122 TFEU decision-making procedure during crises is to keep this procedure as it is but change the way the Council and the Commission use such procedure to informally provide decision-making power for the EP in this procedure. Amending the Treaties to provide a role for the EP in the Article 122 TFEU decision-making procedure would take long negotiations, requiring the approval by all the Member States as per their constitutional requirements²⁶³. Arguing that the informal ways of action to include the EP would reduce the effectiveness of the decision-making process of Article 122 TFEU is incorrect as the EP is able to react fast during crises²⁶⁴. This is exemplified by the reaction of the EP to the Covid-19 pandemic, where the EP introduced the urgency procedure; remote voting; and transferred the decision-making to the EP's President²⁶⁵.

The analysis of the NGEU illustrated that the EU is aware of the alternatives to the decision-making procedure of Article 122 TFEU in times of crisis²⁶⁶. For example, the RRF, one of the main components of the NGEU, is based on Article 175(3) TFEU, that prescribes the OLP for the creation of the RRF²⁶⁷. This paragraph is called the flexibility clause of the EU's cohesion policy²⁶⁸. The EU's cohesion policy is a shared competence of the EU, conferring way more competences on the EU than the EU normally has in the public health sector and fulfilling, albeit via a detour, the wish of the EU citizens to provide the EU with a shared competence in the public health sector²⁶⁹. A shared competence entails that when the EU has exercised its competence in a specific area of law that the Member States shall refrain from exercising their competence in that area of law²⁷⁰.

Lastly, Article 175(3) TFEU is a permanent legal basis, which can be relied upon to respond to concerns going beyond the Covid-19 pandemic²⁷¹. Therefore, the use of this article as legal basis allows the EU to act without requiring amendments to the Treaties²⁷².

²⁶³ Art 48(4) and (6) TEU; Chamon, 'The use of Article 122 TFEU' (n89) 39-40.

²⁶⁴ See marginal 65.

²⁶⁵ See marginal 63.

²⁶⁶ See marginals 82-85.

²⁶⁷ See marginal 85.

²⁶⁸ Päivi Leino-Sandberg & Peter Lindseth, 'How Cohesion Became the EU's Vehicle for Economic Policy: Tracing the Hidden History of Article 175(3) TFEU' (*Verfassungsblog*, 14 August 2023) <<https://verfassungsblog.de/how-cohesion-became-the-eus-vehicle-for-economic-policy/>> accessed 30 April 2025.

²⁶⁹ Arts 2(2) and 4(c) TFEU; Leino-Sandberg & Lindseth, 'How Cohesion Became the EU's Vehicle for Economic Policy: Tracing the Hidden History of Article 175(3) TFEU' (n268). See also marginal 104.

²⁷⁰ Art 2(2) TFEU. Also called the principle of pre-emption.

²⁷¹ Leino-Sandberg & Lindseth, 'How Cohesion Became the EU's Vehicle for Economic Policy: Tracing the Hidden History of Article 175(3) TFEU' (n268). See also marginal 85.

²⁷² Leino-Sandberg & Lindseth, 'How Cohesion Became the EU's Vehicle for Economic Policy: Tracing the Hidden History of Article 175(3) TFEU' (n268); Armin Cuyvers, Vincent Delhomme, Elena Kukovica, Sinead Mulcahy, Darinka Piqani & Corlijn Reijgwart, 'Towards a Climate and

However, it is unclear whether Article 175(3) TFEU provides a fully-fledged solution for the absence of the EP in the decision-making during crises²⁷³.

Additionally, the link between the NGEU and the MFF guarantees the EP's involvement²⁷⁴.

Nevertheless, the informal ways of including the EP in the Article 122 TFEU decision-making procedure do have their limits and would never totally solve the legislative transparency gap of Article 122 TFEU²⁷⁵. The ultimate solution would be to amend the Treaties and to provide a role for the EP in the decision-making procedure of Article 122 TFEU. As clarified above, including the EP in the decision-making procedure of Article 122 TFEU would not harm the effectiveness of this procedure.

VI. Conclusion

This thesis investigated the following research question: How to reconcile the EU institutions' decision-making process during the Covid-19 pandemic with the principle of legality – a core element of the EU's Rule of Law – requiring a transparent EU decision-making process?

Chapter 1 clarified what the principle of legality is. The transparency of the EU decision-making process was discussed²⁷⁶. The principle of transparency is closely related to the principle of democracy as the anchors for the principle of transparency are laid down in the articles of the Treaties describing the principle of democracy. Therefore, there cannot be a democracy based on the Rule of Law without transparent EU institutions.

The OLP installs the EP as co-legislator. Nevertheless, in practice, decisions are often taken via trilogue negotiations which take place behind closed doors. However, the CJEU

Energy Union: The constitutional basis for a sustainable transformation' (*Policy Department for Citizens' Rights and Constitutional Affairs: European Parliament*, September 2024) <[www.europarl.europa.eu/RegData/etudes/STUD/2024/764399/IPOL_STU\(2024\)764399_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2024/764399/IPOL_STU(2024)764399_EN.pdf)> accessed 30 April 2025, 11.

²⁷³ Cuyvers, Delhomme, Kukovica, Mulcahy, Piqani & Reijgwart, 'Towards a Climate and Energy Union' (n272), 12.

²⁷⁴ See marginals 82-83.

²⁷⁵ Cuyvers, Delhomme, Kukovica, Mulcahy, Piqani & Reijgwart, 'Towards a Climate and Energy Union' (n272), 12.

²⁷⁶ See Section 1.3.

clarified that the principle of transparency applies to trilogues even when they are still developing.

Therefore, transparency is an essential characteristic of the EU decision-making process²⁷⁷.

Finally, Chapter 1 illustrated that the EU has a supporting competence in the public health sector. Therefore, during the Covid-19 pandemic, the EU institutions relied for their actions on other legal bases risking to circumvent the limits of their competences as foreseen in the Treaties. The EU institutions relied on the Article 122 TFEU decision-making procedure, a decision-making procedure where the Commission proposes, the Council decides by qualified majority, but the EP plays no role. It follows that the decision-making procedure of Article 122 TFEU lacks transparency as the EP is unable to represent the EU citizens in this procedure.

Chapter 2 analyzed the extent to which the changes made during the Covid-19 pandemic to the decision-making process of the EU institutions were compatible with the principle of legality's requirement of a transparent EU decision-making process.

Regarding the Commission, soft law may not be in line with the principle of legality requiring a transparent EU decision-making process²⁷⁸. It was argued that transparency and effectiveness can boost one another.

The increased use of the written procedure by the Council during the Covid-19 pandemic resulted in the preparatory bodies of the Council having the decision-making power. This thesis addresses that this derogation from the Council RoP may have decreased the transparency level of the EU decision-making process²⁷⁹.

In addition, the Council introduced informal virtual meetings during the Covid-19 pandemic. The transparency safeguards provided for in the Council RoP are not applicable to informal virtual meetings and their informality does not allow the EU citizens to acquire information. Therefore, the use of informal virtual meetings during the Covid-19 pandemic might be incompatible with the transparency requirement of the principle of legality.

²⁷⁷ See marginals 34 and 46.

²⁷⁸ See marginals 52-56.

²⁷⁹ See marginal 59.

The changes made by the EP during the Covid-19 pandemic might breach the transparency requirement of the principle of legality as they reduce the throughput legitimacy of the decision-making process of the EP²⁸⁰. Nevertheless, these adjustments were necessary so that the EP could guarantee transparency in the EU decision-making process during the Covid-19 pandemic by representing the EU citizens.

In addition, the Covid-19 pandemic resulted in the frequent use of the Article 122 TFEU decision-making procedure and trilogues²⁸¹. This practice violates the principle of legality's requirement of a transparent EU decision-making process because the EP cannot represent the EU citizens in the Article 122 TFEU decision-making procedure and it is not clear what the role is of the EP in the trilogue negotiations. This thesis argues that the EP can act swiftly in times of crisis, making the marginalization of the EP in the EU decision-making process during the Covid-19 pandemic unjustified²⁸².

Hereafter, Chapter 3 discussed if and how the joint vaccine procurement by the Commission and the NGEU can be reconciled with the principle of legality - requiring a transparent EU decision-making process?

The decision-making process of the joint vaccine procurement by the Commission may be difficult to reconcile with the principle of legality²⁸³. The related CJEU case-law confirms the broad scope of the right of access to documents²⁸⁴.

Instead, the transparency guarantees in the NGEU decision-making process were advanced and new²⁸⁵. Nonetheless, the NGEU negotiations took place at the European Council, politically bypassing the EP. Therefore, the power of consent for the EP in the MFF procedure mostly translates in a power for the EP to approve or reject already established decisions. Additionally, the trilogue practices in the NGEU decision-making process risk contradicting the CJEU case-law²⁸⁶.

Lastly, I recommend the EU legislators to keep Article 122 TFEU as it is but change the practice of the Commission and of the Council when applying such

²⁸⁰ See marginal 63.

²⁸¹ See marginal 64.

²⁸² See marginal 65.

²⁸³ See marginals 75-80.

²⁸⁴ See marginal 78-80.

²⁸⁵ See marginals 82-85.

²⁸⁶ See marginals 88-89.

provision²⁸⁷. Nevertheless, the ultimate solution to address the transparency gap of the Article 122 TFEU decision-making procedure would be to amend the Treaties by providing a role for the EP in this procedure.

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