FIDE 2025
Katowice

EU Emergency Law

XXXI FIDE Congress | **Katowice 2025**
Congress Publications Vol. 1

Edited by Krzysztof Pacuła

UNIVERSITY OF SILESIA
PRESS

EU Emergency Law

FIDE 2025
Katowice

28–31 May 2025

XXXI Congress of the International Federation of European Law

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Wydawnictwo Uniwersytetu Śląskiego • Katowice 2025

The proceedings of the XXXI FIDE Congress in Katowice in 2025 are published in three volumes.
This book (Vol. 1) contains the reports of the General Rapporteur (Daniel Sarmiento), the Institutional Rapporteurs (Emanuele Rebasti, Anne Funch Jensen and Alice Jaume) and the National Rapporteurs on Topic 1: EU Emergency Law

Editor: Krzysztof Pacuła

General Rapporteur: Daniel Sarmiento

Institutional Rapporteurs: Emanuele Rebasti, Anne Funch Jensen and Alice Jaume

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TOPIC I – EU Emergency Law

FOREWORD

1. XXXI FIDE Congress in Katowice

Founded in 1961, the International Federation for European Law (Fédération Internationale pour le Droit Européen – FIDE) brings together national associations from the Member States of the European Union and beyond. Its mission is to advance knowledge of EU law and to foster unity within the legal community, all in service of the enduring project of European integration. One of the most significant manifestations of FIDE's workings is the organisation of biennial congresses, which convene participants from across Europe and afar, including representatives of the judiciary, public authorities, academia, and legal practice.

The previous, XXX FIDE Congress, flawlessly organised by the Bulgarian Association for European Law, took place from 31st May to 3rd June 2023 in Sofia. This event set an extraordinary standard for excellence and stood as a testament to the remarkable cordiality of our colleagues from the Bulgarian Association – a cordiality that the Polish Association of European Law has had the privilege to experience also throughout the past two years.

As per decision of the FIDE Steering Committee, the privilege of organising the XXXI FIDE Congress was entrusted to the Polish Association of European Law. Consequently, on Saturday of the 3rd June 2023, at the close of the XXX FIDE Congress, Alexander Arabadjiev, President of the Bulgarian Association, passed on the FIDE Presidency to Maciej Szpunar, President of the Polish Association of European Law. With this symbolic act, we embarked on our own journey to organise the next Congress.

Thus, in 2025, Poland has the honour of hosting the FIDE Congress for the very first time, at an occasion which coincides with its presidency of the Council of the European Union.

The Polish Association of European Law was fortunate to be joined by two dedicated co-organisers – the city of Katowice and the University of Silesia. The unwavering support and firm belief in FIDE's mission shared by Marcin Krupa, Mayor of Katowice, and Professor Ryszard Koziołek, Rector of the University, have been instrumental in bringing the 2025 Congress to fruition.

Historically, the overwhelming majority of FIDE Congresses have taken place in the capital cities of the countries from which the host associations originated. In 2025, however, the honour of hosting the Congress fell to Katowice – a city that proudly stands as the vibrant heart of the region of Upper Silesia and serves as the capital of that region. Yet, there is far more to justify this choice than the city's appeal, its logistical convenience, or the support generously offered by the co-organisers.

In the aftermath of the First World War, following the restoration of Polish independence in 1918, the fate of Upper Silesia remained uncertain due to the claims of both Poland and Germany to the region. Ultimately, a unique solution was proposed, in which the vision of Jean Monnet, who would come to be regarded as the chief architect of European integration, played a key role. The disputed territory was to be divided between Poland and Germany, which would then conclude a bilateral agreement governing the cross-border functioning of this hybrid creation. These efforts culminated in the signing of the German-Polish Convention on Upper Silesia in Geneva on 15th May 1922.

Under the Convention, an arbitral tribunal was established as one of the bodies overseeing the implementation of the Convention. The Tribunal was entrusted with the authority to interpret, in a binding manner, the provisions of the Convention at the request of national courts and other public bodies. Some scholars have noted that the preliminary reference procedure before the Court of Justice of the European Union bears a striking resemblance to the mechanism employed by the Upper Silesian Arbitral Tribunal.[1] Remarkably, one of the core mechanisms of the European Union's legal system, the preliminary ruling procedure, traces its conceptual lineage to a legal innovation implemented over a century ago in Upper Silesia.

2. The themes of the XXXI FIDE Congress in Katowice

Each FIDE Congress is defined by thoughtfully chosen themes, reflecting the pressing legal questions of their time. For those seeking to understand the evolving landscape of the European Union and the challenges it has confronted

[1] See, to that effect, M. Erpelding, 'Local International Adjudication: The Groundbreaking "Experiment" of the Arbitral Tribunal for Upper Silesia', in: M. Erpelding, B. Hess, H. Ruiz Fabri (eds.), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I*, Baden-Baden 2019, p. 318; F. Irurzun Montoro, '¿La cuestión de interpretación ante el Tribunal Arbitral de la Alta Silesia (1922-1937) como antecedente de la cuestión prejudicial europeo?', *Revista Espanola de Derecho Europeo* 2017, No. 63, pp. 31–34.

at key historical moments, the FIDE Congresses constitute unparalleled points of reference and a true chronicle of legal dialogue on EU law.[2]

It was in the spirit of this tradition that we set out to identify the themes of the 2025 Congress.

In a process set in motion in 2022, the Polish Association established an advisory committee. This body included *Miguel Poiares Maduro*, former Advocate General at the Court of Justice of the European Union, Dean of the Global School of Law at the Universidade Católica Portuguesa and Adjunct Professor at the School of Transnational Governance of the European University Institute in Florence; *Daniel Sarmiento*, Professor of EU and Administrative Law at the University Complutense of Madrid; and *Stanislas Adam*, Legal Clerk in the Chambers of the President of the CJEU. They were joined by the Polish Judges at the General Court, *Nina Półtorak* and *Krystyna Kowalik-Bańczyk*. Members of the Board of the Polish Association of European Law – *Maciej Szpunar*, *Dagmara Kornobis-Romanowska*, *Sylwia Majkowska-Szulc*, and myself – who also formed part of this committee, wish to express our sincere gratitude to these esteemed colleagues, whose insights have significantly shaped the intellectual agenda of the 2025 Congress.

We also benefited from the invaluable input of the FIDE Steering Committee, national associations, the academic community, and legal practitioners, whose collective and individual insights enriched the conceptualisation of the Congress main themes.

The topics ultimately selected for the XXXI FIDE Congress were the following:

Topic 1: EU Emergency Law

Topic 2: EU Digital Economy: general framework (DSA/DMA) and specialised regimes

Topic 3: Energy solidarity and energy security – from green transition to the EU's crisis management

In retrospect, each of the selected themes emerged organically from the specific context and challenges that defined the years 2022 and 2023.

[2] See, for early manifestations of the links between the FIDE Congresses and evolution of EU law, M. Rasmussen, 'Revolutionizing European law: A history of the Van Gend en Loos judgment', *International Journal of Constitutional Law* 2014, Vol. 12(1), pp. 149–150.

By way of illustration, and with full awareness of the necessarily general and subjective nature of this recollection: the choice of "emergency law" as one of the Congress themes was almost instinctively shaped by the recent and still resonant experience of the COVID-19 pandemic. The year 2022 likewise marked a watershed moment in the European Union's approach to digital governance, exemplified by the adoption of the Digital Services Act and the Digital Markets Act (DSA/DMA). This emerging legal landscape prompted a necessary reflection on the interaction between these landmark instruments and the broader corpus of EU and national law. The inclusion of energy solidarity and security, in turn, was at least in part influenced by the brutal war near the European Union's eastern border and the profound geopolitical instability it triggered – bringing issues of energy resilience, autonomy, and solidarity to the forefront of the Union's legal and political discourse.

Remarkably, over the course of just two years, the relevance of these central themes intensified for reasons that have evolved with the shifting tides of our times.

The concept of "emergency" now seems to encompass a broader array of challenges: from trade conflicts and hybrid threats to the strategic manipulation of digital platforms that threaten democratic institutions. In a similar vein, the Digital Services Act and Digital Markets Act now stand as both bulwarks and battlegrounds for freedom of expression and democratic resilience. Meanwhile, energy solidarity and security are confronted with the reality that traditional alliances may be shifting, and the explosive growth of artificial intelligence and data centres has created new demands and new geopolitical fault lines in that regard.

Hence, the choice of topics for the XXXI FIDE Congress was vindicated, albeit for reasons that partially differed from those that were initially anticipated.

Understandably, these transformations demand renewed reflection on the existing legal frameworks. Through the steadfast commitment and deep insight of the authors whose works constitute this publication, it is our privilege to present to the reader a detailed exploration of the three Congress themes, addressing both the initial concerns and the new challenges that have surfaced over the past two years.

The experiences outlined above impart a valuable lesson and serve as a cautionary tale: rarely can we anticipate all the challenges that the future might bring. It is only through collective effort that we can devise the solutions required to confront such challenges. I remain deeply convinced that this publication provides an excellent confirmation of this thought.

3. Acknowledgements

The present publication is the result of the tireless work and dedication of many individuals. On behalf of the Board of the Polish Association of European Law, I wish to express our profound appreciation to all who have contributed to shaping the agenda and preparing the reports for the XXXI FIDE Congress.

I am particularly grateful to the General Rapporteur for Topic I, *Daniel Sarmiento*, Professor of EU and Administrative Law at the University Complutense of Madrid. I also wish to thank the Institutional Rapporteurs – *Emanuele Rebasti*, Senior Legal Counsellor at the Legal Service of the Council of the European Union; *Alice Jaume*, Legal Adviser at the same institution; and *Anne Funch Jensen*, who contributed to the institutional report in her capacity as Senior Legal Counsellor at the Council until December 2024. I am also thankful to *Michał Ziółkowski*, who acted as the coordinator for Topic I and with whom I had the privilege of assembling the present volume.

Special thanks are also due to the national rapporteurs, whose thoughtful and rigorous contributions form the backbone of this volume and reflect the rich diversity of legal traditions across the European Union.

The organisation of the XXXI FIDE Congress would not have been possible without the generous support of our sponsors and institutional partners.

The steadfast support of the Court of Justice of the European Union and the European Commission proved indispensable to the success of this endeavour.

Krzysztof Pacuła
Secretary General and Member of the Board of the Polish Association of European Law

XXXI FIDE Congress | Katowice 2025

TOPIC I – EU Emergency Law

QUESTIONNAIRE

General Rapporteur: Daniel Sarmiento

EU emergency law refers to the legal framework and measures adopted by the EU institutions and Member States to deal with situations of crisis or urgency that threaten the stability and functioning of the EU. It can involve different types of legal acts supported by institutional practice and judicial interpretation, as well as non-legislative acts, such as guidelines or communications. Depending on the nature and scope of the crisis, EU emergency law can rely on different legal bases and procedures.

Under this definition, EU emergency law builds up its scope around the concepts of "emergency" and "crisis." The concept of "necessity" is sometimes associated with the latter. The list of emergencies and crises that can fall within the ambit of EU emergency law is extensive and vastly diverse: from natural disasters and pandemics through economic calamities to mass migrations and wars.

The national reports are intended to provide valuable insights into the practice of Member States, with the aim of fleshing the EU's tools in addressing situations of emergency.

From the legal viewpoint, the rules forming EU emergency law concern predominantly the action by the EU itself, accompanied by some escape clauses allowing Member States to disregard their obligations stemming from EU law in extraordinary situations.

In the legal landscape so configured, where the situations calling for the application of emergency measures are regretfully abundant, a number of institutional and constitutional questions set on two axes arises.

The first axis concerns the inquiry as to whether, and if so to what extent, the responses to the emergencies shift the institutional balance and come at the price of abandoning the pre-existing safety valves of the EU and domestic legal order. In other terms, this is the question how the EU and domestic legal

order itself accommodates the actions taken out of necessity by its institutions in the face of unforeseen and urgent situations.

The second axis takes the perspective of EU Member States and has a constitutional dimension. It relates to the interplay between the competences of the EU and its institutions, on the one hand, and the Member States, on the other hand. This can concern the action of a Member State taken regardless of an EU action (e.g., supply of medicinal products regardless of EU common purchases) or even an action taken in contradiction of the general EU policy and obligations stemming for this Member State from EU law (e.g., an unilateral ban of agricultural products despite the existence of EU trade rules).

The challenges on both these axes require articulating emergency law with, first, the fundamental freedoms of the internal market, second, the democratic dimension of the functioning of the EU, including its procedures and values, and third, the human and fundamental rights. In particular with regard to the latter, the relationship between EU emergency law and human/fundamental rights is ambivalent: at times, the emergency law can be seen as an obstacle to certain fundamental rights; in certain other scenarios, reliance on EU emergency law can be necessary to ensure respect of such rights.

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

1. Does the law of your Member State distinguish between situations of "emergency," "crisis" and/or "necessity"? If so, what are the differences in law? Are there any other relevant categories that are closely associated to the concepts of "emergency," "crisis" and "necessity" in your country's legal order that deserve mentioning and what are the factors that justify differences among them?

2. Does the law of your Member State provide for a general constitutional/legislative framework to cover situations of emergency more broadly, or are these situations governed by policy-specific sectors, or both?

3. What are the triggering events that justify the implementation of the framework on situations of emergency?

4. Are there any specific constraints of a formal/procedural nature that constrain or condition the way in which an emergency is handled through legal instruments (specific declarations from an authority, need to introduce a parliamentary statute, judicial authorisation, etc.)?

5. Has EU law had any influence or relevance in defining general or policy-specific situations of emergency in the legal order of your Member State?

6. Are there any precedents in the practice of your Member State in which a situation of "emergency," "crisis" and/or "necessity" has been triggered by prior EU action, or it has been handled together by EU and national authorities through both EU and national emergency instruments?

Section 2: The constitutional framework governing emergency law in the Member States

1. Can you describe the constitutional provisions in the law of your Member State which govern situations of emergency? Do these provisions have a prior history or do they reflect previous constitutional or legislative regimes prior to the enactment of the current Constitution?

2. What is the institutional distribution of power in the declaration or implementation of emergency measures? In particular, can you describe the role of Parliament, Government and the courts, as well as any other relevant institutional player playing a role in this regard?

3. In the case that your Member State is a decentralised state, are there any specific regional frameworks applicable to situations of emergency? In the case of national situations of emergency, do the regional/local authorities play a specific role?

4. In case a situation of emergency is triggered under domestic law, how would situations of conflict between the implementation of constitutional provisions and EU or international law be resolved? Are there any specific provisions in this regard, or are there any relevant precedents in the national case-law addressing this scenario?

5. How are fundamental rights protected in cases in which national emergency law is applied? Are there specific constitutional/legislative provisions providing any guidance on how to protect fundamental rights and ensure their protection, or is this a matter left exclusively to the courts? Are there any specific non-judicial bodies entrusted with this task?

6. Are there any precedents in the practice of your Member State in which EU fundamental rights or EU fundamental freedoms of the internal market came into conflict with domestic emergency measures?

Section 3: Statutory/executive emergency law in the Member States

1. In case there are specific legislative or executive provisions/frameworks applicable to specific policy-oriented areas of practice, in which situations of emergency are addressed in the law of your Member State, could you describe them?

2. In the case that your Member States includes both constitutional *and* legislative/executive rules on emergency situations, how are the two regimes differenced? Have there been any situations of conflict between constitutional and legislative/executive frameworks governing the same situation?

3. Are there any constitutional limits on Parliament or Government when making use of emergency powers governed by legislative/executive provisions?

4. The fact that an emergency measure is introduced by the EU, does it alter in any way the balance and distribution of power of the Member State?

Section 4: Judicial review of emergency powers in the Member States

1. In general, what is the jurisdiction of the courts of your Member State when hearing actions challenging measures to address situations of emergency?

2. Are there any procedural specificities applicable to the courts when reviewing the actions of public authorities in situations of emergency?

3. What is the standard of review used by the courts of your Member State when reviewing the actions of public authorities in situations of emergency?

4. Does the principle of proportionality play any role in the judicial review of actions of public authorities in situations of emergency? If so, are there relevant differences between the principle of proportionality under national law and the principle of proportionality under EU law?

Section 5: Implementation of EU emergency law in the Member States

1. When the authorities of your Member States implement EU measures governing situations of emergency (EMU, public health, immigration, energy, banking resolution, etc.), are there any specific principles of national law that interact with principle and rules of EU law?

2. When implementing EU emergency measures in the past, can any gaps or shortcoming be identified in the practice of your Member State? In particular, are there any relevant implementation practices referring to the enforcement of EU measures taken under Article 78(3) TFEU, Article 122 TFEU or any of the EU legislative measures introduced in the course of the COVID-19 pandemic?

GENERAL REPORT

TOPIC I – EU Emergency Law

*Daniel Sarmiento**

Introduction

Emergency law encompasses the rules and principles dealing with crises that threaten the stability, functioning and values of a legal and political system, or the welfare or security of its citizens. These crises, ranging from pandemics, natural disasters and economic shocks to geopolitical conflicts or public disorders, require both rapid action and a careful balance between urgency and the preservation of fundamental rights and democratic values. The legal response to emergencies, both at EU and Member State level, highlight the complex interplay between the institutional, legislative and judicial frameworks within the EU.

At the EU level, emergency powers are designed to provide rapid and coordinated responses while respecting the principles of conferral, subsidiarity and proportionality. The role of the EU's institutions, in particular the European Commission and the Council, is central in proposing and implementing measures that often require the cooperation of Member States. However, emergencies raise questions about the institutional balance within the EU, in particular the extent to which crisis responses shift the power dynamic towards executive bodies and away from democratic deliberation. These shifts, while sometimes necessary, need to be carefully monitored to avoid undermining the values of democracy and the rule of law.

At Member State level, responses to emergencies are strongly influenced by constitutional traditions, legal requirements, institutional design and historical experience. Some Member States operate under wide-ranging constitutional frameworks that explicitly regulate the use of emergency powers, setting limits and requirements for their use. Others rely mostly on legislative measures or judicial interpretation to deal with crises, which can lead to greater flexibility but also potential uncertainty. In all cases, the proportionality and necessity of emergency measures are critical considerations, as excessive or poorly justified restrictions on rights and freedoms risk undermining public confidence in governance.

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One of the main challenges of emergency law is reflected in the tension between the protection of fundamental rights and enabling effective responses to crises. Emergency measures often involve the temporary suspension or restriction of certain rights, such as freedom of movement, privacy or economic activity, in pursuit of broader public safety or welfare objectives. These restrictions must be carefully tailored and limited in time to avoid undue interference with individual freedoms and to ensure compliance with EU and international human rights standards. The role of national constitutional courts, the Court of Justice of the EU and the European Court of Human Rights is paramount in this regard and serve as a significant safeguard against disproportionate action.

Another key dimension of emergency law lies in the relationship between the EU and Member State competences. While the EU has the power to legislate and coordinate in area of policy such as public health, internal market and immigration, to only name a few examples, emergencies often test the limits of these competences. Member States may take unilateral measures to deal with crises within their borders, creating potential friction with EU law. This tension highlights the need for a clear legal framework that delineates the respective roles of the EU and its Member States and ensures that emergency responses are effective without undermining the integrity of the internal market or mutual trust between Member States.

This general report reflects the diversity of approaches among Member States, providing insights into the strengths and limitations of different emergency governance models. Some reported countries emphasise the role of constitutional provisions that delineate emergency powers and provide specific safeguards for fundamental rights. Others rely on enabling legislation or judicial oversight to tailor their legal responses to the nature of the crisis. Non-judicial bodies, such as ombudspersons, national human rights institutions or parliamentary committees, often play a complementary role in ensuring accountability and transparency in the application of emergency measures.

The general report synthesises the reported countries' practices, highlighting both common challenges and innovative solutions in the field of emergency law. It highlights the importance of proportionality, subsidiarity and the rule of law in ensuring that emergency responses are not only effective but also respect the fundamental values enshrined in EU law. By drawing on the experiences of Member States and the broader EU framework, the general report aims to contribute to the development of resilient, rights-based emergency mechanisms that can address future crises without compromising democratic principles or legal certainty.

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

1. Does the law of your Member State distinguish between situations of "emergency," "crisis" and/or "necessity"? If so, what are the differences in law? Are there any other relevant categories that are closely associated to the concepts of "emergency," "crisis" and "necessity" in your country's legal order that deserve mentioning and what are the factors that justify differences among them?

There is a broad terminological variety in the legal systems of the Member States when it comes to emergency law. Whilst some Member States have specific legal concepts with clear and detailed definitions, others use general doctrines developed in the case-law of the courts, or refer to a variety of legal concepts linked to specific situations, powers and procedures. This is not entirely surprising, considering the plurality of constitutional traditions among the reported European countries, as well as the diversity of historical or geographical circumstances that exist between them. However, some common features can be deduced from the information provided in the national reports, which provide a noteworthy outlook of the overall approach towards emergency law in the Member States.

1.1 Definitions provided in national Constitutions

Whilst most national Constitutions refer at some point to situations of emergency, the definition of an "emergency" is subject to a broad conceptual plurality. Some national constitutions have a uniform concept that acts as the basis of the use of emergency powers, whilst other constitutions introduce multiple concepts, sometimes with an overlapping scope. Examples of Member States that refer to a single concept in their Constitution are the Netherlands ("state of *exception*")[2], Cyprus ("state of *emergency*")[3] and Malta (period of *public emergency*),[4] whilst the majority of the Member States distinguish between difference categories, applicable to different situations and responses, as is the case, for example, of Austria ("*exceptional* circumstances,"[5] "*extraordinary* circumstances,"[6] "events *beyond control*,"[7] "disasters or accidents of *exceptional magnitude*"[8]), Germany ("state of *emergency*," "natural disaster or

[2] Article 103 of the Dutch Constitution.
[3] Article 183 of the Cypriot Constitution.
[4] Article 47(2) of the Maltese Constitution.
[5] Article 5, para. 2 of the Austrian Constitution.
[6] Article 25, para. 2 of the Austrian Constitution.
[7] Article 19, para. 3; Article 97, para. 3 and Article 102, para. 5 of the Austrian Constitution.
[8] Article 79, para. 2, subpara. 2 of the Austrian Constitution.

accidents of *exceptional magnitude*," "*imminent danger* to the existence or the free democratic basic order of the Federal Republic or a Land" or "natural disasters or *extraordinary emergency situations*"),[9] or Spain, which contains in its Constitution three different situations of emergency ("*alarm*," "*exception*" and "*siege*") under a common category of "extraordinary states."[10]

When it comes to the definition of these concepts, constitutional texts vary significantly.

Some Member States are characterised by an absence of any definition of an "emergency" or equivalent concepts, leaving the delimitation of its scope and content to the courts, the legislature or both. In these cases, the Constitution explicitly recognises the existence of emergency situations, but their definition is delegated to ulterior implementing court decisions or legislative acts.[11] The Constitutions of Lithuania and of the Netherlands are clear in this regard, renouncing to provide a definition and then providing that the matter "shall be regulated by law."[12] In the case of Slovakia, the definition of an "emergency" is absent in the Constitution, but it is reserved to a "constitutional law."[13] In some of the Member States in which there is no clear definition of an "emergency" in the constitutional text, a doctrine of "constitutional emergency" or "constitutional necessity" appears to have emerged, mostly in the case-law of the courts.[14]

The Member States that provide definitions of an "emergency" do it mostly when it comes to regulate situations of crisis requiring a temporary derogation of constitutional provisions. It is for this purpose that a definition of "emergency" arises in the written provisions of a significant number of constitutions of the Member States. In some cases, the "emergency" is linked to a state of "war"[15] or a "threat from an external enemy."[16] In other cases, an "emergency"

[9] Article 81; Article 35, para. 2, sentence 2, Art. 91, para. 1, and Art. 109, para. 3 sentence 2, respectively, of the Basic Law.

[10] Article 116 of the Spanish Constitution.

[11] See, for example, the Austrian report, Questions 1 and 2.

[12] Article 144, third para. of the Lithuanian Constitution. Article 103, para. 1, of the Dutch Constitution provides for the enactment of states of emergency "as defined by Act of Parliament."

[13] Article 51, para. 2 of the Slovak Constitution.

[14] Belgian report, Section 1, Question 2; Norwegian report, Section 1, Questions 1–3, and Cypriot report, Section 1, Question 1. See also: the Dutch report (Section 1, Question 2), referring to a doctrine of force majeure in the case-law of Dutch courts, with similar effects to the doctrines of "constitutional necessity" described above. This doctrine provides for extraordinary measures in cases duly justified, as is the case of the royal decrees of the Dutch war-cabinet in London during the second world war, which are regarded as legal acts at the same level as Acts of Parliament.

[15] See, *inter alia*, Article 19, para. 5 of the Portuguese Constitution; Article 167, para. 1, Section 2 of the Belgian Constitution and Article 183, para. 1 of the Cypriot Constitution.

[16] Article 62 of the Latvian Constitution.

is linked to "threats to the constitutional order of the State,"[17] "threats to the life of the Republic,"[18] or "public disasters."[19]

Another group of Member States introduces in their constitutional texts different "states" allowing for the derogation of constitutional provisions, distinguishing between distinct situations and their respective definitions. The Constitution of Hungary provides a telling example of this approach, making a distinction between a "state of national crisis" ("a state of war or an imminent danger of armed attack by a foreign power"),[20] a "state of emergency" ("armed actions aimed at subverting the lawful order or at exclusively acquiring power, or in the event of serious acts of violence endangering life and property on a massive scale, committed with arms or with objects suitable to be used as arms"),[21] a "state of preventive defence" ("danger of external armed attack or in order to meet an obligation arising from an alliance"),[22] a "terror threat-situation" ("an event of significant and imminent terror threat or in the case of a terrorist attack"),[23] "unexpected attacks" ("any unexpected invasion of the territory of Hungary by external armed groups")[24] and a "state of danger" ("a natural disaster or industrial accident endangering life and property, or in order to mitigate the consequences thereof").[25] A similar but more simplified approach can be found in the Slovenian Constitution, which distinguishes between a "state of emergency" and a "state of war" and defines both situations, although with identical legal effects.[26] In the case of Greece, the only formally recognised state of emergency is the "state of siege," but this is irrespective of the fact that another provision in the Constitution, Article 44, provides an additional legal base to address "extraordinary circumstances of an urgent and unforeseeable need."[27]

In the case of Germany, there is no formal categorisation of different "states" of emergency, but the Basic Law provides for a broad variety of situations that amount to cases of emergencies affecting diverse circumstances. In this regard, the German report distinguishes between the "emergency constitution"

[17] Article 230 of the Polish Constitution.

[18] See, *inter alia*, Article 183, para. 1 of the Cypriot Constitution, or the detailed set of situations falling under Article 16 of the French Constitution: "when the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments are seriously and immediately threatened, and the regular functioning of the constitutional public authorities is interrupted."

[19] Article 19, para. 2 of the Portuguese Constitution.

[20] Article 48, para. 1, Section (a) and Article 49 of the Hungarian Constitution.

[21] Article 48, para. 1, Section (b) and Article 50 of the Hungarian Constitution.

[22] Article 51 of the Hungarian Constitution.

[23] Article 51/A of the Hungarian Constitution.

[24] Article 52 of the Hungarian Constitution.

[25] Article 53 of the Hungarian Constitution.

[26] Slovenian report, Question 1.

[27] Greek report, Section 1, Question 2.

(*Notstandsverfassung*),[28] cases of "constitutional disruption" (*Verfassungsstörung*),[29] emergency cases within the "financial constitutional law" (*Finanzverfassungsrecht*)[30] and measures of "defensive democracy" (*Wehrhafte Demokratie*).[31] In the case of the "emergency constitution," the Basic Law, following a reform of 1968, includes provisions on the so-called disaster emergency (*Katastrophennotstand*; regional disaster emergency according to Art. 35 para. 2 of the Basic Law and supra-regional disaster emergency according to Art. 35, para. 3 of the Basic Law), the internal emergency (*innerer Notstand*; Art. 91 of the Basic Law) and the so-called state of tension and defence (*Spannungs- und Verteidigungsfall*; Art 80a and Art. 115a-1 of the Basic Law).

1.2 Definitions provided in statutory instruments

All the national reports provide evidence of the existence of general or sector-specific legislative instruments that provide definitions of an "emergency." All the reported States have legislation that develops the declaration of a state of emergency and other equivalent and additional extraordinary situations that empower public authorities to derogate from conventional constitutional rules or practices. In addition, most of the reports give examples of additional situations, not necessarily governed by specific constitutional provisions, empowering national authorities to enact exceptional measures in situations that can be considered to be "emergencies."

In general terms and subject to exceptions, it can be argued that most of the reported countries have constitutional provisions addressing the management of exceptional situations, which can be categorised into three different situations: attacks on the integrity of the State, attacks on the ordinary functioning of the institutions of the State, or natural catastrophes. Depending on the scenario of each factual situation, a specific regime applies to the powers granted to the public authorities, as well as the duration of such powers. A detailed explanation of the constitutional states of emergency will be provided in Section 1, Question 2 and reference is made to the responses therein.

As previously mentioned, all the reports confirm the existence of legislation governing the management of exceptional situations requiring the enactment of extraordinary measures. Besides the legislative instruments that further

[28] Article 12a, paras. 3–6, Article 35, paras. 2 and 3; Article 53a, Article 80a, Article 87a, para. 3, Article 91, and Article 115a-1, para. 1 of the Basic Law.

[29] For example, Article 39, para. 1, second sentence, Article 67 and Article 81 of the Basic Law.

[30] Article 109, para. 3, sentence 2 of the Basic Law.

[31] Article 5(3), second sentence, Article 9(2), Article 18, Article 21(2) and Article 79(3) of the Basic Law.

develop the situations of emergency provided in the Constitution, several countries have introduced additional situations subject to diverse definitions of an "emergency." For example, in French law a general distinction is made between "urgency," "crisis" and "necessity." Situations of "urgency" fall under two different scenarios, both of them governed by statutory provisions: situations of general scope giving rise to a "state of urgency" (*état d'urgence*)[32] and situations of urgency linked to a sanitary crisis, now repealed.[33] Situations of "crisis" are strictly linked to security concerns and are generally handled by the authority of the *préfet*.[34] "Necessity" is defined by reference to individual situations governed by statutory instruments, such as Art. L 2221-15 of the *Code general des collectivités territoriales*, empowering local authorities to intervene "essential use" in the field of food security, or Art. L 622-16 of the *Code de la sécurité interieure*, providing for the enactment of restrictions on the grounds of "urgency or necessity for the protection of public order."

Some countries have enacted general legislative frameworks governing the declaration, management and review of emergency situations and measures. In some cases, these legislative provisions go beyond the specific situations governed by the Constitution and introduce additional situations of emergency, focused on factual circumstances that do not require the derogation of constitutional provisions or practices. That is the case of the Slovak Law 387/2002, on the Management of the State in Crisis Situations Outside Times of War and Martial Law, that, in connection with Article 3(1) of the Slovak Law 42/1994, on Civil Protection of the Population, that defines "emergency" as "a period of threat or a period of stress with consequences on life, health or property," thus covering a broad range of situations that confer powers on public authorities to address the consequences of the emergency. In the Netherlands, the Security Regions Acts refers to "crisis" in broad terms, as "a situation in which a vital societal interest has been affected or is in danger of being affected," granting local authorities broad powers to address the consequences thereof.[35] In 2019, the commission appointed by the Norwegian government proposed a general code on times of extraordinary crisis (*ekstraordinære kriser*). The proposal of the commission was not taken up by the Norwegian legislature, but it had a considerable impact on the drafting of temporary emergency legislation during the initial stages of the COVID-19 pandemic.[36]

Most of the reports enumerated different legislative instruments governing very specific situations subject to emergency powers. In these cases, the definition

[32] Loi nº 55-385, 3 April 1955, also known as the *loi Bourgès-Maunoury*.

[33] Loi nº 2020-290 23 March 2020, repealed.

[34] Article L742-2-1 of the *Code de la sécurité intérieure*.

[35] Article 1 of the Dutch Act of 11 February 2010, containing provisions for the fire services, disaster management, crisis management and medical assistance.

[36] Norwegian report, Question 3.

of an "emergency" is closely linked to the triggering event that provokes the emergency. The diversity and richness of situations defined as "emergencies" in legislative instruments can be enumerated, without an aim of exhaustiveness, as follows:

– transmissible diseases,[37]
– food security,[38]
– floods,[39]
– droughts, earthquakes, fires and volcano eruptions,[40]
– nuclear accidents,[41]
– mafia-related criminal activity,[42]
– mass-migration,[43]
– industrial accidents.[44]

2. Does the law of your Member State provide for a general constitutional/legislative framework to cover situations of emergency more broadly, or are these situations governed by policy-specific sectors, or both?

1.1 General constitutional provisions on situations of emergency

With the exception of the Belgian, Italian and Norwegian Constitutions, all the national reports confirmed the existence of general constitutional frameworks applicable to emergency situations. Broadly speaking, constitutional provisions adopt the conditions under which an institution (i.e., Government, Parliament or another authority) can derogate, for a limited period of time, from constitutional obligations. These provisions refer in most cases, with some terminological variations, to "a state of emergency."

[37] Article 7 and Article 7b of the Austrian Epidemics Act 1950; Article 32 of the Italian Law No. 833 of 23 December 1978, on the Establishment of the National Health Service; Belgian Law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation, *Moniteur Belge* 20/08/2021, p. 90047; Polish Sejm, Act of 5 December 2008 on preventing and combatting infections and infectious diseases in humans, *Dziennik Ustaw*, no. 234, item 1570; Slovenian Law on Infectious Diseases (Uradni list RS, št. 33/06).

[38] Article 1(1) of the Austrian Food Industry Act 1997, and Article 1(1) of the Austrian Security of Supply Act 1992.

[39] Slovenian Zakon o interventnih ukrepih za odpravo posledic poplav in zemeljskih plazov iz avgusta 2023 (Uradni list RS, št. 95/23).

[40] Article 15 of the Spanish Ley 17/2015 de Protección Civil.

[41] Article 38 of the Dutch Nuclear Energy Act (*Kernenergiewet*).

[42] Italian Legislative Decree nº 159 of 2011 (*Anti-Mafia Code*).

[43] Portuguese Law 67/2003, of 23 August 2003, on the Temporary Protection of Displaced Persons; Article 4 of the Population Evacuation Act (*Wet verplaatsing bevolking*).

[44] Article 4 of the Bulgarian Disaster Protection Act.

Constitutional regimes on states of emergency vary depending on the triggering event that justifies its declaration.

In a first category, the majority of the reported countries provide for the temporary derogation of constitutional guarantees in case of foreign threats or states entailing a declaration of war. The reference to these factual events varies from one country to another. Emergency powers can be granted to Government in "the state of war," according to Article 78 of the Italian Constitution. The Portuguese Constitution refer to an "actual or imminent aggression by foreign forces" in Article 19(2). The Slovak Constitution distinguishes between "time of war" and "state of war" in Article 51(2). The Hungarian Constitution has a specific state of emergency ("state of national crisis") for cases involving "a state of war or an imminent danger of armed attack by a foreign power," in Articles 48 and 49. In the case of Malta, the Constitution provides for a "period of public emergency" in Article 47(2) for situations in which the country "is engaged in any war."

In a second category, several national Constitutions include provisions for the declaration of a state of emergency in situations that do not involve a foreign threat or a declaration of war, but that nevertheless require a temporary suspension of constitutional guarantees. This second category of state of emergency can fall under a variety of factual requirements, or it can be the available option when undertaking certain measures which would be deemed unconstitutional, but nevertheless require the intervention of the State authorities (i.e., restrictions to free movement during a pandemic,[45] anti-terrorist measures,[46] or the suspension of regional or local autonomy[47]).

An intermediate solution is provided in the Greek Constitution in Article 48(1), which provides for a declaration of a "state of siege," applicable to "war [or] external dangers or an imminent threat against national security," but also

[45] During the COVID-19 pandemic, several Member States relied on states of emergency to introduce restrictions to fundamental rights and freedoms. At least nine Member States declared a state of emergency pursuant to their constitutional provisions. That was the case Bulgaria (Article 57 of the Bulgarian Constitution), the Czech Republic (Articles 2, 5 and 6 of the Czech Republic's Constitution), Estonia (Articles 129–131 of the Estonian Constitution), Hungary (Article 53 of the Hungarian Constitution), Luxembourg (Article 32(4) of the Luxembourg Constitution), Portugal (Article 19 of the Portuguese Constitution), Romania (Article 93 of the Romanian Constitution) and Spain (Article 55 and 116 of the Spanish Constitution).

[46] Article 51/A of the Hungarian Constitution introduces a specific state of emergency ("Terror threat-situation") "in an event of significant and imminent terror threat or in the case of a terrorist attack."

[47] According to Article 155 of the Spanish Constitution: "If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government [may] take all measures necessary to compel the Community to meet said obligations, or to protect the above-mentioned general interest."

to the case of "an armed coup aiming to overthrow the democratic regime." In both cases, the Constitution provides for the "suspension of force" of specific constitutional provisions, in whole or in part.[48]

In a third category, a majority of national constitutions confer extraordinary powers to the executive branch to make use of specific legal sources of law with legislative rank, for a limited period of time only. Article 44 of the Greek Constitution empowers the President of the Republic, upon a proposal from Cabinet, to issue acts of legislative content to address extraordinary circumstances of an urgent and unforeseeable need. In the case of Italy, Article 77 empowers Government to issue decrees having force of law "in case of necessity and urgency." A similar provision can be found in Article 86 of the Spanish Constitution, authorising Government to enact a Decree-Law in case of "urgent and extraordinary necessity," as well as in several regional Statutes of Autonomy of the Spanish regions.

2.2 General legislative provisions on states of emergency

In cases that do not require a derogation from constitutional provisions and guarantees, all the reported countries provide examples of legislative instruments based on which a state or a declaration of emergency can be issued, with a variety of consequences for the population and their rights and obligations.

Some countries have introduced general frameworks for the declaration of states of emergency that do not require derogations from the Constitution, applicable to a very broad variety of situations. In some cases, these legislative frameworks implement the broader constitutional provisions on the states of emergency, as is the case of Finland,[49] Latvia,[50] Lithuania,[51] Portugal,[52] Romania,[53] Slovakia[54] and Spain.[55] In other case, the legislative frameworks go

[48] Article 48(1) of the Greek Constitution states as follows: "In case of war or mobilization owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime, the Parliament, issuing a resolution upon a proposal of the Cabinet, puts into effect throughout the State, or in parts thereof the statute on the state of siege, establishes extraordinary courts and suspends the force of the provisions of articles 5 paragraph 4, 6, 8, 9, 11, 12 paragraphs 1 to 4 included, 14, 19, 22 paragraph 3, 23, 96 paragraph 4, and 97, in whole or in part. The President of the Republic publishes the resolution of Parliament."

[49] Emergency Powers Act (1552/2011).

[50] Law on Emergency Situation and State of Exception.

[51] Law on State of Emergency, of 6 June 2002, nº IX-938.

[52] Legal Regime of the State of Siege and of Emergency, approved by Law no. 44/86, of 30th September, amended by Organic Law no. 1/2012, of 11 May.

[53] Government Emergency Ordinance Nº 1/1999, on the Regime of the State of Siege and the Emergency Regime, approved by Law Nº 453/2004.

[54] Constitutional Law No. 227/2002 Coll. of laws on state security in time of war, state of war, state of emergency and state of emergency.

[55] Organic Law 4/1981 on the states of alarm, exception and siege.

beyond the scope of constitutional states of emergency and cover all or part of the situations of emergency not directly governed by the Constitution. That is the case of the *loi Bourgès-Maunoury* in France,[56] enacted prior to the current French Constitution but governing a broad range of situations going beyond those provided in Article 16 of the Constitution.

Another generalised feature is the introduction of civil protection regimes, mostly applicable to natural catastrophes or environmental-related events (earthquakes, volcano eruptions, floods, toxic leaks, fires, etc.). However, in some countries the rules on civil protection can cover a very broad range of situations, as in the case of the Austrian Federal Crisis Security Act,[57] or the Norwegian Civil Protection Act, which includes measures during wartime or in case of risk of war.[58] In the case of Germany, reference should be made to the so-called Security and Prevention legislation (*Sicherstellungs- und Vorsorgegesetze*)[59] and the associated ordinances,[60] as well as the Civil Defence and Disaster Relief Act (*Zivilschutz- und Katastrophenhilfegesetz*),[61] with a very broad scope of application and coverage of various situations. In Greece, Law 5075/2023 on the Restructuring of Civil Protection, introduced a considerable overhaul of the previous legal framework on the prevention, response and relief efforts in case of natural, technological and other disasters.[62] The new framework introduces broad measures to address situations of emergency linked to civil protection, such as preventive measures on curfews, partial suspensions of the obligation to work, suspensions of schools, rules on announcements on audiovisual services, as well as restrictions on outdoor events.

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[56] Loi nº 55-385, 3 April 1955, also known as the *loi Bourgès-Maunoury*.

[57] Article 2 Federal Crisis Security Act.

[58] Article 1 of the Norwegian Civil Protection Act.

[59] These include the Act on the Safeguarding of Labour Services for the Purposes of Defence including the Protection of the Civilian Population (Labour Safeguarding Act - ASG -) of 9 July 1968 (Federal Law Gazette I p. 787), last amended by Art. 31 G of 15 July 2024 I No. 236; the Act on the Safeguarding of Basic Food Supplies in a Supply Crisis and Measures to Prepare for a Supply Crisis (Food Safeguarding and Provisioning Act - ESVG -) of 4 April 2017 (Federal Law Gazette I p. 772), last amended by Art. 12 G of 2 March 2023 I No. 56, the Federal April 2017 (BGBl. I p. 772), last amended by Art. 12 G of 2.3.2023 I No. 56, the Federal Benefits Act (- BLG -) of 19.10.1956 (BGBl. I p. 815), last amended by Art. 19 G of 15.7.2024 I No. 236 or the Traffic Safety Act (Verkehrssicherstellungsgesetz - VerkSiG -) of 24 August 1965 (BGBl. III p. 927), amended by Bek. of 8 October 1968 I 1082, last amended by Art. 40 G of 15 July 2024 I No. 236.

[60] See: the ordinance issued on the basis of the ASG, on the determination and coverage of labour requirements in accordance with the Labour Security Act (ArbSV) of 30 May 1989, last amended by Art. 11 G of 19 November 2004 I 2902 or the ordinance based on the ESVG for data transmission for the purpose of implementing the enforcement measures pursuant to Section 12 (1) of the Food Safety and Provision Act (ESVG Data Transmission Ordinance - ESVGDüV -) of 9 March 2023 (Federal Law Gazette I No. 76).

[61] From 25 March 1997 (BGBl. I p. 726), last amended by Art. 1 ZSGÄndG from 02 April 2009 I p. 726.

[62] Greek report, Section 1, Question 2.

The experience of the global pandemic caused by COVID-19 was handled in some countries through specific legislative instruments, focused on the management of the legal, economic and social consequences derived from the pandemic. That is the case of France, through its law on the introduction of a "sanitary state of emergency."[63] The Polish report refers to the introduction by a legislative instrument of an "extra-constitutional state of emergency" during the COVID-19 pandemic.[64]

3. What are the triggering events that justify the implementation of the framework on situations of emergency?

The reports reflect a broad diversity of factual events that may trigger public measures to address an emergency. Irrespective of whether the situation may justify a transitory derogation of constitutional rules or practices, the relevant events can be categorised into three groups.

First, all the reports refer to situations of external internal threats to the constitutional or territorial integrity of the State. A reiterated circumstance is one of a foreign invasion, whether as a threat or as a materialised armed aggression. The terminology is diverse, but it is clear that situations in which a potential or real external aggression to the State justifies the enactment of emergency measures.

A second group of factual situations that justify the triggering of emergency measures concern internal disturbances, civil unrest or any form of action that may contribute to the destabilisation of the constitutional order. Once again, the terminology in each legal system varies considerably, ranging from threats to the "public order,"[65] to "the constitutional system,"[66] "political stability,"[67] "internsal disturbances,"[68] "an armed coup aiming to overthrow the democratic regime,"[69] "disturbance to the democratic constitutional order,"[70] or "danger to the free democratic basic order."[71]

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[63] Loi n°2020-290 du 23 mars 2020 d'urgence pour faire face à la pandémie du covid-19, JORF n°72, 24 mars 2020.

[64] Polish Sejm, Act of 5 December 2008 on preventing and combatting infections and infectious diseases in humans. Dziennik Ustaw, no. 234, item 1570.

[65] French report, Section 1, Question 3.

[66] Polish report, Section 1, Question 3.

[67] Dutch report, Section 1, Question 3.

[68] Latvian report, Section 1, Question 3.

[69] Greek report, Section 1, Question 2

[70] Portuguese report, Section 1, Question 3.

[71] German report, Section 1, Question 3.

Third, all the reports highlight the role of natural "disasters" or "calamities," events that can have a variety of causes, but pointing to an event that triggers nefarious consequences to the life, health and/or property of the population. The cause of such events can be linked to natural developments, such as floods, volcanoes, earthquakes, hurricanes, heatwaves or fires, or they can be the result of environmental or industrial accidents with connection to manmade causes.

Some national reports refer to isolated events, but which deserve specific reference in the legal framework. Although these events are not mentioned in other national reports, they could be subject to one of the three general causes mentioned above. For example, the Latvian report highlights situations that may pose a risk to critical infrastructure,[72] whilst the Finnish report mentions that "hybrid threats" have a specific recognition in the Emergency Powers Act.[73]

Finally, reference should be made to events linked to the economy or financial stability. Not all the reports refer to these circumstances as triggering events of emergency situations, but some reports provide several examples of how economic crises can justify the enactment of emergency measures. This is the case of Belgium, in which emergency measures have been taken in the past, including in situations which, according to the report, have not been considered to be genuine "emergencies," such as the difficulties in meeting the convergence criteria prior to Belgium's joining the Economic and Monetary Union.[74] In the case of Italy, the Constitution itself makes reference to situations of "severe economic recession" or "serious financial crises," which may justify the enactment of extraordinary measures.[75] The German report highlights the role played by the exceptions to the constitutional "debt-break" provided in Article 109, para. 3, second sentence of the Basic Law, in situations related to "an economic development deviating from the normal situation," or in case of "natural disasters or extraordinary emergencies."[76] Other countries, such as Poland, struggled in the 1990's with the use of economic crises as equivalent to other emergencies, at least in the same footing as the three general categories enumerated above. The Polish Constitutional Court rejected at first the use of economic arguments to justify emergency measures, only to overturn this case-law in later years, when it came to admit that the aim of a "budgetary bal-

[72] Latvian report, Section 1, Questions 1 and 3.

[73] The inclusion of "hybrid threats" in the Finnish Emergency Powers Act is the result of an amendment of 2022.

[74] Belgian report, Section 1, Question 3.

[75] The Italian report refers to Constitutional Law No. 243/2012 (Art. 6, para. 2) specifying, in particular, that the "exceptional events" that may lead to temporary budgetary deviations are: severe economic downturns and extraordinary events, including severe financial crises and major natural disasters.

[76] German report, Section 1, Question 3.

ance" is a self-standing constitutional value that may need special protection during "economic emergencies."[77]

4. Are there any specific constraints of a formal/procedural nature that constrain or condition the way in which an emergency is handled through legal instruments (specific declarations from an authority, need to introduce a parliamentary statute, judicial authorisation, etc.)?

The reported countries that have introduced constitutional regimes on states of emergency, share various features regarding the formal/procedural requirements prior to a declaration of constitutional emergency.

First, although some countries allow the Head of State or Government to make a declaration of emergency based solely on constitutional provisions,[78] most countries have introduced a legislative framework that develops the constitutional provisions, to which the head of State or Government is subject to. In most countries, the declaration of an emergency is subject to law and the measures enacted under extraordinary powers are subject to the principle of legality. For example, the Polish Constitution requires in Article 228(2) that a constitutional state of emergency may be introduced "only upon the basis of statute." It is in these cases that the actions of public authorities are based on statutory provisions and not directly on the Constitution.

The reports highlight that a declaration of an emergency, particularly in the case of emergencies entailing a derogation from constitutional provisions or practices, must be enacted by specific instruments. In Slovenia, declarations of emergencies must be passed by a Decree.[79] In Norway, the enactment of emergency measures must be taken by the King-in-council.[80] The Royal Decree is the instrument by which the state of emergency or the separate activation is enacted in the Netherlands.[81] The Cypriot Constitution requires a formal Proclamation of Emergency as a formal requirement to trigger the status provided in Article 183.[82]

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[77] Polish report, Section 1, Question 3. See: the judgment of the Polish Constitutional Tribunal of 12 December 2012, Case K 1/12, Section III.3.4., superseding its previous position delivered in its judgment of 11 February 1992, Case K 14/91.

[78] See: the case of France, as explained in the French report, Section 1, Question 4, and the case of Greece, as explained in the Greek report, Section 1, Question 4.

[79] Slovenian report, Section 1, Question 4.

[80] Norwegian report, Section 1, Question 4, where it is explained that the Norwegian "lockdown" measures of 12 March 2020, during the initial phase of the COVID-19 pandemic, were formally enacted by the Directorate of Health. This course of action, according to the author of the report, breached Article 28 of the Norwegian Constitution.

[81] Dutch report, Section 1, Question 4.

[82] Cypriot report, Section 1, Question 4.

Another formal requirement that is regularly mentioned in most of the reports concerns the limited duration in time of a declaration of emergency, with specific time-periods defined in the Constitution or in statutory instruments. There are multiple examples of the strict timeline to which public authorities are subject when making use of extraordinary powers in situations of emergency. Only to name a few, the Polish Constitution provides for a maximum duration of 90 days, subject to a prorogation of 60 additional days with a parliamentary consent, in the case of a state of exception, and a maximum duration of 30 in the case of natural disasters, which can also be prolonged with a parliamentary consent.[83] The state of emergency provided in the Italian Civil Protection Code has a maximum duration of 12 months, with a single prorogation only of an additional 12 months.[84] The Portuguese Constitution is highly restrictive in this regard, introducing a 15-day time duration for declarations of emergency.[85] There are cases in which the duration of the state of emergency or equivalent situations are not predetermined in time by rules of law, but subject to a case-by-case decision of the competent authorities. This is mostly the case of declarations of war or other declarations of states referring to situations equivalent to a state of martial law.[86] It should be noted that parliamentary control is a common feature in most situations of this kind, including parliamentary scrutiny over the temporal duration of the extraordinary measures taken.

The reports have not raised any case of declarations in situations of emergency requiring preliminary judicial authorisation or the intervention of a court of law in the course of the procedure. Whilst judicial review of emergency measures is a common feature in all the reported countries, this is an *ex post* control, with no references made to *ex ante* judicial intervention. The only exception to this lack of *ex ante* judicial control appears in Article 16 of the French Constitution, in which a right of consultation to the *Conseil Constitutionnel* is introduced, prior to the enactment of emergency measures by the President of the Republic. However, the power of the *Conseil* appears to be merely consultative and not binding.

5. Has EU law had any influence or relevance in defining general or policy-specific situations of emergency in the legal order of your Member State?

The reports confirm that EU law has played a very limited role, or no role at all, in the design and implementation of national constitutional emergency

[83] Articles 229–232 of the Polish Constitution.
[84] Article 24 of the Italian Civil Protection Code.
[85] Article 19(5) of the Portuguese Constitution.
[86] For example, see: Article 116(4) of the Spanish Constitution, stating that: "Congress shall determine [the] territorial extension, duration and terms" of a state of siege (martial law).

regimes. In several countries these constitutional provisions were introduced prior to their accession to the EU. In those countries with amended or new constitutions following their accession (as is the case of Hungary), there is no evidence that EU law played a role in defining their content or in their practical implementation. During the COVID-19 pandemic, several Member States declared constitutional states of emergency, but there is no reference in the reports to a relevant influence of EU law in how these declarations were conceived or put into practice.

This lack of influence of EU law stands in contrast with the statutory regimes of emergency, which are frequent and abundant in all the reported countries. In some sectors, such as energy,[87] cybersecurity[88] or health,[89] EU secondary law has a direct impact in the actions taken by the Member States, particularly when it comes to trigger reporting obligations to EU institutions, offices, bodies or agencies, or to other Member States, or introducing coordination mechanisms among the Member States. More recently, as a result of the Russian invasion of Ukraine and the resulting energy crisis, exceptional measures were passed by Regulation 2022/1854,[90] introducing windfall taxes on energy undertakings that were put into practice by the Member States. The Belgian report puts an emphasis on the extraordinary powers granted to the Government to implement these measures.[91]

The Dutch report introduces a useful criterion to distinguish between different legal techniques through which EU law plays a role in the regulation and implementation of emergency law in the Member States.

A first category of EU rules are those falling within a policy area where the EU is competent to identify an emergency and define it, accordingly activat-

[87] See: Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply; Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector; Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, and Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products.

[88] Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities.

[89] Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health.

[90] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

[91] According to the Belgian report, Section 1, Question 5, Article 22ter, §9, of the amended law of 29 April 1999 (*Moniteur belge/Belgisch Staatsblad*, 22/12/2022, p. 98819) delegates a power to the federal government to adopt *any measure necessary* to ensure the implementation of the Regulation 2022/1854 in case it is being amended.

ing the necessary emergency measures. This is the case, for example, of the regime on temporary protection introduced in Article 5 of Directive 2001/55,[92] which was activated in 2022 as a result of the Russian invasion of Ukraine. Several reports make a reference to the implementation of the temporary protection regime to Ukrainian nationals, and they refer to it as an example of emergency law.

A second category appears when EU law provides for escape clauses or derogations that allow Member States to deviate from their obligations under EU law in case of emergency. Examples of this kind can be found in Article 346(1)(b) TFEU, according to which "any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes."

A third category concerns general rules of EU law that do not refer to emergency cases, nevertheless allow for derogations by Member States, including in situations of emergency. A well-known example is Article 36 TFEU, a provision allowing Member States to derogate from rules on free movement of goods "on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants […]."

Finally, attention must be drawn to Article 222 TFEU, introducing the "Solidarity Clause" for situations in which a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The solidarity clause is triggered in situations that will fall under one of the definitions of an "emergency" or equivalent concepts provided in the law of the Member States. Article 222 TFEU does not have an impact, nor does it condition the terms under which the Member States can rely on their constitutional and/or statutory regimes of emergency, but it adds an additional layer that legally entitles the Member State to request the assistance, including the military resources, of other Member States.

[92] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

6. Are there any precedents in the practice of your Member State in which a situation of "emergency," "crisis" and/or "necessity" has been triggered by prior EU action, or it has been handled together by EU and national authorities through both EU and national emergency instruments?

The national reports provide several examples of situations of emergency that have been directly or indirectly addressed by the EU authorities, or governed by EU law.

First, there are various precedents of measures within the coordinating framework of EU law, emerging as a result of the management of an emergency. At the political level, the Integrated Political Crisis Response mechanism (IPCR) is a general framework allowing the Presidency of the Council to provide a political response to a crisis. It has been employed in the past for streamlining cooperation among the Member States in the context of the current crisis in the Middle East, the Russian invasion of Ukraine or the migration and refugee crisis of 2015. The EU Civil Protection Mechanism is another example, although engaging a more intense form of cooperation among the Member States, having been triggered on several occasions, particularly in the case of recent floods (Belgium and Germany in 2021, Slovenia in 2022, and Greece and Spain in 2024). The emergency measures enacted to coordinate the restrictive measures on free movement of persons during the COVID-19 pandemic is another example referred to by most reports, subject to Recommendations of the Council enacted in 2020 and 2021. The EU framework on cybersecurity provides another case of coordinating measures in the case of security breaches on IT infrastructures.

Second, EU Treaties and legislative instruments include derogations for situations of emergency, some of which have been triggered in the recent past by the Member States. The Treaties provide specific grounds of compatibility of State Aid which can apply to situations of emergency. The Italian report focuses on the measures introduced during the financial crisis of 2010–2012, including an optional intervention of a mandatory depositor guarantee scheme for credit institutions (the Interbank Deposit Protection Fund), considered by the Commission to be in breach of EU State Aid rules. This decision by the Commission triggered the enactment of subsequent measures that finally resulted in the resolution of four Italian credit institutions in 2015 (Cassa di Risparmio di Ferrara, Banca delle Marche, Banca popolare dell'Etruria e del Lazio and Cassa di Risparmio della Provincia di Chieti). The Commission's decision was eventually annulled by the General Court in the case of *Banca Tercas*.[93]

[93] Case T-98/16, T-196/16 and T-198/16 *Banca Popolare di Bari and Italian Republic v. European Commission* EU:T:2019:167. The judgment of the General Court was confirmed on appeal in Case C-425/19 P *European Commission v Italian Republic and Banca Popolare di Bari* EU:C:2021:154.

Third, situations of emergency have been declared by the EU itself, ensuing in EU measures implemented by the Member States. The reports refer to the Decisions of the Council enacted on the basis of Article 78(3) TFEU, resulting from the migration and refugee crisis of 2015, which introduced a binding reallocation system among the Member States.[94] A declaration on the part of the Commission can introduce emergency measures for food and feed of EU origin or imported from third countries, as provided in Regulation 178/2002[95] and it was put in practice in 2011 as a result of the accident at the Fukushima nuclear power station in Japan. This natural catastrophe triggered the enactment of Commission Implementing Regulation 297/2022, imposing special conditions governing the import of feed and food originating in or consigned from Japan.[96]

Section 2: The constitutional framework governing emergency law in the Member States

1. Can you describe the constitutional provisions in the law of your Member State which govern situations of emergency? Do these provisions have a prior history or do they reflect previous constitutional or legislative regimes prior to the enactment of the current Constitution?

The reports confirm that a broad majority of countries have constitutional provisions governing situations of emergency, as a means to address such situations within the remit of the Constitution, authorising derogations or suspensions of the Constitution within the provisions of the constitutional text. Only in the case of Belgium, Italy and Norway, there is an absence of a general constitutional framework to address situations of emergency, but the reports show that the national legal system provides for extraordinary powers to address these situations. The following section will be divided on the basis of the presence or absence of a general constitutional framework in national law.

[94] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

[95] Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

[96] Commission Implementing Regulation (EU) No. 297/2011 of 25 March 2011 imposing special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station.

1.1 States with general emergency frameworks in the Constitution

With the exception of Belgium, Italy and Norway, all the reports confirm the existence of a general framework in the Constitution governing situations of emergency, mostly characterised by procedural rules and substantive requirements that result in a formal declaration of a "state" that empowers the enactment of measures that derogate from the Constitution during a specific period of time. The constitutional provisions on "states of emergency" refer to several autonomous "states," depending on the triggering event, but a frequent distinction can be made between states linked to a situation of war and those connected to other emergencies (internal insurrections or natural disasters).

Another frequent provision addressing situations of emergency that can be found in most Constitutions is the attribution of the exceptional power of Government to enact decrees or provisional laws with the rank of a parliamentary statute.[97] These provisions grant the said powers on a temporary basis and subject to parliamentary *ex post* approval. The grounds justifying the enactment of these measures are not necessarily the same as the triggering events that precede the declaration of a state of emergency.

The historical evolution of these constitutional provisions varies considerably from one country to another. Several reports point out that the current constitutional regimes introduce strict limitations on Government, as a result of past traumatic experiences in periods under authoritarian rule. The reports of Latvia, Lithuania, Poland and Portugal reflect on the impact past political regimes, in which "states of emergency" or "states of war" were declared to purge opposition movements or protests. The Polish report mentions the implementing legislative decrees of 1981 to address the massive anti-governmental protests by *Solidarność*, followed by the introduction of legislation in 1983 creating a "state of exception,"[98] as well as legal concepts such as "higher necessity" to justify the introduction of martial law. As a result of this past experience, the current Polish constitutional provisions provide for a strict and rule-bound regime of states of emergency, including an introductory provisions introducing the applicable principles to any declaration of emergency. These principles include, *inter alia,* subsidiarity, legality, compensation and proportionality.[99]

[97] See, for example, the French report (Section 2, Question 2), the Spanish report (Section 2, Question 2), the Slovenian report (Section 2, Question 2), the Portuguese report (Section 2, Question 2), the Austrian Report (Section 2, Question 2).

[98] Polish Sejm, Act of 5 December 1983 on the state of exception, *Dziennik Ustaw*, no. 66, item 297.

[99] Article 228 of the Polish Constitution.

Several reports highlight the successive reforms introduced in the constitutions to update or simplify the emergency frameworks. For example, The Slovak Constitution of 1992 was amended in 1999 to provide for a general emergency framework. The amendment incorporated a legal basis to enact a Constitutional Law on this matter, which was later enacted by way of Constitutional Law 227/2002.[100] In Greece, the Constitution was amended in 1986 to attribute competences to the Parliament and Government in situations of "siege" governed by Article 48 of the Greek Constitution.[101] The Dutch Constitution was amended in 1983 to introduce the current concept of state of emergency provided in Article 103, followed later by the Coordination Act 1997 that introduces the current system of general and limited states of emergency, together with amendments to the War Act and the Civil Authority Special Powers Act.[102] The German Basic Law underwent a significant reform in 1956 and in 1968 to introduce the provisions governing the "defence constitution" (*Wehrverfassung*) and the "emergency constitution" (*Notstandsverfassung*).[103] The Hungarian Constitution, having been amended successively since its introduction in 1949, was reformed in 2020 to simplify a highly complex general regime on emergency. However, prior to the entry into force of the 2020 amendment, another reform was introduced to address the threats and humanitarian crisis posed by the Russian invasion of Ukraine.[104]

1.2 States without a general emergency framework in the Constitution

The Constitutions of Italy, Belgium and Norway do not include a general framework to address situations of emergency, but this has not prevented State authorities from introducing emergency measures in the past.

The case of Belgium stands out, inasmuch as its Constitution makes an open and explicit statement precluding any suspension of the Constitution. Article 187 states that '[t]he Constitution cannot be suspended, neither in whole or in part." The report deduces from this provision that any state of emergency is precluded *de jure* or *de facto* in Belgium. However, the Belgian courts have shown flexibility when reviewing governmental measures enacted to address situations of emergency. Two examples are highlighted by the report: first, the

[100] Slovak report, Section 2, Question 1.

[101] Greek report, Section 2, Question 1. The report explains that the constitutional amendment of 1986 abolished the President's power to take all necessary legislative or administrative measures in a "state of siege." In particular, the amendment replaced the previous broad powers of the President with a competence to issue, following a proposal from the Government, "acts of a legislative nature to deal with urgent needs or to restore more rapidly the functioning of the constitutional institutions."

[102] Dutch report, Section 2, Question 1.

[103] German report, Section 2, Question 1. Amendment Act of 19 March 1956, Federal Law Gazette I p. 111, and Amendment Act of 30 May 1968, Federal Law Gazette 1968 I p. 709.

[104] Hungarian report, Section 2, Question 1.

so-called decree-laws, introduced during the two world wars, which empowered Government, as the only remaining branch of the constitutional regime in the course of the occupation, to issue "decree laws." Similar extraordinary powers during wartime and occupation are described in the Norwegian report, referring to the assumption of transitory powers by the Norwegian Supreme court during World War II.[105] Second, during the COVID-19 pandemic, Belgium made use of the powers under Article 105 of the Constitution to introduce "special power laws," as a means of authorising the Government to introduce far-reaching decisions, modifying, repealing or supplementing legislation.[106]

It should also me mentioned that these countries, despite the absence of general emergency frameworks in their Constitutions, incorporate provisions that are invoked directly or indirectly to address situations of emergency. In the case of Italy, Government can introduce "decree-laws" of a provisional nature with the force of parliamentary statutes, in "extraordinary cases of necessary and urgency." In fact, Article 77 of the Italian Constitutional was the main source of inspiration of Article 86 of the Spanish Constitution, as explained by the Spanish report. Another example is found in Article 16(1) of the Italian Constitution, that authorises the introduction of measures restricting freedom of movement in case of health or safety reasons.

2. What is the institutional distribution of power in the declaration or implementation of emergency measures? In particular, can you describe the role of Parliament, Government and the courts, as well as any other relevant institutional player playing a role in this regard?

The reports portray the institutional distribution of power during the enactment of emergency measures, showing the differences that exist depending on the type of emergency and the enacted measure. Following a distinction already used in previous passages of this report, the institutional distribution of power will be explained distinguishing between emergency measures linked to a declaration of war (2.1), emergency measures linked to internal insurrection/disturbance or natural disasters (2.2), emergency measures empowering government to adopt statutory acts (2.3) and emergency measures provided in statutory acts (2.4).

For the sake of clarity, each section will be developed through charts reflecting the information provided by the national reports. Further information on each reported country is available in the national reports.

[105] Norwegian report, Section 2, Questions 1 and 2.

[106] Law of 27 March 2020, Act authorizing the King to take measures in the fight against the spread of the coronavirus COVID-19, *Moniteur Belge*, 30/03/2020, pp. 22054 and 22056.

2.1 Emergency measures linked to a declaration of war

Several reports describe specific constitutional and statutory provisions covering situations in which the territorial integrity of the State is threatened or undermined, or governing the consequences of a formal declaration of war.

	Competent authority	Parliamentary control	Legal Base	Duration	Judicial review
Austria	Federal Assembly		Art. 38 B-VG	Unlimited	Military jurisdiction for members of the armed forces only.
Belgium	The King	Parliament vests Government with broad powers, subject to revocation.	Arts. 105 and 167 of the Constitution.	Unlimited	Military jurisdiction.
Bulgaria	Proclamation by the President of the Republic, upon a declaration of Parliament.	Oversight by Parliament of any powers delegated to Government.	Arts. 57 and 84(10) of the Constitution.	Limited duration as defined by Parliament.	Possibility to restrict fundamental rights, and special rules on arrest of individuals (Art. 57(3) Constitution).
Cyprus	Council of Ministers, subject to the right of veto of the President of the Republic.	Right of Parliament to reject or confirm the proclamation of emergency issued by the Council of Ministers.	Arts. 54 and 183 of the Constitution.	Two months from date of confirmation by Parliament, unless prorogued by Parliament.	Possibility to restrict fundamental rights, and special rules on arrest of individuals (Art. 184 Constitution).
Finland	President of the Republic with the consent of Parliament.	Full ex and ex post overview, as applicable, of Presidential decrees during the declaration declaration of emergency.	Sections 23 and 93 of the Constitution	Three months, after which it is possible to extend for a maximum period of one year at a time.	Possibility to restrict fundamental rights, and special rules on arrest of individuals (Section 23 Constitution).

France	Parliament authorises declarations of war, following information by Government.	Authorisation by Parliament and oversight, including right to revoke or extend the declaration after four months (military interventions abroad) and other forms of oversight in case of state of siege and emergency powers.	Art. 35 of the Constitution.	Four months, subject to extension by Parliament (military interventions abroad) and deadlines applicable to state of siege and emergency powers when exercised.	Intervention of the Constitutional Council as provided in the Constitution, and military jurisdictions (state of siege), as well as administrative review by administrative jurisdictions.
Germany	Parliament (Bundestag) with the consent of the Budesrat).	Parliament enacts and derogates the declaration of a state of defence, with the consent of the Bundesrat executive (Art. 115c).	Art. 115a-1 of the Basic Law.	Unlimited, but terminated immediately if the conditions for its determination are no longer imminent (Art. 115l, para. 2, sentence 3).	Military courts can exercise criminal jurisdiction, but Article 115g states that the constitutional functions of the Federal Constitution Court cannot be impaired during a state of defence.
Greece	Parliament, following a proposal of the Cabinet.	Parliament defines the terms of the suspension and the duration.	Art. 48 of the Constitution.	Maximum of 15 days, extendable for additional periods of 15 days.	n/a
Hungary	Parliament. The President of the Republic assumes the power in case Parliament cannot convene.	Parliament participates in the National Defence Council, authority with delegated powers.	Arts. 1(2) (h) and 48 of the Constitution.	Unlimited	n/a

Italy	Parliament agrees on declaration of war and the decision is enacted by the President of the Republic.		Arts. 78 and 87 of the Constitution.	Unlimited	Military jurisdiction.
Latvia	The President of the Republic on the basis of a decision of Parliament.	Without delay, the President shall convene the *Saeima*, which shall decide as to the declaration and commencement of war.	Article 44 of the Constitution.	Unlimited	Military jurisdiction.
Lithuania	Parliament or the President of the Republic with the consent of Parliament.	Parliament can declare the state of emergency and undertakes oversight powers, including approving any extension of the state of emergency in time.	Art. 144 and 145 of the Constitution.	Six months (state of emergency) subject to extension approved by Parliament.	Standard constitutional and judicial review in emergency situations, but subject to possible restrictions to fundamental rights in case of state of emergency.
Malta	The President of the Republic	Duty of information to Parliament and powers to extend duration of revocation of the declaration by the President.	Art. 47(2) of the Constitution and Art. 4 of Chapter 178.	n/a	n/a
Norway	The King	Standard control, subject to the doctrine of constitutional necessity.	Doctrine of constitutional necessity.	n/a	Standard judicial review, subject to the doctrine of constitutional necessity.

Netherlands	The Government	The Two Houses of the States General (Parliament) in joint session.	Art. 96 of the Constitution.	Unlimited	Restrictions on access to justice, but rules on compensation for material loss in the War Act.
Poland	The President of the Republic, on request of the Council of Ministers.	Submission to the Sejm within 48 hours for approval by absolute majority.	Arts. 229 and 231 of the Constitution.	Unlimited	Extraordinary courts or summary procedures may be established only during a time of war.
Portugal	The President of the Republic.	The declaration of the President is subject to Parliamentary approval.	Art. 19 of the Constitution.	15 days, subject to extensions following the same procedure.	Standard constitutional and judicial review.
Romania	The President of the Republic.	Parliamentary approval within 5 days from declaration.	Art. 93 of the Constitution.	n/a	Limitations on grounds of review introduced by Law 554/2004.
Slovakia	President of the Republic upon a proposal of Government.	No specific measures of parliamentary oversight.	Constitutional Law 227/2002.	Unlimited	Powers to limit access to courts and legal protection.
Slovenia	National Assembly upon the proposal of Government, and the President of the Republic if the National Assembly cannot convene.	Submission to the National Assembly "immediately after its next meeting."	Art. 92 of the Constitution.	Unlimited	Military jurisdiction.
Spain	Congress upon a proposal of Government.		Art. 116 of the Constitution.	Determined by the declaration of state of siege.	Military jurisdiction, but recognition of principle of state liability.

2.2 Emergency measures linked to internal insurrection/disturbance or natural disasters

Several reports describe specific constitutional and statutory provisions covering situations linked to internal insurrections or disturbances, as well as situations deriving from natural or similar disasters requiring immediate response from the State authorities.

	Competent authority	Parliamentary control	Legal Base	Duration	Judicial Review
Austria	Federal President on the proposal of the Federal Government, with the consent of the standing sub-committee appointed by the Main Committee of the National Council.	Vote in Parliament within 4 weeks from enactment of the measures.	Art. 18(3)-(5) and Art. 97(3) B-VG.	n/s	Review by the Constitutional Court of emergency legislative measures, and by administrative courts of individual administrative acts.
Belgium	Government	Parliament vests Government with broad powers, subject to revocation.	Art. 105 of the Constitution.	Limited duration as defined in the delegating legislative act.	Standard constitutional and judicial review.
Bulgaria	Proclamation by the President of the Republic, upon a declaration of Parliament.	Oversight by Parliament of any powers delegated to Government.	Art. 84(12) of the Constitution.	Limited duration as defined by Parliament.	Possibility to restrict fundamental rights, and special rules on arrest of individuals (Art. 57(3) Constitution).
Cyprus	Council of Ministers, subject to the right of veto of the President of the Republic.	Right of Parliament to reject or confirm the proclamation of emergency issued by the Council of Ministers.	Arts. 54 and 183 of the Constitution.	Two months from date of confirmation by Parliament, unless prorogued by Parliament.	Possibility to restrict fundamental rights, and special rules on arrest of individuals (Art. 184 of the Constitution).

Finland	Declaration by Government, in cooperation with the President, vesting emergency powers on Government.	Full ex ante and ex post overview, as applicable, of Government decrees during the declaration.	Section 23 of the Constitution.	Six months, except three months in exceptional urgency requiring bypassing advance consultation of Parliament, with possibility to extend for a period of six months at a time.	Possibility to temporarily derogate from fundamental rights (Section 23 of the Constitution).
France	Government (state of siege) and President of the Republic (emergency powers).	Duties of consultation and oversight and prohibition to dissolve Parliament during emergency powers.	Art. 36 of the Constitution.	Twelve days, followed by extensions authorised by the President of the Republic (state of siege) and 30 days subject to approval and prorogation by Constitutional Council (emergency powers).	Intervention of the Constitutional Council as provided in the Constitution, and military jurisdictions (state of siege), as well as administrative review by administrative jurisdictions.
Germany	Federal or Regional Government, depending on the territorial scope of the disaster (Art. 35, paras 2 and 3); Federal or Regional Government, depending on the scope of the emergency (Art. 91).	No significant involvement of the Bundestag and Bundesrat, except for the request to terminate the deployment of the armed forces, Art. 87a para. 4, sentence 2.	Art. 35 paras. 2 and 3; Art. 91 of the Basic Law.	n/a	Standard constitutional and judicial review.

Greece	The President of the Republic, upon the proposal of the Cabinet.	Ratification by Parliament.	Art. 44 of the Constitution.		
Hungary	Parliament (state of preventive defence and terror threat-situation) and Government (state of danger and unexpected attacks).	Powers of control and repeal of decrees adopted by Government.	Arts. 51–54 of the Constitution.	Fifteen days, with power to extend the measures prior authorisation from Parliament.	Standard constitutional and judicial review.
Italy	Government	Subject to ordinary parliamentary control.	No specific constitutional regime on declarations of emergency.	n/a	Standard constitutional and judicial review.
Latvia	Government	Duty to inform the Parliament within twenty-four hours.	Art. 62 of the Constitution.	n/a	Standard constitutional and judicial review and military jurisdiction if necessary.
Lithuania	Government or local authorities (emergency situation), Parliament or the President of the Republic with the consent of Parliament (state of emergency).	Parliament can declare the state of emergency and undertakes oversight powers, including approving any extension of the state of emergency in time.	Art. 144 and 145 of the Constitution.	Six months (state of emergency) subject to extension approved by Parliament.	Standard constitutional and judicial review in emergency situations, but subject to possible restrictions to fundamental rights in case of state of emergency.
Malta	The President or Parliament by a two-third majority.	Duty of information to Parliament and powers to extend duration of revocation of the declaration by the President.	Art. 47(2) Constitution and Art. 4 of Chapter 178.	Fourteen days, subject to prorogation by Parliament for a maximum of 3 months.	Standard constitutional and judicial review

Norway	The King	Standard control, subject to the doctrine of constitutional necessity.	Doctrine of constitutional necessity.	n/a	Standard judicial review, subject to the doctrine of constitutional necessity.
Netherlands	The Government on a recommendation of the Prime Minister.	Supervisory role of the States General (Parliament) in joint session and power to terminate a general or limited state of emergency at any time.	Art. 103 of the Constitution.		No constitutional review of emergency acts introduced by Parliament, but standard judicial review of administrative action.
Poland	President of the Republic, on request of the Council of Ministers, or the Council of Ministers alone in the case of the state of natural disaster.	Submission to the Sejm within 48 hours for verification by absolute majority, but no parliamentary control is foreseen in case of the state of natural disaster.	Arts. 230, 231 and 232 Constitution.	Ninety days, extensible 60 days/30 days in case of natural disaster.	Standard constitutional and judicial review.
Portugal	The President of the Republic.	The declaration of the President is subject to Parliamentary approval.	Art. 19 of the Constitution.	Fifteen days, subject to extensions following the same procedure.	Standard constitutional and judicial review.
Romania	President of the Republic.	Parliamentary approval within 5 days from declaration.	Art. 93 of the Constitution.	n/a	Limitations on grounds of review introduced by Law 554/2004.
Slovakia	President of the Republic upon a proposal from Government / Government.	No specific measures of parliamentary oversight.	Constitutional Law 227/2002.	Sixty days, extensible for additional 30 days/90 days maximum.	Standard constitutional and judicial review.

Slovenia	National Assembly upon the proposal of Government, and the President of the Republic if the National Assembly cannot convene.	Submission to the National Assembly "immediately after its next meeting."	Art. 92 of the Constitution.		Standard constitutional and judicial review.
Spain	Government	Authorisation by Congress.	Art. 116 of the Constitution.	Defined by the declaration (state of alarm)/30 days, extensible for 30 days (state of emergency).	Standard constitutional and judicial review.

2.3 Emergency measures empowering government to adopt statutory acts

Besides the cases in which a declaration introduces a state of emergency for a limited period of time, several reported countries have constitutional provisions empowering the executive to introduce decrees or equivalent instruments, with the same rank and legal effects as parliamentary statutes, to cover situations linked to emergencies. These "urgency decrees" are subject to *ex post* controls by Parliament and they can lose their legal effects in case Parliament rejects them or does not make a determination within a prescribed time-period. Examples of "urgency decrees" are found in the Constitutions of Italy and Spain and their use is not as exceptional as the introduction of states of emergency. Some reports highlight the fact that the use of "urgency decrees" has become frequent and, in some cases, not necessarily linked to situations of "urgency."

Article 77 of the Italian Constitution empowers Government to introduce "provisional measures having the force of law" in cases of "extraordinary necessity and urgency." These measures ("decrees") must be submitted to Parliament on the same day they are enacted, in order for both Chambers to "convert" them into law. From the time in which the decree is passed until its "conversion" by Parliament, the measures deploy their full effects with the same rank as a parliamentary statute. In case the decree is not "convalidated" by Parliament within a period of sixty days since its publication, it shall lose its effects. The use of these measures by the executive can be subject to constitutional review in order to determine if the requirements in Article 77 of the Constitution were complied with. The same instrument was introduced, under the influence of its Italian counterpart, into the Spanish Constitution in Article 86.

A variant that departs from the Italian example appears in the countries that provide in their constitutions for broad delegations from Parliament to the executive. These delegations can be used in some countries to address situations of emergency through extraordinary powers granted to Government. In the case of Belgium, which lacks a constitutional general framework on emergency situations, the attribution of extraordinary powers by the executive is articulated through delegations made by Parliament, which also include provisions governing the role of Parliament in its oversight of executive action. This was the case of the Law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation that mirrors the procedure used in was situations and involves Parliament both at the time of the declaration of the sanitary emergency as well as during the implementation of government measures.[107]

2.4 Emergency measures provided in statutory acts

All the reported countries regulate policy-oriented situations of emergency that do not require a declaration of constitutional emergency, but nevertheless provide extraordinary powers to the authorities. In the case of emergency measures governed by statute only, the powers are generally conferred on the executive branch. Depending on the policy area and the territorial distribution of power, the emergency measures will be introduced by central, regional or local government. Some countries provide for coordinating bodies to ensure the proper cooperation among the different and concerned levels of government.

3. In the case that your Member State is a decentralised state, are there any specific regional frameworks applicable to situations of emergency? In the case of national situations of emergency, do the regional/local authorities play a specific role?

The national reports portray the territorial distribution of emergency powers in line with the distribution of powers within each country. As a result, a distinction can be made between the emergency powers provided in unitary or centralised States and those available in federal or decentralised States. Even though all the reported countries confirm the existence of emergency powers entrusted to regional and/or local authorities, the intensity of these powers and the role of central government varies considerably depending on the overall territorial distribution of power of each State.

In the case of the reported countries that can be qualified as unitary or centralised States, the reports confirm that, despite the centralisation of emergency

[107] See: Belgian report, Section 1, Question 4.

powers in the hands of Parliament and Government, there is significant involvement of regional and/or local authorities, particularly when the emergency is confined to the territory of a specific territory. In the case of Italy, the Law 833 of 1978 and the Civil Protection Code attributes powers to the Regional Boards in case of an emergency at the regional level.[108] A similar framework applies in the Netherlands, as provided in the Municipal Act and the Security Regions Act.[109] In Romania, Art. 4 of GEO 21/2004 provides the conditions under which local authorities are empowered to introduce emergency measures at the local level. The same scheme can be found in Slovakia under Law 42/1994[110] and in Slovenia in a variety of statutory instruments, such as the Minor Offences Act, Communicable Diseases Act, Act on Protection against Natural and Other Disasters.[111] In the case of France, despite the highly centralised structure of the State, significant powers for the handling of emergencies are granted to the *préfet*, as well as mayors in local municipalities. According to the French report, the *Conseil d'État* issued in its annual report of 2021 several proposals to improve the coordination of the different authorities at regional and local level.[112]

It should be noted that, even when the country has autonomous territories, the centralised assumption of powers can be very broad. For example, in the case of the Åland Islands, which are subject to a special regime as an autonomous region of Finland with self-government and its own legislative powers, the central authorities hold the legislative powers concerning situations of emergencies.[113]

The reports from decentralised/federal countries provide a different arrangement in the management of emergencies. A first feature that stands out is the duty to preserve the constitutional distribution of competences between the central and the regional authorities, which results in differentiated and sometimes parallel frameworks to handle emergency situations.[114] As a result, the regions can be entrusted with the power to introduce "urgency decrees" with statutory rank, as well as to declare states of emergency or equivalent

[108] Italian report, Section 2, Question 2.

[109] Dutch report, Section 2, Question 3.

[110] Slovak report, Section 2, Question 3.

[111] Slovenian report, Section 2, Question 3.

[112] *Les états d'urgence : la démocratie sous contraintes, Étude annuelle du Conseil d'État*, 2021, p.102, cited in the French report in footnote 50. (the numeration might change, this needs to be double-checked after typesetting stage).

[113] Section 27(34) of the Act on the Autonomy of Åland, *Ahvenanmaan itsehallintolaki*, 1144/1991. See also: statements of the Constitutional Law Committee of the Parliament PeVL 6/2009 vp and PeVL 29/2022 vp, reports PeVM 1/2021 vp ja PeVM 2/2021 vp, and, in addition, the Statement of the Supreme Court OH 2020/168, KKO-HD/97/2021.

[114] Emergency decrees can be issued by most *Comunidades Autónomas* in Spain and in the *Länder* in Austria, as explained in the Spanish (Section 2, Question 2) and Austrian (Section 2, Question 2) reports.

declarations.[115] In the case of emergencies involving different regions or states, coordination measures are available and in some cases they are regulated by law, as is the case of the Belgian Royal Decree of 22 May 2019,[116] providing in Article 23 to 28 the means through which to channel policy coordination and its framework.[117]

Despite the strict separation of competences, most reports of decentralised States pointed out that the Constitution of legislative acts can introduce some degree of centralisation in the management of an emergency, particularly when the scope of the risks supersede the territorial confines of a territory. In Spain, the state of alarm provided in Article 116 of the Constitution grants central Government powers to coordinate the Autonomous Communities, even in areas of their competence.[118] The Austrian Constitution includes mechanisms to empower the Federal authorities depending on the scope of the crisis, or in situations in which the Länder are impeded to take the necessary measures.[119]

4. In case a situation of emergency is triggered under domestic law, how would situations of conflict between the implementation of constitutional provisions and EU or international law be resolved? Are there any specific provisions in this regard, or are there any relevant precedents in the national case-law addressing this scenario?

In case of conflict between the constitutional provisions or acts of a Member State in the case of an emergency and EU law, the reports show a broad consensus on the matter. Whilst all the reports conclude, in more direct or indirect terms, that such conflicts are resolved through the standard criteria on hierarchy of norms, as well as the use of justifications to derogations recognised in international and EU law, the reasoning varies depending on the terms in which these conflicts are addressed in national law.

The majority of the reports highlight the fact that the ordinary criteria on the hierarchy of norms, including the primacy of EU law, are sufficient to resolve any conflict between legal systems in the case of an emergency. This is particularly the case in purely monist countries, such as the Netherlands, with a long-

[115] Austrian report, Section 2, Question 2. In the case of Germany, the report provides an exhaustive description of the *Länder* constitutions and their respective emergency powers, which can vary from one *Land* to another. See: the case of Baden-Württemberg and Saxony, with specially elected committees in the form of "emergency parliaments," or the case of Hesse, Lower Saxony, North Rhine-Westphalia and Rhineland-Palatinate, in which emergency situations are concentrated in the executive. See: German report, Section 2, Question 2.

[116] *Moniteur Belge*, 27/06/2019, p. 65933.

[117] Belgian report, Section 2, Question 3.

[118] Spanish report, Section 2, Question 3.

[119] Austrian report, Section 2, Question 2.

standing tradition of recognition of effects of international law prevailing over domestic legislation.[120] The reports from Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovenia and Spain point out that the standard rules on conflicts of laws between domestic law and international and/or EU law, apply to situations of emergency.

Some countries have specific references in their Constitutions or statutes to EU law and its primacy in case of conflict, including situations of emergency. Article 7(2) of the Slovak Constitution states that "legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic." Article 148(2) of the Romanian Constitution states that EU law "shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act." In the case of Cyprus, its Constitution was amended in 2006 as a result of a conflict between its Article 11 and the European Arrest Warrant Framework Decision. As a result, the current Article 1A of the Cypriot Constitution states as follows:

> No provision of the Constitution shall be deemed to annul laws enacted, acts done or measures taken by the Republic which become necessary by reason of its obligations as a member state of the European Union, nor does it prevent Regulations, Directives or other acts or binding measures of a legislative character, adopted by the European Union or the European Communities or by their institutions or competent bodies thereof on the basis of the Treaties establishing the European Communities or the Treaty of the European Union, from having legal effect in the Republic.

Reference should be made to the case of Finland, whose Constitution introduces a provision on international law specifically for the case of emergency situations. Section 23 of the Finnish Constitution states that the provisional exceptions to basic rights and liberties in situations of emergency "are compatible with Finland's international human rights obligations." Furthermore, the Emergency Powers Act and the Act on the State of Defence require that the States party to the International Covenant on Civil and Political Rights must be informed if a state of defence is declared or the emergency powers under the Emergency Powers Act are enforced. The same applies regarding the information to the Council of Europe. Article 5 of the Emergency Powers Act provides that the application of the Act must comply with Finland's international obligations.[121]

In contrast to the reports from the EU Member States, the Norwegian report describes a unique case, caused by its dualist system and its position as an

[120] Dutch report, Section 2, Question 4.
[121] Finnish report, Section 2, Question 4.

EFTA Country. The EEA Agreement – through which the internal market is extended to the EFTA States of Norway, Liechtenstein and Iceland – requires a lighter form of supremacy than what is the case under EU law. According to its protocol 35, the EFTA states are only required to adopt *statutory* provisions that resolve conflicts between domestic statues implementing EEA rules and other statutes (i.e., "homegrown" rules) by giving preference to the former. It should be noted that this lighter form of supremacy only needs to be (and has in fact been) implemented at statutory level. Consequently, emergency legislation could prevail over (implemented) EEA rules, if the emergency legislation explicitly states that it applies notwithstanding EEA rules to the contrary. This is the result of Norway's dualist system and its position as an EFTA country that explains why the incorporation of EU law into its legal system follows a different path. The report emphasises that Norway's dualist approach to international law ensures that Norwegian law prevails in the event of a conflict.[122] Furthermore, the doctrine of constitutional necessity, on the basis of which emergency measures are enacted in Norway, has constitutional rank and therefore prevails over ordinary legislation as well as Norway's international obligations. However, the practical result appears to be the same as in the EU Member States, inasmuch as the Norwegian courts rely on a "presumption principle" according to which Norwegian law must be interpreted as far as possible in accordance with Norway's international legal obligations.[123]

Most reports point out that both international and EU law contain provisions that recognise the need to take extraordinary measures in emergency situations and therefore allow for derogations from their rules. These derogations may overlap with the conditions under which a state of emergency may be declared under national law, as in the case of Article 15 ECHR, or with the justifications available to Member States for restricting the rules on free movement, as provided for, *inter alia*, in Articles 36, 45(3) and 52 TFEU. The Austrian report highlights the fact that in some cases a declaration of emergency may be linked to the maintenance of "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security," features which the EU must respect by virtue of the obligations stemming from Article 4(2) TEU.[124] The general consensus of the reports is that, despite the fact that some Member States do not recognise the full primacy of international and/or EU law, emergency situations are generally considered to be closely linked to the preservation of essential State functions or interests, the protection of which is also covered by international and EU law.[125]

[122] See: the judgment of the Norwegian supreme court in Rt. 1997, s. 580 (OFS).

[123] Norwegian report, Section 2, Question 4.

[124] Austrian report, Section 2, Question 4.

[125] Several reports refer to the case law of the Constitutional Courts in which these conflicts have emerged, resulting in findings that generally conclude on the convergence of international/

5. How are fundamental rights protected in cases where national emergency law is applied? Are there specific constitutional/legislative provisions providing guidance on how to safeguard and ensure the protection of fundamental rights, or is this a matter left exclusively to the courts? Are there specific non-judicial bodies entrusted with this task?

The reports confirm that the protection of fundamental rights is an essential feature of the emergency frameworks in all the reported countries. This is reflected in the fact that several constitutions devote specific provisions to this matter or leave it to the legislator to determine the conditions under which fundamental rights may be restricted in a state of emergency.

Several reports emphasize the protection of fundamental rights in constitutional provisions on states of emergency, as in the case of the Slovenian Constitution, which provides in Article 16 as follows:

> Human rights and fundamental freedoms provided by this Constitution may exceptionally be temporarily suspended or restricted during a war and state of emergency. Human rights and fundamental freedoms may be suspended or restricted only for the duration of the war or state of emergency, but only to the extent required by such circumstances and inasmuch as the measures adopted do not create inequality based solely on race, national origin, sex, language, religion, political, or other conviction, material standing, birth, education, social status, or any other personal circumstance.

Similar provisions are found in Article 53 of the Romanian Constitution, Article 228(3) of the Polish Constitution, Article 145 of the Latvian Constitution, Article 19 of the Portuguese Constitution, Section 23 of the Finnish Constitution, and in Article 55 of the Spanish Constitution.

In some national constitutions, restrictions on fundamental rights are limited to a closed list of cases, enumerating the rights that are subject to restrictions during a state of emergency. For example, Article 55 of the Spanish Constitution enumerates the fundamental rights provided for in Articles 17 (liberty and security), 18(2) and (3) (inviolability of the home and secrecy of communications), 19 (freedom of movement), 21 (assembly), 28(2) (collective action) and 37(2)(2) (collective labour disputes), which may be suspended when a state of emergency or state of siege (martial law) is declared under the conditions provided for in the Constitution.

EU law and the domestic constitutional framework. See, for example, the judgment of the Latvian Constitutional Court of 21 December 2023 nº 2022-28-03, or the judgment of the Portuguese Constitutional Court in case 354/2024 (EU COVID Certificate).

Other countries refer the matter to Parliament and leave it to legislation to define the conditions and rights that are subject to restrictions during a state of emergency. In the case of Poland, the parliamentary statutes on the three states of emergency recognized in the Constitution (state of war, state of exception and state of natural disaster) enumerate the rights that are subject to restrictions in these situations. A complete table showing the three states and the respective rights subject to restrictions is included in the Polish report.[126] In Slovakia, Article 51(2) of the Constitution refers the matter to a constitutional law, and this deferral is now enshrined in Constitutional Law 227/2002, which defines four different states of emergency (state of war, state of exception and state of emergency), with each declaration enumerating the rights subject to restrictions. Articles 3, 4 and 5 of Constitutional Law 227/2002 take up this task and establish the limitations to which the competent authorities are subject when restricting the rights set forth therein. A similar constitutional provision is found in Article 52 of the Hungarian Constitution, which delegates the matter to Act XCIII of 2021 on the Coordination of Defense and Security Activities.

It should be noted that some of the reported countries have no constitutional or legislative provisions regulating the suspension or restriction of fundamental rights in times of emergency. This is the case of France, Belgium, Germany, Norway and Italy, where the protection of fundamental rights is subject to the general rules and remedies provided for in the constitution and legislation. In these cases, restrictions on fundamental rights are subject to the standards of review developed in the case law of the courts. In the case of France, particular attention is paid to the role of the administrative courts and the remedy of *référé-liberté*, which gives the administrative judge a relevant role in the review of state actions that interfere with fundamental rights and duties, including in situations of emergency.[127] In the case of Germany, the Federal Constitutional Court plays a particularly relevant role, as the Basic Law provides for a special remedy for the protection of fundamental rights pursuant to Article 94(1)(4a), as well as its remedial counterpart for interim relief in Section 32 of the Act on the Federal Constitutional Court.[128] These remedies apply both in ordinary times as well as in situations of emergency, giving the Federal Constitutional Court a particularly relevant role in determining the standards of protection of fundamental rights in the course of an emergency.

[126] Polish report, Section 2, Question 5.

[127] French report, Section 2, Question 5.

[128] German report, Section 2, Question 4. According to Section 32 of the Act on the Federal Constitutional Court: "In a dispute, the Federal Constitutional Court may provisionally decide a matter by way of a preliminary injunction if this is urgently required to avert severe disadvantage, to prevent imminent violence or for another important reason in the interest of the common good."

6. Are there any precedents in the practice of your Member State in which EU fundamental rights or EU fundamental freedoms of the internal market came into conflict with domestic emergency measures?

Several reports describe examples in which emergency measures clashed with EU fundamental rights and freedoms. There are two category of cases in which this situation emerged: restrictions on entry and exit from the territory of the state during the COVID-19 pandemic, and restrictions at frontiers, both with third countries and within the Schengen area.

The broad and intense restrictions to free movement introduced in 2020 as a result of the global pandemic generated doubts as to their conformity with international obligations, particularly with EU law and the ECHR. In some countries these restrictions were litigated, and, in some instances, actions were successful.

In Slovakia, the Constitutional Court ruled that the implementation of compulsory quarantine in State facilities was disproportionate and contrary to both fundamental rights and EU fundamental freedoms.[129] In Finland, the initial response to the COVID-19 pandemic included a ban entry and exit from the country, including EU Member States, subject to derogations based on a criterion of "indispensability." The European Commission considered this measure to be too broad and disproportionate,[130] although the Finnish authorities rebutted these objections and maintained their policy.[131] The Norwegian report describes several examples of broad restrictions allegedly in breach of EEA obligations, such as the requirement of prior residence for individuals who exercised free movement during the pandemic but were impeded from re-entry as a result of lacking formal residency.[132] It should also be added, as reported in the Norwegian report, that the draft temporary legislative measures enacted in the first months of the pandemic envisaged that Norwegian authorities were authorised – if necessary – to contravene EEA obligations in exceptional and strictly necessary circumstances.[133] In Austria, the exclusion of compensation of employees residing in another Member States was deemed contrary to Regulation 883/2004, on the coordination of social security systems, and Regulation 492/2011, on freedom of movement of workers within the EU, as confirmed by the Court of Justice in the case of *Thermalhotel*

[129] Judgment No. PL ÚS 4/2021 of 8 December 2021.

[130] Letter from the Directorate-General for Justice and Consumer Matters to the Government of Finland, 22 February 2021, Ref. Ares (2021)1401086, as referred in the Finnish report, Section 5, Question 2.

[131] Letter from Ministry of the Interior to the Commission, 4 March 2021, as referred in the Finnish report, Section 5, Question 2.

[132] Norwegian report, Section 2, Question 6.

[133] Prop. 56 L (2019-2020) Section 4.2. See: Norwegian report, Section 2, Question 6.

Fontana Hotelbetriebsgesellschaft.[134] However, the Belgian measures of general application concerning bans of non-essential travelling to areas classified as high-risk zones were ruled to be in conformity with EU free movement rules in the case of *Nordic Info*.[135]

A second group of cases concern restrictions in borders during migratory crises involving third countries. In the years 2021 and 2022, in the context of mass illegal crossings in the frontiers of Poland and Lithuania with Belarus, the Polish report explains that a state of exception was declared, accompanied by a new legal regime that authorised border guards to order irregular migrants to leave the Polish territory, without examining their asylum claims. These measures are reported as posing serious doubts as to their compatibility with the EU's framework on asylum, as well as Articles 18 and 19 of the Charter. Similar measures were introduced in Finland in 2023 and 2024, applicable to the situation on Finland's Russian border, going beyond those foreseen in the EU's Crisis and *Force Majeure* Regulation, adopted as part of the 2024 Pact on Migration and Asylum.[136] By relying on a 2022 amendment to the Border Guard Act, Finland closed all its land border crossing points on the eastern border where it is not permitted to apply for asylum.[137] A new law adopted in 2024, the Act on Temporary Measures to Repeal Instrumentalized Immigration (482/2024) provides for a procedure for "pushbacks" of asylum seekers on the border, which can be put to use in an acute emergency.[138] According to the Finnish report, these measures are in tension with EU obligations and their legality remains uncertain at the time of writing.[139]

The German report refers to the border controls ordered by the Federal Minister of the Interior since 2023, initially only at some parts of the national border, especially in the East, since September 2024 at all German national borders.[140] According to the Ministry's official justification, such controls are carried out to protect internal security and curb irregular migration.[141] However, a "mi-

[134] Austrian report, Section 2, Question 6. Case C-411/22, *Thermalhotel Fontana Hotelbetriebsgesellschaft mbH* EU:C:2023:490.

[135] Case C-128/22 *Nordic Info BV* EU:C:2023:951.

[136] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359, 22.5.2024.

[137] See: for this interpretation, the preparatory acts to the Border Guard Act, HaVM 16/2022 vp, 13-14.

[138] Laki väliaikaisista toimenpiteistä välineellistetyn maahantulon torjumiseksi (482/2024).

[139] Finnish report, Section 5, Question 2.

[140] Press release of the Federal Ministry of the Interior (BMI) of 12 February 2025, available at: https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2025/02/binnengrenzkontrollen.html (last accessed on 15 February 2025).

[141] Press release of the Federal Ministry of the Interior (BMI) of 12 February 2025, available at: https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2025/02/binnengrenzkontrollen.html (last accessed on 15 February 2025).

gration emergency" has not been declared, and the German report adds that such a type of emergency is not recognised under German law either.[142]

Section 3: Statutory/executive emergency law in the Member States

1. In case there are legislative or executive provisions/framework/s applicable to specific policy-oriented areas of practice, in which situations of emergency are addressed in the law of your Member State, could you describe them?

Most of the eports describe the case of legislation covering situations of emergency and not subject to the constitutional derogations described above. Legislative frameworks covering specific policy areas vary from country to country and also in the way in which the institutional arrangements are conceived.

The reports reflect the existence of three main policy areas in which legislation provides for emergency powers, mostly by conferring extraordinary powers to the executive authorities of the State.

1.1 Public Health

Following the COVID-19 pandemic, several reports refer to the introduction of legislation addressing the appropriate measures to revert the sanitary effects of the pandemic. The reports of Belgian, France, Italy, Poland and Slovenia mention the enactment of recent legislation to this effect, mostly involving the attribution of powers to the executive authorities. These post-COVID-19 legislative frameworks coexist with other countries having legislated prior to 2020, such as the case of the Netherlands and Spain. Whilst some countries legislated through a single and broad legislative instrument (see, for example, the Slovenian Communicable Diseases Act[143] or the Belgian "pandemic law"[144]), others have addressed the matter through several laws (see, for example, the case of Lithuania, having introduced the Pharmaceutical Law, the Law on Health Insurance, and the Law on the Prevention and Control of Infectious Diseases,[145] or the case of Austria, with an Epidemics Act, a Medicinal Products Act and a Radiation Protection Act[146]).

[142] German report, Section 2, Question 6.
[143] Slovenian report, Section 3, Question 1.
[144] Belgian report, Section 3, Question 1.
[145] Lithuanian report, Section 3, Question 1.
[146] Austrian report, Section 3, Question 1.

1.2 Natural catastrophes

In the case of emergencies linked to natural catastrophes, including, *inter alia*, floods, fires, earthquakes, volcanos or landslides, several countries report the enactment of general legislative instruments covering civil protection interventions. The existence of Civil Protection Laws is reported in the case of Italy,[147] Portugal[148] and Spain.[149] The Spanish report mentions that a special military force (the *Unidad Militar de Emergencias*) for emergency situations linked to natural disasters provides human and technical means beyond the reach of police and fire forces, was set up by an executive order in 2005 and it is integrated in the national system of civil protection. The report highlights that, due to considerations linked to the rule of law, this military force may not be legally used to implement preventive policies, only to confront materialised disasters.

In the case of Slovenia, a legislative act was introduced in 2023, following the floods of the summer of that year. The Act on Emergency Measures to Eliminate the Consequences of Floods and Landslides of August 2023[150] includes financial aid for affected individuals, businesses and municipalities, supports the reconstruction of housing and temporary shelters, finances infrastructure repair and environmental restoration projects and introduces simplified administrative procedures to speed up relief and recovery measures. The act aims to facilitate rapid recovery and ensure the well-being of affected communities.[151]

1.3 Security

In the field of security, there are several legislative instruments covering different aspects entailing risks or the materialisation of such risks in various policy fields. In France, a legislative instrument was enacted in 2017 to address the terrorist threats (*Loi renforçant la sécurité intérieure et la lutte contre le terrorisme*, « SILT »),[152] conferring on the Minister of the Interior broad executive powers. The German Aviation Security Act contains regulations on emergency response and aviation security, authorising, for example, the deployment of the German Armed Forces within Germany to avert danger in exceptional

[147] Italian report, Section 1, Question 2 and Section 3, Question 1.

[148] Portuguese report, Section 3, Question 1.

[149] Spanish report, Section 3, Question 1.

[150] Zakon o interventnih ukrepih za odpravo posledic poplav in zemeljskih plazov iz avgusta 2023 (ZIUOPZP),
Uradni list RS, št. 95/23, 117/23, 131/23 – ZORZFS in 62/24.

[151] Slovenian report, Section 3, Question 1.

[152] Law of 30 oct. 2017, JORF n° 255, 31 oct. 2017. Initially designed as a provisional legislative act, this framework was made permanent by Law 2021-998 of 30 July 2021 on the prevention of terrorist acts and intelligence.

situations of catastrophic proportions.[153] Lithuania refers to its framework on cybersecurity, introduced through the Law on Cybersecurity, Privacy and Data Protection of 2024. This legislative act transposes Directive 2022/2555 (NIS2), but it also introduces specific measures going beyond the scope of the Directive, to ensure preparedness in the event of a cybersecurity crisis. Several countries legislate in the field of energy to address situations of shortage or incidents posing threats to public safety, health or the national economy, as reported by the Austrian,[154] Lithuanian,[155] Norwegian reports.[156]

2. In the case that your Member States include both constitutional and legislative/executive rules on emergency situations, how are the two regimes differenced? Have there been any situations of conflict between constitutional and legislative/executive frameworks governing the same situation?

The reports describe different scenarios in which constitutional and statutory regimes coexist and may run into conflict. However, the response and coordination among regimes differs depending on the framework governing situations of emergency, which varies among the reported countries.

First, it should be noted, as explained above, that some countries have no constitutional provisions governing situations of emergency, referring the matter to legislation only. This is the case of Italy, Belgium and Norway. However, the reports from the three countries describe scenarios in which situations of emergency have been addressed through constitutional provisions, or have been subject to constitutional review. In the case of Italy, Government is entitled to enact emergency decrees which can be used, if necessary, to address temporary and extraordinary situations of emergency.[157] Belgium has witnessed the introduction of broad delegations of powers from the legislature to the executive, subject to both judicial and constitutional review.[158] In the case of Norway, the report outlines the fact that emergency powers can be used on the basis of the doctrine of "constitutional necessity," which prevails over legislative and executive acts.[159]

Second, other countries, as described in the reports, face the opposite situation and incorporate a "unitary" framework to cover emergency situations, covered by a single framework that includes both constitutional and legislative

[153] German report, Section 3, Question 1.
[154] Austrian report, Section 3, Question 1.
[155] Lithuanian report, Section 3, Question 1.
[156] Norwegian report, Section 3, Question 1.
[157] Italian report, Section 3, Question 1.
[158] Belgian report.
[159] Norwegian report.

measures. These countries include the basic framework in constitutional provisions, subject to subsequent legislative development. This is the model used by Cyprus, Malta, the Netherlands and, to a certain extent, Latvia.[160] The Dutch report explains that in the Dutch legal system "all substantive emergency powers are contained in regular legislation, while the constitutional framework is largely limited to the procedures that condition their use." This framework results in a system in which "conflicts with the Constitution are unlikely to occur."[161]

A separate note must be made to address the case of Finland. In principle, Finland espouses a "unitary" approach, in which the Constitution provides a basic framework, followed by implementing legislation. According to the Finnish report, Section 23(1) of the Constitution establishes that "the grounds for provisional exceptions shall be laid down by an Act," a mandate that was implemented through the Emergency Powers Act. However, this Act and its subsequent amendments[162] have been passed by means of an "exceptive enactment," a procedure provided by Section 73 of the Constitution.[163] The report states that such a course of action is not in line with Section 23(1) of the Constitution, resulting in several attempts to bring the Emergency Powers Act in line with the Constitution.[164] At the time of writing, a reform procedure has been initiated to solve this issue.[165]

The majority of reported countries display a "dual" system, containing both constitutional and legislative emergency frameworks with different scopes of application. These dual regimes are based on separate criteria that guarantee differentiated and autonomous regimes, thus avoiding situations of overlaps or conflict. The scope of application can be based on the triggering situations (for example, war and internal disruptions on the one hand, natural catastrophes or terrorist attacks on the other hand), on the territorial effects of the emergency (national, regional or local), or on the policy sector affected (health, cybersecurity, terrorism, energy, etc.).

The fact that both frameworks are subject to different scopes of application does not guarantee an absence of conflict. From the experiences described in several reports, it appears that a risk of overlap exists, particularly when the emergency is of such a scale that it covers multiple policy areas or requires

[160] The Latvian report highlights the existence of two different frameworks on emergency situations, but it points out that both regimes are similar, to the extent that academic writers defend their unitary interpretation. See: Latvian report, Section 3, Question 2.

[161] Dutch report, Section 3, Question 2.

[162] For example, 706/2022.

[163] See also: n 5 above.

[164] HE 3/2008 vp, 24, 30, 125.

[165] OM015:00/2022.

vast public interventions in intensity and scope, as it was the case during the COVID-19 pandemic. In these scenarios, constitutional courts have developed case-law on the limits of government or legislative interventions in situations of emergency, in order to ensure that the constitutional provisions are complied at all times. The Portuguese report describes the situation that emerged during the COVID-19 pandemic, in which certain confusion emerged as to whether the emergency measures enacted were introduced pursuant to a state of emergency, followed by a declaration of a situation of calamity.[166] The Constitutional Court ruled that the measures restrictive of free movement subject to a declaration of a situation of calamity were unconstitutional.[167] The Lithuanian report also covers several rulings of the Lithuanian Constitutional Court in which the constitutionality of legislative and executive measures was reviewed, as confirmation that, in some circumstances, an overlap can lead to a risk of violation of the constitutional framework.[168]

Special note must be made of the debate that emerged in Poland on the constitutionality of special legislative frameworks on emergency. In addition to the three constitutional states of emergency, in 2008 the Polish parliament adopted an Act on preventing and combating infections and infectious diseases in humans.[169] Among other measures, the Act introduces extra-constitutional "states" of "epidemic threat" and "epidemic," which can be declared by a *voivode*, a minister or the Council of Ministers. As a result, during the COVID-19 pandemic the executive was empowered to impose and specify far-reaching restrictions of fundamental freedoms and rights, such as the duty to use specific medical measures, undergo quarantine in specific locations, or cease business activities. The Polish report explains in detail the academic and jurisprudential debate that ensued as a result of the measures imposed by the executive during the COVID-19 pandemic, in which the legality of the enactment of "extra-constitutional states of emergency" is discussed.

Reference should also be made to the discussions in Germany that led to the unconstitutionality of Section 14(3) of the Aviation Security Act. In 2006, the Federal Constitutional Court ruled that the said provision of the federal law was in conflict with the Basic Law. The provision authorised the armed forces

[166] Portuguese report, Section 3, Question 2.

[167] Ruling no. 88/2022, of 1 February 2022.

[168] See: the judgments of June 21 2022 (authority of the National Public Health Center to impose mandatory infectious disease control measures); of October 12, 2022 (the delegation to the government to specify areas where employees confirmed to be free of infectious diseases are allowed to work, as well as the suspension from work); of January 24, 2023 (limitation of economic activity freedom following the declaration of quarantine); of May 31 2023 (government restrictions on the number of close contacts in indoor spaces during quarantine); of October 4 2023 (constitutionality of the health certificate), and of 7 June 2023 (temporary accommodation of asylum seekers in the foreigners registration center due to a mass influx of foreigners).

[169] Polish Sejm, Act of 5 December 2008, *Dziennik Ustaw*, No. 234, item 1570.

to shoot down aircraft intended to be used as a weapon against human life under certain conditions. This basis for authorisation in an emergency situation was deemed to be incompatible with the Basic Law and, as a result, it was declared null and void.[170]

3. Are there any constitutional limits on Parliament or Government when making use of emergency powers governed by legislative/executive provisions?

All the reports portray a common feature: during a constitutional or statutory situation of emergency, the standard means of parliamentary and judicial oversight are in force, subject to specificities justified by the urgency of the situation. Therefore, the standard means of oversight may require additional interventions of Parliament to decide, for example, on prorogations of the duration of a state of emergency, or on the ratification of governmental decrees, etc. Conversely, the circumstances surrounding the emergency can justify a proportionality analysis adapted to the situation, thus granting additional leeway to governmental action, but under a strict review in light of the legal principles.[171] In sum, the measures taken in the course of an emergency do not give way to general derogations from the constitutional framework. Some Constitutions make a specific reference to the fact that the Constitution is never subject to derogations. For example, Article 187 of the Belgian Constitution states that it "cannot be wholly or partially suspended."

This feature is confirmed in an abundant case-law of several constitutional jurisdictions of the reported countries, addressing a variety of situations in which the adoption of emergency measures was subject to constitutional review, to ensure that parliamentary or judicial oversight is guaranteed at all times.

The Slovak Constitutional Court has confirmed its role as watchdog of the proper development of parliamentary oversight and debate during a state of emergency. Relying on Article 125(1)(a) of the Slovak Constitution, which confirms the role of the Constitutional Court in reviewing the compliance of laws with the Constitution, in 2020 it confirmed the jurisdiction of the court

[170] German report, Section 3, Question 2. See: BVerfG, judgement of 15 February 2006 – 1 BvR 357/05; BVerfGE 115, 118.

[171] In the case of parliamentary oversight, there are situations in which parliamentary activity can be constrained in cases involving an emergency and regulated by law. For example, the Parliament of the French Community in Belgium amended its rules of procedure to allow for the possibility of an extended adjournment of Parliament in case of a health emergency. See: Article 37.2 of its Rules of Procedure: "By way of derogation from the first paragraph, and if, due to a crisis revealing a major risk to human health, the Conference of Presidents decides to adjourn the work of Parliament for a period it defines – and which cannot exceed three months – the Bureau shall record this adjournment and notify the government of this decision."

to "review the shortened (emergency) legislative procedure in the context of the protection of parliamentary debates and the formation of the will of the members of Parliament."[172]

The Slovenian Constitutional Court ruled in 2021 that five government decrees (executive acts) breached the Constitution because the provisions of the Law on Communicable Diseases on which they were based were also unconstitutional. The Constitutional Court emphasised that the principle of legality must be strictly observed even in emergency situations, especially in connection with laws that restrict fundamental rights.[173]

In Romania, the Constitutional Court ruled on a singular situation created by Article 4(1) of Law Nº55/2020, which established that the government is competent to declare a state of alert, but requiring that governmental acts be subject to approval of Parliament. This feature altered the standard jurisdiction of administrative courts, which were not impeded from undertaking judicial review of governmental action in situations of emergency, as the measures were formally approved by Parliament and thus only subject to constitutional review. This framework led to a ruling of the Constitutional Court that declaring it unconstitutional, arguing that "a confusing legal regime of government decisions [is] likely to raise the issue of their exemption and, thus, avoiding the judicial review under the conditions of Article 126 (6) of the Constitution, with the consequence of violating the provisions of Article 21 and Article 52 of the Constitution, which enshrines the free access to justice and the right of the person injured by a public authority."[174] In sum, the Constitutional Courted concluded that "no law can establish or remove, by expanding or restricting, a competence of an authority, if such an action is contrary to the provisions or principles of the Constitution."

The Lithuanian Constitutional Court, in the context of the COVID-19 pandemic, confirmed that in cases of an extinction of the "essence" of a fundamental right, a more stringent constitutional review applies, including in situations of emergency. In the context of this review, special attention was raised to the duration of the period of emergency and of the restrictive measures that risked negating the "essence" of a fundamental right. Furthermore, the Constitutional Court confirmed that the enactment of measures affecting the "essence" of a fundamental right may require establishing compensation for losses incurred due to the declaration of quarantine and the implementation of related measures.[175]

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[172] Judgment No. PL ÚS 13/2020.
[173] Judgment of 13 May 2021, U-I-79/20-24.
[174] Judgment of 1 July 2020 No 457/2020, para. 60.
[175] Judgment of 24 January 2023.

In Austria, the Constitutional Court developed its case-law as a result of the measures introduced during the COVID-19 pandemic. The position of the case-law since the 1950s confirmed the broad powers of governmental authorities to issue ordinances, as defined previously by Parliament. However, in 2020 the Constitutional Court introduced additional requirements for the enactment of ordinances intended to ensure that the legislature is subject to constitutional review at the time of predetermining the government's powers in situations of emergency. As explained by the Austrian report, the case-law of the Constitutional Court requires that the legislator shall determine the relevant factual circumstances in accordance with the law and the contents of the file in a comprehensible manner,[176] insofar as this is reasonable given the situation.[177] The case-law highlights the role of expert advice, so that expert opinion is effectively used in the decision-making process.[178] These requirements are intended to provide protections to the addressees of the emergency measures eventually enacted by government, inasmuch as the powers granted by Parliament are clear, transparent and enable constitutional review.[179]

4. The fact that an emergency measure is introduced by the EU, does it alter in any way the balance and distribution of power of the Member State?

All the reports confirm that emergency measures enacted by the EU do not alter the distribution of power within the reported countries. EU law, even in the context of an emergency, does not interfere in the constitutional distribution of power of the Member States, needless to say of third countries. Therefore, it appears that the constitutional safeguards that protect the autonomy of the national legal systems are fully operative *vis-à-vis* EU law, even in situations of emergency.

However, some reports point out that an indirect rebalancing of territorial powers has been observed in the past. This is not necessarily the result of an intentional objective pursued by the EU or envisaged in EU rules, but an indirect consequence resulting from the need to effectively implement an EU policy. Even in such situations, the tendency to centralise powers takes place within the parameters of the national Constitution and legislation.

[176] Judgment VfSlg 20.398/2020, para. 52 and Judgment 20.399/2020, para. 74.

[177] Judgment VfSlg 20.399/2020, margin no. 78.

[178] Judgment VfSlg 20.475/2021, margin no. 94.

[179] Judgment VfSlg 20.399/2020, cited above, at para. 79 et seq: "[T]he documentation on file in the procedure for issuing ordinances [...] is not an end in itself; for even in situations that are crisis-ridden because there are no appropriate routines for dealing with them, and in which the administration is granted considerable leeway to avert the danger, such requirements have an important function in ensuring the legality of administrative action." See also: VfSlg 20.456/2021, para. 53.

The Dutch report mentions that a serious emergency will often entail that it can only be dealt in a coordinated structure, leading to a concentration of power at the central government level. This rearrangement of territorial power finds its justification in Article 103(2) of the Dutch Constitution, which implies that some autonomous competences of provinces and municipalities, despite their constitutional protection, can be restricted in a general or limited state of emergency.[180] The Spanish report points in the same direction, confirming that Article 116 of the Spanish Constitution allows for a certain degree of centralisation in the management of crises, despite the highly decentralised nature of the Spanish territorial system, if the measure is necessary to better implement and enforce an emergency measure adopted by the EU.[181]

The Lithuanian report focuses on the experience of measures taken during the COVID-19 pandemic, which confirmed a certain tendency to alter the internal balance of powers. The example of the centralised purchase of vaccines at the EU level is used as a reference.[182] An example of another centralising tendency, but with uncertain results, is provided by the Belgian report. Belgium's participation in the NextGenerationEU initiative led to the enactment of a national recovery and resilience plan coordinated between the Federal State and the three regions. Despite the European Commission's efforts through informal means to convince the Belgian authorities to act as a unitary actor and through a single interlocutor, the Belgian report argues that the federal arrangements remained unaltered.[183]

Section 4: Judicial review of emergency powers in the Member States

1. In general, what is the jurisdiction of the courts of your Member State when hearing actions challenging measures to address situations of emergency?

All the reports confirm that the existence of an emergency, including the formal declaration of a situation of emergency under the constitutional framework, does not alter the ordinary jurisdiction of courts. Therefore, the measures introduced during an emergency are subject to the jurisdiction of the courts in accordance with the general rules on jurisdiction. Despite the fact that several Constitutions envisage the introduction of military jurisdiction during the state of war or siege, there is no evidence of the implementation of such a measure in the reported countries.

[180] Dutch report, Section 3, Question 4.
[181] Spanish report, Section 3, Question 4.
[182] Lithuanian report, Section 3, Question 4.
[183] Belgian report, Section 3, Question 4.

The majority of reported countries display a three-tiered system of judicial review, in which (a) constitutional courts are called to review legislative acts or administrative measures with the rank of legislation, (b) administrative courts undertake the review of administrative action, both regulatory and individual acts, and (c) civil and criminal courts rule in case in which neither constitutional nor administrative courts have jurisdiction in matters related on an emergency. This outline applies to the reported countries having a "centralised" system of constitutional review, whilst other countries, such as The Netherlands or Finland, rely on a two-tier system in the absence of a constitutional court.

2. Are there any procedural specificities applicable to the courts when reviewing the actions of public authorities in situations of emergency?

The majority of the reports state that the reported countries do not provide for procedural specificities applicable to situations of emergency. However, it is frequent that the procedural specificities available under the general framework (accelerated procedures, urgent interim relief, constitutional complaints for breach of fundamental rights) are well adjusted to the needs of emergencies. It can be argued that emergency situations do not enjoy special procedures of their own, but they are well suited for the implementation of procedural specificities provided in general.

The main departure in terms of jurisdiction and powers of courts can be found in the consultative jurisdiction of the French *Conseil Constitutionnel* to give its views presidential emergency measures, pursuant to Article 16 of the French Constitution. In case of an immediate threat to the institutions of the Republic, the independence of the National, the integrity of its territory or the fulfilment of its international commitments, "the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council." Additional consultative powers are granted to the *Conseil Constitutionnel* regarding the conferral of means to the constitutional public authorities to enforce the presidential emergency measures, as provided in Article 16, third paragraph of the Constitution.

Several reports highlight the enactment of legislative measures amending or introducing reforms in the judiciary during the COVID-19 pandemic.[184] These measures were aimed at remedying the significant backlog created during the pandemic as a result of the restrictive measures that limited the activ-

[184] Finnish report, Section 4, Question 2; Italian report, Section 4, Question 2; Portuguese report, Section 4, Question 2, and Spanish report, Section 4, Question 2.

ity of courts, or to facilitate judicial review of certain emergency measures. The Finnish report describes a lively debate on whether the introduction of such measures is in accordance with the Constitution.[185] In Spain, a reform was introduced in 2020 granting jurisdiction to higher courts to review emergency measures restrictive of fundamental rights.[186] This jurisdiction was granted on a preliminary basis, prior to the entry into force of the reviewed measures. The reform was challenged in the Constitutional Courts, on the grounds that it introduced a co-management of emergency situations between government and the courts. The application was upheld by the Constitutional Court and the reform was quashed in 2022,[187] but with hardly any practical impact, as the annulment of the reform arrived once all the emergency measures of the COVID-19 pandemic had been introduced and implemented.[188]

3. What is the standard of review used by the courts of your Member State when reviewing the actions of public authorities in situations of emergency?

The majority of reports point out that the standards of judicial review remain unaltered in case of emergencies, leaving courts to undertake the control over legislative and executive action by means of conventional principles of judicial scrutiny. The standard of judicial review can vary depending on a variety of circumstances: the challenged act (a formal declaration of emergency or its implementing measures), the applicable framework (constitutional declarations subject to specific constitutional provisions, or statutory measures of emergency subject only to legislation), the technical expertise involved in the challenged decision, or the grounds of review invoked by the applicant (substantive or procedural grounds). All these factors contribute to determine a standard of judicial, which has been characterised, according to the reports, by a considerable degree of judicial deference to both the legislature and the executive in times of emergency.

Some consideration must be paid to the theoretical underpinning of the standard of judicial review, which can vary from country to country.

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[185] Finnish report, Section 4, Question 2: cf. Lavapuro Juha, "Oikeuden Resilienssi," *Lakimies*, no. 7–8 (2020), 1262, 1265 (considering not foreseeing special emergency regime for judiciary positive feature) with Fredman Markku. "Oikeudenhoito ja asianajo poikkeusoloissa," *Defensor Legis*, no. 1,5 (2022) 323 (arguing lack of specific rules for judiciary in emergencies is problematic).

[186] Ley 3/2020, de 18 de septiembre, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia.

[187] Judgment 70/2022 of 2 June 2022.

[188] Spanish report, Section 4, Question 2.

According to the Belgian report, the basis for a deferent approach on the part of the courts relies on the principle of separation of powers. Belgian courts are aware of the risks of assuming tasks proper to the legislature or the executive when undertaking the judicial review of their actions. This caution leads to a degree of deference, with the aim of avoiding any interference with tasks that are constitutionally assigned to the legislature and the executive. In other countries, there is an explicit or tacit recognition of a "political question" theory, a recognition of a space of immunity from judicial review, in the assumption that the legislature and the executive have been granted certain powers of a strictly political nature, which are subject to political control through political accountability, not judicial review. For example, the French report highlights the extraordinary powers granted by Article 16 of the French Constitution to the President of the Republic, as an example of a constitutionally reserved area of political decision-making of the President.

In Germany, the matter of standards of judicial review in case of emergencies is controversial, as explained in the German report. The majority of authors argue in support of a more nuanced approach and discuss whether emergency situations are subject to full[189] or partial judicial review.[190] The supporters of partial judicial argue that the measures taken during a state of emergency are regularly based on epistemic uncertainties, turning them into essentially political decisions that should only be reviewed to a limited extent.[191]

Several reports, including the Polish, Slovak and Slovenian reports, refer to the importance of the principle of proportionality as a tool that assists constitutional and ordinary courts in determining a standard of judicial review in each case. There is no exception in the way in which this principle works in the said countries when it comes to review emergency measures. However, the Cypriot report highlights the development of a specific test applicable to emergency measures, as developed in the case-law of the Supreme Court. In the case of *Attorney General of Cyprus v. Mustafa Ibrahim*,[192] the Supreme Court

[189] German report, Section 4, Question 3, citing Jahn, *Das Strafrecht des Staatsnotstands*, 2004, p. 121; Denninger/Lisken/Lisken K/214 fn. 307 and Böhm, *Staatsnotstand und Bundesverfassungsgericht*, p. 162.

[190] German report, Section 4, Question 3, citing Schoch/Schneider/Geis, 5th EL July 2024, VwVfG, Section 40 para. 137 et seq.

[191] German report, Section 4, Question 3, citing Schoch/Schneider/Geis, 5th EL July 2024, VwVfG, § 40 para. 163 et seq. or *Schoch/Schneider/Riese*, 45th EL January 2024, VwGO § 114 para. 159. On the state emergency specifically, reference is made to Jahn, *Das Strafrecht des Staatsnotstands*, 2004, p. 123.

[192] [1964] Cyprus L.R. 195. In this landmark case, a dispute emerged over the constitutionality of Law 33/1964 on the Administration of Justice (Miscellaneous Provisions), which merged into a single court the former two Supreme courts of Cyprus (the Constitutional and Supreme Court, whose functions were constitutionally enshrined). The House of Representatives adopted the law, but only with the votes of its Greek-Cypriot elected members, as their Turkish-Cypriot counterparts had withdrawn. The case was cited with approval by courts including in Canada, Pakistan, Lesotho and Grenada. See: Achilles Emilianides, *Cyprus Constitutional Law*. Wolters Kluwer, 2024, p. 45.

introduced the doctrine of "necessity" (*δίκαιον της*) as an implied exception to the application of certain Constitutional provisions. The standard of review in *Mustafa Ibrahim* involves an assessment by the court based on a four-step test.[193] In its ruling in *Papadopoulos*,[194] the Supreme Court ruled that the judiciary is competent to assess not only the constitutionality of measures adopted in response to a situation of emergency, but also the very existence of the alleged situation of emergency that inspired their adoption.

Reference must also be made to the role played by international and EU law in determining the applicable standard of review. In particular, the reports of countries in which constitutional review is assigned to ordinary courts, the role of international law is prominent. In some cases, as reported in the Netherlands and Finland, the role of international law is specifically addressed in the Constitution or by a settled case-law, empowering ordinary courts to undertake judicial review of legislative acts in light of self-executive international law (as well as EU law).[195] Section 23 of the Finnish Constitution, referring to the restriction of fundamental rights in situations of emergency, states as follows:

> Such provisional exceptions to basic rights and liberties *that are compatible with Finland's international human rights obligations* and that are deemed necessary in the case of an armed attack against Finland or in the event of other situations of emergency, as provided by an Act, which pose a serious threat to the nation may be provided by an Act or by a Government Decree to be issued on the basis of authorisation given in an Act for a special reason and subject to a precisely circumscribed scope of application.[196]

4. Does the principle of proportionality play any role in the judicial review of actions of public authorities in situations of emergency? If so, are there relevant differences between the principle of proportionality under national law and the principle of proportionality under EU law?

There is a broad consensus among the majority of the national reports supporting the central role played by the principle of proportionality in the judicial review of emergency measures. The Slovak report describes it as a "leading principle"[197]; the Greek report describes it as "extremely crucial,"[198] the Portuguese report highlights the "paramount importance" of the principle

[193] Cypriot report, Section 5, Question 3.
[194] *Papadopoulos v. the Republic* 1985 C.L.R. 165.
[195] Dutch report, Section 4, Question 3. Finnish report, Section 4, Question 3.
[196] Emphasis added.
[197] Slovak report, Section 4, Question 4.
[198] Greek report, Section 4, Question 4.

in Portuguese emergency law[199]; In Spain and Germany it plays a "crucial role,"[200] whilst the Austrian report states that the principle forms the "core of the obligations" of the legislator when restrictions of fundamental rights are at stake.[201] In Norway, there is no explicit recognition of the principle, but it nevertheless permeates both the interpretation and implementation of the framework governing emergency situation.[202]

Despite the broad presence of the principle of proportionality in the case-law of the courts of most of the reported countries, it is also enshrined in legislation, including the legislation on emergency situations. For example, the Latvian Administrative Procedure Law defines the principle in Article 13, stating that the benefits which society derives from the restrictions imposed on an addressee must be greater than the restrictions on the rights or legal interests of the addressee. Section 6 of the Act on Public Administration (434/2003) states that the acts of public authorities must be *inter alia* "proportionate to the aim sought." In Cyprus, the principle was codified in Article 52 of Law 158(I)/99, of the general principles of Cypriot Administrative Law. Proportionality plays also a specific role in legislation on emergency situations in Slovakia, as reflected in Article 5(3) of Constitutional Law 227/2002, on State Security.

The vast majority of the reports outline the parallelisms between the proportionality test made in the reported countries and the test applicable under the European Convention of Human Rights and EU law. There appears to be no divergence in the principle when the reported countries implement the Convention or EU law in areas covered by both legal frameworks. However, some reports describe an evolution in the way that national courts implement the principle in recent years. For example, the Dutch report highlights a recent development in the practice of administrative courts, which have changed their approach to the principle of proportionality by leaning towards a stricter and more refined test.[203] The Polish report explains that, according to case law, the principle of proportionality is modified in times of emergency, shifting from a review focused on a "strictly necessary" test towards a review targeting "the most effective" measure in addressing the emergency and restoring the ordinary functioning of the State.[204]

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[199] Portuguese report, Section 4, Question 4.

[200] Spanish report, Section 4, Question 4; German report, Section 4, Question 4.

[201] Austrian report, Section 4, Question 4.

[202] There appears to be some recognition of the principle in Norwegian legislation, as is the case of the Infections Diseases Act ("smittevernloven"), which provides in § 1–5 that measures enacted under that law must be, *inter alia*, "necessary for reasons of infection control."

[203] Dutch report, Section 4, Question 4, with references to the case-law of the Council of State of 2 February 2022 (ECLI:NL:RVS:2022:285) and of 1 March 2023 (ECLI:NL:RVS:2023:772), as well as case-law of the College van Beroep voor het bedrijfsleven of 26 March 2024 (ECLI:NL:CBB:2024:190).

[204] Polish report, Section 4, Question 4.

A common difference in the approach towards the principle appears between its implementation in ordinary administrative judicial review and the case-law on constitutional review. Several national reports mention the high degree of scrutiny that characterises administrative judicial review, which is generally the same when it comes to review ordinary administrative action and extraordinary administrative measures in situations of emergency. With the exceptions highlighted above in the cases of the Netherlands and Poland, the principle of proportionality in administrative judicial review is characterised in identical terms to the principle of EU law. However, the principle appears to show different standards of review in constitutional review, where national constitutional and/or supreme courts are willing to give the legislator a broader margin of manoeuvre. The French report provides several examples of the contrast with the administrative judicial review undertaken by the *Conseil d'État* and the constitutional review shown by the *Conseil Constitutionnel*, in which public authorities, including in situations of emergency, enjoy a broader margin of action.[205]

Section 5: Implementation of EU emergency law in the Member States

1. When the authorities of your Member States implement EU measures governing situations of emergency (EMU, public health, immigration, energy, banking resolution, etc.), are there any specific principles of national law that interact with principle and rules of EU law?

The legal systems of the reported countries have adapted to the specific features of EU law and the reports show a broad consensus on the existence of a well-established openness towards EU law, including in some constitutional provisions. In some countries, the constitutional recognition of the EU generally, or of the EU's legal system, has contributed to incorporate EU law and make it effective in the domestic legal system. Article 7(2) of the Slovak Constitution, Article 9 of the Polish Constitution, Article 28 of the Greek Constitution, Section 1(2) of the Finnish Constitution, or the recognition of an "absolute" primacy of EU law over Dutch law,[206] are examples of the developed degree of integration between EU and national laws, including in the implementation of emergency measures.

[205] French report, Section 4, Question 4. See the contrast between the ruling of the *Conseil d'État* in Domenjoud, of 11 December 2015, n° 395009 and M.G., of 11 December 2015, nº 394990, and the judgments of the *Conseil Constitutionnel* in M. Cédric D., of 22 December 2015, n° 2015-527 QPC, and M. Raïme A., of 2 December 2016, nº 2016-600 QPC.

[206] Dutch report, Section 5, Question 1: "the primacy of EU law is absolute in the Netherlands, and unconditionally prevails over principles of national law."

This generally smooth integration does not impede the emergence of individual cases of conflict, as reported in Section 2, Question 6, which may emerge from time to time. However, it appears that the individual exceptions do not undermine the overall reality of a generally smooth integration of EU law in the national legal systems.

2. When implementing EU emergency measures in the past, can any gaps or shortcoming be identified in the practice of your Member State? In particular, are there any relevant implementation practices referring to the enforcement of EU measures taken under Article 78(3) TFEU, Article 122 TFEU or any of the EU legislative measures introduced in the course of the COVID-19 pandemic?

Some reports give account of structural shortcomings at the time of implementing EU emergency measures. The examples of such shortcomings are mostly linked to relocation decisions enacted under Article 78(3) TFEU and the implementation of NextGenerationEU during the period of the COVID-19 pandemic and its economic consequences. In the case of relocations, some reports highlight the deficient degree of implementation in some countries due to structural administrative weaknesses, or the inability of the public authorities to facilitate the integration of the relocated individuals.[207] For example, the Portuguese report explains that the relocation decisions fell short of the vacancies Portugal had offered, whilst several migrants left the country before the end of the welcoming period of 18 months due to a lack of family or social ties within the country.[208] The Slovenian report portrays a situation of serious deficiencies in the access to EU funds in the course of the economic recovery period following the COVID-19 pandemic.[209] Despite the adoption of multiple funds, the Slovenian report gives account of considerable delays in the distribution of funds. Administrative bottlenecks and a lack of coordination between national and local authorities slowed down the implementation of projects that were intended to support economic recovery. According to the report, smaller Slovenian companies and municipalities in particular had difficulties accessing EU funds, often hampered by overly complex bureaucratic procedures.[210]

In other instances, deficiencies or resistance is challenged through adjudication and disputes in court. Several Member States brought actions of annulment against the relocation decisions, whilst the European Commission filed

[207] See: the Slovenian report, Section 5, Question 2, and the Polish report, Section 5, Question 2.
[208] Portuguese report, Section 5, Question 2.
[209] Slovenian report, Section 5, Question 2.
[210] Ibidem.

infringement actions against several Member States for their failure to comply with the said decisions. Litigation was brought in the French *Conseil d'État* as a result of the procurement of EU coordinated purchases of vaccines,[211] but French courts finally declared themselves lacking jurisdiction to rule on the dispute.[212] The Belgian Constitutional is currently hearing several actions against the implementing measures of Regulation 2022/1854,[213] having recently referred a request for a preliminary ruling of validity to the Court of Justice on this matter.[214]

Finally, it should be noted that Norway, in the context of its participation in the EEA, is currently involved in several EU initiatives, including several measures that are relevant in the context of emergency situations. Norway participates in the Schengen Association Agreement,[215] but it is also party to ad hoc agreements concerning individual EU acts, such as the bilateral agreement between Norway and the EU on the former's participation in the provisional relocation scheme for asylum seekers of 2015.[216] In the context of these individual policy measures in which emergency measures were enacted by the EU, the Norwegian report highlights the fact that there have been no obvious shortcomings or legal disputes over the enforcement or scope of such measures.[217]

[211] French report, Section 5, Questions 1 and 2.

[212] CE, Sect., 22 mars 2024, n° 471048.

[213] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ L 261I, 7.10.2022, pp. 1–21).

[214] Belgian report, Section 5, Question 2.

[215] Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis* [1999] OJ L176/36.

[216] Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80. Note article 11 of the decision, which is the legal basis in EU law for such bilateral agreements.

[217] Norwegian report, Section 5, Questions 1 and 2.

TOPIC I – EU Emergency Law

INSITUTIONAL REPORT

Emanuele Rebasti, Anne Funch Jensen and Alice Jaume

II. THE EU EMERGENCY ARCHITECTURE

IV. EMERGENCY AND ITS IMPACT ON THE UNION INSTITUTIONAL BALANCE

EU EMERGENCY LAW

Emanuele Rebasti, Anne Funch Jensen and Alice Jaume[1]

General introduction – The notion of emergency in EU law

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

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

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

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

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

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

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

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

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

The second chapter of Part II will then turn to the institutional dimension and look at the impact that the emergency response has on the institutional balance of the Union. It is often repeated that crises alter that balance in fundamental way, raising a number of calls for institutional reform. In light of the case studies

analysed in Part I, we will look at how recent emergencies have influenced the role of the main four political institutions (the European Council, the Parliament, the Council and the Commission) and impacted their respective interactions.
We will in particular test the often-repeated claim that the increased role of the Council and of the European Council in times of crisis significantly altered the constitutional allocation of powers among institutions as enshrined in the Treaties, by particularly eroding the role of the Commission to the detriment of the Community method and by undermining the possibility of effective democratic control by the Parliament.

The notion of emergency in EU law

The topic of this report is "EU emergency law" which inevitably leads to the question: What is an emergency? The legal relevance and importance of a proper determination of when an emergency exists is therefore very much linked to the fact that such a situation is usually coupled with the triggering of expanded "emergency powers." As is commonly known, and as national reports amply illustrate, an emergency may lead to the declaration of a *state of emergency*, which in turn tends to trigger exceptional emergency powers often vested in the executive. This cannot be fully transposed to the Union context, which is governed by a specific set of rules, is subject to a different institutional set-up and is limited at all times by the powers conferred under the Treaties. The Union is not equipped with powers to declare a general state of emergency, and – as Bruno de Witte puts it – "EU Treaty rules must be used in good and bad times, in normal times and in crisis times."[4]
That does not mean that the concept of emergency is irrelevant in the Union universe or that the Union is without powers when faced with an emergency. It rather means that the tools available in the context of an emergency, the boundaries for Union action and the scope for exceptions and derogations are governed by additional and sometimes different considerations than at national level, although a number of common features are also present. It remains the case that Union responses, too, in order to be effective, may involve certain interferences in individual rights which need to be carefully balanced against the public interest which the measure is aiming to protect.
Many scholars have provided their thoughts on what the concept of emergency means and which situations it covers.[5] It appears to be generally understood

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

[5] See, for example, Mark Rhinard, Neill Nugent and William E. Paterson, *Crises and Challenges for the European Union* (Bloomsbury Publishing Plc), in particular p. 6 which provides the following generic definition of the term "crisis," focusing on how the crisis is being acted upon, how and with what effects: "*A crisis is a perceived threat to collectively held values that quickly changes the priority goals of a decision-making unit and requires unique responses within shortened time-horizons*." See also: Bruno de Witte, EU Emergency Law and its impact on the EU Legal Order, Guest Editorial, *Common Market Law Review* 59: 3–18, 2022 (Kluwer Law International). See also: Pavel Ondrejek and Filip Horak, Proportionality during Times of Crisis: Precautionary Application of Proportion-

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

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

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

The fragmentation of the notion of emergency in EU law is further accelerated by the recent flurry of legislative initiatives which have incorporated crisis response frameworks in a number of sectorial domains of EU law. As the EU model of crisis regulation shifts from a Treaty-based to a legislative one (see on this Chapter III), the definitions of crisis which are associated with the

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ality Analysis in the Judicial Review of Emergency Measures, European Constitutional Law Review, Volume 20, Issue 1, March 2024, pp. 27–51, at 30.

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

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

triggering of emergency measures multiply. Thus, it is possible to find a notion of "public health emergency" in the *Cross-border Threats to Health Regulation*,[8] a notion of "large public health emergency" in the *Schengen Borders Code*,[9] a notion of "public emergency" in the Data Act,[10] a notion of "semiconductor crisis" in the Chips Act,[11] the notions of "supply crisis" and "security crisis" in the *EDIP* proposal,[12] and a definition of a "situation of crisis" in the context of migratory movements of persons in the Crisis Regulation.[13] As a matter of

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

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

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

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

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

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

example, the *IMERA* – the general instruments to tackle emergencies in the internal market – adopts the following definition of crisis[14]:

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

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

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

While adapted for the specific context to which they refer, and limited in their normative relevance to the legal framework to which they belong, these definitions nonetheless share some common elements that are indicative of the general understanding of the concept of emergency in EU law. First, the exceptional character of the situation is explicitly referred to in most of the definitions or it is implied by mentioning examples of situations that ultimately have that character. Exceptionality is often associated with a dimension of suddenness and urgency which further strengthen the difference if compared to "ordinary times," as it excludes any possibility of anticipation of the event. Together, those features point at a limitation in time of the situation of crisis (if not of its effects, which, contrarily can be lasting in time) and in fact several definitions explicitly mention that requirement as well.[16]

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a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security."

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

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

[16] See, for instance, the definition of public emergency in the Data Act.

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

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

Fourth, the categories used to define the crisis remain defined in broad terms and thus allow a wide margin of discretion in the assessment of the situation. That discretion is exercised in the framework of specific decision-making processes, which envisages distinct roles for the Commission, the Council and often for technical bodies providing the relevant expertise, and which will be analysed in Chapter IV of the present report. Such discretion is subject to a lenient standard of review by the Court of Justice, which has applied the standard of the "manifest error of assessment" to assess its legality. According to the Court, in making use of emergency powers "EU institutions

[17] See, for instance, the notion of public emergency in the Data Act which qualifies the exceptional situation as "negatively affecting the population of the Union or the whole or part of a Member State, with a risk of serious and lasting repercussions for living conditions or economic stability." See also: the notion of security crisis in the *EDIP* proposal which requires a situation "which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people."

[18] For instance, *IMERA* refers to the "severe negative impact on the functioning of the internal market," the *Crisis Regulation* requires the situation to be "of such a scale and nature […] that it renders the Member State's well-prepared asylum, reception, […] or return system non-functional," the *Schengen Borders Code* identifies a large-scale public emergency when a serious cross-border threat to health "could have large-scale repercussions on the exercise of the right to free movement."

[19] In line with what is advanced in Bruno de Witte, "EU Emergency Law and its impact on the EU Legal Order, Guest Editorial," *Common Market Law Review* 59: 3–18, 2022 (Kluwer Law International), at page 4.

must be allowed broad discretion when they adopt measures in areas which entail choices, in particular of a political nature, on their part and complex assessments."[20]

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

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

PART I

THE EU EMERGENCY LEGAL FRAMEWORK

I. THE EU EMERGENCY RESPONSE IN THREE RECENT CRISES

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

Introduction

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

1. Migration crises

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

1.1 The 2015 migration crisis

In the years from 1990 onwards, illegal migration to Europe across the Mediterranean Sea and Adriatic Sea steadily increased for both economic reasons

[21] Joint Statement of the Members of the European Council, 26 March 2020, point 12.

[22] The part covering the crisis linked to the Russian military aggression against Ukraine will cover only the energy response and not the various restrictive measures (sanctions) adopted against Russia in the area of the CFSP.

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

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

Among the envisaged immediate measures, on 27 May 2015 the Commission put forward a proposal to trigger for the first time the emergency competence under Article 78(3) TFEU in order to relocate 40 000 asylum seekers from Italy and Greece and thus address the situation of crisis generated by the mass influx of migrants in those Member States. The European Council agreed on the principle of relocation in June 2015, clarifying at the same time that Member States would have to agree by consensus on the distribution of the migrants.[25] Despite the failure to reach such a consensus, in September the Council moved on to adopt a Decision introducing a temporary derogation from the Dublin III Regulation on allocation of responsibility for reception and assessment of asylum applications.[26] A second Council Decision was adopted few days later in order to relocate further 120 000 asylum seekers from Italy and Greece.[27]

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[23] Special meeting of the European Council, 23 April 2015, Statement, https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/. See also: European Parliament's Resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP)).

[24] Communication from the Commission of 13 May 2015, A European Agenda on Migration, COM(2015) 240 final.

[25] European Council of 25 and 26 June 2015, Conclusions, point 4(a) and (b), EUCO 22/15.

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

[27] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24/9/2015, pp. 80–94.

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

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

A second major consequence of refugee arrivals in 2015 was a series of closures of intra-Schengen border-crossing points, designed to slow down the movement of asylum seekers across the EU. The perspective of some Member States receiv-

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The original Commission proposal envisaged to extend the relocation scheme to Hungary, in light of the new migratory pressure on the Western Balkans route, but that Member State declined to take part into the scheme. Council Decision 2015/1601 was amended in September 2016 to allow Member States to meet their relocation obligations by admitting asylum seekers of Syrian nationality present in Türkiye. See: Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601, OJ L 268, 1.10.2016, pp. 82–84.

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

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

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

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

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

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

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

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

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[34] Compare the four cases of reintroduction of border controls in 2014 (none of them linked to migration causes), to the nine cases linked to "unprecedented influx of persons" out of the 12 cases in 2015.

[35] See: the Meeting on the Western-Balkan Migration route which agreed on a 17-point plan of action. See also: European Council of 18 and 19 February 2016, Conclusions, points 5 and 8 d) and e), EUCO 1/16.

[36] Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, OJ L 151, 08/06/2016, pp. 8–11. The Council recommendation for internal border controls was further prolonged in February and May 2017.

[37] See: Médecins Sans Frontières, EU migration crisis update – February 2016, retrievable at https://www.msf.org/eu-migration-crisis-update-february-2016.

[38] European Council of 18 and 19 February 2016, Conclusions, points 5 and 8 g), EUCO 1/16.

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

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

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

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

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

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

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

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

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

[43] Communication from the Commission to the European Parliament and the Council: towards a reform of the common European asylum system and enhancing legal avenues to Europe, COM/2016/0197 final.

[44] A proposal on the reform of Dublin III Regulation, a proposal for a revamped Eurodac system, one establishing a European Union Agency for Asylum, and proposals reforming the Asylum Procedures and Qualification Directives as well as the Reception Conditions Directives and a proposal for a Union resettlement and humanitarian admission framework Regulation.

[45] European Council of 28 June 2018, Conclusions, point 12.

[46] See, for instance, the statement by EP President Tajani at the opening of the European Council of October 2018.

[47] Communication from the Commission on a New Pact on Migration and Asylum, COM/2020/609 final.

a new concept of flexible solidarity based on a voluntary choice of Member States between relocations, financial contributions or other forms of support, but mandatory as to the result, so to ensure fair burden-sharing.

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

It is interesting to note that the negotiation of the various elements of the Pact, including the definition of a strategy for identifying a landing zone within and across the various legislative proposals, was essentially handled by the co-legislators. In Council, the rotating presidencies that followed until the end of the political cycle made a coordinated use of their powers of agenda setting and of organisation of the discussions to allow the conclusion of an agreement on the Pact before the European Parliament elections of 2024. In particular, the 2022 French presidency of the Council proposed a "gradual approach" to take forward the negotiations by sequencing the negotiations on the package and brokering partial deals while maintaining a balance within every deal between the various interests at stake, and in particular between responsibility and solidarity. This initiative was followed in September of 2022 by a political agreement between the European Parliament and five rotating Presidencies of the Council (France and the four upcoming Presidencies) on a "Joint Roadmap on the organisation, coordination, and implementation of the timeline for the negotiations between the co-legislators on the CEAS and the New Pact on migration and Asylum." The political agreement defined a working method for the inter-institutional negotiations with a view of adopting the various Proposals of the pact by the end of the legislature. Such a working method was based on the understanding that the various files represent "building blocks of a common system" and that therefore negotiations on the individual files should be organised in a way that respect balance, complementarity and legal coherence of the whole reform. This method and the agreement reached by the co-legislators on the Joint Roadmap was then endorsed by the European Council (paragraph 27 of the Conclusions of the European Council on 9 Feb-

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

ruary 2023). Following this method, the co-legislators managed to finalise the adoption of the different components of the Pact in May 2024.

1.2 The 2021 Belarus crisis

While the legislative discussions for the Common European Asylum System were progressing with some difficulty, a new situation of crisis emerged. As difficulties in addressing migratory challenges appeared, the possibility to leverage migratory movements as a tool of political coercion became increasingly attractive for malicious third countries and non-state actors. This was particularly exemplified in what became known as the "Belarus crisis" of 2021. In the summer of 2021 the government of Belarus began to encourage migrants from the Middle East and Africa to enter EU states through Belarus as a means of retaliating against the sanctions imposed by the Union on the Lukashenko regime following the serious irregularities detected in the 2020 presidential elections and the violent repression of the protests that ensued. Between August and December 2021, tens of thousands of unauthorised border-crossing attempts were recorded at the borders of Poland, Latvia and Lithuania, facilitated by Belarusian border guards.[49]

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

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

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

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

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

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

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

In the explanatory memorandum accompanying the instrumentalisation proposal, the Commission noted that the aim of the new instrument was to

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

[53] European Council of 21 and 22 October 2021, Conclusions, points 19–21. EUCO 17/21.

[54] Proposal for a COUNCIL DECISION on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final.

[55] The emergency procedure included the following derogations: possibility to delay the registration of asylum applications made at the external border by migrants subject to instrumentalisation; possibility to limit the lodging of asylum applications by those migrants only at specific points located in the proximity of the border; possibility to apply the accelerated procedure at the border for all applications; possibility to limit the obligation to ensure material reception conditions to only basic needs; return procedure at the external borders.

[56] Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.

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

1.3 The 2022 Ukraine War crisis

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

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

[57] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359.

[58] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 07/08/2001, pp.12–23.

[59] On the multiplication of permanent emergency framework established under ordinary legal bases in the aftermath of the poly-crises that affected the Union in recent years, see: Part II, Chapter I, Section 1.2 of the present report.

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

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

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[60] EUCO 18/22, points 1 to 11 and in particular 10.

[61] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022, pp. 1–6.

[62] See: recital 15 of the Council Implementing Decision.

[63] Council Implementing Decision (EU) 2023/2409 of 19 October 2023 extending temporary protection as introduced by Implementing Decision (EU) 2022/382, OJ L, 2023/2409, 24.10.2023; Council Implementing Decision (EU) 2024/1836 of 25 June 2024 extending temporary protection as introduced by Implementing Decision (EU) 2022/382, OJ L, 2024/1836, 3.7.2024.

2. COVID-19 pandemic

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

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

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

[64] Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, OJ L 192, 1.7.2014, pp. 53–58 (consolidated 21.07.2014) and Council Implementing Decision (EU) 2018/1993 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements, OJ L 320, 17.12.2018, pp. 28–34.

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

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

2.1.1 Facilitating and coordinating Member States' unilateral actions

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

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

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

Finally, to help Member States create the necessary fiscal space to tackle a crisis of that dimension, without facing consequences under the financial discipline rules of the Stability and Growth Pact (SGP), the Commission, in a Communication of 20 March 2020[68] informed the Council that it considered

[65] See: Conclusions by the President of the European Council following the video conference on COVID-19 of 10 March 2020.

[66] Commission Communication, "Coordinated economic response to the COVID-19 Outbreak" (COM(2020) 112 final).

[67] "Communication from the Commission – Temporary Framework for State aid measures to support the economy in the current COVID-19" (OJ C 91 I/01, 20.3.2020).

[68] Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact, COM(2020) 123 final, of 20 March 2020.

the conditions for activating the general escape clause to be fulfilled.[69] Finance ministers held a video-conference meeting on 23 March, following which they issued a statement indicating their agreement with the Commission's assessment of the situation.[70] This was the first time that the general escape clause was activated. The derogation allowed Member States to depart from the adjustment path towards their medium-term budgetary objectives and engage in large-scale fiscal stimulus policies.

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

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

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

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

[69] The escape clauses are emergency tools enshrined in Union secondary law, namely in Regulations (EC) 1466/97 and 1467/97. The general escape clause may be activated when a severe economic downturn occurs in the euro area or the Union as a whole.

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

[71] Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No. 1301/2013, (EU) No 1303/2013 and (EU) No. 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak, OJ L 99, 31.3.2020.

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

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

The first significant initiative in this sense was taken by the European Central Bank, which on 18 March 2020 decided to launch a temporary *Pandemic Emergency Purchase Programme (PEPP)* with an envelope of EUR 750 billion

[72] Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak, OJ L 130, 24.4.2020, pp. 1–6.

[73] See: Part II, Chapter III, Section 1.2. for an analysis of the use of ordinary legal bases to adopt emergency measures.

[74] Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency, OJ L 99, 31.3.2020, p. 9.

[75] Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak, OJ L 117, 15/04/2020, pp. 3–8.

[76] European Court of Auditors, Review 6/2020, "Risks, challenges and opportunities in the EU's economic policy response to the COVID-19 crisis," pp. 32ff. See also: Annex III.

euros to buy private and public securities on the financial markets in order to keep the financial sector liquid and ensure supportive financing conditions across the economies of the eurozone.

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

A first result of this work was the presentation on 9 April 2020 of a package of three initiatives aimed at establishing additional safety nets for public finances, businesses and employment at the same time.[80] The package is illustrative of the capacity of the Euro Group to operate across different legal orders and institutional set-ups, taking full advantage of its nature as an informal body.[81]

A first initiative was intergovernmental in nature and consisted in repurposing the existing precautionary credit line under the *ESM Treaty*[82] to provide temporary support to the Member States worth EUR 240 billion (e.g., half of the ESM's lending capacity). The credit line would be used to finance direct and indirect medical costs related to COVID-19 and would be subject to adjusted conditionality, to take into account the specific nature – symmetric and external – of the shock induced by the pandemic.[83] A second initiative, taken by the members of the Euro Group in their capacity as stakeholders of the European Investment Bank, was to endorse the EIB proposal to activate a pan-European

[77] Euro Group, "Statement on COVID-19 economic policy response," 16 March 2020, Statements and Remarks 160/20.

[78] Conclusions by the President of the European Council following the video conference on COVID-19 of 17 March 2020, point 4. Joint Statement of the Members of the European Council of 26 March 2020, in particular at its point 14 which tasked the Eurogroup with presenting proposals within two weeks to address the gravity of the socio-economic consequences of the COIVD-19 crisis. The European Council clarified that the "proposals should take into account the unprecedented nature of the COVID-19 shock affecting all our countries and our response will be stepped up, as necessary, with further action in an inclusive way, in light of developments, in order to deliver a comprehensive response."

[79] Euro Group, "Statement on COVID-19 economic policy response," 16 March 2020, Statements and Remarks 160/20.

[80] Euro Group, "Report on the comprehensive economic policy response to the COVID-19 pandemic," 9 April 2020.

[81] Protocol 14 on the Euro Group.

[82] Treaty Establishing the European Stability Mechanism, in particular Article 14 on the Precautionary Financial Assistance Instrument.

[83] Access to a credit line under the ESM Treaty is subject to strict conditionality, which is intended to ensure that support to a Member State under the Treaty remains compatible with the no-bail-out clause included in Article 125(1) TFEU, as clarified in the *Pringle* judgment (e.g., support provided by ESM should ensure that the Member State pursues a sound budgetary policy). The debate in the Euro Group focused on whether the strict conditionality requirement under the Treaty would be compatible with making access to ESM financial assistance conditional only upon compliance with criteria relating to the use of funds (e.g., financing healthcare, cure and prevention costs) without further macro-economic conditions.

Guarantee Fund able to mobilise up to EUR 200 billion to help companies, especially SMEs, facing liquidity shortages.

The third initiative was a new emergency measure proposed by the Commission under Article 122 TFEU. The emergency legal basis was once more used to establish a financial instrument to provide support to Member States, this time aimed at providing up to EUR 100 billion in form of loans to finance temporary employment support schemes. The SURE proposal anticipated many of the innovations that would later be incorporated in the more consequential NGEU scheme: the use of the whole Article 122 TFEU as a legal basis (thus without specifying either of the two paragraphs of the Article, due to the combination of the empowerment to the Commission to issue common debt to finance the instrument and the conferral of implementing powers on the Council to approve requests for financial assistance submitted by the Member States).[84] In other respects, however, *SURE* remained a more traditional instrument. In particular, the borrowing on the markets was used to finance loans to the Member States (back-to-back loans), thus excluding a redistributive effect. Moreover, as the volume of the borrowing exceeded the capacity of the EU budget to guarantee the issuance of debt, a system of Member States' unilateral and voluntary but coordinated guarantees was put in place to support the operation. Ultimately, the instrument allowed Member States that had limited fiscal capacity to gain access through the Union to loans with lower interest rates than they would have paid if borrowing directly on the markets; the direct assumption of additional debt would have further degraded their fiscal position and represented a significant threat to their capacity for recovery and to the stability of the European economy as a whole

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

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

The topic remained extremely divisive, however. Member States such as the

[84] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L159, 2020.

[85] Letter of 25 March 2020 of the Heads of State and Government of Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal, Slovenia and Spain to the President of the European Council, retrievable at https://www.governo.it/sites/new.governo.it/files/letter_michel_20200325_eng.pdf

Netherlands and Germany that were traditionally against a "transfer Union" based on the issuance of common debt on the market (so-called Eurobonds) remained strongly opposed to exploring solutions that would depart from the traditional paradigm of financial assistance through loans based on strict conditionality, even if their arguments appeared increasingly weak in light of the exogenous nature of the economic crisis caused by the pandemic.[86] These tensions are apparent in the 9 April 2020 Report from the Euro Group, which only mentioned the intention to work on a "Recovery Fund," while leaving all the substantive questions – and notably those relating to the size and modalities of financing – open.[87] On 23 April 2020 the European Council endorsed the various initiatives put forward by the Euro Group in its report and confirmed its agreement with the principle of a Recovery Fund, whose main elements, however, remained to be determined. In that regard, the European Council asked the Commission "to analyse the exact needs and to urgently come up with a proposal."[88]

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

The German judgment opened a major constitutional crisis for EU legal order at the peak of the pandemic, and at the same time cast a serious shadow on the viability of the *Pandemic Emergency Purchase Programme (PEPP)*, which the

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

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

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

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

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

ECB had adopted only a few weeks earlier and represented till that moment the most consequential measure adopted at the EU level to support the economies of the Eurozone. Therefore, it does not seem a coincidence, therefore, that only a few days after the publication of the judgment, on 18 May 2020, the German Chancellor dramatically changed the position held till that moment and joined the French President in a joint statement stressing their common support for the establishment of an ambitious – albeit temporary and exceptional – Recovery Fund of EUR 500 billion in 'EU budgetary expenditure' (e.g., in non-repayable financial support) to be financed by unprecedented borrowing on the markets on behalf of the EU.[91] As has been already stressed,[92] it would not be too far-fetched to think that the German Constitutional Court judgment has shown the limits of an excessive reliance on the technical and independent supranational institutions of the EU, and notably on the ECB, to provide the necessary response to financial and economic crises, and has prompted political actors to take responsibility and action as necessary to protect the common European project.

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

At the centre of the legal construction lies the *European Union Recovery Instrument* (*EURI*),[94] a Regulation to be adopted on the basis of Article 122 TFEU and aimed at supporting the economies of the Member States in their recovery from the pandemic via exceptional funding to be provided in the forms of grants and loans to the Member States. The EURI Regulation is an extremely agile instrument, limited to defining in very broad terms the types of measures to be financed and the amounts to be allocated to various programmes. In doing so, however, it crucially subjects the whole financing scheme to the requirements which are proper to the use of Article 122 TFEU,

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

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

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

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

and in particular to the temporary and exceptional character (e.g., the fact of being necessary to address the crisis situation) of the measures. As we will see, these requirements have played a crucial role in ensuring both the legality of the scheme and the political conditions for its adoption, and notably the necessary reassurances that the instrument was meant to be a one-off arrangement and not a new ordinary way of financing EU expenditure.[95]

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

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

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

[96] Proposal for a Regulation establishing a Recovery and Resilience Facility, COM/2020/408 final.

[97] Amended proposal for a Council Decision on the system of Own Resources of the European Union, COM/2020/445 final.

[98] Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final.

the Union, culminating in the European Council of 17 to 21 July 2020.

If the new position of Germany had made it impossible to oppose the establishment of a Recovery Fund financed on the issuance of common debt, the Member States that still opposed the idea of a transfer Union[99] pivoted towards a strategy with three different objectives: reducing the overall volume of the MFF-NGEU package and of the respective share of grants and loans; ensuring strict control over the allocation and disbursement of funds, through reinforced governance of the RRF and stricter conditionality; and finally extracting the maximum possible financial advantages in form of rebates or exceptional contributions. After five days of intense negotiations, the European Council finally reached an agreement which was documented in very long conclusions, entering into a very high level of detail on the content of the different acts that were under negotiation.[100] The final deal preserved the essential elements of the original Commission's proposal as well as the overall size of the NGEU, even if the ratio of grants/loans was modified (EUR 360 billion in grants and EUR 390 billion in loans). The governance of the RRF was strengthened, *inter alia* by including a controversial emergency brake allowing a Member State to require a debate at the European Council if it did not consider that the conditions for the disbursement of funds were met. Finally a number of concessions were granted to various Member States, starting from the system of budgetary rebates that the Commission had proposed to abolish as a consequence of Brexit.

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

This notably included a strengthening of the *Rule of Law Conditionality Regulation*, which was the main final and last-minute obstacle to the adoption of the overall package. Hungary and Poland had constantly opposed the inclusion of the Conditionality Regulation in the MFF package, as they deemed that the instrument was divisive and at risk of politicisation. Now the two Member States threatened to oppose the adoption of the acts subject to unanimity – no-

[99] The so-called frugal four including the Netherlands, Austria, Denmark and Sweden, and often supported by Finland.

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

tably the MFF Regulation and the ORD Decision – thus preventing the entry into force of the overall package.

A final agreement with the two Member States was finally reached at the December 2020 European Council, on the basis of a set of detailed guarantees and concessions as to the way the Conditionality Regulation would be implemented, which made their way once more into very detailed conclusions[101] and were strongly criticised by Parliament and commentators. However, the adoption of those conclusions made it possible to overcome the threat of a veto and opened the way for the adoption of the various legal instruments according to the relevant procedures.

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

2.2 Health-related measures

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

Nevertheless, the scale of the threat was however unprecedented. The exponential growth in infections from late February 2020, the high associated mortality of the virus, combined with the absence of an effective treatment or a vaccine, led many countries to implement non-pharmaceutical interventions such as "stay-at-home" policies alongside other community and physical distancing measures such as the closure of educational institutions and public spaces. These measures were highly disruptive to society, both economically and socially. As of 22 April 2020, approximately 988 241 cases had been re-

[101] See: Conclusions of the European Council meeting of 10 and 11 December 2020, EUCO 22/20.

[102] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, pp. 17–75.

[103] Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC, OJ L 293, 5.11.2013, pp. 1–15. This decision was later repealed and replaced by Regulation (EU) 2022/2371.

ported by EU/EEA countries and the UK, including 105,064 deaths.[104] The difficulties encountered by Member States with more fragile hospital facilities and weaker medical infrastructure in controlling the spread of the virus affected the ordinary functioning of national health systems and obviously represented a problem in terms of controlling the pandemic in all other Member States. In this context, supporting Member States' medical infrastructure and procurement for medical countermeasures emerged as key priorities.

2.2.1 Activation of the Emergency Support Instrument

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

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

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

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[104] https://www.ecdc.europa.eu/sites/default/files/documents/covid-19-rapid-risk-assessment-coronavirus-disease-2019-ninth-update-23-april-2020.pdf

[105] COM(2020) 175, 2 April 2020.

[106] Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70, 16.3.2016, pp. 1–6 (ESI Regulation). See Miglio A., "The Regulation on the Provision of Emergency Support Within the Union: Humanitarian Assistance and Financial Solidarity in the Refugee Crisis", European Papers, Vol. 1 (2016) No 3, pp. 1171–1182.

[107] Article 1(1) ESI Regulation.

[108] Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak, OJ 15.4.2020, L 117/3.

[109] Article 4 Council Regulation (EU) 2020/521.

With this single instrument, the Council not only activated, for a period of two years, the Emergency Support Instrument to finance expenditure necessary to address the COVID-19 pandemic and adopted temporary measures to facilitate the purchasing of medical countermeasures, but also amended the emergency support legal framework for the future, supplementing its scope of action to address pandemics with large-scale effect. It was notably made explicit that emergency support could also be granted to help address needs *in the aftermath* of a disaster or in order to prevent its *resurgence*, provided that actions fall within the activation period.[110]

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

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

2.2.2 Joint purchasing of medical countermeasures

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

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

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[110] Article 3(1), ESI Regulation.

[111] Recital 23, Council Regulation (EU) 2020/521. See its Article 2 allowing grants to be awarded for actions already completed before the date of adoption provided that the actions started after the date of activation.

[112] Article 3(1) ESI Regulation.

[113] Annex to ESI Regulation.

[114] Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation, OJ L 77I, 15.3.2020, pp. 1–7.

[115] https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_20_476/IP_20_476_EN.pdf

In parallel, Member States were joining forces under a joint procurement agreement pursuant to Decision No 1082/2013/EU, to buy personal protective equipment, respiratory ventilators and items necessary for COVID-19 testing. Joint procurements were entered into on a voluntary basis. They were to be preceded by a *joint procurement agreement* and comply with a number of basic principles.[116] When conducting such joint procurements, the Commission remained in a coordinating role, while the EU countries purchased the items. The first contracts were concluded by Member States as of April 2020. Twelve joint procurement procedures of the kind were run, which resulted in over 200 contracts allowing countries to order essential medical supplies and innovative therapeutics for nearly EUR 13 billion.[117]

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

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

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

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[116] Among these principles, participation in the joint procurement procedure is to remain open to all Member States until the launch of the procedure and the joint procurement should not affect the internal market, nor constitute discrimination or a restriction of trade or cause distortion of competition.

[117] Source: https://commission.europa.eu/strategy-and-policy/coronavirus-response/public-health/ensuring-availability-supplies-and-equipment_en#:~:text=The%20voluntary%20Joint%20Procurement%20Agreement%20for%20medical%20countermeasures,with%20the%20EU%20policies%20on%20testing%20and%20vaccination

[118] Article 4(5) ESI Regulation, as amended by Council Regulation 2020/521.

[119] Article 168(3) of Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast). On this occasion, the ability to procure on behalf of Member States was extended to any EU institution, body or agency as defined in the Financial Regulation.

[120] Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank, "EU Strategy for COVID-19 vaccines," 17 June 2020, COM(2020)245 final.

[121] Commission Decision of 18 June 2020 approving the agreement with the Member States on procuring COVID-19 vaccines on behalf of the Member States and related procedures, C(2020)4192 final and Annex.

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

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

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

[122] For a complete overview of the Commission's vaccines strategy for COVID-19, see: https://commission.europa.eu/strategy-and-policy/coronavirus-response/public-health/eu-vaccines-strategy_en

[123] Article 4 Council Regulation (EU) 2020/521.

[124] Articles 163(6) and 175(5) of Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast). The power to procure on behalf of Member States was extended to any EU institution, body or agency as defined in the Financial Regulation (Financial Regulation).

the contractor and only where justified and strictly necessary to respond to the evolution of the crisis.

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

2.2.3 Health crisis legal framework

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

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

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

[125] ECA Special Report No 19/2022, *COVID-19 vaccine procurement – Sufficient doses secured after initial challenges, but performance of the process not sufficiently assessed* and Council Conclusions on Special Report No 19/2022, ST 15471/22, OJ C 484, 20.12.2022, pp. 15–17.

[126] Commission Communication, "Drawing the early lessons from the COVID-19 pandemic," 15 June 2021, COM(2021) 380 final and Council conclusions on COVID-19 lessons learned in health 2020/C 450/01, IO C 450, 28.12.2020, pp. 1–8.

[127] Commission Communication, Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats, 11.11.2020, COM(2020) 724 final and legislative proposals COM(2020) 725 final, COM(2020)726 final and COM(2020) 727 final. See: McKeea M., de Ruijter A., "The path to a European Health Union," *The Lancet Regional Health – Europe* 2024; 36: 100794.

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

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

[128] Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices, PE/76/2021/REV/1, OJ L 20, 31.1.2022, pp. 1–37.

[129] Articles 2(b) and 4(3) of Regulation (EU) 2022/123. In such a case, the newly established Medicine Shortages Steering Group (MSSG) is to draw up lists of critical medicinal products, the supply and demand of which will be monitored. To this end, Member States and marketing authorisation holders have information and reporting obligations. The MSSG has a central role as it may on its own motion issue recommendations to the Member States and the Commission, but also to marketing authorisation holders and other entities (Articles 6, 8, 10 and 11 Regulation (EU) 2022/123).

[130] Regulation (EU) 2022/123, Article 16.

[131] Regulation (EU) 2022/2370 of the European Parliament and of the Council of 23 November 2022 amending Regulation (EC) No 851/2004 establishing a European centre for disease prevention and control, PE/82/2021/REV/1, OJ L 314, 6.12.2022, pp. 1–25.

[132] Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU, PE/40/2022/REV/1, OJ L 314, 6.12.2022, pp. 26–63.

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

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

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

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

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

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[133] Article 12(3)(c) Regulation (EU) 2022/2371.

[134] Council Regulation (EU) 2022/2372 of 24 October 2022 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, ST 6569/22, OJ L 314, 6.12.2022, pp. 64–78.

[135] Its actual adoption by Council was eventually formalised in October 2022 and its publication was coupled with the Regulation on cross-border threats to health later in December that year.

[136] Article 3 and recital 3 of Council Regulation (EU) 2022/2372.

[137] Commission Decision of 16.9.2021 establishing the Health Emergency Preparedness and Response Authority, (2021) 6712 final.

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

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

2.3.1 Coordination of national travel restrictions

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

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[138] OJ C 57, 20.2.2020, p. 4.

[139] Conclusions by the President of the European Council following the video conference on COVID-19.

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

[141] OJ C 126, 17.4.2020, p. 1.

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

On the one hand, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States allows Member States, under specific conditions, to restrict the freedom of movement and residence of Union citizens and their family members, on grounds of public health.[142] Similarly, the Schengen Borders Code in its then applicable form allowed for a person subject to a border check to be refused entry if he or she would constitute a threat to public health. It is on the basis of those instruments that Member States started to impose national restrictions of general application, covering all travellers from third countries and later on also nationals of other EU Member States.

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

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

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

On 25 June 2020, the Commission proposed a Council recommendation on the temporary restriction on non-essential travel into the EU.[144] The Council took just five days to adopt the Recommendation. Council Recommendation (EU) 2020/912 included a list of third countries for which Member States

[142] Articles 27 and 29, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68, OJ L 158 30.4.2004, p. 77.

[143] Judgment of the Court of 5 December 2023, Nordic Info, case C-128/22, EU:C:2023:951, para. 63.

[144] COM(2020)287 final.

should start lifting the travel restrictions at the external borders.[145] This list of safe third countries was reviewed every two weeks and regularly updated by the Council.

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

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

2.3.2 EU Digital COVID Certificate

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

[145] Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, ST 9208/20, OJ L 208I, 1.7.2020, p. 1.

[146] Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 337, 14.10.2020, p. 3; Council Recommendation (EU) 2020/1632 of 30 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic in the Schengen area, OJ L 366, 4.11.2020, pp. 25–26.

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

[148] Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475, OJ L 018 27.1.2022, p. 110.

initiatives to issue COVID-19 vaccination certificates. In its conclusions of 10 and 11 December 2020, the European Council agreed that a coordinated approach to vaccination certificates should be developed.[149] For vaccination certificates to be used in a cross-border context, an interoperable, secure and verifiable system had to be established at Union level. By contrast to the soft law approach that was favoured to coordinate national travel restrictions, such a system called for a legally binding framework.

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

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

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

[149] EUCO 22/20.

[150] COM(2021)130 final and COM(2021)140 final.

[151] European Parliament resolution of 25 March 2021 on establishing an EU strategy for sustainable tourism (2020/2038(INI), pt. 5.

[152] Statement of the Members of the European Council, 25 March 2021, SN 18/21.

[153] Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, PE/25/2021/REV/1, OJ L 211, 15.6.2021, pp. 1–22 and Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic, PE/26/2021/REV/1, OJ L 211, 15.6.2021, pp. 24–28.

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

2.4 Adaptations to the EU Institutions' procedures

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

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

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

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

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

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

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

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

in as far as discussions that would, under the Council's Rules of Procedure, be held in public. The papers which are the subject of such discussions were similarly made public.

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

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

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

The European Parliament,[161] too, did not have any rules governing remote electronic participation in meetings when the pandemic was declared. On 20 March 2020, the Bureau of the European Parliament supplemented the rules governing voting to establish a system complementary to the system for voting on the premises of the European Parliament, and which did not require the MEPs to be physically present. That decision allowed remote voting only in exceptional circumstances, to be assessed by the President of the European Parliament, namely if normal voting would pose a risk to MEP or staff health

[159] Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union, OJ L 88I, 24.3.2020, p. 1–2. Initially adopted for a period of one month, this temporary derogation was renewed twelves times and expired on 30 June 2022.

[160] Council Decision (EU) 2022/1242 of 18 July 2022 amending the Council's Rules of Procedure, OJ L 190, 19.7.2022, pp. 137–138.

[161] For an overview of the procedural measures taken by the European Parliament and by some national parliaments, see: Parliaments in emergency mode (europa.eu).

or if a Member could not attend due to travel restrictions imposed by Member States. The remote system also included an online tool to take the floor and to vote, although voting did not happen in real time. The decision was temporary and applied until 31 July 2020, but was extended and later laid the foundation for a definitive amendment of the European Parliament's Rules of Procedure, adopted on 17 December 2020. Those permanent rules provide for two situations where exceptions to certain working methods are allowed, including the possibility for remote participation, namely exceptional and unforeseen circumstances beyond the Parliament's control and when the political balance in the EP is severely impaired because a significant number of Members or a political group cannot take part in the EP's proceedings under usual procedures. Contrary to the rules adopted in the Council, the procedural flexibilities allow hybrid meetings, where some Members participate remotely and others are present physicallyIn the early days of the pandemic, the European Parliament also decided to hold two extraordinary part-time sessions in Brussels instead of in Strasbourg.

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

In addition to the specific procedural flexibilities, each institution also introduced a number of security measures to protect the health of those present on the premises. Those rules covered, *inter alia*, distancing, health/temperature checks and the requirement to wear masks and to be in possession of a valid EU COVID certificate. Measures also included for example meeting in bigger

[162] Commission Decision (EU, Euratom) 2020/555 of 22 April 2020 amending its Rules of Procedure, OJ L 127I, 22.4.2020, pp. 1–2.

[163] Judgment of the General Court of 27 April 2022, *Robert Roos and Others v Parliament*, joined Cases T-710/21 and T-722/21, EU:T:2022:262.

meetings rooms to allow for distancing and limiting the size of delegations. The lawfulness of the requirement to present a valid EU Digital COVID Certificate to access the Parliament's buildings, which had been introduced by Bureau of the European Parliament in 2021, was examined in great detail by the General Court in the joined cases *Roos and others*.[164] The General Court concluded that, in view of the epidemiological situation and scientific knowledge at the time of adoption, the measure was necessary and appropriate as far as it allowed the risk of transmission of COVID-19 to be reduced. Its reasoning was later confirmed by the Court.[165]

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

3. Energy crisis

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

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

The Union acted rapidly and decisively through a number of complementary measures which were characterised by an increased level of Union action and coordination as the crisis progressed and deepened. It is not the aim of this re-

[164] Judgment of the Court, 16 November 2023, Roos and Others v Parliament, Case C-458/22 P, EU:C:2023:871.

[165] In summer 2022, wholesale gas prices reached historically high levels of above EUR 300 per MWh. This, combined with other factors, exerted additional pressure on the already tight wholesale electricity market. In the third quarter of 2022, the European Power Benchmark was EUR 339 MWh on average which is 222% higher on average than in the third quarter of 2021.

[166] As described by Alberto Vecchio, "Changing the Flow: The European Response to the Russian Weaponisation of Gas," *European Papers*, Vol. 9, 2024, No. 1, pp 39–51, at pp. 40 to 41.

[167] By way of example, Russian pipeline gas imports from July to September 2022 were down by 74% relative to the same period in 2021, necessitating preparedness in case of a full halt in Russian gas deliveries.

[168] Leigh Hancher, "EU Energy Market Regulation after the 2022 Energy Crisis: the reforms so far and the challenges ahead," *Swedish Institute for European Policy Studies*, January 2024, at p. 3.

[169] The topic of energy is already covered as a separate topic of this FIDE conference.

port to enter into the details of the crisis response.[170] It is nevertheless relevant to understand the main measures and dynamics in order to assess how those measures fit into the general Union emergency framework.

3.1 Early response via coordination measures and legislative reform

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

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

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

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

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

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

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

[174] Referred to in footnote 172.

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

– Diversifying energy imports;
– Saving energy;
– Substituting fossil fuels and accelerating Europe's clean energy transition.

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

Additional Union initiatives initially focused mainly on the root cause of the crisis, namely gas shortages, by attempting to contain soaring gas prices and ensure security of supply. Against that background, the Commission proposed, as early as March 2022, amendments to existing rules with a view to introducing a gas storage obligation. The obligation would ensure that the Union would have enough gas in storage for the winter.[178] The same proposal included new provisions on compulsory certification of all gas storage operators with the aim of avoiding external influence over critical storage infrastructure which could jeopardise the security of the EU's energy supply. The proposed amendments were adopted under the ordinary legislative procedure within three months, with the European Parliament having recourse to the urgent procedure provided for in its Rules of Procedure.[179] Whereas the gas storage obliga-

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

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

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

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

[179] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (OJ L 335, 29.12.2022, p. 1).

tion successfully helped to ensure enough gas was available for the winter, it came at a high price, as the efforts of all Member States to fill their storage facilities at the same time in all likelihood contributed to further spurring an increase in prices. The risk of Member States outbidding each other for gas was subsequently addressed through voluntary demand aggregation and joint purchasing.

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

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

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

3.2 Speeding up the response via emergency measures

At its meeting on 24–25 March 2022, the European Council had tasked the Council and the Commission to reach out to energy stakeholders to discuss how some of the short-term options presented in the Commission toolbox

[180] Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas (OJ L 206, 8.8.2022, p. 1).

[181] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ L 261I, 7:10:2022; p. 1).

[182] European Council conclusions, 24–25 March, para. 16.

Communication could contribute to reducing the gas price and addressing its contagion effect on electricity markets.[183] At the same time, as it adopted the RPowerEU Plan, the Commission therefore presented a Communication based on a report drawn up by the European Union Agency for the Cooperation of Energy Regulators (ACER) as well as stakeholder input, setting out "short-term energy market interventions and long-term improvements to the electricity market design – a course for action."[184] The Communication fell short of the expectations of some Member States and stakeholders in a situation where the soaring prices were increasingly putting a strain on national economies. In its conclusions of 20–21 October 2022, the European Council explicitly invited the Commission to "speed up work on the structural reform of the electricity market, including an impact assessment."[185] [186] The European Council also called for a number of other specific actions which were urgently followed up by the Commission and adopted with incredible speed. Of particular relevance is the series of emergency measures adopted by the Council in the period from July to December 2022.[187] Those measures and the increasingly coordinated Union approach also need to be seen in the context of Member States' hitherto disparate responses to a deepening crisis which threatened to fragment the internal market and the level playing field between Member States. Those emergency regulations were a complementary and coherent response following on from previous toolbox initiatives and REPowerEU objectives and also seeking to preserve and speed up the green transition in line with the Fit for 55 objectives.

The first emergency measure entailed a voluntary gas demand reduction by 15% which would become mandatory in the case of a Union alert (*Coordinated gas demand-reduction emergency measure*).[188] The Regulation was initially adopted for a period of one year but subsequently extended for one year, until

[183] Communication of 18 May 2022 (COM(2022) 236).

[184] European Council conclusions, 20–21 October, para. 20.

[185] In March 2023 that the Commission – following a stakeholder consultation and on the basis of a Staff Working Document – put forward comprehensive proposals for improving the Union's electricity market design, which were subsequently adopted by the co-legislators: Regulation (EU) 2024/1747 of the European Parliament and of the Council of 13 June 2024 amending Regulations (EU) 2019/942 and (EU) 2019/943 as regards improving the Union's electricity market design (OJ L, 2024/1747, 26.6.2024), Directive (EU) 2024/1711 of the European Parliament and of the Council of 13 June 2024 amending Directives (EU) 2018/2001 and (EU) 2019/944 as regards improving the Union's electricity market design (OJ L, 2024/1711, 26.6.2024) and Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024 amending Regulations (EU) No 1227/2011 and (EU) 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market (OJ L, 2024/1106, 17.4.2024).

[186] Those measures are also further described in the separate Chapter on Article 122 TFEU.

[187] Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas, OJ L 206, 8.8.2022, pp. 1–10. The Commission submitted its proposal on 20 July 2022, and the Council adopted the Regulation on 5 August 2022.

[188] Council Regulation (EU) 2023/706 of 30 March 2023 amending Regulation (EU) 2022/1369 as regards prolonging the demand-reduction period for demand-reduction measures for gas and reinforcing the reporting and monitoring of their implementation (OJ L 93, 31.3.2023, p. 1).

31 March 2024, in the light of the continued severe situation in the gas markets.[189] Before the end of that period, the Commission presented a proposal for a Recommendation, to continue efforts to reduce gas consumption. The choice of having recourse to a Recommendation reflected the sentiment that although problems persisted on the gas markets, they may not be sufficiently serious and urgent to fulfil the conditions for recourse to Article 122 TFEU. The Recommendation was based on Article 292 in conjunction with Article 194(2) TFEU. That Recommendation was adopted on 25 March 2024.[190] The initial emergency Regulation was challenged before the Court of Justice by Poland, supported by Hungary.[191]

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

The third emergency package consisted of a basket of measures, first, to enhance solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks (*Facilitation of joint gas*

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

[190] Case C-675/22 *Republic of Poland v Council of the European Union* – still pending.

[191] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, OJ L 261I, 07/10/2022, pp. 1–21. The Commission submitted its proposal on 14 September 2022, and the Council adopted the Regulation on 6 October 2022.

[192] See, for example, cases T-775/22, T-795/22, T-802/22 and case T-803/22 (direct challenges against the solidarity contribution) and T-759/22 (direct challenge against the revenue cap).

[193] C-533/24 and C-358/24 (solidarity contribution) and C-467/24, C-392/24, C-261/24, C-251/24, C-633/23, C-423/23 and 391/23 (revenue cap).

[194] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (OJ L 335, 29.12.2022, p. 1). The Commission submitted the proposal on 18 October 2022 and the Regulation was adopted by the Council on 19 December 2022. The measures were prolonged until 31 December 2024 by Council Regulation (EU) 2023/2919 of 21 December 2023 amending Regulation (EU) 2022/2576 as regards the prolongation of its period of application (OJ L, 2023/2919, 29.12.2023).

purchases), second, to establish a market correction mechanism (*MCM*) and third, to deploy renewable energy as a matter of urgency.

One major component of the third Regulation[195] was a clear structure and framework for the joint gas purchasing platform, enabling the aggregation of demand, possible coordinated gas purchasing and an obligation to include at least 15% of the needs to comply with the mandatory gas storage obligation in the platform, however, without an obligation to take off any quantity of gas. It is interesting to mention that the proposal also included a "frontload" of certain provisions on transparency which were already under discussion between the European Parliament and the Council as part of the so-called gas package. The proposal also included a mechanism to prevent excessive price movements on commodity trading venues (intra-day volatility mechanism), an obligation for ACER to establish an LNG benchmark to enable a more accurate and reliable assessment of the price for LNG deliveries into the Union and a number of important solidarity provisions.

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

The *MCM* was eventually split off and adopted shortly after as a separate and fourth Regulation based on Article 122 TFEU.[196] A critical element for the deal was the introduction of a dynamic rather than a static price cap for gas prices, which would better adapt to market developments. The market correction mechanism has never been triggered as the conditions for its activation have not been met. On the same day, the Council also adopted a fifth emergency measure on the basis of Article 122 TFEU,[197] aiming to accelerate the deployment of renewable energy by speeding up and streamlining permitting procedures which act as a major bottleneck for the swift roll-out of renewable energy installations and grids (*Deployment of renewables emergency measure*). Provisions include a presumption that the planning, construction and operations of plants and installations for the production of energy from renewable sources are in the overriding public interest at least in certain areas. The Regulation also includes maximum durations for granting permits linked to the installation of solar energy equipment and to the repowering of existing energy power plants and their connection to the grid. The Regulation allowed certain exemptions from various environmental impact assessments and in-

[195] On 22 November, the Commission presented a separate proposal fleshing out the market correction mechanism in more detail. That proposal was adopted on 22 December 2022, see: Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices, OJ L 335, 29/12/2022. That measure was prolonged for a year until 31 January 2025 by Council Regulation (EU) 2023/2920 of 21 December 2023 amending Regulation (EU) 2022/2578 as regards the prolongation of its period of application, OJ L, 2023/2920, 29/12/2023.

[196] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ L 335, 29/12/2022, p. 36.

[197] Cases T-534/23 and T-535/23.

cluded provisions on the acceleration of the deployment of heat pumps. The Regulation, the duration of which was limited to 18 months, was challenged by environmental NGOs through the Aarhus Regulation review mechanism, and the review decisions taken in that context have been challenged before the Court of Justice.[198] It should also be noted that an important part of that Regulation was subsequently incorporated, with adaptations, in the Renewable Energy Directive (RED),[199] adopted on 18 October 2023. In spite of this, the Commission tabled a proposal on 28 November 2023 to prolong the application of certain measures of the emergency Regulation by one year until 30 June 2025.[200]

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

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

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

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

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

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

[201]

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

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

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

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

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

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

2. Primary role of Member States in providing emergency response

In all the case studies analysed in this report, Member States played the first and primary role in reacting to the situation of emergency, be it by rapidly

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

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

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

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

3. A complex and multi-faceted EU response

The emergency response of the Union has been a complex one, combining a variety of instruments: political and legal; emergency and ordinary competence. It drew on a variety of tools, which reflected the multi-faceted nature of the crisis itself: from soft law measures to ordinary legislation, from the triggering of escape clause allowing Member States to derogate from EU rules,

to emergency measures taken at the EU level, to international instruments relevant to a variety of policy areas. In the context of the energy crisis for instance, the Union response consisted in a mix of soft law, acts adopted under the ordinary legislative procedure, and emergency measures adopted by the Council on the basis of Article 122 TFEU. The Union response was a holistic one, covering several angles relevant for crisis management (diversification through energy savings, accelerating green investments, enhancing energy solidarity, measures linked to the electricity market and affordability measures, restrictive measures in the field of the CFSP and State aid framework). In a similar vein, given the breadth of the challenges faced, the response to the COVID-19 pandemic was also particularly multifaceted and encompassed soft law measures to coordinate the action of the Member States (e.g., Council recommendations on national restrictions on travel), quick amendments to existing legislative instruments (e.g., *CRI* and *CRI plus*) or adoption of new legislative acts (*COVID- Certificates Regulation)*, as well as emergency measures adopted on the basis of Article 122 TFEU (*SURE*, *EURI*).

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

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

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

4. Graduality in the Union response

Throughout the crises under examination, the Union response followed a sequence characterised by a growing level of normativity and by a shift in

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

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

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

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

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

and *CRI plus*) and the rules on airport slots modified to adapt them to the situation of the pandemic. In a similar vein, the existing spending instruments were mobilised and as necessary amended (*Emergency Support Instrument, EU Solidarity Fund*) to support the Member States.
Only when no instruments were available under the existing legal framework or those available were clearly not sufficient to respond to the situation of crisis did the Union have recourse to emergency competences.

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

In the case-studies analysed in this report, emergency competences were always part of a broader Union response to crises alongside a number of other instruments based on ordinary competences (see above). In the context of the complex Union response, emergency competences were generally triggered at a later stage, and typically when it became apparent that the existing ordinary tools were not able to provide a response to match the scale of the challenges posed by the crisis, and recourse to the ordinary legislative procedure was not deemed sufficiently effective or timely in light of the urgency of the situation (as in the case of the energy emergency measures).
Thus, in the framework of the energy crisis, the response at the Union level initially consisted in a number of proposals based on the ordinary legal bases, aimed at modifying existing regulatory and financing frameworks to increase the ambition and accelerate the achievement of objectives of energy transition and energy savings. The recourse to emergency measures based on Article 122 TFEU only entered into play in a second phase, when the rise in energy prices and the deepening of the crisis prompted a strong call by the European Council for urgent and exceptional measures. Once adopted, however, they played a central role in shaping the Union's emergency response.
In the context of the COVID-19 pandemic, the recourse to emergency competences followed a similar sequence. Emergency measures based on Article 122 TFEU were only proposed by the Commission after having triggered existing mechanisms and having mobilised all available budgetary resources. Crucially, the timing of the proposals reflected the evolution of the political discussions among the Leaders as to the extent and form of the Union involvement in financing the recovery from the pandemic. The proposal for *SURE*, combining an innovative use of Article 122 TFEU and ambitious joint borrowing with a more conventional form of support for Member States through repayable loans (thus implying a limited redistributive effect), acted as the "canary in the coalmine", whose success opened the way to the more ambitious *NGEU* financing scheme. Indeed, the Commission presented the *NGEU* package – centred on another Article 122 TFEU emergency measure, the *EURI* – only once it had received clear indication that Member States would support its

groundbreaking political and legal design: the issuance of common EU debt on an unprecedented scale in order to provide grants to support Member States' recovery.

Once adopted, *SURE* and *EURI* played the central role in the Union response to the economic dimension of the COVID-19 crisis and even ended up symbolising the capacity of the Union to act decisively and boldly in crisis situations. It nonetheless remains true that crucial Union actions taken to address other aspects of the pandemic, notably in the domains of vaccine procurement and restrictions on the movement of persons, were adopted on the basis of ordinary competences or even based on soft law. Not all instruments adopted on the basis of Article 122 TFEU proved equally relevant for tackling the pandemic: the emergency framework concerning medical countermeasures adopted on the basis of Article 122(1) TFEU was ultimately not even activated for the purpose of the COVID-19 pandemic and remains a dormant framework to date.

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

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

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

The extensive use of the provision was however accompanied by a particular attention of the Institutions to compliance with the conditions for its application. During the negotiations in Council on *SURE* and the *NGEU* package, the exceptional and temporary character of the relevant instruments were strengthened. In the context of the energy crisis, the measures adopted on the basis of Article 122(1) TFEU remained genuinely temporary in nature, characterised by short lifespans, whose prolongation was subject to a careful assessment of their continued necessity in light of the evolution of the situation. This did not prevent a certain level of controversy from arising as to the allegedly expansive use of Article 122 and the risk that it would entail both in terms of the principle of conferral – which could be undermined by competence creep driven by emergency – and in terms of dominance of the executive – due to the exclusion of the European Parliament from the adoption of the relevant measures. These concerns will be assessed as part of the analysis carried out in following chapters of this report.

6. A specific role for the Institutions

In times of crisis, the coordination and steering of the response has been shaped significantly by the central role of the European Council. While it always provided a political lead, the degree of its intervention varied, from giving general political impetus, to brokering the final political deal in the case of policy packages or even entering into the detailed determination of the content of the measures as was the case for the financial response to the COVID-19 pandemic (NGEU – MFF– RRF– Conditionality Regulation) or the Relocation Decision (European Council of 25/26 June 2015). The European Council was generally successful in steering certain aspects of the Union action, however with some exceptions. In the field of migration, the strong divergences among its members on the contentious issue of burden-sharing, which was itself the result of the highly asymmetric nature of the crisis, did not allow it to provide impetus to the discussions, notably on the legislative reform of the asylum and migration system before the introduction of a new set of proposals by the Commission under the new Pact on Asylum and Migration.
The Commission, for its part, proved agile and reactive, swifty endorsing soft-law instruments. In certain instances, it anticipated the steering of the European Council, issuing guidance that was later endorsed by the latter. At times, it exercised its power of initiative in the absence of steering from the European Council and put forward proposals that, however, proved to be controversial among Member States. This was notably the case of the two 2015 emergency relocation decisions, which, as a consequence, were immediately attacked in Court by two Member States and largely remained under-implemented. As a result of this negative experience, the Commission retreated into a position of self-restraint, leaving to the Member States to deal with emergency response

in the first place, and rather focussing on working on the legislative reform of the asylum and migration system. The emergency action of the Union was therefore limited to coordinating Member States' measures and financial support. A significant exception in the field of migration was the successful activation, for the first time, of the emergency mechanism under the Temporary Protection Directive as a consequence of the Ukraine war. It is worth noting that the activation of the Temporary Protection Directive was crucially based on a request by the European Council to proceed in that sense.

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

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

7. Solidarity, a central dimension of EU emergency action

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

In the context of the migration crisis, the relocation decisions were driven by a genuine attempt to promote a fairer distribution of asylum seeker than

that imposed by geography. Their limited success prompted a rethink of how solidarity was put into practice, in the context of the New Pact on asylum and migration. However, it did not call into question the principle of solidarity, which has particular significance – and Treaty recognition – in this domain.
In the context of the COVID-19 crisis, two initiatives stand out for their unprecedented nature and the extreme unity and solidarity that they testified to. The first one is the Union's financial response to mitigate the enormous socio-economic impact of the pandemic and enable a swift economic recovery and which entailed an unprecedented transfer of resources among Member States. The second is the success of the joint vaccine procurement which ensured swift and equal access for all Member States to safe vaccines at record speed.
In the context of the energy crisis, solidarity took new forms and dimensions, as it found expression in the protection of common goods which would inevitably be impaired by unilateral Member States' action. In such a context solidarity took the form of the imperative need to act jointly, as certain measures would not be efficient or not even possible, unless introduced by all Member States (e.g., introducing a market correction mechanism based on a dynamic bidding limit for gas). Finally, in the context of the energy crisis, the solidarity principle was further operationalised through obligations imposed on individuals, rather than on Member States themselves, such as the introduction of a revenue cap and solidarity contribution from certain market operators, which helped to finance measures supporting those most affected by the rise in electricity prices.

8. Relationship between emergency measures and ordinary law-making

A final common trend in all the case-studies that we have analysed is the close relationship between emergency measures and ordinary law-making.
Often emergency measures were presented jointly with a broader reform of the ordinary legislative framework applicable in the domain, as happened in the migration and energy crises. In those contexts, emergency measures were used to frontload reforms already being discussed or even agreed (as in the case of certain emergency measures); in other cases, they offered an opportunity to accelerate or catalyse reforms already in the pipeline but having met with strong opposition (as in the case of the *RRF*).
The case-studies also show how emergency measures can also drive change and innovation: those provisions which were considered to have shown their worth beyond the specific crisis framework have subsequently been "repatriated" into legislation based on ordinary legal bases, and even "mainstreamed" in other domains.
The complex relationship between emergency and ordinary competences, and the way the two interfere and interact by setting in place complex normative dynamics in the EU legal order will be the object of Chapter III of the report.

II. THE EU EMERGENCY ARCHITECTURE

"Sovereign is he who decides on the [state of] exception."
C. Schmitt[203]

Introduction: The EU emergency architecture

The case studies analysed in the previous chapter have shown that the EU legal order deals with emergencies in an articulated, multi-layered and multi-faceted way. It is multi-layered, because an EU emergency does not always prompt Union action but may – depending on the circumstances – be dealt with in whole or in part at national or even regional level[204] and it is multifaceted because of the number of different legal bases and types of measures which may come into play in response to an emergency.

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

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

We argue that this approach fails to take into account the specificity of the EU as an international organisation, albeit one characterised by a very high level of integration, and notably that its legal order is based on the principle of conferral of powers from Member States, which means that the Union can only act within the limits of the competences that have been conferred upon it in the EU Treaties.[205] Even where powers have been conferred upon the Union,

[203] C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, 1922, 7th ed. Berlin: Duncker & Humblot.

[204] In addition, in relation to the financial crisis, a certain prevalence was given to collective international law arrangements between Member States.

[205] Article 5(2) TEU.

the intensity of its action is determined by the nature of the powers conferred.[206] In a situation where the Union only enjoys the power to support, coordinate or supplement the actions of the Member States, as is generally the case in the field of health,[207] the exercise of powers is more constrained than where the Union operates under a shared competence, such as in the field of energy,[208] or in an area of exclusive competence, such as competition rules necessary for the establishment of the internal market.[209]

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

The EU's emergency architecture

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

This is reflected by the way international law and the law of international organisations have traditionally accommodated emergency situations. International conventional regimes often recognise that States remain ultimately responsible for taking action in emergency circumstances and, to that end, they provide for specific derogations or escape clauses that allow for the suspension of conventional obligations. A good example in that regard is found in Article 15 of the European Convention on Human Rights, which provides that "in times of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." Thus, confronted with emergency situations, sectorial international regimes accept that the normative space for emergency is the one of the State, and adapt accordingly.

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

First, the classic international law approach to emergency situations is still very much present in the EU legal order. It is notably reflected by the various escape clauses that in exceptional circumstances allow Member States to derogate from their EU law obligations. Originally quite ubiquitous in the text

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

[207] Article 2(5) and 6 TFEU.

[208] Article 4 TFEU.

[209] Article 3 TFEU.

of the EEC Treaty, a number of these escape clauses were gradually deleted in the course of the various Treaty revisions, as a greater number of competences were transferred to the Union. However, several of them still remain and are further developed in sectorial legislation, which often translates into secondary law the system of derogations laid down in the Treaties. Among the Treaty-based clauses, is Article 347 TFEU, which allows Member States to disapply certain EU law obligations when faced with an emergency situation consisting of "serious internal disturbances affecting the maintenance of law and order" or in the event of war or serious international tensions constituting the threat of war. It is worth noting that Articles 36, 45, 52, 65, 72 and 346 TFEU also enable Member States to apply certain derogations in situations that may also cover situations of emergency (e.g., public order, public security, public health). At the same time, as we will see in Section 1 of this Chapter, the much more advanced integrationist agenda of the EU project has resulted in a strict framing of Member States' emergency powers. On the one hand, the Court of Justice has given a restrictive interpretation of emergency clauses, preventing them from constituting a "reserve of sovereignty" that would allow Member States to have the final say on the derogations. In so doing, the Court has introduced a number of procedural and substantive safeguards limiting the impact of those clauses on common EU rules and in fact introducing an element of solidarity to them. On the other hand, in certain specific areas, the possibility for Member States to take emergency action is subject to explicit mechanisms for authorisation by the EU institutions. This is notably the case for certain core competences exclusively conferred on the Union, whereby the need to protect the uniformity and effectiveness of common rules requires unilateral derogations by Member States to be vetted *ex ante* or *ex post*. This category includes:

- Article 107 TFEU. If as a matter of principle, State aid is prohibited, pursuant to Article 107(3)(b), State aid to "remedy a serious disturbance in the economy of a Member State" may be considered compatible with the internal market. In a similar vein, Article 107(2)(b) TFEU provides that State aid to "make good damage caused by natural disasters or exceptional occurrences" shall be compatible with the internal market. In both cases, Member States are enabled to provide aid to mitigate the harmful impact of crises, but subject to a specific authorisation by the Commission. The way in which the Commission has exercised this power to orient Member States' aid towards specific types of projects responding to specific conditions will be analysed in Section 1.2 below.
- Article 144 TFEU allows Member States that have a derogation from participating in the monetary Union and which are experiencing a "sudden crisis in the balance of payments" to take "the necessary protective measures." Such measures are, however, subject to an *ex post* control by the Council, which may decide on the basis of a Commission recommendation and after consultation of the Economic and Financial Committee, that the Member State concerned should amend, suspend or abolish the protective measures.

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

- Article 42(7) TEU (solidarity in the field of foreign policy) – in the event that a Member State is the victim of an act of armed aggression on its territory, the other Member States shall "have towards it an obligation of aid and assistance by all the means in their power"
- Article 222 TFEU (general solidarity clause) – which provides that the Union and its Member States shall act jointly in a spirit of solidarity if a Member State "is the object of a terrorist attack or the victim of a natural or man-made disaster." This provision also provides for EU level coordination and thus includes components of Union action through coordination.[210]

Second, besides provisions accommodating the exercise of emergency powers by Member States, the Treaties have in a number of specific situations conferred on the Union itself the power to take emergency action. These situations are laid down in several legal bases that require the presence of a situation of exceptionality or urgency in order to be triggered. We will refer to those as "emergency legal bases." It is interesting to note that emergency legal bases have often made their appearance alongside escape clauses – and as an alternative to them (see, for instance, the relationship between Articles 72 and 78(3) TFEU, which were originally part of the same emergency provision[211] and between Articles 143 and 144 TFEU). They reflect the understanding that, even if coordinated or authorised, separate actions taken by Member States do not necessarily guarantee an effective or fair response to a crisis situation and can at the same time threaten the common goods that the progressive transfer of sovereignty has established at the European level. This category includes:

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

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

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

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

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

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

- Article 143(2) TFEU, which enables the Council, on a recommendation of the Commission, to grant mutual assistance to a Member State that has a derogation from participating in the monetary union and which "is seriously threatened with difficulties as regards its balance of payments […] and where such difficulties are liable in particular to jeopardise the functioning on the internal market or the implementation of the common commercial policy." Interestingly enough, if the mutual assistance recommended by the Commission is not granted by the Council or if the measures taken are insufficient, "the Commission shall authorise the Member State to take protective measures, the conditions and details of which the Commission shall determine."

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

As the case studies have shown, the inclusion of a number of emergency provisions in the Treaties should not detract from the fact that "ordinary" legal bases have often also been deployed at times to respond to emergency situations, either by means of a direct response or by means of provisions that may be triggered in the event of an emergency. In fact, ordinary legal bases

have even enabled very swift responses in crisis situations, for example in the context of the COVID-19 pandemic, in respect of Brexit contingencies and in the context of the energy crisis. Therefore, whether a measure qualifies as an emergency measure cannot depend on the legal basis on which it is adopted. What matters is whether the measure – in terms of its aim and content – sets out to address a situation of emergency. After all, the choice of legal basis is an objective one, which must refer to the aim and content of the measure.[212]
The question of whether there is a hierarchy between emergency legal bases and ordinary legal bases in cases where the measure could be covered by both types of legal bases is subject to diverging views and will be addressed in Chapter III.
The multifaceted and multi-layered nature of EU emergency law, and notably the fact that the EU legal order accommodates emergencies on the basis of a complex set of provisions rather than of a general "emergency clause," does not mean that EU emergency law is fragmentary. In fact, the unity of EU emergency law is ensured by a set of common principles that underpin the interpretation and application of the various provisions and which ensure unity and coherence for the system. These principles will be the object of Section 3 of this chapter.

Underpinning tensions
The whole debate about emergency powers in constitutional theory focuses on the tension – and the equilibrium to be found – between the greater discretion that is necessary to allow the executive to effectively counter existential threats to the polity and the set of the purposes, conditions and procedures that, according to the emergency constitution, make the recourse to emergency powers legitimate.
In light of the specific features of the EU emergency architecture, these traditional concerns represent a part of the picture and the broader context needs to be taken into account. This is particularly important when classic constitutional theories on emergency powers are used to suggest improvements to the EU emergency constitution *de lege ferenda*.
We argue that a central tension that is triggered by the exercise of emergency powers at the EU level is the one between the allocation of competence for regulating emergency situations between the Union and Member States and the need to preserve the integrity/constitutional identity of the EU legal order. The concern over a possible competence creep of the Union vis-à-vis the emergency competence of the MS is often missing from the analysis of the constitutional theorists.
In fact, as we will see, many of the specificities of the use of emergency powers by the EU are the consequence of such a tension. This concerns in particular:

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

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

- The negotiating dynamics over emergency measures, where it is often the Member States within the Council that insist on strict respect for the limitations on emergency powers, which sits at odd with the traditional concern about the risk of "tyranny of the executive" in the recourse to emergency powers.[213]

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

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

From this point of view, the corpus of EU emergency law may be seen as a system for limiting and framing the emergency competence of national executives in emergency situations, benefitting common action at the EU level, inspired by the principle of solidarity. Paradoxically, via the mechanisms of control that national parliaments have over executives when acting at the EU level, emergency action at the EU level may ensure greater parliamentary involvement than the adoption of national emergency measures.
This dynamic coexists and overlaps with the traditional tension between executive and legislative powers and needs to be taken into account to fully understand the dynamics of EU emergency law, especially when reflecting on whether reforms are desirable.

1. EU law provisions framing Member States' emergency powers

The first pillar of EU emergency architecture consists of EU law provisions that frame the exercise of emergency powers by Member States. As we have underlined in the introduction, this approach to emergency regulation moves from the classic international law approach that considers emergency powers

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

to be a fundamental expression of state sovereignty. The EU legal order accommodates this approach by acknowledging the responsibilities of Member States in certain domains but at the same by framing them according to varying levels of intensity, depending on the level of integration pursued in the domain in question.

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

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

1.1 Escape clauses and derogations

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

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

With the exception of Article 347, which explicitly refers to situations having the character of an emergency, escape clauses have a broader scope than emergency situations, as they generally refer to fundamental State interests, regardless of the circumstances. However, certain State interests they refer to,

and notably the notions of "public security," "national security" and "internal security" have a particular relevance in emergency situations, and indeed have been invoked to justify the adoption of unilateral emergency measures by Member States in situations classified as emergencies. This applies in particular to Article 72 TFEU, which has been invoked by Member States to justify unilateral measures to suspend or derogate from provisions of the EU asylum acquis during the various migration crises and has led to some relevant case-law that has clarified the nature and scope of escape clauses.

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

The question of the nature of escape clauses, and in particular of the one embedded in Article 72 TFEU, was at the centre of the infringement proceedings brough by the Commission against Hungary, Poland and the Czech Republic for their failure to effectively implement the *2015 Relocation Decisions* adopted by the Council on the basis of the emergency competence laid down in Article 78(3) TFEU.[214] These cases are particularly meaningful for our analysis because they illustrate the relationship between emergency powers exercised at the national and EU levels.

Before the Court of Justice, the three Member States did not contest that they had failed to comply with the obligations resulting from the *Relocation Decisions* but argued that they were entitled to rely on Article 72 TFEU, read in conjunction with Article 4(2) TEU to disapply the two decisions. They submitted that Article 72 TFEU, as a provision of primary law, had to take precedence over the two Decisions, as acts of secondary law. In their view, Article 72 TFEU was a rule "comparable to a conflict-of-law rule under which the prerogatives of the Member States in the field of maintenance of law and order and safeguarding of internal security take precedence over their obligations under secondary law."[215] According to this understanding of the provision, a Member State could legitimately set aside a norm of EU secondary law each time that its implementation would – or even could – affect the exercise of the Member State's "responsibilities" in the field of internal security. As remarked by one commentator, the Member States pleaded, in substance, that the scope of EU law ends where the necessities of maintaining law and order, as unilaterally understood by each Member State, start.[216]

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

[214] Judgment of the Court of Justice of 2/4/2020 in joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic*, EU:C:2020:257.

[215] Ibidem, point 137.

[216] H. de Verdelhan, "Art.72 TFEU as Seen by the Court of Justice of the EU: Reminder, Exception or Derogation?," *European Papers*, 2024(9:3), pp. 1330–1364, at page 1336.

> Article 72 TFEU is therefore not – as Poland and Hungary contend – a conflict of laws rule that gives priority to Member State competence over measures enacted by the EU legislature or decision-maker; rather, it is a rule of co-existence. The competence to act in the specified area remains with the Member State (it has not been transferred to the European Union).[217]

The fact that the Member States retained competence, however, did not mean that those areas constituted a "*chasse gardée*." Member States would remain obliged to exercise their competence under Article 72 TFEU in a way that respects other relevant provisions of EU law.[218]
The Court of Justice, however, took a stricter position. According to the Court, Article 72 TFEU could not be interpreted as reserving the domains of the maintenance of internal security for the competence of the Member States:

> Although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of European Union law. As the Court has already held, the only articles in which the Treaty expressly provides for derogations applicable in situations which may affect law and order or public security are Articles 36, 45, 52, 65, 72, 346 and 347 TFEU, which deal with exceptional and clearly defined cases. It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of European Union law and its uniform application.[219]

Thus, the Court makes it clear that Article 72 TFEU is not a competence-conferring provision, nor even a rule of co-existence as suggested by the Advocate General, but is rather a conditional exception that allows Member States to derogate from EU obligations in order to ensure the maintenance of law and order and the safeguarding of their internal security. As a derogating provision, Article 72 TFEU must be interpreted strictly. Consequently, it does not confer on Member States unfettered discretion or a generalised right to derogate from EU obligations. On the contrary, the Court of Justice builds on its previous case-law concerning internal market escape clauses to conclude that the requirements relating to the maintenance of law and order or national security are concepts of EU law. As such, they cannot be determined unilaterally by each Member State on its own, but remain subject to the control of the EU institutions and notably to the judicial review of the Court of Justice.[220]

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[217] Opinion of AG Sharpston in case C-715/17, *Commission v Poland,* EU:C:2019:917, point 211.
[218] Ibidem, point 219.
[219] Judgment in joined cases C-715/17, C-718/17 and C-719/17, supra note 12, point 143.
[220] Ibidem, point 146.

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

1.1.2 Conditions for recourse to escape clauses

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

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

As regard the *burden of proof*, the case-law of the Court makes it clear that it falls to the Member State that intends to rely on Article 72 TFEU to prove that it is necessary to have recourse to the derogation in order to exercise its responsibilities in terms of maintaining law and order and safeguarding internal security.[221]

Thus, in a case concerning emergency measures adopted by Hungary in response to the 2015 migration crisis, the Court stressed that is not sufficient for the Member State to merely invoke, in a general manner, the risk of threats to public order and internal security that arrivals of large numbers of applicants for international protection might cause, without demonstrating, to the requisite legal standard, that it was necessary for it to derogate specifically from the relevant provision of the Asylum procedure directive.[222] In the same vein, in a case concerning Lithuania, the Court rejected a defence based on Article 72 to justify the derogations introduced to the EU asylum acquis on the basis of a national state of emergency declared to address the situation of migrants being instrumentalised at the border with Belarus.[223]

On the contrary, the Member State needs to justify its recourse to the escape clause with an appropriate reasoning for the *necessity* to depart from the provisions of EU secondary law due to a specific situation of emergency. The necessity test requires the Member State to show that the situation at stake has an actual impact on the interests protected by the derogating clause. Thus, in both the Hungarian and Lithuanian cases, the Court stressed that the reference to a situation of mass influx of migrants at the borders is not as such a circumstance that shows the actual existence of a threat for the maintenance

[221] Ibidem, point 147.

[222] Judgment of 17 December 2020 in Case C-808/18, *European Commission v Hungary*, EU:C:2020:1029, point 217.

[223] Judgment of the Court of 30 June 2022 in Case C-72/22 PPU, *Valstybės sienos apsaugos tarnyba*, EU:C:2022:505, point 72.

of public order or the safeguarding of internal security.[224] It must be shown that asylum seekers are actually threatening those interests by engaging in activities of sufficient nature and scale to have such an effect.[225] Such a threat cannot be presumed, as presuming that people will be dangerous simply because they belong to an abstract group would go against the very values of respect for human dignity and freedom on which the EU is founded.

Once the Member State has proven the existence of a relevant and actual threat to the interests protected by the derogation, it is also required to respect the principle of *proportionality* in the choice of the derogating measures. This requires first showing that the derogation is suitable for protecting the interests at stake. Thus, in the Hungarian case, the Court stressed that the Member State had not demonstrated how the derogation to the rights provided by EU legislation to asylum seekers could contribute to the safeguard of internal security or the maintenance of law and order.[226]

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

Insofar as EU law already allows for the protection of those interests by means of specific provisions – as is largely the case in relation to the EU legal framework applicable to asylum – it is up to the Member State to prove specifically that the existing EU legal framework does not provide effective safeguards in relation to the specific situation at hand. In doing so, however, a Member State cannot merely rely on its unilateral assessment as to the lack of effectiveness or malfunctioning of the EU legal regime in question, as this would undermine the binding nature of the relevant EU acts, as well as the principle of solidarity.[227]

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

Finally, while not specifically addressed in the case-law developed to date, recourse to derogating clauses needs also to satisfy *substantive conditions* as to the nature and content of the derogation. In particular, any derogating regime

[224] Case C-72/22 PPU, *Valstybės sienos apsaugos tarnyba*, point 72; Case C-808/18, *European Commission v Hungary*, point 218.

[225] Case C-808/18, *European Commission v Hungary*, points 218–220.

[226] Ibidem.

[227] Judgment in joined cases C-715/17, C-718/17 and C-719/17, supra note 12, points 180 and 181.

under Article 72 TFEU needs to respect the other relevant provisions of EU law, starting with respect for the fundamental rights laid down in the Charter of Fundamental Rights. As Advocate General Emiliou put it in his opinion on the Lithuanian case:

> When examining the compatibility with EU law of any extraordinary and temporary derogation measure, the fundamental rights of the persons concerned should not be overlooked. Although in 'exceptional circumstances' more limitations may theoretically be placed on those rights in order to safeguard public order and internal security, the fact remains, first, that a balance must always be maintained between those rights and requirements, secondly, that some limitations are so serious that they are never acceptable in a democratic society and, thirdly, that some rights do not allow for any limitation, whatever the circumstances.[228]

Concluding remarks

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

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

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

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

It follows that the scope of the action that escape clauses provide to Member States depends on the evolution of EU law over time. The more EU legislation regulates a given matter to incorporate protection of the relevant interests, the more limited the possibility will be for Member States to invoke a deroga-

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

tion. Ultimately, when EU law has fully addressed the matter and developed provisions and procedures to ensure protection of the relevant objectives, the Member States will no longer be allowed to act unilaterally.
This case-law is particularly significant when applied to situations where the Union has exercised its competences and addressed a situation of crisis at the Union level. In such a case, it may be difficult for Member States to have recourse to unilateral emergency powers, even when declaring a state of emergency, to derogate from common EU rules in order to pursue a higher level of protection of their interests. On the contrary, when the EU has exercised its competence, the balance among the interests at stake is to be formulated at the Union level, while respecting the relevant procedural and substantive rules. Derogating clauses should not become a remedy for Member States outvoted in the Council.[229]

1.2 Coordination of national responses: The case of State Aid control in times of crisis[230]

Emergency situations very often require the swift mobilisation of additional resources to finance immediate policy responses. We have seen in previous chapters how additional financing has been mobilised from the Union budget in response to recent emergencies, in particular through the NGEU.
However, the Union budget remains limited in size[231] and therefore Member States generally have to rely primarily on their own national treasuries for financing emergencies. By no means all national support constitutes State aid but, in crisis situations, the need for *targeted support* to mitigate the effects of the crisis often involves *granting* State aid.[232]
It is the sole prerogative of the Member States to decide whether to grant aid and in what amounts and for which beneficiaries, whereas it is the exclusive

[229] See on this matter: the very pertinent reflections of H. de Verdelhan, in the article quoted above, footnote 14.

[230] This section does not address the competition, in particular antitrust, aspects that may arise when emergencies require close coordination, such as through joint purchasing during the energy crisis or business coordination in the context of COVID-19. In some instances, the Commission has provided guidance, see, for example: Communication from the Commission Temporary Framework for assessing antitrust issues related to business coordination in response to situations of urgency stemming from the current COVID-19 outbreak (eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0408(04).

[231] Relative to gross domestic product (GDP), the size of the EU Budget has remained stable over time, at around 1% of the EU's income and only around 2% of EU public expenditure, despite the growing number of tasks on which the EU has been asked to deliver (EU budget in the future: questions and challenges (europa.eu). The extraordinary NGEU programme comes on top of the normal EU budget.

[232] A measure constitutes State aid if the following conditions are met: (1) there is an intervention by the State or through State resources, (2) the intervention confers an advantage on the recipient on a selective basis, (3) competition has been or may be distorted and (4) the intervention is likely to affect trade between Member States. See, for example, judgment of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, para. 101 and the case-law cited.

competence of the Commission to assess the compatibility of such aid with the internal market.

Rarely has State aid control or even the fundamental market rationale for such control been put under as much pressure as during recent years. Successive crises, as well as events putting pressure on the EU's competitiveness in the global arena,[233] have given credence to voices calling for loosening State aid control or even for suspending State aid control.[234] Others have called for caution and have highlighted the inherent risks of excessive State aid in terms of upsetting the level playing field.[235]

Throughout recent crises, the Commission has acted swiftly and adapted State aid rules to enable Member States to provide aid necessary to mitigate the harmful impact thereof. Such use of the flexibility offered by the State aid toolbox – even if it applies equally to all Member States – comes with non-negligeable risks of jeopardising the competitiveness of Member States or regions in a situation where not all Member States have the same fiscal space[236] and may lead to harmful subsidy races.[237] All of this places particular responsibility on the Commission[238] in the exercise of its exclusive competence in the field of State aid.

Whereas State aid control is mainly designed to ensure a level playing field between businesses in the internal market, it is less geared towards factoring in more macro-economic considerations linked to the overall capacity of Member States to support their businesses.[239] The Commission has nevertheless monitored the situation closely, and has reported on the amounts of aid respectively approved and granted per Member State under successive crisis

[233] For example, the US Inflation Reduction Act and China's assertive trade policy.

[234] For example, it was reported that in April 2020, Austria wrote to the Commission asking for a suspension of State aid rules: AGENCE EUROPE – Austria wants more flexible rules in times of COVID-19 crisis – approval of new support schemes (accessible on https://agenceurope.eu/en/bulletin/article/12472/3).

[235] More recently, see, for example, a joint letter from 8 Member States and Iceland (accessible on https://data.consilium.europa.eu/doc/document/ST-7176-2024-INIT/en/pdf).

[236] Under the Stability and Growth Pact (SGP), the activation of the general escape clause can help Member States in the short term to create fiscal space for undertaking budgetary measures to deal adequately with emergencies. For example, in March 2020, the COVID-19 outbreak led the European Commission and the Council to assume a severe economic downturn of the euro area and the EU as a whole and to consider that the conditions for activating the general escape clause of the SGP were fulfilled (Communication in COM(2020) 123 final).

[237] See also: Alessandro Rosano, "Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law," *European Papers*, Vol. 5, No 1, in particular pp. 621–631 (European Forum, 7 May 2020), in particular, p. 630.

[238] Hornkohl, Lena: van't Klooster, Jens: With exclusive Competence Comes Great Responsibility: How the Commission's COVID-19 State Aid Rules Increase Regional Inequalities Within the EU, VerfBlog, 2020/4/29, With Exclusive Competence Comes Great Responsibility – Verfassungsblog.

[239] In order to address level playing field concerns, in his report entitled "Much more than a market" Enrico Letta proposes to set up a "State aid contribution mechanism, requiring Member States to allocate a portion of their national funding to financing pan-European initiatives and investments." Report available here:, Enrico Letta – Much more than a market (April 2024) (on State aid, see, in particular, pp. 11, 26 and 39).

frameworks. The fact remains that the real effects of the successive temporary State aid frameworks and other flexibilities put in place can be difficult to separate out from the effects of other measures, such as regulatory measures, and will often only be known in the longer term.

State aid control is founded on the fundamental principle that businesses competing on equal terms will grow, due to their capacity and ability to adapt to market demand. This in turn benefits consumers in the internal market in terms of increased choice and competitive prices. Article 107(1) TFEU therefore sets out the general principle that State aid is incompatible with the internal market. That is subject to specific exceptions, under which State aid shall[240] or may[241] nevertheless be considered compatible with the internal market. Of relevance for this report, Article 107 TFEU contains specific compatibility grounds linked to exceptional situations. This section will explore how the Commission has used the flexibility offered by State aid rules to enable Member States to provide targeted aid in recent emergencies and to speed up the assessment of aid notifications in times of emergency.[242]

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

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

That provision has already been applied in relation to natural disasters.[243] Moreover, during the COVID-19 pandemic, this provision was extensively used to approve aid to compensate for damage suffered by event organisers, as well as carriers (air, train, ferries, etc.) as a result of travel restrictions and lock-downs.[244]

Article 107(3)(b) TFEU provides that aid to "remedy a serious disturbance in the economy of a Member State" may be compatible with the internal market. In recent crises, the Commission has adopted a series of communications referred to as "temporary State aid frameworks" to facilitate the granting of aid and to ensure a streamlined, coherent and swift decision on the compatibility of aid. Those frameworks have mainly been based on Article 107(3)(b) cited above, but some have also contained elements based on Article 107(3)(c) (aid to facilitate an economic activity or an economic area). The latter is not a specific

[240] Article 107(2) TFEU.

[241] Article 107(3) TFEU.

[242] Speed is of the essence, since Member States are prohibited from putting State aid measures into effect before the aid has been approved pursuant to Article 108(3) TFEU (the "stand-still clause"). This does not apply to measures that comply with the conditions set out in the General Block Exemption Regulation (GBER).

[243] The Commission has provided a checklist for Member States, setting out guidance to facilitate a smooth process in relation to aid notified under that provision (disaster_aid_checklist_en.pdf).

[244] A list of aid measures approved by the Commission can be found here: fd113a0a-9c99-4405-aa4c-4ed52134f657_en (europa.eu).

crisis legal basis, and would appear to cover mainly aid going beyond remedying the immediate serious disruption, for example by supporting projects in the pursuit of more medium- to long-term crisis-related policy objectives. As examples, one could mention aid for green projects in the context of the energy crisis to accelerate the green transition and thereby also phase out dependency on Russian fossil fuels, or investments to help the economy pick up and recover in the aftermath of the COVID-19 pandemic.

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

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

Temporary Crisis Framework (COVID-19)[245]

In the context of the COVID-19 pandemic, the Commission adopted a State Aid Temporary Framework on 19 March 2020,[246] allowing Member States to provide direct support for hard-hit businesses and hence mitigate the economic shocks caused by the pandemic. The framework was amended no less than seven times, with a view, inter alia to: covering support for the research, testing and producing products relevant to fighting the outbreak, as well as support for protecting jobs (first amendment), diversifying the type of aid for companies so as to ease their access to capital and liquidity, enabling support for uncovered fixed costs and for micro- and small enterprises and start-ups, and to incentivising private investment (second, third and fourth amendments) and enabling the conversion of certain repayable instruments into grants (fifth amendment).

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

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

The framework was also amended to introduce provisions related to the application of Article 107(2)(b) TFEU.[247]

The sixth amendment comprised a new section to stimulate investment support for a sustainable recovery. That section was based on Article 107(3)(c), as it was geared more towards recovery and less towards addressing the immediate consequences of the pandemic. In May 2022, the Commission announced that the Temporary Framework was set to expire on 22 June 2022, except for a limited number of measures that continued for an additional six months until 31 December 2022 (investment support) and 18 months until 31 December 2023 (solvency support). However, on 28 October 2022, in light of the Russian invasion of Ukraine, the Commission decided to prolong the investment support measures until the end of 2023 (seventh amendment).

Based on information from the Commission, aid totalling approximately EUR 3.1 trillion was approved under the Temporary Crisis Framework in 2021 and 2022.[248] At the end of 2021, only around EUR 940 billion of the aid approved had been granted. Based on data linked to the actual aid granted, the Commission concluded that "State aid measures actually implemented by Member States seem to be correlated with the economic damage suffered during the crisis. Moreover, there is no evidence of Member States that would have granted an excessively larger amount compared to the others, thus raising concerns on the level playing field in the single market."[249]

Temporary Crisis Framework and Temporary Transition and Crisis Framework – Energy crisis

On 23 March 2022, less than a month after the Russian invasion of Ukraine, the Commission adopted the Temporary Crisis Framework (TCF) to enable Member States to support the economy in the context of Russia's invasion of Ukraine. The initial framework comprised measures to *grant limited amounts of aid to companies affected by the crisis or by the related sanctions and countersanctions, to ensure that sufficient liquidity remains available to businesses, and to compensate companies for the additional costs incurred due to exceptionally high gas and electricity prices.* That framework was announced in the Commission "toolbox communication" of 8 March 2022.[250] The framework was extended on 20 July 2022 to complement the Winter Preparedness Package, in line with RePowerEU objectives to cover measures to accelerate the roll-out of renewable energy and the decarbonisation of the industry based on Article 107(3)(c). It was further amended and prolonged on 28 October 2022 to complement the Regulation on an emergency intervention to address high energy prices[251]

[247] That provision is covered separately below.

[248] Competition State aid brief: state_aid_brief_3_2022_kdam22003enn_coronavirus.pdf (europa.eu).

[249] Competition State aid brief, ibidem.

[250] Supra Chapter I, Section 3.

[251] Council Regulation (EU) 2022/1854, based on Article 122 TFEU, supra Chapter I, Section 3.

and a proposal adopted on 18 October 2022 to address high gas prices in the EU and ensure security of supply that winter, both based on Article 122(1) TFEU.[252]

As the TCF was initially designed to mitigate the direct effects of the energy crisis, on 9 March 2022, it was replaced by the Temporary Crisis and Transition Framework (TCTF), as announced in the Green Deal Industrial Plan.[253] That framework goes further, in that it adds a component aimed at accelerating investments in sectors strategic to the transition towards a net-zero economy. To that effect, it enables support for the *manufacturing* of strategic equipment for the green transition, the production of key components and for the recycling of related raw materials. It also allows for so-called matching aid to prevent investments from being diverted away from Europe. Both manufacturing aid and matching aid are traditionally considered to constitute more distortive types of aid. The measures set out in the TCF were closely linked to the energy crisis and the need to reduce dependency on Russian fossil fuels.[254] However, the transitional measures in the TCTF have a less direct link. They were introduced in the wake of the US Inflation Reduction Act and in response to China's trade policy. The TCTF,[255] in its section 2.8, refers to "global challenges posing a threat of new investments in these sectors being diverted in favour of third countries outside the EEA." The TCTF thus becomes an instrument with a pronounced global competitiveness focus.[256]

Regulatory proposals such as the Chips Act, the Net Zero Industry Act and the Critical Raw Materials Act confirm this trend towards a more protective Union policy, with a strong focus on supply chains and global competitiveness. The two latter proposals were announced by the Commission in connection with the Green Deal Industrial Plan. At the same time, the Commission endorsed an amendment to the General Block Exemption Regulation (GBER) to further simplify and speed up support for the EU's green and digital transitions.[257] That amendment was formally adopted on 23 June. The Commission

[252] Subsequently adopted by the Council as Council Regulation (EU) 2022/2576, supra Chapter I, Section 3.

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

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

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

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

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

also announced that it would "prepare a Code of Good Practices ("Code") for a transparent, inclusive, and faster design of IPCEIs allowing for a streamlined assessment, and share it with the Member States."[258] That code was adopted in May 2022. All of these developments illustrate how State aid was used to serve policy objectives linked to what was increasingly perceived as a competitiveness crisis.

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

Based on information from the Commission, a total of around EUR 671 billion in aid was approved under the framework in 2022. By the end of 2022, only about EUR 93 billion had been granted.[259] The information clearly shows that large amounts of aid are concentrated in very few Member States, so that Germany, Spain and the Netherlands had granted a total of 91% of all aid granted. When this is set against national GDP, the specific circumstances and the types of measures (repayable support vs grants), the picture is arguably slightly more nuanced.[260] The Commission conclusion in terms of the possible distortive effect is more cautious here than in the case of the COVID-19 temporary framework.[261]

1.2.2 Case-law

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

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

[259] Commission State aid brief: state_aid_brief_1_2023_kdam23001enn_TCTF_survey_0.pdf (europa.eu).

[260] See to that effect the figures included in the State aid brief, supra footnote 57.

[261] The State aid brief looks at the aid granted to companies and the potential needs in the energy crisis and concludes that the differing amounts of aid per Member State "[…] may reflect the important disparities that exist within the EU in terms of fiscal ability of Member States to grant support to undertakings, which cannot be addressed by State aid policy and may strengthen the call for EU-level funds to counterbalance national disparities." See: State aid brief, supra footnote 57.

In those rulings, the Court has consistently recognised that the COVID-19 pandemic may qualify as an "*exceptional occurrence*" within the meaning of Article 107(2)(b) and as a "*serious disturbance of the economy*" within the meaning of Article 107(3)(b). [262] Faced with claims that measures favouring national air carriers constitutes unlawful discrimination, the Court held that a difference in treatment is inherent in the nature of an individual aid scheme.[263] In that respect, it has rejected claims to the effect that aid to compensate for damage pursuant to Article 107(2)(b) can only be deemed compatible with that provision if it is granted to all undertakings affected by the damage caused by the exceptional occurrence.[264] The Court has recalled that Article 18 TFEU (prohibition of discrimination) "is intended to apply independently only to situations governed by EU law in respect of which the TFEU lays down no specific prohibition of discrimination." Since Articles 107(2) and (3) TFEU provide for derogations that allow for differences in treatment, those provisions must be regarded as "special provisions provided for in the Treaties," within the meaning of Article 18(1) TFEU, and therefore the relevant criterion is whether a difference in treatment is justified under that provision.[265]

On the basis of what is indicated above, the Court has therefore generally rejected claims linked to purported breaches of the principle of non-discrimination, as long as the aid measure is necessary to address an exceptional occurrence or a serious disturbance and is appropriate and proportionate. In respect of the appropriateness, the Court has generally accepted aid to national air carriers based on reasons related to their link to and importance in the national economy.[266] This means that competitors have had very little success in contesting the fundamental approach of the Commission in these cases.

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[262] Case C-320/21 P, supra footnote 30, in which the Court held that "[…] an event such as the COVID-19 pandemic may be classified both as an 'exceptional occurrence' within the meaning of Article 107(2)(b) TFEU and as an event giving rise to a 'serious disturbance in the economy' within the meaning of Article 107(3)(b) TFEU."

[263] Case C-320/21 P, supra footnote 30, para. 107 (as regards Article 107(2)(b)) and judgment of 6 June 2024, *Ryanair v Commission*, C-441/21 P, EU:C:2024:477, para. 38 (as regards Article 107(3)(b)).

[264] Case C-320/21 P, supra footnote 30, para. 23.

[265] Case C-441/21 P, supra footnote 61, paras. 40–42 (as regards Article 107(3)(b)) and C-320/21 P, supra footnote 30, para. 111 (as regards Article 107(2)(b)).

[266] The bulk of the cases concerned aid to national air carriers that were recognised as playing an important role in the national economy, for example due to their particular presence on the territory or coverage of several routes in the Member State or which were proven to be more affected on the territory than other flight carriers. See, for example, judgment of 18 October 2023, *Ryanair v Commission (Alitalia I; COVID-19)*, T-225/21, EU:T:2023:644, paras. 118 and 119. The Court has even accepted as appropriate a measure which differentiated by covering a company that was subject to French law and a French licence and by virtue thereof was considered to have a "specific, stable link," see: judgment of 17 February 2021, *Ryanair DAC v European Commission*, T-259/20, EU:T:2021:92, paras. 39–41. The judgment of the General Court was upheld on appeal, judgment of 23 November 2023, C-210/21 P, EU:C:2023:908, on the stable link see in particular: paras. 55–56.

Where the Court has struck down State aid measures, this has typically been on more technical grounds, such as failure to provide sufficient justification[267] or an error of assessment in relation to specific aid elements.[268] In doing so, the Court has demonstrated a strict approach to and scrutiny of the causal link between the losses suffered and the exceptional occurrence.[269]

In line with consistent case-law, the Commission, in the area of State aid, is bound by the guidelines and communications that it adopts, insofar as they do not depart from the rules in the Treaty and are accepted by the Member States.[270] The Court has applied the same reasoning to the temporary State aid frameworks adopted in the context of the crisis.[271]

It is important to note that – while the exceptions in paragraphs 2 and 3 of Article 107 TFEU are to be interpreted restrictively[272] – the Court has recognised the existence of a large margin of discretion for the Commission when assessing the compatibility of aid pursuant to Article 107(3) TFEU[273] subject, in particular, to respect for the principle of proportionality.

Finally, the Court has clarified that – contrary to what is the case for Article 107(3)(c) – the Commission is not required to weigh up the beneficial effects and the adverse effects of the aid concerned when acting on the basis of Article 107(3)(b).[274] It follows that: "Aid measures which contribute to the attainment of one of those objectives, provided that they are necessary and proportionate, may therefore be considered to ensure a fair balance between their beneficial

[267] See, for example, judgment of 24 May 2023, *Ryanair v Commission (Italie; régime d'aide; COVID-19),* T-268/21, EU:T:2023:279 – annulment for failure to state reasons (the judgment is under appeal) and judgment of 19 May 2021, *Ryanair DAC v European Commission*, T-643/20, EU:T:2021:286.

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

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

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

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

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

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

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

effects and their adverse effects on the internal market and are therefore in the common interest of the European Union."[275]

Concluding remarks

Contrary to many of the policy measures put in place, State aid is merely a supporting tool. It cannot replace regulatory responses and it cannot replace funding from the Union budget.[276] In relation to both the COVID-19 pandemic and the energy crisis, Member States also granted sizable amounts of support to the economy and to households, which did not qualify as State aid, and financing was also provided from the Union budget. It remains a fact that State aid formed an important part of the emergency response.

The Commission has played an important role in providing flexibility and framing the conditions for such flexibility. Whereas other Union emergency measures have been criticised for being "undemocratic" due to the lesser involvement of the European Parliament,[277] the issue does not arise in this context. Emergency provisions enshrined in the relevant Treaty legal basis do not in any way shift competences as compared to those applicable in ordinary times, and the Commission remains in the driving seat through its exclusive competence as regards assessing the compatibility of State aid with the internal market.

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

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

First, the existence of an emergency can hardly be debated. Both the COVID-19 pandemic and the energy crisis resulting from the Russian invasion of Ukraine affected the Union economy as a whole and hit businesses and consumers hard.[278] Nevertheless, a crisis response needs to be limited to what is necessary to address the crisis and must only be applied for as long as needed to address the emergency. We have seen that the Court insists on the need to apply the

[275] Idem, para. 94.

[276] That point was made in the State aid Brief, cited supra footnote 30.

[277] This aspect of institutional balance is addressed in chapter IV of this Report.

[278] The effects of the various crises are well reflected in the various economic forecasts issued by the Commission (DG ECOFIN).

exception in paragraphs 2 and 3 of Article 107 TFEU strictly, albeit leaving the Commission a wide margin. In that respect, the principle of proportionality and the necessity and appropriateness of a measure remain of key importance. We have also seen that differentiation is inherent in State aid, and there is consequently little comfort to be sought for competitors, as long as measures are deemed to be necessary, appropriate and proportionate.

Second, as regards the need to keep emergency facilitations time limited, the temporary frameworks have proven to be very agile instruments, which have been constantly monitored and have been defined for short time periods, subject to short extensions and adaptations, always following consultations of Member States. In that way, they have been able to factor in developments as the crises progressed. Nevertheless, it is noteworthy that both the COVID-19 temporary framework and the TCF, followed by the TCTF, contain provisions that were not based on a logic of serious disturbances (Article 107(3)(b)) but on the "ordinary" legal basis for furthering an economic activity, enshrined in Article 107(3)(c). The measures covered by those provisions are measures of a different nature, aimed at kick-starting the economy following the pandemic (COVID-19 framework) or accelerating green investments and even furthering production of net-zero technologies or raw materials and diverting relocation (TCF and TCTF). While those measures were undoubtedly a coherent part of the overall policy response, they can hardly qualify as short-term crisis measures, which is also acknowledged through the use of Article 107(3)(c). The inherent risk is that – by including them in a rather flexible framework – they become the "new normal." The Commission has been very cautious to underline the temporary nature of the measures, but the fact remains that some of the non-crisis facilitations will have been in place for over three yeIn addition, when it comes to ensuring that aid is limited to what is necessary and proportionate in light of the circumstances, it is fair to say that the temporary frameworks, irrespective of whether they are based on Article 107(3)(b) or Article 107(3)(c), give Member States considerable leeway and are based on rather general conditions enabling rapid verification and approval by the Commission. While the relevant provisions certainly do not provide a blank cheque and include limitations and requirements to minimise distortions, such conditions are not comparable to those applicable under the "ordinary" State aid guidelines, which are in place to deal with support for projects in various fields, and the scrutiny cannot – for obvious reasons – be as thorough.

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

inadequate national responses.[279] On the other hand, a well-designed State aid framework can contribute to solidarity by aligning conditions for support, thus orienting Member States towards a certain type of measures that are useful for addressing the crisis.

It is fair to say that in times of crisis, national responses are needed more than in "ordinary times" but this cannot be at the expense of competition in general or result in leaving behind certain Member States or regions with less fiscal capacity. Several Member States consistently called for caution as regards too much flexibility or prolonging the flexibility for too long. Such calls were echoed by the Committee of the Regions[280] and the European Parliament and in academic works. However, one cannot lose sight of the fact that many also called for, and continue to call for, more flexibility in the application of State aid rules. The flexibility offered by the Commission has been endorsed or even prompted by national leaders.[281] The jury is still out as regards the long-term effects on competition, including the competitive structure between Member States, of the extensive flexibility granted under the temporary crisis frameworks.

The trend towards protracted crisis frameworks, coupled with more flexible conditions, inherently involve certain risks. Those risks are even more pronounced when "crisis considerations" spill over into more permanent measures, such as the GBER. That being said, similar trends have also been observed in other crisis measures, such as RePowerEU, where NGEU money, initially intended to deal with the effects of the COVID-19 pandemic, was repurposed to further energy-related objectives in the context of the energy crisis. If anything, developments show how State aid control has closely followed and adapted to political realities, although this has not been without risk to competition and the level playing field. The approach in the field of State aid control is illustrative of the general tension between a strict approach, which may slow down growth and hamper proper recovery and too-flexible emergency management, which may harm competition in the internal market. Finding the middle ground between those two extremes is the hardest of tasks. The Commission has been presented as a "flexible and generous crisis regulator", granting considerable leeway to Member States,[282] and there is no doubt that its proactive approach and extensive use of the crisis toolbox has contributed to coordinating and framing Member State action in times of emergencies. This has enhanced transparency and legal certainty as well as predictability.

[279] State aid rules have rightly been presented as having a "negative integration logic" aiming at preventing Member States from distorting competition by helping their own undertakings, Stavros Makis, *Temporary Crisis and Transition Framework: Dealing With Crisis and Transitioning to a Net-Zero Economy – But at What Cost?*, supra footnote 25.

[280] Opinion on the 2022 Commission Report on Competition Policy: Report on Competition Policy 2022 | EESC.

[281] For example, the following conclusions of the European Council refer to temporary State aid frameworks: conclusions of 25 March 2022, para. 16(a), of 23 March 2023, para. 17, of 18 April 2024.

[282] Kluwer competition law blog, supra footnote 54.

The "counterfactual" namely a scenario without those facilitations, may have led to more arbitrary and more fragmented national responses. As such, the State aid response has constituted an important complement to the Union's crisis response.

In light of the various continued threats and challenges facing the Union, it is likely that State aid policy will continue to evolve and enter a new era that risks bringing it further away from its original purpose as set out in the Treaties, namely to preserve competition in the internal market, and closer towards a tool of policy response.[283]

2. Emergency Competences of the Union: Selected Provisions

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

2.1 Article 122 TFEU

At the core of the Union's emergency competences is Article 122 TFEU, which has been central to the Union's emergency response in recent years. Article 122 TFEU enables the Council to adopt measures "appropriate to the economic situation" (paragraph 1) and to provide Union financial assistance to a Member State in difficulty and under certain conditions (paragraph 2).[284] Article 122(1) TFEU in particular, with its wide coverage, has proven to be a powerful tool in addressing even very diverse emergency situations and will be the focus of this section. However, as will be shown, the triggering of this provision has by no means been automatic but has been subject to strict conditions aiming to ensure, *inter alia*, that its use is "without prejudice to any other procedures provided for in the Treaties," as required under that legal basis.

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

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

While this provision has blossomed[285] in recent years, by virtue of the nature and type of measures adopted on the basis thereof and their qualitative impact,[286] the predecessor Treaty legal bases have been used in numerous cases, largely outweighing – in terms of volume – the number of measures adopted in recent years.[287]

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

All of these questions are particularly relevant, given the potentially wide coverage of Article 122(1) TFEU and the broad margin of discretion it encapsulates.[288] This raises questions regarding its relationship with other Treaty legal bases, in particular where such other legal bases are available in parallel to the adoption of a measure based on Article 122(1) TFEU. Moreover, respecting constitutional boundaries is equally important, given that the procedure provided for in Article 122(1) TFEU reserves the decision for the Council alone, acting on a proposal from the Commission. The questions as to whether the emerging emergency acquis has affected the system of ordinary competences and has reshaped the role of their institutions affecting the institutional balance will be addressed in Part II of the report devoted to the transformative effect of emergency measures on the EU legal order.

The analysis in this chapter is also relevant for assessing recent calls for an EU emergency constitution.[289] Depending on where one sets the cursor, Article 122 TFEU could be the centrepiece of an emerging emergency constitution,

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

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

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

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

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

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

At the time of writing, a number of acts adopted under Article 122(1) TFEU have been challenged before the Courts[290] and it remains to be seen whether the Court will size this opportunity to further shape the boundaries of the exercise of powers pursuant to this provision.[291]

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

2.1.1 From Rome to Lisbon: The history of Article 122

Article 122 traces its roots back to the Rome Treaty and has been subject to adaptations in the context of successive Treaty revisions. A detailed overview of how this provision has developed is provided in the study on "the use of Article 122 TFEU", drawn up at the request of the European Parliament's AFCO Committee and in a recent contribution by colleagues from the Commission Legal Service.[292]

A number of elements as regards the evolution of the provision are worth highlighting. For example, the provision initially included language on conjunctural policies, which is now enshrined in Article 121 TFEU.[293] That part was split off from the provision in the context of the Maastricht Treaty to become a separate provision, leaving only two paragraphs dealing respectively with "measures appropriate to the economic situation" and "Community financial assistance," as is still the case today. The current Article 122(2) TFEU was introduced with the Treaty of Maastricht.[294]

The Amsterdam Treaty did not bring modifications to that provision. However, with the Treaty of Nice, an important change was made, in that the

[290] Supra Chapter I, Section 3, Energy.

[291] A number of cases have been brought by non-privileged applicants, for which the question of legal standing is yet to be decided upon. See, for a reference, Chapter I, Section 3 and in particular footnote 193.

[292] Supra footnote 84, p. 15. See also: the detailed analysis in D. Calleja, T. M. Rusche and T. Shipley, "EU Emergency – Call 122? On the Possibility and Limits of Using Article 122 TFEU to Respond to Situations of Crisis," *Columbia Journal of European Law*, 2024 (29:3), p. 520.

[293] The current Article 121 reads: "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120." With the Maastricht Treaty that provision went from being a provision about economic trends (conjunctural policy) to becoming a more general provision on economic policy.

[294] As many have pointed out, this was likely to counter-balance the no bail-out clause, now to be found in Article 125 TFEU, which prevents Member States that have adopted the euro from benefiting from support mechanisms now included in Articles 143–144 TFEU.

decision-making in the Council changed from unanimity to qualified majority voting. Up to that point, qualified majority had only applied in respect of financial assistance under paragraph 2, where severe difficulties were caused by natural disasters. Of particular interest is the fact that the passage to qualified majority voting was not accompanied by any other change in the provision. There is consequently nothing to suggest that the lighter procedure would come with more restrictive conditions for having recourse to that provision.

Finally, the Lisbon Treaty brought a few additions. It added notably the reference to solidarity and the exemplification of measures, specifying that supply difficulties may cover "notably" the area of energy. The latter must be seen in the light of the frequent use of that provision in the context of threats to the security of energy supply.[295] The condition linked to solidarity was also included in the new legal basis for energy, introduced with the Lisbon Treaty, which can be found in Article 194 TFEU. The "without prejudice" clause was also modified, and now refers in general to "any other procedures provided for in the Treaties" in plural, thus covering both TEU and TFEU.

Article 122 TFEU in its current version reads:

> 1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.
> 2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

This report will focus on the use of Article 122(1) TFEU in recent times, given that recent measures have taken on a more important and structural role with a somewhat wider scope and impact than has previously been the case.[296] The more recent measures adopted on the basis of Article 122 TFEU are already described in chapter I to which reference is made. Those examples clearly illustrate the breadth of use of Article 122(1) TFEU and its pivotal role in framing and coordinating action through Union measures.[297] Table 1 presents a complete

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

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

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

overview of measures adopted on the basis of that provision following the Lisbon Treaty.[298]

Table 1

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

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

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

As already emphasised, Article 122(1) TFEU empowers the Council to adopt the "measures appropriate to the economic situation," without specifying which situations qualify for recourse to that provision. Article 122(1) TFEU is therefore not particularly restrictive when it comes to the scope or the type of measures that may fall within its remit, and the Council has considerable leeway in that respect.[299] Article 122(1) TFEU is, however, more restrictive when it comes to the conditions under which such a variety of measures may be adopted.

In the following sections, we will look at the specific conditions[300] for recourse to Article 122(1) TFEU and identify certain aspects of recent measures to illustrate the boundaries and possible tensions which may arise in the applica-

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

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

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

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

Article 122(1) TFEU is an emergency competence and constitutes a specific legal basis for Union action in specific situations. It is not a provision for use in "ordinary times," and therefore requires the presence of a situation of exceptionality or urgency. While this arguably does not follow as explicitly from the wording of that provision as is the case for some other emergency legal bases, there is a significant number of elements that allow us to draw that conclusion. First, a number of textual elements in the wording of the provision point in this direction. The reference to "severe difficulties in the supply of certain products," sets a certain threshold of urgency or exceptionality. While the list is not exhaustive, as denoted by the words "in particular,"[301] the reference to "severe difficulties" supports a clear emergency rationale. The same can be said for the reference to "measures appropriate to the economic situation". It is also reasonable to argue that not every situation of exceptionality or emergency would justify recourse to Article 122(1) TFEU, but only one that is sufficiently serious, as the reference to "severe difficulties" both in paragraph 1 and 2 of Article 122 TFEU seems to suggest. Although paragraphs 1 and 2 are separate provisions, Article 122 TFEU as a whole clearly denotes a context of crisis.

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

Second, it can be argued that the two paragraphs of Article 122 TFEU need to be read jointly, and that the "emergency rationale" which is explicit in the second paragraph (reference to "severe difficulties caused by natural disasters or exceptional occurrences") also applies to the first. This is the position so far taken by the Council Legal Service, and supported by the Commission, which invokes arguments of systemic nature. Article 122 is part of Title VIII of the TFEU on economic monetary policy. That title (and the specific chapter on economic policy to which Article 122 TFEU belongs) is opened by provisions (Article 119, 120 and 121 TFEU), which make it clear that Member States remain responsible for their economic policies and for their respective debts (Article 125 TFEU) and that the competence of the Union on the matter is one of mere coordination. In that context, the conferral on the Union of the competence to adopt "measures appropriate to the economic situation" provided for in Article 122(1) TFEU, as well as to provide financial assistance to a Member State according to Article 122(2) TFEU, remains exceptional, and this is ensured by the exceptional nature of the emergency circumstances that can trigger the

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

exercise of those competences. Finally, the same conclusion can be reached having regard to the specific institutional setting of Article 122(2) TFEU, which excludes all involvement of the European Parliament from the decision-making. This again would suggest interpreting the provision so as to restrict its application to situations of emergency where the need for swift action would justify a simplified procedure based on the central role of the Council.

Some scholars have, however, argued that Article 122(1) TFEU is not (solely) an emergency legal basis. Chamon in particular is not convinced by the arguments supporting the idea that the "emergency rationale" would also apply to the first paragraph of Article 122 TFEU. He considers, instead, that both the historical origin of the provision (and the notion of "conjunctural policy" which would be broader than a mere situation of crisis) and its wording would rather point to the idea that Article 122(1) is a broader economic policy competence. According to such an interpretation, the application of Article 122(1) TFEU would instead be delimited by virtue of the specific context of exceptionality (meant as a broader category than emergency), in which the measure is adopted, and that in turn would require a separate justification to be provided, to enable scrutiny of whether the measure was adopted "without prejudice to any other procedures provided in the Treaties."[302] This interpretation has some significant consequences as to the type of measures that can be adopted, as the measures will no longer need to be appropriate to an emergency situation but could address exceptional situations of a broader type – thus including long-term investment or broader "transformative" economic policies (see below on this, in relation to the objectives of NGEU/RRF financing). Thus, the measures adopted under the legal basis would not necessarily need to be limited in time or to be restricted to what is necessary to respond to an emergency. While interesting, this interpretation entails a significant broadening of the scope of the provision. If interpreted as a genuine economic policy competence, the limit resulting from the additional justification as to whether the measure was adopted "without prejudice to any other procedure" would not be operative, as there is no alternative legal basis in the Treaties for the adoption of economic policy measures by the Union. Also, such an expansive interpretation is difficult to reconcile with the exceptional character that the norm has in the system of the Treaties, for the reasons stated above.

In any event, irrespective of where exactly to put the cursor, it seems to be generally accepted that the conditions for recourse to Article 122(1) TFEU, in particular the "without prejudice" condition, can only be satisfied in exceptional situations. Such situations will often involve a certain element of urgency and "out of the ordinary" as a justification for not having to resort to "ordinary legal bases." The judgment in Balkan Imports goes in the same direction. In that case, the Court emphasised that no other legal basis would have allowed

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

the Union to act with such urgency.[303] This also shows that the discussion is particularly important when there are other legal bases available that could have allowed for the adoption of similar measures "in ordinary times." However, also outside of those cases, it is precisely the existence of a number of strict conditions for having recourse to Article 122(1) TFEU that prevents it from ever becoming the "super-competence" that some scholars criticise it for.[304] Those conditions mean that Article 122(1) TFEU will *de facto* remain a provision reserved for exceptional circumstances such as emergencies.[305]
The debate on the exact situations qualifying under Article 122(1) TFEU, and whether there needs to be urgency or not, also seems to become relatively marginal when considering the types of contexts in which the provision has been invoked in recent times. There can be little doubt that recent measures based on Article 122(1) TFEU were adopted in the context of a genuine emergency. Those emergencies were Union-scale fully fledged crises calling for an immediate response. Three measures were adopted in the context of the COVID-19 pandemic[306] which had deep and profound repercussions for businesses and society at large and seriously affected the Union economy as a whole. Two of those measures, EURI[307] and SURE,[308] set out to mobilise Union financing to address needs arising because of the crisis. Another measure established a framework for securing a supply of crisis-relevant medical countermeasures in the context of a public health emergency.[309] Another five emergency Regulations[310] were adopted on the basis of Article 122(1) TFEU to address the unprecedented energy crisis that unfolded after the Russian invasion of Ukraine.

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

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

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

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

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

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

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

[310] Supra Chapter I, Section 3.

Those five measures formed a comprehensive package, dealing with various aspects of the energy crisis and reflecting the way it evolved. They aimed in particular to tackle security-of-supply risks, including through the reduction of gas and electricity consumption, high energy prices and their impact on energy consumers, bottlenecks in the roll-out of renewable energy and various shortcomings in the electricity and gas markets.[311] Both the COVID-19 pandemic and the energy crisis meet all the criteria to qualify as an emergency, by being urgent, concrete and of a particular scale and gravity.

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

The measures must be limited in time

The measures adopted on the basis of Article 122(1) TFEU must be limited in time to what is necessary to deal with the emergency and must cease to apply once the situation giving rise to the adoption of the measure ceases to exist. This reading, which does not follow explicitly from the provision, has been confirmed by case-law related to Article 103 EEC.[312] Such a condition is also a key criterion under many national emergency regimes, as illustrated by the national reports. If emergency measures were to be stretched beyond what is necessary to address the exceptional situation, this would hamper the normal functioning of the Union system of checks and balances and would risk making emergency a permanent condition, thus circumventing ordinary Treaty legal bases. The time-limited nature of measures adopted on the basis of Article 122(1) TFEU is therefore also in line with the condition that such powers shall be exercised "without prejudice to any other procedures provided for in the Treaties." Article 122(1) TFEU is therefore not a legal basis for regulating matters on an unlimited basis.

All the emergency measures adopted post-Lisbon were limited in time, either by virtue of a clear end date for their application or through specific triggering conditions linked to the requirements of Article 122(1) TFEU. Some measures, notably among those adopted to address the energy crisis, were prolonged one or more times following an assessment of whether prolonging them would be commensurate with the economic situation as it had evolved.[313] An interesting example is the gas demand reduction Regulation, which was prolonged once for an additional year.[314] Upon expiry, it was deemed relevant to keep demand reduction as an objective. However, there were certain misgivings as to whether recourse to Article 122(1) TFEU for the specific objectives sought, including a trigger for a mandatory demand reduction, would remain justi-

[311] A detailed account of those measures is provided in Chapter I, Section 3.

[312] Balkan Import, supra footnote 101, paras. 13–17 (concerning Article 103 EEC).

[313] All the emergency measures adopted during the energy crisis were extended at least once, with the exception of Council Regulation 2022/1854 on an emergency intervention to address high energy prices.

[314] Council Regulation (EU) 2023/706, supra Chapter I, Section 3.

fied. The Council, upon a proposal from the Commission, therefore adopted a recommendation on coordinated gas demand reduction instead.[315] This decision was based on a careful assessment of the fact that the emergency measure had been successful and had overachieved the gas reduction target, but that severe difficulties persisted in the supply of energy, which required keeping the gas demand down to a safe level. It thus appeared that coordinated action at the Union level was still necessary, even if a mandatory target was no longer proportionate.[316]

In some instances, instruments adopted on the basis of Article 122(1) TFEU did not include a specific period of validity. The European Financial Stabilisation Mechanism (EFSM)[317] the Council Regulation on emergency support in humanitarian disasters[318] and the Medical Countermeasures Regulation[319] all establish frameworks without a limit of duration. They identify *ex ante* a toolbox of emergency measures that can be adopted in case of emergency, and define the conditions that allows for the activation of the toolbox, notably by classifying the specific circumstances of the relevant emergency. One may ask whether such a set-up is in line with the requirement of temporary duration referred to above. One factor that favours such an approach is the fact that the framework remains dormant and does not trigger any measure unless it is activated by the Council. Moreover, the activation of the frameworks must be limited in time.[320] In addition, the conditions for triggering the respective frameworks are clearly defined and linked to emergency situations typically covering and reflecting conditions for recourse to Article 122(1) TFEU. Under such circumstances, the technique deployed does appear to ensure respect for the condition of time-limitation, in that the actual measures only apply in justified cases of emergency and are only activated for as long as necessary.

The fact that the framework – unlike the individual measures – is permanent

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

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

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

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

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

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

does not allow for any other conclusion. In fact, one could argue that the power to adopt temporary measures under Article 122(1) TFEU also entails the power to organise the exercise of such a power, notably by adopting rules setting out the conditions for activation and the content of such temporary measures. Such an approach is based on predictability and effectiveness and ensures that when the emergency conditions are met, fast action can be taken by Council without having to design the instrument all over again. This approach is confirmed by the fact that when the Council activates the relevant framework, it is not acting on the basis of implementing powers, but on the basis of Article 122 TFEU itself.[321] Thus, activation is not subject to the limits that apply to implementing acts and which in particular can be combined with an amendment of the relevant framework, so as to adapt it to the circumstances of the case.[322]

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

The measures must be appropriate to the situation

The measures must also be "appropriate" to the economic situation, that is, commensurate with its scale and gravity. This condition reflects the general principle of proportionality, according to which a measure must be appropriate and necessary to achieve its objectives and not impose an excessive burden when balancing the interests at stake. The general principle of proportionality is an important tool for ensuring the appropriate balance between the common interest pursued and the rights of individuals, including their fundamental rights.[323]

A related issue is the degree of leeway granted to the legislator, who is called upon to act in a situation of urgency and unpredictability, and the intensity of the Court review of respect for that principle. As the proportionality of a measure requires a substantial case-by-case assessment, this report will not enter into detail as regards the proportionate nature of recent emergency measures, but a general overview of the intensity of judicial control exercised by the Court in

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

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

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

the event of emergency measures will be given in Section 3 of this chapter.
The temporary nature of measures analysed in the previous paragraph can be considered a specific application of the principle of proportionality to a situation of emergency: proportionality requires the response to be limited to the time of the emergency and to cease to have effect once the situation is back to normal. Yet again, this issue is not limited to being one of duration, but relates to the necessity and appropriateness of the measures as such.
Thus, the scope of the measure at stake needs to be limited to what is appropriate and necessary to respond to an emergency situation. This raises the question of whether measures of a preventive nature can still be validly adopted on the basis of Article 122(1) TFEU. The issue was discussed during the debate leading to the adoption of the Council Regulation on a framework for the supply of crisis-relevant medical countermeasures,[324] as certain Member States expressed interest in also including in the framework a number of measures that would anticipate and reduce the risk of a supply crisis. ` actions would have been adopted outside the context of an ongoing health emergency, in order to avoid a hypothetical future supply crisis. Such a preventive use of emergency powers fails, however, to satisfy the conditions for their exercise in the first place as, rather than responding to exceptional situations, it would in fact make it possible to regulate the matter on a permanent basis in light of a future hypothetical threat. On the basis of an opinion of the Council Legal Service in this sense, the Council did not ultimately include any preparedness measures as part of the framework.[325]
A different conclusion was, however, reached in relation to the possibility of mobilising NGEU funding via the *EURI* to finance preparedness measures in relation to the COVID-19 crisis. In that situation, the key factor was that the pandemic was still in progress and it was not possible to predict its future evolution (such as new strains of the virus and new waves of infection). Thus, if not addressed, persisting problems of supply for certain crisis-relevant products could further undermine the economic situation in the event that the pandemic resurged. On this basis, the Council Legal Service gave a positive opinion on the possibility of including targeted measures for preparedness in the context of the ongoing emergency as appropriate to the situation.[326] The solution was finally adopted by the Council.
Another area of possible tension is linked to the so-called transformative nature of emergency measures. An emergency measure based on Article 122 TFEU may in fact contain features that have effects beyond the time-span of the immediate emergency and which – in spite of the measure being time-

[324] Council Regulation (EU) 2022/2372, referred above in Chapter I, Section 2.

[325] Opinion of the Council Legal Service of 29 November 2021 on the Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, ST 14328/21.

[326] Opinion of the Legal Service of 24 June 2020 on the Proposals on Next Generation EU, ST 9062/20, in particular para. 132.

limited – has certain "transformative" effects, leading to a return to a new and different normal.

Some academics have criticised emergency measures adopted on the basis of Article 122(1) TFEU for going further than addressing the specific emergency, due to their long-term impact and ability to change the political landscape beyond what is needed to address the immediate emergency.[327] Some have referred to this "competence creep," seeing this as encroaching upon ordinary legal bases and the procedures set out therein. Admittedly, this criticism is not solely about the temporary nature of the measures, but also goes to the heart of whether the responses are proportionate and limited to dealing with the specific situation of emergency. Such criticism has in particular been levelled at Next Generation EU (NGEU). It has been argued that NGEU transforms the entire system of finances, that the debt repayment, to be completed by 2058, goes well beyond the short-term nature intended for such measures and that the some of the purposes for which financing may be used were not limited to dealing with the immediate economic consequences of COVID-19, but also pursued recovery-related objectives. Lastly, the repurposing of funds mobilised in the context of a pandemic, to deal with energy-related issues, through REPowerEU, has also been questioned.

Another example of emergency measures having effects that go beyond the immediate crisis is the permitting facilitations introduced in the context of the energy crisis.[328] Whereas the Regulation introduced a short-term, time-limited acceleration of permit-granting procedures for renewable energy installations (Article 1), such facilitations applied to energy installations, many of which have a life span of several years (for onshore wind, typically between 20 and 30 years).

Some of the criticism that has been levelled seems to build on the assumption that emergency measures may only aim to bring the situation back to normal. However, that is arguably an excessively narrow interpretation of the emergency powers available. If one were to accept that emergency measures may not lead to a "new normal," then one would severely jeopardise the effectiveness and usefulness of emergency responses. For example, in a situation of gas supply shortages driven by over-dependency on one supplier, it seems obvious that an emergency response cannot consist solely of securing enough supply of gas from another supplier, thereby shifting dependencies. Some of the emergency measures therefore focused on facilitating the replacement of fossil fuels by greener alternatives, in order to accelerate the green transition, which is the most effective way of breaking free of fossil-fuel dependency. This, for example, is the driving force behind the permitting emergency Regulation.[329] As regards NGEU, the fact that the debt is scheduled to be paid back gradually

[327] See: the authors referred to in footnote 102 above.
[328] Regulation 2022/2577, Chapter I, Section 3.
[329] Ibidem.

over many years is the very element that makes the measure effective and fit for purpose. If one had insisted on an immediate increase in contributions from Member States to the Union budget, instead of resorting to long-term borrowing to finance immediate expenditure, then that would have required Member States to find additional funds in their national coffers. This would in turn have weighed down already strained national economies and led to a further economic downturn, thus compromising the very objective of the emergency intervention. These examples show that an excessively narrow approach to the scope and effects of emergency measures may jeopardise the adequacy and adaptability of the emergency response.

That is not to say that measures can be adopted on the basis of Article 122(1) TFEU without any link to the crisis; what it means is that some latitude needs to be accorded to the legislator in designing the most effective and adequate response, even where the effects of certain measures may reach beyond the duration of the measure itself or may have certain transformative effects. In particular, the fact that an emergency measure is adopted to address a crisis situation does not mean that it cannot *additionally* pursue other objectives which also happen to further the Union policies in ordinary times. In fact, the opening provisions of title VIII of the TFEU on economic and monetary policy, and in particular of its chapter one on economic policy to which Article 122 belongs, make it clear that coordination of the economic policies of the Member States shall "support the general economic policies of the Union" (Article 119(2)TFEU) and contribute "to the achievement of the objectives of the Union" (Article 120 TFEU). Thus, while crisis measures can surely derogate from ordinary legislation as appropriate for addressing the situation, they do not operate in a vacuum or a silo, as they are ultimately meant to pave the way to a return to ordinary policies, possibly adjusted on the basis of the lessons learnt during the crisis, on the basis of a policy cycle that will be analysed in greater detail in Part II of this report. A final and somewhat linked issue relates to the extent to which the Union's response needs to have immediate effects in the light of the urgent situation it aims to address. For example, according to Council Regulation 2022/1854, the solidarity contribution levied on companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors was applicable for the fiscal years 2022 and/or 2023, with the choice left to Member States. As revenues can only be calculated after the close of the financial year, this means that – in particular for the year 2023 – the amounts would not be readily available to finance the relevant measures to mitigate the impact of the energy crisis. Does that mean that the measure is not suitable for addressing the emergency? Similarly, the acceleration of permit-granting according to Regulation 2022/2577 may not kick in with the desired urgency, given the lead time for selecting and implementing the renewable energy projects. Does that mean that the permitting regulation is an unsuitable response? And what of the funds from NGEU, which would

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

The measures must address an economic situation

The reference to the economic situation, as well as the fact that the provision appears in a Chapter on economic policy, means that measures adopted on the basis of Article 122(1) TFEU need to address an economic situation. Such situations, as previously mentioned, would need to be of a certain gravity and scale. This does not necessarily mean that the measures need to be economic in nature. However, it does mean that the measures need to address a situation that impacts the economy of the Union and its Member States. This condition may also be seen in conjunction with Article 121(1) TFEU, according to which "Member States shall regard their economic policies as a matter of common concern […]."[330]

The COVID-19 pandemic and the energy crisis both had a serious impact on the economy of the Union as a whole, as also shown in the relevant economic forecasts drawn up by the Commission.[331] The COVID-19 pandemic – as described in Chapter I – deeply affected the economy, in particular through successive lock-downs and other restrictions, which led not only to significant losses in major sectors of the economy, but also risked delaying important and urgent reforms. It was a multifaceted crisis affecting all Member States, albeit not affecting all Member States alike. Equally, as described

[330] As mentioned at the beginning of this Chapter, a version of that provision referring to conjunctural measures used to form part of the predecessor provisions to Article 122(1) TFEU, until it was carved out and integrated into what is now Article 121(1) TFEU, a provision that now also has a broader scope.

[331] The forecasts are accessible here: Economic forecasts – European Commission (europa.eu)

in Chapter I, the Russian military aggression against Ukraine, triggered an unprecedented energy crisis that threatened to set the Union economy back to COVID times, from which it was just starting to recover. The energy crisis had a severe impact on the economy, from households to energy-intensive industries, as energy prices surged.[332] Just like the COVID-19 pandemic, the impact was felt in all Member States but not always in the same way, due to very different starting points, in particular in terms of their energy mix. It is therefore clear that those emergencies had an impact on the economic situation, as required under Article 122(1) TFEU. However, the intensity and gravity of those situations also demonstrate that – conversely – not all emergencies are likely to have such an impact as to justify recourse to Article 122 TFEU, as this is a legal basis contained in the Treaty Chapter on economic policy. This factor is probably one of the more relevant limitations on the use of Article 122 TFEU as the Treaty's "Swiss army knife" for emergency situations.

The question of whether the proposed emergency measure addresses an economic situation within the meaning of Article 122(1)TFEU is relevant in relation to the Council Regulation establishing an emergency framework for ensuring the supply of medical countermeasures in the event of a public health emergency.[333] One could argue that the Regulation in fact addresses a health situation, as the supply of medical countermeasures is aimed at responding to a (future) health emergency. However, if we apply the standard test of the aim and content of the measure, it is clear that the objective pursued is to strengthen the supply of medical countermeasures and related raw materials. It does so by allowing for a series of measures that are economic in nature, as they establish procedures and tools to coordinate and regulate the supply of certain products. This is furthermore underlined by the requirements that the emergency framework may only be activated where that is appropriate to the economic situation.

The measures must be adopted in a spirit of solidarity

The reference to solidarity was added to Article 122(1) TFEU during the latest Treaty revision, together with a specific reference to measures "in the area of energy." In the field of energy, the notion of energy solidarity is enshrined in Article 194(1) TFEU, a legal basis that was also introduced with the Treaty of Lisbon. The notion of energy solidarity has been given shape by the Court of Justice in the *OPAL* case, where it held that the notion of energy solidarity entails rights and obligations for the European Union and its Member States.[334]

[332] Reference is made to the detailed outline in Chapter I, Section 3.

[333] Council Regulation 2022/2372, see above: Chapter I, Section 2.

[334] Judgment of 15 July 2021, *Federal Republic of Germany v European Commission*, C-848/19 P, EU:C:2021:598, paras. 49–53. The notion of energy solidarity is a separate topic under the 2025 FIDE conference and will not be further explored in this report.

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

Article 122(1) TFEU requires measures to be adopted "in a spirit of solidarity between Member States." In the Anagnostakis case, the Court held this to mean that the spirit of solidarity between Member States must "in accordance with the wording of Article 122(1) TFEU, inform the adoption of measures appropriate to the economic situation within the meaning of that provision". According to the Court, this indicates that the measures "must be founded on assistance between Member States."[335]

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

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

Some of the energy emergency measures also have a financial rationale. The demand aggregation and joint purchasing mechanism therefore aims to allow for gas to be purchased at more advantageous conditions and prices, while ensuring a fair distribution of the gas purchased. [336] It also aims to help Member States comply with their gas storage-filling obligations[337] without having

[335] Judgment of 30 September 2015, Anagnostakis v Commission, T-450/12, EU:T:2015:739, para. 42. This finding has been confirmed by the Court of Justice in appeal, judgment of 12 September 2017, C-589/15 P, para. 71.

[336] Regulation 2022/2576, supra Chapter I, Section 3, recital 10.

[337] Introduced by Regulation 2022/2577, supra Chapter I, Section 3.

to outbid each other, which would risk further driving up gas prices.[338] The emergency intervention Regulation[339] aims to mitigate the impact of the high energy prices by ensuring that Member States with fewer resources can also generate revenues that they can use to protect their consumers.[340]

However, Article 122(1) TFEU cannot be read as requiring the solidarity to be financial in nature. There are many other ways in which solidarity may find its expression in an emergency situation when adopting measures appropriate to the economic situation. In the context of the energy crisis, for example, many of the measures are founded *inter alia* on a need to coordinate measures with a view to avoiding fragmentation. A variety of national measures will inevitably lead to fragmentation, which may harm the internal market in energy, due to its considerable interconnectedness. This internal market solidarity rationale can be found, for example, in respect of the gas demand reduction Regulation,[341] and the emergency intervention for high energy prices Regulation.[342]

A linked consideration is solidarity expressed as an imperative need to act jointly. For example, some of the measures would not be efficient or even possible, unless introduced by all Member States. A good example of this is the market correction mechanism Regulation[343], which involves a dynamic bidding limit for gas. It is quite obvious that such a price limit would not work if only applied by some Member States, and one of the major concerns in the Council was also that such a bidding limit would divert gas away from the Union and exacerbate the security of supply risks at a time where the Union and many of its Member States were still highly dependent on gas.

The joint procurement of vaccines is another prime example of solidarity. By adopting a derogation from the Financial Regulation to empower the Commission to procure vaccines on behalf of Member States,[344] a harmful race between Member States was avoided, and a fair distribution between Member

[338] Regulation 2022/2576, supra Chapter I, Section 3, recital 11.

[339] Regulation 2022/1854, supra Chapter I, Section 3.

[340] Ibidem, recital 11, as well as recital 12, which provides that "If only some Member States with sufficient resources can protect customers and suppliers, this would lead to severe distortions in the internal market. A uniform obligation to pass on the surplus revenues to consumers would allow all Member States to protect their consumers." In the same vein, recital 14.

[341] Council Regulation 2022/1369, supra Chapter I, Section 3, see recital 14, which also refers to the principle of energy solidarity.

[342] Council Regulation 2022/1854, supra Chapter I, Section 3, see recital 6, which refers to the risk arising from uncoordinated national measures and recital 9, which adds that "Safeguarding the integrity of the internal electricity market is therefore crucial to preserve and enhance the necessary solidarity between Member States."

[343] Regulation 2022/2578, Chapter I, Section 3.

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

States was ensured, as well as prices negotiated centrally. It is worth noting that, upon the launch of the EU's COVID-19 vaccine procurement, Germany, France, Italy and the Netherlands had already been working together as the Inclusive Vaccine Alliance (IVA) since May 2020 to secure vaccine supplies for their citizens and an agreement had been announced between AstraZeneca and the IVA for up to 400 million doses. This agreement was subsequently taken over by the Commission and Member State negotiators and was negotiated with AstraZeneca on behalf of all 27 Member States.[345]

One question that has arisen is whether the reference to solidarity "between Member States" also allows for measures where the solidarity is ensured through obligations imposed on individuals. For example, the revenue cap and the solidarity contribution introduced by the emergency measures adopted during the energy crisis are both based on contributions from certain electricity generators and Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors respectively. Do such redistribution mechanisms between operators in specific sectors and those suffering from the energy crisis constitute "solidarity between Member States"? We would reply to that question in the affirmative. First, it is clear that the sectors that are due to pay the contribution do not act out of solidarity; instead, they act because they are obliged to do so by virtue of a measure established pursuant to Union law. The solidarity therefore stems from the decision of the Council to introduce such an obligation in all Member States. Second, the introduction of such obligations aims to ensure that resources to mitigate the effects of high energy prices are available to all Member States and not just to those with the deepest pockets. Third, uncoordinated national measures would lead to distortions in the internal market; on the contrary, the positive effect of uniform obligations to set a revenue limit and to pass on surplus revenues to consumers would have a positive impact on the interconnected Union energy market, thus benefitting other Member States. It is therefore perfectly justifiable to consider that solidarity between Member States can also be viewed as indirect solidarity between their citizens.[346][347]

Finally, the requirement of solidarity "between Member States" raises the question of whether measures can be adopted on the basis of Article 122 TFEU to provide support to third countries. The issue was discussed in relation to the original Commission proposal for the *EURI Regulation,* which contemplated using part of the NGEU funds to provide crisis support to partner countries "in order to restore and enhance their trade and economic relations with

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

[346] See, in this sense, recitals 9 to 12 of Council Regulation 2022/1854.

[347] See to that effect also: D. Schiek, "Solidarity in the case-law of the European Court of Justice – opportunities missed?," In H. Krunke, H. Petersen, & I. Manners (Eds.), *Transnational solidarity: Concept, challenges and opportunities,* Cambridge University Press, 2020.

the Union and strengthen their resilience."[348] In its opinion on the legality of NGEU, the Council Legal Service flagged up, however, that Article 122(1) TFEU is the manifestation of the particular spirit of solidarity that exists between Member States and which justifies taking exceptional action when some of them experience situations of severe economic difficulties. The position of third countries is fundamentally different in that regard. Thus, while the difficulties that a Member State experiences due to the interdependence it might have with the economies of third countries are relevant for triggering Article 122 TFEU, they cannot justify the provision of direct assistance to third countries for measures aimed at supporting their resilience.[349] Third countries can only be supported to the extent that such support has direct consequences on the economic situation of Member States and is appropriate to address the emergency situation. This could happen for instance, in the case of a particular situation of interdependence with the third country in question, which however would need to be duly justified. This advice was taken on board by the Council, which finally excluded support to third countries from the measures financed by *EURI*.

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

One of the more difficult and controversial conditions is that which requires the Council to exercise its powers under Article 122(1) TFEU "without prejudice to any other procedures provided for in the Treaties". Some argue that this wording means that Article 122(1) TFEU is subordinate or residual to other Treaty provisions where such are available, and that priority must be given to the Treaty legal basis that involves the highest degree of involvement of the European Parliament.[350] Such an interpretation does not appear to be well-founded.

Whereas the "without prejudice" requirement is crucial in avoiding circumvention and institutional overreach, it cannot reasonably be argued that the Council can only act when there is no other legal basis for the action. Such an interpretation would not be in line with case-law related to the choice of legal

[348] Proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic, COM/2020/441 final, Article 2(1) and Recital 7.

[349] Opinion of the Legal Service of 24 June 2020 on the Proposals on Next Generation EU, ST 9062/20, in particular, paras. 133 and 134.

[350] See: references in the study on Article 122 TFEU carried out for the AFCO Committee, supra footnote 84, in particular the sources cited in footnote 23 on page 11, referring to a "democracy-maximizing rationale." The study itself concludes that: "While it results in decision-making procedures with lower transparency and lower parliamentary involvement, in themselves, reduced transparency and parliamentary involvement are not pertinent when assessing the Council's recourse to the legal bases in Article 122 TFEU. After all, it is not the procedures that define the legal basis of a measure but instead, the legal basis of a measure determines the procedure to be followed. In turn, the legal basis should only be assessed in light of the standard "choice of legal basis" test established by the Court of Justice," p. 1.

basis and would ignore that the Treaties use different wording when they aim at that effect (see, for instance, the wording used in Article 114 FEU, which will be further analysed in Chapter III). Moreover, it would lead to Article 122(1) TFEU losing a lot of its useful effect as a *sui generis* provision aimed at enabling an urgent response to emergency situations. This requirement is intrinsically linked to the constitutional limits of the Council's powers, both vertically (to delineate Union and national competences) and horizontally (as regards the other institutions and, in particular the European Parliament), and will be discussed in Chapter III.

2.2 Article 78(3) TFEU

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

2.2.1 The history of Article 78(3)

The emergency competence that is now enshrined in Article 78(3) was firstly introduced by the Maastricht Treaty with a much narrower scope, focussing essentially on visa controls. When cooperation was established in the fields of justice and home affairs, visa policy was at the forefront of integration and was already incorporated in the Treaty establishing the European Community in the Chapter on Approximation of Laws, and thus subject to the Community method. Article 100c(1) conferred on the Council acting in unanimity the competence to draw up the list of third countries subject to visa requirements. In this context, Article 100c(2) provided that in the event of an emergency situation in a third country posing the threat of a sudden inflow of migrants, the Council could, acting by a qualified majority, introduce a visa requirement for nationals of the country in question for a period not exceeding six months. This emergency provision was complemented by an escape clause securing the "responsibility incumbent upon the Member States with regard to the maintenance of the law and order and the safeguarding of internal security" (Article 100c(5)).
It is also interesting to note that the arrangements for visa policy represented the model for the further "communitarisation" of justice and home affairs, as

Article K.9 of the Treaty on the European Union introduced a bridging measure, according to which Council could decide at unanimity to apply Article 100c (thus including the emergency provision) to certain additional areas in the domain (see also Article 100c(6)).

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

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

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

> 3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

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

The emergency competence has been used sparingly to date. Its only application consists of adopting the two relocation decisions adopted in 2015 by the Council to tackle the migration crisis and achieved modest results, for the reasons already analysed in Chapter I above. On another occasion, recourse to the provision was requested by Member States or proposed

by the Commission (notably in the context of the 2021 crisis linked to the "instrumentalisation" of migrants by Belarus), but did not result in measures being adopted.

2.2.2 The conditions for recourse to Article 78(3)

The conditions for having recourse to the emergency competence in Article 78(3) TFEU require the existence of an "emergency situation characterised by a sudden inflow" of third-country nationals. The provision therefore establishes a certain threshold of urgency and severity as to the problems created in Member States' asylum system by the sudden inflow of migrants.[351]

The cases brought by Hungary and Slovakia against the second 2015 relocation decision have allowed the Court of Justice to clarify the threshold in question. First, in relation to the notion of "sudden inflow," the Slovak Republic argued that the inflow of migrants into Italy and Greece was foreseeable and had in fact been steadily increasing for several years, and was thus surely not sudden. The Court noted, however, that, on the basis of statistical data provided by various EU agencies and bodies, the contested decision had identified a sharp increase of the inflow of migrants in Italy and Greece over a short period of time in the summer of 2015.[352] In light of those numbers, the Council did not commit any manifest error of assessment in concluding that the inflow was "sudden" even though the increase represented the continuation of a period in which extremely high numbers of migrants had already arrived.

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

On the basis of a literal interpretation, the Court stressed that the provision requires that a "sufficiently close link" is established between the emergency situation and the sudden inflow of third-country nationals.[353] Referring once again to the statistical data provided in the recitals of the decision, it found that, in the circumstances, it was clear that such a link existed between the exceptional inflow of migrants in the summer of 2015 and the significant pressure on the asylum systems of Italy and Greece. The fact that other factors, such as the existence of structural defects in the asylum system of those

[351] As acknowledged by the Commission in its proposal for the first Council relocation decision. See: the explanatory memorandum of the Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM/2015/0286 final.

[352] Judgment of the Court of Justice of 6 September 2017 in joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, paras. 116–123.

[353] Ibidem, para. 125.

countries, may have also contributed to the emergency situation, did not alter the causal relationship.

The measures adopted on the basis of Article 78(3) must respond to a crisis situation that is pre-existing or ongoing at the moment of their adoption, and thus cannot have a mere preventive dimension. However, according to the Court, a mechanism that allows for adapting the emergency measure according to the evolution of the situation is still compatible with the existence of a "sufficiently close link." As Advocate General Bot put it, "responding to the emergency does not exclude the developing and adapted nature of the response, provided that it retains its provisional nature."[354]

The Court further acknowledged that, when assessing the conditions for triggering the emergency powers, the Council must be given broad discretion, as the area in questions entails complex assessment and choices of a particular nature. In such a context, the judicial review of the Court is limited to assessing whether the Council made a manifest error of assessment in evaluating whether the situation classified as an emergency in Article 78(3) exists.[355]

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

Broad typology of measures, including derogation from ordinary legislation

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

For the moment, it is useful to emphasise that the Court found the competence in Article 78(3) to be non-legislative and intended to respond swiftly to a particular emergency situation; it would not serve its intended purpose if it were interpreted too narrowly. Thus, the notion of "provisional measures must be sufficiently broad in scope to enable EU institutions to adopt all provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow" of migrants.[356]

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

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[354] Opinion of Advocate General Bot of 26 July 20172017 in joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union,* EU:C:2017:618, para. 130.

[355] Judgment in cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, quoted above, paras. 123 and 124.

[356] Ibidem, para. 77.

Provisional character of the measures

Article 78(3) empowers the Council to adopt measures of a provisional nature. According to the Court, a measure may be classified as 'provisional' in the usual sense of that word only if it is not intended to regulate an area on a permanent basis and only if it applies for a limited period. In that regard, the current version of the provision, unlike its predecessor Article 64(2) TEC, no longer provides for an explicit time limit. Accordingly, Article 78(3) TFEU, while requiring that the measures referred to therein be temporary, affords the Council discretion to determine their period of application on an individual basis, in light of the circumstances of the case and, in particular, of the specific features of the emergency situation justifying those measures.[357]

The provisional character of the measure needs to be assessed in light of its period of application (the duration of its legal effects) as determined in the relevant act, and not in light of the further effects that it may have in practice. In the relocation cases, the Slovak Republic and Hungary had argued that the relocation measures would have produced effects in the long run, since the asylum seekers would have likely remained in the Member State of relocation well beyond the 24-month period of application of the contested decision. The Court considered, however, that if such an argument were to be followed, no relocation mechanism could in fact be put in place on the basis of Article 78(3), and thus its *effet utile* would be greatly affected.[358]

The Council enjoys broad discretion in defining the period of application of the measures adopted and the control of the Court is limited to assessing the existence of a manifest error of assessment.[359] In exercising such discretion, the Council has to take into account the circumstances of the case, and in particular ensure the effectiveness of the measures adopted, notably when they require substantial preparatory work or the setting-up of complex procedures, the coordination of a number of national authorities and the mobilisation of important resources. On the basis of such reasoning, the Court concluded that a period of application of 2 years for the relocation Decision was justified.[360]

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

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

According to the Court of Justice, this requirement is of particular importance to avoid the emergency powers circumventing the ordinary legislative proce-

[357] Ibidem, para. 90ff.
[358] Ibidem, para. 99.
[359] Ibidem, para. 96.
[360] Ibidem, para. 97.

dure and the competence of the legislator to regulate the area of asylum and migration generally and for an indefinite period.[361]

The requirement applies both to the temporal scope of the measures (thus corresponding to the requirement of provisional character) and to their material scope. The Council needs in particular to be satisfied that the measures chosen are appropriate to address the crisis situation and do not go beyond what is necessary to do so. Such an assessment essentially entails political choices and complex considerations, and must furthermore be made within a short time, in order to provide a swift response to the emergency situation: as a consequence, the Court recognises that also with regard to the choice of measures, the Council enjoys a broad margin of discretion and that the judicial review needs to be limited exclusively to the existence of a manifest error of assessment.[362]

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

The assessment of whether a measure is appropriate must be carried out with regard to the situation in place and the information available at the moment of the decision. Thus, when Slovakia and Hungary argued that the relocation system was not appropriate because it had not proven efficient nor had it led to meaningful results in the relocation of migrants, the Court rejected the argument. The legality of an EU act cannot depend on retrospective assessments of its efficacy: "where the EU legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question."[363]

Measures adopted on the basis of Article 78(3) also need to be proportionate, in the sense that the Council should choose those measures that make it possible to achieve the pursued objective in the least intrusive way for the concurring interests at stake. Thus, in the relocation case, Slovakia and Hungary argued that the mandatory mechanism adopted by the Council was not proportionate, since the objective to alleviate the migratory pressure on two Member States

[361] Ibidem, paras. 73 and 74.
[362] Ibidem, paras. 208 and 209.
[363] Ibidem, para. 221.

could have been achieved by measures less intrusive for the sovereignty of the Member States, such as financial measures or voluntary relocations. The Court rejected that argument, however, having assessed the possible alternatives, by applying the legal threshold of the manifest error of assessment.

An important element considered by the Court when assessing the proportionality of the measure was the temporal and material limitations associated with it. The mandatory relocation mechanism was limited to a two-year period and only concerned a limited number of migrants. Moreover, the binding effect of the decision was also qualified, as the concerned Member States could refuse the relocation of specific applicants where there were reasonable grounds for doing so, related to public order or national security.[364] Finally, various adjustment mechanisms in the relocation decision allowed Member States facing exceptional circumstances to ask for the suspension of their relocation quotas.[365] As a consequence, the relocation decision was designed to take into account, in a proportionate manner, the particular situation of each Member State.

Finally, it is also interesting to note that the Court stressed how the Council has an obligation to give effect to the principle of solidarity when adopting emergency measures. This has an impact on the test of proportionality, since when assessing alternative measures that are equally effective in achieving the objective, the choice of solidarity-based solution – in this case mandatory relocation – cannot be considered to be a manifest error of assessment.[366]

The measures need to give effect to the principle of solidarity

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

The principle of solidarity was a clear feature of the 2015 relocation decisions, and was substantiated by the obligation of all Member States to accept the relocation of asylum seekers: "When one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy." This fair distribution of the relocated applicants among all the Member States is a fundamental element of the relocation decision. Thus, the Court concludes that "faced with Hungary's refusal to benefit from the relocation mechanism

[364] Ibidem, paras. 244 and 245.
[365] Ibidem, para. 295 to 298.
[366] Ibidem, paras. 252 and 253.

as the Commission had proposed, the Council cannot be criticised, from the point of view of the principle of proportionality, for having concluded on the basis of the principle of solidarity and fair sharing of responsibility laid down in Article 80 TFEU that Hungary had to be allocated relocation quotas in the same way as all the other Member States that were not beneficiaries of the relocation mechanism."[367]

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

An example is provided by the case of the 2021 Commission proposal for emergency measures in the context of the Belarus instrumentalisation crisis (see above Chapter I).[368] The proposed measures essentially consisted of a number of targeted derogations from the Asylum Procedure Directive and of the Material Reception Condition Directive, which aimed to ease the processing of asylum requests and the reception of migrants by lowering the applicable legislative standard. While the proposed derogations were limited in time and only applied to certain Member States and certain borders, they did not entail as such any obligations or material burden for Member States not affected by the emergency situation. A component of solidarity was however still present – albeit secondary – in the form of operational support to be provided by a number of EU agencies (Frontex, Easo and Europol) to the concerned Member States, paid for by the Union budget.

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

3. The principles of an emerging EU Emergency Constitution

Through recent emergency measures, the Union has proved more than ever to be a dynamic entity. Recourse to general principles has often enabled the Court to follow an evolutive interpretation and to be responsive to changes

[367] Ibidem, para. 293.

[368] Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final.

in the economic and political order.[369] General principles of EU law have been described as having a triple function: they have a gap-filling function, they serve as an aid to interpretation and they may be relied upon as grounds for judicial review.[370] Pointing to the gap-filling function of general principles, Tridimas explains that *lacunae* are more likely to arise in Union law, considering that the Treaty "is rampant with provisions overpowering in their generality and uses vague terms and expressions which are not defined."[371]

Far from being exhaustive on the values and general principles of Union law that may be relevant to emergency measures, among which respect for fundamental rights and the rule of law feature prominently, this section touches upon the main principles that frame the allocation of powers in the field of EU emergency competences and the way in which this complex fabric of constitutional principles is intertwined.

3.1 Conferral and effectiveness

The principle of conferral of powers laid down in Article 5(1) TEU is a central principle of the EU legal order and of the EU emergency constitution. First and foremost, because it determines whether the Union has competence to act at all and, second, because it determines the scope of the matters for which the Court of Justice of the European Union has exclusive jurisdiction.[372] The principle of conferral therefore determines not only the possibility of the action as such but also sets limits that need to be respected when exercising any powers conferred.

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

[369] Tridimas, Takis, *The General Principles of EU Law*. Second edition. Oxford; New York: Oxford University Press, 2007, p. 18.

[370] Lenaerts, Koenraad, and Gutiérrez-Fons José A., "The Constitutional Allocation of Powers and General Principles of EU Law," *Common Market Law Review* 47 (2010), p. 1629.

[371] Tridimas, *The General Principles of EU Law*, pp. 17–18.

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

response. When it comes to State aid, as a supporting tool in times of crises, the Commission has exclusive competence, which gives it a relatively free hand but also great responsibility.

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

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

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

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

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

It suffices here to say that where no parallel competence exists in another "ordinary" Treaty legal basis, the main question is whether the Union has competence to act at all. It is well known that the Union does not have "*Kompetenz-Kompetenz,*" that is, the power to confer competences on itself.[373] Even with a very broad and open-ended conferral, this must mean that the Union cannot confer competences on itself on the basis of emergency legal bases. For instance, permanent frameworks that have been adopted on the basis of Article 122 TFEU with a view to possible activation by the Council cannot create a secondary legal basis. This means that the activation of specific measures under such permanent frameworks is subject to fulfilling the general conditions laid down in Article 122(1) TFEU.[374]

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

When a parallel competence does exist by virtue of an "ordinary legal basis", the question is whether a sort of hierarchy would exist between the emergency competence and the ordinary one, based in particular on the need to respect the prerogatives of the ordinary legislator and to avoid emergency powers circumventing the use of other legal bases laid down in the Treaties for use in "normal timHowever, as we will see in greater detail in Chapter III, the idea that a hierarchy exists between ordinary legal bases and emergency ones is supported by neither a teleological nor a contextual reading of the relevant provisions.[375] This can be inferred from the fact that the formulation used by the Treaties for subsidiary legal bases[376] differs from the wording that we find in the emergency legal basis, and notably in Article 122(1), which makes it clear that it applies "without prejudice to any other procedures provided for in the Treaties."

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

Whether an emergency legal basis is appropriate for a given measure therefore

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

[374] Those permanent frameworks are the Emergency Support Instrument (Regulation (EU) 2016/369), activated in relation to the COVID-19 pandemic (Regulation - 2020/521) and the medical counter-measures framework (Regulation (EU) 2022/2372). The EFSM was based on a similar logic.

[375] Our analysis will mainly focus on Article 122(1) and Article 78(3) TFEU.

[376] Such as Articles 21, 77(3) or 352 TFEU, for which it is necessary to establish that the Treaties have not provided the necessary powers, or Article 114 TFEU, for which it is necessary to establish that another, more specific, legal basis could not be used.

boils down to the standard legal basis test, according to which the choice of legal basis is determined by objective factors that are amenable to judicial review, such as the aim and content of the measure to be adopted. [377] Where the genuine objective of a measure is to respond to an emergency situation with measures appropriate to the economic situation, then the emergency provision is an appropriate legal basis, irrespective of whether another legal basis may be available for a similar type of measure in "normal times." In particular, Article 122(1) TFEU therefore establishes a concomitant competence, which the Council may resort to, provided the conditions for action established therein, as described in Chapter III, are fulfilled. That reading is fully supported by the Court's ruling in *Balkan Imports,* where the Court held that – despite the existence of a legal basis which could have allowed for the adoption of the measure – there "was no other legal basis allowing a response by such urgency."[378]

In light of the above, there is also no justification for holding that the legal basis with the highest degree of involvement of the European Parliament should be chosen with a view to enhancing the democratic legitimacy of the Union's action.[379] As the Court has consistently held, "it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure."[380]

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

This approach has been confirmed by the Court of Justice in relation to the use of the emergency powers provided by Article 78(3) TFEU in the area of migration. One of the arguments raised by Hungary and Slovakia in the cases concerning the legality of the 2015 second relocation decision was precisely that emergency powers could not result in a derogation from legislative provisions,

[377] See, for example, judgment of 11 June 1991, Commission v Council ("Titanium dioxide"), C-300/89, EU:C:1991:244, para. 10; judgment of 5 May 2015, Spain v Council, C-147/13, EU:C:2015:299, para. 68 and the case-law cited.

[378] Our emphasis.

[379] A thorough analysis and argumentation for why Article 122(1) TFEU cannot be read as being subordinate to other legal bases can be found in European Parliament, The use of Article 122 TFEU – Institutional implications and impact on democratic accountability, study requested by the AFCO Committee (2023), https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU(2023)753307_EN.pdf

[380] Case C-130/10, Parliament v Council, EU:C:2012:472, para. 80.

as this would have resulted in circumventing the competence of the ordinary legislator, and would in particular have undermined the role of the European Parliament. It was in other words the argument of a hierarchical relationship between legal bases based on the principle of democratic legitimacy.

The Court, however, took a different approach and relied on the principle of effectiveness of Union action when interpreting Article 78(3). According to the Court, an interpretation that would limit emergency measures only to those that supplement – but do not derogate from – legislative acts would significantly reduce the effectiveness of the provision at stake, given the extent to which the matter had been regulated in secondary law. Thus "the concept of 'provisional measures' within the meaning of Article 78(3) TFEU must be sufficiently broad in scope to enable the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of nationals of third countries."[381]

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

> both the material and temporal scope of such derogations must nonetheless be circumscribed, so that the latter are limited to responding swiftly and effectively, by means of a temporary arrangement, to a specific crisis.[382]

3.2 Solidarity, subsidiarity and responsibility

Solidarity is a constitutional principle enshrined in the preambles to the TEU and the TFEU and in Article 2 TEU as a value of EU law. Also pursuant to Article 3 TEU, the Union is to promote economic, social and territorial cohesion and solidarity among Member States. The Preamble of the Charter of Fundamental Rights of the European Union further mentions it as part of the "indivisible, universal values" on which the Union is founded. The Court has held solidarity to be "one of the fundamental principles of Union law"[383] that underpins the entire legal system of the European Union.[384]

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[381] Para. 75.

[382] Para. 78.

[383] Judgment of 15 July 2021, *Germany v European Commission*, C-848/19 P, EU:C:2021:598, para. 38.

[384] Idem, para. 41: "It follows that, as the General Court correctly noted in paragraph 69 of the judgment under appeal, the principle of solidarity underpins the entire legal system of the European Union (see, to that effect, judgments of 7 February 1973, Commission v Italy, 39/72, EU:C:1973:13, paragraph 25, and of 7 February 1979, Commission v United Kingdom, 128/78, EU:C:1979:32, paragraph 12) and it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In that regard, the Court has held, inter alia, that that principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU in-

In emergency situations, the risk of fragmentation and unilateral action is increased, hence making the need for unity and solidarity between the Member States particularly great. More than that, it is in emergencies that both the *raison d'être* and the objective of the European project are tested. As Advocate General Bot put it in his opinion in the relocation case, "how would it be possible to deepen the solidarity between the peoples of Europe and to envisage ever-closer union between those peoples, as advocated in the Preamble to the EU Treaty, without solidarity between the Member States when one of them is faced with an emergency situation?" [385]

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

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

Thus, in the *Anagnostakis* case, the Court held that the spirit of solidarity between the Member States must "in accordance with the wording of Article 122(1) TFEU, inform the adoption of measures appropriate to the economic situation within the meaning of that provision". According to the Court, this indicates that the measures "must be founded on assistance between Member States."[386]

This also implies that solidarity needs to inform the design of the 122(1) emergency measures. This concern is very much present in the practice of the institutions. For instance, during the negotiations for the NGEU financing

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stitutions mutual duties to cooperate in good faith with the Member States (judgment of 8 October 2020, Union des industries de la protection des plantes, C-514/19, EU:C:2020:803, paragraph 49 and the case-law cited)."

[385] Opinion of Advocate General Bot, 26 July 2017, *Slovak Republic, Hungary v Council*, Cases C-643/15 and C-647/15, EU:C:2017:618, see: paras. 16 to 24.

[386] Judgment of 30 September 2015, Anagnostakis v Commission, T-450/12, EU:T:2015:739, para. 42. This finding has been confirmed by the Court of Justice in appeal, judgment of 12 September 2017, C-589/15 P, para. 71.

scheme, it was discussed whether the criteria proposed by the Commission to allocate the financial contributions to Member States under the principal spending instrument, the *RRF*, were compatible with the solidarity rationale of Article 122 TFEU. While the institutions enjoy a wide margin of appreciation in determining the relevant criteria, it was nonetheless necessary that the allocation did not merely respond to a logic of *juste retour* but that it reflected to a certain degree the needs of the Member States in a spirit of solidarity.[387]
The Court has further confirmed that the requirement of solidarity needs to be taken into account when assessing the proportionality of emergency measures. Thus, in its judgment on the legality of the Relocation decisions, the Court rejected the argument that, since the same results could have allegedly been achieved by a voluntary commitment, which would have been less prejudicial to Member States' sovereignty, a binding relocation mechanism was disproportionate. The Court in particular recalled that "the Council, when adopting the contested decision, was in fact required, […] to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."[388] As a consequence,

> there is no ground for complaining that the Council made a manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take – on the basis of Article 78(3) TFEU, read in the light of Article 80 TFEU and the principle of solidarity between the Member States laid down therein – provisional measures imposing a binding relocation mechanism.[389]

In similar terms, the Court rejected the assertion that the choice to include Hungary in the mandatory relocation scheme, regardless of the significant migratory pressure on its borders, was disproportionate. Faced with Hungary's refusal to benefit from the relocation mechanism as the Commission had proposed, the Council could not be criticised, in terms of the principle of proportionality, for having concluded on the basis of the principle of solidarity that Hungary had to be allocated relocation quotas in the same way as all the other Member States.[390]
In addition to its role in the choice/design of the emergency measures, the principle of solidarity is also relevant when deciding whether the emergency response should be taken at the EU level at all, or rather left to the Member States. There is in fact a correlation between solidarity and subsidiarity, as solidarity would require the action to be taken at the supranational level – where

[387] The question was examined by the Council Legal Service in its Opinion on the NGEU package, Opinion of the CLS of 24 June 2020, Council doc ST 9062/20, points 143 and 147.
[388] Judgment of the Court of Justice of 6 September 2017 in joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, point 252.
[389] Ibidem, point 253.
[390] Ibidem, point 293.

solidarity is most effectively expressed. When there are common goods at the EU level at stake, as the functioning of the internal market, of the single currency, or of the area of freedom, security and justice, measures adopted unilaterally by Member States will hardly be satisfactory, due to the risk of fragmentation that they would inevitably entail. The preservation of those common goods cannot be achieved by coordination of unilateral measures alone. In order to address the emergency while preserving those European common goods, action at the EU level that is informed by the principle of solidarity is necessary.[391]

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

> Solidarity is the lifeblood of the European project. Through their participation in that project and their citizenship of European Union, Member States and their nationals have obligations as well as benefits, duties as well as rights. Sharing in the European 'demos' is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also requires one to shoulder collective responsibilities and (yes) burdens to further the common good.[392]

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

3.3 Subsidiarity and Proportionality – Identification of the Union objective

The subsidiarity and proportionality principles seem crucial when the Union exercises exceptional competences in times of emergency, as they are a guarantee that use of the emergency competence remains limited to what is necessary and, in this way, contribute to ensuring that the institutional balance is respected. Under the principle of subsidiarity, the Union is to act only if and insofar as *the objectives of the proposed action* cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the

[391] In this sense, see: Chamon, "The Non-Emergency Economic Policy Competence in Article 122(1) TFEU," quoted above footnote 83.

[392] Opinion of Advocate General Sharpston in case C-715/17, *Commission v Poland,* EU:C:2019:917, point 253.

proposed action, be better achieved at Union level. As commentators have observed, the said objectives must be *Union* objectives, otherwise the Union action could not be justified in the first place.[393] Similarly, the proportionality of Union action is defined by reference to what is necessary to achieve the *objectives of the Treaties* (Article 5(4) TEU). The first step in the subsidiarity and proportionality test is therefore to identify the Union objective pursued by emergency measures.

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

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

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

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

[393] Catherine Barnard and Steve Peers, eds. *European Union Law*. Third ed. Oxford: Oxford University Press, 2020, p. 118.

seriousness of the interference with those rights and freedoms (proportionality *stricto sensu)*.[394]

The assessment of each of these conditions by the Court concerning crisis measures reveals specific features. In a comparison of various cases concerning measures adopted in times of crisis, that is, in the *Pringle* case[395] (Eurozone crisis, 2009), the *Jafari* case[396] (migration crisis, 2015), the *Wightman and Others* case[397] (Brexit, 2016) and the *Nordic Info* case[398] (COVID-19 pandemic, 2020), Constantinou already demonstrated common features in the Court's assessment. On the one hand, the Court exercises judicial restraint and defers to political choices in times of crisis and on the other hand, the balancing of interests performed by the Court is highly contextual, which plays a key role in upholding the contested measures.[399]

Among these judgments, the preliminary ruling issued by the Court in Grand Chamber in the *Nordic Info* case[400] deserves special attention, as the Court offered what has been described as a manual of Union law applied to a sanitary crisis.[401] Nordic Info, a travel agency operating in Sweden, sought compensation from the Belgian State following the adoption of a Ministerial Decree on 10 July 2020 prohibiting non-essential travel to and from countries classified as red zones. On 12 July, Sweden was classified as red zone and Nordic Info accordingly cancelled its trips to Sweden. Three days later, Sweden was, however, reclassified as an orange zone. The case indirectly questions the excessive reliance on the colour-coding system recommended at EU level. While the ruling is rich in lessons also concerning the publicity and procedural guarantees that should accompany restrictions on fundamental freedoms, this section focuses on the proportionality assessment made by the Court.

It is worth noting at the outset that the existence of an emergency or the exercise of emergency powers by national authorities do not appear to be relevant to the Court's reasoning. Commentators have questioned whether it would not have been preferable to acknowledge that COVID-19 constituted an exceptional situation, or even to activate the safeguard clause laid down in Article 347 TFEU, rather than to interpret ordinary exceptions to

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

395 Judgment of the Court (Full Court), 27 November 2012, *Thomas Pringle v Government of Ireland and Others*, Case C-370/12, EU:C:2012:756.

396 Judgment of the Court (Grand Chamber), 26 July 2017, *Jafari*, Case C-646/16, EU:C:2017:586.

397 Judgment of the Court (Full Court) of 10 December 2018, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, Case C-621/18, EU:C:2018:999.

398 C-128/22, op. cit.

399 Constantinou, E. "A Tale of Four Crises: The European Court of Justice's Response to Crises." European journal of risk regulation (2025): 1–16.

400 Judgment of 5 December 2023, NORDIC INFO, Case C-128/22, EU:C:2023:951.

401 Warin, C., "Arrêt 'Nordic Info': petit manuel de droit de l'Union appliqué à une crise sanitaire (CJUE, 5 December 2023, C-128/22)," *J.D.E.*, 2024/4, pp. 176–179.

free movement so broadly.[402] Despite the emergency nature of the measures, the Court does not depart from its standard of review applicable to ordinary measures and subjects the measures at stake to a detailed three-stage proportionality test.

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

First under the suitability condition, the objective of the measure may relate to a situation that is anticipated but has not yet occurred, that is, the existence or extent of risks to human health. Under the precautionary principle, says the Court, a Member State must be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. This includes any measure capable of reducing a health risk.[403] In other words, the precautionary principle may justify preventive measures.

Further, the Court clarifies the burden of proof on public authorities when imposing restrictive measures: "[…] Member States must be able to adduce appropriate evidence to show that they have indeed carried out an analysis of the appropriateness, necessity and proportionality of the measures at issue and to present any other evidence substantiating their arguments."[404] The burden of proof should thus be evidence-based. The Court specifies that this does not, however, go as far as requiring positive proof that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions. More specifically, the appropriateness of the measures for attaining the pursued objective will have to be ascertained in light of the scientific data commonly accepted at the time of the facts, taking into consideration the degree of uncertainty and the context that prevailed at the time, be it epidemiological (spread of the virus), organisational (health system) or legal (similar measures taken by other Member States and coordinated by the EU).[405]

Second, with respect to the necessity condition, the Court approves of the fact that the restrictions targeted non-essential travel and travel to Member States regarded as high-risk zones, and were temporary.[406] As to the existence of measures that were less restrictive but equally effective, the Court acknowledges *the measure of discretion* enjoyed by the Member States in the field of the protection of public health "on account of the precautionary principle". The Court exercises judicial restraint by considering that judicial review must confine itself to ascertaining whether it is evident that, in light of the

[402] Carlier J.-Y. and E. Frasca "Libre circulation des personnes dans l'Union européenne," *Journal de Droit Européen*, 2024, p. 191.

[403] Ibidem, para. 79 and the case-law cited therein.

[404] Ibidem, para. 80 and the case-law cited therein.

[405] Ibidem, paras. 82 and 83.

[406] Ibidem, paras. 88 and 89.

available information and context at the time of the facts, other measures would have sufficed to achieve the same result as the restrictive measures at stake.[407] In a context marked by epistemic uncertainty, it will undoubtfully be difficult to bring such evidence before a court and rebut the necessity of a measure.

Third, should emergency measures entail interference with fundamental rights and principles, the proportionality test in the strict sense includes balancing the importance of the objective pursued and the seriousness of the interference of the fundamental rights affected by the measures.[408] According to the Court, an objective of general interest, such as the objective of protecting public health, "may not be pursued by a national measure without having regard to the fact that it must be reconciled with the fundamental rights and principles affected by that measure as enshrined in the Treaties and the Charter, by properly balancing that objective of general interest against the rights and principles at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued."[409] Such balancing is done (i) by measuring *the seriousness of the interference* which such a limitation entails and (ii) by verifying that *the importance of the objective of general interest pursued* by that limitation is proportionate to that seriousness.[410]

In just a few paragraphs, the Court strongly suggests that the contested measures satisfy this test, subject to verification by the national court.[411] As regards legal persons such as Nordic Info, for example, whose freedom to conduct a business was restricted, the Court concludes that "in view of the serious public health context resulting from the COVID-19 pandemic, it did not seem unreasonable to prohibit on a temporary basis non-essential travel to such Member States until their public health situation improved in such a way as to prevent exits from the national territory and, as the case may be, the return of sick persons to that territory and, consequently, the uncontrolled spread of that pandemic between the various Member States and within that territory."[412] The Court does so without engaging in the scientific evidence or in the complexity of the question as to whether travel restrictions contributed

[407] Ibidem, paras. 90–91.

[408] Ibidem, para. 92.

[409] The referring court will have to ascertain whether the restrictive measures at stake were disproportionate in relation to the objective pursued, "having regard to the impact that those measures may have had on the free movement of Union citizens and their family members, on the right to respect for their private and family life guaranteed by Article 7 of the Charter and on the freedom to conduct a business, enshrined in Article 16 thereof, of legal persons."

[410] Ibidem, para. 93. See also to that effect, judgments of 22 November 2022, Luxembourg Business Registers, C-37/20 and C-601/20, EU:C:2022:912, para. 64 and the case-law cited, and of 26 April 2022, Poland v Parliament and Council, C-401/19, EU:C:2022:297, para. 66 and the case-law cited.

[411] C-128/22, paras. 94–97.

[412] C-128/22, para. 95.

to limiting the spread of the virus at a time where it had already widely circulated, showing the difficulty for the judiciary to rule on the complex and uncertain situations that characterise emergency measures.[413]

The Court's analysis has left commentators strongly divided. Dabrowska-Klosinska described this analysis as prioritising risk and uncertainty over clear references to medical and scientific knowledge and as being detrimental to a rights-based approach.[414] In her account, this risk and uncertainty approach made it possible to lower the burden of proof for national authorities, thus shifting the standard of lawfulness of human rights limitation. Delhomme, by contrast, considered that the judgment strikes a convincing balance between the various interests at stake, preserving the capacity for public authorities to act and react swiftly to a public health emergency.[415] Ondrejek and Horak further argued that proportionality analysis is the best standard of constitutional review for times of crisis, provided that each component in its standard structure is adjusted to the precautionary principle.[416]

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

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[413] See in this sense, Delhomme, op. cit., pp. 322–223.

[414] Dabrowska-Klosinska P., "The EU Court of Justice on Travel Bans and Border Controls: Deference, Securisation and a Precautionary Approach to Fundamental Rights Limitations," *European Law Review*, Vol. 50, Issue 1, 2025, pp. 107–124.

[415] Delhomme V. N. "The Legality of COVID-19 Travel Restrictions in an 'Area without Internal Frontiers': Court of Justice (Grand Chamber) 5 December 2023, Case C-128/22, Nordic Info," *European Constitutional Law Review* 20(2) 2024, pp. 307–328.

[416] P. Ondrejek and F. Horak, "Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures," *European Constitutional Law Review*, 20: 27–51, 2024, pp. 29, 44.

PART II

THE TRANSFORMATIVE EFFECT OF EMERGENCY MEASURES ON THE EU LEGAL ORDER

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

> "J'ai toujours pensé que l'Europe se ferait dans les crises,
> et qu'elle serait la somme des solutions qu'on apporterait à ces crises"
>
> Jean Monnet[417]

Introduction

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

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

The analysis of the measures deployed by the European Union to address the series of recent crises has shown that emergency and ordinary competences have been concurrently used by the EU institutions to respond to crises: far from being limited to the adoption of measures under an emergency legal basis, the Union has made full use of the instruments that the Treaties put at its disposal. Emergency measures adopted to derogate from existing regulatory frameworks have been supplemented by measures adopted under ordinary legal bases to (re)shape existing Union policies so as to allow them to tackle the new needs posed by the crises. In other words, ordinary Union policies have been redesigned as crisis instruments. In the aftermath of the crises this phenomenon has further accelerated as the co-legislators have taken stock of the lessons learnt and incorporated a number of crisis response frameworks in sectorial legislation as part of the regulatory regime for those sectors.

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

[417] J. Monnet, *Mémoires*, Paris, Fayard, p. 448.

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

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

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

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

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

A good example is provided by the intensive use of cohesion policy legal bases during the COVID-19 pandemic. The adoption by ordinary legislative procedure of the *Coronavirus Response Investment Initiative* (*CRII*)[418] and the *Coronavirus Response Investment Initiative Plus* (*CRII plus*)[419] amended the

[418] Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No. 1301/2013, (EU) No 1303/2013 and (EU) No. 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak, OJ L 99, 31.3.2020.

[419] Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No. 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak, OJ L 130, 24.4.2020, pp. 1–6.

spending rules for cohesion funds to allow a rapid mobilisation of the existing cohesion funds to provide financial support for the immediate response to the pandemic. At the same time, the *European Solidarity Fund*, a relatively small cohesion instrument that has existed since 2002 to provide grants to Member States struck by natural disasters, was activated and modified so as to extend its scope to major public health emergencies and to double the total level of appropriations for the fund. Moreover, the Commission proposed an additional legislative amendment to the Common Provisions Regulation, the *Recovery Assistance for Cohesion and the Territories of Europe* (*REACT-EU*),[420] to supplement the cohesion funds legislation with a new thematic objective, enabling the additional resources made available thanks to the NGEU borrowing scheme to be used in support of crisis-response and crisis-repair measures. Finally, the most consequential measure to respond to the economic consequences of the COVID-19 pandemic was set up under a ordinary cohesion legal basis (Article 175 TFEU) as a fully fledged new instrument, the *Recovery and Resilience Facility* (RRF), aimed at supporting the recovery by financing national reform and investment plans (see Chapter I, Section 2.1.3 above for a brief description of the main features of the RRF).

Outside cohesion policy, other examples of the use of ordinary legal bases to adopt emergency measures are the *Regulation on an EU Digital COVID Certificate*[421] and the amendment to the Regulation on common rules for the allocation of slots at Community airports (*Airport slots rules amendment*).[422] Adopted on the basis of Article 21(2) TFEU (freedom of movement of persons), the *Regulation on an EU Digital COVID Certificate* was aimed at introducing mutually accepted certificates on COVID-19 vaccination, testing and recovery that citizens could use when travelling, so as to avoid problems linked to the acceptance of Member States' documents and thus facilitate the exercise of free movement. The *Airport slots rules amendment* was adopted on a transport legal basis (Article 100(2)) in order to temporarily suspend the airport slot requirements which oblige airlines to use at least 80% of their take-off and landing slots in order to keep them the following year.

[420] Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) No. 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU), OJ L 437, 28.12.2020, pp. 30–42.

[421] Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, OJ L 211, 15.6.2021, p. 1.

[422] Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EEC) No. 95/93 on common rules for the allocation of slots at Community airports, OJ L 99, 31.3.2020, pp. 1–4.

Ordinary legislation has also been used to respond to the challenges raised by the reduction of gas supplies and the soaring prices during the energy crisis provoked by the Russian aggression of Ukraine. Indeed, the first package of measures at the EU level proposed by the Commission as part of its REPowerEU Plan did not include any proposal based on emergency competences, but rather proposals for amending existing regulatory or spending frameworks, together with a number of soft law instruments. In particular, the Commission proposed under Article 175(3)TFEU a *REPowerEU amendment* of the *Recovery and Resilience Facility*[423] in order to allow the use of Next Generation EU funds to finance measures aimed at pursuing REPowerEU objectives and increase the resilience of the Union's energy system by reducing dependence on fossil fuels and diversifying energy supplies. The Commission further proposed to the co-legislators amendments to an existing regulatory framework via a *Regulation on Gas Storage424* based on Article 194(2) TFEU. The Regulation introduced gas storage obligations for the Member States so that sufficient gas reserves could be available for the winter. It also set out provisions for compulsory certification of gas storage operators aimed at ensuring that existing storage capacities are used effectively, and providing for a range of measures, including the expropriation of the storage system, that could be taken if operators refused to undergo certification.

From the point of view of the system of competence of the Union, the recourse to ordinary legal bases to adopt emergency measures *in the context of a crisis* raises the same issues that exist when those bases are used to set up permanent crisis frameworks *pro futuro*. We will analyse those issues in the next paragraph. It is however necessary to reflect here on the appropriateness and limits of the use of ordinary legal bases to address emergency situations from the point of view of the procedural framework for decision making.

Crisis situations require swift and decisive action. That is the argument traditionally invoked to support the idea of emergency competence in the first place. This is reflected in the simplified governance design for the emergency provisions of the Treaties, where the role of Commission and Council is central: acts are adopted by the Council by a qualified majority (sometimes reinforced, as in the case of Article 143 TFEU) on the basis of a Commission proposal (or recommendation, as in the case of Article 143 TFEU) and without involvement of the Parliament in the process (Article 78(3) TFEU exceptionally provides for Parliament to be consulted). In practice this design has allowed the Union to react particularly fast to situations of crisis and to adopt acts sometimes in a matter of days only, as, for instance, in the case of the EFSM Regulation,

[423] Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans, OJ L 63, 28.2.2023, pp. 1–27.

[424] Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No. 715/2009 with regard to gas storage, OJ L 173, 30.6.2022, p. 17.

adopted at the height of the sovereign debt crisis of 2010 in just two days (Article122(2) TFEU legal basis), the activation and amendment of the Emergency Support Instrument at the outset of the COVID-19 crisis which took 12 days only (Article 122(1) TFEU legal basis), the adoption of the first Regulation on coordinated demand-reduction measures for gas in 16 days (Article 122(1) TFEU legal basis) and the adoption of the second 2015 Relocation Decision under Article 78(3) TFEU in a mere 13 days (see Table 2).

Table 2

Measures adopted during the COVID-19 pandemic

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

On the contrary, it is commonly understood that the democratic safeguards associated with the ordinary legislative procedure translate in a number of procedural steps, deadlines and requirements[425] that inevitably expand the time for decision-making well beyond the temporal horizon of a pressing crisis. The average length of time taken for the adoption of a legislative file during the 9th Parliamentary term (July 2019-April 2024) – that is, the term during which the crises analysed in this report unfolded – seems to confirm this assumption: the average length for the adoption of a file at first reading was of 17 months, while it reached 39 months for files adopted at second reading.[426]

However, the average length of OLP files does not do justice to the capacity of the co-legislators to act very swiftly in situations of urgency. This was for instance the case of the *CRII* and *CRII plus* Regulations mentioned above, which at the outset of the COVID-19 pandemic were adopted respectively in only 17 and 21 days. Similarly, the activation of the *European Solidarity Fund*, together with its amendment in order to extend its scope to major public health emergencies, was concluded in just 17 days. The *Airport slots rules amendment* was also adopted in 17 days.

[425] Definition of Parliament's position; trilogue negotiations between Parliament, Council and Commission; system of readings for the adoption of the act under Article 294 TFEU, involvement of national parliaments via the procedural safeguards and deadlines under the protocols on subsidiarity and proportionality; involvement of consultative bodies as required by the relevant material legal basis; involvement of the public in the form of enhanced transparency of the decision making process.

[426] European Parliamentary Research Service, *European Parliament: Facts and Figures*, PE 766.234, November 2024, retrievable at EPRS_BRI(2024)766234_EN.pdf

Such a rapid adoption is particularly remarkable if one takes into account the significant restrictions on travel and on meetings in person that were in force at the time, and that severely affected the usual working methods of the institutions. In fact, a number of procedural arrangements were put in place in order to ensure swift action. Parliament convened extraordinary plenary sessions,[427] in which it made use of a temporary alternative voting procedure by email.[428] Moreover, Parliament triggered the use of the urgent procedure provided for in rule 163 of its Rules of Procedure with the effect that no reports on the proposals were allowed from the committees responsible, with the Commission's proposals passing directly to the plenary for a vote, although it remained possible to table amendments.[429] The Council adopted its position and thus the relevant acts at first reading by written procedure, which became the normal working method of the Institution during the pandemic.[430] Finally, it was necessary to derogate from the requirement for an eight-week period between the draft legislative act being made available to national Parliaments and the vote in Council referred to in Article 4 of Protocol I on the role of national parliaments, as reflected by the recitals of the various acts.

These procedural arrangements were further combined with remarkable self-restraint demonstrated by the co-legislators, who decided not to modify the proposals presented by the Commission. In fact, while a number of amendments were tabled both in Parliament and in the Council, they were finally dropped on the understanding that had one institution requested changes to the Commission proposal, the other would have done the same in light of its own priorities. This would have made inter-institutional negotiations

[427] On 26 March 2020 and again on 16 and 17 April 2020.

[428] According to a new procedure decided by the Parliament's Bureau.

[429] Rule of Procedure – 9th Parliamentary term – July 2019, OJ L 302, 22.11.2019, pp. 1–128. Rule 163 has been modified in the recent 2024 amendment of the Parliament's Rules of Procedure, adopted on the first day of the Parliament's 10th term. The new rule 170 tightens the conditions for having recourse to urgent procedure by restricting the possibility to have recourse to the procedure only to cases when the proposal is the result of unforeseen developments. Moreover, for requests to use the urgent procedure made by the Commission or the Council, the statement of reasons will have to contain a detailed justification of each proposal and, where appropriate, a precise indication of legally required deadlines for the adoption or entry into force of the proposed legally binding act.

[430] As it was impossible or extremely difficult for Council members to travel with a view to being physically present at Council meetings held at the Council's seat, and therefore to ensure the quorum required by Article 11(4) of the Council's Rules of Procedure, the Council decided to make it easier to have recourse to written procedure (which would normally require unanimity according to Article 12(1)) by allowing COREPER to decide to use written procedure in accordance with the voting rule applicable for the adoption of the Council act concerned. See: Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union, OJ L 88I, 24/03/2020, pp. 1–2 and subsequent 12 extensions. In 2022, the Council finally decided to amend its rules of procedure to make it a standard possibility for COREPER to decide to use written procedure with the voting rule applicable for the adoption of the act concerned in cases of urgency. See: Council Decision (EU) 2022/1242 of 18 July 2022 amending the Council's Rules of Procedure, OJ L 190, 19.7.2022, pp. 137–138.

indispensable and in turn would have certainly delayed the adoption of the measures.[431]

It is interesting to note that this was indeed the case of the Commission's other proposals for emergency instruments to be adopted under ordinary legal bases: they were amended during the legislative deliberations in the Parliament and the Council, leading to the usual inter-institutional negotiations (trilogues). Even if still much shorter than the duration of the average legislative file during the 9th Parliamentary term, *REACT-EU* took 209 days to adopt, the *Recovery and Resilience Facility* took a full 260 days and the *Regulation on a EU Digital COVID Certificate* took 89. It is also interesting to note that, unlike the instruments described above – which essentially consisted in crisis related amendments to existing legal frameworks – two out of the three instruments (*RRF* and *EU Digital COVID Certificate Regulation*) were completely new and all introduced new significantly innovative features. A similar pattern can be found in the case of emergency measures adopted under ordinary legal bases in the framework of the energy crisis. The *REPowerEU amendment* of the RRF took 285 days to adopt, while the *Regulation on Gas Storage*, for which Parliament triggered the use of the urgent procedure under rule 163, took 98 days.In light of this practice it is possible to draw some conclusions. First, the Institutions have been able to equip themselves with the procedural adjustments necessary to remain open for business and maintain a capacity for swift action under ordinary legal bases when this is required by the urgency of the matter. Procedural adjustments are not sufficient, however, as a rapid adoption of the act can only be ensured if the co-legislators exercise a high level of self-restraint and give up or greatly limit the possibility to make amendments to the Commission's proposal. This, in turn, will be easier to achieve when the proposed measures are targeted and aim to introduce specific amendments to an existing legal framework, rather than seeking to introduce ambitious new instruments whose architecture is innovative, possibly controversial, and has never been discussed by the legislators.

Second, the practice exposes a paradox in the use of ordinary legal bases in emergency situations. The possibility to act swiftly under the ordinary legislative procedure comes at the price for the co-legislators of not really being able to introduce substantive modifications to the text under discussion. The Parliament and Council are in practice only left with the choice to accept or reject the Commission proposal – or to open a legislative discussion that inevitably would undermine the timeliness and thus the effectiveness of the emergency measure. In such a scenario, the safeguards of democratic control normally associated with the ordinary legislative procedure are significantly lessened,

[431] In the case of the *Airport slots rules amendment* a single amendment was requested by the Council, in order to extend the suspension of the airport slot requirements so as to cover the full summer season, e.g., an extension of a few more months if compared to the proposal from the Commission. The amendment was informally agreed with Parliament, which incorporated it in its first reading position.

which leaves the procedure open to the objection traditionally levelled at to the use of emergency legal bases, that is, the lack of parliamentary control and the risk of dominance of the executive power.

Third, the situation strengthens the role of the Commission significantly. As the co-legislators are mutually deterred from modifying the proposal due to the shared aim of acting quickly, the Commission ends up being the real policy-maker rather than the usual honest broker between the co-legislators. The Commission's role is particularly enhanced if compared to the situations where the Council acts alone under the emergency competences provided for in the Treaties, as in this case the absence of Parliamentary involvement makes it significantly easier for the Council to exercise its scrutiny over the Commission's proposal effectively and introduce amendments to the proposed instrument in a swift manner[432].

Most importantly, through the exercise of its power of initiative the Commission remains the gatekeeper, ultimately deciding whether a certain measure is proposed on the basis of an emergency legal basis or rather on an ordinary one, in situations where both options exist. Once a proposal is set on an ordinary legal basis, one could argue that the attempt by the Council to change the legal basis and adopt it as an emergency measure would amount to a denaturation of the original proposal[433] and would thus be excluded even at unanimity, without the agreement of the Commission. In exercising its discretion, the Commission would have of course to satisfy the conditions that emergency legal bases require for their use, but could also take into account reasons of expediency. For instance almost all of the instruments adopted to support Ukraine in its war effort against Russia have been proposed on ordinary legal bases, despite the urgency of the situation. This is in particular the case of the *Act in Support of Ammunition Production (ASAP)*, which is based on Article 114 and 173 TFEU.[434] As it has been stressed by authoritative members of the Commission Legal Service,[435] the reasons for such a choice are linked to the important budgetary implications of the Act in question, and in particular the question of how to interpret Article 41(2) TEU, which prohibits the use of the Union budget for expenditure arising from operations having military or

[432] Of course Article 293 TFEU would still apply in these cases, with the effect that the Council will need to act unanimously if the Commission does not accept the envisaged amendment. Moreover, the need to act swiftly will also stymie the possibility of amendments in Council, notably to avoid a situation whereby the inclusion of changes requested by certain Member States would in turn prompt others to require additional modifications and thus open lengthy negotiations. Ultimately, the Commission's role will be strengthened as a result.

[433] Such a modification would entail a fundamental change in the content of its provisions, and most likely require a re-design to comply with the specific conditions which are associated with recourse to emergency competences.

[434] Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP), OJ L 185, 24/07/2023, pp. 7–25.

[435] D. Calleja, T. M. Rusche and T. Shipley, "EU Emergency – Call 122? On the Possibility and Limits of Using Article 122 TFEU to Respond to Situations of Crisis," *Columbia Journal of European Law*, 2024 (29:3), p. 557.

defence implications. By proposing the Act on the basis of ordinary legal bases the Commission ensured that the European Parliament could be involved in the debate and could support a legal construction qualifying the measure as one supporting the adaptation of national defence industry to the structural changes required by the war of aggression against Ukraine and based on a restrictive interpretation of Article 41(2) TEU. The Parliament made use of the arrangements to accelerate the legislative procedure, and the act was finally adopted in 78 days.

In conclusion, while recourse to ordinary legal bases in emergency times remains a viable option, notably in light of the procedural adjustments that the institutions had been able to put in place, it remains fully effective mainly in those cases where the co-legislators are required to adjust an existing regulatory regime via a quick fix. If the crisis requires an innovative or complex legal and policy response, an "emergency use" of the ordinary legislative procedure involves a real risk of not being able to deliver with the urgency required.

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

Beside the use of ordinary legal bases to design emergency measures *during* a crisis, ordinary legal bases are also used to incorporate in sectorial legislation permanent crisis response and preparedness frameworks aimed at tackling future crises. Sometimes the two dimensions can coexist: for instance, during the COVID-19 pandemic the co-legislators activated and at the same time modified the *European Solidarity Fund*, which is a permanent instrument adopted on the basis of Article 175 TFEU.[436]

However, the phenomenon takes on its full significance when the legislator acts in ordinary times, for example, outside the heat of a crisis. A significant illustration is represented by the number of legislative initiatives presented by the Commission in the aftermath of the recent sequence of crises, from the various dimensions of the COVID-19 pandemic to Russia's invasion of Ukraine.[437] These initiatives were prompted by the call of the European Council for lessons to be drawn from the pandemic and for remaining fragmentation, barriers and weaknesses in the Single Market in facing emergency situations to be addressed, as well as by the call for European strategic autonomy to be

[436] See: above. Similarly, the Council at the same time activated and modified the Emergency Support Instrument, which, however, was adopted under Article 122(1) and thus falls outside the scope of the present chapter.

[437] For a detailed list of the initiatives brought forward by the Commission, see: Commission Staff Working Document of 19 September 2022, Impact Assessment Report accompanying the proposal for a Single Market Emergency Instrument and related proposals, SWD/2022/289 final, Part I and Part II.

achieved,[438] in particular by mitigating economic dependence on foreign supply chains in certain key sectors. This has led to a multiplication of initiatives proposing the establishment of crisis response frameworks in sectorial legislative instruments, with negotiations still ongoing in some cases. The proposed frameworks are built on and further developed many of the innovations introduced as *ad hoc* emergency measures during the recent crises. In certain cases, the emergency measures adopted in a given domain were wholly or partially "repatriated" in ordinary legislative instruments in the same domain, to make them available in future crises. In other cases, the solutions adopted as emergency measures in relation to specific domains have been mainstreamed and exported to other sectors which may face similar challenges (e.g., supply crisis). The crisis response frameworks are generally designed around the same model: the activation of an "emergency mode" in the relevant domain allows for the adoption of pre-defined emergency measures at the European level, including market intervention measures often associated with financial penalties in the event of non-compliance by operators. In addition, the activation of the emergency mode can entail enhanced obligations for Member States, particularly if they adopt unilateral emergency measures. Unlike measures adopted under emergency competence (which are essentially reactive in nature) such crisis *response* frameworks are often supplemented by a crisis *preparedness* framework aimed at anticipating and identifying possible crises, in line with the much broader scope of the ordinary legal bases upon which they are based.
It is useful to mention here the most significant of these new legislative developments by area of Union policy and to sketch out their main features. It will then be possible to address the legal issues raised by the use of ordinary legal bases to regulate emergency situations.

1.2.1 Health and medical products

The *Regulation on Serious Cross-border Threats to Health*[439] was adopted on 23 November 2022 on the basis of Article 168(5) TFEU (public health). The new Regulation overhauls the permanent framework on communicable diseases, first established in 1998 with the creation of the *Early Warning and Response System*, and already revised in 2013.[440] Although the Union is precluded from adopting harmonising measures in the area, the Regulation now provides a full-fledged crisis preparedness and management framework. The prepar-

[438] Conclusions of the European Council of 1–2 October 2020, paras. 3 and 4, EUCO 13/20. See also, more recently, Conclusions of the European Council of 18 April 2024, para. 16, EUCO 12/24.

[439] Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No. 1082/2013/EU, OJ L 314, 6.12.2022, pp. 26–63.

[440] Decision No. 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No. 2119/98/EC, OJ L 293, 5.11.2013, pp. 1–15.

edness phase has been significantly enhanced with the creation of a Union prevention, preparedness and response plan, to be drawn up by the Commission, and the coordination of national plans at Union level (see Chapter II). The Commission's recognition of a *public health emergency at Union level* remains the cornerstone of the EU's response in a public health emergency. That recognition in turn triggers the possibility to activate measures under other Union instruments, such as mechanisms to monitor shortages of medical countermeasures pursuant to the Regulation on a reinforced role for EMA. [441] Further, an Advisory Committee on public health emergencies composed of independent experts is established to support decision-making during the crisis.

The *Regulation on a reinforced role for EMA*, adopted on the basis of Articles 114 and 168(4)(c) TFEU (quality and safety of medicinal products and internal market), creates a gradual response framework.[442] If the Commission recognises a *major event* in relation to medicinal products in more than one Member State, the Agency moves into the first response phase.*50* The newly established Medicine Shortages Steering Group (MSSG) is to draw up lists of critical medicinal products, the supply and demand of which will be monitored.51 This triggers information and reporting obligations on Member States and marketing authorisation holders concerned by the listed medical products.52 The MSSG has a central role as it may on its own motion issue recommendations to the Member States and the Commission, but also to marketing authorisation holders and other entities.53 The second response phase kicks in with the recognition by the Commission of a *public health emergency*. In that event, an Emergency Task Force (ETF) is convened in order to provide scientific advice on medicinal products that have the potential to address the emergency, notably with a view to accelerating clinical trials.54

Interestingly, in the context of the reform of the Union's pharmaceutical legislation currently under discussion,[443] the Commission proposed, through the introduction of a new chapter dedicated to the availability and security of supply of medicinal products, mechanisms to monitor and manage shortages of medicinal products even outside crisis situations. The mechanisms are inspired by the measures introduced in 2022 (information obligations, shortage prevention plans, identification of critical medicinal products and critical shortages, recommendations by the MSSG). One of the highly debated provisions in

[441] Articles 23 to 25 of Regulation (EU) 2022/2371 and Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices OJ L 20, 31.1.2022, pp. 1–37.

[442] Regulation (EU) 2022/123, op. cit.

[443] Proposal for a Regulation of the European Parliament and of the Council laying down Union procedures for the authorisation and supervision of medicinal products for human use and establishing rules governing the European Medicines Agency, amending Regulation (EC) No. 1394/2007 and Regulation (EU) No. 536/2014 and repealing Regulation (EC) No. 726/2004, Regulation (EC) No. 141/2000 and Regulation (EC) No. 1901/2006, COM(2023) 193 final.

this context concerns the powers of the Commission to impose contingency stock requirements and other relevant measures required to improve security of supply on marketing authorisation holders, wholesale distributors or other entities.[444]

1.2.2 Internal market

The *Internal Market Emergency and Resilience Act* (*IMERA*)[445] is a Regulation adopted on 9 October 2024 on the basis of Articles 21, 46 and 114 TFEU (free movement of persons, workers and internal market) establishing a framework to anticipate for and respond to the impact of crises on the internal market. In the event of a crisis,[446] the framework aims to safeguard the continued free movement of goods, services and persons, to ensure the availability of goods and services of critical importance and ultimately to prevent the creation of obstacles to the proper functioning of the internal market.[447] It does so by establishing measures for contingency planning (e.g., an early warning system, training, stress tests),[448] a vigilance mode which entails the monitoring of the supply of strategic goods and services which are under threat of a crisis,[449] and finally an internal market emergency mode.[450] It is the latter that deserves particular attention for the purposes of the present report.

The internal market emergency mode can be activated when a crisis creates obstacles to the free movement of goods, services or persons, having an impact on at least one sector of vital societal or economic importance. In the case of disruption of supply chains, it should be additionally assessed whether the goods, services or workers concerned can be diversified or substituted. The existence of a crisis needs to be assessed by the Commission and then the Council on the basis of a set of quantitative and qualitative indicators[451]; the internal market emergency mode is activated by means of a Council implementing act on the basis of a Commission proposal.[452] The Council implementing act must

[444] COM(2023) 193 final, Article 134.

[445] Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No. 2679/98, OJ L, 2024/2747, 8.11.2024.

[446] According to Article 3(1) of IMERA, "crisis" is intended to refer to an exceptional, unexpected and sudden, natural or man-made event of extraordinary nature and scale that takes place within or outside of the Union, that has or may have a severe negative impact on the functioning of the internal market and that disrupts the free movement of goods, services and persons or disrupts the functioning of its supply chains.

[447] Article 1(1) and (2) of IMERA.

[448] Title II of IMERA, articles from 9 to 13.

[449] Title III of IMERA, articles from 14 to 16.

[450] Title IV of IMERA, articles from 17 to 36.

[451] Article 17 of IMERA, laying down the criteria for activation of the internal market emergency mode.

[452] Article 18 of IMERA.

specify the duration of the activation, which in any event cannot be longer than six months.[453] The Council act may also lay down a list of crisis-relevant goods and services, as a condition for the further adoption of emergency response measures concerning them.[454]

The activation of the internal market emergency mode entails specific obligations for the Member States aimed at framing their recourse to national measures in reaction to a market crisis, when this is allowed under EU law.[455] In particular, national measures restricting free movement need to satisfy requirements concerning their limited duration, their lifting and the prior information to be provided to affected stakeholders,[456] and Member States are under an obligation to communicate the measures at stake, once adopted, to the Commission, to the other Member States and to the public.[457] Certain types of restrictions on the right to free movement are expressly prohibited as they are deemed manifestly disproportionate.[458] The Commission is also empowered to adopt mitigation measures for the free movement of persons, such as providing digital tools and templates to facilitate the identification of categories of persons and the verification of relevant facts.[459]

The activation of the internal market emergency mode also allows the Commission to adopt specific emergency response measures in relation to the crisis-relevant goods and services identified by the Council in the activation decision. The Commission can request information from economic operators concerning the production capacities and possible existing stocks of the crisis-relevant goods as well as expected production output and relevant disruptions.[460] It can further activate the emergency procedures included in sectorial instruments relating to specific products subject to an EU harmonised regime which entails various derogations from the harmonised rules with the aim of

[453] Ibidem. According to Article 19 of IMERA, if the Commission considers that the reasons for activating the emergency mode remain valid, it can propose to the Council an extension of the emergency mode for additional six months. If the Commission considers that the reasons no longer exist, it shall propose to the Council, without delay, the deactivation of the internal market emergency mode.

[454] Article 18 and 26 of IMERA. Emergency response measures can only be adopted in relation to specific crisis-relevant goods and crisis-relevant services among those identified in the Council implementing act activating the emergency mode.

[455] See, for instance, Chapter VI of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77. Recitals 39 and 40 make it clear that IMERA does not purport to provide additional grounds for the limitation of the right to free movement beyond those provided in sectorial instruments.

[456] Article 20 of IMERA.

[457] Article 23 of IMERA laying down specific transparency obligations on national emergency measures.

[458] Article 21 and recital 43 and following of IMERA.

[459] For example, the Commission can establish templates in order to identify the categories of persons involved in the production or supply of crisis-relevant goods and services for which it is necessary to facilitate free movement. See: Article 22 of IMERA.

[460] Article 27 of IMERA.

accelerating the placing on the market of those products.[461] The Commission can finally issue non-binding priority-rated requests asking economic operators to prioritise the production or supply of crisis-relevant goods in cases of severe and persistent shortage.[462] If the economic operator accepts the request for a priority-rated order, the Commission implementing act issuing the order will provide for a waiver of the operator's liability under prior contractual obligations. In the event of non-compliance with the information requests or accepted priority-rated orders, the Commission can impose fines on economic operators.[463]

Moreover, in the event of shortages the Commission can coordinate the distribution of crisis-relevant goods or services in a spirit of solidarity among Member States, by issuing recommendations. In the same vein, it can recommend to Member States measures to ensure the availability of crisis-relevant goods or services across the Union by the efficient reorganisation of supply chains, production lines and the use of existing stocks, as well as the acceleration of authorisation and product approval procedures.[464] Finally, when the internal market vigilance mode or emergency mode is active, the Commission can be requested by Member States to procure crisis-relevant goods and services on their behalf or can carry out a joint procurement procedure with the relevant authorities of the Member States. When Member States procure crisis-relevant goods and services autonomously, they are subject to obligations of information, consultation and coordination in a spirit of solidarity.[465]

The Chips Act[466] is a Regulation adopted on 13 September 2023 on the basis of Article 173(3) and 114 TFEU (industry and internal market) with the objective of strengthening Europe's semiconductor ecosystem. One important pillar of the instrument is a mechanism for coordinated monitoring and response to shortages in the supply of semiconductors, aiming to anticipate and swiftly respond to any future supply chain disruptions, through a dedicated emergency toolbox.

Under the mechanism, in the event of a semiconductor crisis characterised by a serious disruption in the semiconductor supply chain or serious obstacles in the trade of semiconductors within the Union causing significant shortages which would have a serious detrimental effect on the functioning of identified critical sectors, the Council can, on a Commission proposal, activate the crisis stage. The Council specifies the duration of the crisis stage, which may not

[461] Article 28 of IMERA, the emergency procedures allow, in the event of activation of a single market emergency, authorisation of the placing on the market of products that have not undergone the conformity assessment procedures required by EU legislation.

[462] Article 29 of IMERA.

[463] Articles 30 to 33 of IMERA.

[464] Articles 34 and 35 of IMERA.

[465] Articles 36 to 41 of IMERA.

[466] Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694, OJ L 229, 18.9.2023, pp. 1–53 (Chips Act).

exceed 12 months but may be prolonged upon a proposal of the Commission if the conditions for the activation persist. [467]

When the crisis stage is activated, the Commission may have recourse to one of the measures included in the "emergency toolbox": it can require information from economic operators in the semiconductor supply chain on production capabilities, capacities and current disruptions[468]; it can adopt priority-rated orders, which mandate economic operators to prioritise crisis-relevant product orders over other legal obligations[469]; and, in response to requests from two or more Member States, it can act as a central purchasing body for the procurement of crisis-relevant products for critical sectors.[470] In the case of non-compliance with the information requests and the priority-rated orders, the Commission can impose fines on economic operators according to Article 33 of the Act.

It can finally be mentioned here the Commission Proposal for a European Defence Industry Programme (*EDIP Regulation*), based on Article 114(1) and 173(3) TFEU (industry) is currently in negotiations between the co-legislators.[471] One of the key elements of the proposal is the establishment of a crisis framework aimed at ensuring the functioning of the internal market for defence products under any circumstances. The proposal provides for the possibility of activating two distinct crisis states. The first is the supply crisis state (Article 44), which occurs if: (a) there are serious disruptions in the provision of non-defence products, or serious obstacles to trade in such products within the Union causing their significant shortage; and (b) such significant shortages prevent the supply, repair or maintenance of defence products to the extent that it would have a serious detrimental effect on the functioning of the Union's defence supply chains impacting the society, economy and security of the Union. The second is the security-related supply crisis state, which can be activated if serious disruptions in the provision of defence products or serious obstacles to trade in defence products occur within the Union simultaneously to a security crisis,[472] causing significant shortages (Article 48)Following the

[467] Article 23 of Chips Act, which defines in its first paragraph the situation of "semiconductor crisis" and lays down in the following one the procedure for the activation of the crisis stage. Annex IV enumerates the critical sectors that are protected by the mechanism due to their impact on society, the economy and the security of the Union. They include energy, health, baking, water, food, defence, security, space and public administration.

[468] Article 25 of the Chips Act.

[469] Article 26 of the Chips Act.

[470] Article 27 of the Chips Act.

[471] Proposal for a regulation of the European Parliament and of the Council establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products ('EDIP'), COM(2024) 150 final.

[472] Defined as a situation in which a harmful event has occurred or is deemed to be impending which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or requires measures in order to supply the population with necessities, or has a substantial impact on property values, including armed conflicts and wars – Article 1(18).

activation of a supply crisis state by a Council implementing act, the Commission may take, as appropriate, emergency measures defined in a "supply-crisis" emergency toolbox. These notably include information requests concerning production capabilities, production capacities and current primary disruptions. The Commission can also adopt prioritisation measures consisting of "priority-rated orders" related to non-defence products under the supply crisis state (Article 47) and "priority-rated requests" related to defence products under the security-related supply crisis state (Article 50).[473]

1.2.3 Border controls, asylum and migration

The incorporation of emergency frameworks in sectorial legislation in the aftermath of the recent crises has not been limited to internal market instruments. Also of particular significance are the legislative developments in the domains of border controls, asylum and migration.

The 2024 amendment of the *Schengen Borders Code*,[474] adopted on the basis of Articles 77(2)(b) and (e) and 79(2)(c) TFEU (borders and illegal immigration), responds to the shortcomings in the Union's management of the external and internal borders exposed during the 2015 refugee crisis and the COVID-19 pandemic. In particular, it addresses the issues raised by the disorderly reintroduction by Member States of travel restrictions for third-country nationals and internal border controls as well as the lack of appropriate tools to ensure coordinated Union action in the first days of the COVID-19 pandemic and during the peaks of the migration crisis. It does so under three different regulatory approaches.

First, it confirms the general principle that under the Code Member States remain responsible for exceptionally reintroducing border controls as a last resort in cases of serious threats to public policy or internal security, and it further details the situations in relation to which such threats may be considered to arise (and thus justify the reintroduction of border controls).[475] At the same time, the 2024 amendment strengthens the procedural safeguards associated

[473] The Council may activate additional measures under the security-related supply crisis state, mainly consisting of facilitating intra-EU transfers of defence products (Article 51); triggering the eligibility of a list of "innovation actions" under the Programme (Article 52); facilitating the certification of defence products (Article 53); and requiring Member States, where possible under national law, to fast-track permit granting processes (Article 54).

[474] Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L, 2024/1717, 20.6.2024.

[475] Article 25(1) (a) to (d). In particular, the 2024 amendment includes a reference to terrorist incidents or threats, threats posed by serious organised crimes, large-scale public health emergencies, and large-scale international events (e.g., sporting events). The list also includes a reference to large-scale unauthorised movements of third-country nationals between the Member States which put a substantial strain on the overall resources and capacities of well-prepared competent authorities and are likely to put at risk the overall functioning of the area without internal border controls.

with the reintroduction of border controls by Member States,[476] particularly by expanding the list of elements that must be assessed in order to demonstrate that the border control is necessary and proportionate,[477] by providing for a mandatory Commission opinion on the proposed border controls in certain instances[478] and by requiring the application of mitigating measures. The central role of the Member States is also confirmed in relation to the introduction of restrictions at the external borders. Besides the general derogations already provided in Article 5 of the Borders Code, Member States are now explicitly allowed to adopt the necessary emergency measures (e.g., closure of specific crossing points) in situations where large number of migrants attempt to cross their external borders in an unauthorised manner, *en masse* and using force,[479] or in cases of instrumentalisation of migrants,[480] provided that those measures are proportionate and take full account of the rights recognised by EU law (notably the right of free movement and the rights of asylum seekers).

Second, in the exceptional case of a large-scale public health emergency affecting several Member States and putting at risk the overall functioning of the area without border controls, the introduction of border controls by Member

[476] See: Article 25, 25a and 27a Schengen Borders Code. As today, Member States are under an obligation to notify measures reintroducing border controls and the Commission and any other Member States may at any time adopt an opinion on the necessity and proportionality of the reintroduced controls.

[477] See: Article 26. New requirements include the need to assess the appropriateness of the measure of reintroducing border controls at an internal border (notably in light of alternative measures, such as checks carried out in the context of the lawful exercise of public powers by competent authorities in the border region and police cooperation) and the likely impact of such a measure on movement of persons within the area without internal border control and on the cross-border regions. In addition, prolongations concerning foreseeable threats exceeding six months should also include a risk assessment.

[478] Article 27a. The opinion of the Commission is mandatory if the Member State intends to prolong border controls for 12 months or more. The Commission opinion must include recommendations and be discussed in the framework of a consultation process. However, the procedure falls short of an authorisation mechanism and any infringements of the Borders Code's requirements by the Member State reintroducing border controls could only be contested by the Commission by way of the standard infringement procedure.

[479] Article 5(3). The provision aims to codify in the EU legal order the case-law of the European Court of Human Rights in the *Melilla* case, limiting the applicability of the prohibition of collective expulsion (Article 4 of Protocol 4 to the European Convention of Human Rights) in the event of an attempt by a large number of migrants to cross that border in an unauthorised manner and *en masse*. In that case, the Court considered that the applicants had in fact placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. They had not made use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen area's external borders. Consequently, the Court considered that the collective expulsion (lack of individual removal decisions) could be attributed to the fact that the applicants had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct. Accordingly, there had been no violation of Article 4 of Protocol No. 4. Grand Chamber judgments of the ECtHR of 13 February 2020 in Case *N.D. and N.T. v. Spain* (no. 8675/15 and 8697/15).

[480] Article5(4). The definition of instrumentalisation under the new Schengen Borders Code cross-refers to Article 1(4)(b), first sentence, of the Crisis Regulation.

States may be subject to an authorisation at Union level. More specifically, if available measures are not sufficient to address the large-scale public health emergency, the Commission may make a proposal to the Council to adopt a decision authorising the reintroduction of border controls by Member States and laying down appropriate mitigating measures. The Council decision may cover a period of up to six months and may be renewed for further six months upon a proposal from the Commission.[481] Once the Council has adopted the decision, Member States can reintroduce or prolong border controls only on the basis and according to the terms of the Council authorisation.[482]

Third, still in the case of large-scale public health emergencies, temporary restrictions at the external borders can be decided on at the EU level so as to ensure a uniform regime on travel to the Union. To this purpose, the 2024 amendment confers on the Council the power to adopt, upon a proposal of the Commission, an implementing regulation setting out temporary travel restrictions for third country nationals at the external borders.[483] Temporary restrictions on travel may include temporary restrictions on entry to the Member States and other measures considered necessary for the protection of public health in the area without internal border control, such as testing, quarantine and self-isolation. The Council regulation, where appropriate, identifies categories of persons to be exempted, the geographical areas or third countries from which travel may be subject to restrictions, the conditions under which non-essential travel may be restricted or exempted and the conditions under which essential travel may be exceptionally restricted.[484] Member States are allowed to adopt stricter restrictions, but need to comply with EU law and need to show that the national measures have no negative impact on the functioning of the Schengen area.[485]

The *Crisis Regulation* was adopted on 14 May 2024 on the basis of Article 78(2) (d) and (e) TFEU (asylum)[486] as an integral part of the New Pact on Migration and Asylum. The Pact aims to substantially reform the entire Union legal

[481] Article 28 Schengen Borders Code.

[482] Article 29 of the Schengen Borders Code already provided for a specific procedure where the overall functioning of the Schengen area is put at risk due to persistent and serious deficiencies relating to the management of the external border in a Member State. In such a case, the Council may, on a proposal from the Commission, adopt as a last resort a recommendation addressed to one or more Member States to reintroduce border controls so as to protect the common interests within the Schengen area. Under this procedure, however, Member States remain free to decide whether to follow the Council recommendation.

[483] New Article 21a of the Schengen Borders Code.

[484] Ibidem. The provision identifies categories of persons to be exempted from restriction on entry in relation to their status (e.g., persons enjoying the right of free movement) or in relation to the purpose of their travel (e.g., essential travel identified according to two separate subcategories in Annex XI).

[485] Article 21a (3) of the Schengen Borders Code.

[486] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU), OJ L, 2024/1359, 22/5/2024.

framework for asylum and migration management to address the challenges and dysfunctions highlighted by the various migration crises that have affected the Union since 2015 (see Part I, Chapter 1). In the framework of this overall reform, the Crisis Regulation caters for the possibility to derogate from certain rules concerning the normal handling of asylum requests and provides for an enhanced solidarity mechanism in specific situations of crisis. The *Crisis Regulation* is actually the result of the merging of two proposals presented by the Commission at different stages of the migration crisis and based upon the experience of ad hoc emergency measures: a proposal aimed at supplementing the rules of the Pact with a set of derogations applicable in situations of mass influx of migrants and *force majeure* and a proposal aimed at tackling situations of instrumentalisation of migrants.

The emergency framework set out by the adopted Regulation thus applies to three types of situations: migration crises provoked by an exceptional situation of mass arrivals of third country nationals on a scale that renders the Member State's asylum system non-functional and could thus entail serious consequences for the functioning of the Common European Asylum System[487]; migration crises provoked by a situation of instrumentalisation of migrants by a third country or hostile non-state actor which encourages or facilitates migratory movements with the aim of destabilising the Union or a Member State and liable to put at risk essential functions of a Member State[488]; and, finally, situations of *force majeure* which prevents the Member States from complying with the relevant EU law on asylum.[489]

When any of those situations occurs, the Member State concerned may submit a request to trigger the emergency framework to the Commission which, if it considers that the conditions are met, determines the existence of a situation of mass arrival of migrants, *force majeure* or instrumentalisation within the meaning of the Regulation.[490] At the same time as this determination, the Commission is to submit to the Council a proposal for an implementing decision authorising the Member State to apply the derogations and the solidarity measures provided for in the Regulation.[491] The measures will remain in force for three months, automatically renewable once. After that, further prolonga-

[487] Article 1(4) (a) Crisis Regulation

[488] Article 1(4) (b) Crisis Regulation

[489] Article 1(5) Crisis Regulation defines *force majeure* as abnormal and unforeseeable circumstances outside a Member State's control, the consequences of which could not have been avoided notwithstanding the exercise of all due care, which prevent that Member State from complying with obligations under the Asylum and Migration Management Regulation and the Procedures Regulation.

[490] Article 3 of the Crisis Regulation. It is interesting to note that when determining the existence of a situation of instrumentalization the Commission will have to "consider whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants" according to recital 28. The impact of this provision on the institutional balance will be analysed further below in Section 1, Chapter IV of Part II.

[491] Article 4.

tions will need to be expressly decided on by the Council on a proposal of the Commission, up to a maximum possible duration of 12 months.[492]
The Council implementing decision can authorise the Member State concerned to derogate from a number of obligations under the Asylum Procedure Directive, and notably to derogate from deadlines for registration and duration of the border procedure as well as for take-back notifications and transfers.[493] The use of the border procedure can also be extended to a greater number of arrivals, or even to all of them in situations of instrumentalisation.[494]
The Council decision can also trigger enhanced solidarity measures (additional to those provided for in the *Asylum and Migration Management Regulation* (AMRR) in a situation of crisis due to mass influx of migrants and instrumentalisation (but not in the case of *force majeure*). In particular, the Council decision can lay out a Solidarity Response Plan identifying the total amount of relocation contributions and other solidarity measures needed to address the situation of crisis as well as the indicative contributions of each Member State to contribute their fair share.[495] If relocation pledges from Member States remain insufficient, more stringent rules kick in, including mandatory offsetting of responsibility for asylum applicants following a secondary movement, derogating from the "first country of entry principle."[496] Finally, in a situation of crisis due to extraordinary mass arrivals, a Member State may be further relieved of its obligations to take back an applicant for whom it is responsible under the "first country of entry" principle.[497]

1.2.4 Cohesion policy and budgetary instruments

Finally, the incorporation of emergency frameworks in sectorial legislation has also involved cohesion policy and budgetary instruments. In these cases, too, the legislative interventions have incorporated and generalised emergency solutions hastily adopted in the heat of a crisis.
A good example of the interaction between emergency response and adaptation of the ordinary legal regime to situations of crisis is offered by financial rules for the implementation of cohesion funds. A little more than a month after the adoption of the *CRII* and *CRII plus* Regulations (see above), the Commission tabled an amendment to its proposal for the *Common Provisions Regulation* for the implementation of the cohesion funds for the period 2021–2027 in order to incorporate similar crisis-related derogations in the future legislation. As in the case of *CRII* and *CRII plus,* the amendment was aimed at facilitating the

[492] Article 5.
[493] Articles 10, 11 and 12.
[494] Article 11.
[495] Article 4 (2)(b) and Article 8.
[496] Article 9.
[497] Article 13.

use of the cohesion Funds in exceptional situations of economic shock.[498] The Commission also proposed a governance mechanism whereby the derogations could be decided on by the Commission once the Council had recognised, in the framework of the Stability and Growth Pact, the occurrence of an unusual event outside the control of one or more Member States which had a major impact on the financial position of the general government, or a severe economic downturn in the euro area or the Union.

It is interesting to note that the co-legislators adopted the amendment as part of the new Common Provisions Regulation[499] but introduced a number of amendments, notably restricting the scope of the derogations to certain funds, limiting the duration of the derogations and including the possibility for the Parliament (or the Council) to invite the Commission for a structured dialogue on the application of the provision.[500]

A second example is provided by the amendment of the *European Solidarity Fund* mentioned above, which was adopted by the co-legislators at the outset of the COVID-19 crisis in order to extend the scope of the fund and allow its mobilisation in response to major public health emergencies, and to define more favourable rules on the financing of specific operations. In this case the legislative intervention pursued a double aim: to allow an immediate emergency response, and to modify the legislative framework for future crises.[501]

Finally, we can mention the 2022 amendment of the *Financial Regulation* which adapted the applicable procurement rules in crisis management situations to allow an EU institution or body to procure on behalf of Member States or to act as a central purchasing body in order to donate or resell supplies and services to Member States, as well as to launch joint procurement procedures despite the EU institutions not acquiring services and supplies for themselves.

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[498] According to the explanatory memorandum accompanying the proposal: "it is also imperative that the legal framework for cohesion policy provides for mechanisms that can be quickly invoked should further shocks strike the Union in the coming years. Correspondingly, measures for the use of the Funds are proposed in response to exceptional and unusual circumstances to ensure that under such circumstances […] derogations to certain rules may be provided to facilitate response to such circumstances." Amended proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM/2020/450 final.

[499] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, pp. 159–706.

[500] Article 20 of the Regulation.

[501] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 2012/2002 in order to provide financial assistance to Member States and countries negotiating their accession to the Union seriously affected by a major public health emergency, COM/2020/114 final.

It also updated the definition of a crisis to include public health emergency situations and provided for the crisis provisions to be triggered in line with applicable internal procedures.

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

The use of ordinary legal bases to regulate emergency situations needs to be reconciled with the principle of conferral, according to which the Union acts only within the limits of the competence conferred upon it in the Treaties by the Member States to attain the objectives set out therein (Article 5(2) TEU). In order to enable a proper legal review of these principles, any given Union act must be based on the appropriate legal basis, and in so doing must respect the scope, nature and features of the underpinning Union competence (the purpose, scope and form of permissible action; limits to the Union's action in the matter; the institutional balance of powers; and the relationship with the exercise of national competence).

It follows that the use of ordinary legal bases to regulate emergency situations raises two distinct questions relating to the Union's system of competence:

- whether ordinary legal bases are appropriate to establish a regulatory regime for situations of emergency;
- what the relationship is between emergency regimes established in ordinary legislative instruments and the emergency legal bases– and, in particular, whether the use of an ordinary legal basis encroaches upon the competence (and related prerogatives and procedures) that the Treaties have codified in the emergency legal basis – and how to ensure coherence of action between the two.

The answer to the first question depends very much on the traditional doctrine on choice of legal basis as established by the case-law of the Court of Justice. According to that doctrine, the choice of the legal basis must be determined in accordance with objective factors amenable to judicial review, in particular having regard to the aim and content of the act in question in relation to the scope, nature and features of the underpinning Union competence.[502] It results that the answer to the question will depend on a case-by-case analysis of whether the envisaged emergency regime, as defined by its aim and content, can be deemed to fall within the chosen ordinary legal basis.

Without entering into a granular assessment of the various instruments re-

[502] See, *inter alia*, judgment of 11 June 1991, *Commission v Council (Titanium dioxide)*, C-300/89, EU:C:1991:244, para. 10; judgment of 17 March 1993, *Commission v Council*, C-155/91, EU:C:1993:98, para. 7; judgment of 29 April 2004, *Commission v Council*, C-338/01, EU:C:2004:253, para. 54; judgment of 10 January 2006, *Commission v Parliament and Council*, C-178/03, EU:C:2006:4, para. 41; judgment of 23 October 2007, *Commission v Council*, C-440/05, EU:C:2007:625, para. 61; judgment of 6 November 2008, *Parliament v Council*, C-155/07, EU:C:2008:605, para. 34; judgment of 19 July 2012, *Parliament v Council*, C-130/10, EU:C:2012:472, para. 42.

cently adopted by the legislators to bring in emergency frameworks, it is useful to make some general remarks. First, as far as a legal basis allows the Union to regulate a given matter, there is no compelling reason to confine the regulatory competence to the definition of a general regime and thus exclude the possibility of regulating specific situations or circumstances as a matter of *lex specialis*. This possibility falls in principle within the wide margin of discretion that the co-legislators enjoy in the exercise of their responsibilities, provided that such *lex specialis* complies with the principle of equality before the law set out in Article 20 of the Charter.[503] The proper identification of objective situations of emergency in the legislative instrument will be crucial to justify a difference of treatment. The main concern for the co-legislators will be to ensure that the measures envisaged by the emergency framework can satisfy the test of necessity and proportionality in relation to the aim pursued (see Part I, Chapter 2, Section 3.4).

This approach is for instance well reflected in the Commission's proposals for a specific regime on asylum procedures, reception conditions and returns of migrants in situations of crisis and *force majeure* and in cases of instrumentalisation. Both proposals were presented as an integral part of the regulatory framework of the New Pact on Migration and Asylum, the fundamental idea of which is to establish a comprehensive approach to migration and asylum management. The two proposals were meant to complete and complement the general regime of the Pact with specific rules applicable in identified emergency circumstances (*lex specialis*). According to the Commission this would justify recourse to the same legal bases on which the other relevant components of the Pact are based. This rationale was confirmed by the co-legislators, which merged the two proposals and confirmed the choice of the legal bases for the adoption of the *Crisis Regulation* (see above).

Of course, the limitations which are inherent to the nature and scope of material legal bases as defined by the Treaties must be taken into account. In certain areas which have proven to be particularly relevant for emergency situations (e.g., health), the competence of the Union is one of providing coordination and support for the activities of the Member States and thus in principle unsuitable for emergency frameworks introducing harmonised and binding measures for undertakings.[504] Moreover, the scale and nature of the problems raised by a crisis situation may well straddle several areas of Union policy and legal bases. This explains why the Commission and the co-legislators have turned towards legal bases that, due to their horizontal scope and wide application, allow greater leeway for action. This is in particular the case of internal market legal bases, and in particular Article 114 TFEU on approxima-

[503] See, for instance, judgment of the Court of 17 October 2013 in case C-101/12, *Herbert Schaible v Land Bande-Wurttemberg*, point 77 and the case-law referred to therein.

[504] Article 168(5) TFEU allows for binding obligations on Member States, such as information and reporting obligations. Common procedures are laid down for fulfilling such obligations.

tion of laws which has been recently used to propose – or has already led to the establishment of – permanent emergency frameworks like *IMERA*, the Chips Act and EDIP, as mentioned above. This is also the case of cohesion policy and in particular of Article 75(3) TFEU, which has been used to mobilise the Union budget to address crisis situation through existing or brand new spending instruments (RRF, REPowerEU, CRII, CRII plus, EUSF).

The recourse to ordinary legal bases which have specific objectives (removing obstacles to the functioning of the internal market; promoting economic, social and territorial cohesion) to establish emergency frameworks raises a number of delicate legal questions which have already fuelled an intense academic debate. Are those legal bases compatible with the different purpose of an emergency response, or would that purpose inevitably entail an expansive interpretation of the relevant Union competence, overstretching the boundaries of the relevant Treaty provisions? What are the implications in terms of design of the emergency framework resulting from the choice of ordinary legal basis? It is useful to briefly touch on those aspects in order to illustrate the Institutions' approach to the matter. We will focus on the case of Article 114 TFEU.

Article 114 TFEU is the central Treaty provision for harmonising or approximating the laws and administrative actions of the Member States with the aim of ensuring the establishment and functioning of the internal market, as set out in Article 26 TFEU. In so doing, the provision introduces an alternative to mutual recognition, which constituted the primary means for EU market integration before the Single European Act. Since then, harmonisation has progressively grown in importance to become the driving force in pursuing the objective of the internal market. As harmonising measures progressively impacted policy areas in which the EU has no or only complementary legislative competence, Article 114 TFEU has led to a significant amount of case-law and has been subject to increasing controversy as to whether it leads to a creeping expansion of the competence of the Union. These trends have further accelerated in recent times and notably during the 9th Parliamentary term, when a number of acts were adopted under Article 114 TFEU but also pursued particularly prominent general interest objectives not strictly related to the internal market, such as the protection of democracy and media freedom.[505]

The growing trend towards an expansive use of Article 114 TFEU finds its limits, however, in the conditions defined by the Court of Justice as to the possibility to have recourse to that legal basis. The Court has in fact made clear

[505] See, for instance, Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising, OJ L, 2024/900, 20.3.2024, Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ L, 2024/1083 and the Proposal for a Directive of the European Parliament and of the Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries, COM/2023/637 final, which is still being discussed by the co-legislators.

that Article 114 TFEU does not confer upon the Union legislature a general power to regulate the internal market.[506] Rather, in order to rely upon Article 114 TFEU as a legal basis, a Union measure needs to satisfy three conditions:

- Disparities exist or are likely to emerge between national laws which are such as to obstruct the fundamental freedoms or cause significant distortion of competition and thus have a direct effect on the functioning of the internal market;
- The genuine purpose of the measure must be to eliminate these obstacles and thus to improve the conditions for the establishment and functioning of the internal market by harmonising national rules[507];
- No other legal basis under the Treaties is appropriate for the adoption of the measures.

For the sake of our analysis, it is important to stress that the Court has accepted that the legal basis can be used to prevent the emergence of future obstacles to trade resulting from divergent national provisions, provided that the risk is not just an abstract one. The Court has also held that the expression "measures of approximation" intends to confer on the Union legislature a discretion as regards the method of approximation most appropriate for achieving the desired result and this may include empowering institutions to take decisions directed at market operators in the framework of an appropriate harmonised mechanism so as to counter specific threats to the orderly functioning and integrity of the market in question.[508] Thus, the choice of Article 114 TFEU appears in principle appropriate to set up regulatory frameworks for the adoption of individual monitoring and intervention market measures such as the ones we have described in paragraph 1.2, provided that the other conditions identified in the case-law are satisfied.

In that regard, however, a tension may exist between the objective of addressing malfunctions of the market in a situation of crisis (e.g., shortages or disruption in the supply chain) and the scope of Article 114 TFEU as defined by the case-law.

As a matter of example, the emergence of crisis-induced shortages or disruption of supply chains which are the focus of *IMERA,* the *Chips Act* or the *EDIP* proposal cannot *as such* be considered obstacles to the free movement of goods in the internal market that would justify recourse to Article 114 TFEU as confirmed by the Court. Indeed, when the Court refers to the elimination of obstacles to the free movement of goods, it has so far referred to the

[506] See: judgment of 5 October 2000, *Germany v Parliament and Council* (*Tobacco advertisement*), C-376/98, EU:C:2000:544, para. 83.

[507] See: judgment of 5 October 2000, *Germany v Parliament and Council (Tobacco advertisement*), C-376/98, EU:C:2000:544, para. 84; judgment of 8 June 2010, *Vodafone and others*, C-58/08, EU:C:2010:321, para. 32 and case-law cited; judgment of 2 May 2006, *UK v Parliament and Council (ENISA*), C-217/04, EU:C:2006:279, para. 42; Judgment of 10 December 2022, *British American Tobacco*, C-491/01, EU:C:2002:741, para. 60.

[508] Judgment of 22 January 2014, *UK v Parliament and Council (ESMA*), C-270/12, EU:C:2014:18, paras. 97–117.

removal of disparities between national rules that products must otherwise satisfy and not just to objective market conditions. Similarly, measures aimed at securing the production or the procurement of goods (e.g., priority-rated orders, joint procurement, stockpiling measures) may not at first sight appear relevant for cross-border trade or pertinent in relation to the risk of divergence between national rules, unless further conditions are specified. Lacking those conditions, such measures have a broader focus on ensuring the availability of goods in the internal market in a situation of scarcity rather than solely on ensuring their free movement. More generally, an emergency response to market crises based on the adoption at EU level of restrictions to the freedom of economic operators would appear to create obstacles to the free movement of goods rather than remove them, and needs therefore to be adequately justified and qualified in order to be compatible with Articles 114 and 26(2) TFEU.

The above considerations were very well in the mind of the co-legislators during the negotiations of the legislative instruments mentioned in paragraph 1.2 above. They explain a number of changes that were introduced in the final texts if compared to the proposals as originally submitted by the Commission, in order to refocus the proposed emergency frameworks on an internal market rationale based on divergence of national provisions, which could justify their adoption on the basis of Article 114 TFEU.

A good example of such redrafting is provided by *IMERA*, which also illustrates the contribution of the Legal Services to the legislative work of the Institutions. Following the presentation of the Commission's proposal, the Council working party in charge of the proposal requested an opinion from the Council Legal Service as to the appropriateness of the legal bases proposed by the Commission for the adoption of the act. The opinion of the CLS identified a number of shortcomings in the Commission's proposal and guided work to re-focus and redraft certain elements of the proposal. This in particular concerned:

- The objective of the proposal (Article 1), which was clarified and tied more closely to ensuring the proper functioning of the internal market, by preventing the creation of obstacles to the proper functioning of the Market and by preventing the application of divergent measures by Member States;
- The definitions, and notably the definition of crisis and internal market emergency mode (Article 3), which were made more specific by adding a reference to their impact on the functioning of the internal market and freedom movement as well as the risk of divergent national measures which may impact the functioning of supply chains;
- The conditions for the triggering of the internal market emergency mode (Article 17) were clarified and further framed, so as to include an assessment by the Commission and the Council of the fact that the crisis creates obstacles to the free movement, having an impact on a vital sector in the internal market, in line with Article 114 TFEU;

– The provision on prior rated requests was further framed (Article 29) while the provision on strategic reserves was dropped altogether;
– The rationale and objective of the instrument, which was recentred around the risk that disruption of supply chains and shortages of goods and services may pose for the proper functioning of the internal market, notably through a careful redrafting of the recitals.[509]

While the strengthening of the internal market rationale provides a more solid justification for the choice of Article 114 TFEU,[510] it comes at a cost linked to the inherent limitations of this legal basis.

Apart for the reframing of the instrument through the lens of the internal market and redefinition of the parameters of its activation as explained above, this is particularly relevant in relation to the solidarity dimension of the crisis framework. As a matter of fact, while the element of solidarity is a key principle of the Union emergency competences (see Part I, Chapter 2, Section 3), it is not among the objectives of the internal market as defined in Article 26 TFEU and operationalised in Article 114 TFEU.

This does not exclude the possibility that harmonisation measures under Article 114 TFEU can additionally pursue an objective of solidarity among the Member States. The Court of Justice has indeed confirmed that measures adopted under Article 114 TFEU can pursue general interest objectives in addition to internal market ones, even when those other policy objectives are a "decisive factor" in the choices to be made.[511] Although this case-law has been developed in relation to the general interests explicitly mentioned in Article 114(3) TFEU (high level of health, environmental or consumer protection), it is inherent in the logic of Article 114 TFEU that harmonisation is not an end in itself but is meant to respect the specific public interest objectives pursued in the policy area concerned. This requires us to consider that the very rationale of handling emergencies at the EU level – rather than leaving to Member States the responsibility to act unilaterally – is to promote solidarity.

[509] Compare recital 6 of the Commission proposal, which did not link the situation of shortages and supply chain disruption with obstacles in the free movement in the internal market, with the new drafting of recital 8: "The impact of a crisis on the internal market can hinder the functioning of the internal market in two ways. It can give rise to obstacles to free movement or it can cause disruptions to supply chains. Disruptions to supply chains can exacerbate shortages of goods and services in the internal market and hinder production, which leads to additional barriers to trade and to the distortion of competition between Member States and between private operators, thereby disrupting the proper functioning of the internal market. Disruptions to supply chains can also lead to the emergence or likely emergence of diverging national measures to address those supply chain issues, leading to the activation of an internal market emergency mode. This Regulation should address these types of impacts on the internal market and introduce measures to avoid obstacles to free movement or supply chain disruptions that create shortages of crisis-relevant goods or services."

[510] A similar reframing of the instrument also took place during the legislative negotiations on the Chips Act.

[511] See: judgment of 4 May 2016, *Philip Morris*, C-547/14, EU:C:2016:325, para. 60 and case-law quoted there; judgment of 8 June 2010, *Vodafone*, C-58/08, EU:C:2010:321, para. 36.

Finally, solidarity is recognised as an essential attribute of society in Article 2 TEU, which sets out the values on which the Union is founded. In that regard, the Court of Justice in its landmark judgment on the rule of law conditionality regulation has ruled that "*the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties*."[512] Thus the co-legislators are empowered to ensure the protection of the values mentioned in Article 2 TEU wherever they have an appropriate legal basis for taking legislative action.

It remains, however, that the pursuit of solidarity should not undermine the pursuit of the internal market objective which needs to remain genuine and underpin the whole regulatory framework. Moreover, since the pursuit of solidarity is not a requirement under Article 114 TFEU, the extent to which the emergency frameworks established under that legal basis pursue a solidarity rationale will depend very much on the choice of the co-legislators in the exercise of their wide margin of discretion.

It results therefore that the choice of Article 114 TFEU as a legal basis entails a possible reduction of the level of solidarity pursued by the emergency framework. This is indeed reflected by the final outcome of the legislative work on *IMERA*,[513] which has weakened the solidarity dimension of the original Commission's proposal, for instance, by ditching the possibility for the Commission to issue mandatory priority orders to economic operators[514] and mandatory requests to Member States to build up strategic reserves for goods of strategic importance.[515]

A last condition for recourse to Article 114 TFEU is that the envisaged measure cannot be adopted under any other legal basis under the Treaties. This requirement raises the issue of the relationship between ordinary and emergency legal bases, which will be discussed in the next paragraph.

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

In a legal order characterised by the principle of attributed powers, the use of ordinary legal bases to introduce permanent emergency frameworks raises

[512] Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 127.

[513] Similar considerations apply to the Chips Act.

[514] According to Article 27(4) of the proposal, economic operators could refuse to comply with priority-rated orders only by invoking "duly justified reasons", failing which they would face fines according to Article 28(1)(b). In the final text of *IMERA* the measure in question becomes voluntary and is therefore renamed "priority-rated requests."

[515] See: Article 12(6) of the proposal. Both elements are aimed at operationalising the principle of solidarity in practice, by conferring on the Commission the power to operate mandatory reallocation of scarce resources. Without those elements, the regulatory framework shifts towards a cooperative model, based on the voluntary acceptance of measures by Member States (use of reserves) and economic operators (priority-rated requests).

questions as to the possible overlap with the exercise of emergency competence and respect for the prerogatives and procedures that the treaties have codified in emergency legal bases. Is there a "preserve" of emergency competence that cannot be encroached upon? Or, conversely, is the emergency competence subsidiary in nature, so that it can no longer be exercised once that the ordinary legislator has occupied the ground? To what extent can the two competences coexist, and if they do, how can it be ensured that they are exercised in a coordinated way?

1.4.1 The coexistence of ordinary and emergency competence

Both the case-law of the Court of Justice and the practice of the institutions play against interpreting the emergency provisions of the Treaties as establishing a *domaine reservé* for the management of crisis situations in favour of the specific procedures and specific role for certain institutions (notably the Council) provided therein; in fact, in the logic of the Treaties emergency competences are rather conceived as existing in parallel to ordinary competence. While emergency competences would overlap with (and, as necessary, derogate from) ordinary legislation, they could never have the effect of pre-empting the exercise of ordinary competence. This is well illustrated by the case-law as well as the practice in relation to the two most relevant emergency competences analysed in this report: Article 122 TFEU and Article 78(3) TFEU.

In the case of *Article 122 TFEU*, the relationship between the provision and other legal bases under the Treaties is defined by the "without prejudice" clause which opens the first paragraph and which has already attracted much academic attention.[516] The expression is admittedly difficult to interpret, as commentators have already remarked. The meaning usually given to the expression in legislative acts – namely "without affecting" or "independently of" – works well to describe the relationship between two substantive rules: it indicates that the rule to which reference is made remains fully applicable and in the case of conflict, prevails over the rule containing the clause. Such an interpretation, however, does not fit well with provisions containing a legal basis, that is, defining the scope of competences.

In such a situation, the "without prejudice" clause can have two distinctive meanings: it could mean that one legal basis is subsidiary, for example, it could only be used if no other legal basis applies. It could also mean that the two legal bases apply in parallel, and independently from each other. What would then differentiate the recourse to the two legal bases would be the circumstances of

[516] Chamon, "The use of Article 122 TFEU – Institutional implications and impact on democratic accountability," study requested by the European Parliament's AFCO Committee, PE 753.307, 21–23; Weber, "Die Neuordnung der EU-Wirtschaftsverfassung durch Art. 122 AEUV?." 149 AÖR (2024), 82–122, at 88; Chamon, "The EU's dormant economic policy competence: Reliance on Article 122 TFEU and Parliament's misguided proposal for Treaty Revision," 49 EL Rev. (2024), 166–187, at 175;

their use, which in the case of Article 122(1) are characterised by the existence of a situation of emergency.

This second interpretation is the one that the Court of Justice has upheld in relation to the predecessor of Article 122(1) TFEU, Article 103 of the Treaty of Rome. In its judgment in the *Balkan Import* case,[517] the Court reflected on the relationship between the said provision and other ordinary ones that "in normal times" would have justified the adoption of the contested measures:

> 14. […] These measures, intended to compensate temporarily for the harmful effects of national monetary measures, so that the process of economic integration may meanwhile continue its progress, are of an essentially transitory nature and would normally have had to be adopted by virtue of the powers conferred on the Council by Articles 40 and 43 and in accordance with the procedures set out therein, in particular after consulting the Assembly.
>
> 15. However, owing to the time needed to give effect to the procedures laid down in Articles 40 and 43, a certain amount of trade might then have passed free of the regulations, and this could jeopardise the relevant common organizations of the market.
>
> There being no adequate provision in the common agricultural policy for adoption of the urgent measures necessary to counteract the monetary situation described above, it is reasonable to suppose that the Council was justified in making interim use of the powers conferred on it by Article 103 of the Treaty.
>
> Consequently – while the suddenness of the events with which the Council was faced, the urgency of the measures to be adopted, the seriousness of the situation and the fact that these measures were adopted in an area intimately connected with the monetary policies of Member States (the effects of which they had partially to offset) all prompted the Council to have recourse to Article 103 – Regulation no 2746/72 shows that this state of affairs was only a temporary one, since the legal basis for the measure was eventually found in other provisions of the Treaty.[518]

The Court's approach is, without mentioning it, based on a teleological interpretation of the then Article 103 TEC, and more specifically a "consequentialist interpretation,"[519] which focuses on the consequences that would ensue from the alternative interpretation of Article 103 TEC as a residual legal basis: if that was the case, the provision would not ensure the capacity for the Union to react effectively to a situation characterised by its "suddenness… urgency… and seriousness," thus compromising its useful effect.[520]

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[517] Judgment of the Court of 24 October 1973, *Balkan Import*, case C-5/73, EU:C:1973:109.

[518] *Balkan Import*, points number 14 and 15.

[519] Lenaerts and Gutierrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice," EUI Working Papers, AEL 2013/9, p. 25; J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford, Clarendon, 1993).

[520] The teleological reasoning was made more explicit in the of opinion Advocate General Roemer in the *Balkan Import* case. Advocate General Roemer underlined that the "speedy effectiveness of measures of conjunctural policy" would have been compromised if the Union had to act accord-

Despite the evolution of the provision in the various iterations of the Treaties, that reasoning remains pertinent today.[521] As such, it has informed the practice of the Institutions in recent uses of the provision.[522] It results therefore that Article 122 TFEU allows the adoption of "measures" that could in principle also be adopted under another, ordinary, legal basis, were it not for the emergency context in which they are to be adopted. Conversely, the ordinary legal bases are not pre-empted by the exercise of the emergency competence, which remains limited to adopting "measures appropriate to the situation," and thus by definition temporary. In this sense, Article 122(1) TFEU is without prejudice to ordinary legal bases, even when those are used to set up a permanent framework for regulating emergency situations.

The interpretation of Article 122 as a parallel and contextual emergency competence allows for clarification of its relationship with Article 114(1) TFEU and the condition laid down there that the harmonisation legal basis can only apply "save where otherwise provided in the Treaties." While being parallel, competences under Article 122 and 114 TFEU rest on divergent paradigms as far as their triggering conditions differ significantly. In the case of Article 122, which is an emergency competence, the trigger for recourse to that legal basis is defined in light of the needs in a specific context (see the words "measures appropriate to the economic situation"). By contrast, the competence under Article 114 TFEU may be exercised "for the achievement of the objectives set out in Article 26." This means that nothing would prevent reliance on Article 114 TFEU for the adoption of measures that could have similar content provided that the conditions for the application of Article 114 were met; this also includes the possibility to establish permanent emergency frameworks such as those recently introduced by *IMERA* and the Chips Act.

Moving to Article 78(3) TFEU, while this provision does not include an explicit "without prejudice" or similar clause clarifying its relationship with ordinary legal bases in the area of migration, it does include a clear definition of its triggering situation, which is associated with an emergency context: the Council is empowered to adopt provisional measures "in the event of one or more

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ing to different procedures. Advocate General Roemer thus concluded that "one ought therefore to take the view that Article 103 can be used independent of other Treaty provisions and *parallel* to them, provided there is a goal in conjunctural policy to be aimed for."

[521] The shift from the notion of "conjunctural measures" in Article 103 TEC to the notion of "measures appropriate to the economic situation" does not affect the logic of the reasoning, even if it may have consequences when defining the features of the measures that can be adopted. On this see: Part I, Chapter II, Section 2.1.

[522] In its opinion on the compatibility with the Treaties of the Next Generation EU scheme, the Council Legal Service clearly links the "without prejudice" clause to the emergency nature of the provision (and thus its operating in parallel to ordinary legal basis, when the conditions are met): "The introductory words 'without prejudice to any other procedures provided for in the Treaties' underscore the exceptional and temporary nature of measures under Article 122(1) TFEU, as recourse to that provision may not undermine or circumvent the use of other legal basis laid down in the Treaties for use in 'normal times.'" Opinion of Legal Service of 24 June 2020, "Proposals on Next Generation EU," ST 9062/20, p. 49.

Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries."

Thus the contextual nature of the legal basis reflects the purpose of the provision (addressing a situation of emergency) and at the same time defines its relationship with ordinary legal bases. This is the logic that the Court of Justice followed to clarify how Article 78(3) relates to the ordinary legislative competence for establishing a permanent policy on asylum:

> 73. They are in fact two distinct provisions of primary EU law pursuing different objectives and each having its own conditions for application, which provide a legal basis for the adoption, in the case of Article 78(3) TFEU, of provisional, non-legislative, measures intended to respond swiftly to a particular emergency situation facing Member States and, in the case of Article 78(2) TFEU, legislative acts whose purpose is to regulate, generally and for an indefinite period, a structural problem arising in the context of the European Union's common policy on asylum.
> 74. Accordingly, those provisions are complementary, permitting the European Union to adopt, in the context of the common policy on asylum, a wide range of measures in order to ensure that it has the necessary tools to respond effectively, both in the short term and in the long term, to migration crises.

The qualification of the two legal bases as "complementary" echoes the notion of "parallelism" identified above, while also stressing the interconnection existing between them, as they both concur in defining a common policy. The conclusion is the same: the existence of a competence which allows the Union to "respond swiftly to a particular emergency situation" leaves unfettered the possibility for the ordinary legislator to set up permanent frameworks to "regulate, generally and for an indefinite period" (recurring) situations of crisis. The two examples show that unlike ordinary competences that are *objective-driven*, emergency competences are rather circumstantial and *needs-driven* under the Treaties.

1.4.2 Coherence and coordination between emergency instruments

Once clarified that emergency and ordinary legal bases can concur in regulating emergency situations, the question arises of how to ensure coherence and coordination between different emergency instruments. The question is all the more relevant as the two sets of legal bases provide for different procedural requirements, which could enhance the risk of divergence.

This concern is at the root of a number coordinating provisions that the co-legislators have introduced in permanent emergency frameworks established under ordinary legal bases. These coordinating safeguards relate both to the material scope and to the governance of the emergency frameworksIn the field of migration, a good example of scope coordination is provided by recital 11 of

the *Crisis Regulation*, which makes clear that "the adoption of measures under this Regulation in respect of a particular Member State should be without prejudice to the possibility to apply Article 78(3)," which possibly opens the door to a cumulative adoption of measures both under the Regulation and the emergency legal basis (see below for further reflections on the interaction between the two).

The *IMERA Regulation* goes to great lengths in ensuring coordination with other Union emergency frameworks. In fact, due to the wide and horizontal scope of *IMERA* and the existence of a number of crisis-related instruments at the EU level, and notably within the internal market, the issue of their interactions and indeed of the added value of the proposed instrument was at the centre of the legislative debate.[523] The solution chosen in the proposal, and then in the final legislative act, is to exclude altogether from the scope of IMERA certain domains (such as financial services, medicinal products, medical devices or other medical countermeasures, food safety products, defence-related products)[524] and then clarify that the *IMERA* framework will apply without prejudice to the provisions of other existing and more targeted instruments, which are to be considered as *lex specialis* and thus prevailing in the event of conflict.[525] The Regulation also explicitly reiterates that it is the responsibility of the Member States to safeguard national security and confirms their power to safeguard other essential state functions, including ensuring the territorial integrity of the state and maintaining law and order.[526] Such a reference to the general safeguard clause of Article 4(2) TEU is of dubious added value, since it does not appear sufficient to avoid the limiting effect that the adoption of a EU regime for the protection of certain interests ultimately has on the possibility for Member States to adopt unilateral action in pursuit of the same objective.[527]

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[523] The point was raised already as critical in the opinion (positive with reservations) of the Regulatory Scrutiny Board on the Impact Assessment Report of the Commission Proposal. The Regulatory Scrutiny Board notably stressed that the Report "should better explain and analyse with examples the hierarchy and interaction of

these measures/instruments that would apply in a crisis situation." Regulatory Scrutiny Board Opinion of 17 August 2022, SEC(2022) 323 final.

[524] Article 2(2) and recitals 11, 14 and 15.

[525] The term is used in the explanatory memorandum accompanying the proposal. Article 2(3) as adopted clarifies that the Regulation is without prejudice to a number of existing crisis response or crisis management mechanisms such as the Union Civil Protection Mechanism, the IPCR, the EU Health Security Framework. See also: recitals 16 to 21.

[526] Article 2(6) and recital 11.

[527] The emphasis on the prerogatives of the Member States as well as the explicit recognition that they could adopt emergency measures in an internal market emergency, subject to certain limitations and information requirements (see above), has led to criticism as to the real added value of the proposal. See, for instance, the declaration of Luxembourg upon adoption of the Regulation: "Unfortunately, Luxembourg has serious doubts as to whether the 'Single Market Emergency Instrument' (SMEI) will live up to these principles. At a time when the EU needs to strengthen the integration and resilience of the internal market, an instrument like the SMEI runs the risk of allowing Member States to impose additional restrictions in a crisis situation. The lessons learned

Coordination between emergency measures and ordinary legislation can also be ensured by delimiting the temporal scope of application of the two sets of rules, to avoid their overlapping. This approach has been followed for instance in the domain of energy, where various emergency measures hastily adopted to face the gas supply crisis due to the Russia's war of aggression against Ukraine were then "repatriated" in the permanent framework under ordinary legislation, because they were deemed to be useful in ordinary times too. For instance, the *Renewable Energy Directive (RED)528* incorporated several provisions for accelerating the permit-granting procedure for renewable energy technologies already included in the emergency Council Regulation 2022/2577 based on Article 122(1) TFEU.[529] To avoid overlapping or a gap between the two regimes, the *RED* set the deadline for the transposition of the relevant provisions as the date of expiry of the emergency Regulation.[530] Similarly, the *Gas Market Package Reform*[531] transformed some of the crisis measures introduced by emergency Council Regulation 2022/2576, also based on Article 122(1) TFEU,[532] into permanent features of the natural gas market.[533] However, in order to avoid an overlap between the two regimes, the application of the permanent rules was deferred until expiry of the temporary emergency framework.[534]

In other cases, the coordination can be achieved by the inclusion of provisions that establish a principle of subordination, so that the measure adopted under an emergency competence becomes available only where the ordinary instruments are not sufficient. This is, for instance, the case of the *Emergency*

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following the numerous restrictions introduced by Member States during the pandemic show that obstacles must be addressed at source and in accordance with the Treaties. However, the SMEI – or IMERA (Internal Market Emergency and Resilience Act) – merely treats symptoms rather than causes, while adding new layers of bureaucracy likely to hamper crisis management." Council doc. ST 13030/24 ADD1.

[528] Directive (EU) 2023/2413 of the European Parliament and the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 (OJ L 2023/2413, 31.10.2023).

[529] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ L 335, 29.12.2022, p. 36.

[530] Council Regulation 2022/2577 was finally prolonged and thus an overlapping between the two regimes did occur. The possible interferences between the two regimes – and thus between the emergency and ordinary competence – will be discussed in the next paragraph.

[531] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009, OJ L, 2024/1789, 15.7.2024.

[532] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders, OJ L 335, 29.12.2022, p. 1.

[533] That concerned in particular the mechanism for demand aggregation and the joint purchasing of natural gas, measures to enhance the use of LNG facilities and natural gas storage, as well as additional solidarity measures in the event of a natural gas emergency.

[534] See: recital 111 Regulation (EU) 2024/1789, quoted above.

Support Instrument, which established, on the basis of Article 122(1) TFEU, a framework for the provision of emergency support in the event of a natural or man-made disaster. Article 1 of the *ESI Regulation* provides that such emergency support can only be provided where a certain threshold of gravity is reached, and most importantly only "in the exceptional circumstances where no other instrument available to Member States and to the Union is sufficient."[535] This provision confers a subsidiary character to *ESI:* while, as explained above, that characteristic is not a requirement resulting from the emergency legal basis, its inclusion reflects the choice of the Council to ensure the exceptional character of the emergency measures.

Coordination can otherwise be achieved via the governance structures of the sectorial crisis management frameworks. In some instances, crisis measures are triggered when the existence of a state of crisis is determined according to a sectorial procedure referred to in the legislative act. This is for instance the case of the emergency regime for the use of cohesion funds introduced during the negotiations on the *Common Provisions Regulation* for the programming period 2021–2027 (see paragraph 1.2.4 above). Article 20 links the possibility for the Commission to adopt derogations from the general regime for the implementation of the funds where the Council has recognised that a situation of economic crisis has occurred, in the cases and according to the procedures set out in the Stability and Growth Pact. The mechanism thus ensures the coordination between the two different regimes, by incorporating in one the determination made by the Council in the other.

In most cases, however, the crisis framework defines a specific triggering event (e.g., a crisis affecting the sector in question) and an autonomous governance mechanism. These governance mechanisms are based on different designs, but all envisage a central role for the Council in the implementation of the crisis framework. While we will analyse the different alternative governance designs in more detail in Section 3 of Chapter III, it is important here to stress that the conferral of implementing powers on the same institution that is empowered to act under the emergency provisions laid down in the Treaties helps to ensure coherence and coordination in the emergency action of the Union. Crucially, the centrality of the Council in the governance of the Union response also promotes coherence and coordination with the emergency action of the Member States, which remain the main actors in emergency situations.

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

One final issue concerns the reciprocal interference resulting from the exercise of ordinary and emergency competences. Even if the complementary/parallel

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

nature of emergency competence excludes an effect of pre-emption when ordinary legal bases are used to adopt crisis response frameworks and *vice versa*, the occupation of the normative space may well have consequences on the subsequent exercise of the competence. Two situations deserve further reflection.

The first situation concerns the setting up of permanent emergency frameworks under ordinary legislation and its relevance for the adoption of measures under Treaty-based emergency provisions. Consider for instance the framework of derogations established by the *Crisis Regulation* in the case of instrumentalisation of migrants. Could the Council adopt on the basis of Article 78(3) TFEU a different set of derogations to the asylum *acquis* or a completely different type of emergency measure than the ones envisaged by the *Crisis Regulation* to react to the same situation?

While the wording of recital 11 of the *Crisis Regulation* mentioned above leaves open such a possibility in abstract terms, in practice the existence of a normative framework established under secondary legislation will inevitably affect the assessment of the conditions for having recourse to Article 78(3) TFEU. This is the position maintained by the Commission, which in the explanatory memorandum accompanying its proposal for a permanent Regulation addressing situation of instrumentalization of migrants has clarified the relationship of that instrument with emergency decisions based on Article 78(3) TFEU as follows:

> A permanent framework on which the Union can consistently rely tailored to this situation is necessary, which would also allow maintaining the exceptional nature of provisional measures under Article 78(3) TFEU and thus render unnecessary to resort to Article 78(3) TFEU to address situations of instrumentalisation that fall under this proposal.[536]

Thus, the fact that a specific emergency "situation" is already regulated by ordinary legislation renders it unnecessary in principle to resort to the emergency competence.

The interaction between ordinary and emergency measures has been tested during the energy crisis, when emergency measures were prolonged and thus overlapped with the introduction of a new legislative framework. The *Renewable Energy Directive (RED)* integrated a number of the provisions included in emergency Council Regulation 2022/2577 to accelerate the deployment of renewable energies, specifically by removing bottlenecks linked to permits for renewable energy projects and related grid connections.[537] Those provisions had to be transposed by the date when Council Regulation 2022/2577 based on

[536] Explanatory memorandum accompanying the proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.

[537] See: footnotes 112 and 113 above.

Article 122(1) TFEU was initially to cease to apply (30 June 2024). In the light of the situation on the energy markets, the Council nevertheless decided to prolong, for another additional year (till 30 June 2025), the application of part of the emergency rules which the co-legislators had not integrated into the *RED* by means of another emergency Regulation.[538] This prolongation thus happened shortly after the co-legislators had reached agreement on the *RED* with an integration of a more limited set of permitting facilitations. In the specific case, it is relevant to note that the co-legislators had not come out strongly against the provisions the application of which was prolonged on the basis of Article 122(1) TFEU. Those provisions had not been considered pertinent in the context of a more permanent framework based on Article 194 TFEU, notably in light of the extensive derogation from EU environmental rules that they entailed.

The decision of the Council not to follow the choice of the ordinary legislator and keep in place provisions that the latter had not included creates a certain tension with the principle of institutional balance and sincere cooperation, and raise issues of democratic legitimacy. These tensions were, however, defused by a detailed justification in the recital of the acts, which explained for each of the prolonged measures why the conditions were met to keep them in place regardless of the adoption of the new legislation. In particular, the justification focussed with a great level of detail on why the measures were necessary in light of both the continued existence of a situation of energy crisis and their positive effect as shown on the occasion of their first application; it further balanced the prolongation of the measures against the interest of ensuring a level of environmental protection adequate to the situation. Finally, the measures were prolonged for a strictly limited period of time (one year), thus further stressing their contingent character.[539]

[538] Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy, OJ L, 2024/223, 10.1.2024.

[539] See: recitals 12 to 22 of Council Regulation 2024/223. A good example of the level of detail of the motivation is provided by recital 14: "[…] Article 3(2) of Regulation (EU) 2022/2577 requires priority to be given to projects that are recognised as being of overriding public interest whenever the balancing of legal interests is required in individual cases and where those projects introduce additional compensation requirements for species protection. An analogous provision is not present in Directive (EU) 2018/2001. The first sentence of Article 3(2) of Regulation (EU) 2022/2577 has the potential, in the current urgent and still unstable energy situation on the energy market which the Union is facing, to further accelerate renewable energy projects since it requires Member States to promote those renewable energy projects by giving them priority when dealing with different conflicting interests beyond environmental matters in the context of Member States' planning and the permit-granting process. The Commission's report demonstrated the value of the first sentence of Article 3(2) of Regulation (EU) 2022/2577 which recognises the relative importance of renewable energy deployment in the current difficult energy context beyond the specific objectives of the derogations foreseen in the Directives referred to in Article 3(1) of Regulation (EU) 2022/2577. Given the particularly severe situation in the supply of energy which the Union is currently facing, it is appropriate to prolong the application of Article 3(2) of Regulation (EU) 2022/2577 in order to appropriately recognise the crucial role played by renewable energy plants to fight climate change and pollution, reduce energy prices, decrease the Union's dependence on fossil fuels and to ensure the Union's security of supply in the context of the balancing of legal interests carried out by permit-

In light of those explanations, rather than pointing to any institutional overreach, the case illustrates how "ordinary" and crisis measures are each based on distinct circumstances and require different responses which is then also reflected in their content and their effects, since the former are designed for a longer time horizon and the latter for more immediate needs.

In conclusion, the fact that a given situation has already been regulated by the ordinary legislator reduces the Council's margin of discretion in adopting measures under an emergency competence, as the institution will have to make a strong case that ordinary legal framework is not sufficient to address the crisis situation, and that the adoption of different set of exceptional measures remains necessary and proportionate.[540] Thus despite being "parallel" in the sense indicated above, the possibility of effectively exercising an emergency competence is de facto restricted by the inclusion of emergency frameworks in ordinary legislation.

At the same time, Treaty-based emergency powers provide flexibility to the system as they allow the Council to act "outside the box" and address novel situations through novel means. Since, as we have seen, the Treaty does not create any hierarchy of norms between legislative acts over non-legislative acts adopted by the Council under emergency powers, the latter acts may derogate from existing legislative acts and will prevail over more general legislative acts in the event of conflict because they will in essence constitute a *lex specialis* addressing a specific situation.

A second, reciprocal, situation concerns the normative "drag" that the exercise of an emergency competence may have on ordinary ones. An example is provided by the impact that the adoption of emergency measures may have on the external action of the Union, and notably on the determination of whether or not an area has already been occupied by Union law. In such a case, the conclusion of an international agreement on the same subject matter (for instance, to allow a third country to join a given emergency scheme) could affect or alter the scope of the common rules adopted via the emergency measure and thus establish the competence of the Union to conclude the agreement alone.

The situation is far from being remote. The temporary and contingent charac-

granting authorities or national courts. At the same time, it is also appropriate to keep the environmental safeguard that, for projects recognised as being of overriding public interest, appropriate species conservation measures, underpinned by sufficient financial resources, are adopted."

[540] The situation seems here similar to the one occurring when Member States invoke derogation clauses to exclude the application of an EU legal framework to protect a specific public interest which already receives protection within that framework. In the case of Article 72 TFEU, the Court of Justice has stressed that a Member State which intends to rely on Article 72 TFEU needs to prove that it is necessary to have recourse to the derogation in order to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security. That necessity has to be assessed in relation to the applicable EU legislation: as far as such legislation already allows for the protection of those interests by means of specific provisions it is up to the Member State to prove specifically that the existing EU legal framework does not provide effective safeguards for the interests at stake in relation to the specific situation of emergency that the national derogating regime aims to address.

ter of emergency measures does not exclude the possibility that their temporal horizon or scope can be of relevance to the conduct of international relations. Moreover, as we have seen above, emergency competences can be used to adopt a procedural framework for the future exercise of emergency measures in a given case. In that regard, a case in point is the current negotiation with EEA countries of an agreement on health emergency measures in area of medical countermeasures aimed at ensuring the participation of those countries in the emergency framework set out in Council Regulation 2022/2372. The question which arises here is whether the exercise of an emergency competence can have the effect of expanding the external competence of the Union by occupying the normative space.

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

Following the intense recourse to Treaty-based emergency provisions during the crises of recent years, the co-legislators have turned to ordinary legal bases to include crisis prevention and crisis response frameworks in a number of sectorial instruments, notably in the domains of the internal market and of migration and asylum.

The need for legislative intervention has been justified[541] by the importance of taking stock of the lessons learnt during the recent crises in order to better equip the Union with "stable and ready-to-use frameworks"[542] to deal with emergency situations quickly and in a consistent way and thus render it unnecessary to resort to *ad hoc* responses. The new legislative frameworks have therefore been built upon the experience of the recent crises: they generalise and expand solutions that have proven successful (e.g., joint procurement) or politically imperative (e.g., to react to the instrumentalisation of migrants) while trying to fill the gaps that were exposed by the handling of the crises (e.g., lack of a centralised mechanism for the coordinated introduction of border controls and travel bans in a health emergency).

The development represents a shift from a constitutional (Treaty-based) to a legislative model of emergency regulation under which emergencies are no longer dealt on the basis of a constitutional empowerment (Treaty provisions) but rather through ordinary legislation, by "enacting ordinary statutes that delegate special and temporary powers to the executives".[543]

The shift to a legislative model of emergency regulation entails some significant advantages. Besides providing stable and predictable solutions, it allows the

[541] Conclusions of the European Council of 1–2 October 2020, paras. 3 and 4, EUCO 13/20.

[542] Along these lines see the explanatory memorandum accompanying the proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.

[543] J. Ferejohn and P. Pasquino, "The law of the exception: A typology of emergency powers," *International Journal of Constitutional Law*, Vol. 2, No. 2 (2004), pp. 210–239.

fragmentation of EU emergency competences to be overcome (see above Part I, Chapter II): ordinary legal bases have wider material scope and flexibility, which allows the legislators to introduce EU-wide emergency frameworks in areas where until now emergencies have been handled by Member State's taking unilateral measures (borders, freedom of movement). It also brings the matter back into the ambit of ordinary law-making, with all the guarantees that this entails.

Recourse to a legislative model of emergency regulation also entails drawbacks.[544] When used in times of crisis to provide an emergency response, ordinary legal bases have proved to be a viable option, but with some significant limitations, linked notably to the fact that the possibility to respond swiftly comes with a trade-off, limiting the co-legislators' capacity to exercise scrutiny on the proposed measures (see Section 1.1 above). When used in ordinary times to establish permanent crisis response frameworks, ordinary legal bases come with a number of inherent restrictions which influence the design and features of the measures that can be adopted. Depending on the chosen legal basis, these restrictions can thus affect and in fact weaken certain dimensions of the emergency response at the Union level, notably its solidarity dimension, which in turn could call into question the added value of Union emergency action in the first place (see Section 1.3 above on the limitations associated with the recourse to Article 114 TFEU).

Moreover, and perhaps most importantly, having permanent "stable frameworks" for crisis response established under ordinary legal bases entail the co-legislators defining in advance the set of emergency measures that can be adopted at Union level in relation to a given crisis situation. While the predefined set of measures generally codify and generalise measures that have already proved successful in recent crises, there is indeed no guarantee that future crises will raise the same challenges: the unpredictability of crises and the need to respond rapidly may mean that the legislative frameworks are insufficient to deal with the crises.[545]

Thus the shift to a legislative model of emergency regulation does not exhaust the need for Treaty-based emergency provisions: emergency competence remains essential to provide flexibility to the system and ensure that effective action is possible when required by the circumstances. This essential role is ensured by the complementary/parallel nature of emergency competence which excludes any possibility of pre-emption when ordinary legal bases are used to adopt crisis response frameworks and *vice versa*. It is further guaranteed by

[544] In their work, Ferejohn and Pasquino identify a number of limitations inherent in the legislative model of emergency regulation in relation to national legal orders. Some of these appear of particular relevance to the EU legal order and indeed are confirmed by the analysis of the recent practice as carried out in this section of the report.

[545] O. Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge, United Kingdom: Cambridge University Press, 2006).

the inclusion in secondary law instruments of clauses and governance arrangements to ensure the coordination between different crisis frameworks and Treaty-based emergency competence. Our analysis has, however, also shown that the multiplication of crisis frameworks in EU secondary legislation may well have consequences on the subsequent exercise of emergency competence, notably by restraining the discretion of the Council to justifying the recourse to a given emergency measure.

Moving to the substance of the new legislation, the multiplication of emergency frameworks has not entailed a paradigm shift in the allocation of emergency competence within the Union: Member States remain at the core of the crisis response and the first actors in emergency situations. However, the new legislative instruments aim to address the shortcomings exposed during the recent crises in the uncoordinated recourse to national emergency measures. They do so along two main lines: on the one hand, there is a significant strengthening of the procedural and transparency obligations that Member States need to respect when adopting unilateral emergency measures. In certain instances, substantive conditions or limitations are added, so that certain types of unilateral emergency measures are prohibited altogether,[546] or the discretion of the Member States is appropriately framed.[547]

On the other hand, the "new generation" of emergency legislation reflects a more expansive use of the competence of the Union in two ways. First, it incorporates emergency regimes in new domains of secondary law: crisis response frameworks are mainstreamed beyond areas traditionally characterised by particularly high or well-known risks (e.g., chemical products, environment, agriculture), and are considered as an inherent element of a comprehensive regulatory regime.[548] New regulatory spaces are occupied at the EU level, which may trigger the usual effect of pre-emption. In that regard, the developments in the domain of health are particularly relevant, particularly in light of the narrow scope of the original Treaty competence on the matter.

Second, the instances where Union institutions are empowered to adopt emergency measures as an integral part of an EU regulatory framework have significantly increased, thus introducing a trend towards a more centralised approach to crisis response. As a result, the space left to Member States for regulating crisis situations is significantly narrowed. When combined with the interpretative approach to derogation clauses followed by the Court of Justice and described in Part I, the legislative developments analysed in this part are

[546] See, for instance, Article 21 of the *Crisis Regulation*.

[547] See: Article 20 of the *Crisis Regulation* which lays down minimum requirements for Member States' emergency measures and Article 22 which requires the adoption of mitigation measures. See also: Article 5(4) of the *Schengen Borders Code* which allows Member States to adopt certain emergency measures in the case of instrumentalisation of migrants, subject to a number of conditions and limitations.

[548] See, in this sense, the explanatory memorandum to the Proposal for a Crisis Regulation in the field of migration. See also: the explanatory memorandum and the impact assessment report accompanying the proposal for a Single Market Emergency Instrument.

ineluctably bound to further restrict Member States' ability to successfully invoke a derogation.

This trend is supported and justified by a narrative according to which certain types of emergencies are better addressed at the European level than by Member States alone: crises expand the range of issues considered to be European (not just supranational) and needing to be addressed through the institutional setting of the Union and its policies.

The recent multiplication of crises response frameworks in ordinary legislation is thus ultimately indicative of the decisive influence of crisis situations and emergency measures on the development of Union policies. The dynamics of this interaction, and in particular the way this influence plays out in practice, will be the focus of the next chapter.

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

Emergency measures adopted in a situation of crisis interact with the exercise of ordinary powers to create dynamics in the EU legal order that go beyond the legal effect of those measures. In other words, emergency measures shape EU policies beyond the crises they are meant to address.

The practice developed in the aftermath of or during the crises analysed in present report shows that the phenomenon can take two different forms.

The first form of interaction between emergency and ordinary powers takes place via the creation of policy packages, whereby emergency measures and ordinary instruments are considered as a single whole for the sake of providing an effective response to the crisis or for political reasons. Policy packages create connections beyond the strict individuality of the legal acts constituting the package, which in practice have played an important role in ensuring the political and legal conditions for the Union to act. They have also provided an effective, yet unorthodox, way to exercise political control by actors that would normally be excluded from the decision-making (such as the EP or national parliaments) and thus helped to achieve greater legitimacy for emergency action. At the same time, policy packages remain controversial as they may impact the decision-making procedure as laid down in the Treaties and thus raise issues of institutional balance.

A second form of interaction relates to the dynamics that emergency measures bring to the legal order, by influencing the way EU policies are shaped *pro futuro*. The way this may happen will be analysed in the second section of this chapter, on the basis of a number of examples taken from recent practice. These examples show that the relevance of emergency measures hardly remains confined to emergency situations. In most cases, they are rather part of a complex regulatory cycle whereby the innovations introduced in times of crisis

receive political validation by incorporation in ordinary legislation. A focus on the cycle, rather than on the individual emergency measure, offers a better understanding of the way emergency powers shape the action of the Union and raises important questions as the implications that such a "crisisification" of EU law may have in terms of policy-making, protection of fundamental rights, and institutional balance.

2.1 The shaping of EU policies through policy packages

2.1.1 The practice of policy packages

Crisis situations may raise challenges of such a scale and complexity that they straddle several Union competences and policies and require broader policy action. However, this practical reality meets with the limitations that are proper to a legal order established on the principle of conferred powers.

The principle of conferral notably requires that any individual legal act must identify the appropriate legal basis for its own adoption under the Treaties. According to the Court of Justice this is a choice of constitutional significance[549] that needs to be made by the legislator on the basis of objective conditions amenable to judicial review, having regard in particular to the aim and content of the relevant act. When the act might be potentially based on two or more legal bases, the institutions must choose the provision that reflect the predominant purpose/content of the act. The recourse to joint legal bases must be limited to cases where the act genuinely pursue various purposes in equal way, provided that the decision-making procedure of the relevant legal bases are compatible with each other. Therefore, the legal basis requirement forces the legislator to cut through the complexity and breadth of the challenges as they present themselves in the real world along the boundaries of the policy areas for which competence is conferred on the Union and of the nature and extent of that competence.

Further complexity is added by the need to take into account the variable geometry that applies to certain area of the EU Treaties, particularly to Title V of the TFEU on the area of freedom, security and justice and to Title VIII on economic and monetary policy. Here, the effect of the system of protocols ensuring specific exclusions, and granting Member States opt-in or opt-out rights under primary law further induce fragmentation of the Union's action in order to safeguard the integrity of the domain in question and the different procedural rights of the Member States.

The need to reconcile these legal constraints with the demand for effective action at the Union level leads to a policy strategy whereby multiple instruments are proposed, negotiated and adopted as a part of a single, unitary package.

[549] Opinion 2/00, *Cartagena Protocol on Biosafety*, EU:C:2001:664; Opinion 1/19, *Istanbul Convention*, EU:C:2021:832.

The various elements of the package remain legally distinct and formally independent, each based on its appropriate legal basis, but they concur in pursuing a regulatory and political rationale.

The functional and political connections established between the elements of the package induce specific policy dynamics[550]: the overall political and regulatory balance will be played for and reached at the package level, with the consequence that nothing will be agreed until everything is agreed and that the negotiations of the different elements will have to be temporally synchronised[551]; the connections between the separate legal acts will leverage the role of institutions beyond the limitations of the legal bases associated with each one of them, and in particular will give the European Parliament a say on elements on which its role would otherwise be more limited[552] and will extend the relevance of the European Council's role of providing general political direction to the action of the Union[553]; conversely, the fact that one major component in a package is subject to unanimity in the Council will raise the bar for the decision-making in relation to other elements, regardless of the fact that they may be subject to qualified majority, as Member States leverage their veto power across the package.

These dynamics are essential to understand the rationale of legislative negotiations and of their outcome but create tensions with the legal requirements resulting from the principle of conferral as developed in the case-law, as those requirements remain essentially linked to the individual act.[554] Thus, the expansion of the normative reach of the whole package beyond the scope of

[550] For an analysis of the phenomenon of policy packages and the challenges it raises for EU legal order and the principle of conferral, see: M. Dougan, "EU Competences in an Age of Complexity and Crisis: Challenges and Tensions in the System of Attributed Powers," *Common Market Law Review*, 2024 (61), pp. 93–138.

[551] This phenomenon was very much evident in the negotiation of the New Pact on Asylum and Migration, where the acknowledgment that all the instruments at issue were part of a unitary package prevented the adoption of the less controversial proposals, on which negotiations among legislators were substantially completed. The Pact was finally adopted as a whole.

[552] As happened in the NGEU package negotiations, as illustrated below.

[553] See: the examples in Chapter I of Part I above on the key role played by the European Council in steering the response of the Union in crisis situations. For an assessment of this role, see: the analysis in Section 1 of Chapter IV in the present part.

[554] The case-law of the Court of Justice recognises a certain limited relevance to the overall policy context when assessing the legality of an individual legal act in light of the principle of conferral. A first case is the doctrine of ancillarity which accepts that the choice of the legal basis needs to rest on the "predominant purpose" of the instrument at stake, and thus accepts that the instrument may also pursue other policy objectives at the same time, and possibly straddle areas covered by other legal bases. Similarly, when the policy objectives are of the same relevance, the Court exceptionally admits the possibility of having recourse to two or more legal bases, provided that the respective decision-making procedures are compatible and would not undermine the prerogatives of the institutions. Finally, the overall package of which a legal act is part can be taken into account as part of the broader context in the framework of a contextual interpretation of its aim and content for the sake of establishing whether the legal act could be validly adopted on a given legal basis. It remains nonetheless that reference to the policy context remains a secondary factor, which does not alter the need to assess the legal act in its individuality.

individual legal bases could be seen as a case of competence creep; in a similar vein, the way the policy actors leverage their procedural role in relation to a single act across the whole package could be considered as infringing the principle of institutional balance. Finally, judicial control (to review either validity or a possible infringement) is also fragmented and focussed on the individual elements of the package, with the risk of altering the balance pursued at package level and compromising the effectiveness of the overall regulatory scheme or, conversely, of providing only partial and ineffective remedy. Ultimately, there appears to be a trade-off between strict legality and effectiveness as two concurring forms of legitimacy of the Union's action.

These dynamics are not specific to the action of the Union in situations of crisis as the phenomenon of policy packages is generally linked to the structure of the Union's competence. However, in situations of crisis, policy packages gain a particular relevance, since the urgency, complexity and scale of the challenges to be faced on the one hand and the limited scope of emergency provisions in the Treaties on the other make it particularly pressing to structure the Union's response as a set of measures based on different legal bases.

The best example of a policy package built to address a crisis situation is that set up to support the recovery from the economic consequences of the COVID-19 pandemic through a number of spending instruments financed by the issuance of common debt under the *Next Generation EU* scheme (*NGEU*) (see Part I, Chapter 1, paragraph 2.1.3. above).

The centrepiece of *NGEU* is the *European Union Recovery Instrument* (*EURI*),[555] a Regulation adopted on the basis of Article 122 TFEU and aimed at countering the risk of an uneven economic recovery, due to the varied impact that the pandemic had on the economies of the Member States and to their different abilities to absorb the economic and fiscal shock. In order to do that, *EURI* provides exceptional funding to various existing and new EU programmes in the form of grants and loans and in a spirit of solidarity among Member States (e.g., entailing a redistributive effect). In fact, the *EURI* Regulation is a very lean instrument, as it essentially defines in broad terms the type of measures that can be supported, identifies the amounts of resources to be allocated to the various programmes in the form of externally assigned revenues or loans to the Member States, and set out various derogations to the Financial Regulation for the implementation of the funding. The actual rules on how the spending takes place are left to a number of individual legal acts establishing the spending programmes, some of them already proposed by the Commission in the framework of the (then) ongoing negotiations for the 2021–2027 Multiannual Financial Framework and to which *EURI* financing would pro-

[555] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I, 22.12.2020, pp. 23–27.

vide a top-up,[556] and a completely new one, the *Recovery and Resilience Facility* (*RRF*), proposed by the Commission at the same time as *EURI* and designed to channel the vast majority of funds. Finally, a third essential component of the package was a proposal for a new *Own Resources Decision* (*ORD*), also presented on the same day, providing for the authorisation for the Union to borrow on the financial markets the EUR 750 billion necessary to finance the scheme and establishing a dedicated budget line within the own-resources ceiling aimed exclusively at providing the Union with the resources necessary to repay the common debt.

This recovery package was then negotiated as part of the already ongoing negotiations on the 2021–2027 MFF, which was itself presented and negotiated as a package, including the *MFF Regulation* proper, a number of legal instruments establishing the various spending programmes for the new multi-annual financial period and finally the proposal for a Regulation establishing a general regime for the protection of the Union budget in cases of breaches of the rule of law (*Rule of Law Conditionality Regulation*). This intricate political and legal architecture explains how the negotiations of the overall MFF-NGEU package were among the most complex in the history of the Union, culminating in a five-day European Council in July 2020 at which the Member States managed to reach an agreement on most of the issues through reciprocal concessions across the package. The pending issues (including the contentious *Conditionality Regulation*) and the need to negotiate certain components of the package with the European Parliament delayed a final agreement till a last minute December 2020 European Council which opened the way for the formal adoption of the various legal instruments, in accordance with the relevant procedures.

2.1.2 Impact of emergency measures on policy packages

It is interesting to stress that the dynamics identified above in relation to policy packages in general were all very much present in the negotiations on the NGEU package. In particular, the presence in the package of various instruments requiring unanimity in the Council (*ORD, MFF Regulation*) immediately created leverage for Member States to seek concessions across the package and among the various legal instruments.[557] However, the presence at

[556] These includes in particular the cohesion Funds as repurposed to address the challenges of the pandemic via the new *REACT-EU* Regulation, *Horizon Europe*, *Invest EU*, the *Rural Development Fund*, the *Just Transition Fund* and the spending measures included in the *RescEU* programme.

[557] In particular, the strong opposition of Hungary and Poland to the adoption of the *Conditionality Regulation* – an instrument based on Article 322 TFEU and thus subject to ordinary legislative procedure and qualified majority in Council – resulted in their opposition to reaching a final agreement on the *MFF Regulation* and *ORD*. The stalemate was finally solved at the December 2020 European Council where agreement was reached on a number of additional reassurances concerning the way the Conditionality Regulation was to be implemented, thus paving the way for the adoption of the whole package.

the centre of the package of an instrument based on an emergency legal basis added some peculiar dynamics that need to be underlined.

To start with, the connections between the elements of the package – *ORD, EURI* and *RRF* – are not merely political – as generally happens in policy packages – but have a legal relevance as well. This is the result of how the architecture of the financing scheme is designed: as *EURI* mobilises resources borrowed on the financial market on the basis of the empowerment set out in the *ORD*, its Article 3(3) makes the availability of the resources contingent on the entry into force of the *ORD*; similarly, the timeline defined in *EURI* for the entering into legal commitments for the grant part of the financing and for the granting of the loans, and the final deadline for the payments are then reflected in the implementation rules for the various spending instruments, and in the *RRF* in particular.

The legal relevance of the relationship between the elements of the package is also a very specific consequence of the fact that measures taken under Article 122 as an emergency legal basis need to satisfy specific conditions. As seen in Chapter II, Section 2.1 above, measures adopted on that legal basis have to be designed to address the situation of crisis (thus having an exceptional character), have to be temporary and finally have to be economic in nature. Since *EURI* relies on a number of autonomous spending programmes to pursue the objective of economic recovery from the pandemic, it is thus necessary that the essential characteristics of those programmes also duly translate the requirements that the measures adopted under Article 122 TFEU must respect. In other words, the legality of *EURI* cannot just be assessed in light of its own aim and content, but also in light of those of the spending instruments through which the resources are used.[558]

At the same time these very requirements for the financing scheme based on Article 122 TFEU to be exceptional and temporary, as further reflected in the design of the individual spending instruments, are the condition for ensuring that the use of external assigned revenues in such a sizeable amount remains compatible with the integrity of the own resources system as provided for in Article 311 TFEU and with the fundamental budgetary principles of unity and universality.[559] In other words, the conditions associated with recourse to

[558] The compatibility of the spending instrument with the crisis rationale underpinning Article 122 was one of the points analysed in the opinion of the Council Legal Service on the Proposals on Next Generation EU. The opinion of the CLS led to reconsideration of the inclusion of certain spending instruments among the beneficiaries of the NGEU funding; this was in particular the case of funds aimed at supporting the recovery in third countries, which for the Legal Service of the Council was difficult to reconcile with the principle of solidarity that should inform the measures adopted under Article 122 TFEU and that only applies to Member States. See: Opinion of the Legal Service, 24 June 2020, *Proposals on Next Generation EU*, Council document 9062/20.

[559] See: Opinion of the Council Legal Service, 24 June 2020, *Proposals on Next Generation EU*, Council document 9062/20. Article 311 TFEU provides that the budget shall be financed wholly from own resources "without prejudice to other revenue." While that provision makes clear that revenues other than own resources – such as external assigned ones – are a possibility, it also under-

Article 122 TFEU as a legal basis for *EURI* are also instrumental to ensure the legality of the spending under the NGEU financing scheme as a whole.

Second, the conditions associated with recourse to Article 122 TFEU were also instrumental in political terms, notably to ensure support for the whole NGEU package. In particular, the exceptional and temporary character of the instrument, as embedded in the legal requirements for the triggering of the legal basis, was crucial in providing the necessary guarantees to reassure those Member States that were very much afraid that the scheme could establish a permanent fiscal capacity for the Union, by opening the door to future operations of "borrowing for spending."

In that regard, it is interesting to observe how the institutions made use of their discretion to place certain elements of the overall scheme in one legal act rather than in another to create the conditions for a broader support. This is for instance the case of the inclusion in the *Own Resources Decision* of the empowerment to the Union to borrow on the financial market the resources to finance the overall NGEU scheme, as well as the inclusion of a general prohibition for the Union to have recourse to borrowing in order to finance operational expenditure outside the case of NGEU. It has to be stressed that the empowerment to the Commission to borrow on the financial market to finance a spending instrument had previously been considered as an ancillary financial rule to that instrument and therefore systematically introduced in the relevant basic act.[560] This practice is justified in light of the very nature of borrowed money. Proceeds from borrowing can hardly be considered a category of own resources as they establish a liability that needs to be repaid rather than an asset. Since both the special empowerment and the general prohibition to borrow relate more to the establishment of a common debt rather than to its repayment, they do not appear to fall within the scope of *ORD* and Article 311 TFEU. They can be considered ancillary elements to the arrangements for financing the repayment of the borrowed amounts.[561] Yet, the inclusion of these elements in the Own Resources Decision, which is adopted by Council at unanimity and enters into force only once approved by the Member States in accordance with their respective constitutional requirements, has made it possible to ringfence the perimeter of the final deal in an instrument subject to a very demanding decision-making procedure, while at the same time ensuring

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lines that this should remain an exceptional occurrence. The reliance on own resources as the primary source of finance for the budget is also a corollary of the requirement for sufficient means to be granted to the Union for the attainment of its objectives and thus of its financial autonomy. Thus, in order to be compatible with the treaties, external assigned revenues must remain additional or complementary to own resources. According to the Legal Service, such a complementarity or additionality is not just to be assessed in quantitative terms, but must also take into account qualitative elements and safeguards that are in place to avoid recourse to external assigned revenues subverting the integrity of the own resources system.

[560] This is the case of *SURE* and all instruments providing for macro financial assistance to third countries.

[561] See the opinion of the Legal Service of the Council quoted above.

that its crucial aspects (creation of common debt but only on an exceptional basis) could be submitted to the national parliaments for their approval.
In a similar vein, while merely consulted for the adoption of the *ORD,* the European Parliament managed to leverage its role as co-legislator in the negotiations of the spending instruments, and notably of the *RRF*, as well as its power of consent to the *MFF Regulation*. The negotiation of the Interinstitutional agreement on budgetary discipline among the three institutions as part of the package provided a further opportunity for the Parliament to leverage its position.[562] As a result, if its influence on the overall size of the MFF-NGEU package was limited to few top-ups to specific programmes,[563] its participation in the negotiations significantly shaped the objectives and priorities of the recovery scheme as well as the spending arrangements. This in particular led to the inclusion of additional procedural mechanisms to ensure the Parliament's involvement in the use of NGEU external assigned revenues and new budgetary powers in the event of any crisis mechanisms based on Article 122 TFEU being set up in future.[564]
The dynamics that the design of the NGEU policy package has introduced raise eyebrows from the point of view of the principle of institutional balance, as the practice of the negotiations significantly impacted the decision-making processes as envisaged for individual legal acts. At the same time, the Court of Justice has acknowledged that in so far as the voting procedures are respected, nothing precludes the institutions from taking into account broader political considerations – such as the importance to achieve the greatest possible majority in Council in relation to a certain matter – when organising the timing and modalities of their discussions (and thus, for instance, to wait for the "common accord" of the Member States when deciding on the conclusion of an international agreement by the Union – see in that regard para 252 and 253 of Opinion 1/19, *Istanbul Convention*). Moreover, the complex design of NGEU played a crucial role in ensuring that, beyond the substantive and procedural

[562] Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ L 433I, 22.12.2020, pp. 28–46.

[563] See, in particular, Article 5 of the MFF Regulation, introducing a mechanism allowing for an increase in the ceilings for commitment and payment appropriations equivalent to the amount of fines collected by the EU, with a cap of EUR 11 billion over the MFF period. Additional resources were secured via an agreement with the Council on the use of return flows in the domain of aid to development and the possibility to make available again certain decommitted appropriations in the area of research.

[564] See, in particular, Part H of Annex I to the Interinstitutional Agreement on budgetary discipline on "Cooperation as regards the European Union Recovery Instrument" and the Joint declaration of the European Parliament, the Council and the Commission of 16 December 2020 on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget, OJ C 444, 22.12.2020, p. 5. These mechanisms of control will be further analysed in the following section.

conditions for the legality of the individual legal acts, the overall scheme was politically acceptable and received the broadest possible democratic support, via the involvement of the Council voting unanimously, the European Parliament and the national parliaments in key aspects of the construction.
Ultimately, the example of the NGEU policy package illustrates well how the setting up of a political package around an emergency measure generates legal and political linkages that expand the emergency rationale proper to that measure well beyond its scope and, in so doing, shape the overall policy response by framing the ordinary legal instruments included in the package.

2.2 The shaping of EU policies through the policy cycle

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

The case-studies examined in this report show that emergency measures deployed in situations of crisis to tackle specific and contingent needs are often intertwined with the evolution of ordinary legislation. Rather than remaining isolated normative events – as their immediate purpose and legal effect would suggest – they induce, contribute to or reshape Union policies according to a variety of patterns.
First, crisis situations are occasions when existing legislation is put to the test, as they expose drawbacks, gaps, and flaws in the regulatory regime. The adoption of emergency measures offers an immediate and temporary *ad hoc* response to such shortcomings but at the same time makes an argument for additional reform. In the aftermath of a crisis, an assessment of the lessons learnt may prompt legislative initiatives aimed at fixing the identified shortcomings through a further development of the regulatory framework.
A good example of this dynamic is provided by the shortcomings exposed by the adoption in the early phase of the COVID-19 pandemic of uncoordinated national emergency measures relating both to free movement of persons and to the supply of goods and services of critical importance for responding to the crisis.
As the recitals of the *IMERA Regulation* make clear, the existing rules at the Union level were not sufficient to avoid those problems. In particular, the emergency actions carried out unilaterally by Member States exacerbated some of the difficulties.

> Ad-hoc measures taken by the Commission in order to re-establish the functioning of the internal market, based on the existing rules, were not sufficient. The Union was not sufficiently prepared to ensure efficient manufacturing, procurement and distribution of crisis-relevant non-medical goods, such as personal protective equipment. Measures to ensure the availability of crisis-relevant non-medical goods during the COVID-19 crisis were necessarily reactive. The CO-

> VID-19 crisis also revealed insufficient information sharing and an insufficient overview of manufacturing capacities across the Union, as well as vulnerabilities related to intra-Union and global supply chains.
> Furthermore, uncoordinated measures restricting the free movement of persons had a particular impact on sectors that rely on mobile workers, including workers in border regions, who played an essential role in the internal market during the COVID-19 crisis.[565]

The recourse to *ad hoc* emergency solutions, like triggering the Integrated Political Crisis Response arrangements to coordinate Member States' action within the Council, provided some responses but was ultimately not sufficient. This finding allows the co-legislators to build the case for a shift in the model of emergency response: from the existing one based on a decentralised approach whereby Member States are responsible for addressing situations of crisis by unilateral emergency measures to a more centralised approach, where additional obligations are laid down and emergency powers are allocated at the Union level:

It emerged that there is a need for arrangements between the Member States and Union institutions, bodies, offices and agencies as regards contingency planning, technical level coordination and cooperation, and information exchange. Additionally, it became clear that the lack of effective coordination between Member States exacerbated the shortages of goods and created more obstacles to the free movement of services and persons.[566]

These needs have been now addressed in specific provisions of the *IMERA Regulation*, which has introduced new obligations on exchange of information about unilateral national measures, has prohibited certain types of measures and has introduced specific requirements to be complied with when adopting measures that are not prohibited.

The introduction of the mechanism of priority-rated requests in *IMERA* followed the same dynamics. As the COVID-19 pandemic unfolded, the issue of prioritisation in the procurement of vaccines emerged as particularly pressing. Given the lack of a specific regulatory mechanism to that effect, the issue was approached by the Commission on a contractual basis, by introducing provisions aimed at ensuring and in certain cases prioritising the delivery of vaccines to the Union. That solution, however, fell short of the much stronger framework provided for in other legal orders, such as the US one, where the government had the possibility to invoke statutory provisions to conclude priority-rated contracts with economic operators, taking automatic precedence over any other contractual engagement.[567] As a result of this experience, the Commis-

[565] Recitals 2 and 3 of the *IMERA Regulation*.

[566] Recital 4 *IMERA Regulation*.

[567] See: European Court of Auditors Special Report 19/22, "EU COVID-19 vaccine procurement – Sufficient doses secured after initial challenges, but performance of the process not sufficiently addressed," at points 22 to 26, 43 and 44.

sion proposed to introduce in *IMERA* a similar mechanism of priority-rated orders, even if ultimately the co-legislators opted for a less stringent system of priority-rated requests (see Section 1.2.2. of this Chapter above).

Similarly, the 2024 amendment of the Schengen Borders Code has strengthened the procedural safeguards associated with the re-introduction of border controls by Member States. Moreover, in the specific case of a large-scale public health emergency, the Code now confers on the Council the power to authorise the adoption of internal border controls or to adopt binding rules on travel to the Union (travel bans), which is a significant departure from the traditional regulatory approach to border management whereby Member States remain responsible for adopting emergency measures.

A second type of dynamic occurs when innovative emergency measures adopted in times of crisis have proved to be successful and effective, and that success prompts an argument for them to be incorporated permanently in the ordinary regulatory framework.

An example of this is provided by the introduction of a mechanism for the joint procurement of medical countermeasures during the COVID-19 pandemic. As the Council noted in April 2020, "existing EU instruments are limited in scale and therefore do not allow a sufficient response or make it possible to address effectively the large-scale consequences of the COVID-19 crisis within the Union." These limitations in particular concerned the absence of a system allowing the Commission to procure vaccines on a large scale on behalf of the Member States.[568] The issue was addressed by means of an emergency measure, adopted on the basis of Article 122(1): in April 2020 the Council adopted an amendment to the Council Regulation on emergency support within the Union that, besides extending the instrument to the financing of actions immediately relevant to the COVID-19 pandemic, introduced a number of temporary derogations to the Financial Regulation to allow the Commission to negotiate contracts on behalf of the Member States for the implementation of relevant actions (and notably the procurement of vaccines).[569] In the aftermath of the pandemic, the conferral on the Commission of the power to jointly procure

[568] At the time of the adoption of the Council amending decision of the Crisis Support Instrument, the Financial Regulation only allowed the possibility for a joint procurement between Institutions and the Member States, but not allowed the Commission to handle procurement procedures on behalf of the Member States, e.g., having the Member States as final beneficiaries. Article 5 of the existing Decision 1082/2013 on serious cross-border threats to health did allow for joint procurements of medical countermeasures by Member States, but the instrument was designed as preparedness instrument and thus did not provide the flexibility and speed to respond to the extreme urgency of the unfolding pandemic. Finally, the Emergency Support Instrument did not allow the Commission to fund the purchase of supplies on behalf of Member States.

[569] Article 4(5) (b) and (c) of the *Emergency Support Instrument* as amended. See also European Court of Auditor Special Report 19/22 quoted above, points 22–26.

vaccines on behalf of the Member States was considered a success story,[570] and led to the inclusion in a number of ordinary legislative instruments of the possibility for the Commission to organise joint procurement procedures in various sectors, including a general residual provision in the *IMERA Regulation*. At the same time the Financial Regulation (see Section 1.2.4. of this chapter) was amended to permanently accommodate the rules for the implementation of these new possibilities.

A second example is provided by the experience of the *EU Digital COVID Certificate Regulation*, which although adopted on an ordinary legal basis, was in fact conceived as a crisis instrument of limited duration (see Part I, Chapter I, Section 2.3.2). The Regulation was designed to address difficulties for the freedom of movement of persons during the pandemic and to that end it introduced common rules for the issuance, verification and acceptance of COVID-19-related certificates. The instrument proved extremely effective in facilitating travel and in contributing to the lifting of unilateral measures restricting the movement of persons, as Member States moved from early restrictions based on the health risk in the geographical area of origin to restrictions based on the health condition of the individual as shown by the certificate (see Part I, Chapter I, Section 2.3).[571] Following the success of the measure, it is not surprising that the ordinary legislator introduced similar mechanisms (e.g., empowering institutions to adopt digital templates and tools aimed at facilitating the identification of categories of persons or the verification of certain facts) both in the *IMERA Regulation572* and in the *Schengen Borders Code* reform.[573] [574]

These two examples – the joint procurement of medical countermeasures and the COVID-19 certificates – also show another interesting interplay between emergency solutions and ordinary legislation: once a solution found in a specific domain proves to be effective during a specific emergency, it is then generalised and mainstreamed across different domains, even if they

[570] Ibidem, point 73.

[571] For an assessment see European Court of Auditors Special Report 1/23, "Tools facilitating travel within the EU during the COVID-19 pandemic – Relevant initiatives with impact ranging from success to limited use," in particular points 69 to 74.

[572] See: Article 22 on mitigation measures for the free movement of persons: during the internal market emergency mode and for the purpose of facilitating the free movement of certain categories of persons, the Commission is empowered to provide Member States with digital tools to facilitate the identification of the categories of person and verification of the relevant facts.

[573] See: Article 21a of the amended Borders Code and Recital 9 of the Amending Regulation, which empower the Council in the event of a large-scale public health emergency to adopt an implementing regulation setting out temporary restrictions on travel to the Union, and which clarify that in that Regulation the Council can specify the conditions under which travel might be permitted, including the requirement to use digital certification systems.

[574] A third example of situation where a measure adopted to address a contingent situation of crisis is then generalised for the future is the inclusion in the Common Provisions Regulation for the period 2021–2027 of a number of the crisis-related derogations already adopted in the framework of the *CRII* and *CRII plus* as a reaction to the COVID-19 pandemic. See Section 1.2.4 of this chapter above.

are completely unrelated to the situation to which it was first applied (e.g., joint procurement rules or priority-rated requests/orders applied to defence contracts).

It is to be noted that impetus for legislative reform can also be prompted by difficulties experienced in the implementation of emergency measures. A clear example of this situation is offered by the two *2015 Relocation Decisions* adopted on the basis of Article 78(3) (see Part I, Chapter I, Section 1.1 above). The very modest outcome of the relocation programme envisaged by the two Decisions contributed to convincing the Commission to withdraw its original 2015 proposal for a permanent mandatory relocation mechanism[575] and instead to opt for a more flexible solution in the framework of a new proposal presented as part of the New Pact on Migration and Asylum.[576]

A third type of dynamic concerns situations where the crisis and the emergency measures adopted to respond to it operate as accelerators of legislative reforms that were already in the making but had encountered political or other difficulties which prevented their adoption.

A first example of this situation is offered by *SURE,* a temporary financing scheme established at the outset of the COVID-19 crisis to mitigate the unemployment risks linked to the pandemic. Before *SURE,* the possibility to establish a European unemployment reinsurance scheme had been debated since the 1970s as part of the debate on the establishment of a Monetary Union. In the aftermath of the 2008 financial and economic crisis the idea gained a new momentum, notably in studies and resolutions[577] of the European Parliament which strongly advocated for the introduction of a common unemployment insurance scheme for the euro area. The Commission put forward the idea again as part of its 2017 reflection paper on the deepening of the Economic and Monetary Union[578] and finally incorporated it as one of the possible applications of the proposed European Investment Stabilisation Function.[579] Due to the strong reluctance from Member States, however, the proposal failed to gain traction in Council. The pandemic dramatically changed the political context, leading to the rapid adoption of *SURE,* which was adopted on the basis of Article 122 TFEU and can be considered as the emergency operationalisation of a European unemployment reinsurance scheme.

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[575] Proposal of 9 September 2015 for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism, COM/2015/0450 final.

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

[577] European Parliament, Resolution of 16 February 2017 on budgetary capacity for the euro area, 2015/2344(INI).

[578] European Commission, Reflection Paper on the deepening of the economic and monetary union, COM(2017) 291.

[579] Proposal for a Regulation on the establishment of a European Investment Stabilisation Function, COM(2018) 387.

Another example is provided by the *Recovery and Resilience Facility,* whose architecture was largely borrowed from a different instrument being discussed at the moment when the COVID-19 pandemic struck: the proposed *Budgetary Instrument for Convergence and Competitiveness* (*BICC).*

The *BICC,* which itself evolved from the Commission proposal for a *Reform Support Programme*,[580] was meant to be a spending instrument aimed at providing financial incentives for the implementation of structural reforms and public investments necessary to foster the convergence and competitiveness of the members of the euro area. The instrument aimed to strengthen the monetary union by complementing the system of budgetary surveillance and strict economic policy requirements with a budgetary instrument that should support the euro area members in their efforts to achieve economic reform. Proposed on the basis of Article 175(3) TFEU (cohesion) like the *RRF*, the BICC envisaged the submission by the Member States of a "package" of reform and investment which should respond to the challenges identified in the European Semester. Following the approval of the package by the Commission, Member States would receive financial support upon the achievement of milestones and targets laid down in the package. The financing would take the form of grants financed by the Union budget for a modest amount; however, the envisaged budget could be supplemented by voluntary contributions from the Member States to provide a critical mass to the instrument.[581]

While the *BICC*'s main objective was quite different from economic recovery from the pandemic, it is interesting to note that its legal and financial architecture already contained the fundamental elements that would then characterise the *Recovery and Resilience Facility* proposal (submission of a package/plan of reforms and investments; coordination with the priorities identified in the European Semester; financing linked to the achievement of milestones and targets and not the usual cohesion model of reimbursement of costs); crucially, the idea of an instrument aimed at supporting the reforms and investments necessary to strengthen the economies of the Member States remained fundamentally the same.[582] After more than two years of difficult negotiations in Council, the Commission finally withdrew the proposal for the RSP/BICC at the moment it presented the *RRF* proposal which was successfully agreed upon in less than nine months.

A final example is provided by some of the emergency measures adopted on the basis of Article 122(1) TFEU to react to the energy crisis prompted

[580] Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme, COM(2018)391 final.

[581] Unlike the case of the *RRF* a major legal and political problem in the negotiation of the *BICC* was to design a (quantitively) meaningful instrument to be financed via the EU budget but fundamentally aimed at the needs of the euro zone members only.

[582] Indeed, one of the criticisms levelled at the RRF is its strong connotation as an instrument of broader economic policy geared towards the convergence of Member States' economies rather than being a cohesion instrument aimed at providing support in facing the immediate consequences of the pandemic.

by the Russia's war of aggression against Ukraine. At the moment when the war broke out, the co-legislators were already discussing the reform of the regulatory framework for gas and hydrogen markets, as part of the so-called gas package. While the discussions continued and finally led to the adoption of the new ordinary framework in July 2024, certain of the elements of the reform were "frontloaded" by incorporating them in emergency measures already adopted in 2022. This was notably the case of certain provisions on transparency for the energy market, adopted in the framework of the emergency Council Regulation 2022/2576 on the facilitation of joint gas purchases.[583]

These three examples show that the political pressure created by the need to provide responses to the crisis can be effectively used by the Commission to overcome existing political resistance and thus push forward a pre-existing regulatory agenda. In particular, the urgent and provisional nature of the measures to be adopted can help to promote the acceptance of innovative and controversial solutions that would be opposed if presented as definitive. At the same time, if the emergency measures ultimately prove to be effective, the argument for pursuing the original legislative proposal would in turn be strengthened.

It is important to stress that according to the dynamics identified in the previous paragraphs, emergency measures have an impact on the legal order which is broader than their (temporally) limited legal effects. The above examples show that in many cases the exercise of emergency powers is in a dialogic relationship with ordinary legislation and ultimately contributes to the latter's evolution. Rather than a factor of mere rupture from the ordinary regulatory framework, emergency powers operate as a vehicle for change in the fabric of the ordinary legislation.

One important effect of this normative dynamic is that the area subject to an emergency regime is eventually brought back to the ordinary law making procedure and the co-legislator becomes fully involved according to the relevant material legal basis, thus having the opportunity to exercise a form of control *ex post* on the emergency powers adopted at the EU level.

Thus, certain of the emergency measures adopted to face the gas supply crisis due to Russia's war of aggression against Ukraine were then "repatriated" in the permanent framework under ordinary legislation, often after an intense legislative debate as to whether those measures had proved effective and whether it was appropriate to apply them in "ordinary" times, notably in relation to their impact on other protected interests. For instance, this was the case for several measures for accelerating the permit-granting procedure

[583] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (OJ L 335, 29.12.2022, p. 1). See, in particular, the measures enhancing the transparency and access to LNG terminals and gas storage facility, as clarified in recital 31.

for renewable energy technologies (e.g., the introduction of a presumption that the deployment was in the public interest) introduced in the emergency Council Regulation 2022/2577 and then incorporated in the *Renewable Energy Directive (RED)*, while other measures were not considered appropriate for permanent inclusion in the ordinary regime. Similarly, the *Gas Market Package Reform*[584] transformed some of the crisis measures introduced by emergency Council Regulation 2022/2576 into permanent features of the natural gas market.[585]

It is interesting to note that in certain cases the Commission anticipates this form of legislative control by submitting at the same time – or within a very short time frame – both a proposal for emergency measures and a proposal for a corresponding change in the ordinary legal framework, thus allowing the two procedures to run in parallel.

A good example of this approach is offered by the practice of emergency measures in the area of migration. Both in 2015[586] and again in 2021,[587] the Commission complemented its proposals for temporary emergency measures for the benefit of specific Member States under Article 78(3) TFEU with legislative proposals for permanent changes in the ordinary legal framework applicable to all Member States. On both occasions, the Commission made clear that the adoption of provisional emergency measures was exceptional and did not remove the need for broader legislative intervention; in fact the Commission stressed that, once adopted, the permanent framework would render it unnecessary to resort to Article 78(3) in the same circumstances.

A similar pattern can be found in the recent application of Article 213 TFEU, on urgent financial assistance to Egypt. On 15 March 2024, the Commission proposed a package of assistance in the form of two macroeconomic financial assistance (MFA) operations: a short-term MFA operation of EUR 1 billion, to address Egypt's particularly urgent financing needs, to be adopted as an emergency measure via a Council decision based on Article 213 TFEU and a regular MFA operation of EUR 4 billion over 2.5 years, to be adopted ac-

[584] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No. 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No. 715/2009, OJ L, 2024/1789, 15.7.2024.

[585] That concerned, in particular, the mechanism for demand aggregation and the joint purchasing of natural gas, measures to enhance the use of LNG facilities and natural gas storage, and additional solidarity measures in the event of a natural gas emergency.

[586] See: Part I, Chapter I, Section 1 on migration crises. During the 2015 migration crisis, the Commission submitted a proposal for a Regulation establishing a crisis relocation mechanism based on Article 78(2)TFEU on the same day as the submission of the second Relocation Decision for the benefit of Italy an Greece based on Article 78(3)TFEU, that is on 9 September (the first Relocation Decision had already been submitted on 27 May).

[587] During the 2021 Belarus migration crisis, the Commission submitted a proposal for a Regulation addressing situations of instrumentalisation based on Articles 78(2) and 79(2) only 13 days after having presented a proposal for a decision for the benefit of Latvia, Lithuania and Poland based on Article 78(3)TFEU.

cording to Article 212 TFEU (ordinary legal basis for MFA, subject to ordinary legislative procedure). The ex ante evaluation statement accompanying the two proposals clarifies the relationship between the two instruments according to the Commission:

> Using Article 213 TFEU is clearly a second-best option, but a first disbursement still in 2024 in response to Egypt's particularly acute financing needs this year would appear impossible if the decision was to be adopted by both the Parliament and the Council in accordance with Article 212 TFEU […]. The recognition of the second-best nature of relying on Article 213 motivates the split of the package into two proposals, rather than one proposal under Article 213 for the entire support, where the limited share of the first part within the overall volume of support under the package has been calibrated taking this into account, in addition to Egypt's urgent financing needs.

In all these cases, by submitting at the same time a proposal for emergency measures and a proposal for an instrument under the ordinary legal basis, the Commission shows to the co-legislators – and to the Parliament in particular – that it takes seriously the exceptional nature of measures adopted under emergency legal bases, by clarifying that they are not meant to regulate the matter on a permanent basis. It, however, also creates the conditions for the legislator to immediately start a legislative debate – and possibly to intervene – on the merit of the policy choices underpinning the proposed emergency measures.

2.2.2 A crisis-driven policy cycle

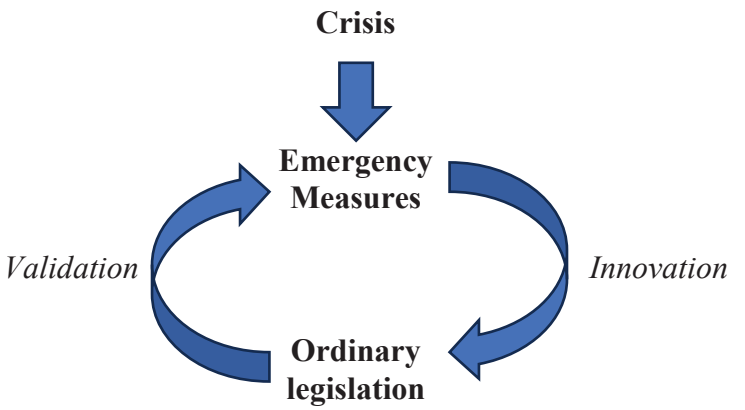
The various patterns of interaction between emergency measures and ordinary legislation identified in the previous paragraph in relation to the situations of crisis examined in this report are illustrative of a policy dynamic whereby emergency measures provide a crucial input for work of the ordinary legislator and the shaping of EU policies for the future. At the same time, the ordinary legislative discussion allows for a broader debate on the scope and effectiveness of the measures adopted under the pressure of emergency.

The reciprocal interactions between emergency measures and ordinary legislation therefore lead to a normative cycle that shapes EU lawmaking and that can be illustrated as follows (Figure 1).

Situations of crisis raise challenges and allow the identification of contingent needs that justify the adoption of emergency measures derogating from or supplementing existing regulatory regimes on a temporary basis. The innovations introduced by emergency measures may prompt reflections as to their effectiveness and whether it would be opportune to introduce a permanent

change in the ordinary regulatory framework. When this materialises in a proposal for new legislation, the legislative debate offers an opportunity for the co-legislators to validate the solutions introduced with the emergency measures or, conversely, to challenge them in favour of different policy choices.

Figure 1
Normative cycle of EU lawmaking



This policy cycle complements (and can also overlap with) the mechanism of cross-validation occurring in the case of policy packages, as explained in the previous chapter. Together, the two dynamics help to address the shortcomings usually associated with recourse to emergency competence – the dominance of the executive and the lack of sufficient democratic scrutiny – by allowing the relevant institutional actors to validate the policy outcome in a broader context than the adoption of the emergency measures individually considered.

It is thus interesting to note that, while not providing for formal arrangements like the ones that can be found in several national constitutions and that require the legislator to validate the use of emergency powers by the executive,[588] the informal mechanisms identified in this section give the Union ordinary legislator a certain degree of control over the exercise of emergency powers.

As the holder of the right of initiative, the Commission plays a central role in ensuring the smooth functioning of these supplementary validation mechanisms. In particular, the tempo and design of the legislative proposals that the Commission brings forward is essential in ensuring that the legislative debate is triggered in a timely and effective manner.

It would, therefore, be possible to enhance the scrutiny of the Union legislator

[588] See, for instance, Article 77 of the Italian Constitution.

over the exercise of emergency powers by strengthening the dynamics identified in this section, and notably by giving them a certain level of formality and predictability. This could be achieved without the need for Treaty change but by appropriate arrangements among the institutions. For instance, an interinstitutional agreement could be concluded engaging the Commission to supplement where appropriate its proposal for emergency measures to tackle a specific crisis situation with the appropriate legislative proposals so as to equip the ordinary legal framework to address similar situations on a more permanent basis. In addition, measures adopted on the basis of emergency provisions could include enhanced reporting obligations for the Commission, requiring it to assess the need to adapt the ordinary legal framework in light of the lessons learnt from the implementation of the emergency measures.

This solution would have the advantage of contextualising the use of emergency powers and placing them in a broader normative cycle, leading to mutual reinforcement of the roles of the ordinary legislator and of the emergency decision-maker. The engagement would provide the necessary reassurances that the Commission and the Council take seriously the exceptional character of emergency measures and that the space for a democratic debate on the content of the measures is safeguarded. This would in turn increase the legitimacy and acceptability of the emergency action at the EU level, while preserving its effectiveness.

Concluding remarks: A crisisification of Union policies?

This section has looked at emergency measures and at their relationship with ordinary legislation beyond the dimension of individual legal acts. Taking a broader perspective, it has focussed on the way they interact in the framework of complex policy packages or concur in activating a normative cycle which provides impetus to the Union's policymaking.

The shift of focus from the individual emergency measure to the broader policy dynamics within the EU legal order provides a better understanding of the role that emergency powers play beyond the situations of crisis they are meant to address and of the underlying institutional tensions. It also allows to take a fresh look at the classic problems associated with recourse to emergency measures – notably the need to avoid the dominance of the executive – and to propose pragmatic solutions that leverage those dynamics to ensure that the role of the ordinary legislator is safeguarded and that the policy choices made during the emergency are subject to democratic scrutiny.

However, the dynamics we have identified also raise important questions as to the consequences of having a policy cycle driven by crises and emergency response.

In institutional terms, one can wonder whether the involvement of the ordinary legislator in a crisis-driven process, whereby solutions introduced by

emergency measures are generalised and incorporated in the ordinary legal framework, really allows for a meaningful democratic debate. The risk exists that the co-legislators, and notably the Parliament, will find themselves faced with a *fait accompli*: the political pressure to "ratify" solutions already proven to be successful, demonstrating the capacity and effectiveness to address a situation of crisis, will ultimately leave the legislators with a limited margin of manoeuvre when negotiating changes to the ordinary legal framework. In that regard, however, it is interesting to note that it is sometimes the Parliament that pushes the hardest for certain emergency provisions to be integrated into permanent rules, as has been the case of the emergency provisions adopted under Article 122 TFEU in the framework of the energy crisis.

Even if this risk does not seem confirmed by the practice analysed in this report – as the Parliament managed to make a relevant contribution in the design of the ordinary legislative instruments adopted in the aftermath of the crises analysed – the fact remains that the involvement of the ordinary legislator in the forms described in this chapter can only ensure *ex post* control of the exercise of emergency powers.

Such a form of scrutiny will be of little relief in the case of emergency measures that have entirely exhausted their effect and are not intended to be incorporated in a permanent legal framework. This is for instance the case of emergency spending instruments, and notably some of the most relevant emergency measures adopted under Article 122 TFEU (e.g., *SURE, EURI, ESI*) for which, however, other forms of parliamentary control can enter into play, as we will see in the next section.

In substantive terms, as the numerous examples described in this chapter have shown and academic literature has already underlined,[589] the "crisis approach" simultaneously shapes the agenda, the process and the content of policy-making. Crisis-based solutions are taken as a blueprint for the design of ordinary regulatory frameworks, while crisis modes become generalised and multiply across the different policy areas falling under Union competence.

This approach is associated with an expansion of the notion of crisis which goes well beyond the specific and limited situations covered by the emergency provisions of the Treaties. Secondary legislation multiplies the type of crises which trigger emergency regimes to include situations that – far from being exceptional – are inherent in the (mal)functioning of the market, such as the disruption of supply chains, shortages and obstacles in trade (as in *IMERA,* the *EDIP* proposal or the *Chips Act*). In other cases, an eminently political element is introduced in the definition of crisis, as

[589] M. Rhinard, "The Crisisification of Policy-Making in the European Union," *Journal of Common Market Studies*, 2019 (57), p. 616; J. White, "Constitutionalizing the EU in an Age of Emergencies," *Journal of Common Market Studies*, 2023 (61), p. 781.

in the case of the notion of instrumentalisation of migrants under the *Crisis Regulation*.[590]

All this results in a progressive "crisisification" of substantive EU law, which introduces into the logic of ordinary regulation the exceptionalism which characterises recourse to emergency measures. The presentation of certain events as "crises" justifies recourse to extraordinary regimes that suspend or supplement the application of the ordinary legal framework in relation to a targeted situation or a targeted group of individuals upon the occurrence of certain situations. So, a form of "permanent exceptionalism" takes shape, which is integrated in ordinary law, altering its scope and becoming the new normal.[591]

This dynamic is particularly problematic in relation to areas where the upholding of individual rights and freedoms is at stake: as the number of crisis frameworks multiplies, the scope of ordinary rules is eroded and the restriction of rights and freedoms becomes a permanent feature of the regulatory regime.[592] This entails the risk of moving from one emergency regime to another and precluding any possibility to restore in full and rapidly the rights and freedoms that have been restricted.

Here again, the institutional lawyer is called upon to play a crucial role in ensuring that the necessary guarantees are in place so that the multiplication of crisis regimes across legislative instruments remains compatible with the Charter. This explains the particular attention paid by the legal advisors of the institutions to frame and provide sufficient justification for any envisaged interference with fundamental rights in situations of crisis as part of their advisory role during the legislative process. In particular, the advice of the institutional lawyer will be particularly important to ensure that the legislators assess with due care whether the limitations of rights and freedoms by the measures to be adopted under the permanent crisis framework are appropriate for ensuring the protection of a relevant public interest, do not exceed what is necessary to attain that objective, and do not affect the essence of the right or freedom in question.

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[590] The definition of instrumentalisation in Article 1(4)(b) of the *Crisis Regulation* requires it to be established that the encouragement or facilitation of migratory movements by a third country or a hostile non-state actor was carried out with the aim of destabilising the Union or a Member State. Recital 28 clarifies that "it is relevant to consider whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants."

[591] T. Houghton, "Is Crisis the New Normal? The European Union in 2015," *Journal of Common Market Studies*, 2016 (54), p. 5.

[592] In relation to the area of migration, Moreno-Lax critically underlines how "crisis" has become a mode of governance enabling new policy dynamics and decision-making processes, and ultimately leading to the normalisation of fundamental rights limitations via a permanent reshaping of ordinary legislation via crisis framework modes. V. Moreno-Lax, "The "Crisification" of Migration Law: Insights from the EU External Border," in S. Burch Elias, K. Cope and J. Goldenziel (eds.), *The Oxford Handbook of Comparative Immigration Law*, Oxford University Press, 2023.

IV. EMERGENCY AND ITS IMPACT ON THE UNION INSTITUTIONAL BALANCE

> "In times of crisis, the limits of institutions built on attributed competence are quickly reached"
>
> E. Van Rompuy[593]

Introduction

This Section will look at whether the balance of powers between the Union institutions has been affected by recent emergencies. The Union derives its powers from the Treaties, and competences not conferred upon the Union in the Treaties remain with the Member States.[594] When it comes to interactions between the Union's institutions, each institution must act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions must practice mutual sincere cooperation.[595] Those basic principles are the foundation of the specific constitutional set-up of the EU.

Emergency situations, however, may require the institutions to adapt the ways in which they function and interact, creating the opportunity – some would argue even the need – for activism by some, while others would suffer an erosion of their prerogatives. This chapter looks in greater detail at how crises have shaped the action of the four main institutions of the EU – the European Council, the Council of the European Union, the European Parliament and the Commission – and whether this has resulted in a shift in the institutional balance.

In all case studies analysed in this report, the European Council has emerged as the driving force in times of crisis, pushing the boundaries of its prerogatives under the Treaties. This role has, however, been criticised by many as an example of executive dominance in times of emergency, and as a development accelerating the erosion of the role of purely supranational institutions, to the advantage of the those operating in the limelight of intergovernmentalism.

The central role that the Council has played in adopting emergency measures reflects the allocation of powers as laid down in the Treaties and could thus be expected. Major measures have thus been adopted on the basis of emergency legal bases that confer decision-making authority on the Council, with little or in some cases no involvement of the European Parliament. The centrality of the European Council in defining the Union's emergency response has not replaced the Council as the forum where the technical aspects of emergency measures are negotiated and their design and specific features are agreed. Other

[593] H. Van Rompuy, *Europe in the storm: promise and prejudice*. Leuven: Davidsfonds Uitgeverij nv, 2014.

[594] Article 4(1) TEU. See also: Article 5 TEU laying down the principle of conferral of powers.

[595] Article 13(2) TEU.

developments are, however, more controversial. In particular, the Council has expanded its role in the implementation of crisis instruments, intervening in areas that were traditionally the preserve of the Commission and, to a lesser extent, of the Member States.

The Parliament is often described as a mere spectator in times of crisis and its limited involvement in the adoption of emergency measures has prompted an intense debate on the risk that increasing recourse to emergency measures would undermine direct democratic control.

Finally, the impact of the crises on the Commission's role seems to be ambivalent. On the one hand, it was instrumental in shaping the Union's emergency response through rapid and decisive initiatives. In situations of urgency, one may argue that the Commission gains substantial power though its right of initiative, as the lead time between proposal and decision is short, thus leaving less time for in-depth scrutiny and discussion. At the same time, it has been questioned whether the enhanced role of the European Council, and its degree of intervention in shaping the emergency response of the Union, undermines the Commission's prerogatives. Moreover, it is interesting to note that, at national level, crisis management tends to involve a more predominant use of executive powers, as illustrated in the national reports. It is therefore relevant to look closer at how the role of the Commission, as the main Union institution implementing EU policy, has shaped up and whether – despite the unique institutional set-up of the European Union – some common denominators are present when compared against the handling of crises at the national level.

This chapter will look more closely at all of these developments and assess whether they have altered the balance of powers as laid down in the Treaties. When carrying out this assessment, it is useful to keep in mind that a shift in the balance of powers – if any – is only legally problematic if it has happened in breach of Treaty provisions. In fact, the institutional balance is not fixed across the Treaties, but it varies depending on every individual legal basis. In that regard, the case-law developed by the Court of Justice to police respect for the principle of institutional balance and to control the overreach of political institutions is one that appears to walk a thin line between safeguarding the constitutional integrity of the Union's legal order and respecting the need to ensure that the institutions have sufficient political space to take effective action.

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

Since its establishment as an Institution by the Treaty of Lisbon, the European Council has played a central role in the management of crises affecting the Union. The academic literature underlines that this function emerged as a key feature of the new institution during the "permanent state of crisis" that has

characterised the Union since 2008, and even argues that "the original *raison d´être* of the European Council was as a crisis management body."[596] It is fair to say that in the situations of crisis analysed in this report, the crisis manager function of the European Council has been confirmed, albeit with varying intensity, and has helped increase the relevance of the institution. Indeed, the role played by the European Council during the COVID-19, migration and energy crises has established its position at the "centre of political gravity" of the Union (see above Chapter I).[597]

Despite this relevance, there is no explicit reference in the Treaties for the European Council to solve crises. Nevertheless, the Treaties define in very broad and yet flexible terms the powers of the European Council, as the institution providing the Union with the necessary impetus for its development and defining the general political directions and priorities thereof (Article 15(1) TEU). This situation has been perceived as creating a certain tension between the formal powers of the European Council and its actual role, and it has been argued that it exposes a "a significant gap between the power exercised by EUCO and the role it formally plays in the EU's Treaty framework."[598] Such an alleged gap has led some commentators to argue that the crisis management role of the European Council has developed fully outside the framework of the Treaties[599] and to question the compatibility of some of its most extreme actions with the Treaties and especially the institutional balance defined therein. Others have reacted to such a gap by putting forward a number of policy recommendations aimed at ensuring that the crisis management function of the European Council is properly reflected and limited in the Treaties, and by advocating for stronger accountability and transparency mechanisms to match the greater power with appropriate safeguards.[600]

In light of this ongoing debate, it is useful to look at the practice of the European Council's action during the different crises analysed in this report. After identifying the different dimensions of the enhanced role played by the European Council, we will assess whether such a role is compatible with the one that the Treaties envisage for the institution in light of the well-established case law of the Court of Justice, and we will come to a clearly positive reply. Beyond a test of strict legality, the reasons why such a development took place and whether there is a need for a reform will also be explored.

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[596] D. Dinan, "Governance and Institution: Implementing the Lisbon Treaty in the Shadow of the Euro Crisis, " *Journal of Common Market Studies*, Vol. 49, 2011, pp. 103–121.

[597] U. Puetter, "Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance," *Journal of European Public Policy*, Vol. 19:2, 2012, pp. 161–178.

[598] A. Akbik, M. Dawson, "The Role of the European Council in the EU Constitutional Structure," Study requested by the EP AFCO Committee, February 2024, PE 760.125, pp. 6 and 28.

[599] In these terms, see, for instance: S. Anghel and R. Drachenberg, "The European Council under the Lisbon Treaty," Study by the European Parliamentary Research Service, November 2019, PE 642.806, p. 27.

[600] See, in this sense, the study by Akbik and Dawson referred above in footnote 6 at page 36ff.

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

The case studies analysed in this report confirm that in times of crisis, the European Council has been playing an increasingly prominent role. The phenomenon has three different dimensions: first, the European Council's intervention in policymaking deepens in times of crisis, so that it becomes the main driver, and in certain cases even the designer, of the emergency response; second, its role seems to expand beyond policymaking to other areas of EU action, such as implementing EU law, which are normally the preserve of other actors; finally, the European Council can provide the forum where the Member States may consider to act beyond the framework of the EU legal order and have recourse to intergovernmental instruments when this is necessary to complement the instruments available at the EU level. These phenomena are not limited to crisis situations.

1.1.1 From agenda-setting to law-making?

As regards the first phenomenon, it has been argued that the involvement of the European Council in shaping the policy response to crises goes beyond its role of providing direction to the Union's action. It is true that, in the early days of each crisis, the European Council intervenes in line with its task of setting the political priorities and agenda for Union action. This was indeed the purpose of the extraordinary Council meetings convened at the height of the migration crisis in 2015, at the outset of the COVID-19 pandemic and in the immediate aftermath of Russia's invasion of Ukraine.

However, the European Council continued to remain significantly involved after its initial intervention, as is clearly shown by the number of meetings that took place during the three crises analysed in this report.

In ordinary times, the European Council is supposed to meet twice per semester[601] in March, June, October and December. Additional meetings are labelled as "extraordinary" or "special" and are convened at the initiative of the President of the European Council when circumstances so require.[602] Informal meetings are also used when they are deemed appropriate to achieve progress on a sensitive issue by holding informal discussions among leaders, or, as happened during the early phase of the COVID-19 pandemic, circumstances prevent a physical meeting: in such cases, conclusions are not adopted by the European Council but its President may issue a press statement or conclusions in his or her own name.

It is interesting to note that recourse to extraordinary, special or informal European Council meetings significantly increases in times of crisis. In 2015, the year when the migration crisis hit and the European Council scrambled to

[601] See: Article 15(3) TEU and Article 1(1) of the European Council Rules of Procedure.
[602] Ibidem.

find solutions against a backdrop of deep divisions among the Member States, the European Council met eight times, six of which on the topic of migration (three regular meetings, one special and one informal). In 2020, the first year of the COVID-19 crisis, the European Council met a record 13 times, discussing COVID-19 related issues on 12 occasions (two regular meetings, two special meetings and eight informal meetings, including meetings via videoconference). Finally, the number of meetings in 2022 at the peak of the energy crisis were nine, eight of which focussed on energy issues (four regular meetings, two special meetings and two informal).[603]

The high degree of European Council involvement during crises can be explained by the need to adapt the response to the fast-changing situation on the ground, which required adjusting the political priorities and thus frequent new steering from the leaders. This is very clear in relation to the COVID-19 crisis, as the health emergency morphed into an economic crisis and internal market crisis, thus prompting a redefinition of the emergency response and the setting of new priorities (see above Chapter I, Section 2).

However, the active approach of the European Council is also the result of the institution establishing itself as the forum where emergency policies are defined, negotiated and finally agreed at political level, often as part of complex political packages. An analysis of the relevant conclusions of the European Council shows that the frequency of its meetings was often coupled with further intervention in the policy debate at an increasingly granular level.

To start with, the European Council made extensive use of the practice of addressing requests to the other EU institutions, notably to the Commission, asking them to come up with policy options or strategies and, eventually, with the relevant legislative proposals. The constitutional law doctrine refers to these requests as "political instructions" (see the contributions listed above in footnotes 4 to 7), which however should not lead to the impression that the European Council requests are meant to have legally binding effect, as it is made clear by the wording used (the requests are often formulated as "calls" and "invites" addressed to other institutions). Once legislative proposals are submitted, the European Council can follow up with further specific requests, either on the substance or on the process, in particular by validating, or requiring adjustment to, the measures proposed and/or requesting the co-legislators to speed up adoption of the relevant piece of legislation, including by setting deadlines. In so doing, the European Council's instructions can at times highlight specific aspects of the measures to be discussed, by providing guidance as to the landing zone for a political compromise, as well as indicating the nature of the instrument (and legal basis) that should be used for its adoption.

The sequence of EUCO conclusions leading to the presentation of the proposals for the *Next Generation EU* scheme to finance the recovery from the economic

[603] See Timeline – Council actions in response to the COVID-19 pandemic, https://www.consilium.europa.eu/en/policies/coronavirus-pandemic/timeline/

impact of the COVID-19 pandemic crisis is a good example of the steering role of the European Council (see Chapter I, Section 2.1.3): as early as 26 March 2020, the European Council acknowledged the gravity of the socio-economic consequences of the pandemic and expressed the political will to "do everything necessary to meet this challenge in a spirit of solidarity." In the same conclusions, the European Council invited the Eurogroup to present proposals which "should take into account the unprecedented nature of the COVID-19 shock affecting all our countries."[604] On 9 April 2020, the Eurogroup presented a report detailing a number of measures on which agreement had been reached. This was not yet the case for the establishment of a Recovery Fund, on which further discussions on crucial issues such as its relation to the EU budget, its sources of financing and recourse to innovative financial instruments were necessary. On those points, the Eurogroup expressly sought guidance from leaders.[605] On 23 April, the European Council finally agreed to work "towards establishing a recovery fund, which is needed and urgent. This fund shall be of a sufficient magnitude, targeted towards the sectors and geographical parts of Europe most affected, and be dedicated to dealing with this unprecedented crisis." The European Council thus asked the Commission to "urgently come up with a proposal that is commensurate with the challenge."[606] The conclusions of 23 April were thus a major breakthrough in the process: the leaders had recognised the need for the fund. From that moment on, the question was no longer about "whether" but about "how" that Fund should be designed.

Another example is to be found in the detailed conclusions adopted by the European Council during the energy crisis. At the informal meeting in Versailles on 11 March 2022, the European Council agreed on the strategic objective of phasing out dependency on Russian gas, oil and coal as soon as possible, and identified various strands of action. It called on the Commission to propose a plan by the end of March to ensure security of supply and affordable energy prices during the following winter and, by the end of May, a plan on the other measures.[607] Following that initial political guidance, the European Council followed up on specific measures at a number of meetings in the course of 2022, setting out more detailed indications as to their content and the timeline for their adoption and adjusting the priorities as required by the evolution of the situation and by the result achieved. Thus, in its Conclusions of 24 and 25 March 2022, for instance, the European Council focussed on the recent OLP proposal presented by the Commission on gas storage, instructing the legislators to examine it, duly taking into account and addressing "the interests of the Member States with significant storage capacity in order to ensure

[604] Joint Statement of the Members of the European Council of 26 March 2020, point 14.

[605] Euro Group, "Report on the comprehensive economic policy response to the COVID-19 pandemic, 9/4/2020, point 19.

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

[607] Versailles Declaration, 10 and 11 March 2022, paras. 16 to 18.

a fair balance."[608] That call resulted in a number of Council amendments to the proposal to accommodate the situation of specific Member States, which were finally incorporated in the final text agreed with the European Parliament. As the crisis progressed and the measures under discussion under the Repower EU plan presented by the Commission did not appear sufficient or rapid enough to respond to the rising emergency prices, the European Council called for further exceptional actions. In its Conclusions of 20 and 21 October 2022, the European Council "agreed that in light of the ongoing crisis, efforts to reduce demand, to ensure security of supply, to avoid rationing, and to lower energy prices for households and businesses across the Union need to be accelerated and intensified, and the integrity of the Single Market has to be preserved." It consequently called on the Council and the Commission to "urgently submit concrete decisions […] as well as Commission proposals" on additional emergency measures, to be adopted under Article 122.[609] It further stressed its commitment to closely coordinating the policy response and common European-level solutions. Once it had set clear guidance for action, the European Council left to the relevant EU institutions – and, in particular, Commission and Council – the task of defining the specific content of the various measures, in line with their responsibilities under the Treaties (and indeed this is shown by the impressive number of meetings of the TTE (energy) Council, held in the reference period). See above Chapter I, Section 3.

In specific cases, the European Council went significantly further than addressing requests to the Commission and the co-legislators and its conclusions directly defined in great detail certain relevant features of the measures to be adopted, in particular with the aim of finding a landing zone for political agreement among the Member States through reciprocal concessions on a complex policy package.

An example is provided by the Conclusions of 20 and 21 October 2022 mentioned above, where the European Council reached an agreement on additional emergency measures to respond to the energy crisis generated by the Russian aggression against Ukraine. The conclusions go to great length in defining the main elements to be incorporated into acts to be adopted on the basis of Article 122(1), including a mechanism for the joint purchase of gas, a mechanism to prevent excessive price volatility, measures to increase market transparency, a series of energy solidarity measures in the event of gas supply disruptions in the absence of bilateral solidarity agreements, the fast-tracking of simplifying permitting procedures to speed up the rollout of renewables and a market correction mechanism capping the price of gas.[610]

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[608] Conclusions of the European Council meeting of 24 and 25 March 2022, EUCO 1/22, in particular point 17.

[609] Conclusions of the European Council meeting of 20 and 21 October 2022, EUCO 31/22, in particular, points 18–20.

[610] The various measures were finally adopted as three distinct Article 122(1) instruments: Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coor-

An even more significant case is represented by the European Council conclusions of July 2020 on the *Next Generation EU*. In this specific case, the conclusions of the European Council defined the central features of at least four legislative acts,[611] and in particular: the financing mechanism based on the authorisation to the Union to borrow the necessary funds on the financial market, as well as its exceptional and temporary character and the arrangements for repaying the borrowed amounts and for ensuring that the borrowing would be counterbalanced by an appropriate asset; the overall amount of the grants and loans to be provided to Member States and their allocation to different EU spending instruments; the main features of the most important of these spending instruments, namely the *Recovery and Resilience Facility*, including the key for allocating the amounts to the Member States; the architecture of the instrument, based on recovery and resilience plans to be submitted by Member States and to be aligned with the country-specific recommendations identified in the European Semester; the rules for payments, to be linked to an assessment by the Commission as to the satisfactory fulfilment of milestones and targets set out in the national plan, including the possibility of triggering an emergency brake involving the European Council.[612]

The level of detail of the conclusions on NGEU is particularly remarkable, as it directly defines key aspects of the legislative instruments at the time of negotiation. At the same time, detailed conclusions are not unprecedented or specific to crisis situations, as the European Council has shown the same degree of involvement in previous negotiations on the Multiannual Financial Framework. Thus, the presentation of NGEU as part of the broader MFF negotiation had the effect of attracting the negotiation of a crisis instrument under the working method already established for that very specific domain.[613]

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dination of gas purchases, reliable price benchmarks and exchanges of gas across borders, Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy and Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy.

[611] The *European Union Recovery Instrument, Multiannual Financial Framework Regulation, Own Resources Decision* and the *Recovery and Resilience Facility Regulation*.

[612] See: points A.1 to A.21 of the Conclusions of the special meeting of the European Council of 17, 18, 19, 20 and 21 July 2020, EUCO 10/20.

[613] These working methods are based on the practice established prior to the entry in force of the Treaty of Lisbon in a context where the Treaties did not envisage the Multiannual Financial Framework as a typical legal act. In such a context, the leaders meeting in the framework of the European Council had since 1988 held negotiations to agree on a stable and predictable budgetary framework to implement the objectives of the (then) Communities over several years. Such negotiations consisted of a policy package covering the ceilings for maximum expenditure per year and per area of action, the own resources legislation and the "national envelopes" pre-allocated to each Member States under sectoral funding legislation (especially under the cohesion and agricultural policy). The result of such a negotiation would be contained in a detailed European Council Conclusions to then be incorporated into an inter-institutional agreement between Parliament, Council and Commission, which would have given legal effect to the leaders' deal. With the entry into force of the Lisbon Treaty, this informal procedure was replaced by the introduction of a specific legal basis for the adoption of a Multiannual Financial Framework Regulation, to be adopted by the Council by unanimity with the consent of the European Parliament (Article 312(2) TFEU). The

It remains, nonetheless, that the crisis situation consolidated and further expanded recourse to a working method that has proved particularly appropriate to achieve consensus on complex policy decisions in the given emergency situations.

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

An important dimension of the criticism addressed by the doctrine and political actors to the role of the European Council in times of crisis concerns its alleged involvement in implementation of EU law. In particular, this concerns the implementation of legislative instruments, both by means of detailed policy instructions on how the implementation should take place and by the introduction in the relevant legislative texts of procedural devices allowing for possible intervention by the European Council in relation to the implementation of the instrument.

A good example of the first situation is provided by the European Council Conclusions of December 2020, which made it possible to reach a final agreement on the NGEU package, which had been previously blocked by the threat of a veto on the legislative files subject to unanimity vote in Council (the MFF Regulation and ORD decision) by two Member States that opposed the adoption of the Rule of Law Conditionality Regulation. In order to overcome the objections of the two Member States, the European Council negotiated a number of reassurances concerning the way in which the Conditionality Regulation would be interpreted and implemented, including specific prescriptions as to the material and temporal scope of application of the regulation, its subsidiary character compared to other instruments for the protection of the budget and the need for the Commission to adopt guidelines on the way it would apply the Regulation (with the additional instruction that if an action for annulment was to be introduced against the Regulation, the Commission would finalise the guidelines only after the judgment of the Court of Justice).[614]

The second situation mentioned above is exemplified by the inclusion in legislative texts of so-called "emergency brakes": the conferral of implementing powers on the Commission or the Council is combined with provisions that introduce the possibility of a discussion in the European Council on certain elements that are relevant to the adoption of the implementing decision and

new procedure does not provide for a role for the European Council. Nonetheless, the importance of the topic discussed, the difficulty in reaching an agreement at the ministry level, and the weight of the pre-existing practice resulted in the Council entrusting the European Council with the task of reaching the final agreement on the main elements of the MFF package (MFF Regulation proper, the necessary adjustments to the Own Resources Decision, and the essential policy decision as to the spending instruments), on the basis of the preparatory work carried out in the Council and aimed at defining a "negotiating box" setting out the main elements of a possible final deal.

[614] Conclusions of the European Council meeting of 10 and 11 December 2020, EUCO 22/20, in particular at points 2c), 2d), 2f), and 2k).

that delay the adoption of the decision until after the discussion in the European Council has taken place. A significant example is the emergency brake laid down in recital 52 of the *RRF Regulation* in relation to the payments for which implementing powers are conferred on the Commission. If, before the adoption of the relevant Commission implementing decision, a Member State exceptionally considers that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets, it can request a discussion in the European Council. In such exceptional circumstances, no decision authorising disbursement should be taken until the following European Council has exhaustively discussed the matter.[615]

It must be stressed that the "emergency break" was introduced by the co-legislators at the request of the Council during the legislative negotiations leading to the adoption of the relevant legislative act, on the basis of the indications resulting from previous European Council conclusions.[616] Such a request addresses the political need to ensure that matters that are of particular relevance and sensitivity for Member States are ultimately considered at the highest political level, which is the ordinary decision-making rule for the European Council (Article 15(4) TEU). Despite the reasons of political expediency that may explain the proliferation of "emergency brakes," the phenomenon has been strongly criticised by the European Parliament and in the doctrine as a step too far, fundamentally altering the institutional balance laid down in the Treaties, as well as the ordinary voting rules for adoption in Council. As it will be shown below in Section 1.2 of the present section, these concerns have proven unfounded and the Court has acknowledged that the careful drafting of the emergency break, and notably its inclusion in the preamble of the act, excluded that the involvement of the European Council had any legal effect on the procedure for the implementation of the Regulation.

A final example concerns the domain of migration. The *Crisis Regulation* provides for a permanent emergency framework that allows the adoption of temporary derogations from the ordinary rules on the processing of asylum requests and asylum seekers' reception conditions in certain specific circumstances, including cases of instrumentalisation of migrants (see Chapter III, Section 1.2.3 above). While Article 3 of the Regulation confers on the Commission the power to determine the existence of a situation of instrumentalisation of migrants by a third country or hostile non-State actor with the aim of destabilising the Union or a Member State, recital 28 also makes it clear

[615] A similar, but narrower, provision can also be found in recital 26 of the Conditionality Regulation to complement a governance framework that confers on the Council the powers to take the implementing measures for the protection of the Union budget. According to recital 26, in case of breach of the principles of objectivity, non-discrimination and equal treatment in the procedure for the adoption of the measures, a Member State can request a referral of the matter to the next European Council for a debate. In such exceptional circumstances "*no decision concerning the measures should be taken until the European Council has discussed the matter.*"

[616] In the case of the RRF Regulation, see: point A.19 of the Conclusions of the special meeting of the European Council of 17, 18, 19, 20 and 21 July 2020, EUCO 10/20.

that such a determination must take into account the view of the European Council in that regard:

> To ensure a high level of political scrutiny and support and expression of the Union's solidarity, it is relevant to consider whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants. The instrumentalisation of migrants is liable to put at risk the essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security.

1.1.3 Gap-filling role

A third dimension in which the European Council plays an extended role in times of crisis relates to providing a forum to discuss solutions that go beyond the framework of the EU Treaties. In so doing, the European Council plays an important "gap-filling" role that makes it possible to overcome the lack of appropriate competences, instruments or the necessary political support at the EU level and still ensure the possibility of a coordinated response in times of crisis. A good example of this is the role played by the European Council in conferring political authority on soft-law measures adopted by the Commission in the absence of a stronger regulatory framework under the pertinent legislation. This is for instance what happened in the early days of the COVID-19 pandemic and during the 2015 migratory crisis, when the Commission adopted a number of recommendations under the Schengen Borders Code to promote the coordination of national unilateral measures reintroducing internal border controls or prohibition of entry at the external border. The endorsement of the recommendations by the European Council[617] resulted in a high degree of compliance and conformity by the Member States, thus compensating for the chosen instrument's lack of mandatory legal effeA second example is provided by recourse to intergovernmental instruments. Due to its membership made up by representatives of the Member States at the highest political level, the European Council can in *extrema ration* shift its action from the instruments and processes offered by the EU legal order to intergovernmental solutions, whenever this is made necessary by political or legal obstacles to action at Union level. This strategy was widely used during the 2010 sovereign debt crisis to overcome limits inherent in the system of Union competences and the political reluctance of certain Member States to use EU-wide instruments in light of the asymmetric nature of the shock and moral hazard considerations.[618] In relation to the situations of crisis analysed in this report, recourse

[617] As described above in Part I, Chapter I, para. 2.3.1.

[618] This led, for instance, to the conclusion of the *ESM Treaty* to provide financial assistance to the euro zone members, with strict rules for conditionality. This is also the case of the *Treaty on Stability, Convergence and Growth* (the so-called *Fiscal Compact*) in order to supplement the Stability and Growth Pact under the EU Treaties with reinforced budgetary obligations.

to intergovernmental tools was much more limited, as the response was essentially based on EU law instruments and on the Community method. However, intergovernmental solutions were occasionally deployed to complement and support Union action. For instance, in the framework of the 2015 migration crisis, the so-called EU-Turkey statement, which was instrumental in reducing the migratory influx from the Middle East, was in fact classified as an agreement between the representatives of the Member States and Turkey,[619] and thus an intergovernmental tool; in the same context, the *EU Facility for Refugees in Turkey* (*FRIT*) supplemented the resources available via the Union budget through an intergovernmental mechanism of coordinated supplementary contributions by the Member States. In relation to the COVID-19 crisis, one of the early measures adopted to tackle the emerging economic consequences of the pandemic was the amendment of the *ESM Treaty* and the activation of a specific credit line for the Member States (even if the facility was in fact never used and in substance lost relevance with the adoption of the EU-based *NGEU* recovery programme).

More generally, the mere existence of a "second best" but still viable intergovernmental alternative reduces the leverage that Member States may have for the adoption of acts that require unanimity in Council, and can thus help break the deadlock in negotiations on a political package. One of the reasons that allowed to reach the required unanimity on the MFF Regulation and thus to adopt the various elements of the NGEU package was the understanding that the financing scheme to support the recovery from the pandemic could have been redesigned via an intergovernmental facility limited to the participating Member States.

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

According to some commentators, the enhanced role that the European Council has played in times of crisis represents a shift in the institutional balance of the Union towards a greater executive dominance that is not reflected in the framework of the Treaties.[620] This view is also shared by the European Parliament, which has on a number of occasions strongly criticised the interventions of the European Council and in particular its alleged interference in the prerogatives of the co-legislator or of the Commission.

A good example is the reaction of the Parliament to the European Council's conclusions of December 2020 referred to above, in which the European Council made a number of remarks concerning the way in which the Conditionality Regulation would be interpreted and implemented. In a Resolution adopted

[619] See: Order of the General Court of 28 February 2017 in case T-192/16, *NF v European Council*, ECLI:EU:T:2017:128.

[620] See, for instance, the studies mentioned above in footnotes 6 and 7.

few days after the European Council, the Parliament contested the interference in the prerogatives of the legislators and of the Commission, as the institution responsible for implementing the Regulation, and threatened legal action. In particular, the Parliament

> 5. Recalls that in accordance with Article 15(1) TEU, the European Council shall not exercise legislative functions; considers, therefore, that any political declaration of the European Council cannot be deemed to represent an interpretation of legislation as interpretation is vested with the European Court of Justice (CJEU);
> […]
> 8. Recalls that in accordance with Article 17(8) TEU, the Commission shall be responsible to the European Parliament; recalls that Parliament has several legal means at its disposal to make sure that the Commission respects its treaty obligation, including the discharge procedure, in order to assess the proper management of Union funds; stresses, furthermore, that Parliament has several legal and political means at its disposal to make sure that the law is enforced by everyone and by EU institutions in the first place; stresses that the conclusions of the European Council cannot be made binding on the Commission in applying legal acts.[621]

In fact, the criticism – as well as the threat of legal action – has generally failed to materialise in any meaningful litigation introduced by the Parliament – or any other institution – to promote respect for their prerogatives from alleged interference by the European Council. This is all the more significant since the establishment of the European Council as one of the EU institutions by the Treaty of Lisbon has made it subject to the system of judicial remedies generally applicable to the acts of the institutions and thus has brought its action under the control of legality by the Court of Justice.

The reasons for such institutional self-restraint appear in part political. They are the expression of a certain deference that the institutions have shown towards the highest political body at the EU level, especially when acting in situation of crisis. Under the pressure of an emergency, the need to ensure an effective response and show unity in face of adversity pushes considerations about institutional prerogatives into second place.

Other reasons are linked to the conditions for the exercise of jurisdiction by the Court of Justice, and especially to the action for annulment in particular, which make it as resulting from its well established case law. First, the action for annulment laid down in Article 263 TFEU is limited to acts intended to produce legal effects, which, in the interpretation followed by the Court of Justice, means acts that, whatever their nature or form, produce legally bind-

[621] European Parliament Resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP)).

ing effects. This naturally excludes acts of mere political guidance, no matter how great their practical consequences and their impact on the conduct of the institutions.

Second, sin addition to its action as an institution of the Union, the meetings of the European Council can operate as a forum where Heads of State or Government act collectively in their national capacity. When this is the case, the acts adopted are intergovernmental in nature and are as such excluded from the review of legality by the Court, which is limited to acts of the institutions of the Union. This was, for instance, the case of the controversial EU-Turkey statement concluded at the height of the migration crisis. When an action for annulment was brought against the "statement" – which the applicant deemed to be a binding international agreement between the Union and Turkey – the General Court found that,[622] despite its title and some textual elements referring to the EU and to the "members of the European Council," a close analysis of its content and of the circumstances linked to its adoption (in particular the documents exchanged in preparation of the meeting with the Turkish counterparts) would instead suggests that the statement was concluded between the representatives of the Member States in their capacity as Heads of State and their Turkish counterparts.[623] The General Court thus concluded, and the Court of Justice confirmed, that there was a lack of jurisdiction.

Despite these hurdles, a case law regarding the role of the European Council in the institutional set-up of the Treaties has slowly developed, essentially on the basis of cases brought by Member States to challenge the legality of legislative acts in cases where the co-legislators have failed to respect the European Council's political indications. This case law has clarified the relationship between the European Council's role to define the "general political directions and priorities" of the Union and the role of the other institutions when acting on the basis of the prerogatives conferred to them by the Treaties.

In case C-5/16, Poland contested the legality of the market stability reserve, a mechanism introduced to correct imbalances in – and therefore essential for the functioning of – the EU´s emissions trading scheme.[624] Among the arguments raised, Poland stressed that the market stability reserve had been phased

[622] Order of the General Court of 28 February 2017 in case T-192/16, *NF v European Council*, ECLI:EU:T:2017:128.

[623] For a critical assessment of the reasoning of the General Court, see: E. Cannizzaro, "Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council," *European Papers* 2017(2), pp. 251–257. Cannizzaro considers that the reasoning of the General Court is affected by two major flows: first, they do not take into account that the *Statement* concerns matters that fall within an area heavily regulated at the EU level and that, when acting in areas occupied by EU law, Member States do not have unfettered power to select the capacity in which they are acting. Second, the findings of the General Court would sit at odds with the rules of international law on attribution, which refer to whether the organ is vested with the power of representation and it appears from the circumstances that it is exercising it.

[624] Judgment of the Court of Justice of 21 June 2018, Case C-5/16, *Poland v Council and Commission*, ECLI:EU:C:2018:483.

in two years earlier than the date agreed by the European Council and that this represented binding instructions for the co-legislators. The Court recalled in that regard that Article 15(1) TEU specifies that the European Council "*shall not exercise legislative functions*": in the institutional framework set up by the Treaties; that role was in fact conferred by Articles 14(1) TEU and 16(1) TEU on the Parliament and the Council. It is therefore for those two institutions alone to decide the content of a legislative measure. Any attempt to infer from EUCO's power of policy guidance an obligation for the co-legislators to follow the indications of the European Council would imply direct interference in the legislative sphere by the latter institution and therefore a breach of the principle of the conferral of powers.[625]

In joined cases C-643 and 647/15 concerning the second relocation emergency decision adopted during the 2015 migration crisis (see above Chapter I, Section 1.1),[626] Slovakia and Hungary argued that by deciding on the relocation of an additional 120 000 asylum seekers by qualified majority, the Council had infringed the European Council's conclusions of 25 and 26 June 2015. In those conclusions, the European Council had only agreed on the adoption by the Council of a relocation decision for 40 000 persons and had made it clear that the Council would agree on the distribution of such persons by consensus, reflecting Member States' specific situations. The Court, however, firmly rejected the arguments of the applicants. The principle of institutional balance prevents the European Council from interfering with the right of initiative of the Commission, which is responsible for determining the subject matter, objective and content of a proposal, including of an emergency decision to be adopted under Article 78(3).[627] Moreover, the principle of institutional balance prevents the European Council from altering the voting rules laid down in the Treaties, and thus from imposing the adoption by consensus of a decision that is subject to qualified majority voting in Council.[628] The Court also clarified that the alleged effect of the "political" nature of the EUCO conclusions on the prerogatives of the Council and of the Commission cannot be a ground for annulling decisions taken in exercise of those prerogatives.[629]

Finally, in case C-156/21 concerning the Conditionality Regulation, [630] Hungary challenged the compatibility with the Treaties of the involvement of the

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[625] Ibidem, para. 85.

[626] Judgment of the Court of Justice of 6 September 2017, joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the EU*, ECLI:EU:C:2017:631.

[627] Ibidem, paras. 146 and 147.

[628] Ibidem, para. 148: "Secondly, Article 78(3) TFEU allows the Council to adopt measures by a qualified majority, as it did when it adopted the contested decision. The principle of institutional balance prevents the European Council from altering that voting rule by imposing on the Council, by means of conclusions adopted pursuant to Article 68 TFEU, a rule requiring a unanimous vote." See also: para. 149.

[629] Ibidem, para. 145.

[630] Judgment of the Court of Justice of 16 February 2022, Case 156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97.

European Council (emergency brake) in the implementation of the Regulation (see above Chapter I, Section 2.1.3). In that regard, the Court stressed that no role is envisaged for the European Council in the procedure established by Article 6 of the Regulation for the adoption of measures, and that this is consistent with its powers of policy guidance pursuant to Article 15(1).[631] As far as a specific role is envisaged for the European Council in recital 26 of the Regulation, the Court simply underlined that the preamble to an EU act has no binding force, and thus cannot be relied on as a ground for derogating from the operational part of the legislative text. Thus,here was consequently no need to further discuss whether the role envisaged for the European Council is compatible with the powers conferred on it by Article 15(1) TEU. As Advocate General Campos made clear in his opinion in the case, such a solution confirms the political and non-binding nature of the "emergency brake" but at the same time does not conclude its illegality and thus preserves its *effet utile*.
This case-law attempts to strike a delicate balance. On the one hand, it reiterates the principles of conferral and institutional balance and, in so doing, it ringfences the role and prerogatives of the various institutions – and of the co-legislators in particular. On the other hand, however, the exclusion of any legally binding effect of the conclusions of the European Council, combined with the limitations on the scope of the action for annulment, give to the European Council a considerable leeway in the exercise of its political role of guidance.
Thus, in accordance with its established case law on the matter, the Court of Justice finds the solution in the adoption of a formal approach to the principle of institutional balance, whereby only the existence of a binding legal effect can undermine the prerogatives of other institutions. As Bruno de Witte elegantly puts it, "[…] the Court has consistently used the term 'institutional balance'; as shorthand for the set of Treaty rules that happen to apply to any EU decision or set of decisions." [632]
The approach of the Court is clearly demonstrated by the remarks of Advocate General Campos on the conclusions of the European Council of December 2020 mentioned above, in his opinion in the cases concerning the legality of the Conditionality Regulation.[633] Campos recalled that according to the EUCO conclusions "the Regulation does not relate to generalized deficiencies." In his view, however, such a statement "is not consistent with the content of the recital and therefore cannot affect the interpretation of Regulation 2020/2092."[634]

[631] Ibidem, para. 190.

[632] Bruno de Witte: The European Union's COVID Recovery Plan: the legal engineering of an economic policy shift."

[633] Opinion of Advocate General Campos Sanchez-Bordona of 2 December 2021 in case C-156/21, *Hungary v Parliament and Council,* EU:C:2021:974. The Court of Justice did not mention the EUCO conclusions in its judgments.

[634] Footnote 53 of the Opinion. Campos refers here to recital 15 of the Conditionality Regulation, which makes it clear that the Regulation applies in cases of "individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities."

The finding that the European Council conclusions are (at least on the point at issue) incompatible with the Regulation does not have any consequence in point of law – not even from the point of view of the principle of sincere cooperation between institutions – as, in any event, those conclusions have no binding legal effects. On the contrary, in terms of compatibility with the Regulation, the Advocate General stresses that they constitute an authoritative interpretation of the legislative instrument (possibly because they provide a direct account of the context in which it was adopted):

> While the European Council has no legislative powers in this area, its conclusions reaffirm procedural and substantive guarantees for Member States included in Regulation 2020/2092 and offer an interpretation (which, in view of the source, could be classed as authoritative, although not binding) of the meaning and scope of various of its elements. In any event, I should point out that interpretation of Regulation 2020/2092 is a matter for the Court.[635]

Ultimately, it will be for the other institutions to decide whether or not to follow such an authoritative interpretation in the exercise of their respective prerogatives and to do so under their own responsibility. This explains why, in the case at hand, the European Parliament finally abandoned the idea of directly challenging the European Council's conclusions and opted instead to bring an action against the Commission for failure to apply the Conditionality Regulation in application of those conclusions.[636]

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

The approach followed by the Court of Justice in enforcing the principle of institutional balance in relation to the expanded role of the European Council has been criticised as too narrow. According to the critics, the strict separation between the separate worlds of law and political reality does not ensure effective protection of the prerogatives of the institutions with regard to pervasive institutional practices that escape any judicial control. The same doctrine stresses that the fact that certain acts are not binding does not really protect the integrity of the legal order, as those acts still shape the behaviour of the institutions. Once established in institutional practice, these behaviours set up parallel structures of power superimposed on those defined in the Treaties.
According to some commentators, the unimpeded expansion of the role of the European Council would even be indicative of a constitutional change to the Union's institutional system. The growing role of the institution beyond the one envisaged in the Treaties would reveal the emerging dominance of an

[635] Point 90 of the Opinion.

[636] Case C-657/21, *European Parliament v Commission*, ultimately discontinued at the request of the Parliament.

intergovernmental approach based on consensual decision-making. The pursuit of consensus on major decisions at the Leaders level would signal a waning acceptance of majority decision-making in accordance with the applicable Treaty rules and ultimately undermine the legitimacy and the autonomy of the EU political and legal order. The EU's legitimacy would only be seen as secondary and derivative and require the mediation of national political processes in order to produce acceptable results. Ultimately, the Community method would be dramatically eroded as the Union is progressively deconstructed into a sum of separate parts, no longer autonomous. [637]

Based on this diagnosis, the same authors underline the need to redress the institutional balance laid down in the Treaties and put forward a number of proposals to that effect. The Court of Justice should reconsider its case-law on "legal effects," to extend its jurisdiction to EUCO conclusions insofar as, if not formally binding, they are substantially aimed at such an effect; in exercising such a jurisdiction, the Court should apply a standard of strict judicial review; the opportunistic use of voting rights in Council, and notably the recourse to vetoes for reasons unrelated to the act under discussion, should be challenged on the basis of the principle of sincere cooperation; more generally, institutions should engage in more aggressive strategic litigation to protect their prerogatives. [638] Other authors, however, insist on the need to increase the accountability and transparency of the European Council to match its enhanced role with greater democratic control. [639]

This criticism is serious and cannot be taken lightly. However, the opposition it describes between the correct functioning of the Community method and the political practice of pursuing consensus on major decisions fails to consider that the two dimensions are interconnected.

The autonomy and effectiveness of the EU legal order ultimately depend on the continued acceptance by the Member States to be bound by decisions taken through the Community method, and on their continued acceptance of the judgments of the Court of Justice. When that acceptance is called into question for reasons pertaining to essential national interests or the protection of fundamental elements of their constitutional identity, the domestic implementation of common rules is no longer ensured by the tools available at the EU level, as Member States and their supreme jurisdictions maintain a claim to the last word. This explains why, throughout the evolution of the process of integration, appropriate mechanisms of a political, legal or judicial nature have been put in place to help defuse tensions by accommodating on an exceptional basis Member States' concerns beyond the empire of majority

[637] J. Baquero Cruz, "Unstable structures: The institutional balance and the European Court of Justice," in M. Dawson, B. de Witte and E. Muir, *Revisiting Judicial Politics in the European Union*, Elgar, Cheltenham, 2024, pp. 142–170.

[638] Ibidem, in particular at pages 163ff.

[639] A. Akbik, M. Dawson, "The Role of the European Council in the EU Constitutional Structure," Study requested by the EP AFCO Committee, February 2024, PE 760.125, notably at pages 37ff.

rule.[640] The establishment of the European Council by the Treaty of Lisbon as a Union institution reflects a further evolution in that regard, as it formalises the most important of those coordination mechanisms by incorporating into the institutional setting of the Union the highest political forum for the pursuit of consensus among Member States.

A redefinition of the principle of institutional balance in the terms mentioned above would only offer an illusory safeguard for the EU's autonomy and legal order and the integrity of the Community method. It would not remove the need to find ways to defuse the tensions between the national and the supranational dimensions but would only displace the pursuit of consensus in the intergovernmental dimension or move further towards informality. In the worst-case scenario, it would magnify the risk that the common rules will ultimately not be accepted and thus not implemented, creating the risk of a constitutional crisisAn example of this is the saga of the relocation decisions during the 2015 migration crisis. The decision of the Commission – and of the Council – to push through the adoption by qualified majority of a second relocation decision beyond the political agreement reached at the European Council (see above) led to the explicit refusal by two Member States to implement that decision, while many more dragged their feet and failed to follow up effectively. The recourse to infringement proceedings by the Commission led to very strong condemnation of the two recalcitrant Member States by the Court of Justice, but did not result in any greater compliance with the common rules. Ultimately, the standstill seriously compromised the Union's ability to adopt emergency measures in the area of migration, as the Commission avoided presenting new proposals. When it did, the proposals were ultimately not adopted, as the Member States largely preferred to use national derogating measures rather than common EU measures. The conflict further polluted the ongoing debate on the reform of the legislative regime on migration and asylum, as the case of the relocation decision had made clear that without broad acceptance, the effectiveness of the new rules would have been compromised *ab origine*. This led to the much-criticised June 2018 conclusions, where the European Council acknowledged that reform of the asylum regime could only be achieved on a consensus based on a balance of solidarity and responsibility[641] (see above Chapter I, Section 1.1).

This example shows *a contrario* that the pursuit of a consensual approach at the European Council level is of particular importance to ensure the effectiveness of Union action in situations of crisis. It corroborates the findings reached in the other case studies examined in this report, which have shown how the

[640] This is the case of the Luxembourg Compromise reached in 1966 to settle the 'empty chair' crisis, triggered by the extension of qualified majority in Council voting. Other examples are the Ioannina compromise and Ioannina bis. The emergency brakes included in certain provisions of Title V of the TFEU, allowing for a matter to be brought to the European Council for discussion is a good example of an arrangement that has received legal formalisation in a specific procedure.

[641] European Council of 28 June 2018, Conclusions, point 12.

Union response to crises has been shaped by the ability of the European Council to identify priorities for action and to reach an agreement on solutions.

In fact, the greater involvement of the European Council (EUCO) brings several notable advantages in the context of crisis management. One of the primary benefits lies in its ability to leverage various tools across legal orders (national via coordination measures; EU measures; intergovernmental solutions), providing a degree of flexibility that makes it possible to overcome the legal and political obstacles that could limit action at the EU level. This flexibility is especially critical in crisis situations when rapid responses are required and ordinary tools are not immediately available.

In that regard, the handling of the crises analysed in this report shows that the centrality of the European Council and recourse to consensual decision making have not resulted in a push towards a greater intergovernmentalism to define the response to the crisis. Intergovernmental solutions did feature,[642] but they remained largely secondary, as the agreements reached in the European Council managed to create the support, sometimes through a complex legal engineering and an evolutive interpretation of the relevant Treaty provisions, for solutions based entirely within the EU legal order.

Second, in cases of complex political packages that included decisions by unanimity and touched upon fundamental policy choices, intervention by the leaders appears the most effective way to reach a landing zone, by facilitating cross-file negotiations and allowing for concessions that would not be imaginable at a lower political level. Certain matters become a *Chefsache*, as the compromises which are required to reach a deal and to propose it to the national electorate require the unique political capital of national leaders.[643]

Moreover, the European Council's central role sends a powerful signal of unity and collective ability to respond to challenges. This is of particular importance in relation to economic measures that impact the fiscal capacity of the Member States or are based on common borrowing. In a context where the Union budget essentially depends on GNI contributions from the Member States, including for reimbursing the resources commonly borrowed on the financial markets, a sign that all Member States are on board is essential to ensuring the political and economic credibility of the Union measure and therefore a good rating of Union bonds on the financial markets.

Ultimately, however, the centrality of the European Council and of the pursuit of consensus is due to reasons of constitutional order. As shown in Chapter II

[642] See, in particular, the establishment of a dedicated credit line under the ESM Treaty in the framework of the COVID-19 pandemic (which was ultimately not requested by any Member States) and the conclusion of the "statement" between the Heads of State and Turkey in the context of the 2015 migration crisis.

[643] On the concept of *Chefsache* applied to the European Council, see: L. van Middelaar and U. Puetter, "The European Council. The Union's supreme decision-maker" in D. Hodson, U. Puetter, S. Saurugger and J. Peterson, *The Institutions of the European Union*, 5th ed., Oxford University Press, 2021.

of this report, crisis response remains fundamentally a Member State responsibility, which can rely on a number of derogatory clauses under the Treaties to that effect. The increasingly wide and deep action of the Union in emergency situations creates tension with this fundamental Member State' claim to emergency sovereignty. In that regard, the involvement of the European Council responds to the essential need to defuse a possible tension with a Member State's role and ensure at the same time the possibility of an effective EU response. It carries out the necessary arbitrage between Member State' and Union action, especially in those domains that have not yet been affected by action at EU level or which raise particularly problematic new challenges (e.g., the assumption of common debt on an unprecedented scale to finance operational expenditure; the expansion of Union action to domains – such as health – where its action is limited; the paradigm shift in energy sector regulation). The criticism of the European Council's role and the resulting proposals for reform often overlook this essential political reality, which ultimately explains the real added value of European Council involvement in ensuring the effectiveness of the crisis response at the Union level.

2. The European Parliament: More than a spectator in times of crisis

Much has been written about what some see as a (too) limited role of the European Parliament in times of crisis, and a fair amount of criticism has been directed, in particular, against the recent uses of Article 122 TFEU, a provision that does not provide for any involvement of the European Parliament as regards paragraph 1 or for information to the European Parliament in the case of paragraph 2. That criticism has been sparked by the increasing significance and impact of measures adopted on that legal basis. Some call this a fundamental shift in the balance of powers, and others refer to 'competence creep' or institutional overreach.[644]

This criticism needs to be placed in a broader context. While not at the forefront of the emergency response in the different situations of crisis analysed in this report, the European Parliament can certainly not be considered a mere spectator. In that regard, some of the criticism mentioned above seems to diminish the role actually played by the institution. It is not enough to look at the specific and isolated crisis measures that did not involve the European

[644] See among the critical voices: Nettesheim, "'Next Generation EU': *Die Transformation der EUFinanzverfassung*," 145 AÖR (2020), 381–437, at 409; Kube and Schorkopf, "*Struktveränderung der Wirtschafts- und Währungsunion*," 74 *Neue Juristische Wochenschrift* (2021), 1650–1655, at 1655; Leino-Sandberg and Ruffert, "Next Generation EU and its constitutional ramifications: A critical assessment," 59 *Common Market Law Review* (2022), 433–472; Panascì, "Unravelling Next Generation EU as a transformative moment: From market integration to redistribution," 61 *Common Market Law Review* (2024), pp. 13–54. For an accurate account of the various academic positions on the growing use of Article 122 TFEU, see: Chamon, "The Non-Emergency Economic Policy Competence in Article 122(1)TFEU," 61 *Common Market Law Review* (2024), 150–1526.

Parliament and to focus only on the formal participatory rights provided for by the emergency legal bases, as this would only give a partial picture. Rather, it is necessary to consider the role that the Parliament has played in the context of the broader Union response to crises, as described in Chapter I of this report. This includes looking at both cases where the Parliament has fully exercised its legislative role, both during and after the crisis and the cases where it leveraged its broader prerogatives to have a say in emergency measures. It is in light of this broader picture that it will be possible to assess some of the proposals for reform concerning greater involvement of the European Parliament in emergency situations.

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

As the analysis in Chapter I has shown, in all of the crises covered by this report (the COVID-19 pandemic in its various dimensions, the migration crises and, lastly, the energy crisis) the Union response has encompassed a broad spectrum of legal instruments, including a number of measures adopted under the ordinary legislative procedure or under other procedures involving either the consultation or consent of the European Parliament. In that sense, the European Parliament has been involved in its role as a co-legislator in shaping emergency measures.

The number of OLP measures adopted as part of the Union's emergency response is by no means negligible (see the examples described in Chapter 1, Section 2 above: *CRII*, *CRII Plus*, *REACT-EU*, *RRF*, *Airport slots Regulation*, *COVID-19 certificates Regulation*, all adopted in the context of the COVID-19 pandemic; *Repower Amendment*, *Gas Storage Regulation* in the context of the energy crisis), and the co-legislators have shown the ability to adopt them in a very short time. In particular, in order to ensure swift action in line with the urgency of the situation, the Parliament made extensive use of the flexibilities allowed in its rules of procedures and introduced new ones.[645]

In fact, as we have also underlined, recourse to ordinary legislative instruments in emergency situations is generally used to introduce targeted amendments to adapt existing regulatory regimes to the crisis situation. While in that regard, recourse to the OLP has proved effective, it is limited in scope. Moreover, as we have already underlined in Chapter III, use of the OLP in times of crisis exposes a paradox, as the possibility of acting swiftly under the ordinary legislative procedure often comes at the price of the co-legislators renouncing to introduce substantive modifications to the text under discussion and of boosting the role of the Commission, which is therefore subject to a lower level of scrutiny (on this point, see Section 1.1 of Chapter III). When the co-legislators did engage in meaningful negotiations on the content of the

[645] See, for details in Chapter I, Section 2.4 above.

proposed measures and tabled amendments, this generally resulted in a much longer adoption time. Thus, for instance, in the case of the COVID-19 pandemic, the centrepiece of the economic measures for the recovery, the *Recovery and Resilience Facility,* is a Regulation adopted on the basis of Article 175(3) TFEU under an ordinary legislative procedure. This allowed for meaningful participation of the Parliament in the design of the instrument: even if Parliament ultimately accepted the Council's position as regards the overall amount and financing design of the Facility, as well as its governance – which had been central points in the political agreement reached by the leaders at the 2020 July European Council – it managed to shape the priorities and objectives of the instrument, in particular by requiring a better focus for the national recovery plans on six policy areas identified as being of European relevance.[646] Parliament also managed to secure a greater role of political scrutiny in the form of a periodic recovery and resilience dialogue on the implementation of the Facility.[647] However, the adoption of the Regulation took a full 260 days.

These dynamics surely explain why, despite the repeated reassurances provided by the Parliament as to its ability to act swiftly under the OLP in emergency situations,[648] recourse to the ordinary legislative procedure was not used for some of the most relevant and pressing measures adopted in the crisis situations analysed in this report. Where rapid action was deemed essential, recourse to the ordinary legislative procedure was not always considered sufficiently timely, as sometimes directly reflected in the recitals.[649] This has recently prompted the European Parliament to modify its internal procedures for urgent decision-making, to be able to provide additional guarantees that decisions under the ordinary legislative procedure can be taken rapidly in emergencies, and also when inter-institutional negotiations have to take place.[650]

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[646] See: Article 3 of the *RRF Regulation*.

[647] See: Article 26 of the *RRF Regulation*.

[648] Parliament often reiterated its readiness to act swiftly on pressing issues, by making use of the flexibilities allowed by its rules of procedure, to allow for rapid legislation in an emergency. See for instance, the emergency measures taken in 2022 to tackle the energy crisis prompted by the Russia´s war of aggression against Ukraine, resolution 2022/2830(RSP) of 5 October 2022, where the Parliament expressed its support for the measure at stake while regretting the use of Article 122(1) TFEU as a legal basis, as it stood ready to act swiftly on legislative proposals "as it requires full democratic legitimacy and accountability" (point 33).

[649] When assessing the conditions for having recourse to Article 122(1) as a legal basis, a number of the emergency measures adopted in the energy domain the second half of 2023 explicitly refer to the need "to take into account the approaching end of the mandate of the European Parliament, the time required to adopt legislation under the ordinary legislative procedure, as well as the need for Member States and investors to have predictability and legal certainty about the legal framework. See, for instance, recital 25 of Council Regulation 2024/223 extending the application of Regulation (EU) 2022/2577 on the deployment of renewable energy.

[650] The revision was part of the overhaul of the Rules of Procedure that took place at start of the Parliament's 10th term in 2024. See: revised Rule 170 on urgent procedure which, following a justified request from the Commission or Council, entails a number of simplifications: a debate becomes optional; the committee report may be exceptionally skipped or replaced by an oral report; simplified rules for the preparation of interinstitutional negotiations apply.

Even when not directly involved in formulating the emergency response via the ordinary legislative procedure, the European Parliament has, however, played its full role as a co-legislator *in the aftermath* of the various crises by appropriately following up the emergency measures adopted by Council.

As we demonstrated in Chapter III, the adoption of emergency measures triggers a normative cycle whereby, in the aftermath of a crisis, the innovations introduced by emergency measures are reviewed on the basis of the lessons learnt and prompt the necessary adjustment in the relevant ordinary regulatory framework, thus allowing the co-legislators to be involved *a posteriori*. In that respect, we stressed how a number of emergency measures adopted or proposed on the basis of emergency legal bases have subsequently been integrated into more permanent legislation with the necessary adaptations.[651]

In certain cases, some of those measures were already part of pending OLP proposals but were fast-tracked using emergency legal bases, only to be "repatriated" into a more permanent framework after the crisis measures had exhausted their effects. In many cases, emergency measures explicitly acknowledged the need to integrate specific parts into legislative acts adopted under "ordinary procedures" as soon as the immediate crisis had passed. Such an approach has been acknowledged by the Court in the *Balkan-Import* ruling,[652] where it emphasised that the rules at issue had subsequently been integrated into an act adopted on the legal basis of the common agricultural policy.

It is also of interest that some of the legislative acts containing such "repatriated" emergency measures were agreed between the co-legislators and were ready to enter into force and apply *before* the expiry of the related emergency acts based on Article 122(1) TFEU. In such cases, the co-legislators cooperated on defining *transitional provisions* to ensure a smooth transition and avoid an overlap of rules (i.e., the ones set out in exercise of emergency competence and the ones agreed would be integrated into future legislative acts). [653]

The technique of integrating parts of emergency-related provisions into ordinary legislative acts obviously only works where there is a legal basis to be found for it in the "*ordinary*" Union toolbox,[654] but that is arguably also the area where the most tension lies when it comes to institutional balance. If the action is not covered by ordinary legal bases, the focus shifts to how it interacts

[651] See: the number of examples mentioned in Chapter III, Section 2 above.

[652] Judgment of 24 October 1973, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof*, case 5/73, EU:C:1973:109 C-5/73, See para. 15: "Consequently while the suddenness of the events with which the Council was faced, the urgency of the measures to be adopted, the seriousness of the situation and the fact that these measures were adopted in an area intimately connected with the monetary policies of Member States (the effects of which they had partially to offset) all prompted the Council to have recourse to Article 103 – Regulation No. 2746/72 shows that this state of affairs was only a temporary one, since the legal basis for the measure was eventually found in other provisions of the Treaty."

[653] See: the example mentioned in Chapter III, Section 1.2.

[654] In the area of health, the Union's competence is limited – with a few exceptions – to a co-ordinating role.

with the balance between the Union and the Member States and whether the Treaty confers sufficient powers on the Union for the action in the first place.
Beyond the cases of "repatriation" of emergency measures in ordinary legislation adopted in the same domain, we have also underlined how experience gained from emergency measures in a given area has inspired the establishment of permanent crisis framework in relation to other areas that may in the future be subject to similar challenges (e.g., shortages in relation to other strategic products). Thus, the co-legislators agreed to extend mechanisms firstly introduced during the COVID-19 crisis to address supply risks in respect of chips, net-zero technologies, raw materials and medical supplies.[655]
The co-legislators also adopted IMERA (a general emergency instrument) and reformed the electricity market design to fix some of the deficiencies identified during the crisis. Last but not least, an impressive amount of legislative action was taken in the field of energy to accelerate the green transition and reducing energy consumption, thereby also reducing dependencies on imported fossil fuels, such as the gas and hydrogen package, the Renewable Energy Directive, the Energy Efficiency Directive, the Energy Performance in Buildings Directive and a host of legislative measures related to the area of transport, to mention just a few. The co-legislators also continued to follow up key measures identified to improve the ability to respond to health emergencies.[656]
This intense legislative activity, in areas much broader than the ones originally covered by the emergency measures and sometimes totally unrelated to them, shows that, in the aftermath of the crises, the co-legislators have not only reviewed the solutions adopted on the basis of emergency competences but have also taken the opportunity to push forward a wider regulatory agenda aimed at incorporating emergency frameworks into ordinary legislation. The result is a progressive shift from a constitutional to a legislative model of emergency regulation, whereby the ordinary legislator occupies the normative space for the regulation of emergencies and has taken over the role of defining the Union's response to crises for the future. As we have seen, this extension has the effect of reducing the discretion of the Council's prerogatives under Treaty-based emergency competences, as the Council will be required to show that the ordinary legal framework is not sufficient to address the situation of crisis (see above Chapter III).[657]
Thus, far from being a spectator, the European Parliament does use its legislative powers to contribute to the framing of EU emergency law, notably

[655] For an analysis of the various instruments, see: Chapter III, Section 1.2 of the present report.
[656] See: Communication from the Commission "Drawing the early lessons from the COVID-19 pandemic," COM/2021/380 final.
[657] Even if most ordinary legislation still confers on the Council the powers to act in situations of emergency, those powers are conferred as implementing powers, and thus need to be exercised within the limits of the empowerment and in full respect for the policy choices made by the ordinary legislator. They are therefore not comparable with the discretion exercised by Council under primary emergency competences.

by providing the necessary stability and predictability by establishing crisis frameworks as part of ordinary legal regimes, in a broader logic of crisis prevention and response. In so doing, the legislative intervention of the ordinary legislator complements and at least *ex post facto* scrutinises the exercise of the emergency competences provided for in the Treaties, taking stock for the future from the lessons learnt from the response to the crisis.

2.2 The Parliament's control over emergency measures

In addition to the relevance of its legislative powers in the context of emergencies, the Parliament has also managed to exercise a certain level of scrutiny of emergency measures adopted under legal bases that do not provide for any Parliamentary involvement. It has done so by making an extensive – and often creative – use of its prerogatives under the Treaties and of its position in the framework of complex policy packages. Two of these are the avenues that the Parliament has explored: the use of its budgetary powers and the leveraging of its power of political scrutiny to enhance its participatory rights in the decision-making process for the adoption of emergency measures.

2.2.1 Budgetary control over emergency measures

Insofar as emergency measures have a spending nature and are financed through the EU budget, the Parliament can make use of its budgetary powers to exercise a degree of control over the act adopted. As a matter of fact, the adoption of spending instruments is generally accompanied by corresponding budgetary decisions over which the Parliament has full control: given the need to adopt both acts at the same time, Parliament is therefore in a position to leverage its budgetary powers to exercise control over the emergency measure. This avenue has been used in particular with regard to measures adopted under Article 122 TFEU and gave rise to interesting developments during the COVID-19 crisis, when recourse to emergency spending instrument took on both a new dimension and a new form.

One example is the establishment of the *Emergency Support Instrument* during the migration crisis and its amendment and activation during the COVID-19 crisis. In both cases, the proposal to activate the instrument, based on Article 122(1) TFEU, was accompanied by a corresponding proposal for an amending budget,[658] which was necessary to mobilise the relevant resources and notably to use the special instruments under the MFF Regulation, given the limited availabilities under the margins of the relevant MFF headings. In both cases, the Parliament therefore had occasion to exercise ultimate control

[658] Draft Amending Budget No. 2 to the General Budget 2020 Providing emergency support to Member States and further reinforcement of the Union Civil Protection Mechanism/rescEU to respond to the COVID-19 outbreak, COM/2020/170 final.

over the financing of the instrument. Even if it ultimately decided to approve the amending budgets as proposed by the Commission, it did so having exercised full scrutiny over the type of actions being financed, as also reflected in the budgetary statements included in the decisions approving the amending budget.[659] [660]

The Parliament's budgetary powers are seriously constrained if the spending instrument is financed by resources that are externally assigned to a specific item of expenditure. While appearing in the budget, the resources in questions are not subject to the budgetary procedure laid down in Article 314 TFEU, as they are directly generated and assigned on the basis of a specific legal act. In this situation, therefore, the budgetary scrutiny of the Parliament is only exercised at a later stage through the discharge procedure, when the accounts are closed. This limitation risked seriously undermining the budgetary powers of the Parliament in relation to the most important emergency spending measure adopted during the COVID-19 crisis on the basis of Article 122 TFEU, the *EURI*,[661] which channels to various spending instruments resources borrowed on the market in the form of externally assigned revenues.[662]

This explains why a major element of the policy package built around the *EURI,* the *Own Resources Decision* and the *MFF Regulation,* was the inclusion requested by Parliament of additional rules that could enhance its budgetary control, despite its recourse to external assigned revenues.

A first set of rules was incorporated into the usual inter-institutional agreement that the three institutions conclude when adopting the MFF Regulation, and which *inter alia* sets out the arrangements for their cooperation during the budgetary procedure.[663] In that framework, the three institutions agreed on an additional procedure aimed at ensuring "an appropriate involvement" of

[659] See, for instance, Definitive adoption (EU, Euratom) 2020/537 of Amending budget No. 2 of the European Union for the financial year 2020, OJ L 126, 21.4.2020, pp. 67–96.

[660] The self-restraint exercised in approving the amending budget did not prevent the Parliament from strongly criticising the establishment of the ESI in 2016. The Parliament strongly criticised the creation of an ad hoc financing mechanism without an overall strategy to address the refugee crisis and without ensuring the full observance of Parliament's prerogatives as co-legislator. The Parliament pointed to the problem that the *ESI* was established under article 122 TFEU and not on the basis of an ordinary legislative procedure, despite the fact that Parliament had always acted constructively and swiftly to support all initiatives in connection with the refugee crisis. See European Parliament resolution of 13 April 2016 on the Council position on Draft amending budget No. 1/2016 of the European Union for the financial year 2016, New instrument to provide emergency support within the Union, P8_TA(2016)0113, point 2.

[661] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I, 22.12.2020, pp. 23–27.

[662] See: Article 3(1) of Regulation 2020/2094.

[663] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ L 433I, 22.12.2020, pp. 28–46. See, in particular, Annex I on Inter-institutional cooperation during the budgetary procedure.

the budgetary authority in the governance of the external assigned revenues under the EURI. The procedure provides in particular for extensive obligations of information by the Commission as regards the estimates and the implementation of the external assigned revenues, regular inter-institutional meetings to assess the state of implementation and outlook of those revenues, and the Commission's commitment to "take utmost account" of the comments received by the budgetary authority throughout the process.[664]

A second set of rules is laid down in the *Joint declaration on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget*,*665* also adopted as part of the overall MFF/NGEU policy package. The declaration, which in fact has the legal nature of an inter-institutional agreement, confers on the budgetary authority the faculty of requiring a "constructive dialogue" whenever the Commission submits a proposal for a Council act based on Article 122 TGEU, which may have appreciable implications for the Union budget. The dialogue takes place within a Joint Committee, before the Council adopts the measure "with a view to seeking a joint understanding of the budgetary implications" of the act. The discussions should be finalised within two months or in the shorter time limit fixed by the Council in light of the urgency of the matter. In any event, the procedure is without prejudice to the Council acting under the powers and prerogatives conferred on it by the Treaties.[666]

The Joint procedure has to date been activated only once, when the Commission presented its proposal to set up, under Article 122 TFEU, a framework for the adoption of measures for the supply of crisis-relevant medical countermeasures in the event of a public health emergency at the Union level[667] (then adopted as the so-called *HERA Regulation*). In that occasion, the two branches of the budgetary authority concluded that establishing the framework itself did not have immediate budgetary implications, but that those would be quantifiable when it was activated in the event of a crisis. They remained committed to launching the scrutiny procedure as soon as possible after the tabling of a Commission proposal to activate the emergency framework.

The two inter-institutional budgetary arrangements are a clear manifestation of the Parliament's ability to leverage its position in the context of broader policy packages (in this case its consent, required for the adoption of the MFF Regulation under Article 312 TFEU) in order to protect and enhance its prerogatives. In fact, the importance of the arrangements in question cannot

[664] See: points 40 to 46 of Annex I.

[665] Joint declaration of the European Parliament, the Council and the Commission on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget, OJ L 444I, 22.12.2020, p. 5.

[666] See: point 5 of the Joint Declaration.

[667] Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, COM/2021/577 final.

be underestimated in terms of safeguarding the Parliament's budgetary role.
However, it is also clear that the power of budgetary control only allows for limited control over emergency measures. First, whenever the emergency measure is essentially regulatory in nature, it will escape any form of control under the mechanisms identified. Thus, for instance, the many Article 122 measures adopted to tackle the energy crisis did not trigger any budgetary scrutiny procedure, despite their significant financial implications for private operators. Second, even when the scrutiny procedure can be triggered, in principle, its scope remains strictly limited to the budgetary implications of the emergency measures. While one can expect the Parliament to try to leverage its budgetary powers to the fullest extent to scrutinise the substance of the measures adopted under Article 122 TFEU, such an attempt will inevitably be resisted by the Council. As the careful framing of the *Joint Declaration* shows, the Council will in principle insist on a strict demarcation between its powers to define an emergency policy under Article 122 TFEU and the prerogatives of the budgetary authority, and thus will not agree to enter into discussions on the substance of the measures proposed and would instead strictly limit the scrutiny procedure to only considering their budgetary implication. The first application of the procedure in the *HERA* case seems indeed to confirm this approach: despite the misgivings of the Parliament as to the use of Article 122 TFEU to set up a permanent framework for the supply of medical countermeasures (see above Chapter I, Section 2.2.3), the discussion was strictly limited to noting that no immediate budgetary consequences existed. Third, the mechanisms introduced by the two IIAs are by their very nature not participatory rights in the adoption of the measures, as they only ensure enhanced information obligations and the possibility for the Parliament to make its voice heard on the budgetary aspects of the proposal.
This explains why, despite having secured these additional budgetary guarantees, the Parliament has explored further ways to exercise political control over emergency measures.

2.2.2 Political control over the adoption of emergency measures

In addition to strengthening its budgetary powers, the European Parliament has tried to leverage its power of political control over the Commission in order to enhance its *ex ante* involvement in the adoption of emergency measures under Article 122 TFEU.
The most relevant example in this regard is the recent 2024 amendment of the Parliament's rules of procedure, which introduced a new Rule 138 on the use of Article 122 as a legal basis.[668] By building on the Parliament's power to submit questions and request to hear members of the Commission (Article 230 TFEU), the rule provides for the European Commission President to be

[668] Rules of Procedure of the European Parliament, 10th Parliamentary term, July 2024.

invited to make an explanatory statement whenever the Commission plans to adopt a proposal on the basis of Article 122 TFEU. The explanatory statement shall in particular explain the main objectives and elements of the proposal and the reasons why the Commission intends to use that legal basis, and shall be made prior to formal adoption of the proposal by the Commission.[669] If this timing is not respected, the statement must be included in the draft agenda of the first session following adoption of the proposal by the Commission, unless the Conference of Presidents decides otherwise. While the Rule does not mention it explicitly, it is clear that the reference to a parliamentary debate on the measure implicitly refers to the possibility that the Parliament may trigger the political responsibility of the Commission, in the forms provided for by the Treaties and that ultimately find expression in the power of censure (Article 17(8) TEU and Article 234 TFEU).

The rule further provides that the proposal is referred to the Parliamentary committee responsible for legal affairs for verification of the legal basis. If the Committee decides to challenge the validity or appropriateness of the legal basis, it reports back to the Parliament and undertakes the necessary steps to bring an action before the Court of Justice.[670]

Finally, the rule provides for a periodic review mechanism, which requires at the earliest three months after the entry into force of the Article 122 act, and at appropriate intervals thereafter, that the Commissioner responsible reports back on the implementation of the measure and on the need to maintain its provisions in light of the requirements of the Treaties.[671]

The new rules undoubtedly represent a good example of self-empowerment and institutional engineering. They have generated a debate leading the Council to express its formal concern as to their impact on the institutional balance.[672] In fact, one might wonder whether the Parliament is still respecting its power of internal organisation and the Treaties when it sets up additional procedural steps for the exercise by the Commission of its power of initiative in relation to proposals based on Article 122 TFEU. Moreover, as Rule 138 aims to ensure that the Parliament is consulted on the substance of the proposed Article 122 measures, and that it can provide its input even before the involvement of the Council, one could argue that it directly contradicts the special legislative procedure set out in Article 122 TFEU, which does not envisage any role for the Parliament in its first subparagraph and only an obligation for the Parliament to be informed in its second.

[669] Rule 138(2).

[670] Rule 138(4).

[671] The reaction of the Council was not limited to new Rule 138, but included a number of other innovations aimed at influencing the organisation of the Commission via strengthened confirmation hearings (new Annex VII), at expanding the scrutiny powers through enhanced hearings and scrutiny sessions (Rule 141) and at strengthening the Parliament's right of inquiry outside the legal framework laid down in secondary law for its exercise (Rule 215).

[672] Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304 20.11.2010, p. 47 and subsequent amendments.

However, such a conclusion does not seem to consider the approach followed to date by the Court of Justice when policing respect for the institutional balance (see above Section 1.2 of this Chapter). In line with that approach, it would be difficult to conclude that the rule in question is illegal. After all, the rule is drafted in such a way that it does not legally impose an additional step in the procedure leading to the adoption of a proposal under Article 122 TFEU, but only sets out an obligation of information. Moreover, no consequences are envisaged should the Commission fail to comply with that obligation and proceed to adopt the proposal under Article 122, other than – of course – the possibility of political consequences or the risk of litigation. In any event, the power of internal organisation on which the Rules of Procedure are based cannot be relied upon to establish obligations as to the way other institutions exercise their powers. In conclusion, the rule in question does not have the kind of "binding legal effect" that the Court considers necessary to establish the existence of interference with the principle of institutional balance. The situation is therefore similar to the inclusion in the recitals of a legislative text of an emergency brake mechanism giving the European Council a say during the procedure for the adoption of certain implementing decisions under an emergency instrument, as we have discussed above (see Chapter III above).

It remains, that even if not challengeable in legal terms, Rule 138 raises questions as to its workability in practice. In particular, given the emergency rationale that characterises the use of Article 122, one could wonder whether a mechanism of prior information and impulsion by the Parliament is compatible with the logic of the legal basis and the tempo imposed by the circumstances and whether in such a context, effective *ex ante* scrutiny by the Parliament is realistic.

In any event, the Commission seems to have accepted the principle of greater parliamentary involvement in the procedure leading to the adoption of proposals based on Article 122 TFEU. On 21 October 2024, that is, before the election of the new Commission according to Article 17(7)TEU and even before the hearings of new Commissioners-designate in Parliament, the Presidents of the Parliament and of the Commission announced the revision of the inter-institutional framework agreement on relations between the two institutions,[673] based on a set of nine political principles aimed at strengthening their cooperation and at ensuring better dialogue.[674] Two of those principles relate to increased cooperation in emergency situations:

[673] Joint Statement by European Parliament President Metsola and European Commission President von der Leyen on the revision of the Interinstitutional Framework Agreement, 21/10/2024, https://www.europarl.europa.eu/news/en/press-room/20241021IPR24772/european-parliament-and-european-commission-agree-on-strengthening-cooperation

[674] Many of the justifications so far used in the preamble to Article 122 TFEU act to justify recourse to the emergency legal basis and which generally refer to the "the time required to adopt legislation under the ordinary legislative procedure," would no longer be sufficient in light of an agreement setting up a mechanism to fast-track decisions under the ordinary legislative procedure.

3. The commitment to provide comprehensive justification and information on the exceptional cases where the proposals by the Commission are based on Article 122 TFEU.
4. Commitment to define a clear mechanism for use of urgent/fast-track decision-making.

At the time of writing, the Parliament and Commission are still negotiating the revised inter-institutional agreement that will put the two principles into practice. It already appears clear, however, that the Parliament has seized the moment of maximum political leverage over the (still to be confirmed) new Commission to extract from its President a commitment to "justify and inform" regarding proposals based on Article 122 TFEU; a commitment that mirrors the changes already introduced by Parliament in its 2024 Rules of Procedure. The important difference is, however, that the obligation to "justify and inform" contained in the third political principle is no longer unilaterally imposed by Parliament but is accepted by the Commission.

It is also interesting to note that the additional commitment to define "a mechanism for the use of the urgent/fast-track decision-making" for the adoption of acts under the ordinary legislative procedure applies to both the Commission and the Parliament. By agreeing to such a mechanism, the Commission would further restrict its margin of discretion as to the use of emergency competences (Article 122 TFEU, but also Article 78(3) TFEU, 213 TFEU, etc.): faced with an emergency situation, the Commission would need to explain why it considers that the agreed fast-track procedure is not sufficient to ensure swift action and that an alternative procedure is preferred.[675] This additional requirement seems to address the Parliament's longstanding grievance that better account should be taken of its ability to act swiftly on the basis of the OLP in selecting the legal basis for acts to be adopted in crisis situations.[676]

The exact impact of the political principles agreed on 21 October 2024 will very much depend on the final wording of the revised inter-institutional agreement when and if concluded. The establishment of additional procedural obligations for using Article 122 TFEU by means of an interinstitutional agreement cannot however alter the institutional balance as resulting from the legal basis. As a matter of fact, the principle of sincere cooperation on which inter-institutional agreements are concluded finds a limitation in the need to respect the prerogatives of the institutions as defined in the Treaties, since they are the expression of the constitutional structure of the Union as reflected in its institutional balance.

[675] See, for instance, the Parliamentary resolutions quoted in footnotes 58 and 71.

[676] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, pp. 17–75.

2.2.3 Scrutiny of the implementation of emergency instruments

A final form of control exercised by Parliament over emergency measures is through mechanisms that ensure its scrutiny of the implementation of emergency instruments. This form of control is of a political nature and is used in parallel to the power of budgetary scrutiny exercised through the discharge and the mechanisms identified in Section 2.2.1.

The scrutiny mechanisms are provided for in legislative acts adopted according to the ordinary legislative procedure and are typically the result of amendments made at the request of the Parliament. The Parliament generally considers their inclusion in the text as one of its priority objectives during the inter-institutional legislative negotiations (trilogues). In that regard, the original opposition of the Council to any form of involvement of the Parliament in the implementation of EU law – which is a domain that the Treaties reserve for the Member States and the Commission and in duly justified cases for the Council but never for the Parliament – has progressively softened.

As a result, the scrutiny mechanisms have progressively multiplied across sectorial legislation. The first type of mechanism is the "structured dialogues" that have been incorporated into a number of crisis instruments. A good example is the *RRF Regulation*,[677] which includes two forms of parliamentary dialogue: one relating to the application of the macroeconomic conditionality[678] and, a more general, "recovery and resilience dialogue," concerning the state of implementation of the facility.[679] In both cases, the competent Parliamentary committee may invite the Commission to discuss the relevant matters in a "structured dialogue." The Commission shall then take into account any element arising from the view expressed by the Parliament through the dialogue, including parliamentary resolutions, if provided.

Similar mechanisms can be found in Article 20 of the *Common Provisions Regulation*,[680] which provides for a "structured dialogue" in relation to the adoption of temporary measures for the use of cohesion funds in response to exceptional circumstances, and in Article 19(14) for the triggering of the macroeconomic conditionality in the context of the implementation of the

[677] See: Recital 29 Article 10(7) RRF.

[678] See: Recital 61 and Article 26 RRF.

[679] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, pp. 159–706.

[680] Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No 2679/98, OJ L, 2024/2747, 8.11.2024.

cohesion funds. Similarly, the *IMERA Regulation*[681] provides for an "emergency and resilience dialogue" that can be triggered by the European Parliament in relation to the activation and deactivation of the internal market vigilance or emergency modes under the Regulation. To that purpose, the Parliament must be informed as soon as possible "of any Council implementing acts proposed or adopted" pursuant to the Regulation.[682] Another example is offered by the *Rule of Law Conditionality Regulation*,[683] which also requires the Commission to timely inform the Parliament in good time of any notification to a Member State that starts the procedure under the Regulation. On the basis of this information, "the Parliament may invite the Commission for a structured dialogue on its findings."[684]

It is interesting to note that the "structured dialogues" are often provided for in cases where implementing powers are conferred on the Council (e.g., macroeconomic conditionality under the *RRF* and *CPR*, the activation of emergency mode under the *IMERA*, the adoption of measures under the *RoL Conditionality Regulation*), and can be understood as the condition imposed by Parliament during legislative negotiations to accept such a governance mode. In that regard, the provisions in question are designed to ensure that the dialogue takes place *before* the Commission submits its proposal for a Council implementing act, so that the input of Parliament can be taken into account in the preparation of such a proposal (in the case of the RRF, the structured dialogue is not linked to specific decisions on implementation, but it is periodical – every two months – which, having regard to the frequency of payments to Member States, allows the Commission to take into account the views of the Parliament for the subsequent decisions).

A second form of scrutiny of implementation is exercised through the possibility of the Parliament's involvement in appointing an observer in consultative bodies that assist the Commission in the implementation of crisis instruments. Another example is the *IMERA Regulation*, Article 4 of which provides that the European Parliament can appoint a representative as a permanent observer on the Internal Market Emergency and Resilience Board, sitting alongside representatives of each Member State and of the Commission. A similar solution has been adopted by the *HERA Regulation,* which similarly provides that a representative of the Parliament must be invited as an observer to the meetings of the Health Crisis Board, a body that provides advice to the Commission on the preparation and implementation of the measures that can be adopted when the Council activates the emergency framework in the event of a public health emergency.The presence of a Parliament observer on advisory

[681] Recital 26 and Article 6 *IMERA Regulation*.

[682] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10.

[683] Article 6(2) of the *RoL Conditionality Regulation*.

[684] Article 5 of Council Regulation 2022/2372.

boards does not as such grant the possibility to directly shape the implementation of emergency measures. However, by providing a seat in the "room where it happens," it ensures that the Parliament is informed properly and in good time of the development. This greatly enhances its power of scrutiny, notably over the Commission, which may then be held accountable in line with the mechanisms provided for in the Treaties.

3. The Council: Work in the Shadow of the Leaders and an Increasing Role in the Implementation of EU Law

According to the institutional set-up laid down in the Treaty, the Council plays a central role in shaping the Union's response to a crisis. It is on the Council that the Treaties explicitly confer a number of emergency competences including, in particular, Article 122 TFEU. Moreover, as the institution composed of the representatives of the Member States, the Council naturally constitutes the forum where the Member States can coordinate their action and thus identify the need for measures at the Union level. Finally, as co-legislator, the Council is also perfectly poised to follow up emergency measures, by agreeing on shaping ordinary legislation for the handling of future crises on the basis of the lessons learnt.

The case studies analysed in this report largely confirm that the Council has been fully playing those roles in practice. On closer look, however, two phenomena deserve attention, as they may raise questions as to the institutional set-up laid down in the Treaties.

The first is the impact of the increased role of the European Council that we have described above on the role and ordinary functioning of the Council. There is no doubt that, when the European Council is seized of a matter and directly shapes the political agreement around complex political packages, this produces a chilling effect on the action of the Council, which will wait for the political instructions of the leaders. When an agreement is finally reached by the European Council, the Council then operates as the chain of transmission for ensuring that the political choices of the leaders inform the legislative deliberations. As we have seen, the intervention of the European Council can go as far as indicating that Council should continue negotiations and seek consensus on a given matter, regardless of whether a lower voting rule applies for the adoption of a given act.[685]

This state of affairs is, however more the result of the structural relationship between the Council and European Council than a dynamic proper of emergency situations. In fact, the relationship between the two institutions is defined by their composition and by the organisation of their work. Thus, the

[685] As has for instance happened in the case of the negotiations on the Pact on Asylum and Migration, see Chapter I, Section 1 above.

fact that the Council is composed of ministers who are politically subordinate in their respective national systems to the leaders who sit at the European Council naturally results in a hierarchical dynamic. This is accentuated by the composition of the General Affairs Council, that is, the Council configuration that ensures consistency and coordination in the action of the Council (Article 2(2) of the Council Rules of Procedure) and the preparation and follow-up of European Council meetings (Article 16(6) TEU).[686] This composition (Ministers of European Affairs, or even under-secretaries of State, in charge of the coordination of the Member State's positions at the EU level, but not of the substance of the files being discussed) ensures that the relevant political matters are ultimately left for discussion by the leaders and that preparations in Council are limited to a preliminary discussion, as the General Affairs Council would generally lack the political authority to go further. Finally, the conferral on the President of the European Council of the power to draw up the agenda of the European Council[687] further contributed to defining the relationship between the two institutions, as it is ultimately up to the President of EUCO (and not to the rotating presidency of the Council) to act as the gatekeeper deciding which policy items move between the Council and the European Council (and *vice versa*). In light of the above, the compression of the role of the Council by the role played by the European Council is not really indicative of a shift in the institutional balance in the context of emergencies, but rather an illustration of the normal dynamic between the two institutions.

Moreover, the role played by the European Council in steering the discussion and determining the direction and tempo of the negotiations in relation of specific files shall not overshadow the instances where that role has rather been played by the co-legislators, and the Leaders have limited themselves to endorse an approach already taken. The case of the Pact on Asylum and Migration is particularly telling in this regard. As it has been shown in Chapter I, the strategy for solving the stalemate in Council was the result of the initiative of various rotating Presidencies, which first adopted a "gradual approach" to the negotiations, so to sequence them in partial deals (2022 French Presidency) and then agreed with the European Parliament a "Joint Roadmap" which defined the methodology for the inter-institutional negotiations with a view of adopting the various Proposals of the pact by the end of the legislature. It is remarkable here that only when those approaches were agreed and started proving successful in practice, the European Council endorsed the approach in its Conclusions of 9 February 2023 (paragraph 27).

[686] The ministers sitting in the General Affairs Council are the Ministers for European Affairs, who in most Member States are junior ministers or even under-secretaries of state.

[687] According to Article 3 of the Rules of Procedure of the European Council, the President of the European Council must draw up the provisional agenda, in light of the discussion at a final meeting of the General Affairs Council, to be held within five days of the European Council. The President of the European Council has further developed the practice to send an invitation letter to the members of the EUCO ahead of each meeting to frame the discussions that are planned.

The second phenomenon is more unexpected. In addition to its natural role as emergency law maker, the Council has also been playing an increasing role in the *implementation* of EU law in crisis situations. As the cases of conferral on the Council of implementing powers multiply across crisis instruments, and the reach of those powers both widens and deepens, the question arises as to whether the phenomenon is altering the set-up provided for in the Treaties and is eroding a role traditionally exercised by the Commission.

3.1 Council implementing powers for emergency measures

In the system of the Treaties, implementation is a matter left first and foremost to the Member States and, where uniform conditions for implementation are needed, to the Commission. Only in duly justified and specific cases, can implementing powers be conferred on the Council by the legislator (Article 291(1) and (2) TFEU). This possibility has been used in the past, but has remained generally confined to domains which, albeit progressively falling under Union competence, touch the core of Member States' sovereignty[688] or to matters where the Council has specific responsibilities under the Treaties.[689]

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[688] This is typically the case of areas falling within the former third pillar and now covered by Title V of TFEU (the area of freedom, security and justice), and notably in relation to border controls and visas. See for instance the implementing powers conferred on the Council by Articles 21a, 28 and 29 of the Schengen Borders Code, Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L 077 23.3.2016, p. 1; see also: Article 42 of Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard, OJ L 295, 14.11.2019, pp. 1–131; Article 25a of the Visa Code, Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas, OJ L 243 15.9.2009.

Another area where implementing powers are traditionally conferred on the Council is taxation. See for instance, Article 397 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347 11.12.2006, p. 1.

In areas of exclusive EU competence, the conferral of implementing powers on the Council remains exceptional but can nonetheless occur when based on an assessment which touches domains close to Member States' sovereignty. See, for instance, the Regulation on protection from economic coercion by third countries, which confers on the Council the powers to determine the existence of a situation of economic coercion by a third state and the appropriateness of requesting reparation. While adopted on the basis of Article 207(2) TFEU on common commercial policy, it is clear that the instruments have an essential foreign policy dimension. The determination that a third country is engaging in economic coercion is already an act of foreign policy, as it will form the Union's policy vis-à-vis that particular country. See Article 5 of Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries, OJ L, 2023/2675, 7.12.2023.

[689] This is, for instance, the case of the coordination of economic policies, where the implementing role of the Council is defined in Articles 121, 126 and 136 TFEU. See, for instance, the specific role conferred on the Council within the various instruments of the Stability and Growth Pact, and in particular Regulation (EU) 2024/1263 on the effective coordination of economic policies and on multilateral budgetary surveillance, OJ L 30.4.2024, Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 209 2.8.1997, p. 6, Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 23.11.2011, pp. 1–7, Regulation (EU) No. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306, 23.11.2011,

In that regard, acts adopted on the basis of Article 122 TFEU that establish a permanent framework (rather than an individual measure) leave to the Council the decision to trigger the framework in a specific crisis situation. This applies to the crisis frameworks laid down in the *EFSM,* which can be activated to provide financial assistance in the form of loans to Member States experiencing severe economic or financial disturbance or in the *ESI,* which allow for the provision of emergency support in the event of a natural or man-made disaster through emergency support operations financed by the budget and implemented by the Commission. A third example is the permanent framework established by *HERA* which, in the event of a public health emergency, provides for a set of emergency measures to be chosen from a dedicated toolbox in order to ensure the supply of crisis-relevant medical countermeasures.

In all of these cases, the activation of the relevant framework – which entails both a technical assessment of the crisis-specific conditions for the adoption of Union measures and a political evaluation of the opportunity to activate – is specifically left to the Council. Such a governance system is not surprising after all, as it reflects the fact that the Treaties confer the emergency competence on the Council in the first place: when this competence is exercised through a permanent framework, it is appropriate – and indeed respectful of the principle of conferral – that its activation in a specific case is reserved for the Council itself. In fact, as we have already underlined in Chapter II, Section 2.1, the activation of a permanent framework does not fall into the category of implementing powers according to Article 291 TFEU, but rather represents the exercise, in a specific case, of the Treaty emergency competence.[690]

In addition to this specific situation, the conferral of implementing powers on the Council has significantly expanded in the context of the instruments adopted by the Union in response to crises. First, implementing powers have been conferred on the Council in relation to policy areas that were traditionally left to the Commission to implement – such as cohesion policy and macro-financial assistance to third countries. These are areas where the action of the Union normally takes the form of spending programmes that mobilise

pp. 8–11, Regulation (EU) No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306, 23.11.2011, pp. 25–32.

[690] When activating the crisis framework, the Council is not merely implementing it, but it is exercising in a specific case its emergency competence based on Article 122. This seems confirmed by the practice according to which activation of the framework is accompanied *in the same act* by a modification of that framework to expand the conditions for activation or support arrangements (this was the case of the *ESI* activation and amendment during the COVID-19 pandemic – see Chapter I, Paragraph 2). This also seems confirmed by recital 3 of the *HERA Regulation* which makes it clear that the framework is activated by the Council "upon a proposal from the Commission pursuant to Article 122(1) TFEU." Logically, if the activation was considered an implementing act, the proposal of the Commission should be based on the basic act (the *HERA Regulation* itself) and not on the Treaty provision.

resources from or assigned to the Union budget and where the central implementing role of the Commission derives directly from its Treaty competence to implement the Union budget, according to Articles 17 TEU and 317 TFEU. Second, the conferral of implementing powers on the Council has deepened, in the sense that it has expanded beyond the adoption of specific key decisions with a particular relevance (such as the activation of a framework), to include decisions relating to the granular and individual implementation of a policy instrument.

An initial example of this dynamic is provided by *SURE,* an instrument adopted on the basis of Article 122 TFEU to provide temporary support to Member States with the aim of mitigating unemployment risks in the emergency situation created by the COVID-19 pandemic (*SURE*).[691] Unlike the *EFSM, ESI* or *HERA*, *SURE* does not establish a permanent crisis framework but rather a specific measure adopted as a reaction to a specific ongoing crisis. Thus, its adoption already entailed an assessment by the Council that the conditions for emergency action under Article 122 TFEU were satisfied.[692] Following that assessment, nothing would have prevented the Council from giving the Commission the task of implementing the instrument in relation to individual requests for support submitted by the Member States. However, the Commission proposed a different solution: the financial assistance would be made available via Council implementing decisions, following a positive assessment by the Commission of the requests submitted by Member States (Article 6 of Council Regulation(EU) 2020/672). The justification for such an approach was identified by the Commission's proposal with reference to the particular financial implications for the Member States linked to the decisions to grant financial assistance. The approach was confirmed by Council upon adoption of the Regulation.[693] Admittedly, the need to have recourse to Member States' voluntary guarantees to cover the market borrowing of the funds needed to finance the instrument, played an important role in the choice of a governance mechanism that gave the Member States the highest possible degree of control.

A second example is provided by the main spending instrument established to support the recovery of Member States' economies from COVID-19, the *Recovery and Resilience Facility*.[694] The *RRF* was designed around the idea of a reform and investment agenda to be negotiated between each Member State and the Commission and ultimately incorporated in a Recovery and Resilience Plan, setting milestones and targets for the disbursement of financial support.

[691] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L159, 2020.

[692] See, in particular, recitals 2 to 6 of the *SURE* Regulation, providing the justification for the recourse to Article 122 TFEU.

[693] See, Recital 13 of the Regulation.

[694] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L57, 2021.

In the original Commission proposal, both the adoption of the Plan and the individual decisions on payments following a positive assessment of the achievement of the milestones and targets were meant to be left to the Commission, as is normally the case for other spending instruments based on Article 175 TFEU (the legal basis for cohesion).[695] However, following a request by the Council in legislative discussions, the governance shifted towards a greater role for the Council, which was ultimately given the power to adopt the plans following a proposal of the Commission based on its positive assessment of the plans submitted by the Member States.[696] The decision on individual payments, based on the fulfilment of the milestones and targets set out in the Member States' Plans, was instead left to the Commission,[697] but supplemented by the requirement to seek an opinion to the Economic and Financial Committee and, most importantly, by an "emergency brake" mechanism, which would allow for the possible involvement of the European Council.

It must be stressed that the conferral of implementing powers on the Council also remains a central feature of the crisis frameworks that have been adopted (or are currently still under negotiation) on the basis of ordinary legal bases in the aftermath of the crises and that we have briefly described in Chapter III, Section 1.2 of the report.

In some instances, the role of the Council in implementing a permanent framework mirrors the role that the institution was already playing in the context of emergency measures. This is for instance the case of the gas package and the electricity market act, which have generalised and made permanent the regime of regulated prices in the event of an electricity or gas price crisis that was originally introduced by the emergency measures adopted under Article 122 TFEU.[698] The role of the Council can here be explained in light of the

[695] In ordinary cohesion instruments, Member States negotiate and then submit programmes that the Commission adopts by means of implementing decisions. See: Article 23 of the Common Provisions Regulation (CPR), Regulation (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231 30.6.2021, p. 159.

The CPR Regulation (and its predecessor) exceptionally provides for giving implementing powers to the Council in the framework of macroeconomic conditionality, a conditionality mechanism that allows the Council to suspend commitments or payments under the funds in the case of failure to take corrective action in response to Council recommendations and decisions under the corrective arm of the Stability and Growth Pact: see: Article 19 CPR.

[696] See: Article 20 and Recital 45, which does not, however, provide an explicit justification for the conferral of implementing powers on the Council.

[697] Article 24 and Recital 52.

[698] This is the case of Article 5 of Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, which introduces a regime of regulated prices in the event of a natural gas price crisis, on the model of the emergency measure already introduced by Council Regulation 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

normative drag exercised by the preceding measures.

However, the conferral on the Council of implementing powers is also a constant feature in new crisis response frameworks introduced by the ordinary legislator in areas where no emergency measures had been previously adopted (and therefore where the Council had never played a role on the basis of emergency powers under the Treaties). It is interesting to note that, even when the Commission's original proposal did not originally envisage a role for the Council in implementing the instrument (as in the case of *IMERA*), such a role was then introduced or expanded at the request of the Council in the legislative discussions.[699] This pattern is all the more remarkable given that the instruments at stake are subject to the ordinary legislative procedure, and thus require the simultaneous agreement of the European Parliament.

The recognition of a specific role for the Council in implementing crisis frameworks, even when they are adopted as part of an ordinary EU competence, can be explained in light of the rationale underpinning the Council's role in the Union emergency competences as described in part I, Chapter II of this report.[700] However, unlike the Treaty-based emergency provisions, where both the assessment of the conditions and the adoption of measures fall within the Council's remit, the crisis frameworks established in secondary law allocate the two between the Council and the Commission, following two alternative governance models.

The first model is the one adopted in the internal market instruments (*IMERA*, Chips Act, proposal for *EDIP*) whereby the Council determines the existence of a crisis situation and activates the crisis mode on a proposal from the Commission. Following such a decision, the Commission is then empowered to adopt the specific emergency response measures appropriate to the situation among those identified in a specific toolbox by the legislative instruments.

The second model is the one adopted in the area of asylum and migration, and notably in the *Crisis Regulation*. Here, the logic seems reversed: the Commission is in charge of determining the existence of one of the crisis situations of provided for by the Regulation (a mass influx of migrants, *force majeure* or situation of instrumentalisation of migrants). Such a decision then paves the

[699] Some of the instruments analysed in this Report were initially proposed with a governance system exclusively based on the Commission's implementing role, which however was reconsidered during legislative negotiations. See for instance the original proposal for the Chips Act (for the activation of the Crisis Mode), *IMERA* (for the activation of the internal market vigilance mode), the *RRF* (for the adoption of Recovery and Resilience Plans), the *Emergency Support Instrument* (no Council decision originally envisaged for the activation of the instrument).

[700] As Member States are traditionally vested with the primary responsibility for dealing with emergency situations, any limitation on such a role would be accepted only if accompanied by the guarantee of preserving sufficient control. This explains the central importance of the Council in cases where emergency competences are exceptionally centralised at Union level. In fact, the conferral of emergency competence on the institution which represents the Member States offers the best institutional design for ensuring (a certain degree of) control by Member States over Union emergency measures, and as such it is the trade-off typically required by the Council during legislative negotiations for accepting the establishment of crisis instruments at the EU level.

way for the Council to adopt an implementing decision authorising a Member State to apply derogations to the asylum acquis and triggering the solidarity measures provided for in the Regulation. A similar approach appears to be followed in the 2024 amendment of the *Schengen Borders Code* in relation to a situation of large-scale public health emergency. In this case, the definition of "large-scale public health emergency" in Article 2(b)(27) refers to a "public health emergency, that is recognised at Union level by the Commission […]," thus clarifying that the Commission is in charge of carrying out the assessment. Where the Commission establishes the existence of the emergency, [701] it may then propose that the Council authorise the reintroduction of internal border controls and decide on temporary travel restrictions for third-country nationals.

The combination of the different roles that the Council and Commission play in the governance of the crisis framework (assessment of the state of crisis versus adoption of measures) reflects the different level of integration in EU policy areas. In areas where integration is advanced, such as in the internal market, the Commission is given the power to adopt the appropriate emergency measure, while Council establishes the existence of a crisis situation. In areas where Member States hold the central role in implementing Union policy (such as border management or migration), the Commission becomes the gatekeeper assessing the existence of the conditions for adopting emergency measures, which are then *authorised* by the Council (and ultimately implemented by the Member States).

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

The expanding role of the Council in the implementation of EU law needs to be assessed in light of the legal framework applicable to the conferral of implementing powers and to the practical arrangements for exercising them according to the Treaties.

In that regard, the Court of Justice has consistently noted that in the system provided for by the Treaties, "when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power."[702] It follows that, when the co-legislators intend to confer implementing powers on the Council instead, they are required to duly justify their choice and provide a detailed statement of reasons.[703] In particular, the Court has made it clear that the

[701] This is the language used in Article 28(1): "Where the Commission establishes that there is a large-scale public health emergency that affects several Member States, putting at risk the overall functioning of the area without internal border control, it may make a proposal to the Council […]."

[702] Judgment in case C-440/14 P, *NIOC v Council*, point 50 and 60 and the case law quoted there.

[703] Judgment of the Court of 24 October 1989 in case C-16/88, *Commission v Council*, EU:C:1989:397, point 10; judgment of the Court of 18 January 2005 in case C-257/01, *Commission v*

co-legislators "must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that, under the system established by the treaty."[704]

In light of this case-law, the General Court has recently annulled a Single Resolution Board decision adopted in application of a Council implementing act[705] specifying the methodology for the calculation of ex ante contributions by banks to the Single Resolution Fund on the basis of Article 70(7) of Regulation 806/2014.[706] The General Court noted that the recitals of the implementing act merely set out the purpose and content of the implementing act to be adopted, "without however providing the slightest indication of the reasons why the implementing power was conferred on the Council rather than the Commission for those purposes."[707] In the absence of any textual element from which it would be apparent that the conferral of implementing powers on the Council was justified by the specific role that it is called on to perform in the specific field at stake, the justification could not be simply inferred by the context in which the conferral was made.[708] Nor, according to the General Court, could such a justification be found either in a general reference to "political reasons," since such a reference is neither detailed nor related to the nature or the content of the relevant basic act.[709] These findings are challenged by the Council which considers that the choice of the legislator as to conferral of implementing powers would result by the broader context of the act and by the general reference to the sensitivity of the matter as required by the case law. The appeal is currently pendiWhen the basic act contains an explicit justification of the conferral of implementing powers on the Council, the Court has shown a great deal of deference to the discretional choices that the co-legislators make on this matter. Thus, it has accepted justifications generally referring to the significant impact that the measures may have either on the Member States[710] or on the individuals that may be concerned by the measures at stake or on the need to ensure consistency in light of the alloca-

Council, EU:C:2005:25, point 50; judgment of the Court of 16 July 2015 in case C-88/14, *Commission v Parliament and Council*, EU:C:2015:499, point 30; judgment of the Court of 1 March 2016 in case C-440/14 P, *NIOC v Council*, EU:C:2016:128, point 49; judgement of the Court of 28 February 2023 in case C-695/20, *Fenix*, EU:C:2023:127, para. 37.

[704] Judgment in case C-440/14 P, NIOC v Council, point 50

[705] Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation No 806/2014 with regard to ex ante contributions to the Single Resolution Fund, OJ 2015 L 15, p. 1.

[706] Regulation (EU) No 806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ 2014 L 225, p. 1.

[707] Judgment of the General Court of 29 May 2024 in case T-395/22, *Hypo Vorarlberg Bank v. SRB*, ECLI:EU:T:2024:333, point 32 and following. The judgment is currently under appeal.

[708] Ibidem, points 37 to 40.

[709] Ibidem, point 41.

[710] Judgement of the Court in case C-695/20, *Fenix*, quoted above, paras. 39 and 40.

tion of competences between institutions, notably in light of the role played by the Council in related areas.[711] The Court has also considered that a "general and laconic" reference to the sensitivity of the matter would suffice to provide the required justification (see, for instance, the Judgment of 18 January 2005, Commission v Council, C-257/01, EU:C:2005:25, paras. 52, 53).

Taking account of this case-law, the short but clear justification provided in recital 13 of the *SURE* Regulation, which refers to the "particular financial implications" notably for the Member States whose voluntary guarantees assist the borrowing on the market of the necessary resources, appears to meet the loose standard of review that the Court has used to assess the justification of the conferral of implementing powers on the Council.

The same cannot be said of the RRF Regulation, recital 45 of which does not provide an explicit justification as to why implementing powers should be conferred on the Council for the adoption of the recovery and resilience plans, but merely describes the relevant procedure. The choice of the legislator can, however, be derived from the broader context as captured by other recitals of the Regulation, and notably by the many references to the European Semester for economic policy coordination as the relevant framework for identifying national reform priorities on which the national resilience and recovery plans will be based,[712] and for the central role played by the Council in that context.[713] The need for coherence and consistency with the Semester process is thus key for pursuit of the RRF objectives and therefore justifies conferring powers on the Council to adopt the recovery and resilience plans, which aim to provide direct financial support linked to the implementation of reforms and investment that responds to the challenges that the same Council has identified in the Semester.

The analysis of the justifications provided by ordinary law instruments establishing permanent crisis frameworks leads to variable outcomes: while the reference to just the "politically sensitive nature"[714] of the decision to be taken does not appear to meet the standard of the case-law, a broader reference to the "*potential and far-reaching consequences*" of the measures to be taken for the individuals or for the functioning of an area of EU policy (e.g., the internal market) appears more solid.[715] A particularly convincing justification is the one developed in recital 31 of the *Crisis Regulation,* which links the conferral on the Council of the power to authorise derogations from the EU asylum regime and to apply an enhanced solidarity regime to the objective of strengthening mutual trust between Member States and to improve coordina-

[711] Judgment of the Court of 1 March 2016 in case C-440/14 P, *NIOC v Council*, ECLI:EU:C:2016:128, paras. 52ff.

[712] See: recitals 4, 5, 17, 32, 39 and 58.

[713] See, in particular, recital 36.

[714] See: recital 8 of the *2024 Schengen Border Code Amendment*. See also recital 58 of the *EDIP* proposal.

[715] See: recital 36 of *IMERA*. See also recital 58 of the *EDIP* proposal.

tion at Union level. Such a justification clearly reflects the logic of the conferral on the Council of implementing powers in the first place, namely, the need to ensure the effectiveness (through acceptance) of a centralised emergency regime, which often coexists with individual Member State measures.

Beyond the obligation of motivation, the conferral of powers on the Council also needs to respect the prerogatives that the Treaties confer on the Commission, as the institutions who are in principle tasked with ensuring the application of EU law (Article 17(1) TEU). This is particularly relevant to instruments that entails the mobilisation of resources from the Union budget, given the specific responsibility that is conferred by the Treaties on the Commission for implementing the budget (Article 17(1) TEU and 317(1) TFEU). In that regard, however, the Court has followed a restrictive interpretation of the reserve of competence of the Commission. According to old but established case-law, the competence that Article 317 TFEU confers on the Commission for implementing the budget is limited to the power of committing appropriations and payments from the EU budget (budget execution *stricto sensu*).[716] As a consequence, the Court has recently confirmed that the complex assessments linked to triggering the horizontal conditionality mechanism established by the Conditionality Regulation "*forms part of a conception of budget implementation that goes beyond that which* […] falls within the Commission's powers in cooperation with the Member States"[717] and could therefore validly be conferred on the Council without infringing the Commission's prerogatives.

In light of this case-law, the conferral on the Council of the power to approve individual Member States' plans under the *RRF*, *SURE* of *EFSM* Regulations, while very much a precursor of the acts implementing the budget *stricto sensu*, still appears to respect the role of the Commission. As a matter of fact, in all cases, the Council's implementing decisions approving national plans must be followed by the conclusion of dedicated agreements between the concerned Member State and the Commission, which set out the individual legal commitments for the grants and detail the borrowing conditions from the loans. It is the conclusion of this additional agreement that constitutes the act of budget execution *stricto sensu*, thus preserving the Commission's prerogatives as defined in the case-law. The Commission, however, expresses strong reserves as whether this case law applies in relation to the conferral on the Council of even more far-reaching powers such as the one authorising individual payments envisaged in the Ukraine Facility.[718]

[716] Judgment of the Court of 24 October 1989 in case C 16-88, Commission v Council, ECLI:EU:C:1989:397, paras. 16ff.

[717] Judgment of the Court of 16 February 2022 in case C-156/21, Hungary v. European Parliament and Council, ECLI:EU:C:2022:97, paras. 186–189.

[718] Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, OJ L 792, 2024. The Ukraine Facility is a macro-financial assistance instrument adopted on the basis of Article 212 TFEU to provide Ukraine with both immediate budget support and medium-term support for reconstruction. The Ukraine Facility was initially proposed by the Commission on the basis of the RRF model of governance but during

In conclusion, when considered individually, the many new instances where the Council is vested with implementing powers in the framework of emergency instruments do not seem to raise a problem of compatibility with the Treaties in light of the case-law. Still, based on the sheer size of the phenomenon, one could argue that the conferral of implementing role on the Council is no longer an exception and that a shift towards a more "executive" and implementing function for the Council is indeed taking place. In order to test this assumption, it is useful, however, to look at how the Council exercises its newly acquired implementing powers in practice.

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

It is clearly too early to assess the implementation of the various permanent crisis frameworks that have been only recently adopted and that in some cases are not yet being applied, let alone those that are still in negotiation. However, the practice developed under the emergency instruments adopted during the past crisis already offers some useful indications as to how the Council exercises its implementing powers.

The first remark in that regard is that despite the importance that Council had attached during the legislative negotiations to the objective of securing a key role in the implementation of crisis instruments, the same Council has so far made little use of the possibilities that the newly acquired powers have offered. In none of the many instances in which the Council had to adopt implementing decisions under SURE or the RRF did it decide to reject or even amend the Commission's proposal, or to request its modification as a condition for adoption. Rather, the proposal for implementing decisions put forward by the Commission has systematically been confirmed after relatively short deliberations in Council.

The factors that explain this situation are manifold.[719] The framework for the exercise of Council implementing powers presents some inherent constraints

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the legislative negotiations, the Council managed to extend its control over implementation of the instrument and most notably obtained control over the assessment of the satisfactory fulfilment of the qualitative and quantitative conditions linked to individual payments. The need for urgent adoption of the Facility to provide to Ukraine with much-needed support explains the fact that the Commission accepted the amendments to the governance of the instrument without obliging the Council to proceed with unanimity as required by Article 293 TFEU. Nonetheless, the Commission issued a unilateral declaration regretting the choice of the legislators and stressing that the decisions related to payments to Ukraine under the Ukraine Facility belong to the power of budget implementation that is part of its institutional prerogatives under the Treaties. Summary Record of COREPER (part 2) meetings of 7, 8 and 9 February, Council ST doc. 6412/24 ADD1 of 1 March 2024.

[719] For a more detailed analysis, see: E. Rebasti, "Shifting the Institutional Balance in Times of Crisis? The Expanding Role of the Council in the Implementation of EU Spending Instruments," *Jean Monnet Working Paper Series* No. 3/24, retrievable at: https://jeanmonnetprogram.org/paper/shifting-the-institutional-balance-in-times-of-crisis-the-expanding-role-of-the-council-in-the-implementation-of-eu-spending-instruments/

that impact on the decision-making. This concerns in particular the default voting practices that apply to the exercise of implementing powers whenever the basic act does not provide for specific arrangements. In particular, the need for unanimity in order to amend the Commission's proposal[720] prevents the Council from modifying such a proposal if the Member States to which that decision is addressed vote against.[721] This ultimately precludes the possibility of the Council adopting more stringent conditions for the concerned Member State unless the Commission agrees. However, such an agreement does not appear likely in those cases where the Commission's proposal is based on a Recovery and Resilience Plan that has been thoroughly negotiated with the Member State concerned. In such cases, the application of the default rule on the approval of amendments to the Commission's proposal *de facto* limits the action of the Council to a mere approval/rejection alternative.[722]

Another factor is the Commission's power of initiative, which significantly frames the exercise of the Council's implementing powers, both in terms of the possibility for the Council to act and in terms of determining the content of the decision, which will have to be based on the assessment carried out in the Commission's proposal. In other words, the Commission also remains the gatekeeper of the Council's powers in the domain of implementation. This is particularly relevant where the assessment to be carried out is of a highly technical nature and is combined with a narrow timeframe to adopt the Council's decision.

Finally, other limitations are linked to the internal organisation and working methods of the Council: while both the Commission and the European Parliament have set up specific administrative structures to prepare and control the implementation of the spending instruments, the Council has not established any specific preparatory body (working parties) to prepare the implementing decisions that it is requested to adopt, nor has it strengthened its administrative services to support those activities. Rather, the additional work strand generated by the conferral of implementing powers has been accommodated within the existing structures and resources.

In conclusion, the practice for the implementation of SURE and RRF shows

[720] As Article 291(2) TFEU does not set out specific rules for the exercise of the Council´s implementing powers, the default voting rules and arrangements applicable to decision-making in the Council under the Treaties applies by analogy, unless the basic act regulates the matter differently. The default rules include the need for the Council to act on the basis of a Commission proposal (Article 17(2) TEU), the vote by qualified majority as defined in Article 238(3) TFEU (Article 16(3) TEU), the need for unanimity in order to amend the proposal unless the Commission supports the amendment (Article 293(2) TFEU), and the absence of deadlines for the Council to act.

[721] This problem is of course relevant when the implementing act is addressed to a specific Member State or specifically concerns its interests.

[722] This is why certain basic acts expressly provide the possibility for the Council to modify the Commission's proposal at qualified majority, regardless of the Commission's position. For instance, such a rule has been provided for the adoption of the decision approving the Ukraine plan (Article 19(1) of the Ukraine Facility) as well as for the adoption of measures for the protection of the budget under the Conditionality Regulation (Article 6(11) of the Conditionality Regulation.

that once presented with the result of lengthy and complex negotiations between the Commission and individual Member States on drafting the respective national plans, and required to act within a very limited timeframe, the Council has had little margin or appetite for reopening an agreement that had already been reached bilaterally. The overall impression is that the Council remains satisfied with a role of political oversight over the implementation of the spending instruments rather than seeking to actively shape the relevant decisions.

This leads us to an important observation. Even where implementing powers are conferred on the Council, the Commission continues to play the key role in implementing the spending instruments via its power of initiative. It is the Commission that identifies the relevant facts and carries out the technical assessments (on the quality of the plans, the conditions for payments, etc.) on which the Council implementing decisions are taken. When necessary, it is the Commission that negotiates with the concerned Member State the content of the measures to be adopted and incorporates the result of such negotiations into its proposals. In practice, the Council does not interfere with the technical assessments and negotiations carried out by the Commission. Ultimately, it is the Commission that exercises discretion and shapes the implementing decisions submitted to the Council for adoption.

A second remark follows from the previous one: the conferral of powers on the Council does not seem to undermine the Commission's role, but – on the contrary – enhances it. And it does so in two different ways.

First, the need for the Commission to obtain the adoption of the Council obliges it to provide a very solid statement of reasons and a convincing narrative for its proposals. While the Commission is normally accountable to the European Parliament, when acting in the framework of its right of initiative for the adoption of Council implementing powers, it becomes accountable to the Council, too. Paradoxically, the conferral on a political body of the final decision makes the process more objective and more democratically accountable.

Second, and perhaps most importantly, the conferral of implementing powers on the Council gives it legal and political responsibility for the acts that are adopted. This assumption of political responsibility has the effect of also providing political backing for the action of the Commission in areas where it enjoys exclusive implementing responsibility but for some reason is reluctant to act.[723]

[723] An example of this phenomenon is the adoption of measures to protect the budget in relation to the Rule of Law situation in Hungary. The discussions and then adoption by the Council of measures under the Conditionality Regulation and the adoption of the RRF plans for the two Member States, which included super-milestones related to the rule of law, has paved the way for the Commission to activate on the same grounds the different conditionality mechanism based on the Common Provisions Regulation to implement the cohesion funds (CPR). It must be stressed that under the CPR, the horizontal enabling conditions are activated by the Commission on its own;

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

Emergency situations of have also reshaped the role played by the European Commission, requiring it to adapt its actions to circumstances and to the new institutional dynamics that have been emerging. These adjustments prompt a reflection on whether "crisis mode" has in fact resulted in an erosion of the Commission's prerogatives, as it would appear in light of the deference and self-restraint that the Commission has exercised vis-à-vis the European Council and the Member States in order to secure a consensual and effective European response. On closer look, however, the strategy followed by the Commission seems to have ultimately strengthened its role by increasing its influence and ability to shape the crisis response. This, in turn, has led to a significant expansion of its powers, of the instruments at its disposal and of the reach of its action.

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

The analysis of the conduct of the Commission during the crises considered in this report points at an apparent erosion of its institutional prerogatives. This erosion seems manifest in three areas that are central to the institutional mission of the Commission: its power of initiative, its role in implementing EU law and finally its role as guardian of the Treaties.

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

As regard the power of initiative, one constant element that has emerged from the case studies analysed in Chapter I is the deference paid by the Commission to the European Council when formulating policy responses to crises. At first sight, it may seem that the Commission has stepped back and left the leaders the role of taking the policymaking initiative, setting out priorities, defining the direction of action and even shaping the content of specific emergency measures. This raises the question of how to reconcile the European Council's power to define the general political directions and priorities of the Union (as laid down in Article 15(1) TEU) and the Commission's power to "promote the general interest of the Union and take appropriate initiatives to that end" (Article 17 TEU).
Such ostensible erosion of the power of initiative of the Commission seems in

however, the Commission has been very reluctant to use its powers under CPR conditionality (and its predecessors) to suspend payments to Member States. It is thus remarkable that once the Council showed its support for imposing the other set of budgetary conditionality under the Conditionality Regulation and the RRF, the Commission finally decided to follow up and to make full use of its prerogatives.

most cases to be the result of a form of self-restraint, prompted by the lessons learnt in situations where initiatives proposed without clear support from the European Council have failed to gather sufficient support and have resulted in a significant setback for the action of the Union.

The migration crisis serves as a pivotal case study here. The Commission struggled to shape the agenda and to identify consensual solutions to address the sudden influx of migrants. It put forward proposals for emergency measures aimed at the mandatory relocation of migrants, which were supported by a majority of Member States but strongly opposed by others. Two Member States refused to comply with the measure, while several more dragged their feet in its implementation. The divergence among Member States' positions was so acute and conflictual that the work of the Council on the package of legislative measures to tackle the migration crisis was paralysed. This led the European Council to agree that an accord on those legislative texts would need to be based on consensus. The Commission readjusted its proposals to take account of the new political context but the agreement on the new Asylum and Migration Pact remained difficult and slow to achieve. In the meanwhile, the Member States adopted a number of unilateral derogating measures to tackle the situation (see Chapter I, Section 1 above).

The energy crisis offers another example. The legislative response proposed by the Commission in reaction to the surge in energy prices as a result of Russia's war of aggression against Ukraine was deemed insufficient by the European Council, which insisted that a number of additional measures be taken, and in particular emergency measures based on Article 122 TFEU. The Commission followed the suggestion and submitted proposals for a number of emergency measures as requested by the leaders (see Chapter I, Section 3 above).

The two examples are testimony to the risk that exercising the power of initiative may entail if proposals are brought forward without having sufficient political support. This explains why, in other cases, the Commission has instead agreed to follow the lead of the European Council and waited for a consensus to emerge on the type of measures to be taken, before submitting formal proposals to that effect. Paradigmatic in that sense is the case of the economic measures taken during the COVID-19 crisis, as shown in Section 2.1 of Chapter I.

The perceived erosion of the Commission's power of initiative needs, however, to be seen in the broader context of its relationship with the European Council. As a member of the EUCO, the President of the Commission is present in the "rooms where it happens." With her technical expertise, and the ability to activate tools at the EU level and mobilise the Union administration, the President of the Commission is in a position to steer the debate among the leaders and to contribute decisively to shaping any agreed solution. Ahead of the European Council, the Commission contributes to the preparations in terms of input, and given that the Commission will be holding the pen on

the actual follow-up initiatives, this is an opportunity to do a reality check of the envisaged direction. Among many examples, we can mention here the decisive contribution of the Commission in shaping the political agreements on the broader NGEU/MFF package during the European Council meetings of July and December 2020. For instance, the much-criticised guarantees as to how the Conditionality Regulation would be implemented, which were crucial in overcoming the stalemate on the overall package during the 2020 December European Council, can only be understood in light of the endorsement provided by the President of the Commission through the participation in the consensus at the European Council.[724] As the body entrusted with the task of initiating proceedings under the Regulation, only the Commission could validly provide workable guarantees, by committing to act in a certain way when applying the Regulation.

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

The second area where the age of crises seems to have eroded the role of the Commission is the one relating to its responsibility for implementing EU law and executing programmes (Article 17(1) TEU). This is evident in relation to the multiplication of instances where the Commission has increasingly had to cede implementing powers to the Council, which may grant implementing powers to itself in "duly justified cases" pursuant to Article 291(2) TFEU. As we have seen, this phenomenon concerns both decisions relating to the implementation of spending instruments (see the examples of *SURE,* the *RRF*, the *Ukraine Facility*, the *RoL Conditionality Regulation*, analysed in the previous section) and decisions for the activation or adoption of measures under emergency modes in the context of permanent crisis frameworks (see, for instance, the cases of *IMERA*, the Chips Act mentioned above in Chapter III, Paragraph 1.2), where the Council is now playing a crucial implementing role.

Even when implementing powers are conferred on the Commission, the exercise of those powers is often framed by the proliferation of mechanisms that ensure a certain degree of involvement of representatives of the Member States in addition to, and beyond the set of procedures laid down in the Comitology Regulation (Regulation 182/2011). An example is provided by the role of the Economic and Financial Committee which, under the *RRF Regulation,* should provide an opinion on the satisfactory fulfilment of milestones and targets before the Commission decides on payments to be made to Member States,[725] or of the emergency brakes that can trigger a debate in the European Council if concerns emerge as to the implementation of the *RRF Regulation* and the *RoL Conditionality Regulation*. In the context of emergency frameworks set

[724] See: Conclusions of the European Council meeting of 10 and 11 December 2020, EUCO 22/20.
[725] See: Recital 52 and Article 24 of the *RRF Regulation*.

up under ordinary sectorial legislation, another example is offered by the systematic establishment of specialised boards composed of representatives of the Member States, which assist the Commission in the preparation and implementation of measures to be adopted in the event of a crisis (e.g., the Internal Market Emergency and Resilience Board under *IMERA*, the European Semiconductor Board under the Chips Act and the Health Crisis Board under the *HERA Regulation*).

Yet, for all of these institutional arrangements and procedural devices, no real setback in the role played by the Commission in the implementation of crisis instruments has been noted in practice. On the one hand, we have already found that the conferral of implementing powers on the Council has had few, if not positive, consequences on the role played by the Commission in implementation spending instruments such as the *RRF* or the *Ukraine Facility* (see the findings reached in the previous section). On the other hand, several of the procedural arrangements introduced to frame the powers of the Commission, such as the EUCO emergency brake, have not been used in practice to date, thus showing that they had more of a role to play in establishing a landing zone for reaching a political agreement than in the actually implementing the instrument. Finally, the multiplication of "emergency boards" to assist the Commission in implementing crisis frameworks can also be seen as an inversion of the trend towards greater "agencification" – the proliferation of EU agencies to undertake specific regulatory tasks. In fact, as the example of HERA shows,[726] the crisis situation seems to have given the Commission the opportunity to re-centralise the Union administration, to the detriment of independent bodies and with the effect of increasing the influence and powers of the central authority.

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

The final area where it can be wondered whether an erosion of the role of the Commission has taken place concerns the exercise of its powers as guardian of the Treaties. The case studies analysed in this report show that in crisis situations, the Commission has clearly avoided strictly policing the many unilateral emergency measures adopted by the Member States, even when they raised

[726] The Health Emergency Preparedness and Response Authority (HERA) was established as a Commission service under the authority of the Head of HERA – ranked as a Commission's Director-General and the political steering of a Coordination Committee composed of the competent Commissioners. The HERA Board, composed of representatives from the Member States, assist and advise the Commission in the formulation of strategic decisions concerning HERA. The nature of HERA was controversial, with the Parliament insisting on its establishment as an independent Union agency. Ultimately, the Commission decision establishing HERA provides for a review that requires the Commission to assess by 2025 the implementation of HERA's operations, including its structure and governance. See: Commission Decision of 16/9/2021 establishing the Health Emergency Preparedness and Response Authority, C(2021) 6712 final.

issues of compatibility with existing regulations or posed a risk for the coherence and functioning of key Union policies (be it the single market, freedom of movement or the asylum and migration policy). This phenomenon is part of a more general trend in which the number of infringement proceedings has fallen in recent years,[727] and has already attracted some academic interest,[728] but which in a context of crisis takes on a new dimension.

The migration crisis again offers a classic example. When in 2015, the Member States reacted to the surge in the inflow of illegal immigrants with a flurry of internal border closures and controversial derogations from the common rules on asylum, the Commission did not trigger infringement proceedings in a significant way, even in relation to the most controversial national measures. The same approach was then followed in the 2021 Belarus crisis, where the Commission did not take action with regard to the unilateral measures adopted by certain Member States to limit arrivals at the international borders. While the Court of Justice finally intervened in relation to the measures adopted by Lithuania, this was the result of a preliminary ruling on the interpretation of EU law (compatibility with EU law of the national measure) rather than of an infringement proceeding. Where, however, the Commission did take infringement action, however, notably in relation to the declared intention of Hungary, Poland and the Czech Republic not to implement the Council emergency relocation decisions, the result was underwhelming: the judgment of the Court declared that the infringement[729] did not change the very modest outcome of the mandatory relocation policy, which remained largely under-implemented.

This latter example is also illustrative of the reasons that possibly underpin the self-restraint of the Commission in having recourse to infringement proceedings. First, the conflictual approach underpinning the recourse to infringements does not appear appropriate at a time when it is paramount to show solidarity and support from the Union institutions. In such a context, a certain understanding is expected as to the fact that emergency measures are temporary and address contingent needs without necessarily taking full account of their impact at the EU level. Moreover, additional caution is required in relation to matters which relate to an area where the sovereignty reflex of the Member States' remains particularly high, in relation to borders, healthcare and internal security. This explains why the Commission has preferred to handle the problems posed by the Member States' unilateral action through a number of soft-law instruments (such as communications and guidelines),

[727] For the most recent data, see: the Report from the Commission, Annual Report on monitoring the application of EU law – 2023 Annual Report, COM(2024) 358 final. Year 2023 recorded the lowest number of new cases in a decade, with 529 new infringements, compared with the peak of 986 in 2016.

[728] R. D. Kelemen, and T. Pavone, "Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union," 27/12/2021. Available at SSRN: https://ssrn.com/abstract=3994918 or http://dx.doi.org/10.2139/ssrn.3994918

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

encouraging coordination among the Member States rather than sanctioning potential breaches of EU law. Second, in times of crisis, the recourse to infringement proceedings does not appear particularly effective either. The procedure may take years and thus does not ensure any meaningful result at the time when a solution is needed the most. Moreover, even when the proceedings result in a judicial finding declaring an infringement, the legal settlement will not necessarily solve the political conflict leading to the infringement in the first place but could even exacerbate it and thus further jeopardise other policy initiatives. Several academic authors have pointed out that, by embracing dialogue with governments over robust enforcement, the Commission has sacrificed its role as guardian of the Treaties to safeguard its role as an engine of integration and an effective manager of crisis.[730] More than a shifting of the institutional balance, the practice is thus indicative of a strategic use of Commission's prerogatives to enhance its influence on policymaking.

4.2 A significant strengthening of Commission's role

Whereas some elements may give the impression that there has been an erosion of the Commission's prerogatives, the case studies analysed in this report point to a very real strengthening of the Commission's role in times of crisis. This strengthening operates on three dimensions: reinforcement of the powers that the Treaties confer on the Commission by leveraging the crisis to enhance its influence; expansion of its prerogatives to new areas; and, finally, recognition of its central role, even when, exceptionally, solutions are sought outside the EU legal order.

4.2.1 Leveraging the crisis to reinforce existing powers

The Commission has been able to leverage crisis situations to reinforce in practice both its power of initiative and its role in implementing EU law.
As regards the power of initiative, the need for rapid action that is typical of emergency situations reduces the level of scrutiny exercised by decision-makers, thereby affording the Commission greater room for manoeuvre in the presentation of proposals. In situations where there is less time for reflection and where urgent action is required, it is plausible that the direction proposed by the Commission is more likely to prevail, and that proposals may be subject to fewer changes than in situations with time for in-depth assessment. As a matter of fact, as we have seen (see Chapter III above), the condition for the very rapid adoption of a crisis-related legislative act under OLP is often to adopt the Commission's proposal without amendments, since any modification by one of the co-legislators could prompt the other to do the same and thus require time-consuming inter-institutional negotiations.

[730] Ibidem.

As in the famous Churchill's quote, the Commission has shown great ability to never waste a good crisis to advance its policy agenda. Thus, in a number of examples examined in this report, the Commission has taken advantage of the crisis situation to overcome resistance to policy ideas or legislative instruments that up to that moment had encountered decisive opposition.

The *RRF Regulation*, that is, a re-incarnation of the then moribund idea of a budgetary instrument for the Euro area – the *BICC* – is perhaps the most spectacular example of this kind. After years of inconclusive negotiations in Council characterised by a limited level of ambition for the proposal for the *BICC* (itself a reframing of the previous proposal for a *Reform Support Programme*), the Commission repurposed the idea and the architecture behind that instrument to develop its proposal for a *Recovery and Resilience Facility*, which immediately gained traction (on the negotiations of the NGEU package, see Section 2.1.3). In the same vein, the Commission managed to leverage the crisis to push forward the establishment of common debt instruments, an unemployment benefit scheme, banking union reforms, and energy-related emergency measures – such as speeding up the installation of renewables or stronger interconnections and transparency in the energy market – that had been strongly resisted up to that point. Crises have also allowed the Commission to accelerate ongoing reforms and policies, as in the case of the Repower Plan presented to respond to the energy crisis and which brought forward the reform of the energy market for completing the establishment of the energy Union and the pursuit of the environmental objectives of the Fit for 55 agenda (see, for instance, the frontloading of a number of legislative measures to simplify the installation of renewable sources of energy). Through REPowerEU, the Commission managed to break the Union free from Russian gas dependency, against which the Commission had been advocating for a long time, but had faced heavy resistance on the matter in several Member States.

Finally, the Commission's power of initiative is amplified by the discretion that it enjoys as a gatekeeper to the emergency competence provided for by the Treaties. The choice as to whether an emergency response shall be framed via the adoption (or amendment) of acts under the ordinary legislative procedure or rather via measures based on emergency competences is in many instances a discretionary one, and one that rests with the Commission. In choosing one solution over another, the Commission has certainly shown a degree of deference to the requests provided by the European Council. It has, however, also taken account the calls for greater involvement coming from the European Parliament and has thus limited or specifically framed the recourse to emergency competences. In other words, the Commission has played a crucial role in defining the balance between the effectiveness of the crisis response and respect for the constitutional principles of the EU legal order.

As regards the Commission's role in implementing EU law, the crisis situations have undoubtedly offered an opportunity to leverage respect for EU rules

against the pressing needs imposed by the emergency. The most relevant example here is the role that budgetary conditionalities have been playing in promoting coherence and compliance with the policies and rules of the Union, in basically every domain of its action, from environmental protection to energy reform, from economic and structural reforms to respect for the rule of law.
While budgetary conditionalities are not linked per se to crisis situations and in fact were already at the centre of negotiations for the 2020–2027 MFF, their incorporation into the spending instruments established to support the recovery from the economic consequences of the COVID-19 crisis, especially in the *RRF*, has unquestionably given them a completely new dimension and reach.
Through the negotiation and the policing of milestones and targets defined in the RRF Plan,[731] the Commission has developed an extremely effective new compliance instrument, which gives it much more room for manoeuvre vis-à-vis the Member States when compared with the standard legal remedies – which ultimately depend on the final say of the Court of Justice.

4.2.2 New instruments, new powers and new domains of action

The second dimension in the strengthening of the Commission's role concerns the expansion of its prerogatives in areas that have to date been out of reach, either due to political resistance to certain matters being regulated at Union level or to the constraints imposed by the existing legal bases as traditionally used.
The pressing needs and sense of urgency associated with the unprecedented crises that the Union has been facing have, however, created the conditions to overcome these limitations. In political terms, as the downsides and the risks of uncoordinated unilateral national emergency measures became increasingly apparent, support for EU-wide solutions has gained decisive weight in all of the crises that we have analysed in this report. This has allowed the Commission to push through several innovative EU instruments that confer powers upon the Commission in previously uncharted domains. A few examples among the many resulting from the case studies analysed in the present report offer a useful illustration of the progressive expansion of Commission's prerogatives through emergency-related measures.
A first example is provided by the role that the Commission has acquired in the procurement of vaccines and other crisis-relevant medical countermeasures. Initially coordinating demand and public purchases by Member States, the Commission later procured COVID-19 vaccines directly on behalf of Member States and other countries that joined the joint procurements, through the amendments made to the *Emergency Support Instrument*, which gave it new powers in that regard.

[731] As we have seen, the fact that formal approval of the Plans is a prerogative of the Council under a RRF Regulation has not in practice weakened the role of the Commission, which on the contrary takes advantage of the legal and political backing for enhancing its action even further.

We have also seen how in the aftermath of the COVID-19 emergency crisis, frameworks have multiplied in sectorial ordinary legislation, expanding joint procurement schemes, together with a number of other crisis-relevant measures. While those give the Council a special role in activating the emergency mode (see Chapter III), the fact remains that the Commission plays the central role in their implementation. The shift towards a legislative model of emergency regulation has thus entailed the consolidation and expansion of the Commission's role as emergency manager.

A second telling example is the increased role that the Commission has acquired in coordinating the Member States' economic policies via the establishment of the *Recovery and Resilience Facility* in the context of the economic recovery from the COVID-19 crisis. While in the domain of economic policy, the role of the Commission and indeed of the Union is limited, developing a financing scheme that links funding for recovery to the attainment of reforms and investments identified in the European Semester has significantly empowered the Commission. It is for the Commission to negotiate with the individual Member States the recovery and resilience plans that translate the broad objectives and reforms identified in the country-specific recommendations in concrete and very specific economic and legislative actions identified in milestones and targets for the implementation of the plan. In so doing, the Commission will be required to assess the merits of the reforms and investments presented by the Member States and to discuss the priorities of their action; in other words, it will negotiate with Member States the structural reforms to organise their economies and the State and more broadly the content of their economic policies. As we have seen, the fact that final approval of the plans is reserved for the Council has not undermined the central role played by the Commission, as the Council has to date limited its role to one of political oversight.

A third example is offered by the decision to raise common debt on an unprecedented scale in order to support the recovery from the COVID-19 pandemic through the *NGEU* financing scheme (and later on to provide financial assistance to Ukraine in the context of Russia's war of aggression). The relevant legal acts have empowered the Commission to manage borrowing operations on the capital market and, given the size of the borrowing, the Commission has rapidly become one of the main issuers of bonds on a part with many sovereign issuers. In order to better manage its borrowing operations, the Commission proposed as part of the 2022 package of emergency measures to support Ukraine[732] a little-noticed, but nonetheless momentous modification

[732] The measures of financial assistance to Ukraine in 2022 and 2023 are not covered in this report. The 2022 package, in addition to the reform of the financial Regulation mentioned in the text, included an Instrument providing support to Ukraine for 2023 (macro-financial assistance plus) and an amendment to the Multi Financial Framework Regulation, necessary to extend the option to use the "headroom" available above the MFF ceilings up to the limits of the own resources ceiling as a budgetary guarantee for loans to third states, and notably to Ukraine (the MFF already provided such a use of the headroom for loans to Member States).

of the financial regulation, empowering it to implement a diversified funding strategy.[733] Such a strategy makes it possible to decouple the timing and the maturity of single funding transactions from the disbursements to beneficiaries. A common liquidity pool financed by the issuance of short-term funding is established and enables the Commission to organise payments in accordance with a regular schedule, independently of the exact timing of the long-term bond issuance. This allows payments to be made to beneficiaries independently of the market conditions prevailing at the time of the disbursement, as borrowing operations are carried out independently from the payment and feed into the common liquidity pool. An annual borrowing decision offers transparency and predictability to investors as to the Union's upcoming borrowing operations. While these rules allow for the orderly management of borrowing operations with a view to reducing their costs, they in fact lay the foundation for an embryonic treasury for the Union and give responsibility for its management to the Commission.

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

Unlike what happened during the financial crisis, the emergency response in the case studies analysed in this report has been firmly based on EU, rather than intergovernmental, instruments. The Commission has played a crucial role in preserving the centrality of the EU legal order as the normative space for crisis response, even in cases where the Treaties confer only limited powers on the Union. This in turn has further strengthened its role as a crisis manager. This result has been achieved thanks to a great deal of creativity in handling the legal constraints imposed by the system of attributed powers, which is a key aspect of the EU legal order.

First, the Commission has relied on an evolutive interpretation of a few crucial legal bases. For instance, as we have seen, Article 114 TFEU – a core internal market provision which empowers the co-legislators to adopt measures for the approximation of national laws – has been used to establish crisis response frameworks that do not directly harmonise or approximate national substantive laws but instead prevent risks of fragmentation in the event that unilateral national measures are adopted (see Chapter III, Section 1.3 above).[734] Another example is the broad and evolutive interpretation of the principle of budget-

[733] Regulation (EU, Euratom) 2022/2434 of the European Parliament and of the Council of 6 December 2022 amending Regulation (EU, Euratom) 2018/1046 as regards the establishment of a diversified funding strategy as a general borrowing method, OJ L 319, 13/12/2022, pp. 1–4.

[734] An expansive use of Article 114 TFEU was also at play during the banking crisis, to establish the main elements of the banking Union, including the setting-up of centralised bodies such as the Single Resolution Board, or the European Supervisory Authorities, which the legislator has entrusted with tasks of regulation and intervention in exceptional circumstances affecting financial stability.

ary balance laid down in Article 310 TFEU and of the principle of integrity of the own resources systems laid down in Article 311 TFEU, which were instrumental in establishing the NGEU financing scheme during the COVID-19 pandemic. Finally, a broad interpretation of the concept of financial rules for establishing and implementing the Union budget under Article 322 TFEU has made it possible to put in place budgetary conditionality that links the disbursement of Union funds to broader respect for Union rules and values, including the Rule of Law.[735]

While it is up to the co-legislators to uphold the proposed evolutive use of the various legal bases – and ultimately for the Court of Justice to validate it – the fact remains that the role of the Commission as a driver has been key to opening up new avenues for the use of Union competences.

In the same vein, using its power of initiative, the Commission has played a central role as gatekeeper of the emergency provisions contained in the Treaties. It is the institution that must be credited with the "rediscovery" of Article 122 TFEU and with having proposed an evolutive interpretation of the provision, allowing its application in a number of previously unexpected forms (see the analysis carried out in Chapter II, Section 2.1.). Such a use has allowed for a rapid and effective Union response to a number of crisis-related challenges that could not be solved at the national level or via other legal bases, and thus ensured the relevance of action at the Union level.

Finally, the Commission took advantage of the flexibility provided by soft-law instruments (see the conclusions of Chapter I) to act swiftly in times of crisis, while at the same time accommodating uncertainty and national diversity. In all the early phases of the crises analysed in this report, faced with divergent unilateral actions by Member States, the Commission promoted convergence through recourse to an increasingly significant body of soft-law instruments. And indeed, some of the Communications adopted by the Commission ended up playing a key role in defining the Union's action. This is particularly the case for the Commission's REPowerEU communication[736] and a number of communications in the context of the COVID-19 pandemic, such as its Communication on a coordinated economic response to the COVID-19 outbreak.[737] Other relevant examples include the so-called temporary frameworks in the area of State aid, described in Chapter II.[738]

Compared to the evolutive interpretation of ordinary legal bases or emergency provisions, the extensive recourse to soft-law instruments raised

[735] The recourse to an evolutive interpretation of these provisions has already been confirmed in a number of judgments of the Court of Justice.

[736] The Commission issued a substantial number of soft-law instruments and guidance in the context of the energy crisis.

[737] Communication COM(2020) 112 final of 13 March 2020 from the Commission on a coordinated economic response to the COVID-19 outbreak. During the pandemic, the Presidents of the European Council and of the Commission also issued documents referred to as roadmaps.

[738] In the context of State aid, however, the use of such instruments is in line with standard practice.

some additional issues. In particular, the lack of transparency and little stakeholder consultation due to the simplified procedures, the absence of any involvement of the European Parliament in the formulation of soft rules, and the exclusion of of direct judicial review must be highlighted as particularly problematic in a context where the use of soft norms is expanded and touch upon particularly sensitive issues (such as finding the right balance between privacy and public health, as in the rules on the use of contact-tracing apps).[739]

The fact remains, however, that due to the recourse to soft law, the Commission has been able to rapidly provide European responses in situation of crisis. As soft-law instruments have by definition no binding legal force,[740] they give Union action a broader reach. They thus ensure the continued centrality of the EU legal order, taking account of the Union's competences, while still allowing Member States to develop national responses in accordance with their specific features and needs. Thus, for instance, soft law has allowed the Commission to intervene in areas beyond the reach of the Union legislator, as they are excluded from harmonisation through binding instruments, such as public health policy. Moreover, as we have already underlined, when backed by the political endorsement of the European Council, soft-law instruments reach a level of compliance that is in fact no different to that of binding instruments.

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[739] See, for example, O. Stefan, "COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda" *European Papers*, 2020(1), pp. *663–670*. See also: the Opinion of Advocate General Bobek of 12 December 2017, in case C-16/16 P, *Kingdom of Belgium v Commission, ECLI:EU:C:2017:959*. Bobek very effectively points out how recourse to soft law may result both in a short-term and long-term pre-emption of ordinary legislative procedure and therefore may undermine the institutional balance:

"93. What is perhaps the greatest strength of recommendations may also then be the greatest danger. They could be used as more than just tools for advancing policies that are politically (lack of consensus) or legally (no specific powers to that effect) gridlocked. They could also potentially be used as a tool to circumvent the same legislative processes.

94. That creates two types of pre-emption: a short and a long-term one. The immediate problem of circumvention of the other institutions normally participating in the legislative process has already been recognised and discussed. It is therefore clear that a recommendation may have an impact on institutional balance, and so also on the separation of powers within the EU. Yet, if recommendations were excluded from a review of legality on the sole ground that they are not binding, the principle of institutional balance could never be upheld.

95. There is, however, another type of pre-emption that is likely to be present in particular for pre-legislative recommendations: the ability to articulate the norms before the actual legislative process takes place, which may even translate into unilateral pre-emption of the legislative process. It is not disputed that a recommendation has the ambition to induce compliance on the part of its addressees. Now if it is even partially successful, it will shape the range of conceivable (acceptable) normative solutions for the future. If, based on a recommendation, a number of EU institutions or Member States already comply, those actors will, in the legislative process that may potentially follow, naturally promote the legislative solution that they had already embraced. In this way, the soft law of today becomes the hard law of tomorrow."

[740] Soft law may, however, may produce legal effects, in particular by binding the actions of the institution that has authored it, as reflected in the Court's case-law linked to state aid control. See above: Chapter II.

Finally, in those instances where the Treaties were not able to provide solution to crises, notably where an evolutive interpretation of the relevant provisions would still not overcome legal constraints or was excluded by political context, and recourse to intergovernmental solutions was required, the Commission still played a central role in shaping and then implementing intergovernmental instruments.

While this occurrence has been only marginal in the cases analyzed in this report (reference can be made to the repurposing of the ESM Treaty credit line to provide assistance during the COVID-19 pandemic – which was, however, not activated; or to the so-called EU-Turkey statement during the migration crisis), it was of great significance during the financial crisis.

In that context, the setting-up of crisis instruments outside the EU Treaties has been accompanied by a number of safeguards to ensure that recourse to the intergovernmental method does not undermine the autonomy of the Union legal order and the Community method. This has allowed intergovernmental solutions to develop as a useful supplement to the EU Treaties and thus defuse fears that the EU legal order might be deconstructed.

Among these safeguards, a crucial one, together with the conferral on the Court of Justice of the jurisdiction on disputes concerning application of the relevant intergovernmental agreement, is the key role bestowed on the Commission in the implementation of the crisis instruments. The continued centrality of the Commission in intergovernmental instruments ensures that they remain coherent with Union action and ultimately guarantees their compatibility with the EU legal order.

Concluding Remarks

Recent crises have increasingly shown the Union's ability to act and to act swiftly. Whereas the financial crisis was characterised by a high degree of intergovernmental action, the response to recent crises has been firmly grounded in the EU's legal order. Even in the area of health, where the Union's competences are more limited, the Union-level coordination, in particular when it comes to vaccine procurement, was instrumental. The financing mobilised through the NGEU was unique in nature. Whereas Treaty limitations drove the Member States to act outside of the Treaties in the context of the financial crisis, the Member States demonstrated solidarity and unity as the COVID-19 pandemic progressively gained ground, and the Union used the set of tools which were available to roll out a coordinated response. The energy crisis was not characterised by the same limitations in terms of the powers conferred under the Treaties, which facilitated Union action. As many have acknowledged, such swift and decisive action has put the Union more firmly on the map, instead of often sub-optimal national measures or international arrangements. Whereas

the measures taken have affected the policies in question and possibly also on a more permanent basis, this seems to mirror the usual trend that crises – when successfully managed – lead to greater integration.

The Union response in emergency situations has entailed a number of adaptations in the functioning and interaction of the institutions. These adaptations are to a certain extent the consequence of the classic dynamics inherent in emergency powers and which result from the need to ensure rapid and effective action for the preservation of the polity in times of crisis. The prominence of the executive and the secondary role of the ordinary co-legislator also feature in EU emergency law and reflect the same logic that we see in action in national legal orders.

At the same time, however, the positioning of the EU institutions in times of emergency reflects the specificities of the EU emergency law architecture and notably the underpinning tension resulting from the principle of conferral and the competing normative claims to regulate emergencies advanced both by the EU legal order and by the legal orders of the Member States.

As the cases analysed in this report have shown, this tension has been addressed in procedural terms, notably by promoting consensual decision-making as a condition for the acceptance and effectiveness of Union emergency action. This is first and foremost reflected by the central role played by the European Council in defining both the priorities and the detailed content of emergency measures. The difference paid by the Commission to such a role has allowed it to gather the support of Member States for the adoption of measures at the Union level and to ensure their successful implementation. When such support has not been achieved, and the Commission has nonetheless decided to push forward proposals for emergency measures, this has led to a setback in terms of effective implementation and in terms of future use of emergency powers, as clearly shown by the migration crises.

The role that the Council has been granted to implement emergency measures or to activate emergency frameworks reflects the same approach. By ensuring the possibility of control by the Council, these solutions facilitate acceptance by the Member States of Union emergency solutions. The fact that in the practice analysed in this report the Council tends to follow the proposals submitted by the Commission and thus does not make significant use of its discretion when exercising its implementing powers confirms that its role is limited to one of political control in exceptional situations and that, in practice, implementation remains firmly in the hands of the Commission.

Finally, the recourse to complex legal constructions in the design of certain emergency instruments (see Next Generation EU) and the practice of political packages, has made it possible to involve national parliaments and strengthen democratic support at national level for the most ambitious measures, thus creating the basis for their widest possible acceptance, even if challenges remain in the judiciary, as the case-law of several national constitutional courts shows.

All of these strategies for consensual decision-making at the European Council seems to leave a limited role for the European Parliament, which is often described as a mere spectator in times of crisis. However, as we have also seen, the Union response has been very varied, and in addition to the recourse to emergency powers, a substantial number of measures have been adopted by the Council and the European Parliament as co-legislators. Political packages have not just benefited from the involvement of national parliaments but also from that of the European Parliament. Moreover, in cases where emergency competences were used, the Parliament has shown a remarkable ability to develop mechanisms to ensure its involvement and scrutiny in addition to the formal procedural setting laid down in the Treaties. Finally, the European Parliament has played a central role in the aftermath of crises, when it has actively supported the incorporation of permanent crisis frameworks into a number of sectorial legislation, and has given its agreement to their design.

Finally, the Commission has emerged strengthened from the times of crisis. The self-restraint it has applied in accepting (and actually supporting) the enhanced steering role of the European Council and in choosing a progressive and non-confrontational approach to coordinate and police the recourse to unilateral emergency measures by Member States has not resulted in an erosion of its prerogatives. On the contrary, as has been shown in detail, this approach has allowed the Commission to leverage the crises to reinforce its existing powers and to acquire new instruments and prerogatives, while expanding the actions of the Union into new domains.

All in all, there seems to be no substantial evidence that the role that the institutions have played during the crises analysed in this report have brought about a more permanent or fundamental shift in the institutional balance or in the balance between Member States and the Union. Whereas certain aspects may be reflected upon, this report has identified no convincing element showing that the measures adopted were done so in breach of the Treaties, in light of the case-law developed by the Court of Justice. And indeed, by adhering to a strictly formal view of the principle of institutional balance, the Court of Justice has managed to strike a delicate balance between preserving the prerogatives of the institutions and giving the political actors the room for manoeuvre that they need to defuse underpinning tensions between the EU and the Member States' legal orders.

Undoubtedly, these dynamics have combined to move the cursor towards greater involvement of the Union in times of crisis. While there is no shift in the institutional balance of the Union, there is certainly a shift of the Union towards an increasing role as a reliable and efficient crisis manager, be it through the exercise of scarcely used emergency powers in the Treaties or through the multiplication of emergency frameworks in sectorial legislation.

This development reflects the increased level of integration and interdependency of national economies and societies, which in turn calls for a higher

degree of solidarity in times of emergency. As the case studies have shown, a certain level of solidarity in the design of emergency measures is necessary to ensure the effective protection of common European goods and the sustainability of the project of integration in the long term.

In legal terms, the successful expansion of the EU's emergency role reinforces the normative claim of the EU legal order to regulate emergencies but also prompts a debate on whether constitutional or legislative adjustments are necessary or desirable. In this respect, any initiative aimed at ensuring greater coherence in EU emergency action and European Parliament's involvement by further expanding the EU's emergency powers (e.g., by means of a generalised emergency power in the form of a "state of emergency" of the Union) should be carefully assessed – and subject to proper democratic debate – for its consequential constitutional implications in terms of further ceding of emergency sovereignty from the Member States.

As the ability to act swiftly is key to any emergency response, it seems important that potential future initiatives to reform the current set-up do not depend on procedures which risk stifling decision-making but instead preserve the agility and adaptability of the Union's emergency response.

NATIONAL REPORTS

Austria

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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Questions 1 and 2

Die österreichische Rechtsordnung stellt im Wesentlichen zwei Reaktionsregime für Situationen des Notstands bzw. krisenhafte Situationen bereit, und zwar ein verfassungsgesetzlich und ein (einfach)gesetzlich verankertes Reaktionsregime:

Die österreichische Bundesverfassung enthält Regelungen, die sich mit dem Staatsnotstand auseinandersetzen. Von einem solchen ist auszugehen, wenn die Ausübung der Staatsgewalt – die Erfüllung der Funktionen der Rechtserzeugung und der Rechtsvollziehung durch die zuständigen Staatsorgane – ernsthaft bedroht, erheblich behindert oder unmöglich gemacht ist.[1] Die Bundesverfassung legt nicht einheitlich fest, wann ein Staatsnotstand vorliegt.[2] Die einzelnen staatsnotstandsrechtliche Regelungsgehalte aufweisenden Bestimmungen der Bundesverfassung – sie lassen sich zu einer „Notstandsverfassung" zusammenfassen[3] – knüpfen vielmehr an das Vorliegen „außergewöhnlicher Verhältnisse",[4] „außerordentlicher Verhältnisse",[5] „höhere[r] Gewalt"[6] oder eines „offenkundigen, nicht wieder gutzumachenden Schadens

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[1] Zum Begriff des Staatsnotstands siehe Fister, Mathis. „Staatsnotstandsrecht in Österreich." *Notstand und Recht*, herausgegeben von Andreij Zwitter, Nomos Verlag, 2012, 160–196, 161; und Koja, Friedrich. „Der Staatsnotstand als Rechtsbegriff.", Universitätsverlag Anton Pustet, 1979, 20 f und 28.

[2] Das Bundes-Verfassungsgesetz (B-VG), BGBl 1/1920 idF BGBl I 89/2024, Stammgesetz der Bundesverfassung, kennt den Begriff des Staatsnotstands oder des Notstands nicht, so bereits Wiederin, Ewald. „Das Recht des Staatsnotstands in Österreich." *Resilienz des Rechts in Krisenzeiten*, herausgegeben von Susanne Reindl-Krauskopf et al, Bundesministerium für Inneres, 2016, 115–134, 117 FN 377. Das B-VG kennt auch den Begriff der Krise nicht, so bereits Kröll, Thomas. „Wirtschaftslenkung und Krisenbewältigung.", ZfV 2023, 185–193, 187.

[3] In der Lehre gehen die Ansichten in der Frage, welche Bestimmungen zur Notstandsverfassung zählen, durchaus auseinander; siehe Gamper, Anna. „Krise und Verfassung." *Wie krisenfest ist unsere Verfassung?* herausgegeben vom Österreichischen Juristentag, Manz Verlag, 2022, 7–25, 12 mit weiteren Nachweisen.

[4] Art 5 Abs 2 B-VG.

[5] Art 25 Abs 2 B-VG.

[6] Art 18 Abs 3, Art 97 Abs 3 und Art 102 Abs 5 B-VG.

für die Allgemeinheit“[7] oder an den Eintritt von „Krieg“,[8] „Elementarereignissen und Unglücksfällen außergewöhnlichen Umfanges“,[9] „Notständen und Katastrophen“[10] oder von „Krieg oder eine[m] anderen öffentlichen Notstand, der das Leben der Nation bedroht“[11] an und legen damit jeweils eigenständig und abweichend voneinander ihre Anwendbarkeitsvoraussetzungen fest. Die Notstandsverfassung ist ein Staatsnotstandsreaktionsregime, sie soll das Funktionieren der Rechtserzeugungs- und Rechtsvollziehungsfunktionen ermöglichen und sicherstellen. Ihre Regelungen ermöglichen insbesondere den Übergang der Zuständigkeiten zur Rechtserzeugung und Rechtsvollziehung von einem Staatsorgan auf ein anderes Staatsorgan, die Erzeugung von Rechtsvorschriften mit normalerweise nicht vorgesehenem oder zulässigem Inhalt, die Änderung der Staats- und Behördenorganisation und die Prävention von Situationen des Staatsnotstands.[12] Ihre einzelnen Bestimmungen sind nicht in einem eigenen, so bezeichneten Abschnitt des Bundes-Verfassungsgesetzes (B-VG) zusammengefasst, sondern in diesem und in Verfassungsbestimmungen außerhalb desselben verstreut.

Neben jenem der Verfassung ist auch auf (einfach)gesetzlicher Ebene ein Reaktionsregime errichtet. Es dient der Abwehr und Bewältigung von krisenhaften Situationen, denen einerseits nicht mehr erfolgreich mit den für Normalzeiten maßgeblichen Regelungen begegnet werden kann, die andererseits aber noch keinen Staatsnotstand darstellen – die Ausübung der Staatsgewalt ist (noch) nicht ernsthaft bedroht, erheblich behindert oder unmöglich gemacht –, dem mit den Regelungen der Notstandsverfassung entgegengetreten werden könnte. Dieses Krisenreaktionsregime wird – vor dem Hintergrund der Einrichtung Österreichs als Bundesstaat und der bundesstaatlichen Kompetenzverteilung zwischen Bund und Ländern – durch eine Reihe materienspezifischer Bundes- und Landesgesetze gebildet, die nicht an das Vorliegen einer einheitlich definierten Krise anknüpfen, sondern jeweils eigenständig und abweichend voneinander ihre Anwendbarkeitsvoraussetzungen festlegen. Anknüpfungspunkte sind beispielsweise eine „unmittelbar drohende Störung der Versorgung [mit Lebensmitteln, anderen Wirtschafts- und Gebrauchsgütern, Energie und Energieträgern] oder eine bereits eingetretene Störung“,[13] die

[7] Art 18 Abs 3, Art 97 Abs 3 und Art 102 Abs 5 B-VG.

[8] Art 10 Abs 1 Z 15 B-VG.

[9] Art 79 Abs 2 Z 2 B-VG.

[10] Art 4 Abs 3 lit c Europäische Menschenrechtskonvention (EMRK), BGBl 210/1958 idF BGBl III 30/1998.

[11] Art 15 Abs 1 EMRK.

[12] Zur Typologie der Regelungen der Notstandsverfassung siehe Fister, Mathis. „Staatsnotstandsrecht in Österreich.“, 162 f; Koja, Friedrich. „Der Staatsnotstand als Rechtsbegriff.“, 32.

[13] § 1 Abs 1 Lebensmittelbewirtschaftungsgesetz 1997, BGBl 789/1996 idF BGBl I 113/2016; § 1 Abs 1 Versorgungssicherungsgesetz, BGBl 380/1992 idF BGBl I 94/2016; § 4 Abs 1 Energielenkungsgesetz 2012, BGBl I 41/2013 idF BGBl I 74/2024; § 2 Abs 2 Preisgesetz 1992, BGBl 145/1992 idF BGBl I 50/2012.

„Verhütung der Weiterverbreitung einer anzeigepflichtigen Krankheit",[14] die „Verhinderung der Verbreitung von COVID-19",[15] der Fall „einer Katastrophe, Epidemie, Pandemie, terroristischen Bedrohung, kriegerischen Auseinandersetzung oder sonstigen Krisensituation […], wenn die notwendige Versorgung der Bevölkerung [mit Arzneimitteln] sonst ernstlich und erheblich gefährdet wäre",[16] eine „Notfallexpositionssituation",[17] eine „Katastrophe",[18] „[die Gefährdung der] Aufrechterhaltung der öffentlichen Ordnung und [des] Schutz[es] der inneren Sicherheit" in Folge einer Überlastung des österreichischen Asylsystems,[19] „Zeiten eines bewaffneten Konfliktes oder sonstiger die Sicherheit ganzer Bevölkerungsgruppen gefährdender Umstände",[20] das Vorliegen „allgemeiner Gefahren" für und „gefährliche[r] Angriffe" auf Rechtsgüter[21] oder „drohende[r oder] gegenwärtige[r] Angriffe gegen militärische Rechtsgüter"[22]. Soweit sich dieses Krisenreaktionsregime auf die Bundesebene bezieht, werden die materienspezifischen Bundesgesetze seit 1. 1. 2024 durch das Bundes-Krisensicherheitsgesetz[23] ergänzt, das in Angelegenheiten, in denen der bundesstaatlichen Kompetenzverteilung zufolge dem Bund Gesetzgebung und Vollziehung zukommen, eine Definition der „Krise", näherhin der „Bundeskrise",[24] enthält. Nachdem die materienspezifischen Bundesgesetze bislang nicht mit dem Bundes-Krisensicherheitsgesetz und seiner Definition

[14] § 7 Abs 2 und § 7b Abs 2 Epidemiegesetz 1950, BGBl 186/1950 idF BGBl I 105/2024.

[15] § 1 Abs 1 und § 6 Abs 1 COVID-19-Maßnahmengesetz, BGBl I 12/2020 idF BGBl I 103/2022. Das COVID-19-Maßnahmengesetz ist mit 30. 6. 2023 außer Kraft getreten.

[16] § 94d Abs 1 und 2 Arzneimittelgesetz, BGBl 185/1983 idF BGBl I 193/2023.

[17] § 123 Abs 1 Z 1–4 Strahlenschutzgesetz 2020, BGBl I 50/2020.

[18] Burgenländisches Katastrophenhilfegesetz, LGBl 5/1986 idF LGBl 40/2018; Kärntner Katastrophenhilfegesetz, LGBl 66/1980 idF LGBl 40/2015; Niederösterreichisches Katastrophenhilfegesetz 2016, LGBl 70/2016 idF LGBl 23/2018; Oberösterreichisches Katastrophenschutzgesetz, LGBl 32/2007 idF LGBl 12/2022; Salzburger Katastrophenhilfegesetz, LGBl 3/1975 idF LGBl 138/2020; Steiermärkisches Katastrophenschutzgesetz, LGBl 62/1999 idF LGBl 87/2023; Tiroler Krisen- und Katastrophenmanagementgesetz, LGBl 33/2006 idF LGBl 85/2023; Vorarlberger Katastrophenhilfegesetz, LGBl 47/1979 idF LGBl 72/2022; Wiener Katastrophenhilfe- und Krisenmanagementgesetz, LGBl 60/2003 idF LGBl 21/2020. In der Regel enthalten die Katastrophenhilfe- bzw. Katastrophenschutzgesetze der Länder eine Definition der „Katastrophe"; dazu siehe auch Müllner, Josef. „Rechtliche Rahmenbedingungen der Katastrophenbekämpfung." Verlag Österreich, 2016, 13–16.

[19] § 36 Abs 1 Asylgesetz 2005, BGBl 100/2005 idF BGBl I 67/2024.

[20] § 62 Abs 1 Asylgesetz 2005 (FN 20).

[21] § 21 Abs 1–3 Sicherheitspolizeigesetz, BGBl 566/1991 idF BGBl I 122/2024.

[22] § 2 Abs 1 Militärbefugnisgesetz, BGBl 86/2000 idF BGBl I 77/2024.

[23] Bundes-Krisensicherheitsgesetz, BGBl I 89/2023.

[24] § 2 Bundes-Krisensicherheitsgesetz: „Droht unmittelbar, entsteht oder besteht durch ein Ereignis, eine Entwicklung oder sonstige Umstände in Angelegenheiten, in denen dem Bund die Gesetzgebung und Vollziehung zukommt, eine Gefahr außergewöhnlichen Ausmaßes für das Leben oder die Gesundheit der Bevölkerung oder eines großen Personenkreises, für die öffentliche Gesundheit, für die öffentliche Ordnung und Sicherheit im Inneren, für die nationale Sicherheit, für die Umwelt oder für das wirtschaftliche Wohl der Republik, deren Abwehr oder Bewältigung die unverzügliche Anordnung, Durchführung oder Koordination von Maßnahmen im Zuständigkeitsbereich des Bundes dringend erforderlich macht, liegen die Voraussetzungen für die Feststellung einer Krise (§ 3) vor. Unberührt davon bleiben die Fälle der militärischen Landesverteidigung." Siehe dazu ErläutRV 2084 BlgNR 27. GP 5 ff; und Kröll, Thomas. „Wirtschaftslenkung und Krisenbewältigung.", 187 f.

der „Krise“ verknüpft worden sind,[25] sind für die Ausübung der dort vorgesehenen Krisenbefugnisse – wie bisher – allein die darin jeweils eigenständig festgelegten Voraussetzungen maßgeblich.[26] Dieses Krisenreaktionsregime enthält keine staatsnotstandsrechtliche Regelungsgehalte aufweisenden Bestimmungen wie jene der Notstandsverfassung, es stützt sich auf die normalen Instrumente der Rechtsordnung.

Question 3

Die als Staatsnotstandsreaktionsregime auf die Sicherstellung des Funktionierens der Staatsfunktionen, näherhin der Rechtserzeugungs- und Rechtsvollziehungsfunktionen, gerichtete Notstandsverfassung ist nicht aus einem Guss, sie ist seit dem Inkrafttreten des B-VG im Jahr 1920 gewachsen. Sie geht im Wesentlichen auf die Zweite Bundes-Verfassungsnovelle[27] von 1929 zurück, mit der unter „Abschwächung des [in der Stammfassung des B-VG etablierten] radikal-parlamentarischen Regierungssystems“[28] eine „Stärkung der Staatsautorität“, also eine Stärkung der Exekutive in einem doppelten Sinn, der Regierung und der dieser zur Verfügung stehenden „Gewaltmittel“ Polizei und Bundesheer, bewirkt werden sollte.[29] Mit einer Novelle zum B-VG[30] wurde 1984 die Notstandsverfassung nach Forderungen der Länder um entsprechende Regelungen für die Landesebene ergänzt.

Auch das durch eine Reihe materienspezifischer Bundes- und Landesgesetze gebildete (einfach)gesetzliche Krisenreaktionsregime hat sich beständig entwickelt. Die dazu zu zählenden materienspezifischen Bundes- und Landesgesetze sind in der Erkenntnis erlassen worden, dass das Auftreten von krisenhaften Situationen nicht ausgeschlossen werden kann und dass daher ein krisenspezifisches Instrumentarium – weil unverzichtbar – bereitgestellt sein muss, um von staatlicher Seite schnell, situationsadäquat und effektiv reagieren zu können.[31] Dies erweisen beispielhaft die Beibehaltung des Bewirtschaftungs-

[25] So die Absicht des Bundesgesetzgebers; siehe ErläutRV 245/ME BlgNR 27. GP 7 und 20 und ErläutRV 2084 BlgNR 27. GP 7 und 23.

[26] Siehe dazu Kröll, Thomas. „Wirtschaftslenkung und Krisenbewältigung.“, 189.

[27] Zweite Bundes-Verfassungsnovelle, BGBl 392/1929.

[28] So Merkl, Adolf. „Der rechtliche Gehalt der österreichischen Verfassungsreform vom 7. 12. 1929.“, ZföR 1931, 161–212, 161.

[29] AB 405 BlgNR 3. GP 3 und 6 und Langhoff, Lukas. „Die Bundesverfassungsnovelle 1929.“, Manz Verlag, 1930, V und VII. Siehe dazu Brauneder, Wilhelm. „Österreichische Verfassungsgeschichte.“, Manz Verlag, 11. Auflage, 2009, 214 f.

[30] Bundesverfassungsgesetz vom 27. 11. 1984, mit dem das Bundes-Verfassungsgesetz in der Fassung von 1929 geändert wird, BGBl 490/1984. Siehe dazu RV 446 BlgNR 16. GP 1 und 5 ff.

[31] Dahin beispielsweise RV 177 BlgNR 14. GP 7 zum Energielenkungsgesetz, BGBl 319/1976, RV 324 BlgNR 20. GP 9 zum Lebensmittelgesetz 1997 (FN 14) oder RV 1386 BlgNR 24. GP 2 zu einer Novelle zum Versorgungssicherungsgesetz (FN 14).

rechts[32] in der unmittelbaren Nachkriegszeit wegen des Mangels an nahezu allen lebenswichtigen Wirtschaftsgütern und internationaler Entwicklungen wie der Koreakrise 1950 und des Ölpreisschocks 1973[33] oder die Erlassung des Strahlenschutzgesetzes[34] im Jahr 1969 oder der Katastrophenhilfe- bzw. Katastrophenschutzgesetze[35] der Länder. Das plötzliche Auftreten des COVID-19-Virus und die dynamische, sich rasch aufbauende Krisensituation der COVID-19-Pandemie haben aber deutlich gezeigt, dass für das Eintreten einer Krisensituation vorbereitete materienspezifische (einfach)gesetzliche Bundes- und Landesgesetze nicht situationsadäquat ausgestaltet und das darin vorgesehene Krisenreaktionsregime ausreichend sein müssen. In Anbetracht des völlig veralterten Epidemiegesetzes[36] musste im März 2020 unverzüglich und rasch ein dieses zum Teil ersetzendes, zum Teil ergänzendes COVID-19-Maßnahmengesetz[37] erlassen werden, das ein ganz zentrales Instrument der Bekämpfung der COVID-19-Pandemie dargestellt hat.[38] Nachdem weder im März 2020 noch zu einem späteren Zeitpunkt der COVID-19-Pandemie die Handlungsfähigkeit der Parlamente auf Bundes- und Landesebene beeinträchtigt war, musste nicht auf die Notstandsverfassung zurückgegriffen werden.[39]

Question 4

Was die Notstandsverfassung betrifft, legen die einzelnen staatsnotstandsrechtliche Regelungsgehalte aufweisenden Bestimmungen, wie bereits unter 1.1 und 2 ausgeführt, jeweils eigenständig die Voraussetzungen ihrer Anwendbarkeit fest. Solange nur diese Voraussetzungen erfüllt sind, können die staatsnot-

[32] Insbesondere des Lebensmittelbewirtschaftungsgesetzes, BGBl 107/1951, und des Rohstofflenkungsgesetzes, BGBl 106/1951.

[33] Siehe dazu Wimmer, Norbert, und Konrad Arnold. „Wirtschaftsrecht in Österreich.", Manz Verlag, 2. Auflage, 1998, 50 ff.

[34] Strahlenschutzgesetz, BGBl 227/1969. Zu den Motiven des Gesetzgebers siehe RV 1235 BlgNR 11. GP.

[35] Siehe FN 19.

[36] Siehe FN 15.

[37] Siehe FN 16.

[38] Siehe dazu nur die Kritik im „Leitantrag ‚COVID-19-Pandemie' der Landeshauptleutekonferenz vom 19. 11. 2021." *46. Bericht über den Föderalismus in Österreich*, herausgegeben vom Institut für Föderalismus, new academic press, 2021, 227–233, 227; Abbrederis, Philipp. „Pandemiebekämpfung aus Sicht der Landesverwaltung.", JRP 2021, 145–151, 146; Ranacher, Christian. „Politisches Krisenmanagement und Rechtsstaat.", JRP 2021, 263–268, 264; Ranacher, Christian. „Legistische Herausforderungen in Zeiten der (COVID-)Krise.", JRP 2023, 262–279, 264.

[39] Siehe dazu nur Eberhard, Harald. „‚Krisenfestigkeit' der Verfassung auf dem COVID-19-Prüfstand: Krise des Parlaments – Krise des Parlamentarismus?" *Wie krisenfest ist unsere Verfassung?* herausgegeben vom Österreichischen Juristentag, Manz Verlag, 2022, 27–38, 27; Ranacher, Christian. „Politisches Krisenmanagement und Rechtsstaat.", 263. Zur Handlungsfähigkeit des Nationalrates während der COVID-19-Pandemie siehe auch Frank, Stefan Leo. „Art 18 Abs 3–5 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 28. Lfg 2022, 1–20, Rz 7 mit Verweis auf Parlamentskorrespondenz Nr. 791 vom 10. 7. 2020.

standsrechtlichen Befugnisse ausgeübt werden. Ihre Ausübung ist daher weder von einer „Ausrufung", „Erklärung" oder „Feststellung" eines Staatsnotstands (durch ein [Verfassungs-]Gesetz oder einen schlichten Parlamentsbeschluss oder ein oberstes Verwaltungsorgan) noch von der Inanspruchnahme auch anderer staatsnotstandsrechtlicher Befugnisse abhängig.[40]

Auch die das (einfach)gesetzliche Krisenreaktionsregime bildenden materienspezifischen Bundes- und Landesgesetze legen grundsätzlich jeweils eigenständig die Voraussetzungen ihrer Anwendbarkeit fest. Solange nur diese Voraussetzungen erfüllt sind, können die Krisenbefugnisse ausgeübt werden. Nur ausnahmsweise wird ihre gesetzmäßige Ausübung von einer „Ausrufung"[41] bzw. „Feststellung"[42] der Krisensituation abhängig gemacht. Da das Bundes-Krisensicherheitsgesetz (wie bereits unter 1.1 und 2 ausgeführt) bislang nicht mit den einzelnen materienspezifischen Bundesgesetzen verknüpft worden ist, setzt die gesetzmäßige Ausübung der dort vorgesehenen Krisenbefugnisse nicht die „Feststellung" einer „Krise" nach § 3 Bundes-Krisensicherheitsgesetz durch die Bundesregierung voraus.[43]

Question 5

Die Ausgestaltung der Notstandsverfassung wurde weder im Zuge des österreichischen EU-Beitritts mit 1. 1. 1995 noch nach diesem Zeitpunkt durch Gemeinschafts- bzw. Unionsrecht beeinflusst.

Demgegenüber sind dem (einfach)gesetzlichen Krisenreaktionsregime zuzuordnende materienspezifische Bundes- und Landesgesetze in ihrer Ausgestaltung durch das Gemeinschafts- bzw. Unionsrecht beeinflusst worden. Beispielhaft hervorzuheben sind dabei die der Versorgungssicherung dienenden Bewirtschaftungsgesetze. Schon vor dem österreichischen EU-Beitritt sind das Versorgungssicherungsgesetz, das Lebensmittelbewirtschaftungsgesetz 1952, das Erdöl-Bevorratungs- und Meldegesetz 1982 und das Energielenkungsgesetz 1982 dahin novelliert worden, dass sie auch zur Erlassung von Lenkungsverordnungen zur Umsetzung von auf der Grundlage von Art 100 EGV (nunmehr Art 122 AEUV) ergehenden Lenkungsmaßnahmen der EG ermächtigen.[44] Nach Novellierung des Energielenkungsgesetzes 1982 in den

[40] Letzteres hervorhebend Fister, Mathis. „Staatsnotstandsrecht in Österreich." 195.

[41] So die Ausrufung einer (drohenden) Katastrophe durch § 18 Burgenländisches Katastrophenhilfegesetz (FN 19) und § 16 Salzburger Katastrophenhilfegesetz (FN 19); siehe dazu und zu den damit verbundenen Rechtsfragen Müllner, Josef. „Rechtliche Rahmenbedingungen der Katastrophenbekämpfung.", 310–336.

[42] So § 2 Abs 2 Preisgesetz 1992 (FN 14).

[43] Siehe dazu Kröll, Thomas. „Wirtschaftslenkung und Krisenbewältigung.", 188 ff.

[44] Versorgungssicherungsgesetz (FN 14) und RV 487 BlgNR 18. GP 10; Bundesgesetz, mit dem das Lebensmittelbewirtschaftungsgesetz 1952 geändert wird, BGBl 377/1992, und RV 483 BlgNR 18.

Jahren 2001[45] (zur Anpassung an die neuen elektrizitätswirtschaftlichen Rahmenbedingungen eines vollliberalisierten Elektrizitätsmarkts) und 2006[46] (zur grundlegenden Neuordnung der Krisenvorsorge für den Erdgasbereich) erfolgte 2012 die Erlassung des Energielenkungsgesetzes 2012[47] (zur Anpassung an die im Zuge der Gaskrise 2009 erlassenen Unionsmaßnahmen[48]), das seinerseits 2021[49] (zur Ermächtigung zur Erlassung von Lenkungsmaßnahmen im Solidaritätsfall[50]) novelliert wurde. Auch das Erdöl-Bevorratungs- und Meldegesetz 1982 wurde zunächst novelliert (unter anderem zur Anpassung an geänderte gemeinschaftsrechtliche Vorgaben[51]),[52] bevor im Jahr 2012 das Erdölbevorratungsgesetz 2012[53] (auch zur Anpassung an geänderte unionsrechtliche Vorgaben[54]) erlassen wurde; auch dieses wurde wiederholt[55] novelliert (unter anderem zur Anpassung an geänderte unionsrechtliche Vorgaben[56]).

Question 6

Als Beispiel für die zuerst genannte Konstellation kann die durch die EU erfolgte Feststellung des Bestehens eines Massenzustroms im Sinne der Richtlinie 2001/55/EG[57] von Vertriebenen aus der Ukraine in die EU infolge

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GP 4; Bundesgesetz, mit dem das Erdöl-Bevorratungs- und Meldegesetz 1982 geändert wird, BGBl 383/1992, und RV 488 BlgNR 18. GP 5; Bundesgesetz, mit dem das Energielenkungsgesetz 1982 geändert wird, BGBl 382/1992, und RV 486 BlgNR 18. GP 4.

[45] Bundesgesetz, mit dem das Energielenkungsgesetz 1982 geändert wird, BGBl 149/2001, und RV 816 BlgNR 21. GP 12.

[46] Energieversorgungssicherheitsgesetz 2006, BGBl I 106/2006, und RV 1411 BlgNR 22. GP 18 f.

[47] Siehe FN 14 und RV 1962 BlgNR 24. GP 3 f.

[48] Verordnung (EU) 994/2010 des Europäischen Parlaments und des Rates vom 20.10.2010 über Maßnahmen zur Gewährleistung der sicheren Erdgasversorgung, ABl 2010 L 295/1.

[49] Erneuerbaren-Ausbau-Gesetzespaket, BGBl I 150/2021, und RV 733 BlgNR 27. GP 4 und 38 f.

[50] Anpassung an die Verordnung (EU) 2017/1938 des Europäischen Parlaments und des Rates vom 25.10.2017 über Maßnahmen zur Gewährleistung der sicheren Gasversorgung, ABl 2017 L 280/1, und Verordnung (EU) 2019/941 des Europäischen Parlaments und des Rates vom 5.6.2019 über die Risikovorsorge im Elektrizitätssektor, ABl 2019 L 158/1.

[51] Richtlinie 98/93/EG des Rates vom 14.12.1998 zur Änderung der Richtlinie 68/414/EWG zur Verpflichtung der Mitgliedstaaten der EWG, Mindestvorräte an Erdöl und/oder Erdölerzeugnissen zu halten, ABl 1998 L 358/100.

[52] Bundesgesetz, mit dem das Erdöl-Bevorratungs- und Meldegesetz 1982 geändert wird, BGBl I 150/2001, und RV 815 BlgNR 21. GP 5.

[53] Erdölbevorratungsgesetz 2012, BGBl I 78/2012, und RV 1801 BlgNR 24. GP 1 ff.

[54] Richtlinie 2009/119/EG des Rates vom 14.9.2009 zur Verpflichtung der Mitgliedstaaten, Mindestvorräte an Erdöl und/oder Erdölerzeugnissen zu halten, ABl 2009 L 265/9.

[55] Bundesgesetz, mit dem das Erdölbevorratungsgesetz 2012 geändert wird, BGBl I 17/2020, und RV 53 BlgNR 27. GP 1.

[56] Durchführungsrichtlinie (EU) 2018/1581 der Kommission vom 19.10.2018 zur Änderung der Richtlinie 2009/119/EG des Rates in Bezug auf die Methoden zur Berechnung der Bevorratungsverpflichtungen, ABl 2018 L 263/57.

[57] Richtlinie 2001/55/EG des Rates vom 20.7.2001 über Mindestnormen für die Gewährung vorübergehenden Schutzes im Falle eines Massenzustroms von Vertriebenen und Maßnahmen zur Förderung einer ausgewogenen Verteilung der Belastungen, die mit der Aufnahme dieser Personen und den Folgen dieser Aufnahme verbunden sind, auf die Mitgliedstaaten, ABl 2001 L 212/12.

der militärischen Invasion der russischen Streitkräfte genannt werden,[58] zu deren Durchführung auf der Grundlage des § 62 Abs 1 Asylgesetz 2005[59] die Vertriebenen-Verordnung[60] erlassen wurde. Als Beispiele für die zuletzt angeführte Konstellation können die Gaskrise 2009, die Flüchtlingskrise 2015, die COVID-19-Pandemie und die Gaskrise 2022 angeführt werden.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1 and 2

Die Notstandsverfassung ist, wie bereits unter 1.1 und 2 ausgeführt, ein Staatsnotstandsreaktionsregime, sie soll das Funktionieren der Rechtserzeugungs- und Rechtsvollziehungsfunktionen ermöglichen und sicherstellen (zu ihrer Genese siehe bereits 1.3). Im Folgenden werden ihre einzelnen Instrumente erläutert:

Für den Fall eines Gesetzgebungsnotstandes auf Bundesebene wegen Handlungsunfähigkeit des Nationalrates ermächtigt Art 18 Abs 3 B-VG den Bundespräsidenten zur Erlassung von vorläufigen gesetzändernden Verordnungen („Notverordnungen") unter der Voraussetzung, dass die sofortige Erlassung von Maßnahmen, die verfassungsgemäß einer Beschlussfassung des Nationalrates bedürfen, zur Abwehr eines offenkundigen, nicht wieder gutzumachenden Schadens für die Allgemeinheit zu einer Zeit notwendig wird, in der der Nationalrat nicht versammelt ist, nicht rechtzeitig zusammentreten kann oder in seiner Tätigkeit durch höhere Gewalt behindert[61] ist. Dieses Notverordnungsrecht[62] ist sowohl in materieller als auch in formeller Hinsicht beschränkt: Mit einer Notverordnung darf Art 18 Abs 5 B-VG zufolge weder die Bundesverfassung geändert werden, noch darf sie eine dauernde finanzielle Belastung des Bundes, eine finanzielle Belastung der Länder oder der Gemeinden, finanzielle Verpflichtungen der Staatsbürger oder eine Veräußerung von Bundesvermögen zum Gegenstand haben, noch darf sie die in Art 10 Abs 1 Z 11 B-VG ange-

[58] Durchführungsbeschluss (EU) 2022/382 des Rates vom 4.3.2022 zur Feststellung des Bestehens eines Massenzustroms von Vertriebenen aus der Ukraine im Sinne des Artikels 5 der Richtlinie 2001/55/EG und zur Einführung eines vorübergehenden Schutzes, ABl 2022 L 71/1.

[59] Siehe FN 21.

[60] Verordnung der Bundesregierung über ein vorübergehendes Aufenthaltsrecht für aus der Ukraine Vertriebene (Vertriebenen-Verordnung), BGBl II 92/2022 idF BGBl II 27/2023.

[61] Unter dem Begriff „höhere Gewalt" verstand der Bundesverfassungsgesetzgeber im Jahr 1929 „nicht vorhersehbare und mit normalen Mitteln nicht abwendbare Ereignungen", wie beispielsweise „Lahmlegungen des Eisenbahnverkehrs von maßgeblicher Bedeutung, Elementarkatastrophen, Unruhen außergewöhnlichen Umfanges"; siehe AB 405 BlgNR 3. GP 4.

[62] Siehe dazu Frank, Stefan Leo. „Art 18 Abs 3–5 B-VG."; und Wieser, Bernd. „Art 18/3–5 B-VG." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 19. Lfg 2024, 1–20.

führten Angelegenheiten (insbesondere jene des Arbeits- und des Sozialrechts) oder solche des Koalitionsrechts oder des Mieterschutzes regeln. Der Bundespräsident bedarf nach Art 18 Abs 3 B-VG eines (mit Einstimmigkeit zu beschließenden[63]) Vorschlags der Bundesregierung, der im Einvernehmen mit einem ständigen Unterausschuss des Hauptausschusses des Nationalrates[64] zu erstatten ist; die Notverordnung ist von der Bundesregierung gegenzuzeichnen. Art 18 Abs 4 B-VG sieht eine nachprüfende parlamentarische Kontrolle von Notverordnungen vor. Die Bundesregierung hat jede Notverordnung unverzüglich dem Nationalrat vorzulegen; dieser ist vom Bundespräsidenten, falls der Nationalrat in diesem Zeitpunkt keine Tagung hat, während der Tagung aber vom Präsidenten des Nationalrates für einen der der Vorlage folgenden acht Tage einzuberufen. Binnen vier Wochen nach der Vorlage hat der Nationalrat entweder an Stelle der Notverordnung ein entsprechendes Bundesgesetz zu beschließen oder durch Beschluss zu verlangen, dass die Notverordnung von der Bundesregierung sofort außer Kraft gesetzt wird. Im zuletzt genannten Fall hat die Bundesregierung diesem Verlangen sofort zu entsprechen. Zum Zweck der rechtzeitigen Beschlussfassung des Nationalrates hat der Präsident die Vorlage spätestens am vorletzten Tag der vierwöchigen Frist zur Abstimmung zu stellen. Wird die Notverordnung von der Bundesregierung aufgehoben, treten mit dem Tag des Inkrafttretens der Aufhebung die durch die Verordnung aufgehoben gesetzlichen Bestimmungen wieder in Kraft.

Das bundesverfassungsgesetzlich vorgesehene Zusammenwirkung von Bundespräsident, Bundesregierung und ständigem Unterausschuss des Hauptausschusses des Nationalrates soll eine missbräuchliche Ausübung des Notverordnungsrechts verhindern.[65] Durch die Mitwirkung des Nationalrates an der Notverordnungserlassung in Gestalt des ständigen Unterausschusses des Hauptausschusses soll „das Gesetzgebungsmonopol des Parlaments im größten noch möglichen Umfang […] erhalten und damit das System der Checks and Balances auch im Staatsnotstand zumindest prinzipiell […] bewahr[t]“[66] und demokratische Legitimation vermittelt werden; diese Mitwirkung stellt auch eine Form präventiver parlamentarischer Kontrolle dar. Die in Art 18 Abs 4 B-VG vorgesehene nachträgliche parlamentarische Kontrolle wird durch die

[63] Art 69 Abs 3 B-VG.

[64] Der ständige Unterausschuss des Hauptausschusses des Nationalrates wird nach dem Grundsatz der Verhältniswahl gewählt; ihm muss mindestens ein Mitglied jeder im Hauptausschuss vertretenen Partei angehören. Derzeit gehören dem ständigen Unterausschuss jeweils 13 Mitglieder und Ersatzmitglieder an. Der ständige Unterausschuss muss jederzeit einberufen werden und zusammentreten können. Siehe Art 55 Abs 3 B-VG und §§ 30 f Geschäftsordnungsgesetz 1975, BGBl 410/1975 idF BGBl I 81/2024.

[65] So bereits Merkl, Adolf. „Der rechtliche Gehalt der österreichischen Verfassungsreform vom 7.12.1929.“, 193; Walter, Robert. „Österreichisches Bundesverfassungsrecht.“, Manz Verlag, 1972, 453; Fister, Mathis. „Staatsnotstandsrecht in Österreich.“ 165: „parlamentarische Zähmung des Notverordnungsrechts“.

[66] Fister, Mathis. „Staatsnotstandsrecht in Österreich.“, 165; so auch Wiederin, Ewald. „Das Recht des Staatsnotstands in Österreich.“, 137.

politische und die rechtliche Verantwortlichkeit des Bundespräsidenten und der Mitglieder der Bundesregierung ergänzt.[67] Die Notverordnungen unterliegen zudem der Kontrolle durch den Verfassungsgerichtshof; sie müssen nicht nur den in Art 18 Abs 3–5 B-VG festgelegten Voraussetzungen entsprechen, sondern in jeder Hinsicht bundesverfassungsmäßig sein.
Die dargestellte materielle Beschränkung des Notverordnungsrechts[68] ist in der Lehre wiederholt kritisiert und seine damit einhergehende mangelnde Effektivität und Praktikabilität betont worden.[69] Dem kann entgegengehalten werden, dass das Notverordnungsrecht durchaus geeigneter und wirkmächtiger als angenommen erscheint, um einem Gesetzgebungsnotstand abzuhelfen, auch in Kombination mit anderen notstandsrechtlichen Instrumenten.[70]

Notstandsrechtlichen Gehalt weist sodann ein in Art 10 Abs 1 Z 15 B-VG enthaltener Kompetenztatbestand auf, der den Bund zur Gesetzgebung und Vollziehung von „aus Anlass eines Krieges oder im Gefolge eines solchen zur Sicherung der einheitlichen Führung der Wirtschaft notwendig erscheinende[r] Maßnahmen, insbesondere auch hinsichtlich der Versorgung der Bevölkerung mit Bedarfsgegenständen", ermächtigt.[71] Dieser so genannte „Kriegsfolgentatbestand" konzentriert in den angeführten, nicht aber in anderen Notstandssituationen wie Wirtschaftskrisen, auch wenn in diesen vergleichbare Versorgungsengpässe wie im Krieg oder im Gefolge eines solchen bestehen sollten,[72] zur Sicherung der einheitlichen Führung der Wirtschaft die Gesetzgebungs- und Vollziehungszuständigkeiten beim Bund[73] und vermittelt diesem ausnahmsweise eine umfassende Wirtschaftslenkungskompetenz,[74] bringt aber keine Erleichterung des Gesetzgebungsverfahrens mit sich.[75]

[67] Bundespräsident: Art 60 Abs 6 B-VG und Art 68 in Verbindung mit Art 142 B-VG; Mitglieder der Bundesregierung: Art 74 sowie Art 76 in Verbindung mit Art 142 B-VG.

[68] Das Notverordnungsrecht ermächtigt auch nicht dazu, einem Gesetzgebungsnotstand auf Landesebene abzuhelfen.

[69] So beispielsweise Ermacora, Felix. „Österreichische Verfassungslehre.", Verlag Österreich, 2. Auflage, 1998, 375; Reindl-Krauskopf, Susanne, und Eva Schulev-Steindl. „Reaktionsfähigkeit des österreichischen Rechts im Krisenfall." *Krise der liberalen Demokratie*, herausgegeben vom Österreichischen Juristentag, Manz Verlag, 2019, 229–263, 240 f.

[70] So insbesondere Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 166 und 193 f; Wiederin, Ewald. „Das Recht des Staatsnotstands in Österreich.", 137; Reindl-Krauskopf, Susanne, und Eva Schulev-Steindl. „Reaktionsfähigkeit des österreichischen Rechts im Krisenfall.", 241.

[71] Siehe dazu Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 168 ff; Vašek, Markus. „Art 10/1 Z 15 5. Tatbestand B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 14. Lfg 2018, 1–17; Truppe, Michael. „Art 10 Abs 1 Z 15 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 12. Lfg 2013, 1–20.

[72] So auch Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 170.

[73] Es handelt sich dabei um einen Fall der Bedarfsgesetzgebung; siehe Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 168; und VfSlg 3378/1958.

[74] Schulev-Steindl, Eva. „Wirtschaftslenkung und Verfassung.", Springer Verlag, 1996, 90 f; Truppe, Michael. „Art 10 Abs 1 Z 15 B-VG.", Rz 23.

[75] Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 168; Koja, Friedrich. „Der Staatsnotstand als Rechtsbegriff.", 40.

Ob der Kriegsfolgentatbestand nur in den angeführten Notstandssituationen anwendbar ist[76] oder ob er in „Normalzeiten" zur Vorsorgegesetzgebung für solche Notstandssituationen ermächtigt,[77] wird in Rechtsprechung und Lehre unterschiedlich beurteilt.

Für den Fall eines die Besorgung der Geschäfte der unmittelbaren (das heißt durch eigene Bundesbehörden in den Ländern erfolgende) Bundesverwaltung betreffenden Vollziehungs- bzw. Verwaltungsnotstandes[78] auf Bundesebene wegen Handlungsunfähigkeit der obersten Verwaltungsorgane des Bundes (insbesondere Bundesregierung, Bundesminister und Bundespräsident) sieht Art 102 Abs 5 B-VG Notstandsbefugnisse des Landeshauptmannes vor.[79] Wird „in einem Land in [diesen] Angelegenheiten die sofortige Erlassung von Maßnahmen zur Abwehr eines offenkundigen, nicht wieder gutzumachenden Schadens für die Allgemeinheit zu einer Zeit notwendig […], zu der die obersten Verwaltungsorgane des Bundes wegen höherer Gewalt[80] dazu nicht in der Lage sind, hat der Landeshauptmann an deren Stelle die Maßnahmen zu treffen." Der Landeshauptmann ist in diesem Land zur Erlassung von Verordnungen und Bescheiden sowie zur Erteilung von Weisungen, auch an die ihm unterstellten Bundesbehörden[81] und das Bundesheer,[82] ermächtigt.
Die Bundesverfassung enthält keine Regelung über die politische und die rechtliche Verantwortlichkeit des Landeshauptmannes für die Ausübung der Notstandsbefugnisse des Art 102 Abs 5 B-VG.[83] Vom Landeshauptmann im Rahmen dieser Befugnisse erlassene Verordnungen und Bescheide unterliegen der Kontrolle der Gerichtshöfe des öffentlichen Rechts, und zwar Verordnungen jener des Verfassungsgerichtshofes, Bescheide jener der Verwaltungsgerichte, deren Entscheidungen darüber wiederum jener des Verwaltungsgerichtshofes unterworfen sind.[84]
Hinsichtlich der im Falle eines Vollziehungs- bzw. Verwaltungsnotstandes

[76] So die Rechtsprechung des Verfassungsgerichtshofes: VfSlg 4570/1963, 4939/1965, 7059/1973; und beispielsweise Truppe, Michael. „Art 10 Abs 1 Z 15 B-VG.", Rz 22 mit weiteren Nachweisen.

[77] So beispielsweise Vašek, Markus. „Art 10/1 Z 15 5. Tatbestand B-VG.", Rz 7 mit weiteren Nachweisen; Wiederin, Ewald. „Bundesrecht und Landesrecht.", Springer Verlag, 1995, 115 ff.

[78] So bereits Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 170.

[79] Siehe dazu Raschauer, Bernhard. „Art 102 B-VG." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 15. Lfg 2019, 1–40; Bußjäger, Peter. „Art 102 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 14. Lfg 2014, 1–27; Holzinger, Gerhart. „Die Notstandskompetenz des Landeshauptmannes im Sinne der B-VG-Novelle 1984.", Österreichische Gesellschaft zur Förderung der Landesverteidigung, 1988.

[80] Zu diesem Begriff siehe FN 62.

[81] Holzinger, Gerhart. „Die Notstandskompetenz des Landeshauptmannes im Sinne der B-VG-Novelle 1984.", 13; Raschauer, Bernhard. „Art 102 B-VG.", Rz 108.

[82] Raschauer, Bernhard. „Art 102 B-VG.", Rz 108.

[83] Darauf haben bereits Holzinger, Gerhart. „Die Notstandskompetenz des Landeshauptmannes im Sinne der B-VG-Novelle 1984.", 17; und Reindl-Krauskopf, Susanne, und Eva Schulev-Steindl. „Reaktionsfähigkeit des österreichischen Rechts im Krisenfall.", 248; hingewiesen.

[84] Art 139 bzw. Art 130 und 133 B-VG.

auf Bundesebene wegen Handlungsunfähigkeit der obersten Verwaltungsorgane des Bundes im Sinne des Art 102 Abs 5 B-VG ebenso betroffenen Besorgung der Geschäfte der mittelbaren (das heißt durch für den Bund tätig werdende Landesbehörden in den Ländern erfolgenden) Bundesverwaltung sieht die Bundesverfassung keine vergleichbaren Notstandsbefugnisse des Landeshauptmann vor. Als Träger der mittelbaren Bundesverwaltung in den Ländern kann der Landeshauptmann diese auf Grund der Gesetze und in Bindung an bestehende allgemeine Weisungen „gewissermaßen aus eigenem“[85] führen.

„[Z]um Schutz der verfassungsmäßigen Einrichtungen und ihrer Handlungsfähigkeit sowie der demokratischen Freiheiten der Einwohner“ und „zur Aufrechterhaltung der Ordnung und Sicherheit im Inneren überhaupt“ sowie „zur Hilfeleistung bei Elementarereignissen und Unglücksfällen außergewöhnlichen Umfangs“ kann die gesetzmäßige zivile Gewalt unmittelbar gemäß Art 79 Abs 2 und 4 B-VG in Verbindung mit § 2 Abs 5 Wehrgesetz 2001[86] die Mitwirkung des Bundesheeres in Gestalt des Assistenzeinsatzes[87] in Anspruch nehmen. Das Bundesheer ist dabei dem für die Aufgabenbesorgung eigentlich zuständigen[88] zivilen Organ unterstellt, das die Assistenzleistung des Bundesheeres angefordert hat. Ein Assistenzeinsatz ist nur verfassungsmäßig, wenn das zivile Organ die ihm übertragene Aufgabe nur unter Mitwirkung des Bundesheeres als letztes Mittel erfüllen kann.[89]
Neben diesen Sonderverfügungsbefugnissen der gesetzmäßigen zivilen Gewalt über das Bundesheer ermächtigt der staatsnotstandsrechtlichen Gehalt aufweisende Art 79 Abs 5 B-VG das Bundesheer ausnahmsweise zu selbständigem militärischem Einschreiten zu den zuvor angeführten Zwecken, „wenn entweder die zuständigen Behörden durch höhere Gewalt[90] außerstande gesetzt sind, das militärische Einschreiten herbeizuführen, und bei weiterem Zuwarten ein nicht wieder gutzumachender Schaden für die Allgemeinheit eintreten würde, oder wenn es sich um die Zurückweisung eines tätlichen Angriffes oder um die Beseitigung eines gewalttätigen Widerstandes handelt, die gegen eine Abteilung des Bundesheeres gerichtet ist“. Die Befugnisse des Bundesheeres enden mit der Wiedererlangung der Handlungsfähigkeit der zuständigen

[85] Holzinger, Gerhart. „Die Notstandskompetenz des Landeshauptmannes im Sinne der B-VG-Novelle 1984.“, 11.

[86] Wehrgesetz 2001, BGBl I 146/2001 idF BGBl I 77/2024.

[87] Sicherheitspolizeilicher Assistenzeinsatz und Katastropheneinsatz.

[88] Die Inanspruchnahme des Bundesheeres zu Assistenzleistungen richtet sich nach der durch die bundesstaatliche Kompetenzverteilung vorgegebenen allgemeinen Aufgabenverteilung zwischen dem Bund und den Ländern und den jeweils vollziehenden Organen.

[89] Siehe dazu Truppe, Michael. „Art 79 B-VG.“ *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 9. Lfg 2012, 1–32, Rz 23–42; Fister, Mathis. „Art 79 B-VG.“ *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich,18. Lfg 2023, 1–22, Rz 26–39.

[90] Zu diesem Begriff siehe FN 62.

zivilen Behörde. Für eine fortsetzende Assistenzleistung ist eine Anforderung durch die zivile Gewalt erforderlich.[91]

Die Notstandsverfassung enthält keine Regelungen, die eine Erleichterung der Verfahren der Rechtserzeugung und Rechtsvollziehung (möglicherweise mit einem Wechsel der Rechtssatzform) vorsehen. Dieser Kategorie staatsnotstandsrechtlicher Regelungen lassen sich allenfalls das Notverordnungsrecht des Bundespräsidenten (weil mit dem Wechsel der Rechtssatzform [Verordnung] ein anderes Rechtserzeugungsverfahren einhergeht [Verordnungserlassungsverfahren an Stelle des Gesetzgebungsverfahrens]) und das selbständige militärische Einschreiten des Bundesheeres (wegen der Befreiung von der Verfügungsbefugnis und Befehlsgewalt der zivilen Gewalt) zuordnen.[92]

In der Notstandsverfassung sind Regelungen vorgesehen, die die Erzeugung von Rechtsvorschriften mit normalerweise nicht vorgesehenem oder nicht zulässigem Inhalt zulassen.
Als solche Regelungen können zunächst jene Grundrechte angeführt werden, die notstandsbezogene Einschränkungen ihres Schutzbereichs aufweisen[93] oder deren Gesetzesvorbehalte Notstandssituationen explizit berücksichtigen und weitergehende Beschränkungen ermöglichen.[94], [95]
Zum anderen ist Art 15 EMRK[96] betreffend die Suspendierung bestimmter Konventionsrechte „[i]m Falle eines Krieges oder eines anderen öffentlichen Notstandes, der das Leben der Nation bedroht", zu nennen. Neben dem (auch als Bundesverfassungsrecht geltenden) Art 15 EMRK ermächtigt

[91] Siehe dazu Truppe, Michael. „Art 79 B-VG.", Rz 43 ff; Fister, Mathis. „Art 79 B-VG.", Rz 44–48; Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 171.

[92] So bereits Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 171 f; Koja, Friedrich. „Der Staatsnotstand als Rechtsbegriff.", 52.

[93] So Art 4 Abs 3 lit c EMRK, dem zufolge „jede Dienstleistung im Falle von Notständen und Katastrophen, die das Leben oder das Wohl der Gemeinschaft bedrohen", nicht als Zwangs- oder Pflichtarbeit im Sinne dieses Artikels gilt.

[94] So Art 10 Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger (StGG), RGBl 142/1869 idF BGBl 864/1988, der „in Kriegsfällen" eine Beschlagnahme von Briefen ohne Vorliegen einer gesetzlichen Verhaftung oder Hausdurchsuchung oder eines richterlichen Befehls erlaubt. Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 174, betont zudem treffend, dass sich, auch wenn die ganz überwiegende Mehrzahl der in der Bundesverfassung verbrieften Grundrechte keine spezifisch notstandsrelevanten Gesetzesvorbehalte vorsehen, „im Staatsnotstand (vorübergehend) Grundrechtsbeschränkungen rechtfertigen lassen, die im Normalzustand nicht rechtfertigbar wären".

[95] Siehe dazu Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 173 f.

[96] Siehe dazu Lukan, Matthias. „Art 15 EMRK." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 12. Lfg 2013, 1–27; Siess-Scherz, Ingrid. „Art 15 EMRK." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 1. Lfg 1999, 1–19; Grabenwarter, Christoph, und Katharina Pabel. „Europäische Menschenrechtskonvention.", C.H.Beck Verlag, 7. Auflage, 2021, § 2 Rz 8–13; Pabel, Katharina. „Bewährungsproben des Rechtsstaats und Reaktionsmöglichkeiten im Rechtsschutzsystem der EMRK." *Resilienz des Rechts in Krisenzeiten*, herausgegeben von Susanne Reindl-Krauskopf et al, Bundesministerium für Inneres, 2016, 188–212,190–199.

keine weitere Bestimmung der Bundesverfassung zu einer Suspendierung in derselben verbriefter Grundrechte. Eine solche könnte allein durch den Bundesverfassungsgesetzgeber erfolgen. Dass die Bundesverfassung Grundrechte garantiert, die Konventionsrechten inhaltlich gleichen, schränkt die praktische Wirksamkeit einer nach Art 15 EMRK erfolgenden Suspendierung von Konventionsrechten ein.[97]

Zur Ermöglichung und Sicherstellung des Funktionierens der Rechtserzeugungs- und Rechtsvollziehungsfunktionen statuiert die Notstandsverfassung eine Reihe Vorschriften, die zu diesem Zweck eine Änderung der Staats- und Behördenorganisation erlauben:

Für die Dauer „außergewöhnlicher Verhältnisse" kann der Sitz (Wien) der obersten Organe des Bundes[98] vom Bundespräsidenten auf (einstimmig zu erstattenden) Antrag der Bundesregierung in einen anderen Ort des Bundesgebietes verlegt werden.[99] Für die Dauer „außerordentlicher Verhältnisse" kann zudem der Nationalrat vom Bundespräsidenten auf (einstimmig zu erstattenden) Antrag der Bundesregierung in einen anderen Ort des Bundesgebietes berufen werden.[100] Die Begriffe „außergewöhnliche Verhältnisse" und „außerordentliche Verhältnisse" sind bedeutungsgleich, sie enthalten eine sprachliche Variation der Umschreibung des Staatsnotstands, der das ordnungsgemäße Funktionieren der obersten Organe des Bundes in Wien vereitelt.[101]
Das bundesverfassungsgesetzlich vorgesehene Zusammenwirkung von Bundespräsident und Bundesregierung soll eine missbräuchliche Ausübung dieser Notstandsbefugnisse verhindern. Der Bundespräsident und die Mitglieder der Bundesregierung sind dafür auch politisch und rechtlich verantwortlich.[102]

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[97] Dies hat Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 175 f, bereits hervorgehoben.

[98] Nationalrat, Bundesrat, Bundesversammlung, Bundespräsident, Bundesregierung, Bundeskanzler, Vizekanzler, Bundesminister, Verfassungsgerichtshof, Verwaltungsgerichtshof, Oberster Gerichtshof.

[99] Art 5 Abs 2 B-VG. Siehe dazu Schäffer, Heinz. „Art 5 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 4. Lfg 2006, 1–5; Wieser, Bernd. „Art 5 B-VG." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 9. Lfg 2009, 1–5; Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 176.

[100] Art 25 Abs 2 B-VG. Siehe dazu Jakab, András. „Art 25 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 23. Lfg 2019, 1–4; Wieser, Bernd. „Art 25 B-VG." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 1. Lfg 1999, 1–3; Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 177 f.

[101] Als Beispiele für „außergewöhnliche Verhältnisse" und „außerordentliche Verhältnisse" werden in der Literatur „innere Unruhen von beträchtlichem Ausmaß", „schwer wiegende Naturkatastrophen" und „der ‚Verteidigungsfall', in dem unter Umständen das Territorium der Stadt Wien bedroht ist oder verloren geht", genannt; Schäffer, Heinz. „Art 5 B-VG.", Rz 3. Siehe auch Wieser, Bernd. „Art 5 B-VG.", Rz 5.

[102] Bundespräsident: Art 60 Abs 6 B-VG und Art 68 in Verbindung mit Art 142 B-VG; Mitglieder der Bundesregierung: Art 74 sowie Art 76 in Verbindung mit Art 142 B-VG.

Die Verordnungen des Bundespräsidenten unterliegen zudem der Kontrolle durch den Verfassungsgerichtshof.

Handlungsunfähig gewordene Staatsorgane können aufgelöst und neu konstituiert werden.
Was zunächst Gesetzgebungsorgane betrifft, kann der Nationalrat auf (einstimmig zu erstattenden) Vorschlag der Bundesregierung vom Bundespräsidenten vor Ablauf der Gesetzgebungsperiode aufgelöst werden; der Bundespräsident „darf dies jedoch nur einmal aus dem gleichen Anlass verfügen".[103] Im Falle der Auflösung ist der Nationalrat neu zu wählen. Das bundesverfassungsgesetzlich vorgesehene Zusammenwirken von Bundespräsident und Bundesregierung soll eine missbräuchliche Ausübung dieser Notstandsbefugnisse verhindern. Der Bundespräsident und die Mitglieder der Bundesregierung sind dafür auch politisch und rechtlich verantwortlich.[104] Werden die Auflösungsakte als Verordnungen des Bundespräsidenten qualifiziert, unterliegen diese zudem der Kontrolle durch den Verfassungsgerichtshof.
Hinsichtlich der obersten Verwaltungsorgane des Bundes kann zum einen die Bundesregierung vom Bundespräsidenten entlassen werden.[105] Der Bundespräsident hat in diesem Fall eine neue Bundesregierung zu ernennen (allenfalls bis dahin eine einstweilige Bundesregierung mit der Fortführung der Verwaltung zu betrauen).[106] Zum anderen kann der Bundespräsident vor Ablauf der Funktionsperiode auf Verlangen der Bundesversammlung durch Volksabstimmung abgesetzt werden; dafür ist ein (mit erhöhten Präsenz- und Konsensquoren zu beschließender) Antrag des Nationalrates erforderlich. Ab dem Zeitpunkt der Beschlussfassung durch den Nationalrat ist der Bundespräsident an der ferneren Ausübung seines Amtes verhindert und üben die Präsidenten des Nationalrates als Kollegialorgan seine Befugnisse aus.[107]

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[103] Siehe dazu Konrath, Christoph. „Art 29 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 19. Lfg 2017, 1–33, Rz 14–32; Wieser, Bernd. „Art 29/1 B-VG." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 19. Lfg 2024, 1–22.

[104] Bundespräsident: Art 60 Abs 6 B-VG und Art 68 in Verbindung mit Art 142 B-VG; Mitglieder der Bundesregierung: Art 74 sowie Art 76 in Verbindung mit Art 142 B-VG.

[105] Art 70 Abs 1 B-VG. Siehe dazu Hofstätter, Christoph. „Art 70 B-VG." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 18. Lfg 2023, 1–18, Rz 10–15; Wieser, Bernd. „Art 70 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 9. Lfg 2012, 1–22, Rz 34–39.

[106] Art 70 und 71 B-VG.

[107] Art 60 Abs 6 und Art 64 Abs 1 B-VG. Siehe dazu Frank, Stefan Leo. „Art 60 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 28. Lfg 2022, 1–28, Rz 28–34; Holzinger, Gerhart, und Kerstin Holzinger. „Art 60 B-VG." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 13. Lfg 2017, 1–18, Rz 37–41.

Indem Art 84 B-VG anordnet, dass die Militärgerichtsbarkeit „außer für Kriegszeiten" aufgehoben ist, ermächtigt diese Staatsnotstandsbestimmung für den Fall des Krieges zu einer Änderung der Behörden- bzw. Gerichtsorganisation.[108]

Von den dargestellten Instrumenten der Notstandsverfassung weisen insbesondere die Befugnisse des Bundesheeres zu selbständigem Einschreiten und die Befugnisse des Bundespräsidenten zur Verlegung des Sitzes oberster Bundesorgane staatsnotstandspräventive Funktion auf. Denn sie ermöglichen es auch, das Entstehen einer Notstandssituation präventiv abzuwenden oder die Ausweitung einer bereits eingetretenen Notstandssituation zu verhindern.[109]

Die in der Notstandsverfassung vorgesehenen Instrumente können – unter Erfüllung der dafür jeweils bundesverfassungsgesetzlich festgelegten Anwendungsvoraussetzungen – auch kumulativ einander ergänzend eingesetzt werden. Die damit verbundene erhöhte Wirkmächtigkeit der Notstandsinstrumente ermöglicht es, effektiver auf Notstandssituationen zu reagieren.[110]

Question 3

Eine Notstandsverfassung, die das Funktionieren der Rechtserzeugungs- und Rechtsvollziehungsfunktionen auf Landesebene ermöglichen und sicherstellen soll, ist im österreichischen Bundesstaat auch für die Länder vorgesehen. Ihre sowohl bundes- als auch landesverfassungsgesetzlich festgelegten Instrumente werden im Folgenden erläutert:

Für den Fall eines Gesetzgebungsnotstandes auf Landesebene wegen Handlungsunfähigkeit eines Landtages ermächtigt Art 97 Abs 3 B-VG[111] die Lan-

[108] Siehe dazu Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 179 f; Truppe, Michael. „Art 84 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 9. Lfg 2012, 1–7; Handstanger, Meinrad. „Art 84 B-VG." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 13. Lfg 2017, 1–15.

[109] Siehe dazu Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 180 f, der außerdem jene Bestimmungen der Bundesverfassung anführt, die die Vertretung der obersten Verwaltungsorgane des Bundes (Bundespräsident, Mitglieder der Bundesregierung) im Falle derer Verhinderung regeln (Art 64, Art 69 Abs 2, Art 73 B-VG).

[110] So auch – unter Angabe von Beispielen – Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 192–195, dem zufolge sich aus den staatsnotstandsrechtlichen Gehalt aufweisenden Bestimmungen der Bundesverfassung kein „Gebot der Einhaltung einer bestimmten Reihenfolge" in der Anwendung der Notstandsinstrumente entnehmen lässt.

[111] Teilweise wird Art 97 Abs 3 und 4 B-VG in den Landesverfassungen wiederholt; siehe Art 50 Abs 2–4 Burgenländisches Landes-Verfassungsgesetz, LGBl 42/1981 idF LGBl 43/2020; Art 39 Kärntner Landesverfassung, LGBl 85/1996 idF LGBl 18/2024; Art 49 Oberösterreichisches Landes-Verfassungsgesetz, LGBl 122/1991 idF LGBl 39/2019; Art 41 Salzburger Landes-Verfassungsgesetz 1979, LGBl 25/1999 idF LGBl 97/2022; Art 42 Steiermärkisches Landes-Verfassungsgesetz, LGBl 77/2010

desregierung zur Erlassung von vorläufigen gesetzändernden Verordnungen („Notverordnungen") unter der Voraussetzung, dass die sofortige Erlassung von Maßnahmen, die verfassungsgemäß einer Beschlussfassung des Landtages bedürfen, zur Abwehr eines offenkundigen, nicht wieder gutzumachenden Schadens für die Allgemeinheit zu einer Zeit notwendig wird, in der der Landtag nicht rechtzeitig zusammentreten kann oder in seiner Tätigkeit durch höhere Gewalt behindert ist. Dieses Notverordnungsrecht[112] ist sowohl in formeller als auch in materieller Hinsicht beschränkt. Mit einer Notverordnung darf Art 97 Abs 4 B-VG zufolge nicht die Landesverfassung geändert werden, weder darf sie eine dauernde finanzielle Belastung des Landes, eine finanzielle Belastung des Bundes oder der Gemeinden, finanzielle Verpflichtungen der Staatsbürger oder eine Veräußerung von Landesvermögen zum Gegenstand haben, noch Maßnahmen in Angelegenheiten der Kammern für Arbeiter und Angestellte auf land- und forstwirtschaftlichem Gebiet.[113] Die Landesregierung hat nach Art 97 Abs 3 B-VG das Einvernehmen mit einem Ausschuss[114] des Landtages herzustellen; die Notverordnung ist zudem der Bundesregierung zur Kenntnis zu bringen. Art 97 Abs 3 B-VG sieht eine nachprüfende parlamentarische Kontrolle von Notverordnungen vor. Der Landtag ist einzuberufen, sobald das Hindernis für sein Zusammentreten weggefallen ist; Art 18 Abs 4 B-VG gilt sinngemäß.

Auch hier dient das bundesverfassungsgesetzlich angeordnete Zusammenwirken der Landesregierung und des zuständigen Ausschusses des Landtages der Verhinderung einer missbräuchlichen Inanspruchnahme. In vergleichbarer Weise soll die Mitwirkung des Landtages an der Notverordnungserlassung das Gesetzgebungsmonopol des Landtages in größtmöglichem Umfang erhalten und das System der Checks and Balances auch im Staatsnotstand zumindest prinzipiell bewahren, demokratische Legitimation vermitteln und eine präventive parlamentarische Kontrolle ermöglichen. Die in Art 97 Abs 4 in Verbindung mit Art 18 Abs 4 B-VG festgelegte nachträgliche parlamentarische Kontrolle wird durch die politische und die rechtliche Verantwortlichkeit der Mitglieder der Landesregierung ergänzt.[115] Die Notverordnungen unterliegen

idF LGBl 110/2022; Art 53 Tiroler Landesordnung 1989, LGBl 61/1988 idF LGBl 36/2022. Siehe dazu Steiner, Wolfgang. „Landesregierung." *Das Recht der Länder*, herausgegeben von Erich Pürgy, Band I, Jan Sramek Verlag, 2012, 299–383, Rz 97 f.

[112] Siehe dazu Müller, Thomas. „Art 97/3, 4 B-VG." *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 14. Lfg 2018, 1–12.

[113] Im Zusammenhang mit der materiellen Beschränkung des Notverordnungsrechts ist zu ergänzen, dass dieses auch nicht dazu ermächtigt, einen Gesetzgebungsnotstand auf Bundesebene oder in einem anderen Land abzuhelfen.

[114] Dieser Ausschuss des Landtages hat nach dem Grundsatz der Verhältniswahl gewählt zu sein.

[115] Art 105 in Verbindung mit Art 142 B-VG; Art 56 f Burgenländisches Landes-Verfassungsgesetz (FN 112); Art 54 f Kärntner Landesverfassung (FN 112); Art 39 NÖ Landesverfassung 1979, LGBl 0001-0 idF LGBl 23/2022; Art 44 und 48 Oberösterreichisches Landes-Verfassungsgesetz (FN 112); Art 38 f Salzburger Landes-Verfassungsgesetz 1979 (FN 112); Art 38 Steiermärkisches Landes-Verfassungsgesetz (FN 112); Art 64 Tiroler Landesordnung 1989 (FN 112); Art 48

der Kontrolle durch den Verfassungsgerichtshof; sie müssen nicht nur den in Art 97 Abs 3 und 4 B-VG festgelegten Voraussetzungen entsprechen, sondern in jeder Hinsicht (bundes- und landes)verfassungsmäßig[116] sein.
Das dem Notverordnungsrecht des Bundespräsidenten nachgebildete Notverordnungsrecht der Landesregierung ist von seiner Effektivität und Wirkmächtigkeit ähnlich zu beurteilen wie jenes des Bundespräsidenten.

Hinsichtlich der Sonderverfügungsbefugnisse der gesetzmäßigen zivilen Gewalt – im gegebenen Kontext der zur Aufgabenbesorgung eigentlich zuständigen Landes- und Gemeindebehörden – über das Bundesheer (Heranziehung zum Assistenzeinsatz, insbesondere zum Katastropheneinsatz) nach Art 79 Abs 2 und 4 B-VG in Verbindung mit § 2 Abs 5 Wehrgesetz 2001 und des ausnahmsweisen selbständigen militärischen Einschreitens des Bundesheeres gemäß Art 79 Abs 5 B-VG siehe oben unter 2.1 und 2.

Auch für die Landesebene sieht die Notstandsverfassung keine Regelungen vor, die eine Erleichterung der Verfahren der Rechtserzeugung und Rechtsvollziehung (möglicherweise mit einem Wechsel der Rechtssatzform) vorsehen. Dieser Kategorie staatsnotstandsrechtlicher Regelungen lassen sich allenfalls das Notverordnungsrecht der Landesregierung (weil mit dem Wechsel der Rechtssatzform [Verordnung] ein anderes Rechtserzeugungsverfahren einhergeht [Verordnungserlassungsverfahren an Stelle des Gesetzgebungsverfahrens]) und das selbständige militärische Einschreiten des Bundesheeres (wegen der Befreiung von der Verfügungsbefugnis und Befehlsgewalt der zivilen Gewalt) zuordnen.[117]

Zur Ermöglichung und Sicherstellung des Funktionierens der Rechtserzeugungs- und Rechtsvollziehungsfunktionen auf Landesebene statuiert die Notstandsverfassung Vorschriften, die zu diesem Zweck eine Änderung der Staats- und Behördenorganisation erlauben:

Die Landesverfassungen sehen regelmäßig die Möglichkeit vor, für die Dauer „außerordentlicher Verhältnisse“ oder „außergewöhnlicher Verhältnisse“ den Sitz (die jeweilige Landeshauptstadt) des Landtages und der Landesregierung zu verlegen oder diesen bzw. diese an einem anderen Ort als der Landeshauptstadt einzuberufen.[118]

Vorarlberger Landesverfassung, LGBl 9/1999 idF LGBl 68/2022; §§ 37 und 135 Wiener Stadtverfassung, LGBl 28/1968 idF LGBl 27/2023. Siehe dazu Steiner, Wolfgang. „Landesregierung.“, Rz 88–93.

[116] Müller, Thomas. „Art 97/3, 4 B-VG.“, Rz 12.

[117] Siehe FN 93.

[118] Art 7 Abs 2 Burgenländisches Landes-Verfassungsgesetz (FN 112); Art 13 Abs 2 und Art 45 Abs 2 Kärntner Landesverfassung (FN 112); Art 5 Abs 2 NÖ Landesverfassung 1979 (FN 116); Art 17 Abs 2 Oberösterreichisches Landes-Verfassungsgesetz (FN 116); Art 12 Abs 2 und Art 34 Abs 8 Salzburger Landes-Verfassungsgesetz 1979 (FN 112); Art 4 und Art 11 Abs 2 Steiermärkisches Landes-Verfassungsgesetz (FN 112); Art 16 Abs 2 und Art 44 Abs 5 Tiroler Landesordnung 1989 (FN 112);

Handlungsunfähig gewordene Staatsorgane können aufgelöst und neu konstituiert werden.
Was zunächst Gesetzgebungsorgane betrifft, kann ein Landtag auf (einstimmig zu erstattenden) Antrag der Bundesregierung mit (mit erhöhten Präsenz- und Konsensquoren zu erteilender) Zustimmung des Bundesrates vom Bundespräsidenten vor Ablauf der Gesetzgebungsperiode aufgelöst werden.[119] Im Falle der Auflösung ist der Landtag neu zu wählen. Das bundesverfassungsgesetzlich vorgesehene Zusammenwirken von Bundespräsident, Bundesregierung und Bundesrat soll eine missbräuchliche Ausübung dieser Notstandsbefugnisse verhindern. Der Bundespräsident und die Mitglieder der Bundesregierung sind dafür auch politisch und rechtlich verantwortlich.[120] Werden die Auflösungsakte als Verordnungen des Bundespräsidenten qualifiziert, unterliegen diese zudem der Kontrolle durch den Verfassungsgerichtshof.

Hinsichtlich der obersten Verwaltungsorgane des Landes sehen die Landesverfassungen eine Abberufung der Landesregierung oder einzelner ihrer Mitglieder vor.[121]

Von den dargestellten Instrumenten der Notstandsverfassung auf Landesebene weisen insbesondere die Befugnisse des Bundesheeres zu selbständigem Einschreiten und die Befugnisse zur Verlegung des Sitzes der obersten Landesorgane Landtag und Landesregierung oder zu deren Einberufung an einem anderen Ort als der Landeshauptstadt staatsnotstandspräventive Funktion auf. Sie ermöglichen es nämlich auch, das Entstehen einer Notstandssituation präventiv abzuwenden oder die Ausweitung einer bereits eingetretenen Notstandssituation zu verhindern.[122]

Art 14 Abs 1 Vorarlberger Landesverfassung (FN 116); §§ 37 und 135 Wiener Stadtverfassung (FN 116). Siehe dazu Steiner, Wolfgang. „Landesregierung.“, Rz 53.

[119] Siehe dazu Pesendorfer, Wolfgang. „Art 100 B-VG.“ *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 2. Lfg 2002, 1–4; Müller, Thomas. „Art 100 B-VG.“ *Kommentar Bundesverfassungsrecht*, herausgegeben von Karl Korinek, Michael Holoubek et al, Verlag Österreich, 16. Lfg 2021, 1–13; Abbrederis, Philipp, und Erich Pürgy. „Gesetzgebung der Länder.“ *Das Recht der Länder*, herausgegeben von Erich Pürgy, Band I, Jan Sramek Verlag, 2012, 231–297, Rz 40.

[120] Bundespräsident: Art 60 Abs 6 B-VG und Art 68 in Verbindung mit Art 142 B-VG; Mitglieder der Bundesregierung: Art 74 sowie Art 76 in Verbindung mit Art 142 B-VG.

[121] Art 56 Burgenländisches Landes-Verfassungsgesetz (FN 112); Art 55 Kärntner Landesverfassung (FN 112); Art 39 Abs 1–4 NÖ Landesverfassung 1979 (FN 116); Art 44 Abs 1–4 Oberösterreichisches Landes-Verfassungsgesetz (FN 116); Art 39 Salzburger Landes-Verfassungsgesetz 1979 (FN 112); Art 38 Abs 4 Steiermärkisches Landes-Verfassungsgesetz (FN 112); Art 64 Abs 3 Tiroler Landesordnung 1989 (FN 112); Art 48 Vorarlberger Landesverfassung (FN 116); § 37 Wiener Stadtverfassung (FN 116). Siehe dazu Steiner, Wolfgang. „Landesregierung.“, Rz 59.

[122] Siehe dazu Fister, Mathis. „Staatsnotstandsrecht in Österreich.“, 180 f. Zu nennen sind hier auch jene Be-stimmungen der Landesverfassungen, die die Vertretung der obersten Verwaltungsorgane des Landes (Landesregierung und deren Mitglieder) im Falle derer Verhinderung regeln: Art 55 Burgenländisches Landes-Verfassungsgesetz (FN 112); Art 46 Abs 2–4 Kärntner Landesverfassung (FN 112); Art 40 und 43 NÖ Landesverfassung 1979 (FN 116); Art 46 Abs 1 und 2, Art 50 Abs 2 und Art 51 Abs 2 Oberösterreichisches Landes-Verfassungsgesetz (FN 116); Art 35a und 37

Die in der Notstandsverfassung vorgesehenen Instrumente auf Landesebene können – unter Erfüllung der dafür jeweils (bundes- und landes)verfassungsgesetzlich festgelegten Anwendungsvoraussetzungen – auch kumulativ einander ergänzend eingesetzt werden. Die damit verbundene erhöhte Wirkmächtigkeit der Notstandsinstrumente ermöglicht es, effektiver auf Notstandssituationen zu reagieren.[123]

Question 4

Da sie ein Staatsnotstandsreaktionsregime, das das Funktionieren der Rechtserzeugungs- und Rechtsvollziehungsfunktionen ermöglichen und sicherstellen soll, konstituieren, weisen die (unter 2.1–3 dargestellten) staatsnotstandsrechtlichen Bestimmungen der Bundesverfassung und der Landesverfassungen im Wesentlichen staatsorganisatorischen Gehalt auf (Regelungen betreffend Zuständigkeiten zur Rechtserzeugung und Rechtsvollziehung, Verfahren der Rechtserzeugung und Behördenorganisation). Die EU verfügt grundsätzlich über keine Kompetenzen zur Regelung der Staatsorganisation der Mitgliedstaaten. Dessen ungeachtet können aus dem Unionsrecht Anforderungen an die Staatsorganisation der Mitgliedstaaten erwachsen, wie insbesondere jene, die zur Gewährleistung eines effektiven Rechtsschutzes in den vom Unionsrecht erfassten Bereichen die Organisation der Gerichtsbarkeit betreffen.[124] Unionsrechtliche Anforderungen an die staatsnotstandsrechtlichen Gehalt aufweisenden Bestimmungen der Bundesverfassung und der Landesverfassungen sind nicht erkennbar. Zudem hat die EU gemäß Art 4 Abs 2 erster Satz EUV die nationale Identität der Mitgliedstaaten zu achten, die insbesondere „in ihren grundlegenden politischen und verfassungsmäßigen Strukturen" zum Ausdruck kommt. Die in die Bundesverfassung und in die Landesverfassungen eingebettete Notstandsverfassung ist ein wesentliches Element dieser grundlegenden politischen und verfassungsmäßigen Strukturen, soll sie doch mit den Rechtserzeugungs- und Rechtsvollziehungsfunktionen gerade „die grundlegenden Funktionen des Staates", welche die EU nach Art 4 Abs 2 zweiter Satz EUV gleichfalls zu achten hat, sicherstellen. Ein Konflikt zwischen

Abs 2 Salzburger Landes-Verfassungsgesetz 1979 (FN 112); Art 40 Abs 2 und 2a Steiermärkisches Landes-Verfassungsgesetz (FN 112); Art 50 Tiroler Landesordnung 1989 (FN 112); Art 43 Vorarlberger Landesverfassung (FN 116); § 38 Wiener Stadtverfassung (FN 116). Siehe dazu Steiner, Wolfgang. „Landesregierung.", Rz 26 ff; Steiner, Wolfgang. „Landeshauptmann." *Das Recht der Länder*, herausgegeben von Erich Pürgy, Band I, Jan Sramek Verlag, 2012, 385–421, Rz 11–14.

[123] So auch – unter Angabe von Beispielen – Fister, Mathis. „Staatsnotstandsrecht in Österreich.", 192–195, dem zufolge sich aus den staatsnotstandsrechtlichen Gehalt aufweisenden Bestimmungen der Bundesverfassung kein „Gebot der Einhaltung einer bestimmten Reihenfolge" in der Anwendung der Notstandsinstrumente entnehmen lässt.

[124] Art 19 Abs 2 UAbs 1 EUV in Verbindung mit Art 47 GRC. EuGH (GK) 29. 7. 2024, Rs C-119/23, *Valancius*, ECLI:EU:C:2024:653; (GK) 22. 2. 2022, verb Rs C-562/21 PPU ua, *X ua*, ECLI:EU:C:2022:100; (GK) 20. 4. 2021, Rs C-896/19, *Repubblika*, ECLI:EU:C:2021:311; 9. 7. 2020, Rs C-272/19, *Land Hessen*, ECLI:EU:C:2020:535.

den staatsnotstandsrechtlichen Gehalt aufweisenden staatsorganisatorischen Bestimmungen von Bundesverfassung und Landesverfassungen und Unionsrecht (unabhängig davon, ob unmittelbar anwendbare oder nicht unmittelbar anwendbare Bestimmungen des Unionsrechts) erscheint daher schwer vorstellbar. Spezielle sich auf einen solchen Normenkonflikt beziehende bundes- oder landesverfassungsgesetzliche Vorschriften oder höchstrichterliche Rechtsprechung existieren nicht.

Question 5

Aus Anlass der COVID-19-Pandemie hat der Verfassungsgerichtshof im Kontext eines Verfahrens zur Prüfung der Gesetzmäßigkeit einer auf das COVID-19-Maßnahmengesetz[125] gestützten, Betretungsverbote für Betriebsstätten zur Verhinderung der Verbreitung des COVID-19-Virus festlegenden COVID-19-Schutzmaßnahmenverordnung[126] betont, dass „in solchen [krisenhaften] Situationen, wie sonst, die Bundesverfassung Gesetzgebung und Vollziehung zu ihrer Bewältigung insbesondere durch das Legalitätsprinzip des Art 18 [Abs 1] B-VG sowie die durch ein System verfassungsgesetzlich gewährleisteter Rechte gebildete Grundrechtsordnung [leitet]. Das Legalitätsprinzip stellt Anforderungen an die gesetzliche Bindung bei der Verwaltung bei ihren Maßnahmen zur Krisenbekämpfung. Die Grundrechtsordnung gewährleistet, dass in den notwendigen Abwägungsprozessen mit öffentlichen Interessen die in einer liberalen Verfassungsordnung wesentlichen Interessen des Einzelnen berücksichtigt und die Interessen angemessen ausgeglichen werden, auch wenn, wie in der vorliegenden [Krisens]ituation die Interessen auf grundrechtlich geschützten Interessen basieren, die den Staat auch zum Handeln verpflichten".[127]

Sowohl die auf der Grundlage der Notstandsverfassung erlassenen (Not) Verordnungen als auch die das einfachgesetzliche Krisenreaktionsregime bildenden Bundes- und Landesgesetze (siehe unten 3.7) und auf deren Grundlage erlassene Verordnungen müssen zum einen nach Maßgabe des dem Legalitätsprinzip erfließenden Bestimmtheitsgebots das Handeln der Verwaltung und der Gerichtsbarkeit hinreichend konkret determinieren. Zum anderen müssen sie mit den durch die Bundesverfassung garantierten Grundrechten vereinbar sein. Letzteres gilt gleichermaßen für die – auf den zuvor genannten Gesetzen und (Not)Verordnungen ergehenden – individuell-konkreten Verwaltungsakte (Bescheide, Akte unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt) und Gerichtsakte. Dies entspricht dem – auch in Staatsnotstands- und

[125] COVID-19-Maßnahmengesetz, BGBl I 10/2020.

[126] Verordnung des Bundesministers für Soziales, Gesundheit, Pflege und Konsumentenschutz betreffend vorläufige Maßnahmen zur Verhinderung der Verbreitung von COVID-19, BGBl II 96/2020 idF BGBl II 151/2020.

[127] VfSlg 20.399/2020, Rz 5.1.

in Krisensituationen maßgeblichen – rechtsstaatlichen Gebot, dass „alle Akte staatlicher Organe im Gesetz und mittelbar letzten Endes in der Verfassung begründet sein müssen".[128]

Dieses rechtsstaatliche Gebot verlangt aber auch, dass „für die Sicherung dieses Postulats wirksame Rechtsschutzeinrichtungen bestehen".[129] Im Hinblick auf ihre Konformität mit den Grundrechten (einschließlich der durch die EU-Grundrechtecharta garantierten Grundrechte bei Durchführung des Unionsrechts im Sinne des Art 51 Abs 1 GRC[130]) und ihre sonstige Verfassungsmäßigkeit unterliegen Gesetze und (Not)Verordnungen der Kontrolle durch den Verfassungsgerichtshof.[131] Individuell-konkrete Verwaltungsakte (Bescheide und Akte unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt) sind dahingehend zunächst der Kontrolle durch die Verwaltungsgerichte unterworfen;[132] deren Entscheidungen können beim Verfassungsgerichtshof auf ihre Grundrechtskonformität und ihre sonstige Verfassungsmäßigkeit und beim Verwaltungsgerichtshof auf ihre Gesetzmäßigkeit überprüft werden.[133] Entscheidungen der ordentlichen Gerichte sind im Instanzenzug der ordentlichen Gerichtsbarkeit zu bekämpfen.

Die Notverordnungsrechte des Bundespräsidenten und der Landesregierungen verlangen, dass der Verordnungsvorschlag der Bundesregierung an den Bundespräsidenten im Einvernehmen mit dem ständigen Unterausschuss des Hauptausschusses des Nationalrates zu erstatten ist bzw. dass die Landesregierung das Einvernehmen mit dem zuständigen Landtagsausschuss herzustellen hat (siehe oben 2.1–3). Mehrere das einfachgesetzliche Krisenreaktionsregime mitkonstituierende Bundesgesetze ordnen für die Erlassung von Krisenabwehr- und Krisenbewältigungsverordnungen die Mitwirkung des Hauptausschusses des Nationalrates an;[134] dies ist teilweise sogar bundesverfassungsgesetzlich geboten.[135] Mit dieser parlamentarischen Mitwirkung an der Verordnungser-

[128] VfSlg 2455/1952 und 16.327/2001. Siehe dazu Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", 13. Auflage, Facultas Verlag, 2022, Rz 74.

[129] VfSlg 2455/1952 und 16.327/2001.

[130] VfSlg 19.632/2012.

[131] Art 139 und 140 B-VG.

[132] Art 130 Abs 1 Z 1 und 2 B-VG.

[133] Art 133 und 144 B-VG.

[134] § 1 Lebensmittelbewirtschaftungsgesetz 1997 (FN 14), § 1 Versorgungssicherungsgesetz (FN 14), § 5 Energielenkungsgesetz (FN 14), §§ 36 und 62 Asylgesetz 2005 (FN 20). Ebenso die bereits außer Kraft getretenen § 12 COVID-19-Maßnahmengesetz (FN 16) und § 18 COVID-19-Impfpflichtgesetz, BGBl I 4/2022 idF BGBl I 131/2022.

[135] So gemäß Art 55 Abs 5 B-VG für die Erlassung von Lenkungsmaßnahmen vorsehenden Verordnungen, die als besonders eingriffsintensiv im Hinblick auf die Eigentumsfreiheit (Art 5 StGG und Art 1 1. ZPEMRK) und die Erwerbsfreiheit (Art 6 Abs 1 StGG) gelten, auf der Grundlage der Bewirtschaftungsgesetze. Siehe § 1 Lebensmittelbewirtschaftungsgesetz 1997 (FN 14), § 1 Versorgungssicherungsgesetz (FN 14) und § 5 Energielenkungsgesetz (FN 14); das Erdölbevorratungsgesetz 2012 (FN 54) und das Preisgesetz 1992 (FN 14) sehen eine Mitwirkung des Hauptausschusses des Nationalrates nicht vor. Zu Art 55 Abs 5 B-VG siehe Kahl, Arno. „Art 55 B-VG." *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, herausgegeben von Benjamin Kneihs und Georg Lienbacher, Verlag Österreich, 7. Lfg 2005, 1–17, Rz 10 f; Neisser, Heinrich. „Art 55 B-VG." *Kommentar Bundes-*

lassung soll nicht nur demokratische Legitimation vermittelt, sondern auch eine präventive politische Kontrolle dahin ermöglicht werden, ob sich die Notverordnung bzw. die Krisenabwehr- und Krisenbewältigungsverordnung im Rahmen der Verordnungsermächtigung bewegt und – insbesondere dann, wenn sie sich als besonders eingriffsintensiv erweist – mit den Grundrechten vereinbar ist.[136] Andere besondere nicht-gerichtliche Einrichtungen zur Wahrung der Grundrechte sind nicht vorgese

Question 6

In der Literatur wurden zum Beispiel Verstöße (früher) Beschränkungen der Einreise aus EU-Nachbarstaaten vorsehender COVID-19-Schutzmaßnahmen[137] gegen das Freizügigkeits- und Aufenthaltsrecht und die Grundfreiheiten festgestellt.[138] In einem vom Verwaltungsgerichtshof eingeleiteten,[139] mit Urteil vom 15. 6. 2023[140] entschiedenen Vorabentscheidungsverfahren hat der EuGH Art 45 AEUV und Art 7 Arbeitnehmerfreizügigkeits-Verordnung[141] dahin ausgelegt, dass sie einer nationalen Regelung wie jener des § 32 in Verbindung mit den §§ 7 und 17 Epidemiegesetz entgegenstehen, nach der die Gewährung einer Vergütung für den Verdienstentgang, der den Arbeitnehmern aufgrund einer wegen eines positiven COVID-19-Testergebnisses verfügten Absonderung entstehet, davon abhängt, dass die Anordnung der Absonderungsmaßnahme durch eine österreichische Gesundheitsbehörde aufgrund dieser Regelung

verfassungsrecht, herausgegeben von Karl Korinek, Michael Holoubek und et al, Verlag Österreich, 12. Lfg 2013, 1–27, Rz 27; Rattinger, Christoph, und Carina Neugebauer. „Art 55 B-VG." *Kommentar zum Bundesverfassungsrecht*, herausgegeben von Arno Kahl, Lamiss Khakzadeh und Sebastian Schmid, Jan Sramek Verlag, 2021, 812–822, Rz 14 f.

[136] Erlassen auf der Grundlage des Energielenkungsgesetzes 2012 (FN 14): Energie-Lenkungsmaßnahmen-Verordnung Erdöl, BGBl II 349/2022; Energie-Lenkungsmaßnahmen-Verordnung Erdöl, BGBl II 276/2022; Energie-Lenkungsmaßnahmen-Verordnung Erdöl, BGBl II 106/2022. Erlassen auf der Grundlage des Energielenkungsgesetzes 2012 (FN 14) und des Erdölbevorratungsgesetzes 2012 (FN 54): Verordnung der Bundesministerin für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie über die Festsetzung der Höhe der Pflichtnotstandsreserven, die zu einem bestimmten Zeitpunkt zu halten sind, BGBl II 265/2022. Erlassen auf der Grundlage des § 62 Asylgesetz 2005 (FN 21): Vertriebenen-Verordnung, BGBl II 92/2022. Beispielsweise erlassen auf der Grundlage des COVID-19-Maßnahmengesetzes (FN 16): 6. COVID-19-Schuzmaßnahmenverordnung, BGBl II 537/2021; 5. COVID-19-Notmaßnahmenverordnung, BGBl II 475/2021; 5. COVID-19-Schutzmaßnahmenverordnung, BGBl II 465/2021.

[137] § 3 und § 3a Abs 1 Verordnung des Bundesministers für Soziales, Gesundheit, Pflege und Konsumentenschutz über Maßnahmen bei der Einreise aus Nachbarstaaten, BGBl II 87/2020 idF BGBl II 149/2020.

[138] Siehe Klaushofer, Reinhard, Benjamin Kneihs, Rainer Palmstorfer und Hannes Winner. „Ausgewählte unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des COVID-19-Virus.", ZÖR 2020, 649–771, 671–680.

[139] VwGH 24. 5. 2022, Ra 2021/03/0098.

[140] EuGH 15. 6. 2023, Rs C-411/22, *Thermalhotel Fontana Hotelbetriebsgesellschaft m.b.H.*, ECLI:EU:C:2023:49.

[141] Verordnung (EU) 492/2011 des Europäischen Parlaments und des Rates vom 5.4.2011 über die Freizügigkeit der Arbeitnehmer innerhalb der Union, ABl 2011 L 141/1.

verfügt wird. Der EuGH erachtete dies als eine mittelbare Diskriminierung von EU-Ausländern.

Section 3: Statutory/executive emergency law in the Member States

Question 1

Das (einfach)gesetzliche Krisenreaktionsregime wird – vor dem Hintergrund der Einrichtung Österreichs als Bundesstaat und der bundesstaatlichen Kompetenzverteilung zwischen Bund und Ländern – durch eine Reihe materienspezifischer Bundes- und Landesgesetze gebildet. Dazu sind insbesondere folgende Bundes- und Landesgesetze zu zählen:

Die der Versorgungssicherung bzw. Bewirtschaftung dienenden Bundesgesetze zielen auf die Wiederherstellung oder Erhaltung einer ungestörten Erzeugung und die zweckmäßige Verteilung des Mangels auf die Bevölkerung und sonstige Bedarfsträger.[142]
Das Lebensmittelbewirtschaftungsgesetz 1997[143] ermächtigt den Bundesminister für Land- und Forstwirtschaft, Regionen und Wasserwirtschaft im Einvernehmen mit dem Hauptausschuss des Nationalrates im Falle einer unmittelbar drohenden Störung der Versorgung oder zur Behebung einer bereits eingetretenen Störung mit Verordnung für bestimmte Waren (Lebensmittel einschließlich Trinkwasser, Marktordnungswaren, Düngemittel, Pflanzenschutzmittel, Futtermittel sowie Saat- und Pflanzengut) unbedingt erforderliche Lenkungsmaßnahmen anzuordnen, die die Aufrechterhaltung oder Wiederherstellung der ungestörten Erzeugung und Verteilung von Waren zur ausreichenden Versorgung der gesamten Bevölkerung und sonstiger Bedarfsträger zum Ziel haben.[144]
Das Versorgungssicherungsgesetz[145] ermächtigt den Bundesminister für Arbeit und Wirtschaft im Einvernehmen mit dem Hauptausschuss des Nationalrates im Falle einer unmittelbar drohenden Störung der Versorgung oder zur Behebung einer bereits eingetretenen Störung mit Verordnung für bestimmte, nicht dem Lebensmittelbewirtschaftungsgesetz 1997 unterfallende Wirtschafts- und Bedarfsgüter (zum Beispiel Rohstoffe und Halbfabrikate, mineralische Roh-

[142] Siehe dazu Müller, Thomas. „Versorgungssicherungsrecht." *Öffentliches Wirtschaftsrecht*, herausgegeben von Michael Holoubek und Michael Potacs, Öffentliches Wirtschaftsrecht, Band 2, 4. Auflage, Verlag Österreich, 2019, 1773–1803, 1775; Puck, Elmar. „Wirtschaftslenkungsrecht." *Grundriß des österreichischen Wirtschaftsrechts*, herausgegeben von Bernhard Raschauer, Manz Verlag, 1998, 229–520, 229; Müller, Thomas. „Preisrecht.", *Öffentliches Wirtschaftsrecht*, herausgegeben von Michael Holoubek und Michael Potacs, Öffentliches Wirtschaftsrecht, Band 2, 4. Auflage, Verlag Österreich, 2019, 1739–1771.

[143] Siehe FN 14.

[144] §§ 1–5 Lebensmittelbewirtschaftungsgesetz 1997 (FN 14).

[145] Siehe FN 14.

stoffe, Erzeugnisse der chemischen Industrie, Kunststoffe, Kautschuk, Schuhe, Metalle, Maschinen und Apparate) unbedingt erforderliche Lenkungsmaßnahmen anzuordnen, die die Aufrechterhaltung oder Wiederherstellung der ungestörten Erzeugung und Verteilung von diesen Gütern zur ausreichenden Versorgung der gesamten Bevölkerung und sonstiger Bedarfsträger zum Ziel haben.[146]

Auf der Grundlage des Energielenkungsgesetzes 2012[147] können insbesondere[148] zur Abwendung einer unmittelbar drohenden Störung oder zur Behebung einer bereits eingetretenen Störung der Energieversorgung Österreichs mit Verordnung vom Bundesminister für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie im Einvernehmen mit dem Hauptausschuss des Nationalrates zur Sicherstellung der Deckung des lebenswichtigen Bedarfs an Energie, der Aufrechterhaltung einer ungestörten Gütererzeugung und Leistungserstellung und der Versorgung der Bevölkerung und sonstiger Bedarfsträger Lenkungsmaßnahmen ergriffen werden.[149] Diese beziehen sich auf feste und flüssige Energieträger (Erdöl und Erdölprodukte, sonstige flüssige Brenn- und Treibstoffe, feste fossile Brennstoffe), elektrische Energie und Erdgas.[150]

Das Erdölbevorratungsgesetz 2012[151] verpflichtet zur Bildung von Pflichtnotstandsreserven an Energieträgern (Erdöl und Erdölprodukte),[152] auf die sich Lenkungsmaßnahmen nach dem Energielenkungsgesetz 2012 zunächst zu beziehen haben.[153]

Das Preisgesetz 1992[154] ermächtigt den Bundesminister für Arbeit und Wirtschaft, für Lenkungsmaßnahmen unterliegende Sachgüter (nicht für die Lieferung elektrischer Energie und Erdgas) für die Dauer dieser Maßnahmen mit Verordnung volkswirtschaftlich gerechtfertigte Preise festzusetzen. Auch für keinen Lenkungsmaßnahmen unterliegende Sachgüter und Leistungen, bei denen eine Störung der Versorgung unmittelbar droht oder bereits eingetreten ist, können mit Verordnung volkswirtschaftlich gerechtfertigte Preise bestimmt werden.[155]

Im Falle einer anzeigepflichtigen Krankheit ermächtigt das Epidemiegesetz[156] zum Schutz vor der Weiterverbreitung insbesondere zur Absonderung von oder

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[146] §§ 1–6 Versorgungssicherungsgesetz und die Anlage dazu (FN 14).
[147] Siehe FN 14.
[148] § 4 Abs 1 Z 2–4 und Abs 2 Z 2–4 Energielenkungsgesetz 2012 (FN 14).
[149] § 4 Abs 1 Z 1, Abs 2 Z 1 und Abs 3 und 4 und § 5 Energielenkungsgesetz 2012 (FN 14).
[150] §§ 7–12, §§ 14–25a und §§ 26–35a Energielenkungsgesetz 2012 (FN 14).
[151] Siehe FN 54.
[152] §§ 4–7 Erdölbevorratungsgesetz 2012 (FN 54).
[153] § 8 Energielenkungsgesetz 2012 (FN 14).
[154] Siehe FN 14.
[155] §§ 1 ff Preisgesetz 1992 (FN 14).
[156] Siehe FN 15. Das COVID-19-Maßnahmengesetz (FN 16) ist mit 30.6.2022 außer Kraft getreten.

zur Verhängung von Verkehrsbeschränkungen über einzelne(n) kranke(n), krankheitsverdächtige(n) oder ansteckungsverdächtige(n) Personen,[157] zur Festlegung von Verkehrsbeschränkungen für kranke, krankheitsverdächtige oder ansteckungsverdächtige Personen durch den Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz mit Verordnung,[158] zur Setzung von Maßnahmen gegen das Zusammenströmen größerer Menschenmengen (Veranstaltungen) mit Verordnung.[159] Es ermächtigt zudem zur Anordnung von Verkehrsbeschränkungen in Bezug auf Epidemiegebiete (für dort aufhältige Personen und für das Betreten der Epidemiegebiete)[160] und Verkehrsbeschränkungen gegenüber dem Ausland (für die Einreise oder Beförderung von Menschen in das Bundesgebiet und für die Ein- und Durchfuhr von Waren)[161] jeweils durch den Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz mit Verordnung.

Nach dem Arzneimittelgesetz[162] hat der Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz in einer Krisensituation, wenn die notwendige Versorgung der Bevölkerung mit Arzneimitteln sonst ernstlich und erheblich gefährdet wäre, mit Verordnung zum einen Ausnahmen von § 4 (betreffend Anforderungen an Arzneimittel) sowie von den Be-stimmungen des II. Abschnitts (betreffend Arzneispezialitäten), des III. Abschnitts (betreffend klinische Prüfungen und nichtkonventionelle Studien), des VI. Abschnitts (betreffend den Vertrieb von Arzneimitteln) und des VII. Abschnitts (betreffend Betriebsvorschriften für Betriebe, die Arzneimittel oder Wirkstoffe herstellen, kontrollieren oder in Verkehr bringen) dieses Gesetzes und der zu diesem ergangenen, entsprechenden Durchführungsverordnungen anzuordnen, soweit und solange dies auf Grund der besonderen Situation erforderlich ist und der Schutz des Lebens und der Gesundheit gewahrt bleibt, und zum anderen Regelungen über Versorgungs- und Bereitstellungsverpflichtungen für Zulassungsinhaber, Depositeure, Hersteller, Arzneimittel-Vollgroßhändler, Arzneimittel-Großhändler und öffentliche Apotheken zu erlassen, wenn und solange dies auf Grund der besonderen Situation erforderlich ist.[163]

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[157] § 7 und § 7a Epidemiegesetz (FN 15).

[158] § 7b Epidemiegesetz (FN 15). Als Verkehrsbeschränkungen kommen insbesondere Voraussetzungen und Auflagen für das Betreten und Befahren von Betriebsstätten, Arbeitsorten, Alten- und Pflegeheimen, bestimmten Orten und öffentlichen Orten in ihrer Gesamtheit, für das Benutzen von Verkehrsmitteln und für Zusammenkünfte in Betracht, ebenso die Untersagung des Betretens und Befahrens.

[159] § 15 Epidemiegesetz (FN 15).

[160] § 24 Epidemiegesetz (FN 15).

[161] § 25 Epidemiegesetz (FN 15).

[162] Siehe FN 17.

[163] § 94d Abs 1 und 2 Arzneimittelgesetz (FN 17).

In Notfallexpositionssituationen hat die zuständige Behörde[164] auf der Grundlage des Strahlenschutzgesetzes 2020[165] die Lage zu bewerten, auf Basis dieser Bewertung die erforderlichen Schutzmaßnahmen[166] festzulegen und diese durch behördliche Anordnungen oder Empfehlungen an die – rechtzeitig darüber zu informierende – Bevölkerung umzusetzen. Erforderlichenfalls sind die Organe des öffentlichen Sicherheitsdienstes, insbesondere deren Notfalleinsatzkräfte, beizuziehen, die an der Umsetzung der festgelegten Schutzmaßnahmen sowie bei Überwachung der Einhaltung dieser Maßnahmen mitzuwirken haben. Bei Gefahr im Verzug können die Schutzmaßnahmen auch gegen den Willen von Betroffenen durch unmittelbaren Zwang vollzogen werden.[167]

Stellt die Bundesregierung im Einvernehmen mit dem Hauptausschuss des Nationalrates mit Verordnung fest, dass – auf Grund einer Überlastung des österreichischen Asylsystems[168] – die Aufrechterhaltung der öffentlichen Ordnung und der Schutz der inneren Sicherheit gefährdet sind, sind während der Geltung dieser Verordnung und der Durchführung von Grenzkontrollen an den Binnengrenzen[169] die Sonderbestimmungen des 5. Abschnitts[170] des 3. Hauptstückes des Asylgesetzes 2005[171] anzuwenden. Diese sehen insbesondere die Einrichtung von Registrierstellen und spezifische Kriterien für die Stellung von Anträgen auf internationalen Schutz durch Fremde vor.[172]

Für Zeiten eines bewaffneten Konflikts oder sonstiger die Sicherheit ganzer Bevölkerungs-gruppen gefährdender Umstände kann die Bundesregierung im Einvernehmen mit dem Hauptausschuss des Nationalrates auf der Grundlage des Asylgesetzes 2005 mit Verordnung davon unmittelbar betroffenen Gruppen von Fremden, die anderweitig keinen Schutz finden (Vertriebene), ein vorübergehendes Aufenthaltsrecht im Bundesgebiet gewähren. Bis zum Inkrafttreten dieser Einreise und Dauer des Aufenthaltes der Fremden unter Berücksichtigung der Umstände des besonderen Falles regelnden Verordnung ist der Aufenthalt von Vertriebenen im Bundesgebiet geduldet.[173] Wird infolge der längeren Dauer der eingangs erwähnten Umstände eine dauernde Integration der Aufenthaltsberechtigten oder bestimmter Gruppen davon erforderlich,

[164] Dies ist insbesondere in Notfallexpositionssituationen infolge eines Unfalls in einer kerntechnischen Anlage oder radiologischen Terrors nach § 123 Abs 1 Strahlenschutzgesetz 2020 (FN 18) der Bundesminister für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie.

[165] Siehe FN 18.

[166] Siehe dazu die Anlage 2 der Interventionsverordnung, BGBl II 343/2020.

[167] § 123 Strahlenschutzgesetz 2020 (FN 18).

[168] Siehe AB 1097 BlgNR 25. GP 13 f.

[169] § 10 Abs 2 Grenzkontrollgesetz, BGBl I 435/1996 idF BGBl I 206/2021.

[170] Eingefügt mit dem Bundesgesetz, mit dem das Asylgesetz 2005, das Fremdenpolizeigesetz 2005 und das BFA-Verfahrensgesetz geändert wird, BGBl I 24/2016; AB 1097 BlgNR 25. GP 9–27.

[171] § 36 Asylgesetz 2005 (FN 20).

[172] §§ 37–41 Asylgesetz 2005 (FN 20).

[173] § 62 Abs 1 und 2 Asylgesetz 2005 (FN 20).

können in der Verordnung von den Vorschriften des Niederlassungs- und Aufenthaltsgesetz[174] abweichende Bedingungen bei der Erteilung von Aufenthaltstiteln festgelegt werden.[175]

Zu den Aufgaben der Sicherheitsbehörden im Rahmen der Aufrechterhaltung der öffentlichen Sicherheit zählt das Sicherheitspolizeigesetz insbesondere die Abwehr allgemeiner Gefahren und den vorbeugenden Schutz von Rechtsgütern.[176] Gefährlichen Angriffen haben die Sicherheitsbehörden unverzüglich ein Ende zu setzen.[177] Ihnen obliegt unter anderem der besondere vorbeugende Schutz der verfassungsmäßigen Einrichtungen und ihrer Handlungsfähigkeit sowie von kritischen Infrastrukturen.[178] Das Sicherheitspolizeigesetz räumt den Sicherheitsbehörden und den Organen des öffentlichen Sicherheitsdienstes zur Aufrechterhaltung der öffentlichen Sicherheit weitreichende Befugnisse ein. Diese umfassen neben dem Stellen von Auskunftsverlangen und der Identitätsfeststellung die Ausübung von Befehls- und Zwangsgewalt, die Verhängung eines Platzverbots mit Verordnung, die Erklärung bestimmter Orte zu Schutzzonen oder Waffenverbotszonen mit Verordnung, die Auflösung von Besetzungen mit Verordnung, Wegweisungen, das Betreten und Durchsuchen von Grundstücken, Räumlichkeiten und Fahrzeugen, das Durchsuchen von Menschen, die Sicherstellung von Sachen und Eingriffe in die persönliche Freiheit.[179]

Das Militärbefugnisgesetz betraut die militärischen Organe mit dem militärischen Eigenschutz, der neben der nachrichtendienstlichen Abwehr den Wachdienst zum Schutz militärischer Rechtsgüter umfasst.[180] Im Wachdienst sind die militärischen Organe befugt, Angriffe gegen militärische Rechtsgüter zu beenden, Auskunftsverlangen zu stellen, Personen zu kontrollieren, zu durchsuchen und vorläufig festzunehmen, mit Verordnung Platzverbote zu verhängen, Wegweisungen vorzunehmen, Grundstücke, Räume und Fahrzeuge zu betreten und Sachen sicherzustellen.[181] Diese ihnen übertragenen Befugnisse dürfen grundsätzlich mit unmittelbarer Zwangsgewalt durchgesetzt werden; dazu gehört auch der Waffengebrauch einschließlich des lebensgefährdenden Waffengebrauchs.[182]

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[174] Niederlassungs- und Aufenthaltsgesetz, BGBl I 100/2005 idF BGBl I 67/2024.

[175] § 62 Abs 3 Asylgesetz 2005 (FN 20).

[176] § 20 Sicherheitspolizeigesetz (FN 22).

[177] § 21 Sicherheitspolizeigesetz (FN 22).

[178] § 22 Abs 1 Z 1 und 6 Sicherheitspolizeigesetz (FN 22). Der besondere vorbeugende Schutz kritischer Infrastrukturen wurde mit der Sicherheitspolizeigesetz-Novelle 2014, BGBl I 43/2014, in Umsetzung der Richtlinie 2008/114/EG des Rates vom 8.12.2008 über die Ermittlung und Ausweisung europäischer kritischer Infrastrukturen und die Bewertung der Notwendigkeit, ihren Schutz zu verbessern, ABl 2008 L 345/75, eingeführt; siehe RV 99 BlgNR 25. GP 1, 3 und 12 ff.

[179] §§ 32–49 Sicherheitspolizeigesetz (FN 22).

[180] § 2 Abs 1 Militärbefugnisgesetz (FN 23).

[181] § 6 in Verbindung mit §§ 6a–14 Militärbefugnisgesetz (FN 23).

[182] §§ 17 ff Militärbefugnisgesetz (FN 23).

Die Katastrophenhilfe- bzw. Katastrophenschutzgesetze[183] der Länder bestimmen die Behördenzuständigkeit zum Teil nach dem Ausmaß der Katastrophe, zum Teil unabhängig davon.[184] Die jeweils zuständige Behörde fungiert im Katastrophenfall als Einsatzleiter und bedient sich zur Verfügung stehender Hilfsdienste wie Rettung oder Feuerwehr. Ihre Befugnisse umfassen insbesondere die Verpflichtung von Jedermann zur Hilfeleistung im Rahmen der Zumutbarkeit, die Inanspruchnahme von Hilfsmitteln und Unterkünften, das Betreten und die Benutzung von Liegenschaften, die Vornahme von Wegweisungen aus dem Katastrophengebiet, die Ermittlung der Identitätsdaten von Betroffenen und die Verhängung von Gebietssperren mit Verordnung. Die der zuständigen Behörde (aber auch den Organen der Hilfsdienste) übertragenen Befugnisse können, sofern und soweit vorgesehen, mit unmittelbarer Befehls- und Zwangsgewalt durchgesetzt werden.

Question 2

Als Staatsnotstandsreaktionsregime zielt die Notstandsverfassung, wie bereits unter 1.1 und 2 dargelegt, darauf ab, das Funktionieren der Rechtserzeugungs- und Rechtsvollziehungsfunktionen zu ermöglichen und sicherzustellen, wenn die Ausübung der Staatsgewalt ernsthaft bedroht, erheblich behindert oder unmöglich gemacht ist (Staatsnotstand). Demgegenüber dient das durch Bundes- und Landesgesetze konstituierte (einfach)gesetzliche Krisenreaktionsregime der Abwehr und Bewältigung krisenhafter Situationen, denen einerseits nicht mehr mit den für Normalzeiten maßgeblichen Regelungen begegnet werden kann, die andererseits aber noch keinen Staatsnotstand darstellen. Es enthält keine staatsnotstandsrechtliche Regelungsgehalte aufweisenden Bestimmungen wie jene der Notstandsverfassung, es stützt sich auf die normalen Instrumente der Rechtsordnung.
Sowohl die Bestimmungen der Notstandsverfassung als auch jene der das (einfach)gesetzliche Krisenreaktionsregime konstituierenden Bundes- und Landesgesetze, die die einzelnen Instrumente regeln, legen jeweils eigenständig und durchaus abweichend voneinander ihre Anwendungsvoraussetzungen fest. Solange nur diese Voraussetzungen jeweils erfüllt sind, können die in der Notstandsverfassung festgelegten Notstandsbefugnisse bzw. die in den Bundes- oder Landesgesetzen vorgesehenen Krisenbefugnisse ausgeübt, die

[183] Siehe FN 19. Siehe dazu im Überblick Fuchs, Claudia. „Katastrophenhilfe." *Das Recht der Länder*, herausgegeben von Erich Pürgy, Band II/1, Jan Sramek Verlag, 2012, 241–255; Fuchs, Claudia. „Feuerwehrrecht." *Das Recht der Länder*, herausgegeben von Erich Pürgy, Band II/1, Jan Sramek Verlag, 2012, 225–240; Kröll, Thomas. „Rettungswesen und Rettungsdienst." *Das Recht der Länder*, herausgegeben von Erich Pürgy, Band II/1, Jan Sramek Verlag, 2012, 577–611.

[184] Siehe dazu Müllner, Josef. „Rechtliche Rahmenbedingungen der Katastrophenbekämpfung.", 172–205.

Instrumente auch kumulativ einander ergänzend eingesetzt werden. Die beiden Reaktionsregime schließen einander nicht aus.
Krisenhafte Situationen, die sich zunächst mit den Instrumenten des (einfach) gesetzlichen Krisenreaktionsregime bekämpfen lassen, können sich dahin weiterentwickeln, dass die Ausübung der Staatsgewalt, beispielsweise die Gesetzgebungsfunktion, ernsthaft bedroht, erheblich behindert oder unmöglich gemacht ist. In diesem Fall stehen nunmehr/nur mehr die Notstandsbefugnisse (in Gestalt des Notverordnungsrechts) zur Verfügung, um die (einfach) gesetzlichen Grundlagen der Instrumente zu ändern, sollten diese zur Krisenbewältigung nicht mehr ausreichen.

Question 3

Für das (einfach)gesetzliche Krisenreaktionsregime ist charakteristisch, wie in 3.7 erkennbar, dass auf der Grundlage der dieses Krisenreaktionsregime konstituierenden Bundes- und Landesgesetze Krisenabwehr- und Krisenbewältigungsmaßnahmen mittels Durchführungsverordnungen[185] gesetzt werden sollen (die wiederum die Grundlage für individuell-konkrete Maßnahmen zur Krisenabwehr und Krisenbewältigung darstellen).[186]
Der Verfassungsgerichtshof hat die Bundesverfassungsmäßigkeit der Krisenabwehr und Krisenbewältigung durch sich auf weite Verordnungsermächtigungen stützende Durchführungsverordnungen bereits im Jahr 1950 – im Kontext der wegen anhaltender Versorgungsstörungen erforderlichen Lebensmittelbewirtschaftung – bejaht,[187] 2020 hat er sie – befasst mit der Frage nach der Gesetzmäßigkeit von Schutzmaßnahmenverordnungen zur Bekämpfung der COVID-19-Pandemie – bekräftigt.[188] Für eine verfassungskonforme Ausgestaltung müssen solche (einfach)gesetzlichen Verordnungsermächtigungen, die dem Verordnungsgeber Abwägungs- und Prognosespielräume einräumen, hinreichend deutlich die wesentlichen Ziele enthalten, die das Verwaltungshandeln leiten sollen. Die situationsbezogene Konkretisierung des Gesetzes ist dem Verordnungsgeber überlassen. Damit dürfen – abhängig von der konkreten Krisensituation – ganz unterschiedliche Verordnungsinhalte festgelegt werden, solange sie nur von den wesentlichen gesetzlichen Zielen gedeckt sind.[189] Damit sollen „ein rascher Zugriff und die Berücksichtigung vielfältiger örtlicher und zeitlicher Verschiedenheiten für eine sinnvolle und wirksame Regelung“[190] gewährleistet sein, die vom Gesetzgeber zu spät käme. Dies

[185] Im Sinne des Art 18 Abs 2 B-VG.
[186] Zum Folgenden siehe bereits Kröll, Thomas. „Wirtschaftslenkung und Krisenbewältigung.“, 190 f.
[187] VfSlg 1983/1950 zum Lebensmittelbewirtschaftungsgesetz 1947, BGBl 28/1948.
[188] VfSlg 20.398/2020 und 20.399/2020 zum COVID-19-Maßnahmengesetz (FN 16).
[189] VfSlg 1983/1950, 191, 194 ff; und VfSlg 20.399/2020, Rz 73 f.
[190] So wörtlich übereinstimmend VfSlg 1983/1950, 191, 194; und VfSlg 20.399/2020, Rz 73.

gilt gleichermaßen für Bewirtschaftungsmaßnahmen zur Bewältigung einer Störung der Versorgung mit Lebensmitteln und für COVID-19-Schutzmaßnahmen zur Pandemiebewältigung sowie für die Bewältigung anderer Krisen. Krisenabwehr- und Krisenbewältigungsmaßnahmen haben in Anbetracht der konkreten Krisensituation, „um überhaupt wirksam werden zu können, rasch und anpassungsfähig [zu] sein“[191]. 2020 hat der Verfassungsgerichtshof aber auch Anforderungen an das Verordnungserlassungsverfahren aufgestellt, die wegen der weiten Verordnungsermächtigungen die rechtsstaatliche Kontrolle des Verordnungsgebers sicherstellen sollen. Im Falle eingriffsintensiver Krisenabwehr- und Krisenbewältigungsmaßnahmen muss der Verordnungsgeber die nach dem Gesetz maßgeblichen tatsächlichen Umstände ermitteln und seine Willensbildung nachvollziehbar dokumentieren,[192] soweit dies situativ zumutbar ist.[193] Einschlägiger Sachverstand muss verwertet, bestehende Verfahrensregelungen müssen eingehalten werden.[194] Durch diese Anforderungen werden die Rechtsunterworfenen geschützt; die tatsächlichen Entscheidungsgrundlagen des Verordnungsgebers werden nämlich deutlich und ermöglichen seine verfassungsgerichtliche Kontrolle.[195]
Mehrere das einfachgesetzliche Krisenreaktionsregime mitkonstituierende Bundesgesetze ordnen, wie sich aus der Darstellung in 3.7 ergibt, für die Erlassung von eingriffsintensiven Krisenabwehr- und Krisenbewältigungsverordnungen die Mitwirkung des Hauptausschusses des Nationalrates an. Dies ist von der Bundesverfassung nicht nur gedeckt,[196] sondern teilweise sogar geboten.[197]

Question 4

Die Tatsache, dass die EU eine Notfallmaßnahme erlässt, als solche ohne Abstellen auf den Inhalt des Unionsrechtsakts ändert nicht die in der Bundesverfassung vorgesehene Verteilung der Rechtserzeugungs- und Rechtsvollziehungsfunktionen auf verschiedene Organe und das darin zum Ausdruck kommende österreichische Gewaltenteilungsmodell.

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[191] VfSlg 1983/1950, 191, 195.

[192] VfSlg 20.398/2020, Rz 52, VfSlg 20.399/2020, Rz 74.

[193] VfSlg 20.399/2020, Rz 78.

[194] VfSlg 20.475/2021, Rz 94 f.

[195] In VfSlg 20.399/2020, Rz 79 f, unterstreicht der Verfassungsgerichtshof, dass „die aktenmäßige Dokumentation im Verfahren der Verordnungserlassung […] kein Selbstzweck ist; denn auch in Situationen, die deswegen krisenhaft sind, weil für ihre Bewältigung entsprechende Routinen fehlen, und in denen der Verwaltung zur Abwehr der Gefahr erhebliche Spielräume eingeräumt sind, kommt solchen Anforderungen eine wichtige, die Gesetzmäßigkeit des Verwaltungshandelns sichernde Funktion zu“. So auch VfSlg 20.456/2021, Rz 53.

[196] Art 55 Abs 4 B-VG zufolge kann durch Bundesgesetz festgelegt werden, dass bestimmte allgemeine Akte der Bundesregierung oder eines Bundesministers des Einvernehmens mit dem Hauptausschuss des Nationalrates bedürfen. Zu Art 55 Abs 4 B-VG siehe Kahl, Arno. „Art 55 B-VG.“, Rz 7 f; Neisser, Heinrich. „Art 55 B-VG.“, Rz 22 ff; Rattinger, Christoph, und Carina Neugebauer. „Art 55 B-VG.“, Rz 8–12.

[197] Siehe dazu FN 136.

Section 4: Judicial review of emergency powers in the Member States

Question 1–3

Die Kontrolle der das (einfach)gesetzliche Krisenreaktionsregime bildenden Bundes- und Landesgesetze obliegt dem Verfassungsgerichtshof in dem auf Antrag eines Gerichts, aufgrund eines Individualantrags oder eines Parteiantrags oder von Amts wegen eingeleiteten Gesetzesprüfungsverfahren (Art 140 B-VG).[198] Prüfungsmaßstab ist das (Bundes- und Landes)Verfassungsrecht, außerdem die durch die EU-Grundrechtecharta garantierten Grundrechte bei Durchführung des Unionsrechts im Sinne des Art 51 Abs 1 GRC[199]). Im Verfahren vor dem Verfassungsgerichtshof ist zur Vertretung des Bundesgesetzes die Bundesregierung, zur Vertretung des Landesgesetzes die Landesregierung berufen.[200] Hebt der Verfassungsgerichtshof das Gesetz wegen Verfassungswidrigkeit auf, tritt die Aufhebung mit Ablauf des Tages der Kundmachung in Kraft, sofern er für das Außerkrafttreten nicht eine Frist setzt. Mit dem Tag des Inkrafttretens der Aufhebung treten jene gesetzlichen Bestimmungen wieder in Kraft, die durch das aufgehobene Gesetz aufgehoben worden waren, sofern der Verfassungsgerichtshof nicht anderes ausspricht. Alle Gerichte und Verwaltungsbehörden sind an die aufhebende Entscheidung des Verfassungsgerichtshofes gebunden. Auf die vor der Aufhebung/vor Ablauf der Frist verwirklichte Tatbestände mit Ausnahme des Anlassfalls ist das verfassungswidrige Gesetz weiterhin anzuwenden, sofern der Verfassungsgerichtshof nicht anderes ausspricht. Ist das Gesetz im Zeitpunkt der Entscheidung des Verfassungsgerichtshofes bereits außer Kraft getreten, hat dieser auszusprechen, ob das Gesetz verfassungswidrig war.

Die Kontrolle der auf der Grundlage der Notstandsverfassung erlassenen Notverordnungen und der auf der Grundlage der das (einfach)gesetzliche Krisenreaktionsregime bildenden Bundes- und Landesgesetze erlassenen Durchführungsverordnungen obliegt dem Verfassungsgerichtshof in dem auf Antrag eines Gerichts, aufgrund eines Individualantrags oder eines Parteiantrags oder von Amts wegen eingeleiteten Verordnungsprüfungsverfahren (Art 139 B-VG).[201] Prüfungsmaßstab ist das gesamte höherrangige (Bundes- und Landes)Recht einschließlich des (Bundes- und Landes)Verfassungsrechts, außerdem die durch die EU-Grundrechtecharta garantierten Grundrechte bei Durchführung

[198] Zum Gesetzesprüfungsverfahren siehe Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 1007 f und 1011 f.

[199] VfSlg 19.632/2012.

[200] § 63 Verfassungsgerichtshofgesetz 1953, BGBl 85/1953 idF BGBl I 88/2024. Siehe auch Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 1028.

[201] Zum Verordnungsprüfungsverfahren siehe Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 1005 f, 1010 und 1012.

des Unionsrechts im Sinne des Art 51 Abs 1 GRC[202]). Im Verfahren vor dem Verfassungsgerichtshof ist zur Vertretung der (Not)Verordnung die zuständige oberste Verwaltungsbehörde des Bundes oder des jeweiligen Landes berufen.[203] Hebt der Verfassungsgerichtshof die (Not)Verordnung wegen Gesetz(- bzw. Verfassungs)widrigkeit auf, tritt die Aufhebung mit Ablauf des Tages der Kundmachung in Kraft, sofern er für das Außerkrafttreten nicht eine Frist setzt. Bei Notverordnungen treten mit dem Tag des Inkrafttretens der Aufhebung jene gesetzlichen Bestimmungen wieder in Kraft, die durch die aufgehobene Notverordnung aufgehoben worden waren, sofern der Verfassungsgerichtshof nicht anderes ausspricht.[204] Alle Gerichte und Verwaltungsbehörden sind an die aufhebende Entscheidung des Verfassungsgerichtshofes gebunden. Auf die vor der Aufhebung/vor Ablauf der Frist verwirklichte Tatbestände mit Ausnahme des Anlassfalls ist die gesetz(- bzw. verfassungs)widrige (Not) Verordnung weiterhin anzuwenden, sofern der Verfassungsgerichtshof nicht anderes ausspricht. Ist die (Not)Verordnung im Zeitpunkt der Entscheidung des Verfassungsgerichtshofes bereits außer Kraft getreten, hat dieser auszusprechen, ob die (Not)Verordnung gesetz(- bzw. verfassungs)widrig war
Die Kontrolle individuell-konkreter Verwaltungsakte (Bescheide und Akte unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt) obliegt den Verwaltungsgerichten (Bescheidbeschwerde und Maßnahmenbeschwerde nach Art 130 Abs 1 Z 1 bzw. 2 B-VG).[205] Zur Erhebung einer Bescheidbeschwerde oder einer Maßnahmenbeschwerde ist legitimiert, wer durch den Bescheid bzw. den Akt unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt in einem einfachgesetzlich, verfassungsgesetzlich oder unionsrechtlich gewährleisteten Recht verletzt zu sein behauptet. Eine Bescheidbeschwerde entfaltet grundsätzlich aufschiebende Wirkung,[206] eine Maßnahmenbeschwerde grundsätzlich keine.[207] Parteien des Beschwerdeverfahrens sind der Beschwerdeführer, die belangte Behörde (das heißt die Verwaltungsbehörde, die den bekämpften Bescheid erlassen bzw. der der Akt unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt zuzurechnen ist) und sonstige Personen, denen in der betreffenden Verwaltungssache Parteistellung zukommt.[208] Die Verwaltungsgerichte entscheiden grundsätzlich in der Sache

[202] VfSlg 19.632/2012.

[203] § 58 Verfassungsgerichtshofgesetz 1953 (FN 201). Siehe auch Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 1028.

[204] Hier ist Art 140 Abs 6 B-VG analog anzuwenden; so auch Frank, Stefan Leo. „Art 18 Abs 3–5 B-VG.", Rz 16; Wieser, Bernd. „Art 18/3–5 B-VG.", Rz 83.

[205] Zu Bescheidbeschwerde und Maßnahmenbeschwerde siehe bspw. Grabenwarter, Christoph, und Mathis Fister. Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit, 7. Auflage, Verlag Österreich, 2023, 249–253 bzw. 254–256.

[206] In Verwaltungsstrafsachen kann die aufschiebende Wirkung der Bescheidbeschwerde nicht ausgeschlossen werden.

[207] Siehe Grabenwarter, Christoph, und Mathis Fister. Verwaltungsverfahrensrecht und Verwaltungsgerichts-barkeit, 253 bzw. 259.

[208] Siehe Grabenwarter, Christoph, und Mathis Fister. Verwaltungsverfahrensrecht und Verwaltungsgerichts-barkeit, 268.

selbst.[209] Ihre Entscheidungen können beim Verfassungsgerichtshof (mittels Entscheidungsbeschwerde nach Art 144 B-VG) auf ihre Grundrechtskonformität und ihre sonstige Verfassungsmäßigkeit[210] und beim Verwaltungsgerichtshof (mittels Revision nach Art 133 B-VG) auf ihre Gesetzmäßigkeit und ihre Unionsrechtskonformität[211] überprüft werden. Entscheidungsbeschwerden und Revisionen entfalten grundsätzlich keine aufschiebende Wirkung, eine solche kann aber auf Antrag zuerkannt werden.[212] Hebt der Verfassungsgerichtshof eine Entscheidung eines Verwaltungsgerichts auf, tritt die Rechtssache in die Lage zurück, in der sie sich vor Erlassung der Entscheidung befunden hat; in diesem Fall sind das Verwaltungsgericht und die Verwaltungsbehörde verpflichtet, in der Rechtssache unverzüglich den der Rechtsanschauung des Verfassungsgerichtshofes entsprechenden Rechtszustand herzustellen.[213] Entscheidet der Verwaltungsgerichtshof nicht in der Sache selbst, sondern hebt er die Entscheidung des Verwaltungsgerichts auf, tritt die Rechtssache in die Lage zurück, in der sie sich vor Erlassung der Entscheidung befunden hat; in diesem Fall sind das Verwaltungsgericht und die Verwaltungsbehörde verpflichtet, in der Rechtssache unverzüglich den der Rechtsanschauung des Verwaltungsgerichtshofes entsprechenden Rechtszustand herzustellen.[214]

Question 4

Nach der Rechtsprechung des Verfassungsgerichtshofes bildet der Verhältnismäßigkeits-grundsatz den Kern der Bindung des Gesetzgebers und des Verordnungsgebers bei Eingriffen in Grundrechte, die unter einem formellen[215] oder einem materiellen[216] Gesetzesvorbehalt stehen, und in Grundrechte ohne Gesetzesvorbehalt[217].[218] Auch bei dem dem Gleichheitssatz erfließenden Sachlichkeitsgebot stellt der Verfassungsgerichtshof bei der Beurteilung der Sachlichkeit einer Regelung regelmäßig auf ihre Verhältnismäßigkeit ab.[219]

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[209] Siehe Grabenwarter, Christoph, und Mathis Fister. Verwaltungsverfahrensrecht und Verwaltungsgerichts-barkeit, 279–290.

[210] Zur Entscheidungsbeschwerde siehe bspw. Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 1049–1060.

[211] Zur Revision siehe bspw. Grabenwarter, Christoph, und Mathis Fister. Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit, 317–359.

[212] § 85 Verfassungsgerichtshofgesetz 1953 (FN 201) bzw. § 30 Verwaltungsgerichtshofgesetz 1985, BGBl 10/1985 idF BGBl I 88/2024.

[213] § 87 Verfassungsgerichtshofgesetz 1953 (FN 201).

[214] § 42 Abs 3 und § 63 Abs 1 Verwaltungsgerichtshofgesetz 1985 (FN 213).

[215] Zum Beispiel die Freizügigkeit (Art 4 Abs 1 StGG), die Eigentumsfreiheit (Art 5 StGG) oder die Erwerbsfreiheit (Art 6 Abs 1 StGG).

[216] Zum Beispiel das Recht auf Achtung des Privat- und Familienlebens (Art 8 EMRK), die Religionsfreiheit (Art 9 EMRK) oder die Meinungsfreiheit (Art 10 EMRK).

[217] Zum Beispiel die Wissenschaftsfreiheit (Art 17 Abs 1 StGG) oder die Kunstfreiheit (Art 17a StGG).

[218] Siehe dazu Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 722.

[219] Siehe zum Beispiel VfSlg 18.706/2009 und Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 765 ff.

Zu ihrer Verhältnismäßigkeit[220] muss eine in einem das (einfach)gesetzliche Krisenreaktionsregime mitkonstituierenden Bundes- oder Landesgesetz, in einer auf dieser Grundlage erlassenen Durchführungsverordnung oder in einer auf der Grundlage der Notstandsverfassung erlassenen Notverordnung enthaltene Regelung ein im öffentlichen Interesse gelegenes Ziel verfolgen.[221] Sie hat zur Erreichung dieses Zieles geeignet[222] und in dem Sinn erforderlich zu sein, dass sie ein möglichst schonendes (gelindes) Mittel[223] zur Zielerreichung bildet. Zwischen dem öffentlichen Interesse und der durch den Eingriff verkürzten Grundrechtsposition muss eine angemessene Relation bestehen (Adäquanz bzw. Verhältnismäßigkeit im engeren Sinn); insofern ist eine Güterabwägung vorzunehmen.[224] Eine selbständige Prüfung der Achtung des Wesensgehalts eines Grundrechts durch eine durch Gesetz oder Verordnung statuierte Regelung erfolgt (heute[225]) nur (mehr) bei bestimmten Grundrechten.[226]
Ist – wie beispielsweise im Rahmen der Bekämpfung der COVID-19-Pandemie[227] – in einem das (einfach)gesetzliche Krisenreaktionsregime mitkonstituierenden Bundes- oder Landesgesetz dem Verordnungsgeber ein Abwägungs- und Prognosespielraum eingeräumt, hat dieser die in Aussicht genommene

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[220] Siehe dazu Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 716 f mit Verweisen auf die Rechtsprechung des Verfassungsgerichtshofes.

[221] Hier beschränkt sich der Verfassungsgerichtshof auf eine Vertretbarkeitskontrolle; siehe zum Beispiel VfSlg 12.094/1989.

[222] Die Prognose, ob ein Mittel zur Zielerreichung geeignet ist, obliegt zunächst dem Gesetz- bzw. dem Verordnungsgeber. Der Verfassungsgerichtshof kann diesem nur entgegentreten, wenn die Eignung von vornherein auszuschließen ist; siehe zum Beispiel VfSlg 13.725/1994.

[223] Dabei sind auch dem Gesetz- bzw. dem Verordnungsgeber zur Verfügung stehende alternative Mittel in Betracht zu ziehen; siehe zum Beispiel VfSlg 17.817/2006.

[224] Siehe zum Beispiel VfSlg 11.853/1988.

[225] Im Gegensatz zur Rechtsprechung des Verfassungsgerichtshofes zu Beginn der 1980erJahre. So hat der Verfassungsgerichtshof in VfSlg 8813/1980 festgehalten, dass der Wesensgehalt der Erwerbsfreiheit (Art 6 Abs 1 StGG) nicht durch die vom Erdöl-Bevorratungs- und Meldegesetz, BGBl 318/1976, statuierte Pflicht Erdöl- und Erdölprodukte importierender natürlicher und juristischer Personen, Pflichtnotstandsreserven an Erdöl und Erdölprodukten zu halten, berührt wird. Hinsichtlich der Richtlinie 2009/119/EG (FN 55) idF Durchführungsrichtlinie (EU) 2018/1581 (FN 57) siehe in diesem Sinn zum Wesensgehalt der unternehmerischen Freiheit des Art 16 GRC EuGH 30.4.2024, verb Rs C-395/22 ua, *Trade Express-L ua*, ECLI:EU:2024:374, Rz 82.

[226] Siehe insbesondere die mit VfSlg 4486/1963 anhebende Rechtsprechung des Verfassungsgerichtshofes zur Eigentumsfreiheit (Art 5 StGG und Art 1 2. ZPEMRK). So VfSlg 8813/1980, 12.227/1989 und 15.771/200 zu Eingriffen in die Eigentumsfreiheit durch das Erdöl-Bevorratungs- und Meldegesetz (FN 226) und das Erdöl-Bevorratungs- und Meldegesetz 1982, BGBl 546/1982 idF BGBl 652/1987 bzw. BGBl 383/1992. Hinsichtlich der Richtlinie 2009/119/EG (FN 55) idF Durchführungsrichtlinie (EU) 2018/1581 (FN 57) zum Wesensgehalt der Eigentumsfreiheit des Art 17 Abs 1 GRC siehe EuGH, verb Rs C-395/22 ua (FN 226) Rz 82.

[227] So zum Beispiel in § 24 Epidemiegesetz (FN 15), der zur Anordnung von Verkehrsbeschränkungen in Bezug auf Epidemiegebiete mit Verordnung ermächtigt (siehe zu der auf § 24 Epidemiegesetz gestützten COVID-19-Virusvariantenverordnung, BGBl II 63/2021 [idF BGBl II 98/2021]: VfGH 24.6.2021, V 91/2021 ua), oder in (dem mit 30.6.2023 außer Kraft getretenen) § 5c Abs 1 Epidemiegesetz (FN 15 idF BGBl I 136/2020), der zur Erhebung von Kontaktdaten mit Verordnung ermächtigte (siehe zu der auf § 5c Epidemiegesetz gestützten Verordnung des Magistrats der Stadt Wien betreffend Auskunftserteilung für Contact Tracing im Zusammenhang mit Verdachtsfällen von COVID-19, ABl Stadt Wien 41/2020: VfSlg 20.456/2021).

Regelung auf dem von ihm ermittelten und dokumentierten, in der konkreten Situation zeitlich und sachlich möglichen und zumutbaren Informationsstand über die relevanten Umstände, auf die das Gesetz maßgeblich abstellt, und nach Durchführung der gebotenen Interessenabwägung, in der Eignung, Erforderlichkeit und Adäquanz prognosehaft zu beurteilen sind, zu erlassen.
Zu individuellen Vollziehungsakten, die auf der Grundlage eines das (einfach) gesetzliche Krisenreaktionsregime mitkonstituierenden Bundes- oder Landesgesetzes, einer auf dieser Grundlage erlassenen Durchführungsverordnung oder einer auf der Grundlage der Notstandsverfassung erlassenen Notverordnung ergehen:[228] Bescheide von Verwaltungsbehörden und Entscheidungen der Verwaltungsgerichte verletzten unter einem formellen oder einem materiellen Gesetzesvorbehalt stehende Grundrechte, wenn sie gesetzlos ergehen,[229] sich auf ein verfassungswidriges Gesetz/eine gesetz(- oder verfassungs)widrige Verordnung stützen[230] oder wenn das Gesetz/die Verordnung in denkunmöglicher Weise[231] angewendet wird. Grundrechte ohne Gesetzesvorbehalt werden verletzt, wenn Bescheide der Verwaltungsbehörden und Entscheidungen der Verwaltungsgerichte gesetzlos ergehen, sich auf ein verfassungswidriges Gesetz/eine gesetz(- oder verfassungs)widrige Verordnung stützen, dem Gesetz/der Verordnung ein intentionaler[232] Eingriff unterstellt wird oder wenn ein nicht intentionaler Eingriff nicht verhältnismäßig ist[233].[234]

Section 5: Implementation of EU emergency law in the Member States

Question 1 and 2

Die Bundesverfassung und ihre integrationsverfassungsrechtlichen Gehalt aufweisenden Bestimmungen differenzieren nicht zwischen EU-Notfallmaßnahmen und anderen Rechtsakten des sekundären und des tertiären Unionsrechts. Damit sind für die Durchführung von EU-Notfallmaßnahmen die

[228] Siehe dazu Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 724–736.

[229] Im gegebenen Zusammenhang ist als Gesetz auch eine Verordnung anzusehen; siehe zum Beispiel VfSlg 10.956/1986 und Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 727.

[230] Als Verfassungswidrigkeit kommt hier jede Verfassungswidrigkeit, nicht nur eine Grundrechtswidrigkeit in Betracht; siehe dazu Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 729.

[231] Darunter ist eine qualifiziert rechtswidrige Gesetzes- oder Verordnungsanwendung zu verstehen. Eine solche ist insbesondere dann gegeben, wenn dem Gesetz/der Verordnung fälschlich ein grundrechtswidriger, weil dem berührten Grundrecht widersprechender, oder sonst verfassungswidriger Inhalt unterstellt wird; siehe dazu Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 728 und 730.

[232] Intentionale Eingriffe sind direkt („intentional") darauf gerichtet, in das Grundrecht einzugreifen; siehe dazu Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 720.

[233] Siehe zum Beispiel VfSlg 13.978/1994 und Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 735.

[234] Siehe dazu Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 735.

für die Durchführung von Unionsrecht(sakten) allgemein geltenden Regeln maßgeblich.

Sind EU-Notfallmaßnahmen unmittelbar anwendbare Unionsrechtsakte, verdrängen sie aufgrund ihres Anwendungsvorrangs entgegenstehendes österreichisches Recht einschließlich des Bundesverfassungsrechts mit Ausnahme der Grundprinzipien bzw. Baugesetze der Bundesverfassung[235].

Nicht unmittelbar anwendbare EU-Notfallmaßnahmen sind in österreichisches Recht umzusetzen. Die Umsetzung hat grundsätzlich durch den nach der bundesstaatlichen Kompetenzverteilung zuständigen (Bundes- oder Landes)Gesetzgeber durch Gesetz zu erfolgen,[236] nur ausnahmsweise, wenn bereits eine hinreichend bestimmte gesetzliche Grundlage besteht, ist nach der Rechtsprechung des Verfassungsgerichtshofes[237] eine Umsetzung mit Durchführungsverordnung zulässig.[238] Darüber hinaus bleibt der Gesetzgeber bei der Umsetzung insoweit an bundesverfassungsgesetzliche Vorgaben gebunden, als die Umsetzung unionsrechtlicher Vorgaben nicht durch diese inhibiert wird.[239]

Wie andere Unionsrechtsakte auch sind EU-Notfallmaßnahmen, die offenkundig außerhalb der beschränkten Verbandskompetenz der EU liegen oder die den Grundprinzipien bzw. Baugesetzen der Bundesverfassung widersprechen, als aus der Integrationsermächtigung[240] des EU-Beitritts-Bundesverfassungsgesetzes[241] ausbrechende Rechtsakte und damit in der österreichischen Rechtsordnung absolut nichtige Rechtsakte zu qualifizieren.[242]

Diese für die Durchführung von Unionsrecht(sakten) allgemein geltenden Regeln haben auch die Grundlage für die Durchführung beispielsweise der folgenden auf Art 122 AEUV gestützten EU-Notfallmaßnahmen gebildet:

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[235] Zu den Grundprinzipien bzw. Baugesetzen der Bundesverfassung siehe im Überblick Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 66–76.

[236] Dies folgt schon aus Art 23d Abs 5 B-VG. So auch – unter Bezugnahme auf EuGH 28.2.1991, Rs C-131/88, *Kommission/Deutschland*, ECLI:EU:C:1991:87, Rz 71, – VfSlg 17.022/2003: „Welcher Gesetzgeber zuständig ist, eine Richtlinie in nationales Recht umzusetzen, bestimmt sich ausschließlich auf Grund der nationalen Verfassungsrechtsordnung, in Österreich speziell der Kompetenztatbestände gemäß Art 10 bis 15 B-VG, ohne dass diese durch oder zum Zweck der Umsetzung von [Unions]recht verändert wären." Siehe dazu Öhlinger, Theo, Harald Eberhard und Michael Potacs. „EU-Recht und staatliches Recht.", Verlag LexisNexis, 8. Auflage, 2023, 125–128.

[237] So VfSlg 15.189/1998 und 19.569/2011.

[238] Zur Kritik an dieser Rechtsprechung in der Lehre siehe Öhlinger, Theo, Harald Eberhard und Michael Potacs. „EU-Recht und staatliches Recht.", 129 f.

[239] Zum so genannten Grundsatz der doppelten Bindung siehe jüngst VfGH 13.122023, G 212/2013 ua, Rz 91 und 96–101; und Öhlinger, Theo, Harald Eberhard und Michael Potacs. „EU-Recht und staatliches Recht.", 131 f.

[240] Siehe dazu Öhlinger, Theo, Harald Eberhard und Michael Potacs. „EU-Recht und staatliches Recht.", 61 f mit weiteren Nachweisen.

[241] EU-Beitritts-Bundesverfassungsgesetz, BGBl 744/1994.

[242] Siehe jüngst VfSlg 20.522/2021, Rz 66, und VfGH 13.12.2023, G 212/2023 ua, Rz 122; Öhlinger, Theo, und Harald Eberhard. „Verfassungsrecht.", Rz 191; Öhlinger, Theo, Harald Eberhard und Michael Potacs. „EU-Recht und staatliches Recht.", 196 f.

Während die – mit Ablauf des 31. März 2024 außer Kraft getretene – Verordnung (EU) 2022/1369 über koordinierte Maßnahmen zur Senkung der Gasnachfrage[243] dies nicht verlangte, wurden zur Durchführung der „hinkenden" Verordnung (EU) 2022/1854 über Notfallmaßnahmen als Reaktion auf die hohen Energiepreise[244] gesetzliche Durchführungsmaßnahmen erforderlich: Zur Durchführung der Art 4 und 5 wurde das (mit Ablauf des 31.12.2023 außer Kraft getretene[245]) Stromverbrauchsreduzierungsgesetz,[246] der Art 6 ff das Bundesgesetz über den Energiekrisenbeitrag-Strom[247] und der Art 14 ff das Bundesgesetz über den Energiekrisenbeitrag-fossile Energieträger[248] durch den zuständigen Bundesgesetzgeber erlassen.
Die – bis 30.6.2025 befristete – Verordnung (EU) 2022/2577 zur Festlegung eines Rahmens für einen beschleunigten Ausbau der Nutzung erneuerbarer Energien[249] hat zur Erlassung von zeitlich befristeten Sonderbestimmungen durch einzelne (zuständige) Landesgesetzgeber geführt,[250] um bestehende Widersprüche einzelner landesrechtlicher Bestimmungen mit der Verordnung zu beseitigen.[251]

[243] Verordnung (EU) 2022/1369 des Rates vom 5.8.2022 über koordinierte Maßnahmen zur Senkung der Gasnachfrage, ABl 2022 L 206/1, idF Verordnung (EU) 2023/706 des Rates vom 30.3.2023 zur Änderung der Verordnung (EU) 2022/1369 zwecks Verlängerung des Nachfragesenkungszeitraums für Maßnahmen zur Senkung der Gasnachfrage und zur verstärkten Berichterstattung und Überwachung in Bezug auf die Umsetzung dieser Maßnahmen, ABl 2023 L 93/1.

[244] Verordnung (EU) 2022/1854 des Rates vom 6.10.2022 über Notfallmaßnahmen als Reaktion auf die hohen Energiepreise, ABl 2022 L 261 I/1, berichtigt durch ABl 2022 L 318/207.

[245] § 23 Abs 1 Stromverbrauchsreduktionsgesetz (FN 247).

[246] Stromverbrauchsreduktionsgesetz, BGBl I 235/2022 idF BGBl I 4/2023, und IA 3022/A BlgNR 27. GP 6 ff.

[247] Bundesgesetz über den Energiekrisenbeitrag-Strom, BGBl I 220/2022 idF BGBl I 13/2024, IA 3024/A BlgNR 27. GP 6–9.

[248] Bundesgesetz über den Energiekrisenbeitrag-fossile Energieträger, BGBl I 220/2022, IA 3024/A BlgNR 27. GP 9 f.

[249] Verordnung (EU) 2022/2577 des Rates vom 22.12.2022 zur Festlegung eines Rahmens für einen beschleunigten Ausbau der Nutzung erneuerbarer Energien, ABl 2022 L 335/36, idF Verordnung (EU) 2024/223 des Rates vom 22.12.2023 zur Änderung der Verordnung (EU) 2022/2577, ABl 2024/223.

[250] Tiroler Landesgesetz vom 10.5.2023, mit dem das Tiroler Stadt- und Ortsbildschutzgesetz 2021 geändert wird, LGBl 44/2023 (befristet bis 29.6.2024), und ErläutRV 284/2023. Vorarlberger Landesgesetz über begleitende Regelungen zu einer EU-Verordnung betreffend den beschleunigten Ausbau der Nutzung erneuerbarer Energien – Sammelnovelle, LGBl 48/2023 (befristet bis 30.6.2024), und SA 93/2023 31. GP.

[251] Zu den sich aus der Verordnung (EU) 2022/2577 (FN 250) ergebenden Herausforderungen für das Anlagenrecht siehe auch Bußjäger, Peter. „EU-Notfallverordnung und nationales Anlagenrecht.", Nachhaltigkeitsrecht 2023, 146–152; Berl, Florian. „Die EU-Beschleunigungs-VO und ihre Auswirkungen auf Genehmigungsverfahren.", ÖZW 2023, 13–17.

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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

The concepts of situations of "emergency," "necessity" and "crisis" are occasionally referred to in Belgian law but are often used as synonyms and used interchangeably. For example, the COVID-19 pandemic was indistinctly regarded by the public authorities as a health crisis,[1] a state of necessity,[2] or an epidemic emergency situation.[3] However, it is worth noting that the Legislation Section of the Council of State provided a specific interpretation of the notion of "state of necessity," emphasising that it "is not a creation of the will of the State; the competent authority can only acknowledge its existence and decide on appropriate measures to address it in concrete terms."[4]

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[1] Royal Decree of 22 April 2020, on Special Measures for Members of the Federal Public Service in the Context of the COVID-19 Health Crisis, *Moniteur Belge*, 24/04/2020, p. 28717.

[2] Ordinance of 14 October 2021, on the Extension of the COVID Safe Ticket in Case of Necessity Arising from a Particular Epidemiological Situation, *Moniteur Belge*, 14/10/2021, p. 107237.

[3] See: The Law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation, *Moniteur Belge*, 20/08/2021, p. 90047.

[4] Opinion of the Council of State n° 172 on a draft law on the attribution to the King of extraordinary powers in time of war, 9 June 1952. The Council of State added that it is in the nature of laws based on the state of necessity to be temporary and to disappear once that necessity itself no longer exists.

Wartime is another relevant concept in Belgian emergency law, as it has particular implications on the functioning of the State.[5] According to a decree-law (*arrêté-loi*) of 11 October 1916, there are three types of exceptional regimes: the "state of war," the "state of siege" and the "enhanced state of war." These regimes involve derogation rules, primarily resulting in the potential transfer of authority from civilian to military authorities.[6] The state of war and the state of siege should not be confused with the notion of "war period" which was established by a 1994 law to create a new period of availability for the Belgian armed forces in the context of Belgium's participation in an international conflict.[7]

While it does not provide any emergency framework (see Question 2), the Belgian Constitution also recognizes the existence of a "state of war," which can be declared by the King according to Article 167, § 1, al. 2, of the Belgian Constitution, as revised in 1993.[8]

Question 2

The Belgian Constitution does not recognize any state of emergency that would trigger an exceptional legal framework in time of peace. Article 187 explicitly prohibits any legal state of emergency, providing that "the Constitution cannot be wholly or partially suspended." It relies on the fact that fundamental rights and rules governing the State must be upheld even in exceptional circumstances.

Despite this constitutional prohibition, emergency situations evidently do arise in practice. While some crisis situations can be managed within the existing constitutional framework (such as deploying the fire brigade or civil protection during natural disasters, or providing shelter to the homeless in winter), certain circumstances have required actions beyond those provided for in the Constitution. Article 187 only prohibits the suspension of the Constitu-

[5] For a detailed analysis, see: Behrendt, "Le commandement de l'armée et la notion d'état de guerre," in Genart (ed.), *De Grondwet en Jan Velaers*, die Keure, 2022, pp. 517–530.

[6] Ergec and Watthée, "Les dérogations aux droits constitutionnels," in Verdussen and Bonbled (eds.), *Les droits constitutionnels en Belgique*, Bruylant, 2011, pp. 398–399.

[7] Law of 20 May 1994 on the periods and positions of military personnel in the reserve framework and on the implementation and conditioning of the Armed Forces, *Moniteur belge*, 21 June 1994.

[8] Before 1993, Article 167 referred to the competence to "declare war." According to Gerits, the constitutional concept of a "state of war" does not have the same meaning as the legal concept of a "state of war." The Constitution refers to the factual finding that our country is involved in a war, while the decree-law of 1916 refers to the period between the mobilisation and demobilisation of the army, see: Gerits, "De staat van oorlog en de staat van beleg: uitzonderingsregimes die aan een herziening toe zijn," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 73.

tion by any authority's decision, but it does not rule out *force majeure*. When constitutional provisions cannot be enforced, an exceptional framework may be necessary to address the situation of *force majeure*. In principle, such measures are only permissible when there is an absolute impossibility to respect the Constitution,[9] although there have been instances where circumstances have been invoked to neutralise some constitutional provisions in practice.[10] As a result, creative techniques have been employed to address crises, often justified within the existing constitutional framework, both in times of war and in times of peace.

As previously noted, situations of war have led to the application of specific rules that suspend several fundamental rights and modify the exercise of public powers. Among the consequences prescribed by the Constitution of recognizing a state of war are the prohibition of constitutional revision (Article 196), the possibility of establishing military courts (Article 157) and the enforcement of various military regulations.[11] Recognition of a state of war also implies the application of unique legal acts. During the two World Wars, Belgian authorities were unable to exercise their powers as provided by the Constitution due to the impossibility of convening Parliament. Wartime decrees-laws were therefore adopted by the King and his government, some of which remain in force today.[12] That is, for instance, the case of the decree-law of 11 October 1916, establishing a mechanism of suspension of rights and liberties, and the decree-law of 12 October 1918, empowering the Minister of Justice to intern individuals suspected of having ties with the enemy.[13] This method was later upheld by the Court of Cassation, based on an imperative to protect the continuity of legislative power and the independence of the State.[14]

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[9] The Legislation Section of the Council of State considered that the state of necessity was not a creation of the State will, but a factual situation the competent authorities could only notice the existence of and take measures to fight against (avis n° 172, 9 juin 1952, rendu sur un projet de loi relatif à l'attribution au Roi de pouvoirs extraordinaires en temps de guerre).

[10] This is the case of the two World Wars. See: Van Drooghenbroeck and Velaers, "L'article 187 de la Constitution et la problématique de la protection des droits et libertés dans les états d'exception," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 12.

[11] Behrendt, "Le commandement de l'armée et la notion d'état de guerre," in Genart (ed.), *De Grondwet en Jan Velaers*, die Keure, 2022, p. 524.

[12] During World War II, the King was declared unable to reign by the government, which then exercised legislative power alone. The sequence was not expressly settled by Article 93 of the Belgian Constitution, which provides that the Houses are convened if the King is unable to reign.

[13] Bouhon, Jousten, and Miny, *Droit d'exception, une perspective de droit comparé – Belgique : Entre absence d'état d'exception, pouvoirs de police et pouvoirs spéciaux*, Service de recherche du Parlement européen, 2021, p. 7.

[14] Cass. 11 February 1919, Pas. 1919, I, 9. See also: Cass. 4 March 1940. For a commentary on these rulings and of their doctrinal critics, see: Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, pp. 42–43. As can be seen, the deviation from the constitutional provisions regarding the normal functioning of institutions was justified without departing from the framework of Article 187 of the Constitution.

However, the constitutionality of these exceptional regimes related to wartime situations remains a subject of debate in legal doctrine today.[15]

Despite the apparent clear language of Article 187, this is even true for any scenario involving the suspension of the Constitution. Some scholars consider that Article 187 provides itself a constitutional basis for measures derogating to the Constitution, since it should be interpreted in light of the principles of state independence and continuity.[16] Others reject this analysis, arguing that only an extra-constitutional justification, based notably on a pre-constitutional decree of 1830 concerning the independence of the Belgian State, can serve as the basis for the existence of an exceptional framework.[17]

The use of extraordinary powers is another technique employed during wartime to derogate from common rules.[18] Under laws passed in 1939 and 1944, the King was granted extraordinary powers for the duration of the state of war, allowing him to adopt legislative provisions through royal decrees discussed in the Council of Ministers in cases of urgency and necessity. These extraordinary powers are characterised by their broad purpose and scope, as well as the fact that they are not granted for a predetermined period.[19] After World War II, extraordinary powers were no longer used in Belgium.[20]
Even in peacetime, creative techniques exist to address various crises. The most common of these is known as the "special powers" technique,[21] which involves legislative delegation to the Executive to take all the necessary measures to overcome an emergency situation. As per the Council of State, "The special powers law differs from the ordinary enabling law mainly in that the objectives to be achieved by the measures to be taken are formulated in such a general manner that the determination of the concrete outlines of the objective is left, for a specific period, to the discretion of the King [...], which amounts to

[15] See: Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, p. 23. Some argue that the Constitution is only intended for peacetime and does not apply in times of war. This is, however, contradicted by the fact that the framers of the Constitution did expressly consider the situation of war. See: Van Drooghenbroeck and Velaers, "L'article 187 de la Constitution et la problématique de la protection des droits et libertés dans les états d'exception," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 18.

[16] Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, p. 33.

[17] Van Drooghenbroeck and Velaers, "L'article 187 de la Constitution et la problématique de la protection des droits et libertés dans les états d'exception," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, pp. 22–23.

[18] Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, pp. 46–53.

[19] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 187.

[20] Uyttendaele, *Trente leçons de droit constitutionnel*, Anthemis, 2020, p. 549.

[21] On special powers, see also: answers to questions 1 and 2 in Section 2.

giving the King the ability to establish, in place of the legislator, the guiding principles that govern governmental policy."[22] The legislator adopts a "special powers" law that authorises the government to issue decrees that may amend, repeal, complete, or replace existing laws, granting broad discretionary power.[23] The Council of State has established several conditions to the recognition and exercise of special powers:

> 1° Certain factual circumstances, generally described as exceptional circumstances or crisis situations, must be present, which determine the limits of the period during which special powers may be granted;
> 2° Special powers can only be granted for a limited period;
> 3° The powers granted to the King must be precisely defined, both in terms of the goals and objectives as well as the matters where measures can be taken and their scope;
> 4° When granting special powers, the legislator must respect both supranational and international rules, as well as the constitutional rules concerning the distribution of competences.[24]

Special power measures adopted by the government cannot be considered as formal laws until they have been confirmed by the Parliament.[25] This technique is not grounded in the "state of necessity,"[26] but rather in Article 105 of the Belgian Constitution, which provides that "the King has no powers other than those formally attributed to him by the Constitution and by specific laws." Some emergency situations are also governed by policy-specific sectors. This is now the case for managing sanitary crises, which is governed by a Law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation.[27] This law was adopted during the COVID-19 pandemic as a response to the lack of a specific legal framework, which had previously forced the authorities to rely on general laws.[28]

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[22] Opinion of the Council of State n° 18.648/1 on a draft law on the safeguarding of competitiveness, 14 July 1988, p. 38.

[23] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, pp. 178–179.

[24] Opinion of the Council of State n° 25.167/1 on the promotion of employment and the preventive safeguarding of competitiveness, 4 June 1996, pp. 45–46. See also: Opinion of the Council of State n° 70.402/4 on a draft decree of the Walloon Region on the gas and electricity markets following the floods of July 2021, 1 December 2021, p. 6.

[25] Decrees adopted in areas expressly reserved to the law by the Constitution need a confirmation in any event. See: Constitutional Court, 27 May 2008, n° 83/2008, B.16.3.

[26] Early on, it was argued that "state of necessity" justifications could be invoked to derogate from the Constitution, but Belgian legal doctrine finally preferred an interpretation compatible with the Constitution. See: Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, pp. 181–182.

[27] See: *supra* fn 8.

[28] In 2020, the Federal authority – through decisions of its minister of the Interior alone – first relied on provisions in the law of 31 December 1963 with regard to civil protection, the law of

Question 3

The activation of special powers can be justified by a wide range of events, provided they involve exceptional circumstances. Special powers were initially recognized primarily in the context of socio-economic and financial crises. In practice, the legislator has the discretion to determine whether the socio-economic context qualifies as a crisis and justifies the granting of special powers.[29] Over the years, situations that were not genuine crises have nonetheless been considered exceptional circumstances, such as when Belgium faced challenges in meeting the criteria for joining the European Economic and Monetary Union.[30] The purpose of these powers is to enable the government to take the necessary measures to protect the population as swiftly as possible. The underlying rationale is that in such situations, it would be impractical to follow the standard legislative process. In principle, exceptional circumstances must be present at the time the authorization is granted.[31]

The special powers technique has also been employed to address threats to the country and its citizens, such as during wartime or pandemics. For instance, special powers were attributed to manage the H1N1 and COVID-19 health emergencies, at both the federal and federated levels.[32] However, it must be noted that special powers were not used to adopt sanitary measures during the COVID-19 crisis, but "to take measures to mitigate economic and other consequences that follow from these health measures."[33]

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5 August 1992 with regard to the police function and the law of 15 May 2007 with regard to civil security to adopt emergency measures (closure of most shops, prohibition of gatherings and several activities, suspension of school…) to limit the spread of COVID-19.

[29] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 191.

[30] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 193.

[31] See, for example: Belgian Constitution Court, ruling of 27 May 2008, n° 83/2008.

[32] See: for the first wave of Covid-19 – Walloon Decrees of 17 March 2020, *Moniteur Belge*, 18/03/2020, p. 16045 & 16048; Decree of the French-speaking Community of 17 March 2020, *Moniteur Belge*, 20/03/2020, p. 16420; Brussels ordinance of 19 March 2020, *Moniteur Belge*, 20/03/2020, p. 16607; Brussels Decree of 23 March 2020, *Moniteur Belge*, 03/04/2020, p. 24640; Federal Laws of 27 March 2020, *Moniteur Belge*, 30/03/2020, p. 22054 & 22056, and Decree of the German-speaking Community of 6 April 2020, *Moniteur Belge*, 14/04/2020, p. 26047. Only Flanders has not made use of this technique. For a summary of all the law granting special powers during the COVID-19 period, see: Bourgaux and Gaudin, "(In)competence des Parlements belges en période de confinement," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19 – Quelles leçons pour l'avenir?*, Larcier, 2022, pp. 184–185.

[33] Popelier, "COVID-19 legislation in Belgium at the crossroads of a political and a health crisis," *The Theory and Practice of Legislation*, vol. 8, 2020/1–2, p. 140.

Question 4

The activation of a specific framework governing situations of emergency depends on the techniques involved, with two types of constraints based on whether the Parliament is involved or not.
On the one hand, the federal Parliament is entirely excluded from any role in activating the "state of war." The power to state the existence of a war is vested with the King. This royal decree does not require deliberation by the Council of Ministers, though it must be countersigned by a minister.

On the other hand, Parliament plays a crucial role in the activation and oversight of special powers. First, Parliament must consent to the granting of special powers by adopting the enabling law. Second, Parliament continues to monitor the government's actions during the period of special powers and can revoke these powers at any time. Third, Parliament is usually invited to validate the special powers decrees issued by the government. However, this oversight role is somewhat limited in practice, as challenging these decrees could undermine legal certainty.[34]

In response to criticism regarding the limited role Parliament played in managing the COVID-19 crisis, a so-called pandemic law was introduced to clearly define Parliament's role in such situations. The law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation sets out several conditions for its application. According to Article 3, the King states the existence of an epidemic emergency situation for a specified period (a maximum of three months, with the possibility of extensions), through a decree deliberated in the Council of Ministers. This process mirrors the procedure used in war situations. However, unlike the state of war, this law seeks to involve Parliament in the declaration process. Article 3 requires that the royal decree declaring the epidemic emergency be confirmed by law after considering the scientific data on which the emergency situation is based. If the royal decree is not confirmed within 15 days of its entry into force, it ceases to produce effect. Additionally, Article 9 mandates that the federal government reports monthly to the House of Representatives on the declaration or continuation of the epidemic emergency situation and the administrative police measures taken on this basis. Finally, the government must submit an evaluation report to the House of Representatives within three months after the end of each epidemic emergency situation, to determine whether this pandemic law should be repealed, supplemented, amended, or replaced.[35]

[34] Leroy, "Les pouvoirs spéciaux en Belgique," *A.P.*, 2014/4, p. 500.

[35] The initial draft law actually went further in imposing an evaluation obligation on Parliament, but this constraint was in conflict with the principle of parliamentary autonomy. For an analysis of this draft and the opinion of the Council of State on it, see: El Berhoumi, Rizcallah, Belleflamme et al., "Le Conseil d'État et l'avant-projet de loi dit pandémie: expiation du passé ou balises pour l'avenir ?," *A.P.*, 2021/4, pp. 633–677.

Question 5

As developed under question 2 in this report, Article 187 of the Belgian Constitution precludes the suspension of the Constitution, in full or in part.[36] There being no general state of emergency, it is difficult to find instances where EU law would have influenced general situations of emergency in the Belgian legal order. However, this does not mean that EU emergency law cannot result in structural changes in the Belgian legal order. Examples of such specific but structural reverberations are presumably manifold, but two examples (one pre-pandemic, the other post-pandemic) may serve to illustrate.

When the EU sets up coordination mechanisms to deal with emergencies, these will typically take the form of networks where Member States are required to designate national authorities.[37]
To allow Belgium to properly participate in such networks and mechanisms, and given that the competences involved will internally be allocated to different levels in the Belgian federation, specific structures will need to be set up, often requiring a formal agreement between the levels concerned,[38] arguably (further) forcing Belgium into a cooperative federalism. This is of course generally true for many developments at EU level (which treats its Member States as black boxes), but emergency mechanisms arguably put the threshold higher (than, for instance, the requirement of Points of Single Contact under the Services Directive),[39] since they depend on an effective and swift cooperation of authorities in emergency contexts.

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[36] See: Opinion of the Council of State n° 68.936/AG/AV, § 8.

[37] See: Article 9 of Decision 2119/98/EC of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community, OJ [1998] L 268/1. This Decision has been replaced by Decision 1082/2013 of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health, OJ [2013] L 293/1 (currently in force); Article 3 of Council Decision 2001/792 of 23 October 2001 establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions, OJ [2001] L 297/7. The relevant Decision currently in force is Decision 1313/2013 of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, OJ [2013] L 347/924.

[38] See, for example, Arrêté royal portant fixation du plan d'urgence pour les événements et situations de crise nécessitant une coordination ou une gestion à l'échelon national/Koninklijk besluit tot vaststelling van het noodplan voor de crisisgebeurtenissen en -situaties die een coördinatie of een beheer op nationaal niveau vereisen, 31/01/2003, Moniteur belge/Belgisch Staatsblad, 21/02/2003, p. 8619; Protocole d'accord conclu entre le Gouvernement fédéral et les autorités visées aux articles 128, 130, 135 et 138 de la Constitution concernant l'organisation et le financement d'un point de contact national concernant les soins de santé transfrontaliers, Moniteur belge, 16/01/2019, p. 3439; Projet de loi/Wetsontwerp relatif aux mesures de police administrative lors d'une situation d'urgence épidémique/betreffende de maatregelen van bestuurlijke politie tijdens een epidemische noodsituatie, *Doc. parl.*, Chambre/*Parl.St.* Kamer, 2020-21, n° 1951/1, p. 16.

[39] See: Article 6 of Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ [2006] L 376/36.

A specific example of such EU initiatives that force Belgium into internal cooperative federalism was provided by the EU's response to the COVID-pandemic with the introduction of the EU Digital COVID Certificate.[40] Since the vaccination and issuance of certificates come under competences of different levels of government in Belgium, a cooperation agreement between the different entities was needed to allow for the equivalence and compatibility between Belgian certificates, their use within Belgium (rather than cross-border in an EU context) and to establish sufficient safeguards for the protection of personal data.[41]

In so far as pushing the Belgian make of federalism more towards one of *co-operative* federalism is viewed as positive development, it would be a mistake to conclude that EU emergency law only has virtuous effects on the Belgian legal order. A final example, that is more *ad hoc*, can be drawn from the energy crisis measures.

Thus, in order to ensure the proper application and implementation of the regulation on an emergency intervention to address high energy prices,[42] the federal Belgian legislator adopted a new law relating to the organization of the electricity market and introducing a ceiling on revenues from the electricity producers' market.[43] In Article 22ter, §9, the amended law delegates a power to the federal government to adopt *any measure necessary* to ensure the implementation of the Regulation in case it is being amended.[44] While these executive measures need to be confirmed by a formal law within 12 months,

[40] Regulation 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, OJ [2021] L 211/1.

[41] Accord de coopération entre l'État fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, la Commission communautaire commune, la Région wallonne et la Commission communautaire française concernant le traitement des données liées au certificat COVID numérique de l'UE et au COVID Safe Ticket, le PLF et le traitement des données à caractère personnel des travailleurs salariés et des travailleurs indépendants vivant ou résidant à l'étranger qui effectuent des activités en Belgique / Samenwerkingsakkoord tussen de Federale Staat, de Vlaamse Gemeenschap, de Franse Gemeenschap, de Duitstalige Gemeenschap, de Gemeenschappelijke Gemeenschapscommissie, het Waalse Gewest en de Franse Gemeenschapscommissie betreffende de verwerking van gegevens met betrekking tot het digitaal EU-COVID-certificaat, het COVID Safe Ticket, het PLF en de verwerking van persoonsgegevens van in het buitenland wonende of verblijvende werknemers en zelfstandigen die activiteiten uitvoeren in België, Monit*eur belge/Belgisch Staatsblad*, 23/07/2021, p. 76170.

[42] See: Council Regulation 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, OJ [2022] L 261I/1.

[43] Loi modifiant la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité et introduisant un plafond sur les recettes issues du marché des producteurs d'électricité/Wet tot wijziging van de wet van 29 april 1999 betreffende de organisatie van de elektriciteitsmarkt en tot invoering van een plafond op marktinkomsten van elektriciteitsproducenten, 16/12/2022, *Moniteur belge/Belgisch Staatsblad*, 22/12/2022, p. 98819.

[44] See: Article 5 of the Law of 16/12/2022..

in absence of which they are deemed to be never adopted, and while the EU regulation itself was a temporary measure (that is not in force anymore), it constitutes a significant empowerment. As the Council of State in its advice on the draft law noted, it would allow the executive to decide on essential elements reserved to the legislator.[45] While this is not entirely excluded under Belgian constitutional law, the Council of State still advised to circumscribe the empowerment better. The relevant provision of the law as adopted was amended slightly in the light of this advice but remains remarkably open-ended, referring to "any measure necessary." In addition, under the case law of the Belgian Constitutional Court, this option is in any event only available when it would be impossible for the legislator to act in time, respecting the ordinary parliamentary proceedings, to realize an objective of general interest.[46] The Council of State did not make any observations in this respect but the empowerment in the law implies that the legislator believed this condition to be met, regardless of the precise modification made to the EU regulation (by the EU Council). However, accepting such a presumption appears problematic and would seem to turn an exceptional executive empowerment to determine the essential elements of legislation into the rule.

Question 6

Without being exhaustive,[47] we can indeed mention a number of instances where EU and national legal frameworks and administrative authorities interact to deal with crisis situations and ensure coordinated responses.

One such instance is that of civil protection measures in cases of natural disasters. While civil protection remains a national competence, the EU, relying on its supplementary powers in the field (Article 196 TFEU), and drawing upon the solidarity clause of Article 222 TFEU, has set up a general cooperation and mutual assistance framework known as the "EU Civil Protection Mechanism."[48] The Mechanism enables Member States faced with a natural disaster to request and receive assistance from their national counterparts, under a joint action

[45] Avis/Advies 72.460/3 sur un avant-projet de loi modifiant la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité et introduisant un plafond sur les recettes issues du marché des producteurs d'électricité/over een voorontwerp van Wet tot wijziging van de wet van 29 april 1999 betreffende de organisatie van de elektriciteitsmarkt en tot invoering van een plafond op marktinkomsten van elektriciteitsproducenten, 14/11/2022, para. 11.

[46] Belgian Constitutional Court, ruling of 7 July 2016, n° 107/2016, B.4.2.

[47] The COVID-19 pandemic has led to the activation of a number of mechanisms which have triggered various forms of co-management between the EU and the Member States (on health matters, fiscal and economic matters, free movement matters, […]). For the sake of diversification, we focus on other instances in this section.

[48] Initially set up by Council Decision 2001/792/CE, it was widely reformed and reorganised in 2013 by Decision 1313/2013 of the Council and the European Parliament, OJ [2013] L 347/924.

framework coordinated by the EU and its Emergency Response Coordination Center, and with supranational financial support (most notably through the RescEU fund). The Mechanism was activated by Belgian authorities in July 2021, when the country faced historic floods, and enabled the country to benefit from the support of French, Austrian and Italian rescue teams, whose intervention was funded by the EU.[49]

Another example might be that of food crisis management. The EU is endowed with an integrated food safety crisis mechanism, which enables swift and coordinated response in the EU. The mechanism, known as the Rapid Alert System for Food and Feed, is formally part of the General Food Law Regulation since 2002.[50] It sets up a governance network closely intertwining national administrations with the European Commission and the European Food Safety Authority. The system enables national administrations to notify problematic situations to the EU, thereby prompting coordinated emergency response at EU and national level. In a rather famous instance, that of the fipronil crisis of 2017, Belgium notified the results of home investigations about the presence of fipronil in eggs to the European Commission, triggering the adoption of coordinated emergency measures, such as the blocking of affected farms, or the tracing, recalling and destruction of affected products, at EU and national level. Next to sanitary measures, additional economic measures were adopted by Belgian authorities to deal with the fallout of the crisis and financially support affected farmers, in good agreement with EU authorities, and with due regard for EU state aid law.[51]

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

As noted above, Article 187 of the Belgian Constitution dictates that "[t]he Constitution cannot be suspended, neither in whole or in part." This means

[49] See: European Commission, Press Release – EU supporting Belgium with flood response, 15 July 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3721.

[50] See: Regulation 178/2002 of the European Parliament and of the Council, OJ [2002] L 31/1, Articles 50–57.

[51] See, for example, the Flemish "Besluit van de Vlaamse Regering houdende nadere regels betreffende de betaling van de materiële kosten voor de verwijdering van met fipronil verontreinigde pluimveemest, veroorzaakt door de fipronilcrisis," which explicitly identifies the situation as one of urgent necessity, and asserts that the crisis at issue is covered by the notion of exceptional occurrence of Article 107(2)(b) TFEU, as clarified by the Commission Guidelines on state aid in the agricultural sector (2014/C 204/01). The aid regime was later validated by the EU Commission (Decision SA.49812, 2 March 2018). See also: the Federal law of 21 November 2017 "relative à des compensations en faveur d'entreprises touchées par la crise du fipronil," *Moniteur belge*, 15/12/2017, p. 112418, whose Article 4 explicitly refers to compliance with Article 107 and EU state aid law.

that the Belgian Constitution, as opposed to many other Constitutions, in principle does not allow for any *de jure* or *de facto* state of emergency.[52] This provision, which has been enshrined in the Constitution from its conception in 1831, and has never been amended since,[53] makes clear that the Belgian Constitution is intended to be a constitution "for all seasons." Given the absolute wording of the provision, even the existence of a *de facto* state of emergency does not justify an exception.[54] This means that crises and emergencies must in principle be tackled within the normal constitutional framework. The laudable aim behind Article 187 of the Constitution has, however, not been able to stop the Belgian government from being confronted with various crises and emergencies throughout the years. Given the absolute phrasing of Article 187 of the Constitution, the Belgian legal literature, and especially the judiciary, have shown some flexibility and lenience in order to allow the government to tackle those emergencies.

As also noted in the answer to Question 2, one clear example of that can be found in the so-called decree-laws that were issued during the two World Wars. During those years, (part of) the Belgian territory had been occupied and it was no longer possible to convene the legislative chambers of Parliament. This meant that the legislative power could not function as intended by the Constitution, which states in Article 36 that the legislative power is exercised by the King, the Chamber of Representatives and the Senate. In those circumstances, the council of ministers and the King – and during World War II only the council of ministers,[55] as the only remaining branch of the legislative power, issued decree-laws. In those decree-laws, mention was made of the impossibility to convene the legislative chambers. After the war, the validity of those decree-laws was challenged, but their legality was confirmed by the Court of Cassation. The Court accepted that the King, as the only remaining branch of the legislative power, could take legislative action via the decree-laws in order to protect the territory and the vital interests of the state.[56]

A different legislative technique which is often used in Belgium to tackle crises or emergencies are the special powers laws and the extraordinary powers laws. Those types of laws, which are discussed in more detail under question 8, find their constitutional foundation in Article 105 of the Belgian Constitution. In general, in those laws, Parliament attributes part of its power to the executive

[52] See on this further: Delforge, Romainville, Van Drooghenbroeck, and Verdussen, "Absence d'état d'urgence en droit constitutionnel belge," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19*, Larcier, 2022, pp. 25–82.

[53] In the last century, the provision has been declared open for amendment a handful of times but was never subsequently amended.

[54] Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, p. 82. See also: the answer to question 2.

[55] During World War II, the King was in captivity and was not allowed to leave the castle.

[56] Court of Cassation 11 February 1919, Pas. 1919, I, 9 (for WWI); Court of Cassation 11 December 1944, Arr. Verbr. 1945, 60.

and empowers it to take far-reaching decisions, that may even modify, cancel, supplement or replace existing formal legislation.[57] The last time such a special powers law was enacted, was at the beginning of the COVID-19 outbreak.[58]

One last piece of legislation that is mentioned here is the decree-law of 11 October 1916, concerning the state of war and martial law. While this law was enacted during WWI, the Court of Cassation has ruled that it is a law with perpetual force, which offers a permanent legal framework that becomes applicable automatically when the Kingdom of Belgium is at war.[59] The law significantly expands the power of the government in wartime or when martial law is declared. The constitutionality of this law is debated, since it allows for very far-reaching and preventive limitations on several fundamental rights and freedoms.[60]

Finally, it should be mentioned here that there have been several calls in legal literature in the past to amend the Constitution and provide a constitutional framework for emergency situations.[61] However, Article 187 of the Constitution has not been declared open for amendment at the end of the previous legislative term, which means that this provision cannot be amended during this legislative term (2024–2029).

Question 2

As mentioned in the answer to the previous question, the Belgian Constitution in principle does not allow for any *de jure* or *de facto* state of emergency. That means that even during crises or emergencies, the normal distribution of power should in principle be respected.

In order to deal with the specific challenges that times of emergency bring forth, the concept of special powers laws has been developed. This specific type of law confers wide powers to the government, so that for a certain period of time and for those areas indicated by the legislature, all necessary measures can be taken by the federal executive, which has wide discretionary powers in this regard.[62] The decrees that are taken by the government on the basis of

[57] Moonen, "Bijzondere machten als oplossing voor een crisis. Of zelf in een midlifecrisis?," in Vandenbossche (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, La Charte, 2019, p. 178.

[58] Law of 27 March 2020, Act authorizing the King to take measures in the fight against the spread of the coronavirus COVID-19, *Moniteur Belge*, 30/03/2020, p. 22054 & 22056.

[59] Court of Cassation 4 March 1940, Pas. 1946, I, 493.

[60] Van Haegenborgh and Verrijdt, "De noodtoestand in het Belgische publiekrecht," *Preadviezen 2016*, La Haye, Boom, p. 30.

[61] With further references: Delforge, Romainville, Van Drooghenbroeck, and Verdussen, "Absence d'état d'urgence en droit constitutionnel belge," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19*, Larcier, 2022, pp. 76–82.

[62] Alen and Muylle, *Handboek van het Belgisch Staatsrecht*, Kluwer, 2011, p. 730.

these special powers law, can modify, cancel, supplement or replace existing parliamentary laws.

It is by now commonly accepted that the special powers laws are based on Article 105 of the Constitution, which reads: "The King has no other power than that which the Constitution and particular laws, enacted pursuant to the Constitution itself, expressly grant him."[63] That provision is understood to provide a constitutional basis for the legislature to attribute the executive branch with some of its powers. Given that these special powers laws deviate from the normal division of powers between the legislative and executive branches, the Belgian judiciary has established that four conditions must be met for recourse to this type of laws. First, there must be extraordinary or crisis circumstances present.[64] Second, the special powers can only be attributed to the executive branch for a limited time period. Third, special powers that are attributed should be clearly delineated. Fourth, the fundamental rights and division of competences in the federal Belgian state must be respected.[65]

Beyond the special powers laws, the Belgian legal system has also developed the concept of extraordinary powers law. The difference between the two is not watertight and is mostly one of gradation. In an extraordinary powers law, the legislature vests the executive with even more far-reaching powers, which can be attributed for a longer period than special powers laws. So far, this type of laws has only been used right before and right after WWII.

In Belgium, the special powers laws have become the standard way in practice to tackle crisis or emergency situations. The last time this type of legislation was used was at the start of the COVID-19 pandemic. The law allowed the government to take measures that would, among others, help to stop the spread of the virus, including the enforcement of public health and safety, to ensure the necessary logistical and reception capacity, and to ensure the continuity of the economy, the country's financial stability and market functioning as well as protect consumers. Despite this broad mandate offered by the legislature, the government did not take any sanitary measures on the basis of this law.[66]

It should be clear that the special powers laws significantly alter the normal distribution of powers between the legislative and executive branches. As a consequence of such a law, the legislature empowers the executive at its own expense. Via special powers laws, a big part of the primary decision-making

[63] The Court of Cassation has accepted this as well, see: Court of Cassation 3 May 1974, *RW* 1974–75, 78.

[64] Whether there are such extraordinary or crisis circumstances present is primarily a political decision, which the courts barely verify.

[65] See, for example, Council of State, advies over een ontwerp van wet strekkende tot realisatie van de budgettaire voorwaarden tot deelname van België aan de Europese Monetaire Unie, *Parl.St.* K 1995-96, n° 608/1, 21.

[66] Article 5 of the law of 27 March 2020, Act authorizing the King to take measures in the fight against the spread of the coronavirus COVID-19 (II), *Moniteur Belge*, 30/03/2020, p. 22056.

power, as well as the power to decide on general policy, is temporarily shifted from the parliament to the government.[67]
Even when special powers laws are used, the Belgian judiciary can offer judicial protection. The royal decrees, issued on the basis of a special powers law, constitute measures by the executive, which can be reviewed by the ordinary courts and tribunals, as well as by the Council of State.[68] The Belgian courts and tribunals will nevertheless be rather restrained in their review, given the fact that special powers laws are adopted when there is some kind of crisis or emergency.[69] If the measure by the executive is subsequently ratified by the legislature in a formal law – as is sometimes required by the special powers law itself – that formal law can still be challenged before the Constitutional Court.[70]

Question 3

Belgium is a federal state. The system of division of competences is premised on the idea that any matter in principle falls within the exclusive competence of one level of government.[71] During a crisis or emergency situation, every level of government in principle remains empowered to take those measures that fall within its respective competences.[72]
The general role that the local authorities can play during an emergency situation is laid down in the Royal Decree of 22 May 2019.[73] Article 23 of that decree states that during an emergency situation, the policy coordination can take place on three different levels: a municipal level, a provincial level and a federal level. The decision of which level applies, should be based on the following parameters: the geographical extent of the (possible) harmful con-

[67] Bouhon, Jousten, and Miny, "Droit d'exception, une perspective de droit comparé. Belgique: entre absence d'état d'exception, pouvoirs de police et pouvoirs spéciaux," 14, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/690581/EPRS_STU(2021)690581_FR.pdf

[68] In Belgium, the courts and tribunals are required to verify whether a measure by the executive complies with higher norms of national or international law and to disapply the measure in question if it does not comply. The Council of State is competent to annul measures by the executive *erga omnes* if a measure by the executive breaches a higher norm. See on this also: the response to Section 4, Question 1.

[69] See: on the role of courts during the COVID-19 pandemic: Verlinden, De Raeymacker, and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19-crisis," *Rechtskundig Weekblad*, 2023–24, pp. 1162–1175. See further: the questions in Section 4, particularly Questions 3 and 4.

[70] See, for example, Belgian Constitutional Court, ruling of 21 December 1988, n° 71/88.

[71] See, for example, Belgian Constitutional Court, ruling of 17 December 2020, n° 165/2020, B.11.1.

[72] Unsurprisingly, this may lead to disputes about which level of government is competent to take which exact measures. See: Reybrouck and Van Nieuwenhove, "Het Belgische federalisme tijdens een noodsituatie: de COVID-19-pandemie als stresstest voor de bevoegdheidsverdeling," in Reybrouck, Rochtus, Spinoy, and Verrijdt (eds.), *De Belgische Grondwet en noodsituaties*, Intersentia, 2024, pp. 283–310.

[73] See: *Moniteur Belge*, 27/06/2019, p. 65933.

sequences; the resources to be used; the actual or potential number of people affected; the need for coordination; the extent, severity and/or social impact of the events; the nature of the events and mainly their technical complexity; the population's need for information; the evolution of events; the applicable regulations. Which level is triggered depends on the direct and indirect consequences of the emergency situation in question. When a higher level (meaning the provincial or the federal level) is promulgated, intervention at the lower level will automatically be cancelled.[74] This means that whether the local authorities have a role to play in combating a specific emergency situation is governed by the principle of subsidiarity.[75]

Beyond that general framework, specific legislation can also assign a particular role to the local authorities. The pandemic law states, for example, that the provincial and municipal authorities, each for their specific territory, can take more severe measures than the federal level.[76]

Question 4

The Belgian Constitution does not govern the situation of how a conflict between the implementation of constitutional provisions and EU or international law should be resolved in case of a situation of emergency. Because of this, we fall back on the general principles within the constitutional framework of the hierarchy between constitutional and international law. On this point as well, the Belgian Constitution remains rather silent. Article 34 of the Constitution holds that the exercise of certain powers may be entrusted by treaty or by law to institutions of international law.[77] This provision provides a constitutional basis for the fact that international or supranational organizations exert power within the Belgian legal system. It is also considered by the Belgian judiciary as an argument for the primacy of international and EU law over Belgian (constitutional) law.[78] The Belgian judiciary has since long accepted that EU law in principle has primacy over domestic law.[79]

In 2016, the Constitutional Court nevertheless made clear that Article 34 of the Constitution does not allow that the national identity, which is embedded in the political and constitutional structure, or the fundamental values of the

[74] Articles 27 and 28 of the Royal Decree of 22 May 2019.

[75] Keyaerts, "Lokale bestuursniveaus en hun verantwoordelijke overheden als beheerders van crisissituaties," in Reybrouck, Rochtus, Spinoy, and Verrijdt (eds.), *De Belgische Grondwet en noodsituaties*, Intersentia, 2024, p. 345.

[76] Article 4(2) of the Law of 14 August 2021 on administrative police measures during an epidemic emergency, *Moniteur Belge*, 20/08/2021, p. 90047.

[77] See on this also: the response to Section 5, Question 1.

[78] See more in detail: Velaers, *De Grondwet: een artikelsgewijze commentaar*, II, die Keure, 2019, pp. 20–39.

[79] For example, Court of Cassation 2 June 2003, S.02.0039.N.

protection that the Constitution offers to the people are impaired. In other words, the Constitutional Court made clear that Article 34 of the Constitution does not offer a blank check.[80] Despite the theoretical importance of that statement, the Court has so far never found a measure of international law to reach that threshold.

Question 5

There is no explicit provision in the Belgian Constitution that governs how fundamental rights are protected during a national emergency, despite past recommendations to introduce such a provision.[81] On top of that, it is generally accepted that, since Article 187 of the Constitution precludes any suspension of the Constitution, the Belgian government is also not allowed to rely on the emergency provisions in human rights treaties, such as Article 15 ECHR or Article 4 of the ICCPR.[82] This means that, when it comes to fundamental rights protection, the constitutional framework of fundamental rights protection continues to apply as normal, even in emergency situations.

In general, the protection of fundamental rights is primarily the responsibility of the courts and tribunals. The Belgian courts are very open to international law and interpret the fundamental rights in the Belgian Constitution in light of the European and international human rights framework.[83] Via this technique, the Belgian courts introduce a proportionality requirement when fundamental rights are limited, even though the Belgian Constitution does not contain such a requirement.[84]

Even though the protection of fundamental rights is primarily the responsibility of the courts, at times domestic emergency legislation explicitly instructs the government to respect fundamental rights. For example, Article 4(3) of the law on administrative police measures during an epidemic emergency, also known as the pandemic law,[85] states that all measures that are taken within the framework of that law must be necessary, appropriate and proportionate to the pursued aim.

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[80] Belgian Constitutional Court, ruling of 28 April 2016, n° 62/2016, B.8.7.

[81] Velaers and Van Drooghenbroeck, "Invoeging van een transversale bepaling in de Grondwet over het afwijken van rechten en vrijheden," Parl.St. K 2005-06, n° 51-2304/001, 93–94.

[82] Rochtus, "Het schorsingsverbod van artikel 187 van de Grondwet: een analyse in het licht van de COVID-19-pandemie," in Reybrouck, Rochtus, Spinoy, and Verrijdt (eds.), *De Belgische Grondwet en noodsituaties*, Intersentia, 2024, p. 421.

[83] Lambrecht, "Belgium: The EU Charter in a tradition of openness," in Bobek and Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, Hart, 2022, p. 87.

[84] See on this also: Section 4.

[85] Law of 14 August 2021 on administrative police measures during an epidemic emergency, *Moniteur Belge*, 20/08/2021, p. 90047.

Question 6

During the COVID-19 pandemic, the Belgian government – like governments in all other countries – had to take far-reaching measures in order to slow the spread of the virus. These measures had a significant impact on a wide range of fundamental rights of the citizens, such as the right to respect for private and family life, the freedom of religion, the right to demonstrate. These measures also conflicted with more specific EU rights, most notably the rights enshrined by the GDPR. In general, when these measures were challenged before the Belgian courts, no violation of those fundamental rights was found.[86]
One measure that was introduced by the Belgian government gave rise to an important case before the ECJ concerning the freedom of movement. In July 2020, the government prohibited non-essential travel between Belgium and the other Schengen countries, if those countries had been designated as a red zone in light of their epidemiological situation. This measure was challenged before the Brussels court of first instance, which asked the ECJ via a preliminary reference whether the measure was in compliance with EU law. In its *Nordic Info* judgment, the Grand Chamber of the ECJ ruled that such a measure was not prohibited by Union law, provided that the measure complied with all the conditions and safeguards referred to in Article 30–32 of Directive 2004/38/EC, and the fundamental rights and principles of the Charter, in particular the principle of the prohibition of discrimination and the principle of proportionality.[87]

Section 3: Statutory/executive emergency law in the Member States

Question 1

When an epidemic emergency situation is declared, the "pandemic law"[88] allows the federal government to adopt, by decree deliberated in the Council of Ministers, the necessary administrative police measures to prevent or mitigate the consequences of the epidemic on public health. These measures may include restrictions on entry into Belgian territory, the closure of establishments, limitations and prohibitions on gatherings and movements. Such measures can only be implemented after consultation with the competent expert bodies involved in crisis management.

[86] For example, the so-called COVID-safe ticket. See: Belgian Constitutional Court, ruling of 27 April 2023, n° 68/2023.

[87] CJEU, Case C-128/22, *Nordic Info*, ECLI:EU:C:2023:951.

[88] Law of 14 August 2021 on Administrative Police Measures in the Event of an Epidemic Emergency Situation, *Moniteur Belge*, 20/08/2021, p. 90047.

Question 2

As previously noted, the absence of a constitutional framework for managing emergency situations in peace time does not prevent federal and federated legislators from establishing specific legal frameworks. The only restriction is the prohibition against wholly or partially suspending the Constitution in Article 187 of the Constitution. This means that any limitations to laws and liberties, even permitted by emergency legislation, must comply with the traditional conditions of legality, legitimacy and proportionality. The Legislation Section of the Council of State affirmed this position in its opinion on the draft "pandemic law."[89]

However, the question remains whether the courts conduct the same review when the restrictive measures that are scrutinised are adopted in the context of emergency situations. Certain restrictive measures adopted to fight COVID-19 could have seemed incompatible with the essence of fundamental rights (like the freedom of religion or the freedom to conduct a business).[90] Moreover, the (formal and material) legality of these restrictions has been contested by several scholars.[91] In practice, some decisions have resulted in findings of unconstitutionality by courts, and even by the Council of State.[92] The administrative high court notably suspended a communal ordinance banning prostitution in the territory of the city of Brussels adopted to limit the spread of the COVID-19 pandemic, because of the city's lack of competence to regulate prostitution for public health reasons.[93] In general however, the constitutionality review of supreme courts found no invalidity of the adopted measures.[94]

[89] "Given that Article 187 of the Constitution prohibits its suspension in whole or in part and that, according to Article 53 of the European Convention on Human Rights, it is also impossible to derogate from the fundamental rights guaranteed by the ECHR based on Article 15 of the ECHR, all limitations on fundamental rights must be assessed in light of the usual limitations criteria outlined in Title II of the Constitution and the ECHR" (Opinion of the Council of State n° 68.936/1, p. 8).

[90] Delforge, Romainville, Van Drooghenbroeck, and Verdussen, "Absence d'état d'urgence en droit constitutionnel belge," in Bouhon, Slautsky, Wattier (eds.), *Le droit public belge face à la crise du COVID-19*, Larcier, 2022, pp. 61–75.

[91] See, for instance, Velaers, "Constitutionele lessen uit de COVID-19-crisis," *T.B.P.*, 2021/9, pp. 541–546; Clarenne and Romainville, "Le droit constitutionnel belge à l'épreuve du Covid-19," in Baranger, Beaud, and Guérin-Bargues (eds.), *Les démocraties face au Covid*, Editions Panthéon-Assas, 2023, pp. 226–228.

[92] For an overview of all the important court's decisions in this period, see: Bouhon, Jousten, and Miny, "Droit d'exception, une perspective de droit comparé. Belgique: entre absence d'état d'exception, pouvoirs de police et pouvoirs spéciaux," pp. 124–134. https://www.europarl.europa.eu/RegData/etudes/STUD/2021/690581/EPRS_STU(2021)690581_FR.pdf

[93] Council of State, 9 October 2020, *Bou-oudi et Akhoun*, n° 248.541.

[94] Cass., 28 septembre 2021; Constitutional Court, ruling of 22 December 2022, n° 170/2022; Council of State, 30 October 2020, *nv Umami*, n° 248.818.

Question 3

The role of the Parliament is often diminished by law during emergency situations, even though there is no explicit constitutional framework governing this limitation of powers. Additionally, many Belgian parliamentary assemblies have revised their rules of procedure to address exceptional situations. In response to the unprecedented lockdown imposed by the COVID-19 pandemic, several assemblies implemented internal rules to regulate their organisation and functioning in the event they are unable to convene in person. When an exceptional situation threatening public health prevents MPs from being physically present, most assemblies now provide for virtual procedures for debate and voting.[95] Some assemblies – such as the Parliament of the French Community – even allow for the possibility of an extended adjournment of Parliament.[96]

Question 4

Emergencies impact systems of government in various ways. Most notably, they tend to empower executive branches and sideline parliaments. Throughout the recent crises, this risk has materialized in Belgium as well.[97] We observe that the involvement of the EU in the management of an emergency or crisis has, overall, contributed to further strengthening and exacerbating these trends. Belgium's participation in the NextGenerationEU initiative, the Union's post-pandemic macroeconomic recovery plan, is a good example of this phenomenon. Both the drafting of Belgium's "national recovery and resilience plan" and its subsequent implementation have been dominated by executive actors, that is, the federal government (both in its capacity of recipient of a portion of the funds, and as the coordinator of the entire Belgian plan) and regional executives.[98]

[95] See: Jousten and Behrendt, "Fonctionnement des parlements belges en période de confinement et de distanciation sociale," Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19*, Larcier, 2022, pp. 225–256.

[96] See: Article 37.2 of its Rules of Procedure: "By way of derogation from the first paragraph, and if, due to a crisis revealing a major risk to human health, the Conference of Presidents decides to adjourn the work of Parliament for a period it defines—and which cannot exceed three months—the Bureau shall record this adjournment and notify the government of this decision."

[97] See, for example, Verdussen, "Le Parlement au temps du coronavirus – Belgique," *Fondation Robert Schuman*, October 2020; Bourgaux and Gaudin, "(In)compétences des parlements belges en période de confinement et de distanciation sociale," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19 – Quelles leçons pour l'avenir?*, Larcier, 2022, pp. 179–224.

[98] On the drafting and implementation of the Belgian plan, see: Zeitlin, Bokhorst, and Eihmanis, "Governing the RRF – drafting, implementing and monitoring national recovery and resilience plans as an interactive multilevel process," *Recovery Watch Policy Study*, June 2023, pp. 22–23, 35, 39. More generally, on executive dominance, parliamentary sidelining and NGEU, see: Fromage and Markakis, "The European Parliament in the EMU after COVID – towards a slow empowerment?,"

In federal systems, emergencies generally act as a centripetal force, strengthening the central government at the expense of regional and decentralized entities, and putting the competence allocation logic under strain.[99] The Union's involvement in the management of the emergency tends to consolidate the trend. For example, it has been widely documented that EU initiatives adopted in the context of the COVID-19, starting with NGEU,[100] have contributed to strengthening the centralization of authority and decision-making within national governments. Interestingly, Belgium partly defies this trend, and EU emergency measures do not seem to have significantly weakened the federated entities (communities and regions) vis-à-vis the federal level. Turning again to the example of NGEU, the Belgian plan[101] has indeed primarily consisted in a compilation of various plans and sets of investment and reform projects drawn up by the relevant power levels (namely the Federal State and the three Regions, that is, Flanders, Wallonia and Brussels) on the basis of their allotted part of funding, coordinated by a dedicated federal secretariat of State, primarily acting as single contact point with the EU, and validated by the so-called Concertation Committee.[102] During both the drafting and the implementation phases, the Union, through the Commission, has sought to pressure Belgium, mainly through informal means, to act as a unitary actor, represented by a single interlocutor. If it has boosted the Federal State's coordinating role, this has not meaningfully impacted the order of competences and powers in Federal Belgium, nor the concrete prerogatives and autonomy of federated entities. The same observations can certainly be made vis-à-vis the management of the Ukrainian crisis, both in its humanitarian and energy dimensions. This continued involvement of federated entities, and the overall preservation of their prerogatives, in emergency situations, can be best explained by Belgium's complex and intricate system of competence allocation. As touched upon in the answer to Section 5, Question 1, it also creates a certain number of challenges of its own, most notably for the consistency

The Journal of Legislative Studies, 2022, pp. 389–397; Leino-Sandberg and Raunio, "From bad to worse – the continuous dilemma facing parliaments in European economic and fiscal governance," *Government and Opposition*, 2023, pp. 7–11.

[99] For an in-depth assessment of the COVID-19 crisis' impact on Belgium competence system, see: El Behroumi, Van Drooghenbroeck, and Losseau, "Le fédéralisme belge ne connaît pas la crise: la gestion de la pandémie de COVID-19 à l'épreuve de la répartition de compétences," in Bouhon, Slautsky, and Wattier (eds.), *Le droit public belge face à la crise du COVID-19 – Quelles leçons pour l'avenir?*, Larcier, 2022, pp. 83–140.

[100] Bokhorst and Corti, "Governing Europe's Recovery and Resilience Facility – between discipline and discretion," *Government & Opposition*, 2023, 1–17; Zeitlin, Bokhorst, and Eihmanis, *supra* fn 102, p. 42.

[101] The Belgian plan, in its submitted version from July 2021, can be consulted here: https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/country-pages/belgiums-recovery-and-resilience-plan_en#documents

[102] The Concertation Committee, set up by Article 31 of the "loi ordinaire de réformes institutions du 8 août 1980," brings together representatives from all levels of government, and ensures the necessary cooperation and coordination between the various entities of the Belgian federal system.

and speediness of political action, and complicated Belgium's relationship vis-à-vis the EU.

Section 4: Judicial review of emergency powers in the Member States

Question 1

In situations of crisis, the judiciary is constitutionally entitled to adjudicate as usual. Consequently, every legal act, action or omission falls within the scope of judicial review provided that the rules surrounding merits, admissibility and competence are met.

Depending on their legal nature, norms can be challenged before three different types of courts: the judiciary headed by the Court of cassation, the administrative courts, headed by the Council of State and the Constitutional court.[103] The relevant question pertains thus to the kind of measures adopted to address situations of emergency, no matter their political salience, context or policy field.

The Constitutional Court can review federal and federated acts of Parliament. If the Court considers that the act under review breaches the Constitution, EU law or any international agreement that is binding for Belgium, it annuls it.[104] As a matter of example, during the COVID-19 pandemic, the Constitutional Court delivered no less than five cases dealing with crisis management.[105] As emphasised earlier, "special powers" laws are particularly used in a context of emergency. They aim at delegating substantial legislative power to the executive, which arguably allows for a quicker answer to address the detrimental effects of a crisis. The Constitutional Court is competent to review the parliamentary laws that provide the Executive with the legal bases for acting. Downstream, the Constitutional court can also review the sanctioning parliamentary law that provides for parliamentary approval to royal decrees. The adoption of such a law is compulsory when essential aspects in reserved matters had been delegated to the Executive.

More often than not, legal acts adopted to tackle a crisis are executive in nature. They can be Royal decrees – adopted under the framework of an ordinary law or a special powers law – or ministerial decrees. They can also be executive acts adopted at community or regional level. At a lower

[103] Popelier and Lemmens, *The Constitution of Belgium. A contextual analysis*, Hart, 2015, pp. 181–186.

[104] See: Art. 1 of the Special act of 6 January 1989 on the Constitutional court. It is worth noting that Ordinary courts must also put a parliamentary law aside if it contradicts international law with direct effect, see Brucher and Verdussen, "La jurisprudence Le Ski: des lendemains qui chantent ou qui déchantent?," *Journal des tribunaux*, 2021, pp. 643–648.

[105] Belgian Constitutional Court, rulings of 9 June 2022, 22 September 2022, 22 December 2022, 2 March 2023 and 29 June 2023.

level, the mayor or the governor of the province can adopt executive acts which are also relevant in case of emergency. Given the role the Executive is called to play in times of crisis, judicial review of its acts and decisions is paramount.

Executive acts and decisions are subject to judicial review following three main avenues. First, they can be legally challenged before the administrative branch of the Council of State. The abstract review it conducts can lead to annulment of the acts and decisions under review with binding effect towards all (*erga omnes*) and with retroactive effect. Second, various specialised administrative courts can hear claims pertaining to the legality of administrative acts in specific policy fields. An appeal against the decisions of those specialised administrative courts before the Council of State is always possible. Third, every court and tribunal has to declare an act or decision of the executive inapplicable should it contradict written or unwritten law pursuant to Article 159 of the Belgian Constitution. In last instance, the Supreme Court can overrule such a decision if needed.

In addition to the power to discard an act or decision of the Executive, the ordinary courts can adjudicate cases pertaining to State liability. Emergency does not prevent the State from repairing the damage caused by its illegal action. This is true for the three branches of government (the executive, the legislature and the judiciary). When unforeseen and urgent situations arise, deficient prevention or deficient measures to fight against the crisis might lead to damage. If this happens and the causal link is proven, tort liability requires the State to provide for legal redress. The flooding in Ruisbroek in 1976[106] and the dioxin crisis in the 1990's[107] are cases in point.

On top of this, strict responsibility can force the State to repair damages caused to another person, although it does not commit any tort. The Council of State is competent to adjudicate such cases.[108] As an example, in the context of the dioxin crisis, the question arose whether individuals could claim compensation from the Belgian State for the damage they had suffered as a result of decisions that the Belgian government took to fight against the crisis under request from the Commission.[109]

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[106] Interestingly, two different cases related to the same legal question were brought to different courts and led to different results, one Court condemning the Belgian State and the other not. Compare judgments Rb. Mechelen 24 oktober 1978, *Tijdschrift voor aannemingsrecht,* 1983, p. 203, and Antwerpen 30 juni 1980, *Tijdschrift voor aannemingsrecht*, 1983, p. 195. On these cases, see: Van Oevelen, "Overheidsaansprakelijkheid bij de bestrijding van rampen," in Lust and Luypaers (eds.), *Rampen, noodsituaties, crisis [...] Voorkoming, beheersing en bestrijding. Bevoegdheden, verantwoordelijkheden en aansprakelijkheden*, die Keure, 2006, p. 112.

[107] Rb. Gent 23 juni 2003, *Nieuw juridisch weekblad*, 2003, p. 1410. The tribunal condemned the Belgian State to repair the damage it had caused.

[108] Art. 11 of the Coordinated Laws on the Council of State.

[109] See: Van Oevelen, "Overheidsaansprakelijkheid bij de bestrijding van rampen," in Lust and Luypaers (eds.), *Rampen, noodsituaties, crisis [...] Voorkoming, beheersing en bestrijding. Bevoegdheden, verantwoordelijkheden en aansprakelijkheden*, die Keure, 2006, p. 125.

In short, even in emergency situations, a comprehensive system of jurisdictional protection exists which ensures that no act from the public authorities escape judicial review. Given the various judicial means of adjudicating on state action in emergency situations, the judiciary is seen as a key player in the overall assessment of crisis management and the allocation of accountability. Judges are seen as watchdogs, whose main task is to protect the rule of law, individual freedoms and human rights.[110] Therefore, in the heat of the COVID-19 pandemic, the government passed a law adding the judiciary to the list of vital services.[111] Consequently, Courts had to implement a whole array of resilience measures in order to keep working during the COVID-19 crisis.[112]

Question 2

Specificities applicable to the courts in situations of emergency can be either procedural or organizational in nature.

On a *procedural level*, when certain conditions are met, emergencies can trigger specific procedures that allow for a quicker judicial review, albeit provisional in most cases. The purpose of summary proceedings is to allow that further proceedings hold meaningful effects. Therefore, applicants can ask for a faster procedure, generally on the condition that they can prove that waiting for a longer time would cause irreparable harm. Every time a claimant convincingly argues that normal judicial delays might lead to irrevocable damage, they can require a specific procedure instead of the regular ones. The potential damage that triggers an emergency has to be personal, direct and meets a certain level of gravity.

Given the pluralistic jurisdictional system in Belgium, different provisions apply to the Constitutional court, the administrative courts and the ordinary courts.

At the suit of the petitioning party, the Constitutional Court can entirely or partially suspend a statute before delivering its judgment on the annulment action.[113] Before the Council of State, two procedures can be triggered depending on whether the claimant faces "mere emergency" or "extreme emergency."[114] They enable the claimant to ask for preliminary measures and a temporary

[110] Verlinden, De Raeymaecker, and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19 crisis," *Rechtskundig Weekblad*, 2023–2024, pp. 1172–1173.

[111] See: Ministerial Decree of 18 March 2020 on emergency measures to limit the spread of the COVID-19 coronavirus, *Moniteur Belge*, 18/03/2020, p. 16037.

[112] OECD, "Evaluation of Belgium's COVID-19 Responses. Fostering Trust for a More Resilient Society," OECD Publishing, 2023, https://doi.org/10.1787/990b14aa-en, pp. 77–78.

[113] See: Art. 9 and following of the Special Law on the Constitutional Court.

[114] See: Donnay and Pâques, *Contentieux administrative*, Brussels, Larcier, 2023, pp. 637–656.

suspension of the decision.[115] In case of extreme emergency, the procedure differs widely from the usual rules, narrowing down the rights of defence of the parties. Therefore, this procedure is limited to exceptional cases only.[116]

As to the judiciary, the President of every ordinary Court is empowered to issue interim injunctions whenever they recognise urgency.[117] They enjoy a broad room for interpretation provided that two criteria are met. The first one is factual and pertains to the urgency of the situation as such. An emergency exists when there is a serious fear of serious harm or inconvenience. The second is jurisdictional: given the urgency, summary proceedings are required because the ordinary procedure would be unable to avoid the harm or inconvenience to occur.[118] Summary orders can be very effective. They are enforceable provisionally, notwithstanding opposition or appeal.[119]

Such procedures do not apply only in situations of crisis. On the contrary, there are many circumstances in everyday life where cases have to be tried quickly, whereas no crisis or sense of emergency exists on a collective level. However, whenever a crisis breaks out, chances that justice has to be done urgently are likely to rise. This is so because most of the time governmental measures are adopted quickly, with immediate effect and in an unusual context, as evidenced during the COVID-19 pandemic.[120] However, during the first wave of COVID-19, most cases brought to the Council of State were dismissed because one (or several) of these requirements was not met.[121] The same holds true for cases brought before the ordinary courts.[122]

In the different procedures highlighted, the mere lodging of the application does not have any suspensive effect. However, delays are shortened as much as possible in order to speed up the jurisdictional process.

On an *organisational* level, the COVID-19 pandemic revealed a lack of preparedness of the judiciary to deal with situations of crisis. No emergency plan existed and scarced resources made the task of ensuring the continuity of public service a challenging one. Furthermore, previous deficiencies such as

[115] See: art. 17, §§ 1–4, Coordinated Laws on the Council of State and art. 16 with regard to summary proceedings.

[116] See: art. 17, § 4, Coordinated Laws on the Council of State and art. 16 of the procedure with regard to summary proceedings.

[117] Summary jurisdiction is dealt with in art. 1035 to 1041 of the Judicial Code.

[118] See: De Leval, *Droit judiciaire,* t. II: Procédure civile, vol. 1 : Principes directeurs du procès civil – Compétence – Action – Instance – Jugement, Brussels, Larcier, 2021, pp. 203–227.

[119] See: art. 1039, § 2, of the Judicial Code.

[120] For example: the Royal decree that acknowledges the state of epidemic emergency and triggers a specific regime allowing for several limitations to fundamental rights comes into force with immediate effect, under Art. 3, § 2, *in fine* of the parliamentary law of 14 August 2021 on administrative police measures during an epidemic emergency.

[121] Renders et al., "La gestion de la pandémie de Covid-19 dans l'Etat fédéral belge: chronique d'une vie dénoncée ou d'une mort annoncée," in Fougerouse (ed.), *La gestion de la pandémie de Covid par les Etats. Les institutions publiques à l'épreuve*, Bruylant, 2023, p. 224.

[122] Verlinden, De Raeymaecker, and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19 crisis," *Rechtskundig Weekblad*, 2023–2024, p. 1170.

lack of human resources and delays in digitalization of procedures aggravated the impact of the pandemic on the usual judicial work.[123]
Despite these shortcomings, an audit of the High Council of Justice conducted from July 2020 to June 2021 showed that the judiciary managed to fulfil its tasks during the COVID-19 crisis.[124] This was made possible thanks to procedural novelties such as pleading through video-conferences or written proceedings.[125] A sense of flexibility also helped to ensure continuity of justice. For example, in the most critical moments, extension of deadlines allowed lawyers to compensate for the waste of time caused by the general lack of information on how to adapt to the pandemic.[126] As for the future, the High Council of Justice highly recommends that the judiciary is allocated better human and material resources. It also strongly encourages the judiciary to adopt guidelines and procedures to share responsibilities among all stakeholders and allow for a smooth judicial process even under exceptional circumstances.

Question 3

It is generally accepted that the political question doctrine does not exist in Belgium, contrary to other countries such as France, the United States or the United Kingdom.[127] In other words, no specific doctrine prevents the judiciary from trying a case because its subject-matter would be committed to other constitutional powers or would be too sensitive politically. Under the same line, unforeseen and urgent situations do not preclude judicial review. Consequently, legal acts adopted to address situations of emergency can be challenged before courts like any others.

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[123] High Council of Justice, *Audit report on the covid-19 crisis: the impact on litigants and the approach of the judiciary*, 30 June 2021, pp. 75–76.

[124] High Council of Justice, *Audit report on the covid-19 crisis: the impact on litigants and the approach of the judiciary*, 30 June 2021, pp. 75–76.

[125] See: the Royal Decree No. 3 of 9 April 2020. Some these novelties have triggered severe criticism in terms of rights of defence and right to a fair trial, see: Chevalier, De Coninck, Hoc et al., "La procédure civile en période de Covid-19 – Commentaires et analyses de l'arrêté royal n°2 du 9 avril 2020," *Journal des Tribunaux*, 2020, p. 330.

[126] See, for example, the special powers Royal Decree No. 2 of 9 April 2020 as amended on 28 April 2020; Royal Decree No. 12 concerning the extension of the time limits for proceedings before the Council of State and the written procedure (21 April 2020); Royal Decree No. 19 concerning the extension of the time limits for proceedings before the Aliens Litigation Council and the written procedure (5 May 2020); Constitutional Court, Directive on special procedural measures taken by the Constitutional Court in the context of the coronavirus crisis of 18 March 2020 (18 March 2020).

[127] Velaers, *De Grondwet – Een artikelsgewijze commentaar*, 2019, die Keure, p. 371. On the political question doctrine in France, the United States and the United Kingdom, see: Saunier, *La doctrine des « questions politiques ». Etude comparée: Angleterre, Etats-Unis, France*, LGDJ, 2023. On Italy, see: Giomi, *L'atto politico e il suo Giudice. Tra qualificazioni sostanziali e prospettive di tutela,* FrancoAngeli, 2022.

However, the principle of separation of powers implies that the judiciary is not allowed to assess the political appropriateness of acts and actions adopted by the parliament and/or the executive. It is settled case law that judicial review stops at the edge of political decision-making. Otherwise, there would be too great a risk of the judge – a counter majoritarian power – substituting themselves to political power.[128] In that respect, one can convincingly argue that the judiciary shows a higher sense of self-restraint in cases of emergency.[129]

The reasons for this cautious stance are manifold. First, situations of emergency are more often than not uncharted territories for public authorities. They have to address an unknown situation under time constraint and without every relevant information at their disposal. Second, the legal framework surrounding situations of emergency in Belgium leaves higher room for manoeuvre for the executive than in normal times.[130] Third, emergency usually triggers situations labelled as "conflicts of rights," where competing fundamental rights are at stake. In such situations, elected powers are given precedence to strike the right balance between competing rights and interests that are equally valued.[131] For instance, when deciding whether to close premises such as schools or public transportation as a matter of emergency, the government has to assess the right to education or to free movement in light of the competing rights it seeks to protect with such measures (be it the right to health and to life in the case of a pandemic or the right to life and to security in the case of the fight against terrorism). Fourth, when assessing the government's course of action *ex post-factum*, the judiciary has to remember what was the situation at the time the government took the disputed measures. Its role is to ensure that the government remains within the limits of the rule of law, and not to second-guess how it could have done better in optimal circumstances.

The fight against the COVID-19 pandemic is once again a good case in point. Since the beginning of the pandemic, a whole range of cases reviewing the management of the crisis has been delivered at a rapid pace. Provided that procedural requirements pertaining to standing, admissibility and competence were met, the judiciary tried the merits of the cases, assessing the

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[128] Bombois, "Conditions et limites du pouvoir judiciaire face à l'autorité publique: vol au-dessus d'un nid de vipères ?," *CDPK,* 2005, pp. 24–49.

[129] See: Ginsburg and Versteeg, "The bound executive: emergency powers during the pandemic," *International Journal of Constitutional Law*, 2021, pp. 1498–1535; Golia, Hering, Moser, and Sparks, "Constitutions and Contagion – European Constitutional Systems and the COVID-19 Pandemic," *Heidelberg Journal of International Law*, 2021, pp. 147–234.

[130] The Constitutional court rules that such a wide room for manoeuvre was justified given the wide diversity of emergency situations the Executive might possibly face, see: C.C., 22 September 2022, n° 109/2022, B.8.2.; C.C., 22 December 2022, n° 170/2022, B.8.2. and C.C., 29 June 2023, n° 104/2023, B.8.2 and Verlinden, De Raeymacker and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19-crisis," *Rechtskundig Weekblad,* 2023–24, p. 1167.

[131] Velaers, "Constitutionele lessen uit de COVID-19-crisis," *T.B.P.,* 2021/9, pp. 546–547.

legality of the measures but also their effects on the subjective rights of claimants. In some (rather exceptional) cases, the judiciary annulled the decisions taken to tackle the crisis.[132] The legal basis and pleas argued by petitionners were diverse, ranging from violations of freedom of religion[133] to breach of the principle of equality and non-discrimination.[134] Nevertheless, the judiciary overall upheld government decisions,[135] an orientation some authors criticised.[136]

Overall, the Constitutional Court, the Council of State and the ordinary judges relied heavily on the wide room for manoeuvre which the Parliament left to the Executive according to the laws governing crisis management.[137] In addition to this, the judiciary acknowledged the very specific circumstances surrounding the health crisis. COVID-19, an ever-evolving, rapidly spreading and highly contagious virus required quick public response. Therefore, the government had to make decisions while it did not possess all relevant information.[138] To take due account of this, the judiciary put special emphasis on procedural requirements. In the first stage of the crisis, experts' consultation was particularly valued and showed, in the judiciary's eye, that the government took the most up-to-date state of knowledge into account. As the pandemic was evolving and public demands changed, not only medical experts' opinions were valued but also concerns voiced by civil society, such as fundamental rights agencies, representatives of socioeconomic life or experts in mental health.[139] Under the same procedural token, upstream deliberations in the Council of Ministers or within the so-called Concertation Committee played a special role in the legal reasoning leading the judiciary to uphold executive acts.[140] Such attention dedicated to the deliberative and procedural quality of the decision-making

[132] For an overview, see: Verlinden, De Raeymacker, and Bultheel, "De bijzondere rol van rechtscolleges tijdens de COVID-19-crisis," *Rechtskundig Weekblad*, 2023–24, pp. 1172–1173.

[133] See, for example, Council of State, 8 December 2020, n° 249.177 and Council of State, 17 June 2022, n° 254.041 (ban to collective worship).

[134] See, for example, Council of State, 2 February 2021, n° 249.685.

[135] Slautsky et al., "Belgium: Legal Response to Covid-19," *The Oxford Compendium of National Legal Responses to Covid-19*, Oxford, OUP, 2022.

[136] See, for example, Meeusen, "De terughoudendheid van de Raad van State bij de beoordeling van maatregelen genomen in het kader van de coronacrisis," *CDPK,* 2020, pp. 33–50.

[137] See: Civil Protection Act of 31 December 1963, art 4; Police Force Act of 5 August 1992, arts 11, 42; Civil Security Act of 15 May 2007, arts 181, 182, 187. Federal Special Powers Act of 27 March 2020 (I); Federal Special Powers Act of 27 March 2020 (II). In a later stage, see: Statute of 14 august 2021 on administrative police measures during an epidemic emergency.

[138] See, for example, Belgian Constitutional Court, ruling of 2 March 2023, n° 33/2023, B.69.

[139] Popelier et al., "Health crisis measures and standards for fair decision-making: a normative and empirical-based account of the interplay between science, politics and courts", *European Journal of Risk Regulation*, 2021, vol. 12, n° 3, pp. 1–20; PVerrijdt, "Blijf in uw kot! De kwalificatie en de evenredigheidstoets van noodmaatregelen die de bewegingsvrijheid beperken," in Reybrouck, Rochtus, Spinoy, and Verrijdt (eds.), *De Belgische Grondwet en noodsituaties*, Intersentia, 2024, pp. 159–165.

[140] As exemplified in Council of State, 2 February 2021, n° 249.685, § 21. On this, see: Velaers, "Constitutionele lessen uit de COVID-19-crisis," *T.B.P.,* 2021/9, pp. 550–551.

process, although not a new phenomenon[141], was particularly relied on in judicial reasoning pertaining to the pandemic management.

Question 4

The Belgian Constitution was designed in the 19th century, a time where there was a lot of faith in parliament. The catalogue of fundamental rights has not changed dramatically in the meantime, which means that it does not say a word about the principle of proportionality. Roughly speaking, according to constitutional wording, the fact that limitations are imposed by parliament is seen as enough to protect fundamental rights.

In spite of that, proportionality is paramount to judicial review, be it in situations of emergency or in ordinary situations. It plays a role in assessing whether a legal norm breaches the principle of equality and non-discrimination or any other fundamental rights. Because of the outdated wording of the Constitution, both in terms of fundamental rights itself as in the way they can be limited, the Belgian courts have started to apply the principle of proportionality inherent to the European Convention on Human Rights and the EU Charter of fundamental rights, in line with the principle of the highest protection of fundamental rights. Consequently, any limitation to a fundamental right or to the principle of equality and non-discrimination must be prescribed by a legal act, have a legitimate aim and be necessary in a democratic society. This last requirement implies proportionality, something that some legislations, such as the pandemic law, explicitly express.[142]

To be proportionate, any interference with a fundamental right has to be *adequate*, which means that it is able to achieve the legitimate aim it pursues. In a second step, the interference with a fundamental right also has to be *necessary*, in the sense that no other less intrusive means could achieve the same aim. Lastly, the interference with the fundamental right has to be assessed in the light of the legitimate aim it follows. In other words, the interference should not be so detrimental to specific fundamental rights that it outweighs the beneficial impact it aims at – be it the safeguard of the public order or another fundamental right. This third criteria, understood as *proportionality in the narrow sense*, triggers a certain leeway for the judiciary as it touches upon the appropriateness of an act.[143]

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[141] For an early illustration, see: Belgian Constitutional Court, ruling of 30 April 2003, n° 51/2003. On this: Popelier, "Evidence-Based Lawmaking: Influences, Obstacles and the Role of the European Court of Human Rights", in Gerards and Brems (ed.), *Procedural Review in European Fundamental Rights Cases,* Cambridge University Press, 2017, 91; Popelier and Van De Heyning, "Procedural Rationality: Giving Teeth to the Proportionality Analysis", *European Constitutional Law Review*, 2013, vol. 9, n° 2, 255–256.

[142] See: art. 4(3) of the Pandemic law, *supra* fn 8.

[143] Rosoux, *Contentieux constitutionnel*, Larcier, 2021, p. 343.

The scope of judicial review when assessing the proportionality of actions taken by public authorities depends on the circumstances of each case. As highlighted above,[144] a situation of emergency or a sense of crisis usually limits the margin of appreciation of the judiciary and widens the Executive's room for manoeuvre accordingly. Two reasons underly such a finding.
First, it is settled case-law of the European Court of Human Rights that when a conflict of rights emerges, the judiciary has to adopt a restraining stance in assessing the proportionality of legal acts.[145] Second, as the same Court recently noted, the judiciary must consider the exceptional and unforeseeable context when determining whether the challenged Executive's measures are proportionate.[146] In this context, the principle of precaution is becoming increasingly significant. It enables the judiciary to appropriately account for uncertainty and risk management when assessing legal acts, actions and omissions from the government. In sum, since in emergency cases uncertainty is the rule and quick responses are needed, the evidential threshold of what is required from the government in terms of proportionality is somewhat lowered. It must suffice to show that, in light of the scientific knowledge available, its policy is not manifestly unreasonable to avert a likely serious harm.[147]

Section 5: Implementation of EU emergency law in the Member States

Question 1

Two very relevant principles here are the principles of division of competences within the Belgian federal setup and the doctrine of constitutional identity.

As to the first, it plays an important role in two main phases. First, when the EU adopts EU measures and where this involves decision-making on the part of the Council of the European Union, whether Belgium will be able to properly engage in this decision-making will first depend on the (internal) competence at issue. Afterall, in the case that the issue discussed touches on competences not exclusively coming under the competence of the federal government, the representative of Belgium in the Council can only take a position for or against measures deliberated in Council when the relevant federal entities in Belgium unanimously agree on the position to be taken. Where disagreements persist (between the federal entities), Belgium will have to abstain in the Council.[148]

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[144] See Answer to Section 4, Question 3.

[145] See: Smets and Brems (eds.), *When human rights clash at the European Court of Human Rights. Conflict or Harmony?*, OUP, 2017.

[146] See: European Court of Human Rights (first section), *Pasquinelli and others v. San Marino*, 29 August 2024, §§ 97–108.

[147] Velaers, "Constitutionele lessen uit de COVID-19-crisis," *T.B.P.,* 2021/9, pp. 548–550.

[148] See: Cooperation Agreement of 8 March 1994, *Moniteur belge*, 17/11/1994.

This impacts EU-decision making since abstentions are effectively "votes against" when the decision-making rule is qualified majority voting.

Conversely, during the implementation phase, an EU measure falling within the competences of the regions or communities (within the Belgian federal setup) cannot be implemented by the federal Belgian government for the entire Belgian territory. Instead, it will require separate implementing measures by the Regions and Communities concerned. The cases of food and migration emergencies are a case in point. Food safety, migration and asylum are federal matters, and the federal government will implement measures. However, other necessary measures to manage crises in these areas might touch on competences of the regions. For instance, where food scares result in food products that need to be destroyed, these become waste, which triggers a regional competence, requiring regional action to, for example, provide financial assistance to manage the resulting waste. Similarly, when temporary protection for Ukrainians is granted in Belgium based on Council Decision 2022/382, the status is granted by the federal government, but further measures such as housing and job placement constitute regional competences,[149] while measures facilitating the integration of Ukrainians in the educational system are community competences.[150]

The implementation of NGEU and the adoption of Belgium's national recovery and resilience plan, which has already been evoked in the above, has closely involved the Federal government and the three Regions, typically in the concertation committee, and is another case in point. Along similar lines, although in a more distant context, the national climate and energy plan, as provided by Regulation 2018/1199 (the so-called Governance Regulation), covers different areas of competence in Belgium, and its adoption and updating has required the involvement of both the Federal government and regional executives, further complicating the process and causing tensions, coordination issues and ultimately, delays, which have been deplored by the EU.

The second important principle is a direct result of an EU (*sensu lato*) emergency measure. When during the eurocrisis, the eurozone Member States concluded the Treaty on Stability, Coordination and Governance, the Belgian Constitutional Court was asked to assess this international agreement in light

[149] See, for example, Decreet of 18 maart 2022 tot regeling van de tijdelijke huisvesting van gezinnen of alleenstaanden die dakloos zijn of dreigen te worden naar aanleiding van de oorlog in Oekraïne.

[150] See, for example, Arrêté du Gouvernement de la Communauté française du 27 octobre 2022 établissant la reconnaissance temporaire du Certificate of Complete General Secondary Education et de l'Attestat of Complete General Secondary Education délivrés par le Ministère ukrainien de l'éducation et des sciences et le certificat homologué d'enseignement secondaire supérieur donnant accès à l'enseignement supérieur de type court.

of the Belgian Constitution. The general approach under Belgian Constitutional Law regarding the relation between international and EU law and the Belgian constitution has been to accept the primacy of international and EU law over the Belgian constitution. This primacy found its basis in EU law itself (according to the *Le Ski* jurisprudence of the Court of Cassation), or in the Belgian Constitution, since Article 34 allows the conferral of powers to bodies under public international law (according to the jurisprudence of the Supreme Administrative Court and the Constitutional Court).

Beyond those divergences on the source of primacy, Belgian courts had never established any limits or reservations to the principle of primacy, the same way its Italian or German counterparts, for example, had done. In 2016, however, when the Constitutional Court reviewed the Fiscal Compact, it held that this primacy, enabled through Article 34 of the Belgian Constitution, could not "allow (discriminatory) interference with the national identity embedded in the basic political and constitutional structures or with the core values of protection the Constitution confers on the subjects of law."[151] So far this test has never been met by an EU measure, but in theory, where an EU measure interferes with Belgium's national identity, Belgian authorities would be barred from implementing them. The reference to the discriminatory nature of such interferences seems less relevant here. This is so because the Belgian Constitutional Court's jurisdiction hinges on Articles 10 and 11 of the Belgian Constitution laying down the principle of non-discrimination. The prism through which the Court reviews measures will therefore typically be non-discrimination.

Question 2

There are not many instances of problematic implementation of EU emergency measures. The main one is fairly recent and relates to the implementation of Regulation 2022/1854 on an emergency intervention to address high energy prices, one of the instruments adopted to face the energy crisis prompted by the war in Ukraine. Most notably,[152] Articles 14 to 18 of that Regulation required Member States to subject surplus profits generated by fossil fuel companies to a mandatory temporary solidarity contribution. In Belgium, this contribution

[151] On this judgment, see: the special issue in (2017) *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 6, pp. 294–377; Rosoux, "L'ambivalence ou la double vocation de l'identité nationale – Réflexions au départ de l'arrêt n° 62/2016 de la Cour constitutionnelle belge," *Cahiers de droit européen*, 2019, pp. 91–148.

[152] Other provisions of this Regulation have also been subject to litigation in Belgium. Most notably, measures capping or limiting market revenues (Articles 6 to 8 of Regulation No. 2022/1854) are at the heart of litigation pending before the Court of Appeal of Brussels, which has referred questions to the CJUE (C-633/23).

was set up by a federal law of 16 December 2022.[153] This law, which severely affected the benefits of oil and gas companies, was challenged before the Belgian Constitutional Court in the framework of an action for annulment.[154] One of the main arguments of the parties relates to the legal basis of the EU Regulation from which the Belgian law derived. Parties argue that Regulation 2022/1854 could not validly be based on Article 122(1) TFEU. More specifically, they consider that the solidarity contribution constitutes a direct tax, which could not have been adopted on the basis of Article 122(1) TFEU but should have been based on Article 115 TFEU, the proper legal basis, in their view, for fiscal legislation. The Constitutional Court, having observed that the Court of Justice had not yet ruled on the validity of Regulation No. 2022/1854,[155] decided to send a preliminary ruling request and question the Court about the mobilization of Article 122(1) to set up the solidarity contribution.[156] The Court also decided to refer other questions concerning the scope of application of the solidarity contribution (and its potentially discriminatory nature), about its compatibility with internal market law, state aid law and the Charter of Fundamental Rights.

[153] Loi du 16 décembre 2022 instaurant une contribution de solidarité temporaire à charge du secteur pétrolier, *Moniteur belge*, 22/12/2022, p. 98819.

[154] Suspension requests were also introduced, but rejected by the Court, for lack of a risk of serious and irreparable harm (*risque de préjudice grave difficilement réparable*): Belgian Constitutional Court, ruling 97/2023, 15 June 2024, B.3.1-B.4.

[155] Several annulment actions, making similar claims about the improper use of Article 122 TFEU, are currently pending before the General Court (T-759/22, T-775/22, T-802/22, T-803/22 but will in all likelihood be found inadmissible.

[156] Belgian Constitutional Court, ruling of 25 April 2024, n° 46/2024, B.5-B.8.3.

Bulgaria

*Nikolay Angelov**

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

According to the Article 84, point 12 of the Constitution of Republic of Bulgaria the National Assembly shall act on a motion from the President or the Council of Ministers, introduce martial law or a state of emergency on all or part of the country's territory. For the first time in the democratic years of the development of Bulgaria, state of emergency was declared on 13.03.2020 during the COVID-19 crisis and a special law was introduced by the parliament to regulate this kind of situation (Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020, and on Overcoming the Consequences).

Since January 2007, Bulgaria has had Disaster Protection Act, which introduces the concepts of crisis and necessity. The state of disaster is declared when the conditions of Article 48 of the law are met. State of disaster shall be a regime, which shall be established in the zone of the disaster by the bodies determined in the Law, related to the application of measures for a definite period of time aiming to overcome the disaster and implement rescue and urgent emergency and restoration works.

State of disaster shall be announced in cases of an ongoing, ended or risk of future disaster related to:
1. loss of a human life, and/or;
2. harm to the human health, and/or;
3. significant harm to the property and/or economy, and/or
4. significant consequences to the environment, related to the pollution of soil, water or air with chemical, biological or radioactive substances and materials or to the extermination of biological species.

In the context of this Act:
1. "Natural phenomena" shall be phenomena with geologist, hydro-meteorological and biological origin, such as earthquakes, floods, movement of

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masses (landslides, muddy stone torrents, avalanches), storms, hailstorms, enormous snow amassing, freezing, droughts, forest fires, mass diseases from epidemic and epizootic character, invasions of pests and other similar ones, caused by natural forces.

2. "An incident" shall be unpredictable or hardly foreseeable, limited by time and space action, with high intensity of forces or as a consequence of human activity, threatening the life and health of the humans, the property or the environment.

3. "An accident" shall be an incident on a large scale, including roads, highways and air traffic, fire, demolishment of hydro-technical facilities, incidents, caused by activities in the sea, nuclear incidents and other ecological and industry accidents, caused by activities or actions of the human.

4. "An industrial accident" shall be an immediate technological damage of machines, facilities and aggregates or implementation of activities with risk substances and materials in the production, treatment, use, storage, loading, transport or sale, when this leads to danger for the life or health of humans, animals, property or environment.

When any of the events mentioned above happened then the mayor of the municipality, the district governor or the Council of Ministers will be competent to declare a state of emergency upon part or all the territory respectively of the municipality, the district or the country upon the procedures set up in Articles 49–50(a) of the Disaster Protection Act. There is also regulation of the emergency situation when there is a risk for the social health upon Article 63 of the Health Act in case of imminent danger to the life and health of the citizens from epidemic spread of a contagious disease under Article 61, para. 1, in view to protect and preserve the life and health of the citizens, an extraordinary epidemic situation shall be declared. Emergency epidemic situation under para. 1 shall be declared for a certain period of time by a decision of the Council of Ministers, upon a proposal of the Minister of Health, on the basis of an assessment of the existing epidemic risk, performed by the Chief State Health Inspector.

Question 2

There is a very clear regulation at the legislation to cover the abovementioned situations of emergency and all the competencies of the administrative bodies are strictly provided by law. Therefore, the proper framework includes both constitutional provisions – Article 84 point 12 of the Constitution and

legislative provisions – Disaster Protection Act, Health Act, and the Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020, and on Overcoming the Consequences.

Question 3

As stated above, there are strict definitions in the legislation which justify the implementation of the framework on situations of emergency. So, in the first place, when the National assembly declared state of emergency due to the global pandemic of the disease COVID-19. As an example in the Health Act, there is a definition of such triggering events: Immediate danger to the life and health of the citizens under Article 61, para. 1 is present, when while performing the assessment under para. 2, it is established that the contagious disease under Article 61, para. 1:

1. has been caused by a pathogen of high epidemic potential (infectious person, high mortality, multiple routes of transmission or healthy carrier) and/or the source, mechanism and route of transmission are unusual or unknown, or;
2. poses a serious risk to public health, even when the number of human cases detected is low, or;
3. may impede or delay public health control measures, including due to lack of treatment and / or vaccine and / or the presence of multiple outbreaks etc., or;
4. has low immunization coverage of the population, or;
5. is unusual for the region, season or population, or;
6. is more severe, than expected, has a higher incidence and / or mortality, or has unusual symptoms, or;
7. puts at risk vulnerable or at-risk groups of the population (children, the elderly, refugees, people with immune deficiencies and/or chronic diseases, etc.), or;
8. there are registered cases among medical professionals.

Also in the Disaster Protection Act, there are several other provisions concerning the state of disaster which shall be announced in cases of an ongoing, ended or risk of future disaster related to:

1. loss of a human life, and/or;
2. harm to the human health, and/or;
3. significant harm to the property and/or economy, and/or;
4. significant consequences to the environment, related to the pollution of soil, water or air with chemical, biological or radioactive substances and materials or to the extermination of biological species. All these are pro-

voked by natural phenomenon, an incident, an accident or an industrial accident.

Question 4

As all the forms concerning the state of emergency and the situations of crisis are strictly regulated by the law, there are procedural guarantees of any misconduct of the competent authorities, for example, the emergency situation upon Article 63 of the Health Act shall be declared for a certain period of time by a decision of the Council of Ministers, upon a proposal of the Minister of Health, on the basis of an assessment of the existing epidemic risk, performed by the Chief State Health Inspector. Upon the procedure set up in Articles 49–50 a) of the Disaster Protection Act, the mayor of the municipality, the district governor or the Council of Ministers will be competent to declare a state of emergency upon part or all the territory respectively of the municipality, the district or the country. In all cases above, there is a guarantee for judicial review in front of administrative courts which includes considering both the procedure and merits of the administrative bodies.

Question 5

The Disaster Protection Act introduces the requirements of Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (OJ, L 345/75 of 23 December 2008). The Health Act and the other one – Act on the Measures and Actions during the State of Emergency Declared with the Decision OF the National Assembly of March 13th, 2020, and on Overcoming the Consequences are concerned with the specific situation of a contagious disease

Question 6

Only if considering the global pandemic situation of COVID-19 which was handled together by the national and the EU authorities especially the delivery of vaccines.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

The only constitutional provision is Article 84, point 12 of the Constitution of Republic of Bulgaria which provides that the National Assembly shall on a motion from the President or the Council of Ministers introduce martial law or a state of emergency on all or part of the country's territory. This provision has not been amended since the entering into force the Constitution – 13.07.1991. The first and only time this provision was used by the National assembly during the COVID-19 pandemic on 13.03.2020 implementing the above stated law.

Question 2

As regards the legislative acts, adopted by the Parliament, even in declaring state of emergency, there are still procedures which have to be followed and possible control of the Constitutional Court of Bulgaria for possible omission of the Constitution. As an example we can point decision 15/17.11.2020 on case 4/2020 of the Constitutional Court of Bulgaria which declares several provisions of the Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020, and on Overcoming the Consequences as incompatible with the Constitution. As for the acts of the Government, either the Council of Ministers, or the Minister of Health, the Minister of the Inferior, the mayors of the municipalities and the district governors, all their acts issued under the Health Act or the Disaster Protection Act are subject to direct judicial control in front of the administrative courts upon the provisions of Administrative Procedure Code. There were a lot of examples especially during the pandemic when administrative measures were declared unlawful by the courts and afterwards there was a possibility for state liability. Of course, as all the acts are connected with an emergency situation, there is always preliminary enforcement granted by the administrative bodies of such measures and then there is a possibility of judicial review.

Question 3

Non applicable.

Question 4

If a conflict arises between the implementation of constitutional provisions and EU or international law, the competent authority for resolving it is the Constitutional Court of Bulgaria. So far there has been no case law concerning possible emergency state situations, but in several occasions (excluding the ones which could be identified as constitutional identity cases) the Constitutional Court has always applied the EU law in the light of the provision of Article 5, para. 4 of the Constitution of Bulgaria, which gives a priority of ratified international acts to national ones.

Question 5

When national emergency law is applied, the other provisions of the Constitution and the procedural codes are not suspended. There is a full judicial control by the administrative courts and the Supreme Administrative Court upon the administrative acts and actions of the government and the municipal authorities and as there is a possibility a legislative act of the National Assembly violates some of the fundamental rights, stated in the Constitution, then there is the possibility that the Constitutional Court will declare the provisions incompatible with the Constitution (decision 15/17.11.2020 on case 4/2020 of the Constitutional Court of Bulgaria, and decision 10/23.07.2020 on case 7/2020 of the Constitutional Court of Bulgaria).

Question 6

Not to my knowledge.

Section 3: Statutory/executive emergency law in the Member States

Question 1

Non applicable

Question 2

Non applicable

Question 3

Practically, there are no constitutional limits, rather the other acts of the legislative body – only the fundamental rights and the rights of defence have to be respected by the National Assembly.

Question 4

Not to my knowledge

Section 4: Judicial review of emergency powers in the Member States

Question 1

The general regime is introduced in the Administrative Procedure Code (APC). It covers that any measure/act or action of the executive powers shall be subject to full judicial control in front of the first instance administrative court and as a cassation in front of the Supreme Administrative Court. Of course, as all the acts are connected with an emergency situation, there is always preliminary enforcement granted by the administrative bodies of such measures and then there is a possibility of judicial review.

Question 2

The general regime is introduced in the Administrative Procedure Code (APC). The only peculiarity is that in case of state of emergency, there is no suspensive effect of the plea – so the act and actions of the executive bodies has effective enforcement since the time of their issuing, but the court may upon the circumstances of Article 166 APC stop the enforcement of the measures.

The judicial control is full and does not differ the court review at any usual case in front of the courts.

Question 3

The standard of review is the same as in any other normal case in front of courts, for example, there are no specific procedural rules for cases of emergencies. So the standard is that the executive organ has to apply all the procedural guarantees for the rights of defence in front of them, they have to

take into consideration all the objections from the parties, involved in the procedure and that the act has to be lawful, hence it has to follow the regulation's provisions.

Question 4

In Article 63, para. 3 of the Health Act, the legislator did not formally settle the prerequisites for substantiating "immediate danger to the life and health of citizens" (as claimed in the request), but by formulating them in the law, he complied with the requirement of foreseeability in the exercise of the powers of the executive authorities. In this case, it is precisely the criteria expressly stated in items 1–8 of this provision that limit the executive authority from possible arbitrariness, given the express norm of Article 169 APC, regulating the review by the court and the discretionary competence of the body and in accordance with these criteria. In this way, the legislator has provided an even stricter and more certain condition: special explicit criteria in the law for the presence of "immediate danger to the life and health of citizens," limiting the discretionary competence of the Council of Ministers to an even greater extent.

Thus, in a clear and unambiguous way, the hypotheses (preconditions) under which it is possible and permissible to limit the exercise of the rights of citizens are regulated in law. The basis on which the fundamental rights of citizens can be restricted is established by law, within the limits provided for in the Constitution, the restriction is temporary, pursues a legitimate goal – to preserve the human life and health of citizens, and is of general interest – pressing public need to protect public health.

The possibility given in Article 63, paras. 4–7 of the Health Act to limit the exercise of certain rights corresponds to the principle of proportionality, since the contested provisions do not exceed the limits of what is appropriate and necessary to achieve the legitimate goals pursued by the legal regulation in question. The restrictions on the exercise of certain rights of citizens provided for in Article 63, para. 5 and para. 6 of the Health Act, are necessary in order to limit the spread of the infectious disease and its control and are proportionate to the pursued goal – protection of the life and health of citizens. The right to free movement, economic freedom and the right to work are not absolute and give way to the need to ensure the achievement of the priority goal – guaranteeing the life and protection of citizens' health. The state intervention here is not only constitutionally tolerable, it is socially necessary and socially justified by the legitimate purpose of the law (Decision No. 8/2016 of The Constitutional Court of Bulgaria under the Code of Criminal Procedure

No. 9/2015). The protection of citizens' health as a public good is without a doubt the legitimate, constitutionally defined (Article 52, para. 3, first proposition of the Constitution) purpose of the Health Protection Act (Articles 1 and 2).

The decision of the Council of Ministers to declare an emergency epidemic situation, as well as the orders of the Minister of Health and the director of the relevant regional health inspection to introduce temporary anti-epidemic measures are subject to control according to the order of the APC. In this way, the judicial power during an extraordinary epidemic situation fulfills its constitutional obligations to protect the rights and legitimate interests of citizens, legal entities and the state (Article 117 of the Constitution), with the courts exercising control over the legality of acts and actions of administrative bodies (Article 120 of the Constitution).

Carrying out this function and carrying out effective judicial control, the judiciary continues to be a guarantor of human rights and their proportionate limitation even during an extraordinary epidemic situation. The legislative, executive and judicial authorities retain their constitutional functions in the event of a declared emergency epidemic situation.

Section 5: Implementation of EU emergency law in the Member States

Question 1

So far there have not been any situations of implementing EU law measures in the field of emergency situations by the authorities of Republic of Bulgaria.

Question 2

Not to my knowledge.

Cyprus

Stéphanie Laulhé Shaelou
*Phoebus Athanassiou**

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

(a) Article 183 of the Constitution[1] of the Republic of Cyprus (RoC) identifies a "state of emergency" as the legal basis for the temporary suspension of specific Constitutional provisions and for the adoption, by the Council of Ministers, following a "Proclamation of Emergency," of time-limited "ordinances," possessed of the force of law, in derogation from the regular law-making process (on the modalities for the making of such Proclamations, see *infra*, Section 1, Q4 (a)).

(b) Moreover, through a long line of jurisprudence, dating back to its seminal ruling in *Mustafa Ibrahim* and cited around the world,[2] the Cypriot Supreme

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[1] The original version of the 1960 Constitution, as published in English, was first published as "Appendix D: Draft Constitution of the Republic of Cyprus," in: Cmnd. 1093: Cyprus: Presented to Parliament by the Secretary of State for the Colonies, the Secretary of State for Foreign Affairs and the Minister of Defence by Command of Her Majesty (London: Her Majesty's Stationery Office, July 1960), 91–173 (available on HeinOnline). A copy of the original English language version is available online on the website of the Law Office of the Republic, www.law.gov.cy/law/law.nsf/1D2CDD154DCF33C9C225878E0030BA5E/$file/The%20Constitution%20of%20the%20Republic%20of%20Cyprus.pdf. A copy of the English language version of the 1960 Constitution "with amendments through 2013" is also available on the website of the Law Office of the Republic at: www.law.gov.cy/law/law.nsf/1D2CDD154DCF33C9C225878E0030BA5E/$file/The%20Constitution%20of%20the%20Republic%20of%20Cyprus%20as%20amended%20until%202013.pdf. A copy of the updated 1960 Constitution in the Greek language is available on the website of Cylaw: https://www.cylaw.org/nomoi/indexes/syntagma.html

[2] *Attorney General of Cyprus v. Mustafa Ibrahim* [1964] Cyprus L.R. 195. The dispute in that case revolved around the constitutionality of Law 33/1964 on the Administration of Justice (Miscellaneous Provisions), which merged into a single court the former two Supreme courts of Cyprus (the Constitutional and Supreme Court, whose functions were constitutionally enshrined). The House of Representatives adopted the law, but only with the votes of its Greek-Cypriot elected members,

Court (hereinafter, 'the (Supreme) Court') has read into the Cypriot Constitution (and, in particular, into Articles 179, 182 and 183 thereof) the (legal) doctrine of necessity[3] (or "law of necessity" – *δίκαιον της ανάγκης* – as it is referred to in the RoC), as an implied exception to the application of certain Constitutional provisions. The aim of invoking this doctrine is to ensure the continuing functioning and the very existence of the RoC, following the outbreak, in 1963, of intercommunal unrest, and the paralysis of the State Institutions caused by the withdrawal of Turkish Cypriots from the civil service (including, as of 1966, from the posts they occupied in the judiciary).[4] The events of the summer of 1974 (Turkish Invasion of Cyprus) and the Court's ruling in *Ambrosia Oils v. Bank of Cyprus*[5] reaffirmed (and, in some respects, also developed – see *infra*, Section 2, Q5 (a)) the doctrine of necessity, consolidating its role as a core Cypriot Constitutional doctrine,[6] as the main legal foundation for all legislative and judicial activity in the territory of the RoC under the control of its lawful, internationally recognized, government,[7] and as a necessary "extension of the rule of law."[8] It is not without interest that

as their Turkish-Cypriot counterparts had withdrawn. The case was cited with approval by courts including in Canada, Pakistan, Lesotho and Grenada. See: Achilles Emilianides, *Cyprus Constitutional Law*. Wolters Kluwer, 2024, p. 45.

[3] The doctrine of necessity traces its origins in Roman Law and in the writings of Cicero, who stated that s*alus populi suprema lex esto* ("let the good of the people be the supreme law") – see: Cicero, De Legibus Book III, Part III, sub. VIII. In the common law world, this doctrine dates back to English Mediaeval jurist Henry de Bracton, who famously stated: "that which is not otherwise lawful is made lawful by necessity." On the doctrine of necessity as a rule of common law, and its application in different common law jurisdictions, including the RoC, see, generally, Peter W. Hogg, "Necessity in a Constitutional Crisis," *Monash University Law Review*, vol. 15 no. 3/4 1989 (Hogg, 1989), pp. 253–264.

[4] "The Constitution of Cyprus, which dated from 1960, when Cyprus achieved independence from the United Kingdom, established a diarchical form of government, with elaborate provisions for the sharing of power between the Greek Cypriot and the Turkish Cypriot community. In particular, the constitution made provision for 'mixed' courts (with judges from both communities) to try certain criminal cases, for a Supreme Constitutional Court (also with judges from both communities) to decide constitutional questions, and for the enactment of laws in both languages. These 'basic articles' of the constitution were expressly declared to be unalterable by any means whatever" (Hogg (1989), at 261).

[5] *Ambrosia Oils v. Bank of Cyprus* [1983] 1 CLR 55. On *Ambrosia*, the reader is referred to our analysis in Section 2, Q5.

[6] The doctrine of necessity has been aptly referred to as "the unwritten cornerstone of the Cypriot legal order," one that is "nearly undisputed" (see European Commission for Democracy through Law (Venice Commission), Opinion 1060 / 2021 on Three Bills Reforming the Judiciary, 11 December 2021).

[7] It is telling that the law of necessity is invoked in the Preamble to the Constitution, as amended, and is routinely invoked in the preamble to Cypriot draft laws (in particular, those laws that have amended the Constitution). On the (continuing) importance of recourse to the doctrine of necessity as a means of resolving the intractable problems caused by the Turkish Cypriot rebellion against the RoC and its impact on the viability of State Institutions, see: Efthymiou, "The Law of Necessity in Cyprus," *Cyprus Law Review*, vol. 3, issue 12, 1985, p. 1951.

[8] The relationship between the rule of law and the doctrine of necessity is multifaceted. For a consideration of contemporary challenges to this uneasy relationship, which pre-dates Cyprus's

the doctrine of necessity has been invoked, over the years, as a justification for the amendment of several non-basic (i.e., amendable) Articles of the Cypriot Constitution,[9] without the participation of Turkish Cypriot MPs,[10] but, also, to address constitutionally unforeseen situations unrelated to the bi-communal nature of the RoC and its State Institutions: for instance, the doctrine was employed to legitimize the lowering of the voting age for legislative elections from 21 to 18 years of age[11] and changes to the RoC's family courts.[12]

(c) With respect to more recent and/or landmark attempts to invoke the doctrine of necessity, it should be noted that this was the case (although this time unsuccessfully) in a rather different context, that of the austerity measures adopted in the RoC in response to the economic meltdown caused by the dual budgetary and banking sector crises in the RoC, in early 2013.[13] In *Alexandros Phylaktou v. the Republic of Cyprus*,[14] the Attorney General of the RoC abortively invoked *Mustafa Ibrahim*, to argue that the horizontal Civil Service salary cuts mandated by the Government (also in respect of judges) were legally warranted as reactions to the imperative of an acute "economic necessity" caused by exceptional (economic) circumstances. Rejecting the Attorney General's argument, the Court ruled that the law imposing pay cuts on judges was unconstitutional and could not be salvaged by invoking the doctrine of necessity.[15]

EU accession, see the work of the Jean Monnet Centre of Excellence for the Rule of Law and European Values CRoLEV available at: https://crolev.eu/. See also, *ex multi*, Polyvios Polyviou, "The case of Ibrahim the Doctrine of Necessity and the Republic of Cyprus" (Nicosia: Chrysafinis and Polyviou, 2015).

[9] The Constitution of the RoC distinguishes between basic Articles, which cannot be amended, and non-basic ones, which are subject to amendment following the dedicated (special 2/3 majority) constitutional process of Article 182(3). The basic Articles are exhaustively listed in Annex III of the Constitution. The permissibility of amending the basic Articles of the Constitution by invoking the legal doctrine of necessity is a complex question, which does not lend itself to an analysis in the responses to this Questionnaire, beyond some thoughts are as expressed in this report.

[10] *Koulountis and others v House of Representatives* [1997] 1 CLR 1026. The amendment of the Constitution at stake in that case related to Article 66 para. 2 with the addition of a provision allowing for the filling, by the first runner-up candidate of a parliamentary seat left vacant for any reason, rather than running a new election to fill the vacant seat.

[11] *President of the Republic v. House of Representatives* [1986] 3 CLR 1439.

[12] *Nicolaou and Others v. Nicolaou and Other* (1992) 1 CLR 1338.

[13] For a concise account of the acute dual crisis that hit Cyprus in 2013, see: *ex multi*, Phoebus Athanassiou and Angelos Vouldis, *The European Sovereign Debt Crisis: Breaking the Vicious Circle Between Sovereigns and Banks*. Routledge, 2022. See also: Stéphanie Laulhé Shaelou and Phoebus Athanassiou, "Cyprus Report," in Gyula Bàndi et al., European Banking Union (FIDE XXVII Congress Proceedings, Vol. 1, Wolters Kluwer, 2016), pp. 269–297.

[14] Αλέξανδρου Φυλακτού, Επαρχιακό Δικαστήριο Πάφου και Κυπριακής Δημοκρατίας, μέσω Γενικού Λογιστή Υπόθ. 397/2012397/2012 και 480/2012.

[15] For a consideration of emergency measures with respect to cuts in salaries and pensions in the public sector during the financial crisis in Cyprus, see: Constantinos Kombos and Stéphanie Laulhé Shaelou, "The Cypriot Constitution under the Impact of EU law: An Asymmetrical Formation," in *National constitutions in European and global governance: Democracy, rights and the rule of law*, edited by Anneli Albi and Samo Bardutzky. Asser Press, 2019 (Kombos and Laulhé Shaelou

(d) It is important to understand the terminology in the context of the existential application of the doctrine of necessity to the RoC, ongoing for the past 50 years and pre-dating EU membership. It appears that the dividing line between an "emergency" and a "necessity" triggering the application of the doctrine of necessity is fluid, suggesting that these two concepts largely overlap in terms of their substantive content. Article 183 exemplifies a "state of emergency" by reference to a "war or other public danger threatening the life of the Republic or any part thereof," whereas, in its jurisprudence, the Court has referred to "an imperative and inevitable necessity or exceptional circumstances" (a formulation that is broad enough to encompass wars or another, serious public dangers, within the meaning of the Cypriot Constitution). What, however, seems clear is that, in practical terms, reliance on Article 183 of the Cypriot Constitution is no alternative for recourse to the doctrine of necessity as a means of addressing constitutionally unforeseen situations: this is because the activation of Article 183 is conditional on bi-communal cooperation, which broke down (irreversibly it seems) in 1963 and has not been restored since, rendering reliance on Article 183, in a situation of emergency/necessity, a practical impossibility, and leaving the doctrine of necessity as the only viable alternative.

Question 2

See our response to Q1 and the references there to Article 183 of the Constitution of the RoC, which identifies a "state of emergency" as the legal basis for the suspension of specific Constitutional provisions and for the adoption, by the Council of Ministers, of temporary "ordinances," possessed of the force of law, in derogation from the regular law-making process.

Question 3

See our response to Q1 and, in particular, the analysis in paragraph (b) on the triggering events for (i) the Proclamation of an Emergency, pursuant to Article 183 of the Cypriot Constitution, and (ii) the application of the doctrine of necessity, subject to the conditions laid down in the jurisprudence of the Cypriot Supreme Court (in this regard, also see our response to Q4).

(2019)), pp. 1396–7.

Question 4

(a) Regarding a state of emergency, within the meaning of Article 183 of the Constitution, its declaration is conditional on a Proclamation of Emergency by the Council of Ministers. Such proclamation shall specify the Articles of the Constitution that are to be suspended for the duration of the state of emergency (right to liberty, right to free movement within Cyprus, inviolability of the home, secrecy of correspondence, compensation for expropriation, right to strike, etc.),[16] and shall be laid before the House of Representatives for its confirmation. Following its promulgation by the President of the Republic (who has a right of veto),[17] it shall be published in the official Gazette of the Republic. Once the above conditions are fulfilled, the Council of Ministers may, if satisfied that immediate action is required, adopt ordinances, possessed of the force of law, that are strictly connected with the state of emergency. Such ordinances shall cease to produce legal effects at the expiration of the state of emergency (unless revoked earlier). Proclamations of Emergency shall cease to operate at the end of a two-month period from the date of their confirmation by the House of Representatives unless the House, at the request of the Council of Ministers, decides to prolong their duration (subject to a Presidential veto).

(b) Regarding the application of the doctrine of necessity, it follows from the jurisprudence of the Supreme Court that the following pre-requisites must be satisfied for the doctrine to be validly invoked: (i) an imperative and inevitable necessity or exceptional circumstances must apply; (ii) there should be no other remedy available; (iii) the measure taken must be proportionate to the necessity, and (iv) the measure in question must be of a temporary character, limited to the duration of the exceptional circumstances.[18] Significantly, the author of the "measures" to which the Supreme Court referred in *Mustafa Ibrahim* is not the Supreme Court itself but, rather, another branch of Government: as a commentator has astutely observed, referring to the *Mustafa Ibrahim* judgment, "the Court's role was confined to upholding a measure promulgated by another institution of government, in this case, the Parliament of Cyprus."[19] It is implicit in the above (and there is plentiful judicial precedent to back this) that measures adopted by the Executive branch of Government would also be covered by the legal doctrine

[16] Significantly, Article 33(1) of the Constitution stipulates that fundamental rights and liberties cannot be limited beyond the Constitutional provisions relating to the Proclamation of a state of emergency.

[17] In truth, the body in which the power to issue a Proclamation of Emergency under Article 183 is vested is the Council of Ministers, which, under the Constitution, is to consist of 7 Greek Cypriot and 3 Turkish Cypriot members. Similarly, the decision of the Council of Ministers is subject to the veto power of the President, who is to be a Greek Cypriot, and/or the Vice President, who is to be a Turkish Cypriot.

[18] *Attorney General of Cyprus v. Mustafa Ibrahim* [1964] Cyprus L.R. 195, 265.

[19] Hogg (1989), p. 262.

of necessity, as applied in the RoC. Indeed, one of the criticisms levelled against the doctrine of necessity is that it "provides the foundation for the court's granting (of) *wide discretion to the executive* [emphasis is ours]."[20]

(c) Ordinances enacted on the basis of the doctrine of necessity follow the procedure prescribed in the Cypriot Constitution for enacting regular laws or, where relevant, for laws amending the Constitution (except for the non-involvement in them of Turkish Cypriot elected representatives).

(d) The Supreme Court's approach to the doctrine of necessity suggests that the Court perceives that doctrine as an *autonomous source of law* rather than as a mere defence, based on public good considerations in situations of emergency.[21] Academics, including some who do not challenge, as a matter of principle, the doctrine of necessity, have been critical of its *concrete application* by the Court, suggesting that of the four requirements for its activation the last three have been largely ignored by the Court in its jurisprudence or merely paid lip service to (including in *Mustafa Ibrahim* itself).[22]

Question 5

(a) There is some legal backing at the level of the European Court of Human Rights (hereinafter ECtHR) for the application in the RoC of the doctrine of necessity. In *Aziz v. Cyprus*[23] the ECtHR implicitly approved the existence of the doctrine of necessity by accepting the need for legal mechanisms through which to address "the anomalous situation that began in 1963."

[20] Nicos Trimikliniotis, "The Proliferation of Cypriot States of Exception: The Erosion of Fundamental Rights as Collateral Damage of the Cyprus Problem," *The Cyprus Review*, vol. 30, issue 2, 2018, p. 43, at 44. See *contra* Emilianides (2024), p. 44, who argues that "the appropriate organ may take such steps within the nature of its competence as are required to meet the necessity."

[21] In this regard, also see: Criton Tornaritis, *Peculiarities of the Constitution of Cyprus and their impact on the smooth functioning of the State* (in Greek), Nicosia, 1980, Annex I, at 38.

[22] Critics of the doctrine who (also) challenge it on *grounds of principle* include Özersay Kudret, "The Excuse of State Necessity and its Implications on the Cyprus Conflict," *Perceptions: Journal of International Affairs*, vol. 9, no. 4, 2004, pp. 31–70, 31; and Zaim Necatigil, *The Cyprus Question and the Turkish Position in International Law*. OUP, 1993, pp. 64–65. Critics of the doctrine who question, instead, its *concrete application* include Nasia Hadjigeorgiou and Nikolas Kyriakou, "Entrenching hegemony in Cyprus: The doctrine of necessity and the principle of bicommunality," *Constitutionalism under Extreme Conditions: Law, Emergency, Exception,* edited by Yaniv Roznai and Richard Albert, Springer, 2020; and Christos Papastylianos, "The Cypriot Doctrine of Necessity and the Amendment of the Cypriot Constitution: The Revision of the Unamendable Amendment Rules of the Cypriot Constitution Through a Juridical Coup d'État," *ICL Journal*, vol. 17, no. 3, 2023, pp. 313–336.

[23] *Aziz v. Cyprus* (2005) 41 EHRR, 11, para. 26. The case arose from Cypriot legislation that permitted the applicant, a Turkish Cypriot, to vote in national elections although, in practice, he could not (as a Turkish Cypriot, he was only entitled to register on a list of Turkish Cypriot voters and to vote for a Turkish Communal chamber, which have not existed since 1963). The applicant claimed that the exclusion, on practical grounds, of his right to vote was a violation of human rights.

However, the ECtHR also ruled (as it already had in its earlier judgment in *Selim v. Cyprus*)[24] that the "doctrine of necessity" must be exercised in a manner that does not violate the nucleus of fundamental rights or the principle of equality, compelling the RoC to introduce amendments to its national law, consistent with the applicant's arguments.[25] In so doing, the ECtHR also affirmed the validity and continuing relevance of the necessity and proportionality legs of the doctrine of necessity, as per the Court's line of jurisprudence since *Mustafa Ibrahim*.[26]

(b) It is not without interest that at least one of the amendments to the Cypriot Constitution (lowering of the age for voting – see our response to Section 1, Q1, paragraph (b), and fn. 11 thereto), presented under the guise of the doctrine of necessity, was declared constitutional by the Supreme Court, as a legitimate attempt to adapt the Constitution to the obligations arising from the European Convention of Human Rights (of which the RoC is a signatory).

Question 6

(a) To the knowledge of the Authors no such precedents existed at the time of answering this Questionnaire.

(b) Certain aspects of the discussion around the austerity measures adopted in the RoC in response to the economic meltdown caused by the dual budgetary and banking sector crises in the RoC in the 2012–2013 period (see Q1(c) above), could also be of relevance to this question, even if not providing an exact answer to it. The Cypriot authorities had engaged in talks with international lenders in July 2012, to agree on an Economic and Financial Adjustment Programme. However, this was not agreed until after February 2013, when conditions had deteriorated significantly, notably for the two largest Cypriot banks, the Cyprus Popular Bank (Laiki) and the Bank of Cyprus (BoC). On 15 March 2013 the Eurogroup agreed on an "upfront one-off stability levy applicable to resident and non-resident depositors," covering insured and uninsured deposits alike. On 25 March, following widespread opposition to the proposed bank levy and the Cypriot Parliament's unanimous rejection, on 19 March 2013, of draft legislation implementing it, the Eurogroup revisited its earlier decision, declaring the inviolability of insured deposits, but making the granting

[24] Application no. 47293/99, Judgment of 16 July 2002.

[25] See: Law on the exercise of the right to elect and be elected by the members of the Turkish Community who have their normal residence in the government-controlled areas (Temporary Provisions) Law 2(I)/2006, 21 January 2006.

[26] See also: Stéphanie Laulhé Shaelou, *The EU and Cyprus: Principles and strategies of full integration*, vol. 3 (Studies in EU External Relations), Brill/Martinus Nijhoff Publishers, Leiden, 2010 (Laulhé Shaelou 2010), p. 254.

of financial support to Cyprus dependent on the prior resolution and recapitalisation of the two Cypriot banks without use of public funds. To implement the second Eurogroup decision, the Central Bank of Cyprus, in its capacity as bank resolution authority, issued several resolution decrees, based on powers conferred upon it under Cyprus's Resolution of Credit and Other Financial Institutions Law of 22 March 2013. These decrees mandated, inter alia, deposit haircuts (for uninsured deposits in Laiki), deposit freezes (for uninsured deposits in BoC), as well as the sale of some of the two banks' business. As a result, Cyprus reached an agreement on a comprehensive Economic and Financial Adjustment Programme with its European partners and the International Monetary Fund (IMF) in March 2013, and exited its Programme within three years from its start (31 March 2016), having received some EUR 7.3 billion (out of a total envelope of EUR 10 billion).[27]

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

See our response to Section 1, Q4, and, in particular, the analysis in paragraph (a). The Cypriot Constitution was the product of high-level agreements between Greece and Turkey in Zurich, which were subsequently endorsed by the Greek and Turkish Cypriot leaders in London. The Constitution was written from scratch, and it represented a compromise, premised on the assumption (long since proven wrong and/or untenable) that the two communities on the island would cooperate for the governance of the RoC and for its smooth operation as a functioning, democratic State, bound by the rule of law.

Question 2

See our response to Section 1, Q4, and, in particular, the analysis in paragraph (a) thereof.

[27] Of these funds, EUR 6.3 billion were disbursed by the ESM, and EUR 1 billion by the IMF. Cyprus had fully repaid its IMF loan of EUR 1 billion by February 2020. See: Stéphanie Laulhé Shaelou and Phoebus Athanassiou, "Cyprus's EU membership, twenty years on: A statement of motives and an assessment of benefits," *European Foreign Affairs Review*, vol. 29, no. 3, 2024 p. 231; see also: n. 13 above.

Question 3

As per its Constitution, the RoC is a bi-communal but unitary state, with single (but shared) government institutions.[28] Following the events of 1963 and 1974, State Institutions have been staffed by Greek Cypriots, in derogation from the letter of the Constitution but in line with the spirit of Article 179 thereof, which, according to the Court in *Mustafa Ibrahim*, is the implicit basis for the doctrine of necessity.

Question 4

(a) Article 169(3) of the Constitution grants to ratified Treaties superior force against any conflicting municipal law (also see paragraph (c), *infra*). This rule was supplemented by the adoption of Law No. 35(III)/2003, with which the House of Representatives approved the ratification of the EU Accession Treaty. Article 4 of the Law states that, "[t]he rights and obligations deriving from the Treaty [of Accession] are directly applicable in the Republic and take precedence over any contrary legal or regulatory provision." The formula used there guaranteed the primacy of EU law against all conflicting *national legal acts* but left unresolved the delicate question of the hierarchy between EU law provisions and *national Constitutional provisions*.

(b) One year after the RoC's accession to the EU, a judgment of the Supreme Court found that the Framework Decision for the European Arrest Warrant (EAW) did not prevail over Article 11 of the Constitution, which precluded the extradition of Cypriot citizens.[29] This judgment prompted a Constitutional amendment in 2006 (hence, two years *after* the RoC's accession to the EU) in order to provide for the supremacy of EU over national Constitutional law. This was achieved by supplementing Article 1 of the Constitution (on the RoC's Constitutional regime), by a new Article 1A, which states that, "[N]o provision of the Constitution shall be deemed to annul laws enacted, acts done or measures taken by the Republic which become necessary by reason of its obligations as a member state of the European Union."[30] Given the insertion, in the Constitution, of new Article 1A,

[28] Article 1 of the Constitution states that, "[T]he State of Cyprus is an independent and sovereign Republic with a presidential regime, the President being Greek and the Vice-President being Turk elected by the Greek and the Turkish Communities of Cyprus respectively as hereinafter in this Constitution provided."

[29] *Attorney General v. Kostas Konstantinou*, Civil Appeal No. 294/2005.

[30] It bears noting that Article 1 is a basic Constitutional provision, within the meaning of Article 182, and Annex III thereto, one that cannot in any way, be amended, whether by way of variation, addition or repeal. Views in Cypriot scholarship are divided in terms of the constitutionality of the insertion of Article 1A in the constitution: some have argued that the insertion of new Article 1A cannot be considered to be a variation, repeal or addition to the text of article 1, since it leaves its

by virtue of the Fifth Constitutional Amendment, it seems likely that any situation of conflict between the implementation of Constitutional provisions and EU law (including those catering for a state of emergency) would be resolved in favour of the latter.

(c) Turning to situations of conflict between the implementation of Constitutional provisions and international law the following remarks are apposite. It should follow from Article 169(3) of the Cypriot Constitution that the RoC is a *monist* jurisdiction: that provision states there that international treaties, conventions and agreements have, as from the moment of their publication in the Official Gazette of the Republic, superior force to *any* municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto (reciprocity for bilateral agreements). It follows from this provision that in case of conflict between international treaties, conventions or agreements, including – we argue – those catering for a state of emergency, on the one hand, and municipal law, on the other hand, the former should prevail, although an alternative reading has been provided with respect to international treaties *per se*, showing the complexity of the Cyprus legal system.[31]

Question 5

(a) In its ruling in *Ambrosia Oils v. Bank of Cyprus*,[32] the Court developed the doctrine of necessity by invoking it as legal justification for legislative measures that purported to impose limitations on the enjoyment of fundamental rights (in that particular case, the right to property). The case in question concerned the constitutionality of Law 24/1979, which suspended the right of creditors to recover debt from debtors displaced from the occupied northern part of Cyprus, following the events of 1974, and to charge interest, during a six-year moratorium period stretching from 1974 to 1982. The Court upheld the constitutionality of the relevant law by invoking the doctrine of necessity, suggesting that the said doctrine can be used both as a shield, to immunise the branches of the government against charges of inaction on account of the impossibility to undertake action in light of a situation covered by the doctrine of necessity, and as a sword, to legitimise positive measures adversely affecting the rights of individuals in pursuit of the general good amidst a state of emergency covered by the doctrine

wording intact (see: Papastylianou, 323–324), while others have taken the view that "there is a clear question about the constitutionality of the Law introducing the Fifth Constitutional Amendment," adding that there has never before or since been any amendment of a basic Constitutional provision (Kombos and Laulhé Shaelou, (2019), p. 1382).

[31] See: *contra* Emilianides (2024), p. 37.

[32] *Ambrosia Oils v. Bank of Cyprus* [1983] 1 CLR 55. For a critical assessment of the Court's ruling in *Ambrosia*, see: Hadjigeorgiou and Kyriakou, 2020.

of necessity. The subsequent ruling of the Supreme Court in *Solomonides*[33] affirmed the Court's earlier stance in *Ambrosia*.

(b) In light of the ECtHR's rulings in *Selim* and *Aziz* it seems likely that one of the factors that the Court will need to pay particular attention to when assessing, in its future jurisprudence, the legality of measures presented under the guise of the doctrine of necessity is the effective protection of fundamental rights.[34]

Question 6

(a) See our response to Section 1, Q5, and, in particular, our account of the precedent set by the ECtHR in *Aziz*, by upholding the applicant's argument that the RoC's failure to enact legislation to guarantee the practical exercise of his right to vote was a violation of human rights, against which the doctrine of necessity provided no adequate defence for the benefit of the RoC.[35]

Section 3: Statutory/executive emergency law in the Member States

Question 1

The only explicit legal framework on emergency situations is that of Article 183 of the Cypriot Constitution, on a "state of emergency," analysed earlier in this Questionnaire. For its part, the judicially endorsed doctrine of necessity is said to emanate from Article 179 thereof, which, according to the Court in *Mustafa Ibrahim*, provides its implicit basis.

Question 2

In the case of the RoC, the only existing framework for addressing emergencies/exceptional circumstances is constitutional, meaning that there is no scope for conflicts between that framework and other, competing legal frameworks (of which none are in existence).

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[33] *Solomonides v. Minister of the Interior as the Custodian of Turkish Cypriot Properties*, (2003) 1B CLR 1275. This ruling is authority for the proposition that the doctrine of necessity can provide the basis for the imposition of limits to the enjoyment, by Turkish Cypriots, of their property rights regarding real estate located in areas under the effective control of the RoC.

[34] See: Laulhé Shaelou (2010), pp. 140 and 201.

[35] For a consideration of the protection on socio-economic rights deriving from EU law, see: Kombos and Laulhé Shaelou (2019), pp. 1392–8.

Question 3

See our response to Section 1, Q4.

Question 4

See our response to Q4, which points to the conclusion that EU-based emergency measures would in no way alter the balance and distribution of powers between the RoC and the EU, given the constitutionally enshrined doctrine of supremacy of EU over national (including constitutional) law guaranteed, since 2006, by Article 1A of the Cypriot Constitution.

Section 4: Judicial review of emergency powers in the Member States

Question 1

(a) Final jurisdiction to adjudicate over challenges against measures taken to address emergency situations is vested in the highest courts as described in points (b) and (c) below. However, all judges, including those serving in lower courts, are both entitled and obliged to assess, if needed, the constitutionality of laws at stake in proceedings over which they preside.
(b) Until the merging of the High Court and the Supreme Constitutional Court into a single Supreme Court, in accordance with the provisions of Law 33/64 on the Administration of Justice, final jurisdiction in these matters was vested in the Supreme Constitutional Court, pursuant to Article 144 of the Constitution. It bears noting that the law whose constitutionality was at stake in the proceedings before the Court in *Mustafa Ibrahim* – the foundational judgment for the judicial recognition, in the RoC, of the doctrine of necessity – was Law 33/64, which, amongst others, merged into a single Supreme Court the former High Court and Supreme Constitutional Court.
(c) Recently, in line with the Recovery and Resilience Programme of Cyprus, the Cypriot justice system has undergone several fundamental reforms including at the higher level.[36] Since 1 July 2023, the court system is composed by the following first instance courts, namely six District Courts, six Assize Courts, the Administrative Court, the Administrative Court of International Protection, the Commercial Court, and the Admiralty Court. Other specialised courts include family courts, rent control tribu-

[36] https://www.gov.cy/mjpo/en/justice-sector/legal-affairs-unit/courts-reform-strengthening-the-justice-system/#:~:text=In%20order%20to%20improve%20judicial,parts%20of%20a%20coherent%20plan

nals, industrial disputes tribunals, and a military court. The second-tier court is the Court of Appeal, which deals with appeals against judgments at first instance in civil, commercial and administrative matters, and the third instance courts are now the Supreme Constitutional Court and the Supreme Court. Some progress has been made towards the reinforcement of the third tier of the judiciary in the RoC, in line with European standards. As of 1 July 2023, the Cyprus judicial system is based again on two distinct highest courts of the RoC, following the Seventeenth Amendment to the Constitution, Law 103(I)/22 combined with the amendment of Law 33/64 on the Administration of Justice by Law 145(I)/22.[37] In terms of jurisdictions at the highest level, the Supreme Constitutional Court rules on claims of unconstitutionality and conflicts of competences among public authorities, and acts as a third instance court in administrative disputes. On the other hand, the Supreme Court as the highest appellate court hears claims at third instance in all civil and commercial matters, as well as cases under the jurisdiction of specialised courts/procedures.[38]

Question 2

No procedural specificities applied at the time of responding to this Questionnaire.

Question 3

(a) The standard of review is the one set out by the Court in *Mustafa Ibrahim* and it involves an assessment, by the Court, that all four legs of the test in *Mustafa Ibrahim* are fulfilled. In its ruling in *Papadopoulos*,[39] a majority of the Supreme Court decided that the judiciary is competent to assess not only the constitutionality of measures adopted in response to a situation of emergency but, also, the very existence of the alleged situation of emergency that inspired their adoption.

(b) As mentioned earlier in this Questionnaire, one of the criticisms levelled against the Court for its practical application of the four-leg test in *Ibrahim Mustafa* is that the Court has largely ignored or merely paid lip service to the last three, focusing instead on the first leg (i.e., ascertaining that an imperative and inevitable necessity or exceptional circumstances apply in a particular situation).

[37] See: Emilianides (2024), pp. 133–5.
[38] See: European Commission, 2024 Rule of Law Report on Cyprus, p. 3 and fn. 7.
[39] *Papadopoulos v. the Republic* 1985 C.L.R. 165.

Question 4

(a) Of the four legs of the *Ibrahim Mustafa* test, the third one is concerned with the principle of proportionality (while the second one is concerned with the related principle of necessity).

(b) As construed in Cyprus, the principle of proportionality requires striking a balance between a measure that pursues a particular objective and the consequences of that measure. Where a public authority is called upon to choose between two or more measures that would satisfy, in equal measure, that objective, that public authority must choose the measure that is the least intrusive or that produces the least number of adverse effects. The principle of proportionality was given a prominent status in Cypriot law through the codification, by Law 158(I)/99, of the general principles of Cypriot Administrative Law (see Article 52 thereof). That said, the principle of proportionality enjoyed, already before the entry into force of Law 158(I)/99, the status of an unwritten principle of law – reflected in the references to it by the Supreme Court in *Mustafa Ibrahim* – as one of the conditions to be met for the doctrine of necessity to be validly invoked in a particular case. It has aptly been observed by two commentators that "the overall effect is that the principle of proportionality is not just a general principle of law with constitutional status, but it also constitutes an integral criterion for the assessment of the foundation of the Cypriot Constitution post-1964, that is, the doctrine of necessity."[40]

(c) The principle of proportionality, as applied by Courts in Cyprus, is aligned with the construction of that same principle by the Court of Justice of the EU, which, in its jurisprudence, has interpreted the principle of proportionality – enshrined in Article 5(4) of the Treaty on European Union – as a boundary to the actions of the EU Institutions and Agencies, and as a complement to the principles of subsidiarity and conferral.[41] The criteria for applying the principle of proportionality are set out in the Protocol (No. 2) on the application of the principles of subsidiarity and proportionality annexed to the treaties and, in case of a violation of the principle, applicants may – provided the conditions are met – challenge the validity of relevant measures before the CJEU.

[40] Kombos and Laulhé Shaelou (2019), p. 1391.

[41] On the principle of proportionality as a general principle of EU law see, generally, Takis Tridimas, *The General Principles of EU Law*, OUP, 2006, Chapter 3.

Section 5: Implementation of EU emergency law in the Member States

Question 1

(a) EU measures governing emergency situations are likely to impose restrictions on fundamental rights and freedoms. In accordance with the Cypriot Constitution, restrictions to fundamental rights and freedoms are only possible following a Proclamation of Emergency made in accordance with Article 183. This is clearly stated in Article 33(1) of the Constitution, according to which the "subject to the provisions of this Constitution relating to a state of emergency, the fundamental rights and liberties guaranteed by this Part shall not be subjected to any other limitations or restrictions than those in this Part provided." Considering that Article 183 cannot be activated, for the reasons explained earlier in the responses to this Questionnaire, a narrow interpretation of the Constitution can only lead to the conclusion that measures, whether mandated by the national authorities of the EU, that purport to restrict the enjoyment of fundamental rights are unconstitutional and could not be validly taken even if their authors were to invoke the doctrine of necessity.

(b) For an illustration of the legal challenges posed in the Cypriot legal order by measures purporting to restrict the enjoyment of fundamental rights and freedoms guaranteed by the Cypriot Constitution, see our analysis in our response to Q2, below, prompted by measures taken in the RoC in response to the COVID-19 pandemic, inter alia on the basis of guidance/directions by the EU Institutions.

Question 2

(a) Article 183 of the Constitution does not specifically mention public health reasons as justification for proclaiming an emergency. That said, it is likely that public health reason could legitimately provide the basis for a "Proclamation of Emergency." Reliance on Article 183 of the Constitution was not an option in the context of the national response to the COVID-19 pandemic, for the reasons explained earlier in our responses to this Questionnaire.

(b) In March 2020, the Cypriot Government relied, instead, on the Quarantine Law of 1932 – a colonial period law that predated the 1960 Constitution – as the enabling legal basis for its response to the public health emergency posed by the COVID-19 pandemic. What made this possible was Article 188(1) of the Constitution, which allows legislation predating the Constitution to continue to apply unless modified or repealed. The Quarantine Law of 1932 empowered the Governor of Cyprus (by implication,

post-independence, the Government of the RoC) to declare an area as an infected area and to adopt all measures necessary to tackle the resulting public health emergency, including measures taken in pursuit of guidance/directions of the EU Institutions and agencies, and the World Health Organisation. The Government sub-delegated[42] special powers to the Ministry of Health, authorising the Minister to issue time-bound *decrees* setting out COVID-19 pandemic-specific restrictions and prohibitions.[43] Thus, the measures adopted in the RoC to tackle the COVID-19 pandemic resulted from the exercise of executive power, qualifying as "acts of government," which, in the RoC, are not subject to judicial review under Article 146 of the Constitution.[44]

(c) The measure that attracted the greatest degree of criticism was a Ministry of Health decree of 15 March 2020 introducing a requirement for Cypriot citizens to present a medical certificate stating they were free of Coronavirus infection in order to enter the country from abroad. That measure, plus a 14-day quarantine requirement (regardless of the presentation of a free-from-infection medical certificate), was contested as its effect was to prevent Cypriot citizens living abroad from being repatriated. This measure was deemed to be in violation of Article 14 of the Cypriot Constitution, which states that "no citizens shall be banished or excluded from the Republic under any circumstances." More broadly, to the extent that this and its subsequent decrees did not merely *specify* but, in fact, *established* restrictions on the enjoyment of fundamental rights and freedoms, their constitutionality was deemed questionable, for the reasons set out above.[45]

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[42] This sub-delegation was not based on the enabling law, but on Law 23/1962 on the Delegation of the Exercise of Powers Derived from Any Law. The Cypriot Government routinely makes use of this law, a practice that Cypriot Courts have declared constitutional.

[43] These encompassed restrictions to free movement, the closure of public markets, prohibitions to attend places of worship and traditional celebrations, the closure of retail businesses and schools, the closure of check-points along the ceasefire line separating the territory of the RoC under the effective control of the government and those areas not falling under its effective control and curfews.

[44] See: *Louca v. The President of the Republic* (1983) 3 CLR 783.

[45] For a critical assessment of the constitutionality of the Cypriot Minister of Health decrees regarding the COVID-19 pandemic, see: Costas Stratilatis, "The COVID-19 Pandemic in Cyprus: A Problematic Legal Regime, and the Potential of Rule of Law in Emergencies," *Democracy after COVID*, edited by Kostas Chrysogomos and Anna Tsiftsoglou, Springer, 2022, pp. 91–109. It bears noting that two students submitted a request for an interim order of suspension of a decree precluding their repatriation to Cyprus. However, the administrative court dismissed the request: as the decrees were acts of government (as opposed to administrative measures) they were not subject to judicial review (*Patsalidi v Republic of Cyprus*, case no. 301/2020, judgment of 16 April 2020, ECLI:CY:DD:2020:18.). See also: Stephanie Laulhé Shaelou and Andrea Manoli, "The Islands of Cyprus and Great Britain in times of COVID-19 pandemic: Variations on the Rule of Law 'in and out' of the EU." 2020, https://ruleoflawmonitoringmechanism.eu/posts/the-islands-of-cyprus-and-great-britain-in-times-of-covid-19-pandemic-variations; and Stephanie Laulhé Shaelou and Andrea Manoli, "A Tale of Two: the COVID-19 pandemic and the Rule of Law in Cyprus." 2020, https://verfassungsblog.de/a-tale-of-two-the-covid-19-pandemic-and-the-rule-of-law-in-cyprus/

Finland

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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

The Constitution of Finland and other relevant laws regulating emergency measures define emergencies, literally "exceptional circumstances" (*poikkeusolo*), as a situation in which the Government may be authorized to use emergency powers. Section 23(1) of the Constitution of Finland (*Suomen perustuslaki*, 731/1999, this Section is amended by 1112/2011), "Basic rights and liberties in situations of emergency," establishes that provisional exceptions are necessary "in the case of an armed attack against Finland or in the event of other situations of emergency." Currently, two relevant permanent parliamentary acts refer to Section 23 of the Constitution, namely the Emergency Powers Act (*valmiuslaki*, 1552/2011) and the Act on the State of Defence (*puolustustilalaki*, 1083/1991). These acts include definitions of emergencies.

The Emergency Powers Act categorizes six emergency conditions that authorize the use of emergency powers, which are provided in the Act. Furthermore, the Act on the State of Defence authorizes the President of the Republic to declare a state of defence "in a time of war against Finland and in the event of internal violent disturbances which seriously affect the maintenance of public order and which seek to overthrow or alter the constitutional order of the State." Such emergencies are truly exceptional as they provide the Government (or, in the case of Act on the State of Defence, the President of the Republic) with powers that make provisional exceptions to basic rights and liberties.

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The regulation of emergencies in the Finnish legal order builds upon the dichotomy between, on the one hand, normal or ordinary circumstances and, on the other hand, exceptional circumstances. The regulation of the latter in Section 23 of the Constitution is inspired by the idea of a "public emergency" which threatens "the life of a nation" foreseen in Article 4 of the International Covenant on Civil and Political Rights and in Article 15 of the European Convention on Human Rights. This approach is visible also in the approach of the Constitution to emergency regulation as concerned with derogating from fundamental rights. That said, the Emergency Powers Act and the Act on the State of Defence regulate various crisis situations comprehensively.

A definition for "crisis" as such seems to be lacking in the Finnish legislation. There are not many instances in which crisis as an extraordinary situation is mentioned. Examples include the laws regarding the use of intelligence gathering practices during crises, such as the Police Act (*poliisilaki*, 872/2011, chapter 5, section 3), Act on Telecommunications Intelligence in Civil Intelligence (*Laki tietoliikennetiedustelusta siviilitiedustelussa*, 582/2019, section 3), and the Act on the Supervision of Social Welfare and Health Care (*laki sosiaali- ja terveydenhuollon valvonnasta*, 741/2023, chapter 3, section 16). However, these do not authorize the use of extraordinary powers, at least not in the sense of making provisional exceptions to basic rights and liberties.

While there are sector-specific ordinary laws regarding emergencies, such as the Communicable Diseases Act (*tartuntatautilaki*, 1227/2016), the Finnish emergency framework is based on a dichotomy between a state of emergency and a state of normalcy. Extraordinary measures are limited to exceptional circumstances, but only if they cannot be governed by means of normal legislation. This "principle of normalcy" was visible during the pandemic, as the state of emergency was declared only for a limited period of time.[1] The Constitutional Law Committee of the Parliament (*perustuslakivaliokunta*) has also repeatedly emphasized that priority must always be given to the use of ordinary legislation and powers susceptible to affect the enjoyment of fundamental rights as little as possible.[2]

[1] Farzamfar Mehrnoosh, Salminen Janne, and Tuominen Janna, "Governmental Policies to Fight Pandemics: Defining the Boundaries of Legitimate Limitations on Fundamental Freedoms: National Report on Finland," *Governmental Policies to Fight Pandemic*, edited by Vedaschi Arianna. Brill Nijhoff, 2024, 180, 180–181.

[2] See, for example, PeVM 9/2020 vp, p. 3.

Question 2

Finnish law provides for a general constitutional and legislative framework that covers emergency situations.[3] Section 23 of the Constitution of Finland regulates the use of emergency powers and that the grounds for using them have to be laid down by an Act of Parliament. Currently, the Emergency Powers Act and the Act on the State of Defence are such acts. The former regulates emergency governance in general and the latter armed attacks and similar emergencies. However, the Emergency Powers Act is an exceptive enactment that deviates from the Constitution of Finland and Section 23 specifically.[4] Attempts to amend the Act to conform with the Constitution have been made to provide for a general constitutional framework.[5] The practice in developing the emergency framework has been that emergency provisions cohere under one law rather than dispersing emergency authorizations under policy-specific legislation.[6]

In the wake of Russia's war of aggression against Ukraine, the Emergency Powers Act expanded, in 2022, the definition of "exceptional circumstances," and thereby the Act's scope, to encompass various hybrid threats to essential societal functions, such as public decision-making capacity, maintenance of border security and public order, availability of essential social and health or rescue services as well as the supply of energy, water, food, medicines, and other indispensable goods, the provision of essential financial services, the functioning of critical transport systems, or yet threats to the supporting data and communication technology services and systems connected to the above.[7]

Furthermore, at present, the Emergency Powers Act is under comprehensive review at the Ministry of Justice. The aim is to update the Act regarding its scope, obligations on preparedness for public authorities, compatibility with the Constitution especially as regards derogations from fundamental rights and delegated norm-giving powers, as well as procedures for its deployment and the organization of institutional powers.[8]

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[3] Brunila Tuukka, "Legislation, Emergencies and the Need for Swift Action: Tensions between the Executive Branch and Emergency Legislation during the COVID-19 Pandemic in Finland," *The Theory and Practice of Legislation* (2024), p. 1.

[4] On "exceptive enactments," that is, acts which derogate from the Constitution without formally amending it, see, for example, Ojanen Tuomas, "Constitutional Amendment in Finland," *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, edited by Xenophon Contiades, Taylor & Francis Group, 2012, pp. 93–113, 94.

[5] Jonsson Cornell Anna and Salminen Janne, "Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland," *German Law Journal*, 19 (2018), pp. 219, 240–241.

[6] HE 248/1989 vp, 6.

[7] Laki valmiuslain muuttamisesta (706/2022).

[8] See: Memorandum on the establishment of the working group responsible for the review of the Act, 29 September 2022 (in Finnish): https://valtioneuvosto.fi/hanke?tunnus=OM015:00/2022.

Other provisions regarding emergency preparation exist in policy-specific legislation. These are mostly laws requiring specific sectors, such as health care, to prepare for contingencies. It should be underlined that the Finnish emergency law framework is based upon the principle that the emergency powers can only be deployed when ordinary legislation does not provide sufficient means to respond to a crisis (principle of normalcy, referred to above). Currently, the government is also reviewing the possibilities to respond to crises through ordinary legislation within the Finnish legal order.

Question 3

The Emergency Powers Act includes six emergency conditions: (1) an armed attack, (2) a threat of an armed or a similarly serious attack, (3) a threat to the livelihood of the population or national economy, (4) a grave natural disaster, (5) a wide-spread contagious disease, (6) a hybrid threat, including attempts to influence society's essential functions resulting in substantial and widespread disruption. Originally, the earlier Emergency Powers Act (1080/1991) included five emergency conditions, of which some have later been subsumed together and some new have been added, such as (5) a widespread contagious disease (in 2011) and (6) hybrid threats (in 2022). The practice developed by the Emergency Powers Act is that emergency conditions should be determined as exactly as possible. Furthermore, emergency powers should only be used when governing by means of ordinary powers and legislation is not enough.[9] For example, the Communicable Diseases Act provides for measures to respond to a contagious disease under ordinary circumstances.

As for the Act on the State of Defence, it can be enforced during a war or equally severe internal disturbance to secure national independence and maintain law and order in Finland.

Question 4

The Constitution is silent about which institution can declare an emergency and according to what procedure.[10] The Emergency Powers Act, however, stipulates a three-phase deployment procedure. According to that procedure (Section 6), if the Government, in cooperation with the President of the Republic, finds that there are exceptional circumstances (i.e., an emergency), in which the

[9] See Brunila (n 6), 10; Salminen Janne, "Finsk Krishantering i Fredstid — Beredskapslagen Tillämpas För Första Gången," *Svensk Juristtidning* (2020), pp. 1116, 1118.

[10] Brunila Tuukka and Salminen Janne, "'Regular Powers Are No Longer Enough' – Checks and Balances in Declaring a State of Emergency According to the Constitution of Finland," *Scandinavian Studies in Law* 70 (2024), pp. 215, 223.

ordinary competences of authorities are not enough, a Government decree (Emergency Powers Act application decree) may provide for the application of the exceptional competences (provisions of Part II).

The Constitution and the Emergency Powers Act require that all decrees issued thereunder are submitted to the Parliament. The Parliament decides whether the Government decree may remain in force or whether it must be repealed in part or in full, and whether it is in force for the intended period or a shorter one. All Emergency Powers Act application decrees that have not been submitted to Parliament within a week of their issuance shall lapse. A decree may be issued for up to six months. According to the Act on the State of Defence, the President of the Republic issues a decree declaring the state of defence and this decree is to be submitted to the Parliament, which may repeal it or let it remain in force.[11]

In addition, according to the terms of Section 23 of the Constitution, basically any other law adopted by the Parliament could declare a state of emergency provided that the requirements in that provision – including the temporary nature of the fundamental rights restrictions at issue, their compliance with international human rights obligations, and the presence of exceptional circumstances related to an armed aggression or other serious threat prescribed by law – are fulfilled. Since the Constitution does not establish requirements as to what constitutes an "emergency," the Parliament could in such a case lay down in that act the conditions under which a state of exception prevails.

Question 5

The Emergency Powers Act as well as the Act on the State of Defence define situations of emergency for the purposes of applying these acts. As such, there appears to be limited scope for EU law to influence the definition of situations of emergency in the Finnish legal order. Nevertheless, it has been argued that when applying, for example, the Emergency Powers Act, obligations deriving from EU law should be taken into consideration in its interpretation.[12]

In this regard, it may be noted that, among the Emergency Powers Act's criteria for establishing the presence of "exceptional circumstances" feature emergen-

[11] For a detailed analysis of checks and balances during emergencies, see: Brunila and Salminen (n 13).

[12] See: Heikkonen, Johannes, Kataja Pauli, Lavapuro Juha, Salminen Janne, and Turpeinen Mira,"Valmiuslaki ja perusoikeudet poikkeusoloissa: Valtiosääntöoikeudellinen kokonaisarvio valmiuslain ja perustuslain 23 §:n suhteesta," *Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja* 64 (2018), pp. 38ff.

cies other than of military nature. For example, an economic emergency can be declared in case of a "particularly serious event or threat for the public welfare or the foundations of the country's economic life due to which the essential societal functions are substantially jeopardized." Relatedly, Chapter 5 of the Act provides for possibilities for extensive economic regulation, for example, restrictions on exports, price controls, as well as rationing of raw materials, agricultural products and the energy supply.

It has been observed in literature that the definition of an emergency under the Emergency Powers Act, particularly as regards economic emergencies, is broader than the exceptional circumstances envisaged in Articles 346 and 347 TFEU. This has been interpreted to imply that the restrictive impact of economic or other non-military emergencies on rights derived from EU law are to be assessed in relation to the more specific grounds of justification related to public order and security.[13]

From the perspective of EU law, nationally defined "exceptional circumstances" do not relieve Member States from the observance of EU obligations. Instead, emergency measures are assessed against the various grounds of derogation and justification provided in the Treaties. The European Court of Justice (ECJ) has accepted derogations from rights to free movement within the internal market on grounds of economic threats rising to the level of matters of public security. However, such derogations are subject to the strict observance of the principle of proportionality and, in any event, justifying restrictions on these grounds is not possible where EU legislation fully regulates the issue.[14]

Another question which arises in connection with the economic emergency powers is to what extent Member States may regulate matters which fall within exclusive EU competences.[15] The Emergency Powers Act enables far-reaching regulation of trade with third countries. To the extent its application could encroach upon measures adopted within the EU's common commercial policy – an exclusive Union competence – it may be enquired to what extent, if any, the EU Treaties would tolerate such derogations. While such economic emergency measures could arguably be justified under Articles 346 and 347 TFEU, these provisions only relate to the specific cases of war and related trade measures.

Finally, it can be mentioned that the preparatory works to the Emergency Powers Act have incidentally referred to the "Solidarity Clause" in the EU Treaties, namely Article 222 TFEU, which establishes an obligation on the Union and

[13] Ibidem, pp. 39–40.
[14] Case 72/83, *Campus Oil*, ECLI:EU:C:1984:256, paras. 27 and 37 et seq.
[15] On this point, see also: text under Section 2, Question 4 below.

Member States to provide assistance, when requested, in the event of terrorist attacks, or natural or man-made disasters.[16] Presumably, the underlying indication is that such situations also qualify as emergencies from an EU law perspective.[17]

Question 6

During Finland's EU membership, the constitutional emergency powers under the Emergency Powers Act have only been triggered in the context of the COVID-19 pandemic. In those situations, the emergency powers were not triggered by prior EU action.

As for the joint EU-Member State handling of the pandemic, the most important EU emergency measures with regard to the Member States, for the purposes of the management of the pandemic, may have been the financial support mechanisms, such as the Recovery and Resilience Facility, which were adopted to support the Member States' recovery from the economic impact of the health emergency.[18] Other measures which responded to the economic impact of the pandemic and modified the ordinary regulatory framework included, for example, the loosening of State aid control by the Commission.[19]

However, while many EU measures, such as the "EU Digital COVID Certificate," supplemented national emergency action in the course of the pandemic, none of them appears to have risen to the level of emergency instruments, in a constitutional sense, so that the pandemic could be characterized as having been handled, in Finland, jointly by "EU and national emergency measures."

[16] See: preparatory works to the Emergency Powers Act, HE 3/2008, p. 19. See also: Declaration (no. 37) on Article 222 of the Treaty on the Functioning of the European Union.

[17] Other solidarity mechanisms in the EU Treaties, which could have been mentioned (but have not been) in the preparatory works on the Emergency Powers Act include those of Article 42(7) TEU regarding Member States' obligation of aid and assistance in the case of an armed aggression directed at another Member State, and Article 122 TFEU concerning solidarity in case of shortages of products like energy.

[18] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ 2021, L57, p. 17.

[19] See, for example, Communication from the Commission "Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak," OJ 2020, C91I/1.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

As the highest level of legislation within the Finnish legal system, the Constitution of Finland recognizes, predicts and – to a certain extent – regulates a state of emergency. Section 23, Basic Rights and Liberties in Situations of Emergency, authorizes the declaration of such a state of emergency. Section 23 permits inserting exceptions on fundamental rights if, and only if, it is absolutely necessary and proportional to the aims and objectives. The constitution requires that these exceptional provisions must fully comply with international human rights obligations. Furthermore, with the phrase "in the case of an armed attack against Finland or in the event of other situations of emergency," the legislator's intention has been to expand the instances of states of emergency to more than merely armed conflicts. While such an open-ended list might leave room for interpretation, the Constitution of Finland, nonetheless, establishes boundaries on how the Parliament and parliamentary law is to interpret that an emergency must "pose a serious threat to the nation." Lastly, provisional exceptions must be grounded in law by means of formal legislative acts. Therefore, the Finnish Constitution can be seen as establishing a legalist practice of emergency measures with enforceable exceptions to rights originating from precise delegation of provisional powers, which are granted by acts of parliament or governmental decrees.

While Section 23 is not comprehensive enough to regulate emergencies solely on its own terms, the requirement to constitutionally review decrees upholds legality by giving no room for unregulated, extra-legal, or extra-constitutional emergency law-making. Namely, Section 23 requires that all the governmental decrees concerning provisional exceptions must be submitted to the Finnish Parliament for further parliamentary consideration. As a constitutional rule, the Finnish Parliament has the authority to decide on the legal validity of these governmental decrees. Therefore, the constitution establishes that provisional exceptions cannot go beyond what the Constitution of Finland has explicitly and clearly regulated. Both the Emergency Powers Act, which actually grants more far-reaching powers to the Parliament than this, as well as the Act on the State of Defence include this requirement.

Question 2

Regarding the Emergency Powers Act, a three-phase procedure binds the Government, the President of the Republic and the Parliament together. The

Government and the President declare the emergency together, the Government issues Emergency Powers Act application decrees, and the Parliament reviews any decree issued.

According to the Emergency Powers Act, the Finnish Government, in cooperation with the President of the Republic, may declare a state of emergency, when the criteria for a state of emergency exist. Under emergency conditions, the authorities may exercise only powers that are necessary and proportionate to the objectives pursued. The Finnish Emergency Powers Act provides only a limited set of additional powers. These powers are closely purpose-related. A declaration of emergency as such does not mean that all powers mentioned in the Emergency Powers Act are automatically at the authorities' disposal. The Act, instead, includes a procedure, according to which the Government must first issue a decree stating clearly which powers are needed to handle the emergency. This decree is then subjected to Parliament's scrutiny. If the decree is accepted by the Parliament, the Government can issue further decrees to apply the adopted powers. All these decrees are reviewed by the Parliament ex-post their issuance. In addition, the specific powers in disposal, according to the Emergency Powers Act, are dependent on the emergency in question. *Mutatis mutandis*, the Parliament has similar powers according to the Act on the State of Defence in case the President as the commander-in-chief of the defence forces (Section 128 of the Constitution) issues a decree on the state of defence.

Question 3

Finland is a unitary state. The levels of subnational government do not have any specific role in the decision-making regarding emergencies. However, in the situations of emergency the state, in order to implement the decisions, typically needs to rely on regions and local authorities. For example, healthcare and social welfare services and rescue services are provided by self-governing public entities (wellbeing services county). Regarding the Åland Islands, which is a special autonomous region of Finland with self-government and its own legislative powers, the state has the legislative powers concerning situations of emergencies (Section 27(34) of the Act on the Autonomy of Åland, *Ahvenanmaan itsehallintolaki,* 1144/1991).[20]

[20] See also: statements of the Constitutional Law Committee of the Parliament PeVL 6/2009 vp and PeVL 29/2022 vp, reports PeVM 1/2021 vp ja PeVM 2/2021 vp, and, in addition, the Statement of the Supreme Court OH 2020/168, KKO-HD/97/2021.

Question 4

According to Section 23 of the Constitution emergency exceptions to basic rights and liberties have to be compatible with Finland's international human rights obligations. Both the Emergency Powers Act and the Act on the State of Defence require that the States party to the International Covenant on Civil and Political Rights must be informed if a state of defence is declared or the emergency powers under the Emergency Powers Act are enforced. Same applies regarding the information to the Council of Europe. Article 5 of the Emergency Powers Act provides that the application of the Act must comply with Finland's international obligations. The preparatory works to the Act, while indicating that EU obligations are subsumed under the expression "Finland's international obligations," also specify that the primacy of EU law, nonetheless, follows directly from that law.[21] Therefore, it appears that, in principle, the primacy of EU law measures is acknowledged also in relation to national measures adopted under emergency powers. Under ordinary circumstances, the primacy of EU law is in principle recognized in Finland, even though the Parliament has in certain high-stakes situations recently ignored, or at best paid lip service, to the EU obligations, particularly in the context of border controls.[22] Neither the preparatory works to the Emergency Powers Act, nor any other sources analyse – to the best of our knowledge – the question of a potential conflict of national emergency measures with EU law in any great detail.[23]

The preparatory works have paid more attention – albeit also at a relatively high level of generality – to the impact which the application of national emergency law might have on Finland's obligations under EU law and, in particular, the functioning of the internal market.[24] In this regard, it has been submitted that the grounds for an emergency (or, under the terms of the Act, "exceptional circumstances") are by and large comparable to those providing for derogations from the provisions of the EU Treaties. Thus, an "armed aggression" or its threat within the Emergency Powers Act has been viewed as equivalent to the derogations authorized under Article 347 TFEU on grounds of "war" or "serious international tension constituting a threat of war." As regards other exceptional circumstances, such as a natural disaster or a pandemic, it has been

[21] See: preparatory works to the Emergency Powers Act, HE 3/2008, p. 34.

[22] See, on the issue of primacy in the practice of the Constitutional Law Committee of the Parliament, for example, PeVL 20/2017 vp, pp. 6–7, and PeVL 23/2022 vp, para. 14. cf. Opinion of the Administrative Law Committee of the Parliament on amendments to the Border Guard Act, HaVM 16/2022 vp, p. 15, as well as concerning the Act on Temporary Measures to Repel Instrumentalized Immigration 482/2024, HaVM 15/2024 vp.

[23] In addition, see: Heikkonen Johannes, Kataja Pauli, Lavapuro Juha, Salminen Janne, and Turpeinen Mira, "Valmiuslaki ja perusoikeudet poikkeusoloissa: Valtiosääntöoikeudellinen kokonaisarvio valmiuslain ja perustuslain 23 §:n suhteesta," *Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja* 64/2018, pp. 38ff.

[24] HE 3/2008, p. 21.

considered that the emergency measures could be covered by the derogations allowed under the provisions in the EU Treaties relating to the maintenance of law and order, such as Articles 4 TEU and 72 TFEU, or those relating to derogations to the free movement of goods, persons, services, and capital in Articles 36, 45, 52 and 65 TFEU.[25]

Nevertheless, it has been equally noted that obligations deriving from EU law must be taken into account when applying the Emergency Powers Act in concrete situations.[26] In fact, since the Act does not address questions of EU law, it is implied that such questions must be considered at the stage of introducing concrete measures under the Act. This approach presupposes, of course, that Member States have the competence to adopt measures in the first place. The situation where the EU has exclusive competence has been noted in passing when drafting the preparatory works. Such a situation could arise, in particular, in the case of measures falling within the monetary policy in the Euro area, where the role of the European Central Bank would be relevant in regulating financial and insurance operations.[27] The preparatory works have highlighted, in this respect, that any problems of application regarding EU law should, as a matter of principle, be primarily resolved "via the EU."[28]

Question 5

As explained in response to Section 2, Question 2 above, the Constitution enables, in its Section 23, temporary derogations to fundamental rights in emergencies. That provision provides guidance on how fundamental rights should be protected also in emergencies and on the limits of permissible derogations. When national emergency measures implement EU law, the Charter Fundamental Rights of the European Union (the Charter) is applicable. In that regard, it has been noted in the preparatory works to the Emergency Powers Act that the Charter does not, as indicated in the Explanations to its Article 52,[29] preclude Member States from providing for derogations to fundamental rights in emergencies in accordance with Article 15 of the European Convention on Human Rights (ECHR) or from taking action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Article 4 TEU and in Articles 72 and

[25] See: ibidem, pp. 17–21, and preparatory works to a subsequent amendment of the Act, HE 63/2022 vp, pp. 31–32.

[26] HE 3/2008, p. 22

[27] Ibidem, pp. 21–22.

[28] Ibidem, pp. 19.

[29] Explanations Relating to the Charter of Fundamental Rights of the European Union, OJ 2007, C303, p. 17, 33.

347 TFEU.[30] The judicial protection of fundamental rights in emergencies is addressed in the responses to the questions in Section 4 below.

As for the existence of specific non-judicial bodies, the parliamentary oversight of fundamental rights protection during emergencies is linked closely with the peculiar Finnish system of ex ante constitutional review. In this system, the constitutionality of the legislation is reviewed by the Constitutional Law Committee of the Parliament. It is composed of members of the parliament and it reviews drafts bills and authoritatively interprets the constitutional basis of legislation. Importantly for the purposes of fundamental rights protection, it is also in charge of the review of emergency decrees in the Parliament (see, on that review, response to Question 4 above).[31]

There are also other oversight institutions with responsibilities over fundamental rights protection, namely the Chancellor of Justice of the Government and the Parliamentary Ombudsman.[32] They supervise the legality of the actions of public authorities. During emergencies, both function as institutions that respond to complaints regarding rights violations, upholding protection under law and ensuring due process. A recent law on the division of tasks between these two institutions (330/2022) states that the Chancellor of Justice focuses on supervising the decisions and activities of the Government, the President of the Republic, and legal counsels, while the Ombudsman's supervision concerns mainly other public officials, such as the military, border control, police, intelligence, prisons, and, among others, minority rights.

Question 6

On this question, please see the response to Section 5, Question 2 below, which deals with: (1) the travel restrictions in Finland under the COVID-19 pandemic and the Commission's view on the proportionality of those restrictions with regard to free movement rights, as well as (2) Finland's recent border control measures regarding "instrumentalized migration" which have been considered to contravene certain fundamental rights under the Charter.

[30] HE 63/2022 vp, p. 32.

[31] Brunila Tuukka, Salminen Janne, and Värttö Mikko, "Oikeuden Resilienssi Poikkeuksellisissa Oloissa – Perustuslakivaliokunnan Rooli Oikeuden Ylläpitämisessä Covid-19-Pandemian Aikana" (2023) Lakimies 1011.

[32] Farzamfar Mehrnoosh and Salminen Janne, "The Supervision of Legality by the Finnish Parliamentary Ombudsman during the COVID-19 Pandemic" (2022) 99 Nordisk Administrativt Tidsskrift 1.

Section 3: Statutory/executive emergency law in the Member States

Question 1

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Question 2

Section 23(1) establishes that "the grounds for provisional exceptions shall be laid down by an Act." The Emergency Powers Act is such an act, which, however, deviates from the Constitution. The Act and the subsequent amendments[33] have been legislated by means of exceptive enactment, a procedure enabled by section 73 of the Constitution.[34] Attempts have been made to bring the Emergency Powers Act in line with the Constitution.[35] A reform process (OM015:00/2022) has been initiated recently to solve this issue. Currently, however, the Act still remains an exception to the Constitution.

Question 3

Section 23 subjects an emergency decree to parliamentary oversight. In normal situations, such an explicit oversight regarding single governmental decrees does not exist. This is evident in the difference between governmental decrees in general and those regulated under Section 23. The issuance of governmental decrees in general is regulated under Section 80 of the Finnish Constitution. According to this Section, the President of the Republic, the Government, and a Ministry may issue decrees based on the authorization given to them in the Constitution or in another act. If there are no specific provisions on who should issue a decree, it is issued by the Government. The principles governing the rights obligations of private individuals and other matters that are legislative in nature shall be governed by the legislative acts of parliament. This means that the Constitution includes several reservations for using parliamentary acts on certain issues; for example, the grounds of the rights and obligations of individuals must be enacted in law. Regarding the decrees created under Section 80 of the Constitution, the Parliament has the possibility to consider only the sections on which the decree has been issued. In this context, the main restricting element of the content of decrees is the requirement of enacting certain issues on the level of parliamentary acts.

[33] For example, 706/2022.

[34] See also: n 5 above.

[35] HE 3/2008 vp, 24, 30, 125. See: Perustuslain tarkastamiskomitea, Perustuslain tarkistamiskomitean mietintö [Betänkande av kommittén för en översyn av grundlagen] (Oikeusministeriö: Edita Publishing 2010), 60.

In contrast, Section 23 of the Constitution concerns the emergency decrees, issued only after the declaration of a state of emergency. Unlike the ordinary or general decrees issued under Section 80, the decrees issued under Section 23 must be temporary and necessary in nature and subjected to an immediate parliamentary review. During its review, the Parliament has the power to approve or disapprove the validity of these governmental decrees. What is relevant here is that although the Finnish Constitution allows some exceptions to the constitutional rights, it does not allow official institutions to derogate from their public duties, such as matters related to the relationship between the Government, the President of the Republic, and the Courts. The same applies to the institutional duties of municipalities or other self-governmental regional bodies. The Constitution does not recognize any other temporal changes during emergencies than those stipulated based on and under Section 23 of the Constitution. Thus, the Finnish system of emergency powers presupposes that the Finnish Parliament and Government should function together even during the hassles of the states of emergency.

Materially the constitutional limits are, according to the Constitution, the temporary and necessary nature of the exceptions of the basic rights and liberties which, in addition, have to be compatible with Finland's international human rights obligations. Although the Government is allowed to issue decrees, the grounds for provisional exceptions have to be laid down by an Act.

In addition, it should be noticed that according to the Constitution under situations of emergency no other exceptions than those of basic rights and liberties are allowed. Thus, other provisions of the Constitution may not be derogated under emergency.

Question 4

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Section 4: Judicial review of emergency powers in the Member States

Question 1

The judiciary in Finland consists of a two-track system with civil and criminal matters heard by ordinary courts and administrative matters heard before administrative courts. Within the administrative track, the jurisdiction to hear actions challenging "measures to address situations of emergency" depends on the type of measure at issue. Such measures may include, most prominently,

executive measures adopted under the Emergency Powers Actor the Act on the State of Defence, which establish frameworks transferring broad decree-giving power to the government, as well as ordinary legislative enactments, which have included in the past, for example, amendments to the Communicable Diseases Act or the Border Guard Act (578/2005). During emergencies public authorities adopt decisions as part of their administrative duties which can be of individual nature or have the character of generally applicable rules or standards.

The Constitution of Finland foresees only limited judicial review of legislation, including government decrees. Under Section 106 of the Constitution, where an act of parliament is "in manifest contradiction" with the Constitution, the courts are to grant priority to the Constitution. A lower bar for review is provided for government decrees: under Section 107, the courts are to grant priority to the Constitution if such decrees are "in contradiction" with the Constitution. No *actio popularis* exists to enable abstract review of ordinary legislation. Therefore, these forms of limited judicial review are available only incidentally as part of the resolution of concrete controversies before courts. Subject to very limited exceptions, individual applicants do not have standing to challenge a government decree in court.[36] In no cases do the courts have jurisdiction to repeal legislative acts, including acts of delegated legislative authority such as government decrees.

In contrast with the limited review available against legislative acts, administrative decisions adopted by public authorities are, in principle, always capable of judicial review. Section 21 of the Constitution provides that everyone has the right to have "a decision pertaining to his or her rights or obligations reviewed by a court of law" and this right is given concrete expression by the provisions of Chapter 2 of the Administrative Courts Procedure Act (808/2019), whereby it is stipulated *inter alia* which decisions can be subjected to review, who can petition for review, and which courts are competent to hear such actions.

However, since in the emergency context the salient administrative decisions tend to be measures of general application, in practice this review is limited due to the grounds of standing available to private parties to challenge such measures. Under Section 7 of the Administrative Courts Procedure Act, administrative decisions can be challenged by the "addressees of the decision," by those whose "right, obligation or interest is immediately affected," and by those who are "specifically entitled by law" to do so. Individuals do not have standing to challenge an administrative decision establishing a generally applicable scheme simply because it affects them incidentally. For example,

[36] See: Supreme Administrative Court of Finland, ECLI:FI:KHO:2022:63.

during the COVID-19 pandemic, the decision of the Northern Finland Regional Administrative Authority to limit gatherings of over 50 persons and public assemblies subject to certain health precautions, which was based on the Communicable Diseases Act, could not be challenged in court by an individual simply on the ground that the Constitution guaranteed them the right to freedom of movement.[37] A challenge against a pandemic-related decision to temporarily close public swimming pools and gyms by a person who was merely a frequent swimming pool goer was similarly rejected for lack of standing.[38]

At the same time, the availability of judicial protection against administrative decisions which immediately affect the rights, obligations, or interests of individuals remains the general rule. Thus, an action against the abovementioned decision, which could not be challenged by the public swimming pool user, was considered admissible when brought by a corporation operating a gym in as much as the decision imposed concrete obligations upon the gym operator concerning the closure of its business premises.[39] When private parties are able to demonstrate an individualizing interest, their actions are admissible before the administrative courts, as in when, during the pandemic, restrictions imposed on public gatherings affected the campaigning in local elections or when a city official unlawfully imposed a ban on visits to a care facility for persons with disabilities.[40]

Question 2

The general rules on judicial review apply regardless of whether a state of emergency is invoked or not. The Constitution, the Emergency Powers Act or the Act on the State of Defence do not contemplate a role for the judiciary in emergencies which would be different from that in normal times. This solution is both applauded and contested. An ongoing scholarly discussion in Finnish law journals exists as to whether this constitutional solution protects the right to judicial protection against unduly restrictive emergency measures targeting the judiciary, or whether effective judicial protection would be better safeguarded by designing specific rules for the way courts should carry out their work during emergencies.[41]

[37] Supreme Administrative Court of Finland, ECLI:FI:KHO:2020:108.

[38] Supreme Administrative Court of Finland, ECLI:FI:KHO: 2023:9.

[39] See: Supreme Administrative Court of Finland, ECLI:FI:KHO:2023:9.

[40] See, respectively, Supreme Administrative Court of Finland, ECLI:FI:KHO:2022:140 and ECLI:FI:KHO:2021:1.

[41] Cf. Lavapuro Juha, "Oikeuden Resilienssi," *Lakimies*, no. 7–8 (2020), pp. 1262, 1265 (considering not foreseeing special emergency regime for judiciary positive feature) with Fredman Markku. "Oikeudenhoito ja asianajo poikkeusoloissa," *Defensor Legis*, no. 1,5 (2022), p. 323 (arguing lack of specific rules for judiciary in emergencies is problematic).

Question 3

The formal standard of judicial review is the same for emergency measures and for any ordinary legislative or administrative measure. In practice, there are certain differences owing to the applicable constitutional and legislative framework, especially insofar as the review of legislative enactments is concerned. For example, the review of emergency measures which are adopted under the Emergency Powers Act must proceed taking into account that Section 23 of the Constitution precisely authorizes the government to decree, pursuant to delegated legislative authority, temporary "derogations" from fundamental rights where such measures are indispensable to address the emergency at hand. Thus, the fact that such measures derogate from the regular fundamental rights regime is not per se a ground for assessing their compatibility with the Constitution.[42] However, even such measures can be subjected to judicial review as regards other aspects of their constitutionality, such as their necessity or their compatibility with Finland's international human rights obligations, which are conditions that Section 23 expressly obliges the legislature and government to observe.

Question 4

The principle of proportionality is enshrined in the Act on Public Administration (434/2003) as one of the fundamental legal principles which bind the administration. According to Section 6 of the Act, the acts of public authorities must be *inter alia* "proportionate to the aim sought." The assessment of proportionality contains various components, namely the public act should be apt, effective and suitable for achieving the legitimate aim sought, it must be necessary and it should also comply with proportionality *stricto sensu*, that is, it should not restrict private rights or use public power more than what is necessary and that the least restrictive option should be selected. It has been noted in doctrine that the principle of proportionality in Finnish administrative law corresponds by and large to the principle in EU law.[43] The Finnish administrative courts habitually apply the principle in both the domestic and EU law contexts.[44]

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[42] As was noted above, under Section 107 of the Constitution the courts are to grant priority to the Constitution if government decrees are "in contradiction" therewith.

[43] See: for this view, the third edition of a major administrative law textbook: Mäenpää, Olli, *Halinto-oikeus*. Alma Talent, 2023, 168, 171.

[44] See, for example, Supreme Administrative Court of Finland, ECLI:FI:KHO:2024:61 (assessing proportionality of COVID-19 travel restrictions in case of EU citizen who was denied entry to Finland to visit their partner).

Section 5: Implementation of EU emergency law in the Member States

Question 1

To comprehensively identify all the "specific principles of national law that interact with principle and rules of EU law" is a tall order, but this section attempts to provide a brief overview as well as some specific examples of such principles. First of all, it should be noted that the Constitution of Finland expressly affirms Finland's membership in the EU (Section 1 § 3). This approach which reflects the Constitution's openness and respect towards European law, or a Finnish variety of *Europarechtsfreundlichkeit*,[45] characterizes the place of EU law within the Finnish legal order. This is an overarching constitutional principle which applies, in principle, also as regards EU crisis measures. However, such measures have also at times provoked controversy.

Another "principle" of the national implementation of EU crisis measures is their *ex ante* scrutiny before the Parliament of Finland (*eduskunta*). Thus, in Finland, many of the salient debates regarding EU crisis measures are found within the legislative branch. During the sovereign debt crisis, the various European-level bailout measures, which were legally engineered as "intergovernmental" as opposed to "EU" acts, were reviewed by the Constitutional Law Committee of the Parliament nonetheless as "EU measures" for the purposes of the Finnish Constitution. From its robust constitutional position, the Parliament has affected European-level decision making. For example, in 2012, it required the government to secure its budgetary prerogatives in the European negotiations over the qualified-majority decision-making powers of the Board of Directors of the European Stability Mechanism.[46]

As regards administrative authorities' national-level implementation of EU emergency measures, the Act on Public Administration extends the principles of good administration to all these authorities (with limited exceptions regarding, for example, policing, judging, and military activities). The principles include those of legality, non-discrimination, impartiality, proportionality, and the protection of legitimate expectations. The public authorities are also bound, as per Section 22 of the Constitution, to guarantee the observance of fundamental rights and human rights. By and large, these principles correspond to those existing in EU law as general principles or fundamental rights. Some rights and principles have, nonetheless, greater weight or a different outlook in the national context.

[45] For the use of the term, see: Leino Päivi and Salminen Janne, "The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?," *EuConst*, vol. 9 no. 3 (2013), pp. 451, 456.

[46] Ibidem, pp. 465ff.

A case in point is the right of access to documents, which is a broadly interpreted constitutional right in Finland.[47] During the sovereign debt crisis, the Finnish government required a collateral guarantee as a condition for its participation in the emergency lending provided to Greece. The agreement signed by the finance ministers was politically sensitive for both governments and Greek representatives had expressly required that it should remain confidential. A Finnish opposition MP challenged the non-disclosure of the agreement judicially. In the appeal against the Ministry of Finance's non-disclosure decision, it was argued that "EU secrecy" as well as hiding behind the "commercial secrets" of private law corporations established by Member States was inimical to the Finnish legal culture of public access to documents. The Supreme Administrative Court ruled that the finance ministers' agreement as well as the annexed agreements on financial products and escrow arrangements were to be made public, except for the names and other identifying information of the investment banks involved.[48]

Yet other principled approaches have been employed in connection with EU emergencies in recent years. The protection of public health, even the right to life, as well as the precautionary principle were extensively invoked during the COVID-19 pandemic to justify restrictions on freedom of movement to Finland from other Member States. Following increased numbers of border crossings by asylum seekers in 2023, which were identified by Finnish authorities as a form of hybrid warfare by Russia following Finland's accession to the NATO, Finland has also adopted strict measures on its eastern border with Russia which have been justified with reference to national security. The controversies regarding the implementation of both the travel restrictions and the border closure are briefly recapped in the next section.

Question 2

The Commission identified shortcomings in Finland's initial response to the COVID-19 pandemic. The Finnish response to the pandemic during the first year was to ban entry to the country from the outside, including from the other Member States, subject to exceptions which included travelling for strictly defined "indispensable" reasons, including "indispensable" travel for work.[49]

[47] Under Section 12 § 2 of the Constitution, "[d]ocuments and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings."

[48] Supreme Administrative Court of Finland, ECLI:KHO:2013:90.

[49] Cf. "Maahantulon rajoituksia kiristetään 27.1," sisäministeriön tiedote 22.1.2021, https://intermin.fi/-/maahantulon-rajoituksia-kiristetaan-27.1. See also: Neergaard Ulla, Paju Jaan, and Raitio Juha, "Closure of Borders in the Three Nordic EU Member States During the Covid-19 Pandemic," *Free Movement of Persons in the Nordic States: EU Law, EEA Law, and Regional Cooperation*, edited by Hyltén-Cavallius Katarina and Paju Jaan. Hart Publishing, 2023.

These measures were determined largely unilaterally and the Commission critically noted that Finland could protect public health with more targeted restrictions so as to better observe the needs of free movement.[50] However, the government did not consider the criticism as valid but maintained that the health and safety of the population justified the strict measures.[51]

In the context of migration, Finland has adopted particularly strict measures on its Russian border which go beyond those foreseen in the EU's Crisis and Force Majeure Regulation, adopted as part of the 2024 Pact on Migration and Asylum.[52] By relying on a 2022 amendment to the Border Guard Act, Finland has closed all its land border crossing points on the eastern border where it is not permitted to apply for asylum.[53] A new law adopted in 2024, the Act on Temporary Measures to Repeal Instrumentalized Immigration (482/2024) provides for a procedure for "pushbacks" of asylum seekers on the border, which can be put to use in an acute emergency.[54] These most recent measures are in tension with EU law; at the time of writing, many aspects of their implementation on the ground, however, remain unclear.

[50] Letter from the Directorate-General for Justice and Consumer Matters to the Government of Finland, 22 February 2021, Ref. Ares (2021)1401086 (on file with the authors).

[51] Letter from Ministry of the Interior to the Commission, 4 March 2021 (on file with the authors).

[52] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359, 22.5.2024.

[53] See, for this interpretation: the preparatory acts to the Border Guard Act, HaVM 16/2022 vp, 13–14.

[54] Laki väliaikaisista toimenpiteistä välineellistetyn maahantulon torjumiseksi (482/2024).

France

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Section 1 : La notion d'« urgence » et d'autres notions connexes dans les ordres juridiques des États membres

Question 1

S'il les confond parfois, le droit français distingue souvent entre l'urgence, la crise et la nécessité. L'urgence renvoie à une question de temporalité, la crise renvoie à une appréciation de l'intensité, et la nécessité désigne l'impériosité. D'une certaine manière, ces termes sont liés et peuvent désigner différents aspects d'un même danger.

La notion d'urgence. Seule la situation d'urgence justifie de déclarer un état d'urgence. Deux régimes existent en la matière. Le premier, plus général quoiqu'à nette coloration sécuritaire depuis ses modifications à la suite des attentats terroristes de 2015,[1] est prévu par la loi de 1955 relative à l'état d'urgence.[2] Il permet de renforcer les compétences de l'exécutif en matière de police administrative. Le second, plus spécifique, car dédié aux questions sanitaires, a été institué pour répondre à la pandémie de Covid-19 dès mars 2020[3] et a été abrogé.[4] Toutefois, l'urgence a pu être appréciée largement : par exemple, la persistance de la menace terroriste sur le territoire français a conduit à prolonger l'état d'urgence prévu par la loi du 3 avril 1955 à six reprises entre 2015 et 2017.

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[1] Et ce, dès la loi n° 2015-1501 du 20 novembre 2015 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et renforçant l'efficacité de ses dispositions, JORF n° 270, 21 novembre 2015 p. 21665.

[2] Loi n° 55-385, 3 avril 1955 relative à l'étatd'urgence. https ://www.legifrance.gouv.fr/loda/id/JORFTEXT000000695350

[3] Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à la pandémie du covid-19, JORF n° 72, 24 mars 2020, créant un état d'urgence sanitaire aux articles L. 3131-12 et s. dans le Code de santé publique.

[4] Néanmoins et selon un régime de droit commun, en cas de menace de crise sanitaire grave, le Ministre de la santé peut adopter toute mesure proportionnée nécessaire (Article L. 3131-1 Code de la santé publique).

La notion de crise. La notion de crise embrasse une dimension plus large. Cela désigne une situation de haute intensité pouvant concerner de nombreux domaines (crise institutionnelle, crise politique). En matière administrative, les outils de gestion de crise permettent d'y répondre. Contrairement à l'urgence, la crise peut être appréhendée par le droit commun, sans recourir à une dérogation. Par exemple, le préfet est doté de pouvoirs de crise sur le fondement de l'article L. 742-2-1 du Code de sécurité intérieure.[5]

La notion de nécessité. Plus rare en droit positif, elle est protéiforme. Quelques dispositions la mobilisent formellement. La notion de « biens de première nécessité » est appréciée par l'autorité pour permettre une intervention locale en matière alimentaire.[6] De même, le Code de sécurité intérieure prévoit des dérogations pour « urgence ou nécessité tenant à l'ordre public, »[7] ce qui en confirme la différence.

Les notions connexes. D'autres catégories sont mobilisées pour évoquer une situation dangereuse. La notion d'importance vitale[8] constitue le fondement de dispositions dérogatoires permettant de renforcer la sécurité et la résilience de nombreux points, activités et opérateurs économiques dont l'atteinte serait préjudiciable à la collectivité. Elle se rapproche de la notion d'entité critique qui existe en droit de l'Union.[9] La notion de calamité permet quant à elle d'identifier des situations dangereuses qui ne causent pas, en tant que telles, de troubles à l'ordre public. À cet égard, la notion de calamité publique est mobilisée dans la loi de 1955 relative à l'état d'urgence, en condition alternative au péril imminent résultant d'atteintes graves à l'ordre public[10] déclenchant ce régime exceptionnel. De telles situations dangereuses se rapprochent des catastrophes mais ont pour spécificité de permettre l'intervention de la solidarité nationale.[11] Enfin, le droit ayant tendance à user de la litote, l'identification du péril n'est pas toujours explicite. Ce furent ainsi des « événements » qui justifièrent l'intervention de troupes au sol en Algérie puis ils furent ensuite qualifiés de guerre. De même, les termes de circonstances particulières et de circonstances exceptionnelles sont utilisés plus aisément par

[5] J. Millet, « La LOPMI et le renforcement des pouvoirs de crise du préfet en situation de crise, » *JCP A*, 2023, p. 2100.

[6] Article L 2221-15 Code général des collectivités territoriales.

[7] Article L. 622-16 Code de la sécurité intérieure.

[8] Ordonnance n° 58-1371 du 29 décembre 1958 tendant à renforcer la protection des installations d'importance vitale, codifiée aux articles L. 1332-1 et s. du Code de la Défense.

[9] M. Cirotteau, « Les infrastructures critiques européennes, l'apparition d'une nouvelle forme de souveraineté supranationale, » *RFDA*, 2024, p. 165.

[10] Conformément à l'article 1er de la loi du 3 avril 1955, l'état d'urgence peut être déclaré « soit en cas de péril imminent résultant d'atteintes graves à l'ordre public, soit en cas d'évènements présentant, par leur nature et leur gravité, le caractère de calamité publique ».

[11] Voir notamment, CE, 5 mai 1971, *Min. de l'Intérieur c. Bardalou*, *Rec.* 330 (dédommagement de personnes ayant dû quitter l'Algérie suite à la décolonisation)

le juge administratif afin d'assouplir les contours de la légalité pour apaiser la situation.[12]

Question 2

Un cadre essentiellement législatif. La constitution de la V^e^ République ne mentionne pas l'urgence, ni l'état d'urgence. En revanche, elle régit l'état de siège ou appréhende certaines situations de troubles au travers de dispositions particulières modifiant les pouvoirs de l'une des institutions françaises. Le traitement des situations d'urgence procède donc essentiellement d'un cadre législatif.

Un cadre général régissant l'urgence. L'état d'urgence est issu de la loi Bourgès-Maunoury de 1955.[13] Le régime se structure en deux phases. La première est gouvernementale : l'exécutif prononce l'état d'urgence sur tout ou partie du territoire, pour une durée de douze jours. Passé ce délai, la seconde phase peut être enclenchée. Dans ce cas, seul le Parlement est habilité à prolonger l'état d'urgence, pour une durée qu'il détermine.[14] La procédure législative régit alors l'étude, le vote et la promulgation des dispositions spéciales, dans le respect de la Constitution et des stipulations conventionnelles. Cela concerne également l'état d'urgence sanitaire, et certains s'interrogent quant à la possibilité de prévoir un état d'urgence environnementale.[15]

Des cadres spécifiques régissant diverses situations de crise. *Lato sensu*, le cadre constitutionnel, pour faire face aux crises, à la nécessité et à l'urgence, est varié. Si l'urgence est internationale, cela peut conduire à l'emploi de la force armée. Dans ce cas, les articles 5, 20 et 35 de la Constitution sont susceptibles d'être invoqués. Dans une optique davantage interne, il y a plusieurs régimes exceptionnels : pouvoirs exceptionnels du Président de la République ; état de siège (**Q. 1, section 2**). Ce régime à coloration militaire est aujourd'hui désuet, mais la loi prévoit explicitement qu'il est impossible de le cumuler avec l'état d'urgence,[16] qui est un régime d'exception à caractère civil. De manière plus ordinaire, des dispositions permettant la gestion de crise sont intégrées au droit administratif « commun, » à destination des autorités de police générale ou spéciales.

[12] Voir notamment CE, 22 mars 2020, n° 439674 sur le décret portant confinement de la population face au Covid.

[13] Version actuelle : https ://www.legifrance.gouv.fr/loda/id/JORFTEXT000000695350

[14] Article 3 loi du 3 avril 1955.

[15] X. Dupré de Boulois, « La fin des droits de l'homme ?, » *RDLF,* 2020, chron. 60.

[16] Article L. 2131-1 Code de défense.

Question 3

Cadre général régissant l'urgence. En tant que tel, l'état d'urgence peut être prononcé dans deux situations alternatives. Soit en cas de péril imminent résultant d'atteintes graves à l'ordre public, soit en cas d'événements présentant, par leur nature et leur gravité, le caractère de calamité publique. En pratique, seuls les troubles graves à l'ordre public ont justifié le recours à ce régime en France, mis en œuvre à 9 reprises.[17] Les calamités publiques comptent néanmoins parmi les raisons valides permettant de le mobiliser.

Les éléments déclencheurs dans les cadres spécifiques régissant les diverses situations de crise. D'autres situations périlleuses sont identifiées par le droit pour conditionner le recours à des régimes spéciaux. Cela dépend alors des situations. L'état de siège est prononcé en cas d'atteinte à l'intégrité du territoire ou d'insurrection armée. De même, l'article 16 de la Constitution prévoit des critères limitatifs pour justifier une extension des prérogatives du Président de la République. D'abord, le fonctionnement régulier des pouvoirs publics constitutionnels doit être interrompu. Ensuite, une liste limitative d'enjeux de très haute importance permet, lorsqu'ils sont menacés de manière grave et immédiate, de prendre des mesures tenant à leur rétablissement (**Q. 1, section 2**).[18] Le recours aux dispositions issu d'une application de l'état d'urgence ultérieurement intégrées au droit commun (**Q. 1, section 3**) laisse à voir des conditions qui peuvent paraître définies de manière large. Ainsi en est-il de la police spéciale de fermeture « des lieux de culte dans lesquels les propos qui sont tenus, les idées ou théories qui sont diffusées ou les activités qui se déroulent provoquent à la violence, à la haine ou à la discrimination, provoquent à la commission d'actes de terrorisme ou font l'apologie de tels actes. »[19]

Question 4

Les contraintes de mise en œuvre de l'article 16 de la Constitution. Les pouvoirs exceptionnels du Président de la République, prévus par l'article 16 de la Constitution, obéissent à des conditions de fond et de forme. Sur le fond, la Constitution exige deux conditions. Premièrement, il faut qu'existe une me-

[17] Le 15 mai 2024, le Gouvernement a eu recours pour la neuvième fois à l'état d'urgence, déclaré sur une partie du territoire français, en Nouvelle-Calédonie : décret n° 2024-436 du 15 mai 2024 portant application de la loi n° 55-385 du 3 avril 1955, JORF n° 112, 15 mai 2024.

[18] Conformément à l'article 16 de la Constitution de 1958, « lorsque les institutions de la République, l'indépendance de la nation, l'intégrité de son territoire ou l'exécution de ses engagements internationaux sont menacées d'une manière grave et immédiate et que le fonctionnement régulier des pouvoirs publics constitutionnels est interrompu, le Président de la République prend les mesures exigées par ces circonstances, après consultation officielle du Premier ministre, des présidents des assemblées ainsi que du Conseil constitutionnel. »

[19] Article L 227-1 Code de la sécurité intérieure.

nace grave et immédiate sur les institutions de la République, l'indépendance de la Nation, l'intégrité de son territoire ou sur l'exécution de ses engagements internationaux. Deuxièmement, il est nécessaire qu'il y ait interruption du fonctionnement régulier des pouvoirs publics constitutionnels. Sur la forme, premièrement, le Président de la République est soumis à des obligations de consultation : il doit consulter le Premier ministre, les présidents des assemblées (Assemblée nationale et Sénat) ainsi que le Conseil constitutionnel. Deuxièmement, le chef de l'État doit également informer la Nation de la mise en œuvre de l'article 16 par un message. On relèvera ici le caractère relativement large du cadre ainsi dressé qui ménage une marge d'appréciation souple au profit du chef de l'État. Malgré ces obligations consultatives, le recours à l'article 16 constitue un pouvoir propre et discrétionnaire du Président de la République. Il pourra donc ne pas tenir compte du sens des avis rendus par les autorités consultées et son pouvoir s'exerce sans contreseing du Premier ministre ou des ministres compétents. Au-delà de son champ d'application déjà mentionné, on peut relever certaines limites encadrant les mesures prises dans le cadre du recours à l'article 16. Premièrement, les mesures prises par le Président de la République et pour lesquelles le Conseil constitutionnel est consulté doivent être inspirées par la volonté d'assurer aux pouvoirs publics constitutionnels, dans les moindres délais, les moyens d'accomplir leur mission. Deuxièmement, durant l'application de l'article 16, le Président ne peut interdire au Parlement de se réunir. Enfin, le chef de l'État ne peut pas plus dissoudre l'Assemblée nationale ni réviser la Constitution.[20] Par ailleurs, depuis une réforme constitutionnelle du 23 juillet 2008, le Conseil constitutionnel exerce un contrôle sur les conditions permettant le recours à l'article 16 (**Q. 2, section 2**).

Les contraintes de mise en œuvre de l'État de siège. Ce régime n'a pas été utilisé durant les deux guerres mondiales. Sous la V^e^ République, l'article L. 2121-1 du code de la défense précise que « l'état de siège ne peut être déclaré, par décret en conseil des ministres, qu'en cas de péril imminent résultant d'une guerre étrangère ou d'une insurrection armée. Le décret désigne le territoire auquel il s'applique et détermine sa durée d'application. » Ce régime a pour effet de transférer à l'autorité militaire les pouvoirs dont l'autorité civile est investie pour le maintien de l'ordre et la police.[21] L'autorité militaire sera également investie de compétences élargies pour répondre à la situation de crise. Elle peut procéder à des perquisitions domiciliaires de jour et de nuit, éloigner toute personne ayant fait l'objet d'une condamnation devenue définitive pour crime ou délit ainsi que les individus qui n'ont pas leur domicile dans les lieux soumis à l'état de siège, ordonner la remise des armes et munitions, procéder à leur recherche et à leur enlèvement, ou en-

[20] Décision n° 92-312 DC du 2 septembre 1992, *Traité sur l'Union européenne*.
[21] Article L. 2121-2 Code de la défense.

core interdire les publications et les réunions qu'elle juge de nature à menacer l'ordre public.[22]

Les contraintes de mise en œuvre des états d'urgence. Pour l'état d'urgence, sa déclaration est laissée à l'appréciation du gouvernement qui le déclare, par décret en Conseil des ministres, pour une durée de douze jours. Passé ce délai, le gouvernement doit obtenir une validation du Parlement, qui se matérialise par une loi prorogeant l'application de l'état d'urgence. Cette durée peut être variable, comme le montre le recours à l'état d'urgence entre 2015 et 2017. La durée de prorogation a ainsi oscillé, au gré des six lois adoptées et par un glissement sémantique fort de la notion de « péril imminent résultant d'atteintes graves à l'ordre public, »[23] entre 2 et 7 mois. Durant le délai de douze jours, la mesure portant état d'urgence a un caractère réglementaire et le juge administratif peut théoriquement en contrôler la pertinence, ce qui en pratique n'a jamais donné lieu à une censure. Passé ce délai, l'état d'urgence a un caractère légal, ce qui empêche le juge administratif de le contrôler. Lors de l'exercice du contrôle de constitutionnalité des lois, le Conseil constitutionnel se refuse à porter une appréciation identique à celle du législateur sur l'opportunité de prolonger l'état d'urgence pour faire face à la situation. En attestent, par exemple, ses décisions relatives à la prorogation de l'état d'urgence sanitaire en France lors de la crise du Covid-19.[24] Enfin, ces différents régimes peuvent requérir des dérogations au droit de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (**Q. 10**).

Section 2 : Le cadre constitutionnel régissant le droit d'urgence dans les États membres

Question 1

Il convient de traiter ensemble les questions des dispositions constitutionnelles régissant les situations d'urgence et celle des régimes antérieurs. La Constitution française contient plusieurs dispositions qui peuvent, directement ou indirectement, être rattachées à des situations d'urgence ou de crise.

Les pouvoirs exceptionnels du Président de la République (article 16 de la Constitution). Comme déjà évoqué, cette disposition permet la mise en œuvre de pouvoirs exceptionnels au profit du Président de la République française lui permettant d'agir, dans certaines circonstances, au mépris de la séparation

[22] Art L. 2121-7 Code de la défense.

[23] P. Gervier, « Quels obstacles à une sortie de l'état d'urgence en France ? Une analyse des débats parlementaires (2015–2017), » in P. Gervier. (dir.), *La sortie de l'état d'urgence*, IFJD, 2020, p. 21–52.

[24] Décembre n° 2021-824 DC, 5 août 2021, *Loi relative à la gestion de la crise sanitaire.*

des pouvoirs. La présence d'une telle disposition dans la norme fondamentale est directement liée à des circonstances historiques et plus spécifiquement au constat de l'impuissance du Président Lebrun en juin 1940 dans un contexte de défaite de l'armée française face aux troupes allemandes. Le général de Gaulle mentionna cette idée devant le Comité consultatif constitutionnel chargé par la loi constitutionnelle du 3 juin 1958 de formuler un avis sur l'avant-projet de Constitution de 1958.[25] Il faisait alors valoir que l'incapacité constatée du Président de la République à faire face à l'invasion allemande nécessitait de prévoir un régime constitutionnel lui permettant de concentrer les pouvoirs pour dépasser une situation de crise d'une particulière gravité. Les conditions de mise en œuvre sont exposées à la question 4.

L'État de siège (article 36 de la Constitution). Cette disposition constitutionnelle consacre un autre régime d'exception : l'état de siège. Dès 1791, l'Assemblée nationale constituante vota une loi sur les places de guerre. En 1811, une distinction fut posée entre l'état de paix, l'état de guerre et l'état de siège qui entraînait un transfert des pouvoirs des autorités civiles aux autorités militaires. L'état de siège fut par la suite repris et affermi par les lois du 9 août 1849 et 3 avril 1878 avant d'être constitutionnalisé par la loi constitutionnelle du 7 décembre 1954 complétant l'article 7 de la Constitution de la IV^e^ République de la manière suivante : « L'état de siège est déclaré dans les conditions prévues par la loi. » L'état de siège a été appliqué pour la première fois afin de gérer des situations de troubles internes durant la révolution de février 1848 et en 1849 ainsi qu'en 1871 pour la Commune de Paris (insurrection parisienne ayant duré près de 72 jours). Les conditions de mise en œuvre sont exposées à la question 4.

Les dispositions constitutionnelles relatives à la guerre (article 35 de la Constitution). L'article 35 de la Constitution dispose en son alinéa 1 que la déclaration de guerre est autorisée par le Parlement. Cette disposition apparaît désormais comme une forme d'anomalie dans la mesure où tant le droit international public que le droit constitutionnel interne interdisent la guerre. L'alinéa 14 du Préambule de la Constitution de 1946 dispose que « La République française, fidèle à ses traditions, se conforme aux règles du droit public international. Elle n'entreprendra aucune guerre dans des vues de conquête et n'emploiera jamais ses forces contre la liberté d'aucun peuple. » En outre « si le régime juridique d'exception qu'est la guerre est très sommairement décrit en droit, cela s'explique certainement par l'existence de deux autres régimes d'exception dont les critères de déclenchement, s'ils ne se superposent pas complètement avec celui du conflit armé, interétatique ou pas, peuvent en tout cas couvrir ce cas de figure. Il s'agit du régime des circonstances exception-

[25] *Documents pour servir à l'histoire de l'élaboration de la Constitution du 4 octobre 1958*, vol. II, Paris, La Documentation française, 1988, p. 300–302.

nelles et de celui de l'état de siège, prévues respectivement aux articles 16 et 36 de la Constitution. »[26]

Les adaptations constitutionnelles à l'urgence. Un certain nombre de dispositions constitutionnelles vont soit s'avérer particulièrement utiles en période d'urgence, soit prévoir plus directement des adaptations en cas d'urgence.

La voie des ordonnances. Les ordonnances[27] constituent un instrument de droit commun, de sorte que l'action du gouvernement par voie d'ordonnances n'est pas propre aux situations d'urgence. Il n'en demeure pas moins que celles-ci sont particulièrement bien adaptées à ce type de situation. Le Conseil constitutionnel précise ainsi de manière constante que « l'urgence est au nombre des justifications que le Gouvernement peut invoquer » pour y recourir.[28] Or, le Conseil d'État français a pu pointer du doigt, durant la crise sanitaire liée à l'épidémie de Covid-19, un recours massif aux ordonnances qui a notamment pour effet d'affaiblir le rôle du Parlement dans les situations d'urgence[29] (**Q. 2, section 2**). Cette remarque se comprend au regard du régime juridique des ordonnances : il permet au gouvernement de demander au Parlement l'autorisation de prendre par ordonnances, pendant un délai limité, des mesures qui relèvent normalement du domaine de la loi. Les ordonnances sont prises en Conseil des ministres après avis du Conseil d'État. À l'expiration du délai fixé, les ordonnances ne peuvent plus être modifiées que par la loi dans les matières qui sont du domaine législatif.

Les « circonstances particulières » dans la jurisprudence du Conseil constitutionnel. Enfin, la jurisprudence constitutionnelle a pu retenir la notion de « circonstances particulières ». C'est le cas, par exemple, dans une décision de 2020[30] dans laquelle, en raison de l'urgence liée au contexte épidémique lié au Covid-19, le Conseil constitutionnel a décidé de ne pas sanctionner la méconnaissance d'une règle de procédure législative. Il a estimé que « compte tenu des circonstances particulières de l'espèce, il n'y a pas lieu de juger que cette loi organique a été adoptée en violation des règles de procédure prévues à l'article 46 de la Constitution. » Cette expression de « circonstances particulières » fait écho à la théorie des circonstances exceptionnelles qui, consacrée par le Conseil d'État,[31]

[26] C. Landais, P. Ferran, « La Constitution et la guerre. La guerre est-elle une affaire constitutionnelle ?, » *Nouveaux cahiers du Conseil constitutionnel*, n° 51, Dossier : la Constitution et La Défense nationale, avril 2026, p. 29–35.

[27] Article 38 Constitution.

[28] Voir notamment, décembre n° 99-421 DC, 16 décembre 1999, *Loi portant habilitation du Gouvernement à procéder, par ordonnances, à l'adoption de la partie législative de certains codes* ; décembre n° 2003-473 DC, 26 juin 2003, *Loi habilitant le Gouvernement à simplifier le droit* décembre n° 2004-506 DC, 2 décembre 2004, *Loi de simplification du droit.*

[29] Les états d'urgence : la démocratie sous contraintes, Étude annuelle du Conseil d'État, 2021, p. 109.

[30] Décembre n° 2020-799 DC, 26 mars 2020, *Loi organique d'urgence pour faire face à l'épidémie de covid-19.*

[31] CE, 28 juin 1918, *Heyriès*, *Lebon*, p. 651 ; CE, 28 février 1919, *Dames Dol et Laurent*, *Lebon*, p. 208.

autorise certaines dérogations aux règles de compétence ou de fond lorsque les circonstances l'exigent.

Catégorie des projets de loi « relatifs aux états de crise. » Depuis une réforme constitutionnelle de 2008, la Constitution fait mention des « projets relatifs aux états de crise. » Cette innovation concerne les projets de loi autorisant la prolongation de l'état de siège ou des états d'urgence sécuritaire et sanitaire afin d'adapter la procédure législative à l'urgence. Ces textes ne sont notamment pas soumis à l'obligation d'être accompagnés d'une étude d'impact lors de leur dépôt, ce qu'impose en principe l'article 39 de la Constitution. De même, les projets relatifs aux états de crise ne sont pas soumis au respect d'un délai minimum avant discussion en séance (article 42 de la Constitution). Dans le prolongement, l'examen de ces projets est, à la demande du Gouvernement, inscrit à l'ordre du jour par priorité (article 48 de la Constitution).

Question 2

Les pouvoirs exceptionnels du Président de la République (article 16 de la Constitution)

Le rôle du gouvernement. Si la mise en œuvre de cette disposition constitue un pouvoir propre du Président de la République, une obligation de consultation accompagne son déclenchement (**Q. 3, section 1**). Le Président doit consulter le Premier ministre, le président de l'Assemblée nationale, le président du Sénat, ainsi que le Conseil constitutionnel. Ainsi, c'est à titre d'autorité consultative, à travers le Premier ministre, que le gouvernement intervient dans l'utilisation de l'article 16. En revanche, son déclenchement ne nécessite aucun contreseing ministériel.

Le rôle du Parlement. C'est également dans le cadre de la consultation que le Parlement va être modestement associé à cette procédure. Le Président a, en effet, l'obligation de consulter le président de l'Assemblée nationale et du Sénat. Ici encore, cette intervention n'est pas déterminante, le Président n'étant pas contraint de suivre l'avis formulé et aucun vote n'intervenant au Parlement. En revanche, durant toute la période d'application de l'article 16 le Parlement se réunit de plein droit et bénéficie d'une protection dans la mesure où le pouvoir de dissolution ne peut pas être utilisé par le Président de la République. Le Parlement a également un rôle dans le contrôle de l'utilisation et de la durée d'application de l'article 16. En effet, le Président de l'Assemblée nationale, du Sénat, soixante députés ou soixante sénateurs pourront, après 30 jours d'exercice des pouvoirs exceptionnels, saisir le Conseil constitutionnel afin qu'il vérifie que les conditions d'application sont toujours réunies. Enfin, une hypothèse peut être envisagée dans le cas où le Président de la République abuserait de l'utilisation des pouvoirs exceptionnels. Le Parlement a toujours la possibilité de contraindre le Président à la démission (cette hypothèse ne s'est jamais produite). En effet, aux termes de l'article 68 de la Constitution, le Prési-

dent de la République peut être destitué « en cas de manquement à ses devoirs manifestement incompatible avec l'exercice de son mandat. La destitution est prononcée par le Parlement constitué en Haute Cour. »

Le rôle du juge. C'est d'abord le juge constitutionnel qui intervient en assumant un rôle de surveillance de la durée d'application des pouvoirs exceptionnels. Depuis la réforme constitutionnelle de 2008, le juge constitutionnel exerce un contrôle sur les conditions de recours à l'article 16. Ce dernier distingue deux cas. Premièrement, le Conseil constitutionnel peut être saisi de manière facultative après 30 jours d'exercice des pouvoirs exceptionnels. Les autorités de saisi ne sont le Président de l'Assemblée nationale, le Sénat, soixante députés ou soixante sénateurs. Le juge examinera si les conditions exigées pour l'application de son article 16 demeurent réunies. Le Conseil se prononce dans les délais les plus brefs par un avis public. Deuxièmement, la Constitution instaure un contrôle de plein droit après 60 jours d'exercice des pouvoirs exceptionnels et à tout moment au-delà de cette durée. Par ailleurs, la décision du Président de la République de recourir à l'article 16 ne peut pas faire l'objet d'un contrôle juridictionnel par les juridictions ordinaires. Il s'agit d'un acte de gouvernement.[32] En revanche, le juge administratif français a estimé que les décisions du Président de la République prises dans ce cadre peuvent faire l'objet d'un recours pour excès de pouvoir dès lors qu'elles sont intervenues dans le domaine du règlement.[33] S'agissant des décisions prises dans le domaine de la loi, il est possible de considérer qu'elles pourraient faire l'objet d'une question prioritaire de constitutionnalité (contrôle *a posteriori* de constitutionnalité exercé par le Conseil constitutionnel sur renvoi des juridictions suprêmes). Certains estiment que les garanties qui entourent l'utilisation de l'article 16 de la Constitution ne sont pas suffisantes.[34]

L'État de siège (article 36 de la Constitution). L'état de siège n'a jamais été décrété sous la V^e^ République. Contrairement à l'article 16 de la Constitution, la mise en œuvre de l'article 36 ne modifie pas la répartition des compétences constitutionnelles.

Le rôle du gouvernement. L'état de siège est déclaré par décret en conseil des ministres en cas de péril imminent résultant d'une guerre étrangère ou d'une insurrection armée.[35] Il s'agit donc d'un décret pris par le Président de la République qui met en place l'état de siège après délibération du Conseil des ministres qu'il préside.

Le rôle du Parlement. Le Parlement dispose ici d'un rôle important dans la maîtrise de la durée de l'état de siège. En effet, son interven-

[32] CE, 2 mars 1962, *Rubin de Serven*, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007636269/

[33] CE, 23 octobre 1964, *d'Oriano*.

[34] Voir S. Platon, « Vider l'article 16 de son venin : les pleins pouvoirs sont-ils solubles dans l'état de droit contemporain ?, » *RFDC* 2008/5 (HS n° 2), p. 97–116.

[35] Article L. 2121-1 Code de la défense.

tion est obligatoire pour la prolongation de l'état de siège au-delà de douze jours.

Le rôle du juge. S'agissant du juge, deux points apparaissent fondamentaux. D'une part l'effet d'un tel régime sur les compétences juridictionnelles et, d'autre part, la question du contrôle juridictionnel des mesures prises dans le cadre de l'état de siège. Sur le premier point, l'état de siège emporte une réorganisation des compétences juridictionnelles : les juridictions militaires peuvent être saisies d'infractions relevant jusqu'alors de la compétence des juridictions pénales et cela, quelle que soit la qualité des auteurs principaux ou des complices, c'est-à-dire qu'ils soient militaires ou civils.[36] Dans le cas d'une insurrection à main armée, la compétence dérogatoire des juridictions militaires à l'égard des civils ne peut s'appliquer qu'aux crimes spécialement prévus par le code de justice militaire ou par les articles du code pénal mentionnés l'article L. 2121-3 al. 1 du code de la défense et aux crimes connexes. Quant au cas de guerre étrangère, les juridictions militaires peuvent être saisies, quelle que soit la qualité des auteurs principaux ou des complices, de la connaissance des infractions prévues et réprimées par les articles du code pénal mentionnés à l'article L. 2121-3 du code de la défense. Après la levée de l'état de siège, les juridictions militaires continuent de connaître des crimes et délits dont la poursuite leur avait été déférée. S'agissant, deuxièmement, du contrôle juridictionnel des mesures prises dans le cadre de l'état de siège, le Conseil d'État a précisé que l'état de siège demeure un régime de légalité et, en conséquence, les décisions des autorités militaires et civiles sont soumises au contrôle juridictionnel.[37]

Les aspects constitutionnels des états d'urgence. Comme cela a déjà été évoqué, les états d'urgence ne bénéficient pas d'un fondement constitutionnel mais seulement législatif. Pour autant, certains aspects constitutionnels tenant aux autorités compétentes pour le mettre en œuvre ou au contrôle de constitutionnalité méritent d'être mentionnés.

Le rôle du gouvernement. Celui-ci est central dans la décision de mettre en œuvre les états d'urgence. L'état d'urgence est déclaré par décret en Conseil des ministres.[38] Ce décret détermine la ou les circonscriptions territoriales à l'intérieur desquelles il entre en vigueur. De la même manière, l'état d'urgence sanitaire est déclaré par décret en conseil des ministres pris sur le rapport du ministre chargé de la santé.[39] Par ailleurs, le rôle du gouvernement est absolument déterminant dans la conduite des états d'urgence dans la mesure où c'est au pouvoir exécutif qu'il revient de prendre les mesures nécessaires pour faire face à la situation (**Q. 1, section 3**).

[36] Article L. 2121-3 Code de la défense.
[37] CE, 6 août 1915, *Delmotte et Senmartin*, n° 54583.
[38] Article 2 L. 3 avril 1955.
[39] Article L. 3131-13 Code de la santé publique.

Le rôle du Parlement. C'est d'abord sur la durée des états d'urgence que le Parlement dispose d'un moyen d'action déterminant. Ainsi, la loi relative à l'état d'urgence dispose que la prorogation de l'état d'urgence au-delà de douze jours ne peut être autorisée que par la loi. De manière comparable, la prorogation de l'état d'urgence sanitaire au-delà d'un mois ne peut être autorisée que par la loi, après avis du comité de scientifiques.[40] En revanche, il peut être mis fin à l'état d'urgence sanitaire par décret en conseil des ministres avant l'expiration du délai fixé par la loi le prorogeant. C'est ensuite au titre d'information que le Parlement est associé à la mise en œuvre des états d'urgence. En vertu de la loi de 1955, « l'Assemblée nationale et le Sénat sont informés sans délai des mesures prises par le Gouvernement pendant l'état d'urgence. Les autorités administratives leur transmettent sans délai copie de tous les actes qu'elles prennent en application de la présente loi. L'Assemblée nationale et le Sénat peuvent requérir toute information complémentaire dans le cadre du contrôle et de l'évaluation de ces mesures. » Un même dispositif d'information est prévu pour l'état d'urgence sanitaire.[41] Malgré ces interventions, le rôle du Parlement est apparu plutôt secondaire durant les périodes d'état d'urgence. Cela est notamment dû à l'habilitation dont jouit le gouvernement afin d'agir par voie d'ordonnance (**Q. 1, section 2**). Ce faisant, le Conseil d'État a souligné « qu'aucune disposition des lois qui régissent les états d'urgence, qu'il s'agisse de celle de 1955 ou de celle de 2020, n'altère les prérogatives parlementaires. Pour autant, l'état d'urgence conjugué au fait majoritaire accentue considérablement le déséquilibre du fonctionnement de la V^e^ République au profit de l'exécutif qui bénéficie, en particulier, d'une forte extension du pouvoir de légiférer par ordonnances. »[42]

Le rôle du juge. La présente partie étant consacrée au cadre constitutionnel des régimes d'urgence, nous développerons principalement ici le rôle du juge constitutionnel (pour les garanties offertes par les juges ordinaires voir **section 4**). La première question qui mérite une attention particulière est celle du contrôle de la prorogation des états d'urgence par le juge constitutionnel. Cette question est restée non tranchée durant une longue période par la jurisprudence constitutionnelle.[43] Or, dans une décision relative à la loi autorisant la prorogation de l'état d'urgence sanitaire, le Conseil constitutionnel a opéré un contrôle restreint des conditions de fond justifiant le maintien de l'état d'urgence notamment au regard des avis scientifiques connus sur la situation de la pandémie.[44] Il s'agit ici « d'une avancée indéniable dans le contrôle des lois d'exception prises dans le cadre de l'état d'urgence[45] » et le Conseil d'État propose d'envisager une saisine automatique du Conseil constitutionnel sur toute loi de prorogation de l'état

[40] Article L 3131-13 Code de santé publique.

[41] *Ibid*.

[42] Les états d'urgence : la démocratie sous contraintes, Étude annuelle du Conseil d'État, 2021, p. 20.

[43] Décembre n° 85-187 DC, 25 janvier 1985 ; décembre n° 2015-527 QPC, 22 décembre 2015 ; décembre n° 2016-536 QPC 19 février 2016.

[44] Décembre n° 2020-808 DC, 13 novembre 2020, *Loi autorisant la prorogation de l'état d'urgence sanitaire et portant diverses mesures de gestion de la crise sanitaire.*

[45] M. Guerrini, L. Dimingo, P. Gaïa, F. Mélin-Soucramanien, E. Oliva, A. Roux, *Les grandes décisions du Conseil constitutionnel*, Dalloz, 20^e^ éd., Paris, 2022.

d'urgence et toute loi établissant le cadre nouveau d'un état d'urgence.[46]

Dispositions constitutionnelles relatives à la guerre (article 35 de la Constitution).

Le rôle du gouvernement. La décision de faire intervenir les forces armées à l'étranger est une décision du Président de la République tout comme celle de retirer les forces armées engagées à l'extérieur. La formulation de l'article 35 selon laquelle « le Gouvernement informe le Parlement de sa décision de faire intervenir les forces armées à l'étranger » est donc trompeuse, car elle laisse entendre qu'il s'agit d'une décision du gouvernement, ce qui n'est pas le cas.[47]

Le rôle du Parlement. Le Gouvernement informe le Parlement de sa décision de faire intervenir les forces armées à l'étranger, au plus tard trois jours après le début de l'intervention. Il précise les objectifs poursuivis. Cette information peut donner lieu à un débat qui n'est suivi d'aucun vote. Lorsque la durée de l'intervention excède quatre mois, le Gouvernement soumet sa prolongation à l'autorisation du Parlement, mais il peut demander à l'Assemblée nationale de décider en dernier ressort. En revanche, une fois l'autorisation de prolonger l'intervention au-delà de quatre mois accordée, celle-ci apparaît comme étant définitive. La Constitution étant muette sur ce point, l'on peut estimer que si l'opération se prolonge, le Parlement n'est pas constitutionnellement invité à se prononcer.

Le rôle du juge. La décision du Président de la République d'engager des forces militaires à l'étranger est un acte de gouvernement qui n'est pas susceptible de recours.[48]

Question 3

Une recentralisation du pouvoir observé. Les régimes constitutionnels d'urgence qui ont été exposés ont la particularité de conduire à une recentralisation notable du pouvoir dans des périodes de crise. Le cadre constitutionnel ne consacre pas de développements spécifiques aux collectivités territoriales. Pour autant, l'application de ces régimes peut avoir des incidences à différentes échelles. Par exemple, en temps de guerre, l'article L. 2112-1 du code de la défense concerne les règles relatives aux pouvoirs du préfet à l'égard des communes. Mais ce sont surtout les états d'urgence qui ont entraîné des difficultés d'articulation entre les différents niveaux : central, déconcentré et décentralisé.

[46] Les états d'urgence : la démocratie sous contraintes, Étude annuelle du Conseil d'État, 2021, p. 173.

[47] Voir *Code constitutionnel et des droits fondamentaux*, Dalloz, 2025, 14e éd., article 35.

[48] CE, 5 juillet 2000, *M. Mégret, M. Mekhantar*, Lebon, p. 291.

Articulation des polices. C'est d'abord une question d'articulation en matière de police administrative qui s'est posée. Dans le cadre de l'état d'urgence sanitaire, le Conseil d'État a jugé que « la police spéciale instituée par le législateur fait obstacle, pendant la période où elle trouve à s'appliquer, à ce que le maire prenne au titre de son pouvoir de police générale des mesures destinées à lutter contre la catastrophe sanitaire, à moins que des raisons impérieuses liées à des circonstances locales en rendent l'édiction indispensable et à condition de ne pas compromettre, ce faisant, la cohérence et l'efficacité de celles prises dans ce but par les autorités compétentes de l'État. »[49]

Association des territoires aux dispositifs d'urgence. L'étude annuelle du Conseil d'État de 2021 a souligné le besoin d'associer davantage les territoires aux dispositifs d'urgence.[50]

Question 4

Les clauses de sauvegarde dans le cadre du droit international. À la différence des régimes des pouvoirs exceptionnels du président de la République[51] et de l'état de siège,[52] les régimes d'état d'urgence « sécuritaire » et « sanitaire » ne sont consacrés qu'au niveau législatif (**Q. 1, section 1**). Par conséquent, les mesures règlementaires et individuelles adoptées dans le cadre de ces deux régimes ne constituent pas des actes de mise en œuvre de dispositions constitutionnelles mais des actes de mises en œuvre de dispositions législatives. Si l'ordre juridique français reconnaît largement la primauté du droit international et européen sur les lois, la question de la contradiction d'une législation « d'exception » avec les engagements internationaux et européens de la France ne saurait être appréhendée à travers le prisme exclusif du principe de primauté. En effet, le droit international des droits de l'homme se compose de « clauses de sauvegarde » (ou « clauses de dérogation ») qui permettent aux États, sous réserve du respect d'une obligation de notification et d'information, de déroger aux droits et libertés fondamentaux garantis par un instrument international. Le Gouvernement français a activé le régime dérogatoire de la CEDH lors de l'instauration de l'état d'urgence sécuritaire[53] mais non celui du Pacte international relatif aux droits civils et politiques. En revanche, il a fait le choix de

[49] CE, 17 avril 2020, *Commune de Sceaux*, n° 440057.

[50] Les états d'urgence : la démocratie sous contraintes, Étude annuelle du Conseil d'État, 2021, p. 102.

[51] Article 16 Constitution.

[52] Article 36 Constitution.

[53] Voir toutefois CEDH, 14 mai 2014, *Domenjoud c. France*, n° s 34749/16 et 79607/17, par lequel la CEDH se place sur le terrain des restrictions et non des dérogations pour les mesures prises dans le cadre de l'état d'urgence sécuritaire dans l'hypothèse où la mesure vise un objectif autre que celui de la lutte contre le terrorisme djihadiste (assignation à résidence de militants écologistes lors de la tenue de la COP 21).

n'activer ni l'un ni l'autre lors de la mise en place de l'état d'urgence sanitaire, préférant se placer sur le terrain des restrictions à l'ordre public plutôt que sur celui des dérogations aux droits et libertés conventionnellement garantis.

Le droit l'Union européenne. Le droit de l'Union européenne ne comporte pas de clause de dérogation à la Charte des droits fondamentaux de l'Union européenne. Si la question de l'applicabilité de celle-ci sera explicitée *supra* (**Q. 6, section 2**), la CJUE,[54] à l'instar de la CEDH et des juges internes (**Q. 5, section 2**), applique les dérogations aux libertés de circulation. Ainsi a-t-elle admis, sous certaines conditions, que des atteintes à la libre circulation des personnes soient justifiées par un motif de protection de santé publique pendant la crise sanitaire. Il en irait de même des motifs de protection de l'ordre public et, quand bien même les juges français ont indiqué à la CJUE que, conformément à l'article 4 § 2 TUE, la sauvegarde de la sécurité nationale constitue une fonction essentielle de l'État qui reste de sa seule responsabilité,[55] ce qu'elle admet[56] tout en imposant, de jurisprudence constante, que les mesures nationales poursuivant un tel objectif ne sauraient entraîner l'inapplicabilité du droit de l'Union et dispenser les États du respect de ce droit. Il peut en résulter des divergences d'appréciation sur le caractère proportionné des restrictions aux droits et libertés fondamentaux, comme en témoigne par exemple la conservation des données personnelles.[57]

Question 5

Développement du contrôle de proportionnalité des mesures restreignant les droits et libertés fondamentaux. Le droit positif français ne définit pas de méthode d'interprétation à destination des juges, à l'instar des articles 19 § 2 de la Loi fondamentale allemande ou 52 § 1 de la CDFUE qui fournissent un fondement juridique au contrôle de proportionnalité des atteintes portées aux droits et libertés fondamentaux. C'est donc de manière prétorienne que le Conseil d'État, puis le Conseil constitutionnel, ont développé un contrôle de proportionnalité des mesures restreignant les droits et libertés fondamentaux pour préserver l'ordre public[58] (**Q. 4, section 4**).

Importance singulière du référé-liberté devant le juge administratif. Le contentieux des mesures d'urgence amène tout naturellement les requérants

[54] CJUE, G.C., 5 décembre 2023, *Nordic Info BV*, C-128/22.

[55] Décembre n° 2021-940 QPC, 15 octobre 2021, *Société Air France* ; CE, Ass., 17 décembre 2021, *M. Q.*, n° 437125.

[56] CJUE, G.C., 15 juillet 2021, *B.K.*, C-742/19.

[57] CJUE, G.C., 6 octobre 2020, *La Quadrature du net e. a.*, C-623/17 ; CE, Ass. 21 avril 2021, *French Data Network et a.*, n° 393099.

[58] CE, 19 mai 1933, *Sieur Benjamin*, n° 17413.

à privilégier l'office du juge du référé-liberté du juge administratif.[59] Cet office est particulièrement adapté à ce contentieux puisque le juge des référés peut ordonner toutes mesures nécessaires à la sauvegarde d'une liberté fondamentale, et qu'il doit de surcroît statuer dans un délai de quarante-huit heures (**Q. 2, section 4**).

Rôle du Défenseur des droits. Le Défenseur des droits, autorité constitutionnelle,[60] joue un rôle spécifique dans la protection des droits et libertés fondamentaux dans le cadre des états d'urgence. Tout citoyen qui s'estime lésé dans ses droits et libertés par l'administration de l'État peut adresser une réclamation au Défenseur des droits lequel, par voie de décision, formule ses observations. Il peut également formuler des recommandations qui prennent la forme de décisions, d'avis ou de rapports. À ce titre, il faut souligner une certaine complémentarité des solutions. Ainsi, le Conseil d'État a pu préciser le régime juridique des perquisitions administratives[61] dans le sens des recommandations formulées par le Défenseur des droits.[62]

Question 6

La France a mis en œuvre l'état d'urgence sécuritaire du 14 novembre 2015 au 1er novembre 2017, puis l'état d'urgence sanitaire du 23 mars 2020 au 1er janvier 2021. La question de potentiels conflits entre les mesures d'urgence et le droit de l'Union européenne appelle deux séries de réponses selon que l'on se situe sur un plan théorique ou contentieux.

L'atteinte aux droits fondamentaux de l'Union européenne sur le plan théorique. Sur un plan théorique, il paraît évident que les mesures d'urgence ont affecté les principes fondamentaux du droit de l'Union. Du fait de la congruence des garanties offertes au niveau constitutionnel et au niveau européen (CEDH, CDFUE), les mesures prises dans le cadre de l'état d'urgence sécuritaire (assignations à résidence, perquisitions administratives, interdictions de manifestation, fermetures de lieux de culte et de réunion, saisies des matériels et données informatiques, contrôles d'identité et fouilles de véhicules, dissolutions d'association) ont porté atteinte aux droits et libertés fondamentaux protégés en particulier par la CDFUE : liberté de circulation et de séjour, le droit de

[59] Article L. 521-2 Code de justice administrative.

[60] Article 71-1 Constitution.

[61] CE, Ass., avis, 6 juillet 2016, *M. E. et a*., n° 398234.

[62] DDD, 26 février 2016, décembre MDS-MDE-2016-069, *Recommandations générales relatives à l'usage des forces de police et de gendarmerie lorsqu'elles interviennent dans un domicile où sont présents des enfants* ; DDD, 26 mai 2016, décembre MSP-MDS-2016-153, *Recommandations générales relatives à la mise en œuvre des mesures de perquisitions administratives et à l'indemnisation des personnes dans le cadre de l'état d'urgence.*

propriété, le droit au respect de la vie privée et familiale ainsi que la liberté professionnelle et le droit de travailler, liberté de manifestation et de réunion, liberté d'association, liberté personnelle, droit à la protection des données personnelles. Les mesures prises dans le cadre de l'état d'urgence sanitaire (confinements, fermetures des lieux ouverts au public et des commerces non essentiels, prorogation des délais de détention provisoire) ont également porté atteinte à certains droits et libertés fondamentaux garantis par la CDFUE, en particulier aux droits à la sûreté et un contrôle juridictionnel effectif. Elles ont également affecté les libertés de circulation du marché intérieur.

L'absence de concrétisation contentieuse de l'atteinte aux droits fondamentaux de l'Union. Toutefois, sur un plan contentieux, nous n'avons pas trouvé de décisions de justice constatant une atteinte disproportionnée aux principes fondamentaux du droit de l'Union. Deux séries de considérations peuvent l'expliquer. D'une part, s'agissant du Conseil constitutionnel, il se refuse à contrôler la compatibilité des lois, y compris d'urgence, au droit international et au droit de l'Union en particulier en vertu de la jurisprudence « IVG. »[63] D'autre part, s'agissant du juge administratif, la plus grande partie des affaires qu'il a eu à traiter relève du référé-liberté.[64] Or, dans le cadre de cet office, et en raison de la congruence des catalogues de protection sus-évoquée, le juge administratif ne prend pas le soin d'identifier formellement la source textuelle qui consacre la liberté dont la méconnaissance est invoquée, et se contente généralement de relever que telle liberté constitue une liberté fondamentale au sens de l'article L. 521-2 du CJA. Par ailleurs, lorsque les requérants invoquent une source textuelle externe, ceux-ci privilégient la CEDH à la CDFUE.

Section 3 : Droit d'urgence statutaire/exécutif dans les États membres

Question 1

Urgence et terrorisme. Dans le domaine de la sécurité intérieure, la lutte contre le terrorisme a suscité, ces dix dernières années, une prolifération de lois et de mesures. La loi de 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme (dite SILT)[65] doit tout particulièrement être mentionnée. Elle se comprend au regard des multiples prolongations de l'état d'urgence déclaré en 2015 et prolongé jusqu'en 2017. Bien que ces prolongations aient été validées, la nature temporaire de principe du régime d'état d'urgence a été

[63] Décembre n° 74-54 DC, 15 janvier 1975, *Loi relative l'interruption volontaire de grossesse*.

[64] Article L. 521-2 Code justice administrative.

[65] Loi du 30 octobre 2017, JORF n° 255, 31 octobre 2017. Initialement conçu à titre expérimental, ce dispositif a été pérennisé par la loi n° 2021-998 du 30 juillet 2021 relative à la prévention d'actes de terrorisme et au renseignement.

rappelée avec de plus en plus d'insistance,[66] ce qui a incité le gouvernement français à instituer ce nouveau dispositif. En substance, la loi SILT intègre dans le droit commun des dispositions jusque-là réservées à l'état d'urgence (assignations à résidence, perquisitions, etc.), tout en modifiant quelque peu les termes et, pour les perquisitions, le régime juridique. Elle augmente largement les pouvoirs de police des autorités administratives, notamment ceux du préfet, et tend à instaurer un régime de droit administratif répressif dans le sens où, si les mesures visent pour l'essentiel à la prévention du renouvellement d'action terroriste individuelle ou de masse, elles sont, pour la plupart, jumelles des mesures pénales de lutte antiterroriste (périmètres de protection, visites et saisies, etc.).

Urgence, catastrophe et sécurité civile. Si les situations de catastrophe ou de crise majeure ont pu conduire à des dispositifs spécifiques, la loi du 24 janvier 2023 d'orientation et de programmation du ministre de l'Intérieur (LOPMI) a introduit dans le code de la sécurité intérieure « le fondement légal des actions ou décisions caractérisées par l'urgence par laquelle l'autorité de police compétente est en mesure, désormais, de rétablir l'ordre public. »[67] Ainsi, sur le fondement d'une nouvelle disposition[68] est réglementée la coordination des forces de sécurité étatiques, de la police municipale, la sécurité civile et du secteur privé dans la mission d'organisation des actions de sécurité en cas de crise. Ce dispositif régit les actions en urgence nécessitées par des situations de crise relevant de la sécurité civile entendue comme « la prévention des risques de toute nature, l'information et l'alerte des populations ainsi que la protection des personnes, des biens et de l'environnement contre les accidents, les sinistres et les catastrophes. »[69] Ce dispositif couvre donc les catastrophes naturelles, technologiques, mais également les attentats et implique le recours à des moyens d'action tant déconcentrés que décentralisés. La planification est la caractéristique majeure de ces politiques de prévention.

Question 2

Les domaines des règles législatives/exécutives sur les situations d'urgence sont strictement délimités par les dispositifs normatifs pertinents, ce qui exclut les situations de conflits entre ces différents cadres. Pour la différence entre ces derniers (**Sections 1 & 2**).

[66] Conseil d'État, avis n° 392427, 8 décembre 2016 : JurisData n° 2016- 015349 ; CNCDH, 15 décembre 2016, https ://www.cncdh.fr/publications/avis-contre-letat-durgence-permanent

[67] O. Gohin, préface de la 6e édition du Code de la sécurité intérieure (Lexis Nexis 2025).

[68] Article L. 742-2-1 Code de la sécurité intérieure.

[69] Article L. 112-1 Code de la sécurité intérieure.

Question 3

Le Parlement et le gouvernement sont soumis à des limites lorsqu'ils font usage de pouvoirs d'urgence, limites qui sont juridictionnellement contrôlées et sanctionnées (**Q. 3, section 4**).

Question 4

Une mesure d'urgence introduite par le droit de l'Union ne modifie pas la répartition des pouvoirs déterminée par le droit interne.

Section 4 : Contrôle juridictionnel des pouvoirs d'urgence dans les États membres

Question 1

Trois versants du contrôle juridictionnel des pouvoirs d'urgence peuvent être envisagés dans le système français. En fonction de l'objet de ce contrôle, les juridictions chargées de l'exercer ne disposeront pas des mêmes compétences vis-à-vis des mesures prises par les pouvoirs publics en la matière.

Contrôle des régimes d'exception. Il concerne l'adoption et la modification du régime juridique des pouvoirs d'urgence et relève principalement de la compétence du Conseil constitutionnel. Bien qu'il se soit estimé compétent pour en connaître par voie d'exception à l'occasion du contrôle d'une loi modifiant un dispositif déjà en vigueur,[70] il a fallu attendre le 11 mai 2020 pour voir le Conseil constitutionnel saisi *a priori* de la régularité d'un régime d'exception.[71] Dans le cadre du contrôle *a posteriori*,[72] il s'est prononcé à 9 reprises sur des questions prioritaires de constitutionnalité portant sur l'état d'urgence sécuritaire[73]

[70] Décembre n° 85-187 DC, 25 janvier 1985, *Loi relative à l'état d'urgence en Nouvelle-Calédonie et dépendances*.

[71] Décembre n° 2020-800 DC, 11 mai 2020, *Loi prorogeant l'état d'urgence sanitaire et complétant ses dispositions*.

[72] Article 61-1 Constitution.

[73] Décembre n° 2015-527 QPC, 22 décembre 2015, *M. Cédric D.* (Assignations à résidence dans le cadre de l'état d'urgence) ; Décembre n° 2016-536 QPC, 19 février 2016, *Ligue des droits de l'homme* (Perquisitions et saisies administratives dans le cadre de l'état d'urgence) ; Décembre n° 2016-535 QPC, 19 février 2016, *Ligue des droits de l'homme* (Police des réunions et des lieux publics dans le cadre de l'état d'urgence) ; Décembre n° 2016-567/568 QPC, 23 septembre 2016, *M. Georges F. et autres* (Perquisitions administratives dans le cadre de l'état d'urgence II) ; Décembre n° 2016-600 QPC, 2 décembre 2016, *M. Raïme A.* (Perquisitions administratives dans le cadre de l'état d'urgence III) ; Décembre n° 2017-624 QPC, 16 mars 2017, *M. Sofiyan I.* (Assignations à résidence dans le cadre de l'état d'urgence II) ; Décembre n° 2017-635-QPC, 9 juin 2017, *M. Émile L.* (Interdiction de séjour dans le cadre de l'état d'urgence) ; Décembre n° 2017-677 QPC, 1er décembre 2017, *Ligue*

et à 5 reprises dans le cadre de l'état d'urgence sanitaire.[74] Le juge constitutionnel est donc compétent pour abroger les dispositions législatives irrégulières et ainsi supprimer de l'ordre juridique des dispositions qui habilitent les autorités publiques à prendre des mesures exceptionnelles, sachant qu'il lui est loisible de moduler dans le temps la date et les effets de leur abrogation. Les régimes des pouvoirs d'urgence peuvent également être contrôlés par le juge de droit commun. Ce dernier est compétent[75] pour contrôler leur compatibilité avec les engagements internationaux, en particulier la CEDH.[76] Dans cette hypothèse, le juge ordinaire ne peut pas abroger le contenu d'un régime juridique de crise, mais uniquement en écarter l'application par voie d'exception au litige dont il est saisi.

Contrôle des décisions déclenchant l'application d'un régime d'exception. Alors que la décision du président de la République de mettre en œuvre l'article 16 de la Constitution présente le caractère d'un acte de gouvernement dont il n'appartient pas au juge administratif d'apprécier la légalité et de contrôler la durée d'application,[77] le Conseil d'État est compétent pour se prononcer sur le décret par lequel le président de la République déclare l'état d'urgence sur le fondement de la loi de 1955.[78] Toutefois, la loi de prorogation de l'état d'urgence, qui doit intervenir dans les 12 jours suivant sa déclaration,[79] a pour effet de ratifier le décret en question de telle sorte que le recours pour excès de pouvoir engagé contre lui est frappé d'irrecevabilité.[80] Lorsque cette loi a confié le soin au président de la République de fixer la fin de l'application de l'état d'urgence, le juge administratif est compétent pour connaître des appréciations du chef de l'État quant au maintien de l'état d'urgence et peut lui enjoindre d'y mettre fin.[81]

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des droits de l'Homme (Contrôles d'identité, fouilles de bagages et visites de véhicules dans le cadre de l'état d'urgence) ; Décembre n° 2017-684 QPC, 11 janvier 2018, *Associations La cabane juridique / Legal Shelter et autre* (Zones de protection ou de sécurité dans le cadre de l'état d'urgence).

[74] Décembre n° 2020-846/847/848 QPC, 26 juin 2020, *M. Oussman G. et autres* (Violations réitérées du confinement) ; Décembre n° 2020-872 QPC, 15 janvier 2021, *M. Krzystof B.* (Utilisation de la visioconférence sans accord des parties devant les juridictions pénales dans un contexte d'urgence sanitaire) ; Décembre n° 2020-878/879 QPC, 29 janvier 2021, *M. Ion Andronie R. et autres* (Prolongation de plein droit des détentions provisoires dans un contexte d'urgence sanitaire) ; Décembre n° 2021-911/919 QPC, 4 juin 2021, *M. Wattara B. et autres* (Utilisation de la visioconférence sans accord des parties devant les juridictions pénales dans un contexte d'urgence sanitaire II).

[75] Article 55 Constitution.

[76] CE, Ass., 24 mars 2006, n° 286834 ; n° 287218, *Rolin et Boisvert*, *Lebon*, p. 171 ; CE, 2e–7e ch., 23 décembre 2016, n° 395091, Inédit, *Ligue des droits de l'homme* (Police des lieux de réunion dans le cadre de l'état d'urgence) ; CE, 2e–7e ch., 23 décembre 2016, n° 395092, Inédit, *Ligue des droits de l'homme* (Perquisitions administratives dans le cadre de l'état d'urgence).

[77] CE, Ass., 2 mars 1962, *Rubin de Servens*, *Lebon*, p. 143.

[78] CE, Juge des référés, 14 novembre 2005, *Rolin*, *Lebon*, p. 499.

[79] Article 2.

[80] CE, Ass., 24 mars 2006, *Rolin et Boisvert*, *Lebon*, p. 171 ; CE, Juge des référés, 27 janvier 2016, *LDH*, no 396220, *Lebon*, p. 8.

[81] CE, Juge des référés, 9 décembre 2005, *Allouache*, *Lebon*, p. 562 ; CE, Juge des référés, 27 janvier 2016, *préc.*

Le contrôle des mesures d'application des régimes d'exception. Les régimes d'exception prévus par la loi ou par la Constitution confèrent généralement aux autorités des compétences étendues de police administrative en vue de prévenir les atteintes à l'ordre public causées par une situation de crise ou d'urgence. De ce fait, le juge principalement chargé d'en connaître est le juge administratif. Dans le cadre des référés-urgence (**Q. 2, section 4**), le juge administratif prononce des mesures provisoires et rapides de sauvegarde des droits et libertés visés par les mesures d'urgence sans régler définitivement le litige. Il peut ainsi suspendre l'application d'une mesure qui porterait une atteinte manifestement grave ou illégale à une liberté fondamentale[82] ou en cas de doute sérieux sur sa légalité.[83] Il peut également prononcer des mesures nécessaires à la sauvegarde d'une telle liberté comme que l'injonction de prendre une nouvelle décision administrative qui en assurerait la protection.[84] Dans le cadre des procédures au fond, le juge administratif est compétent, dans le contentieux de l'excès de pouvoir, pour annuler les mesures d'urgence qui seraient contraires à la législation de crise qui leur sert de fondement.[85] Dans le cadre de recours de plein contentieux, le juge peut notamment assortir les mesures d'annulation d'une indemnisation pour le préjudice causé par l'application d'une mesure d'urgence illégale.[86] Cet exemple est particulièrement marqué par les mesures de perquisition dont, par essence, les effets ne peuvent être annulés du fait de leur caractère fugace, la seule sanction de l'irrégularité de la mesure s'apparente donc à l'indemnisation du préjudice qu'elle a généré. Le juge administratif détient ainsi des compétences qui lui permettent de sanctionner l'irrégularité des mesures d'urgence prises en application d'un régime de pouvoir de crise. Il peut aussi les assortir d'une dimension individuelle qui tient compte de la situation de leur destinataire, y compris en urgence. De manière résiduelle, le juge judiciaire peut être parfois amené à se prononcer sur la régularité des mesures prises sur le fondement des régimes d'exception lorsque leur non-respect entraîne des poursuites pénales à l'encontre de contrevenants. Ces derniers peuvent alors exciper de l'irrégularité de ces mesures afin d'échapper à une condamnation et le juge pénal peut se prononcer sur cette exception.[87]

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[82] CE, Juge des référés, 17 avril 2020, Commune de Sceaux, n° 440057.

[83] CE, Juge des référés, 9 décembre 2005, *Allouache*, n° 287777, (Refus d'injonction au président de la République de suspendre l'état d'urgence).

[84] TA Strasbourg, Ord., 2 septembre 2020, n° 2005349 ; TA Paris, 1er octobre 2020, n° 2015655, 2015758, 2015761, 2015802/9, *Société SIIS Développement, Société KC Marcadet et autres, Syndicat FRANCE ACTIVE FNEAPL et autres Société LE TIGRE YOGA CLUB et société QEE*.

[85] Pour des exemples de rejet d'une demande d'annulation : CE, 2e–7e ch., 23 décembre 2016, n° 395091, *Ligue des droits de l'homme* (Police des lieux de réunion dans le cadre de l'état d'urgence) ; CE, 2e–7e ch., 23 décembre 2016, n° 395092, *Ligue des droits de l'homme* (Perquisitions administratives dans le cadre de l'état d'urgence).

[86] CE, Ass., 6 juillet 2016, *Napol et autres*, n° 398234.

[87] Article 111-5 Code pénal ; Cour cass., crim., 3 mai 2017, n° 16-86.155.

Question 2

Contrôle constitutionnel consultatif des pouvoirs exceptionnels du Président. La seule hypothèse qui s'apparente à une procédure spécifique à l'action des autorités publiques en situation d'urgence est celle qui est prévue à l'article 16 de la Constitution (**Q. 2, section 2**).

Procédures d'urgences de droit commun devant le juge administratif. Les procédures de référés d'urgence issues de la loi du 30 juin 2000 sont un instrument privilégié par les justiciables visés par des mesures exceptionnelles. Bien que n'étant pas spécifiquement destinées à l'action des pouvoirs publics en période de crise, elles permettent au juge d'agir en urgence pour assurer la sauvegarde de droits fondamentaux plus largement mis en cause en de telles périodes. L'intervention en urgence du juge du référé est donc particulièrement adaptée à l'accroissement des pouvoirs de l'administration en vue d'une action plus rapide dictée par des circonstances exceptionnelles. En effet, les régimes de crise tels que les états d'urgence sécuritaire et sanitaire permettent à l'exécutif de restreindre l'exercice des libertés sans autorisation judiciaire en vertu du principe du préalable de l'administration. L'intervention du juge dans « les meilleurs délais » en référé suspension[88] et en 48 heures en référé-liberté[89] limite alors les conséquences de la mise à l'écart de l'autorité judiciaire. La célérité de l'intervention du juge du référé donne au juge administratif les moyens procéduraux de sanctionner une décision illégale ou d'en suspendre les effets le plus rapidement possible après qu'elle a été prononcée. Une présomption d'urgence pour les mesures prononcées en application d'un régime de crise permet par ailleurs au justiciable de remplir une des conditions de recevabilité de la requête en référé-liberté, accroissant considérablement l'intérêt d'une telle procédure en période d'urgence.[90] La quantité de procédures de référé initiées dans le premier temps de la crise sécuritaire, entre novembre 2015 et février 2016, illustre son caractère privilégié pour permettre au justiciable visé par des mesures d'urgence d'en contester la teneur dans des délais restreints.[91] Elles sont toutefois dédiées à l'urgence causée par l'action des pouvoirs publics pour les intérêts du justiciable, mais ne sont pas inhérentes à l'urgence générée par une situation de crise.

[88] Article L. 521-1 Code de justice administrative.

[89] *Ibid*.

[90] CE, ord., 25 février 2016, n° 397153.

[91] « 160 référés – dont 125 référés-libertés et 35 référés-suspension – ont été soumis à la juridiction administrative ; 12 suspensions seulement ont été prononcées » – B. Cazeneuve, Ministre de l'intérieur Séance à l'Assemblée nationale, 11 février 2016.

Question 3

Plusieurs facteurs vont déterminer la norme de contrôle utilisée par le juge saisi des normes produites pour faire face à une situation d'urgence. Selon que la contestation en justice porte sur le contenu du régime d'exception ou sur ses mesures d'application, que le juge compétent soit le juge constitutionnel ou le juge de droit commun, les normes mobilisées pour en contrôler la régularité ne seront pas les mêmes.

Contrôle du régime juridique de crise. Qu'il s'agisse d'en contrôler la constitutionnalité ou la conformité au droit international et européen, ce sont des normes de contrôle extérieures au régime de crise qui seront mobilisées par le juge. La fréquence des questions prioritaires de constitutionnalité posées à l'encontre du régime de l'état d'urgence sécuritaire puis de l'état d'urgence sanitaire traduisent la prégnance des droits et libertés constitutionnels comme norme de contrôle de l'action du législateur en situation d'urgence. Le Conseil constitutionnel a en ce sens sanctionné le contenu du régime de l'état d'urgence sécuritaire sur différents fondements : la liberté d'aller et de venir (2017-635 QPC, 2017-677 QPC, 2017-684 QPC), le droit au respect de la vie privée (2016-567/568 QPC, 2016-600 QPC, 2017-677 QPC), le droit de mener une vie familiale normale (2017-635 QPC) ou encore le droit d'exercer un recours juridictionnel effectif (2017-624 QPC). Concernant l'état d'urgence sanitaire, il se fonde sur une méconnaissance des droits de la défense (2020-872 QPC, 2021-911/919 QPC) ou sur la liberté individuelle (2020-878/879 QPC) pour en censurer le régime. Les droits et libertés que la Constitution garantit sont aussi mobilisés comme motifs de censure dans le contrôle *a priori* de l'état d'urgence sanitaire : le droit au respect de la vie privée (2020-800 DC, 2021-828 DC, 2022-835 DC), la liberté individuelle, le principe d'égalité (2021-824 DC) ainsi que le droit d'expression collective des idées et des opinions (2022-835 DC) y sont également mobilisés comme normes de contrôle du régime d'exception. Du point du droit international et européen, le juge administratif a mobilisé à plusieurs reprises certains énoncés de droits fondamentaux conventionnels sans pour autant sanctionner le régime de l'état d'urgence à leur égard. Que ce soit par rapport à la Convention européenne des droits de l'homme ou au Pacte international relatif aux droits civils et politiques,[92] le juge de la conventionnalité s'est borné à affirmer la conformité du régime juridique de l'état d'urgence à leurs stipulations sans chercher à motiver cette position. Les énoncés portant des droits fondamentaux sont donc la norme de contrôle privilégiée par le juge français, qu'il s'agisse de contrôler la constitutionnalité ou la conventionnalité du contenu des régimes de crise.

[92] CE, Ass., 24 mars 2006, n° 286834 ; n° 287218, *Rolin et Boisvert*, *Lebon*, p. 171 ; CE, 2e–7e ch., 23 décembre 2016, n° 395091, *Ligue des droits de l'homme* (Police des lieux de réunion dans le cadre de l'état d'urgence) ; CE, 2e–7e ch., 23 décembre 2016, n° 395092, *Ligue des droits de l'homme* (Perquisitions administratives dans le cadre de l'état d'urgence).

Contrôle des décisions déclenchant l'application d'un régime d'exception. La norme du contrôle assuré par le juge administratif en la matière est le texte législatif qui institue le régime d'exception et en particulier celles de ses dispositions relatives aux conditions de fond relatives au déclenchement du régime d'exception.

Contrôle des mesures d'application. Les régimes d'urgence étant prévus par la loi, le contrôle de leurs mesures d'application portera sur une légalité entendue au sens large dans l'office du juge administratif. En excès de pouvoir, le juge de la légalité au sens strict mobilise le contenu du régime de crise pour contrôler les actes administratifs qui en découlent. Le contenu même du régime de crise est donc la norme de contrôle principale de ses mesures d'application, tout comme dans le cadre du référé-suspension où le doute sérieux quant à la légalité des actes administratifs pris en application du régime de crise repose sur leur conformité à ce dernier.[93] Les normes mobilisées dans le cadre du référé-liberté permettent d'envisager une autre perspective. Puisque l'article L. 521-2 du Code de justice administrative dispose que le juge « peut ordonner toutes mesures nécessaires à la sauvegarde d'une liberté fondamentale, » cela implique que les mesures d'application d'un régime de crise peuvent être confrontées à une norme de contrôle qui lui est extérieure, directement fondée sur la protection des droits et libertés. Le juge du référé a permis au justiciable des états d'urgence de mobiliser des libertés fondamentales autonomes des énoncés constitutionnels et conventionnels. Dans le cadre des assignations à résidence prononcées sur le fondement de l'état d'urgence, le juge du référé a eu à se prononcer sur des atteintes portées à la liberté d'aller et venir.[94] Il a pu se prononcer sur des atteintes à la liberté de culte dans le cadre de la crise terroriste[95] ou de la crise sanitaire,[96] mais également au respect de la liberté personnelle quant à une obligation locale de port du masque.[97] Le juge saisi des régimes de crise ou de leurs mesures d'application est donc conduit à privilégier les droits et libertés fondamentaux comme norme de contrôle, que ceux-ci soient issus des normes constitutionnelles, conventionnelles ou qu'il les développe de manière autonome en son prétoire.

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[93] Voir en ce sens CE, juge des référés, 14 novembre 2005, n° 286835, *Rolin* (Demande de suspension du décret présidentiel déclarant l'état d'urgence).

[94] CE, Sec. Juge des référés, 11 décembre 2015, *M. Domenjoud*, n° 395009 (contestation des assignations à résidence) ; CE, Sec., Juge des référés, 11 décembre 2015, *M. G.*, n° 394990 (contestation des assignations à résidence).

[95] CE,juge des référés, 25 février 2016, n° 397153 (Fermeture de lieu de culte – Présomption d'urgence en référé-liberté).

[96] CE, Juge des référés, 7 novembre 2020, Association Civitas et autres, n° 44582 (Limitation des réunions dans les lieux de cultes) ; CE, Ord., 29 novembre 2020, Conférence des évêques de France et autres, n° 446930.

[97] CE, juge des référés, 17 avril 2020, n° 440057 (Port du masque – Commune de Sceaux).

Question 4

Admission progressive du contrôle de proportionnalité par le juge administratif. Le principe de proportionnalité est au cœur du contrôle juridictionnel des restrictions aux droits et libertés en général et son application aux situations d'urgence est déterminante de la latitude dont bénéficient les pouvoirs publics pour y remédier. Le contrôle des mesures d'application des régimes de crise a longtemps exclu l'examen de leur proportionnalité, alors qu'il était implicitement mis en œuvre par le juge administratif depuis l'arrêt *Benjamin* de 1933.[98] Ce n'est qu'à partir de l'affaire *Domenjoud*[99]qu'un contrôle entier de proportionnalité des mesures des régimes d'urgence appliqués en situation de crise a vu le jour. Bien que les conditions d'un tel contrôle n'apparaissent pas expressément dans l'arrêt, la doctrine officielle affirme qu'il y apparaît pour la première fois pour contrôler une mesure d'assignation à résidence. Cette lecture est renforcée par la décision rendue sur la question prioritaire de constitutionnalité renvoyée au Conseil constitutionnel dans la même affaire : il y affirme que le juge administratif doit contrôler qu'une mesure d'application de l'état d'urgence doit être « adaptée, nécessaire et proportionnée à la finalité qu'elle poursuit. »[100] En ce sens, le contrôle de constitutionnalité du régime de crise a conduit le juge administratif à exercer un contrôle entier de proportionnalité de ses mesures d'application, marquant un accroissement significatif de son encadrement juridictionnel.

Contrôle de proportionnalité par le Conseil constitutionnel. Pour autant, le contrôle de proportionnalité exercé par le Conseil constitutionnel à propos de la conformité des régimes de crise aux droits et libertés que la Constitution garantit semble relativement permissif, favorisant l'exercice du pouvoir dans un contexte d'urgence et de crise. Le contrôle exercé par le juge constitutionnel est à ce titre restreint : s'il mentionne généralement les trois conditions du contrôle (nécessité de l'atteinte, adéquation au but poursuivi, proportionnalité de son intensité), il apparaît toutefois qu'il se limite à un contrôle de l'absence de disproportion manifeste de l'atteinte portée aux droits et libertés.[101] Le juge

[98] CE, 19 mai 1933, n° 17413 17520, « l'éventualité de troubles (…) ne présentait pas un degré de gravité tel qu'il n'ait pu, sans interdire la conférence, maintenir l'ordre en édictant les mesures de police qu'il lui appartenait de prendre. »

[99] CE, Sec. juge des référés, 11 décembre 2015, *M. Domenjoud*, n° 395009 (contestation des assignations à résidence) ; CE, Sec. juge des référés, 11 décembre 2015, *M. G.* n° 394990 (contestation des assignations à résidence).

[100] Décembre n° 2015-527 QPC, 22 décembre 2015, *M. Cédric D.* (Assignations à résidence dans le cadre de l'état d'urgence).

[101] Pour un exemple issu de l'état d'urgence sécuritaire, Décembre n° 2016-600 QPC, 2 décembre 2016, *M. Raïme A.* (Perquisitions administratives dans le cadre de l'état d'urgence III) : « le législateur a, en ce qui concerne la saisie et l'exploitation de données informatiques, assuré une conciliation qui n'est pas manifestement déséquilibrée entre le droit au respect de la vie privée et l'objectif de valeur constitutionnelle de sauvegarde de l'ordre public » (considérant 12). Pour un exemple issu de l'état d'urgence sanitaire, Décembre n° 2020-846/847/848 QPC, 26 juin 2020,

constitutionnel laisse donc une marge d'appréciation importante au législateur dans la restriction aux droits et libertés justifiée par la période de crise et mise en œuvre par le régime d'urgence. Le contrôle de proportionnalité appliqué en de telles périodes est en ce sens comparable avec celui, relativement compréhensif, de la Cour de justice de l'Union européenne. Tout d'abord, elle se refuse de reconnaître l'existence d'« une réserve générale, inhérente au traité, excluant du champ d'application du droit communautaire toute mesure prise au titre de la sécurité publique » qui serait de nature à porter atteinte « au caractère contraignant et au caractère uniforme du droit de l'Union. »[102] En ce sens, bien que les États bénéficient d'une large marge d'appréciation dans la détermination des dérogations aux droits et libertés que protège le droit de l'Union,[103] les mesures qu'ils prennent doivent s'inscrire « dans le respect du principe de proportionnalité, aux fins de la réalisation de l'objectif légitime »[104] qu'ils poursuivent. L'exemple de la pandémie de Covid-19 voit la Cour reconnaître aux États membres une marge d'appréciation qui leur permet « de décider du niveau auquel ils entendent assurer la protection de la santé publique et la manière dont ce niveau doit être atteint. »[105] En droit interne comme en droit de l'Union, le contrôle de proportionnalité tend à assurer que les mesures prises par les pouvoirs publics en période de crise ne portent pas une atteinte trop importante aux exigences de l'ordre juridique. Pour autant, la marge d'appréciation que le juge laisse dans l'une et l'autre hypothèse aux pouvoirs publics conduit à en limiter les effets et à favoriser l'exercice du pouvoir face à l'état d'exception.

Section 5 : Mise en œuvre du droit d'urgence de l'UE dans les États membres

Questions 1 et 2

Il convient de traiter ces deux questions ensemble car, de manière générale, quels que soient les domaines, la mise en œuvre des mesures de l'UE régissant des situations d'urgence ne reposent pas sur des mécanismes spécifiques et ne révèlent guère de difficultés.

M. Oussman G. et autres (Violations réitérées du confinement) : « Compte tenu des risques induits durant une telle période par le comportement réprimé, les peines instituées ne sont pas manifestement disproportionnées. Dès lors, le grief tiré de la méconnaissance du principe de proportionnalité des peines doit être écarté. »

[102] CJCE, 15 mai 1986, *Marguerite Johnston*, n° 222/84.

[103] CJCE, Gr. Ch., 3 septembre 2008, *Y.A. Kadi et autre c/ Conseil dit « Kadi I »*, aff. jointes n° C-402/05 et 415/05 P : « une grande marge d'appréciation doit être reconnue au législateur tant pour choisir les modalités de mise en œuvre que pour juger si leurs conséquences se trouvent légitimées, dans l'intérêt général, par le souci d'atteindre l'objectif de la législation en cause. »

[104] CJUE, 5 décembre 2023, *Nordic Info BV*, C-128/22.

[105] *Ibid*., § 78.

Absence de spécificité des mesures européennes d'urgence en matière de santé. Dans le domaine de la santé, la France ne met pas explicitement en œuvre le droit de l'UE et ne fait aucune référence aux mesures de l'UE régissant les situations d'urgence. Il est donc particulièrement difficile de parvenir à identifier une mise en œuvre de telles mesures de l'UE et des principes spécifiques du droit français interagissant avec le droit de l'UE. Tout au plus peut-on noter la mise en œuvre, parfois défaillante,[106] de textes adoptés dans le cadre de la politique de santé suite à une crise sanitaire, telle celle de la vache folle. En revanche, la question de la fourniture de vaccins dans le cadre de la crise du Covid-19 a fait l'objet d'un arrêt du Conseil d'État en date du 22 mars 2024.[107] Dans le cadre de la stratégie en matière d'acquisition de vaccins,[108] la Commission européenne a conclu en 2021 des contrats-cadres pour la livraison de 4,6 milliards de doses en application du règlement (UE) 2016/369 du 15 mars 2016 relatif à la fourniture d'une aide d'urgence au sein de l'Union.[109] Tel que modifié en 2020,[110] l'article 4, paragraphe 5, point b), de ce règlement prévoit que l'aide d'urgence peut être accordée sous la forme d'une passation de marché menée par la Commission pour le compte d'États membres, sur la base d'un accord conclu entre la Commission et des États membres. Devant le Conseil d'État, était contestée une clause du contrat-cadre. L'arrêt du 22 mars 2024 conclut à l'incompétence du juge administratif pour connaître des actions concernant « l'ensemble contractuel » formé par le bon de commande passé par l'Agence nationale de santé publique en application du contrat-cadre conclu le 20 novembre 2020 entre la Commission européenne et les sociétés Pfizer et BioNTech ManufacturingGmbH.

Absence de difficulté dans le cadre de l'UEM. Dans l'UEM, les mesures d'urgence adoptées dans le cadre de l'Union européenne ou, en ce qui concerne le Mécanisme européen de stabilité, dans le cadre de la zone euro n'ont donné lieu ni à une confrontation avec des principes spécifiques au droit français ou à des difficultés particulières dans l'ordre juridique national. La révision de l'article 136 TFUE et la ratification du traité établissant le Mécanisme européen de stabilité n'ont guère suscité d'intérêt tant sur le plan politique que juridique ; en particulier, alors qu'il a été saisi de la loi de ratification du traité sur la stabilité, la coordination et la gouvernance,[111] le Conseil constitutionnel ne s'est pas prononcé sur ces questions. Tout au plus, pendant la crise de dette souveraine, la question du risque financier d'un défaut grec a-t-elle été ana-

[106] CJUE, 22 octobre 2002, National Farmers Union c/ SGAE, aff. C-241/01.

[107] CE, Sect., 22 mars 2024, n° 471048, ECLI :FR :CESEC :2024 :471048.20240322.

[108] Stratégie de l'Union européenne concernant les vaccins contre le Covid-19, COM(2020) 245.

[109] *JOUE* L 70 du 16 mars 2016, p. 1.

[110] Règlement (UE) 2020/521 du Conseil du 14 avril 2020 portant activation de l'aide d'urgence en vertu du règlement (UE) 2016/369 et modification des dispositions dudit règlement pour tenir compte de la propagation du Covid-19, *JOUE* L 117, 15 avril 2020, p. 3.

[111] Décembre n° 2012-653 DC, 9 août 2012, *Traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire*.

lysée par le Sénat français,[112] mais la France s'est opposée à toute hypothèse d'exclusion de la Grèce de l'Union européenne ou de la zone euro.[113]

Un constat comparable dans le cadre de l'Union bancaire. Dans l'Union bancaire, le Mécanisme de résolution unique tel qu'établi par le règlement (UE) n° 806/2014[114] n'a pas davantage suscité de difficultés ; tout au plus a-t-on relevé un contentieux sur la nature fiscale des contributions au fonds de résolution unique due par les établissements bancaires en application dudit règlement.[115] Au contraire, l'Autorité de contrôle prudentiel et de résolution applique les règles européennes, comme le montre l'adoption par les établissements bancaires des plans de résolution.[116] La question s'est néanmoins posée en France de l'articulation entre les règles de résolution et celles qui régissent les procédures collectives telles qu'elles sont déclinées pour les établissements bancaires. En substance, si le droit de la résolution s'est largement européanisé, le droit des procédures collectives demeure essentiellement national. Dans un rapport, le Haut Comité Juridique de la Place financière de Paris a souligné que le droit commun des procédures collectives devait continuer à s'appliquer aux établissements bancaires.

Une réception aisée des mesures d'urgence adoptées au titre de l'article 122 TFUE. De la même manière, les mesures d'urgence adoptées au titre de l'article 122 TFUE ont fait l'objet d'une réception en France qui n'a pas davantage suscité de difficultés, ni même de réaction. Pour l'application du règlement SURE,[117] a été adoptée la disposition autorisant le Ministre de l'économie à octroyer à titre gratuit la garantie de l'État français à l'Union européenne au titre des prêts contractés au titre de ce mécanisme.[118] La France n'a pas demandé à bénéficier des prêts accordés dans le cadre de SURE. Pour les mesures d'urgence adoptées en matière énergétique, le gouvernement français a même anticipé les dispositifs prévus par le règlement (UE) 2022/1854 du 6 octobre 2022

[112] Sénat, *Les risques financiers pour la France inhérents à un éventuel défaut grec*, Rapport d´information, 8 juillet 2015.

[113] F. Martucci, « La France et la crise de dette souveraine en Grèce, » *Annuaire français de relations internationales*, 2016, p. 347–365.

[114] Règlement (UE) 806/2014 du Parlement européen et du Conseil du 15 juillet 2014 établissant des règles et une procédure uniforme pour la résolution des établissements de crédit et de certaines entreprises d'investissement dans le cadre d'un mécanisme de résolution unique et d'un Fonds de résolution bancaire unique, et modifiant le règlement (UE) n° 1093/2010, *JOUE* L 225, 30 juillet 2014, p. 1.

[115] Voir par exemple CAA de PARIS, 12 avril 2024, 23PA01377.

[116] ACPR, Rapport annuel 2022, p. 88.

[117] Règlement (UE) 2020/672 du Conseil du 19 mai 2020 portant création d'un instrument européen de soutien temporaire à l'atténuation des risques de chômage en situation d'urgence (SURE) engendrée par la propagation du Covid-19, *JOUE* L 159, 20 mai 2020, p. 1.

[118] Article 32 de la loi n° 2020-935 du 30 juillet 2020 de finances rectificative pour 2020, *JORF* n° 187 du 31 juillet 2020.

sur une intervention d'urgence pour faire face aux prix élevés de l'énergie.[119] Deux propositions de loi avaient été déposées, visant, pour l'une, l'organisation d'un référendum sur la création d'une contribution additionnelle sur les bénéfices exceptionnels des grandes entreprises, pour l'autre, à instaurer une « taxe sur les profiteurs de crise. »[120] Le gouvernement a finalement déposé deux amendements au projet de loi de finances, faisant application des dispositifs du règlement (UE) 2022/1854. D'une part, l'article 40 de la loi finances pour 2023 a créé la « contribution temporaire de solidarité »[121] que doivent acquitter les entreprises dont le chiffre d'affaires provient, pour 75 % au moins, d'activités économiques relevant des secteurs du pétrole brut, du gaz naturel, du charbon et du raffinage. La contribution a été instaurée en application du règlement (UE) 2022/1854 dont le chapitre III est consacré à la « contribution de solidarité. »[122] D'autre part, l'article 54 de la loi de finances pour 2023 a introduit un plafonnement des revenus infra-marginaux des producteurs d'électricité aux fins d'appliquer les dispositions de la section 2 du chapitre II du règlement (UE) 2022/1854 dont l. l'article 6 du règlement fixe le plafond obligatoire sur les recettes issues du marché obtenues par les producteurs d'électricité. A ainsi été instaurée une contribution à laquelle est soumise la rente infra-marginale dégagée par l'exploitation d'une installation de production d'électricité située sur le territoire métropolitain. Ces deux dispositifs ont eu vocation à financer notamment le bouclier tarifaire qui a constitué la première aide fournie aux consommateurs particuliers pour faire face à la crise énergétique.[123] Le financement de ce bouclier respecte à la fois le règlement (UE) 2022/1854 et la jurisprudence de la Cour de justice en matière de tarifs réglementés de l'énergie.[124]

[119] Règlement (UE) 2022/1854, *préc*.

[120] Assemblée nationale, Proposition de loi présentée en application de l'article 11 de la Constitution portant création d'une contribution additionnelle sur les bénéfices exceptionnels des grandes entreprises, 21 septembre 2022.

[121] Article 40 de la loi de finances pour 2023.

[122] Règlement (UE) 2022/1854, *préc*.

[123] M. Lamoureux, « Prix de l'énergie : qu'est-ce que le "bouclier tarifaire" et comment le financer ?, » 27 septembre 2022, Le club des juristes.

[124] Article 5 de la directive (UE) 2019/944 du Parlement européen et du Conseil du 5 juin 2019 concernant des règles communes pour le marché intérieur de l'électricité et modifiant la directive 2012/27/UE (refonte), *JOUE* L 158, 14 juin 2019, p. 125 ; CJUE, 20 avril 2010, *Federutility et autres / Autorità per l'energia elettrica e il gas*, C-265/08, ECLI :EU :C :2010 :205 ; CJUE, 7 septembre 2016, *ANODE*, C-121/15, ECLI :EU :C :2016 :637 ; CE, 19 juillet 2017, n° 370321, ECLI :FR :CEASS :2017 :370321.20170719 ; CE, 18 mai 2018, *Engie*, n° 413688, ECLI :FR :CEASS :2018 :413688.20180518.

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Abschnitt 1: Der Begriff des „Notstands" und andere damit verbundene Begriffe in den Rechtsordnungen der Mitgliedstaaten

Question 1

Von den ausgewiesenen Begrifflichkeiten kennt das deutsche Recht ausdrücklich nur denjenigen des „Notstands". Der Begriff taucht dabei an verschiedenen Stellen der Rechtsordnung auf,[1] wird jedoch nirgends legaldefiniert. Das Begriffsverständnis ergibt sich deshalb ausschließlich aus Literatur und Rechtsprechung, wobei es häufig zu Determinierungsschwierigkeiten kommt, weil der Begriff dogmatisch nicht immer einheitlich verwendet wird. Zum Teil wird er als gemeinsamer Oberbegriff für eine Notstandslage (*Tatbestand*) und eine Notstandshandlung (*Rechtsfolge*) verwendet, andernorts wird er wiederum auf die Notstandslage beschränkt und dementsprechend als Tatbestandsbegriff gebraucht.[2] Bei kursorischer Auswertung der gegenwärtigen Staats- und Verfassungsrechtsliteratur lässt sich folgendes Begriffsverständnis feststellen: Der Notstand (auch: Staatsnotstand) wird regelmäßig als außerordentliche Gefahrenlage für den Staat definiert, die sich durch eine existentielle Bedrohungslage auszeichnet und Gefahrenabwehrmaßnahmen dringend erforderlich macht.[3] Die Notstandsgefahr wird durch eine erhöhte Gefah-

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[1] Ausdrücklich taucht dieser Begriff etwa in der Strafrechtsordnung – dort maßgeblich in §§ 34, 35 StGB – oder in der Zivilrechtsordnung – dort wiederum in §§ 228, 904 BGB – auf. In dem hier relevanten staats- und verfassungsrechtlichen Kontext wird die Bezeichnung lediglich in Art. 81 GG und dort nur in der spezifischen Form des sog. Gesetzgebungsnotstands verwendet. Im Übrigen taucht der Begriff nur als tatbestandliche Umschreibung, das heißt in Gestalt einer bestimmten Staatsnotlage auf, s. dazu noch näher unter → *Abschnitt 1, 3 a.*

[2] Dazu v. a. *Windthorst*, Der Notstand, in: Thiel (Hrsg.), Wehrhafte Demokratie, 2003, S. 365 f.; ferner *Oberreuter*, Notstand und Demokratie, 1978, S. 9 ff.

[3] Vgl. dazu insbes. *Reindl-Krauskopf et al.,* Verfassungsvergleichende Studie zum Thema „Resilienz des Rechts in Krisenzeiten", 2016, S. 19 f. Von einer „ernsthaften Gefahr für den Bestand (Existenz) des Staates" spricht i. Ü. *Stern*, StR II, 1980, § 52, S. 1295. Ähnlich auch *Forsthoff*, in: Handwörterbuch der Sozialwissenschaften, 1958, S. 455, der – allerdings den Begriff des Ausnahmezustands – als eine „außergewöhnliche, den Staatsbestand gefährdenden Lage" bezeichnet. Bei *Oberreuter*, Notstand und Demokratie, 1978, S. 11 ist wiederum von der „Gefährdung der Existenz

renintensität („existentiell") für ein staatliches Schutzgut sowie eine zeitliche Dringlichkeit in der Gefahrenabwehr gekennzeichnet und dabei regelmäßig auch durch den plötzlichen und unvorhersehbaren Eintritt einer bestimmten Gefahrenursache bedingt.[4] Je nachdem, ob der Staat dabei in einem engen oder weiten Sinne verstanden wird, ist zwischen einem engen und weiten Notstandsbegriff zu unterscheiden: Während der *enge* Notstandsbegriff den Staat auf seine Staatsgewalt beschränkt und einen Notstand dann annimmt, wenn die staatlichen Rechtssetzungs- und/oder -vollziehungsbefugnisse in Abrede stehen,[5] definiert das *weite* Verständnis den Staat nach *Jellinek* als aus einem Volk, einem Gebiet und der Hoheitsgewalt bestehenden Einheitsgefüge, das sich wiederum dann in einem Notstand befindet, wenn entweder das Einheitsgefüge unmittelbar als Ganzes oder mittelbar durch existentielle Bedrohung eines seiner Elemente – Volk, Gebiet oder Hoheitsgewalt – gefährdet wird.[6] Als typische Gefahrenursachen für eine solche (weite Notstands-)Situation werden regelmäßig Krieg, innere Aufstände, (Natur-)Katastrophen oder Pandemien genannt.[7]

Eng mit der Kategorie des *Notstands* verbunden sind die der deutschen Rechtsordnung ebenfalls bekannten Begriffe der „Katastrophe", des „Notfalls" und des „Ausnahmezustands". Der *Notfall* erreicht dabei jedoch schon *per definitionem* nicht das für einen Notstand erforderliche („existentielle") Schadensausmaß. Stattdessen bezieht er sich auf ein persönlich und sachlich sehr begrenztes Schadensereignis (z. B. ein Busunglück oder einen Hausbrand).[8] Anders als der Notstand kann er regelmäßig auch mit den normalen Organisations- und Zuständigkeitsabläufen bewältigt werden.[9] Die *Katastrophe* gilt wiederum als eine Situation, in der das Leben oder die Gesundheit einer Vielzahl von Men-

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des Staates" die Rede. Z. T. wird auch aus funktionaler Perspektive auf eine Bedrohung der wesentlichen Staatsfunktionen abgestellt, so etwa bei *Strebel*, AöRV 31 (1955), S. 112 (112). Das Dringlichkeitserfordernis wird vor allem bei *Reindl-Krauskopf et al.,* Verfassungsvergleichende Studie zum Thema „Resilienz des Rechts in Krisenzeiten", 2016, S. 20 u. 29 sowie bei *Jahn*, Das Strafrecht des Staatsnotstands, 2004, S. 76 ff. hervorgehoben.

[4] Zu den Notstandselementen im Einzelnen, siehe u. a. *Koja*, Der Staatsnotstand als Rechtsbegriff, 1979, S. 18 ff.; *Jahn*, Das Strafrecht des Staatsnotstands, 2004, S. 36 ff. Ebenso *Reindl-Krauskopf et al.,* Verfassungsvergleichende Studie zum Thema „Resilienz des Rechts in Krisenzeiten", 2016, S. 19 ff.

[5] So etwa bei *Ruppelt*, Staatsnotstand und Staatsnotrecht, 1983, S. 16 f.; ebenso *Koja*, Der Staatsnotstand als Rechtsbegriff, 1979, S. 20 ff.

[6] So u. a. bei *Folz*, Staatsnotstand und Notstandsrecht, 1962, S. 28 oder *Jahn*, Das Strafrecht des Staatsnotstands, 2004, S. 54.

[7] Auch wirtschaftliche Krisenlagen können eine Staatsnotlage auslösen. Zu den potenziellen Notstandsursachen vgl. u. a. *Reindl-Krauskopf et al.*, Resilienz des Rechts in Krisenzeiten, 2016, S. 24 ff.; ebenso *Speidel*, Der Begriff der Staatsnotstandslage und die Möglichkeiten ihrer Abwehr in der Bundesrepublik Deutschland, 1964, S. 54 ff. Seit den Terroranschlägen in den USA vom 11. September 2001 und den daraufhin auch in Europa stattfindenden Terroranschlägen (z. B. in Frankreich in 2015, Brüssel 2016) stand zudem vermehrt die Frage im Raum, inwiefern auch terroristische Gefahrenlagen einen Staatsnotstand bedingen können.

[8] *Krings/Glade,* in: Karutz/Geier/Mitschke (Hrsg.), Bevölkerungsschutz, 2017, S. 35 f.

[9] So *Krings/Glade,* in: Karutz/Geier/Mitschke (Hrsg.), Bevölkerungsschutz, 2017, S. 35 f. Ferner *Reindl-Krauskopf et al.*, Resilienz des Rechts in Krisenzeiten, 2016, S. 20.

schen, die Umwelt oder bedeutende Sachwerte in ungewöhnlichem Ausmaß gefährdet oder geschädigt werden.[10] Wegen ihres nicht unerheblichen Gefahren- und/oder Schadenspotenzials ist die effektive Bewältigung der Katastrophe üblicherweise auf andere Zuständigkeiten und Mechanismen angewiesen als diejenigen, die üblicherweise einschlägig sind.[11] Sie *kann*, muss aber keine existentielle Gefahrenlage des Staates herbeiführen und wird deshalb grundsätzlich auch als typische Gefahrenursache des (Staats-)Notstands eingestuft.[12]

Darüber hinaus kursiert im deutschen Sprachgebrauch auch der Begriff des *Ausnahmezustands*. Er wird ausschließlich durch die Literatur geprägt und taucht – anders als der Notstand – nicht im Gesetzestext auf.[13] Eine Abgrenzung von Notstand und Ausnahmezustand fällt dabei regelmäßig schwer, weil die Begriffe z. T. synonymhaft, dann wiederum mit unterschiedlicher Konnotation verwendet werden.[14] Häufig(er als im Sinne des oben skizzierten, tatbestandlichen Notstandsbegriffs) bezieht sich der Ausnahmezustand jedoch in der einschlägigen Staats- und Verfassungsrechtsliteratur auf ein bestimmtes Rechts(folgen)institut, das an eine Notlage für den Staat bestimmte außergewöhnliche Rechtsfolgen knüpft.[15] Zumeist ist mit diesen außerordentlichen Rechtsfolgen die Suspension des Rechts gemeint, welche dem (Staats-)Notstand verfassungshistorisch gesehen häufig zugeordnet wurde, mittlerweile aber nicht mehr zwangsläufig als Voraussetzung gilt.[16] So verstanden bezieht sich der Begriff des Ausnahmezustands dann jedoch nicht (mehr) auf eine rechtliche Kategorie, wie sie der eingangs dargestellte Notstandsbegriff beschreibt, sondern meint stattdessen einen aus dem Recht ausgelagerten, tatsächlichen

[10] So etwa bei *Bußjäger*, Katastrophenprävention und Katastrophenbekämpfung im Bundesstaat, 2003, S. 1 f. S. a. *Steiner,* in Lewinski: Resilienz des Rechts, S. 103. Ferner *Schwartz*, Das Katastrophenschutzrecht der Europäischen Union, 2012, S. 17 f. Ähnlich auch UNISDR, 2009, S. 9 in Bezug auf den englischen Begriff „*disaster*": „A serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources."

[11] Zu beidem *Gusy*, Katastrophenschutzrecht - Zur Situation eines Rechtsgebietes im Wandel, in: *Lange/Endreß/Wendekamm* (Hrsg.), Versicherheitlichung des Bevölkerungsschutzes, 2013, S. 208. S. a. *Krings/Glade,* in: Karutz/Geier/Mitschke (Hrsg.), Bevölkerungsschutz, 2017, S. 38 sowie *Schwartz*, Das Katastrophenschutzrecht der Europäischen Union, 2012, S. 17 f.

[12] Dazu bereits oben → Fn. 7.

[13] *Kaiser,* Ausnahmeverfassungsrecht, 2020, S. 68 f. Zum Notstand als sog. Rechtssatzbegriff, siehe bereits → Fn. 1.

[14] Zu diesen Abgrenzungsschwierigkeiten siehe u. a. […].

[15] Vgl. dazu nur die in der *Lit.* weithin akzeptierte Definition des Ausnahmezustands, wie sie u. a. bei *Barczak*, Der nervöse Staat, 2020, S. 83; *Stern*, StR II, 1980, § 52, S. 1295 oder *Klein*, HStR XII, § 280, Rn. 1 zu finden ist. Darin wird der Ausnahmezustand als „ernsthafte Gefahr für den Bestand (Existenz) des Staates oder die öffentliche Sicherheit und Ordnung, die nicht mit den in der Verfassung vorgesehenen normalen, sondern mit exzeptionellen Mitteln zu beseitigen sind." Zum Bestandteil der Definition werden also schon bestimmte (außerordentliche) Rechtsfolgen gemacht, ohne deren Vorliegen die Annahme eines Ausnahmezustands ausscheidet.

[16] Eingehend dazu u. a. *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 85 ff. Zur Entwicklungsgeschichte des Ausnahmezustands s. i. Ü. *Boldt*, Ausnahmezustand, in: Brunner/Conze/Koselleck (Hrsg.), Geschichtliche Grundbegriffe, 4. Aufl. 1992, S. 343 ff.

Zustand, und zwar den Zustand einer suspendierten Rechtsordnung.[17] Als solches setzt der Ausnahmezustand begriffsnotwendig eine gewisse „Rechtsnot" voraus,[18] die dem Notstandsbegriff in dem oben bezeichneten – und vom deutschen Grundgesetz erfassten – Sinne[19] jedoch gerade nicht zu Grunde liegt.
Nicht im deutschen Sprachgebrauch verwendet wird hingegen die im englischsprachigen Raum geläufige Bezeichnung der sog. „*necessity*" (zu Deutsch auch: „Notwendigkeit"). Für die gleiche Rechtsfigur, die an den Staatsnotstand unter bestimmten Umständen außerrechtliche bzw. -gesetzliche Handlungsbefugnisse knüpfen will, wird im deutschen Rechtskontext stattdessen die Bezeichnung eines sog. Notrechts (auch: Staatsnotrechts) verwendet.[20] Gleichermaßen fremd ist der deutschen Rechtsordnung der Krisenbegriff. In der gegenwärtigen Staats- und Verfassungsrechtsliteratur wird der Begriff zwar vermehrt gebraucht.[21] Nach einhelliger Auffassung handelt es sich dabei bislang allerdings lediglich um eine heuristische Kategorie, die herangezogen wird, um die geltende Rechtsordnung auf ihren Umgang mit widrigen Lebensumständen hin zu untersuchen.[22] Eine rechtliche Bedeutung kommt diesem Begriff hingegen nicht zu.

Question 2

Auf Bundesebene[23] ist folgender rechtlicher Rahmen vorgesehen:

a. Notstandsverfassung: Das deutsche Grundgesetz sieht in einer sog. Notstandsverfassung verschiedene Regelungen für den Staatsnotstand vor. Dieser, über das Grundgesetz verteilte Regelungskatalog wurde nachträglich im Zuge einer umfangreichen Grundgesetzänderung (1968)[24] in das Grundgesetz eingefügt, das zuvor keine spezifischen Notstandsregelungen kannte.[25] Von der Notstandsverfassung umfasst werden seitdem Regelungen zum sog.

[17] *Bettermann* spricht deshalb auch davon, dass es sich beim Ausnahmezustand um einem „Zustand der Rechtslosigkeit und nicht um einen Zustand des Rechts" handelt, *Bettermann*, in: Fraenkel (Hrsg.), Der Staatsnotstand, 1965, S. 190 (192).

[18] Zum zusätzlichen Begriffselement der „Rechtsnot", siehe u. a. bei *Jahn*, Das Strafrecht des Staatsnotstands, 2004, S. 93 ff.

[19] Siehe dazu auch noch eingehend unten → *Abschnitt 1, 3 a.*

[20] Zur Frage des Notrechts, jüngst eingehend bei *Barczak*, Der nervöse Staat, 1. Aufl. 2020, S. 625 ff.; ebenso *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 331 ff. m. z. w. N.

[21] Siehe u. a. *Kaiser*, Ausnahmeverfassungsrecht, 2020, die den Begriff als Ausgangspunkt des von ihr als solches bezeichneten „heuristischen Schichtenmodells des öffentlichen Rechts" verwendet (S. 63 f.). Ebenso *Barczak*, Der nervöse Staat, 2020, S. 100 f., der den Begriff als „analytische Kategorie [einstuft], um zu untersuchen, wie sich eine normative Ordnung zu widrigen Erscheinungsformen der Lebenswirklichkeit verhält."

[22] So insbes. *Barczak*, Der nervöse Staat, 1. Aufl. 2020, S. 101; ebenso *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 70.

[23] Landesrechtliche Regelungen werden unter → *Abschnitt 2, 3.* besprochen.

[24] Durch das 17. Gesetz zur Ergänzung des Grundgesetzes, BGBl. 1968 I S. 709.

[25] Eingehend zur Entwicklungsgeschichte der Notstandsverfassung u. a. *Stern*, StR II, 1980, § 52, S. 1322 ff.

Katastrophennotstand (regionaler Katastrophennotstand nach Art. 35 Abs. 2 und überregionaler Katastrophennotstand nach Abs. 3 GG), zum inneren Notstand (Art. 91 GG) sowie zum sog. Spannungs- und Verteidigungsfall, der wiederum maßgeblich in Art. 115a Abs. 1GG bzw. Art. 80a GG sowie den Art. 87a Abs. 3, 53a und 12 Abs. 3-6 GG geregelt ist. Während letztere wie auch Art. 91 GG und Art. 35 Abs. 3 GG bisher keine Anwendung in der Praxis erfahren haben, wurde der regionale Katastrophennotstand nach Art. 35 Abs. 2 GG bereits mehrfach bei Naturkatastrophen von den jeweiligen Bundesländern ausgerufen, um Katastrophenhilfe durch Polizeikräfte und technische Hilfe zu erhalten.[26]

b. Verfassungsstörung: Darüber hinaus werden zum Teil auch Regelungen zur sog. Verfassungsstörung[27] zum Notstandsverfassungsrecht hinzugezählt.[28] Entsprechende Regelungen finden sich unter anderem in Art. 81 GG (sog. Gesetzgebungsnotstand), Art. 67 GG (sog. Misstrauensvotum) bzw. Art. 39 Abs. 1 S. 2 GG (Permanenz des Bundestages).[29] Während der Gesetzgebungsnotstand bisher noch nie ausgerufen wurde, gab es in der Geschichte der Bundesrepublik bereits zwei konstruktive Misstrauensvoten gem. Art. 67 GG.[30]

c. Finanzverfassungsrecht: Auch das Finanzverfassungsrecht enthält mittlerweile eine Regelung, die nach allgemeiner Auffassung zum deutschen Notstandsverfassungsrecht dazugezählt wird.[31] Es handelt sich um Art. 109 Abs. 3 S. 2 GG, der für Naturkatastrophen oder außergewöhnliche Notsituationen, die sich der Kontrolle des Staates entziehen und die staatliche Finanzlage erheblich beeinträchtigen, eine Ausnahmeregelung im Bereich der sog. Schuldenbremse[32] vorsieht. In der Vergangenheit hat die Bundesregierung schon vereinzelt von Art. 109 Abs. 3 S. 2 GG Gebrauch gemacht.[33]

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[26] Bspw. bei den Hochwasserkatastrophen 2002 und 2021.

[27] Zur Definition siehe sogleich unter → *Abschnitt 1, 3. b.*

[28] So etwa *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 78 u. 152 ff. unter Verweis darauf, dass verfassungsendogene Störungen genauso wie verfassungsexogene Störungen in der Lage sein können, existentielle Ausnahmesituationen für den Staat herbeizuführen; *a. A.* aber u. a. *Barczak*, Der nervöse Staat, 2020, S. 75 sowie Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 81 Rn. 6, die die Verfassungsstörung gerade deshalb nicht zum Notstandsrecht hinzuzählen wollen, weil sie nicht auf systemfremde, sondern auf systemimmanente Ursachen zurückzuführen ist. Warum dieser systemimmanente Ursprung die Entstehung einer existentiellen Gefahrenlage für den Staat ausschließen soll, begründen sie jedoch nicht.

[29] Außerdem zählt *Kaiser* noch das in Art. 68 GG fehlende Selbstauflösungsrecht des Bundestages zu den grundgesetzlichen Regelungen über die sog. Verfassungsstörung, s. Ausnahmeverfassungsrecht, 2020, S. 79.

[30] 1972 führte Rainer Barzel (CDU) erfolglos ein Misstrauensvotum gegen Willy Brandt (SPD) durch, 1982 war Helmut Schmidt (CDU) mit einem Misstrauensvotum gegen Helmut Schmidt (SPD) erfolgreich.

[31] Exemplarisch dazu *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 78.

[32] Diese sieht vor, dass die Haushalte von Bund und Ländern grundsätzlich ohne Einnahmen aus Krediten auszugleichen sind, s. Art. 109 Abs. 3 S. 1 GG.

[33] Bspw. im Falle des *Zweiten Nachtragshaushalt 2021*, welcher vom BVerfG u. a. für unvereinbar mit Art. 109 Abs. 3 S. 2 GG erklärt wurde und damit nichtig war, siehe Urt. v. 15.11.2023 - BvF 1/22.

Auch einige Landesregierungen (z. B. Sachsen-Anhalt) haben sich insbesondere im Zusammenhang mit der Covid19-Pandemie bereits auf die Ausnahmeregelung berufen. Um auf Landesebene wirksam zu sein, ist eine landesrechtliche Umsetzung erforderlich *(siehe unter → Abschnitt 2, Ziffer 3*).

d. Wehrhafte Demokratie: Darüber hinaus werden vereinzelt auch die Regelungen der sog. Wehrhaften Demokratie – allen voran die Grundrechtsverwirkung gem. Art. 18 GG, das Parteiverbot gem. Art. 21 Abs. 2 GG, das Vereinsverbot gem. Art. 9 Abs. 2 GG, die Verfassungstreueklausel in Art. 5 Abs. 3 S. 2 GG sowie die Ewigkeitsgarantie aus Art. 79 Abs. 3 GG – dem deutschen Notstandsverfassungsrecht zugeordnet.[34] Als Begründung wird insofern angeführt, dass durch die Gefahrenabwehrmaßnahmen im Sinne der Wehrhaften Demokratie insbesondere ein innerer Notstand verhindert werden kann. Bei den Regelungen der Wehrhaften Demokratie handele es sich demnach um eine Art Notstandsverhinderungsrecht.[35] Das Bundesverfassungsgericht hat bisher in zwei Fällen ein Parteiverbot nach Art. 21 Abs. 2 GG ausgesprochen, insgesamt gab es fünf Parteiverbotsverfahren.[36] Grundrechtsverwirkungen wurden bisher in vier Verfahren durch die jeweilige Bundesregierung erfolglos vor dem Bundesverfassungsgericht angestrengt; Vereinsverbote hingegen werden regelmäßig durch das Bundesinnenministerium und die Landesinnenministerien ausgesprochen.

e. Einfachgesetzliches Notstandsrecht: Auf einfachgesetzlicher Ebene werden die verfassungsrechtlichen Regelungen wiederum durch zahlreiche weitere Notstandsregelungen ergänzt, das sog. einfache Notstandsrecht. Es zeichnet sich dadurch aus, dass es zwar bereits in Kraft getreten ist, aber einen bestimmten Notstandsfall voraussetzt, um ganz oder teilweise zur Anwendung zu gelangen. *Stern* spricht insofern auch von einem sog. „Anwendbarkeits(Wirksamkeits-)vorbehalt“[37]. In quantitativer Hinsicht sind die einfachgesetzlichen Regelungen den verfassungsrechtlichen

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[34] So maßgeblich etwa *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 77 f. u. 154 ff. Ähnlich auch *Gusy*, in: E. Denninger/W. Hoffmann-Riem/H.P. Schneider/E. Stein, AK Kommentar GG, 3. Aufl. 2001, Art. 18, Rn. 1 bzw. *Vöneky*, in: W. Kahl/C. Waldhoff/C. Walter (Hrsg.), Bonner Kommentar, Stand Februar 2016, Art. 18, Rn. 16. A. A. allerdings *Oberreuter*, Notstand und Demokratie, 1978, S. 189, der insbesondere auf die zeitliche Vorverlagerung im Vergleich zu den traditionellen Vorschriften des Staatsnotstands, die unsichere Wirkung und die Gefahr eines „permanenten Notstandssystem[s]“ verweist. Auch *Stern*, StR II, 1980, § 52, S. 1319 führt die Regelungen zur Wehrhaften Demokratie nicht in seiner Liste der notstandsbezogenen Regelungen auf.

[35] So spricht u. a. *Gusy*, in: E. Denninger/W. Hoffmann-Riem/H.P. Schneider/E. Stein, AK Kommentar GG, 3. Aufl. 2001, Art. 18, Rn. 1 im Zshg. mit Art. 18 GG von „weniger Notstands- als vielmehr Notstandsverhinderungsrecht“. Und auch *Vöneky*, in: W. Kahl/C. Waldhoff/C. Walter (Hrsg.), Bonner Kommentar, Stand Februar 2016, Art. 18, Rn. 16 macht geltend, dass „[d]as Grundgesetz […] zugleich verhindern [soll], dass zu schnell ein öffentlicher Notstand angenommen werden muss“.

[36] Verfahren gegen die SRP als Nachfolgeorganisation der NSDAP 1952 und die KPD 1956 waren erfolgreich; Verfahren gegen die Freiheitliche Deutsche Arbeiterpartei (FAP,), die Nationale Liste (NL) und die Nationaldemokratische Partei Deutschlands (NPD) hingegen erfolglos.

[37] *Stern*, StR II, 1980, § 52, S. 1341.

Vorschriften deutlich überlegen.[38] Sie können hier deshalb nicht allesamt aufgeführt werden.[39] Exemplarisch kann (und soll) hier zumindest auf die prominentesten Beispiele der sog. Sicherstellungs- und Vorsorgegesetze[40] und die dazugehörigen Verordnungen[41] sowie das Zivilschutz- und Katastrophenhilfegesetz[42] verwiesen werden.

Question 3

Für die oben aufgeführten Regelungsbereiche lassen sich folgende Notstandsauslöser feststellen:

a. Notstandsverfassung: Die Notstandsverfassung nach dem Grundgesetz bezieht sich auf den sog. Katastrophennotstand (Art. 35 Abs. 2 und 3 GG), den inneren Notstand (Art. 91 GG) sowie den sog. Spannungs- und Verteidigungsfall (Art. 80a Abs. 1 bzw. Art. 115a Abs. 1 GG).

aa. Regionaler und überregionaler Katastrophennotstand, Art. 35 Abs. 2 und 3 GG: Der sog. Katastrophennotstand wird durch die in Art. 35 Abs. 2 S. 1 GG genannte *Gefährdungslage von besonderer Bedeutung* oder durch eine *Naturkatastrophe* bzw. einen *besonders schweren Unglücksfall* (s. Art. 35 Abs. 2 S. 2, Abs. 3 GG) ausgelöst.

(1) Gefährdungslage von besonderer Bedeutung: Unter einer *Gefährdungslage von besonderer Bedeutung* gem. Art. 35 Abs. 2 S. 1 GG wird dabei zunächst jede konkrete Gefahr für die öffentliche Sicherheit und Ordnung i. S. d. allgemeinen Polizeirechts verstanden, die

[38] Auch dazu *Stern*, StR II, 1980, § 52, S. 1340.

[39] Eine – in Teilen allerdings bereits veraltete – Übersicht findet sich u. a. bei *Stern*, StR II, 1980, § 52, S. 1340 f. Vgl. dazu im Übrigen auch Dürig/Herzog/Scholz/Depenheuer, 104. EL April 2024, GG Art. 80a Rn. 45 ff.

[40] Dazu zählt u. a. das Gesetz zur Sicherstellung von Arbeitsleistungen für Zwecke der Verteidigung einschließlich des Schutzes der Zivilbevölkerung (Arbeitssicherstellungsgesetz - ASG -) vom 9.07.1968 (BGBl. I S. 787), zuletzt geändert durch Art. 31 G v. 15.07.2024 I Nr. 236; das Gesetz über die Sicherstellung der Grundversorgung mit Lebensmitteln in einer Versorgungskrise und Maßnahmen zur Vorsorge für eine Versorgungskrise (Ernährungssicherstellungs- und -vorsorgegesetz - ESVG -) vom 4. April 2017 (BGBl. I S. 772), zuletzt geändert durch Art. 12 G v. 2.03.2023 I Nr. 56, das Bundesleistungsgesetz (- BLG -) vom 19.10.1956 (BGBl. I S. 815), zuletzt geändert durch Art. 19 G v. 15.07.2024 I Nr. 236 oder auch das Gesetz zur Sicherstellung des Verkehrs (Verkehrssicherstellungsgesetz - VerkSiG -) v. 24.08.1965 (BGBl. III S. 927), neugefasst durch Bek. v. 8.10.1968 I 1082, zuletzt geändert durch Art. 40 G v. 15.07.2024 I Nr. 236.

[41] Z. B. die auf Basis des ASG (*s. o.* → Fn. 35) erlassene Verordnung über die Feststellung und Deckung des Arbeitskräftebedarfs nach dem Arbeitssicherstellungsgesetz (ArbSV) v. 30.05.1989, zuletzt geändert durch Art. 11 G v. 19.11.2004 I 2902 oder die auf dem ESVG (*s. o.* → Fn. 35) beruhende Verordnung zur Datenübermittlung zum Zweck der Ausführung der Vollzugsvorkehrungen nach § 12 Absatz 1 des Ernährungssicherstellungs- und -vorsorgegesetzes (ESVG-Datenübermittlungsverordnung - ESVGDüV -) v. 9.03.2023 (BGBl. I Nr. 76).

[42] Vom 25.03.1997 (BGBl. I S. 726), zuletzt geändert durch Art. 1 ZSGÄndG v. 2.04.2009 I S. 726.

jedoch das gewöhnliche Ausmaß einer solchen Gefahrenlage übersteigt und deshalb die Voraussetzung der „besonderen Bedeutung" i. S. v. Art. 35 Abs. 2 S. 1 GG erfüllt.[43] Angenommen wird eine solche Notsituation beispielsweise im Fall einer Großdemonstration und damit verbundenen Ausschreitungen.[44] Den zuständigen Landesbehörden wird insofern aber ein gewisser Beurteilungsspielraum eingeräumt, weil die Einschätzung regelmäßig nur auf Basis einer wertenden Lagebeurteilung im Einzelfall ergehen kann.[45] Keine Anwendung findet die Vorschrift auf Arbeitskämpfe (vgl. Art. 9 Abs. 3 S. 3 GG) mit der Ausnahme „wilder" oder „politischer" Streiks.[46]

(2) **Naturkatastrophe oder besonders schwerer Unglücksfall:** Bei einer *Naturkatastrophe* sowie dem *besonders schweren Unglücksfall* i. S. v. Art. 35 Abs. 2 S. 2 und Abs. 3 GG handelt es sich nach allgemeiner Auffassung um jeweils großräumige Schadensereignisse von „katastrophischen Dimensionen"[47], die entweder – wie im Fall der Naturkatastrophen – durch Naturereignisse wie Erdbeben, Hochwasser, Eisgang, Unwetter, Wald- und Großbrände, Dürren oder Massenerkrankungen oder aber – wie im Fall des besonders schweren Unglücksfalls – durch technisches oder menschliches Versagen verursacht werden, z. B. ein Reaktorunfall.[48] Dabei reicht es, dass die Schadenslage mit an Sicherheit grenzender Wahrscheinlichkeit zu erwarten ist; die Schadenslage muss nicht notwendigerweise bereits eingetreten sein.[49]

bb. Innerer Notstand, Art. 91 GG: Von einem inneren Notstand i. S. v. Art. 91 GG ist dann auszugehen, wenn eine *drohende Gefahr für den Bestand oder die freiheitliche demokratische Grundordnung des Bundes oder eines Landes* vorliegt (s. Art. 91 Abs. 1 GG). Geschützt wird zum einen der Bestand des Bundes oder eines Landes, zum anderen die freiheitliche demokratische Grundordnung des Bundes oder der einzelnen Bundesländer. Störungen im Wirtschafts- und Sozialgefüge werden grundsätzlich nicht erfasst.[50]

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[43] Statt vieler Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 35 Rn. 7 m. w. N.

[44] Vgl. dazu auch Huber/Voßkuhle/*v. Danwitz*, 8. Aufl. 2024, GG Art. 35 Rn. 73.

[45] Dazu Sachs/*Schubert*, 10. Aufl. 2024, GG Art. 35 Rn. 36.

[46] S. auch dazu Sachs/*Schubert*, 10. Aufl. 2024, GG Art. 35 Rn. 37; ebenso Huber/Voßkuhle/*v. Danwitz*, 8. Aufl. 2024, GG Art. 35 Rn. 73.

[47] So maßgeblich BVerfGE 132, 1 Rn. 43; BVerwGE 162, 296 Rn. 13. Statt vieler auch Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 35 Rn. 9.

[48] Eingehend zu beiden Fällen mit weiteren Beispielen s. a. *Stern*, StR II, 1980, § 56, S. 1462 f.

[49] BVerfGE 115, 118/145; 132, 1 Rn.47; 133, 241 Rn. 65 ff; diff. Reimer BK 267 f , zit. in: Jarass/Pieroth/Jarass, 18. Aufl. 2024, GG Art. 35 Rn. 9, beck-online.

[50] So ausdrücklich Sachs/*Windthorst*, 10. Aufl. 2024, GG Art. 91 Rn. 11 m. w. N.; ebenso Huber/Voßkuhle/*Volkmann*, 8. Aufl. 2024, GG Art. 91 Rn. 16 m. w. N. Vgl. auch *Reindl-Krauskopf et al.*,

(1) **Gefahr für den Bestand des Bundes oder eines Landes:** Der *Bestand des Bundes* umfasst begrifflich die territoriale Integrität, die Souveränität nach außen im Sinne der völkerrechtlichen Handlungsfähigkeit sowie die Souveränität nach innen; Letztere ist beschränkt auf die Sicherung der Staatsgewalt als effektiver Ordnungsmacht in ihrem elementaren rechtlichen und faktischen Substrat.[51] Dem *Bestand einzelner Bundesländer* kommt auf Grund des Neugliederungsvorbehaltes in Art 29 GG[52] keine eigenständige Bedeutung zu. Der Bestand der Länder als Schutzgut unterstreicht vielmehr ihre Zugehörigkeit zum Bund und ihre – unabhängig von ihren konkreten territorialen Grenzen – zu schützende Eigenstaatlichkeit im Sinne einer Bewahrung eines Kernbestandes an eigenstaatlicher Selbständigkeit im föderalen Staatsgefüge.[53]

(2) **Gefahr für die freiheitliche demokratische Grundordnung:** Der Begriff der *freiheitlichen demokratischen Grundordnung* i. S. v. Art. 91 Abs. 1 GG wird unterschiedlich ausgelegt. Nach einer Auffassung sind damit grundsätzlich die von Art. 79 Abs. 3 GG in ihrem Kernbestand absolut geschützten, in Art. 1 und 20 GG verankerten Grundprinzipien einer rechts- und sozialstaatlichen demokratischen Ordnung der Freiheit und Gleichheit gemeint, mit Ausnahme der bundesstaatlichen und republikanischen Grundprinzipien.[54] Eine andere Auffassung hält eine Reduktion auf den durch Art. 79 Abs. 3 GG garantierten Kernbestand an Freiheit und Demokratie für verfehlt und will – wegen des engen sachlichen Zusammenhangs – stattdessen das im Zusammenhang mit den Vorschriften der sog. Wehrhaften Demokratie vom Bundesverfassungsgericht entwickelte Begriffsverständnis der freiheitlichen

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Resilienz des Rechts in Krisenzeiten, 2016, S. 46. A. A. offensichtlich aber *Stern,* StR II, 1980, § 56, S. 1470, der unter den Bestand des Bundes oder eines Landes die Existenz des Staates in Form „seines elementaren rechtlichen, sozialen und wirtschaftlichen Substrats" fasst und damit ausdrücklich auch „die Sicherheit der Bevölkerung einschließlich ihrer [wirtschaftlichen und sozialen] Existenzgrundlagen" als schutzwürdiges Notstandsgut erfasst.

[51] So fassen es u. a. *Reindl-Krauskopf et al.*, Resilienz des Rechts in Krisenzeiten, 2016, S. 46 zusammen. Für eingehendere Ausführungen dazu s. insbes. auch Huber/Voßkuhle/*Volkmann*, 8. Aufl. 2024, GG Art. 91 Rn. 14.

[52] Nach Art 29 GG kann das Bundesgebiet neu gegliedert werden, um zu gewährleisten, dass die Länder nach Größe und Leistungsfähigkeit die ihnen obliegenden Aufgaben wirksam erfüllen können. Bei einer solchen Neugliederung sind die landsmannschaftliche Verbundenheit, die geschichtlichen und kulturellen Zusammenhänge, die wirtschaftliche Zweckmäßigkeit sowie die Erfordernisse der Raumordnung und der Landesplanung zu berücksichtigen (Abs. 1 S. 2). Zudem sind die betroffenen Länder zu hören und das betreffende Bundesgesetz bedarf der Bestätigung durch Volksentscheid (Abs. 2).

[53] So ausdrücklich bei *Reindl-Krauskopf et al.*, Resilienz des Rechts in Krisenzeiten, 2016, S. 46; s. a. Dreier/*Heun*, 3. Aufl. 2018, GG Art. 91 Rn. 8 m. w. N.

[54] So etwa Dreier/*Heun*, 3. Aufl. 2018, GG Art. 91 Rn. 9 unter Verweis auf BVerfGE 144, 20 (202 ff., Rn. 528 ff.).

demokratischen Grundordnung[55] zur Anwendung bringen.[56] Nach beiden Auffassungen muss jedenfalls das für einen Notstand erforderliche Gefahrenausmaß erreicht sein. Demnach reicht es nicht aus, wenn einzelne Prinzipien der – auf die ein oder anderen Weise definierten – freiheitlichen demokratischen Grundordnung gefährdet sind. Vielmehr muss die freiheitliche demokratische Grundordnung als Ganzes „auf dem Spiel stehen".[57] Angenommen wird dies u. a. dann, wenn die Bildung oder die Funktionen von obersten Staatsorganen oder ganzen Zweigen der Staatstätigkeit objektiv gestört oder blockiert werden, etwa durch die gewaltsame Behinderung von Wahlen, die Lahmlegung von Parlamenten oder die Verhinderung eines effektiven Rechtsschutzes durch die Gerichte.[58] Der Versuch einzelner Aufständischer, die geltende Verfassungsordnung zu beseitigen, reicht regelmäßig nicht. Dieser Gefahr kann mit den üblichen polizeilichen Mitteln begegnet werden.[59] Von wem die Gefahr im Einzelnen ausgeht, ist unerheblich. Die Gegenmaßnahmen können sich also sowohl gegen Private und politische Parteien als auch gegen eigene oder fremde Hoheitsträger richten.[60]

cc. Verteidigungs- und Spannungsfall: Der *Verteidigungsfall* ist in Art. 115a Abs. 1 GG geregelt und dort legaldefiniert. Er liegt vor, wenn das Bundesgebiet mit Waffengewalt angegriffen wird oder ein solcher Angriff unmittelbar droht. Unter Bundesgebiet ist dabei das aus den in Abs. 3 der Präambel des Grundgesetzes genannten Bundesländern bestehende Territorium der Bundesrepublik Deutschland einschließlich des nach den Regeln des Völkerrechts dazugehörenden Luftraums und Küstenmeeres zu verstehen.[61] Der Angriff muss von außen, das heißt von außerhalb des bundesrepublikanischen Territoriums erfolgen.[62] Ein bewaffneter Aufstand im Inneren sowie andere bürgerkriegsähnliche

[55] Siehe dazu noch genauer unten → *Abschnitt 1, 3. d.*

[56] So ausdrücklich etwa Huber/Voßkuhle/*Volkmann*, 8. Aufl. 2024, GG Art. 91 Rn. 17 f.; ähnlich auch Sachs/*Windthorst*, 10. Aufl. 2024, GG Art. 91 Rn. 14; Hömig/Wolff/*Wolff* GG Art. 91 Rn. 1.

[57] So ausdrücklich etwa Huber/Voßkuhle/*Volkmann*, 8. Aufl. 2024, GG Art. 91 Rn. 18 unter Verweis auf den Sinn und Zweck des Rechtsinstituts, „das nicht einzelne Krisensymptome, sondern die Krise schlechthin […] im Auge hat." Ähnlich auch Jarass/Pieroth/*Kment*, 18. Aufl. 2024, GG Art. 91 Rn. 1, der von „schwerwiegenden Umständen" spricht.

[58] Dreier/Heun, 3. Aufl. 2018, GG Art. 91 Rn. 10.

[59] *Reindl-Krauskopf et al.*, Resilienz des Rechts in Krisenzeiten, 2016, S. 47 unter Verweis auf *Reimer/Kempny*, Einführung in das Notstandsrecht, Verwaltungsrundschau 57. Jg, Heft 8 (2011) 253 (254).

[60] So ausdrücklich etwa Dreier/*Heun*, 3. Aufl. 2018, GG Art. 91 Rn. 11. Vgl. auch *Reindl-Krauskopf et al.*, Resilienz des Rechts in Krisenzeiten, 2016, S. 46.

[61] Statt vieler s. nur Huber/Voßkuhle/*Grote/Schemmel*, 8. Aufl. 2024, GG Art. 115a Rn. 7.

[62] Vgl. dazu nur Sachs/*Robbers*, 10. Aufl. 2024, GG Art. 115a Rn. 4 oder auch Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 115a Rn. 3 m. w. N.

Zustände werden grds. nicht erfasst, selbst dann nicht, wenn sie nachweislich durch auswärtige Mächte unterstützt werden.[63] Des Weiteren muss der Angriff unter Verwendung von Waffengewalt erfolgen. Als Waffen werden dabei alle konventionellen, aber auch nuklearen, chemischen, biologischen und physikalischen Kampfmittel verstanden.[64] Neuartige Formen der Kriegsführung, wie z. B. ein Cyberwar, können ebenfalls unter den Begriff der Waffengewalt fallen. Erforderlich ist, dass sie die zivile Ordnung in einem Ausmaß beeinträchtigen, das dem bisherigen Verständnis eines Angriffs mit Waffengewalt entspricht.[65] Andere Arten der unfriedlichen Auseinandersetzung, wie etwa eine Wirtschaftsblockade oder sonstige wirtschaftliche oder politische Sanktionen, reichen hingegen nicht aus.[66] In zeitlicher Hinsicht muss sich der Angriff entweder bereits in Gang befinden („*angegriffen wird*") oder aber es muss die konkrete Gefahr eines solchen Angriffs bestehen („*droht unmittelbar*"). Letzteres wird regelmäßig dann angenommen, wenn ein Angriff mit an Sicherheit grenzender Wahrscheinlichkeit zu erwarten ist.[67] Nicht ausdrücklich Stellung bezieht Art. 115a Abs. 1 GG wiederum zur Person des Angreifenden. Nach allgemeiner Auffassung ist nicht zwingend der Angriff durch einen fremden Staat erforderlich. Ausreichend kann auch der bewaffnete Angriff durch eine nichtstaatliche Organisation sein, sofern diese Organisation eine militärische Operations- und Organisationsstruktur erkennen lässt oder ein Zerstörungspotential aufweist, das ein kriegsähnliches Ausmaß erreicht.[68] Dem Sinn und Zweck von Art. 115a GG folgend muss die nichtstaatliche Organisation demnach über eine Kampfkraft verfügen, die in der Lage ist, die Bundesrepublik existentiell zu bedrohen.[69] Nach diesen Maßstäben ist u. a. auch die Notstandsqualität eines terroristischen Anschlags zu beurteilen.[70] Punktuelle Aktionen einer nichtstaatlichen (Terror-)Organisation, von denen keine systematische Schwächung der

[63] So ausdrücklich Sachs/*Robbers*, 10. Aufl. 2024, GG Art. 115a Rn. 4.

[64] Zum Waffenbegriff eingehend u. a. Dürig/Herzog/Scholz/*Epping*, 105. EL August 2024, GG Art. 115a Rn. 43.

[65] So ausdrücklich Sachs/*Robbers*, 10. Aufl. 2024, GG Art. 115a Rn. 5. Ebenso Dürig/Herzog/Scholz/*Epping*, 105. EL August 2024, GG Art. 115a Rn. 44.

[66] Sachs/*Robbers*, 10. Aufl. 2024, GG Art. 115a Rn. 5. Ebenso Huber/Voßkuhle/*Grote/Schemmel*, 8. Aufl. 2024, GG Art. 115a Rn. 12. A. A. offensichtlich Dürig/Herzog/Scholz/*Epping*, 105. EL August 2024, GG Art. 115a Rn. 45.

[67] Dürig/Herzog/Scholz/*Epping*, 104. EL April 2024, GG Art. 115a Rn. 56 m. w. N., zumal unter Verweis auf das Wörtchen „unmittelbar", das ausweislich der Genese den Sinn hatte, einen an Sicherheit grenzenden Grad von Wahrscheinlichkeit zu verlangen.

[68] So ausdrücklich Dürig/Herzog/Scholz/*Epping*, 104. EL April 2024, GG Art. 115a Rn. 49. Ähnlich auch Huber/Voßkuhle/*Grote/Schemmel*, 8. Aufl. 2024, GG Art. 115a Rn. 16 sowie Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 115a Rn. 3

[69] Dürig/Herzog/Scholz/*Epping*, 104. EL April 2024, GG Art. 115a Rn. 51. Vgl. im Übrigen auch Huber/Voßkuhle/*Grote/Schemmel*, 8. Aufl. 2024, GG Art. 115a Rn. 16.

[70] Vertiefend dazu etwa Dürig/Herzog/Scholz/*Epping*, 104. EL April 2024, GG Art. 115a Rn. 51.

Bundesrepublik ausgehen, lösen den Verteidigungsfall i. S. v. Art. 115a Abs. 1 GG nicht aus.[71]

Dem Verteidigungsfall vorgelagert ist der sog. *Spannungsfall* i. S. v. Art. 80a Abs. 1 GG.[72] Anders als der Verteidigungsfall wird er im Grundgesetz nirgends legaldefiniert. Es besteht jedoch weitestgehend Einigkeit, dass darunter eine erhöhte zwischenstaatliche Konfliktsituation zu verstehen ist, die mit gesteigerter Wahrscheinlichkeit zu einem bewaffneten Angriff von außen auf das Bundesgebiet führen wird.[73] Dem Bundestag wird dabei eine großzügige Einschätzungsprärogative zugestanden.[74] Vor dem Hintergrund neuartiger Bedrohungslagen, wie einem sog. ABC-Terrorismus oder Cyberwar-Szenarien,[75] dürfte es mittlerweile als angemessen erscheinen, den Spannungsfall nicht – wie ursprünglich noch ausschließlich – militärisch zu definieren, sondern auch auf andere Gefahrenlagen auszuweiten.[76] An andere als militärische Aktivitäten werden dabei allerdings regelmäßig hohe Anforderungen zu stellen sein. Vereinzelt wird vorgeschlagen, für diese Fälle ein Gefahrenausmaß zu verlangen, welches die Rechtsfolgen des Spannungsfalls notwendig erscheinen lässt.[77] Dabei gilt es, die Handlungs- und Verteidigungsfähigkeit des Staates zu erhalten und den Eintritt des Verteidigungsfalls zu vermeiden.[78]

b. Verfassungsstörung: Die Regelungen der sog. Verfassungsstörung werden grundsätzlich durch eine – anhand der einschlägigen Vorschriften (*s. o.*) näher zu bestimmende – Funktionsstörung der obersten Verfassungsorgane ausgelöst. Der Begriff der Verfassungsstörung wird dabei grundsätzlich als „staatsrechtlich abnorme Lage [definiert], die besteht, wenn ein von der Verfassung zur Erfüllung bestimmter staatsrechtlicher Aufgaben verordnetes oberstes Organ nicht imstande ist, seine Funktion im Verfassungsleben zu

[71] So ausdrücklich Dürig/Herzog/Scholz/*Epping*, 104. EL April 2024, GG Art. 115a Rn. 51. Ähnlich deutlich auch Huber/Voßkuhle/*Grote/Schemmel*, 8. Aufl. 2024, GG Art. 115a Rn. 16 sowie Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 115a Rn. 3.

[72] Er wird gemeinhin auch als Vorstufe des Verteidigungsfalls bezeichnet, vgl. dazu nur Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 80a Rn. 18 oder auch *Stern*, HStR, § 55, S. 1437.

[73] S. etwa Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 80a Rn. 18; *Vitzthum*, in: Isensee/Kirchhof (Hrsg.), HStR, § 170 Rn. 6. Ähnlich auch Sachs/*Mann*, 10. Aufl. 2024, GG Art. 80a Rn. 2 sowie Dürig/Herzog/Scholz/*Depenheuer*, 105. EL August 2024, GG Art. 80a Rn. 13.

[74] S. dazu Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 80a Rn. 18; Dreier/*Heun*, 3. Aufl. 2015, GG Art. 80a Rn. 5.

[75] Zu diesen und anderen Beispielen, s. etwa Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 80a Rn. 18.

[76] So maßgeblich Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 80a Rn. 18 auch unter Verweis auf *Mertins,* Der Spannungsfall, 2013, S. 65 ff.

[77] Siehe dazu auch Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 80a Rn. 18.

[78] Auch dazu Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 80a Rn. 18.

erfüllen."[79] So setzt etwa Art. 81 GG eine Funktionsstörung des Bundestages voraus, die unter bestimmten Umständen zu einer Ersatzvornahme durch Bundesrat und Bundespräsident:in bei der Gesetzgebung führt.[80] Art. 67 GG ist wiederum auf die Verhinderung einer Funktionsstörung der Bundesregierung gerichtet.[81] Sinn und Zweck der Vorschrift ist es, durch die dort vorgesehene „Abwahl durch Neuwahl" u. a. eine „Leerstelle" im Kanzleramt zu vermeiden.[82] Die Vorschrift soll somit einer zu befürchtenden Regierungskrise vorbeugen, sollte der:die Bundeskanzler:in abgewählt, ein:e neue:r jedoch nicht gleichzeitig bestimmt werden.[83] Aus diesem Grund wird Art. 67 GG z. T. auch als eine Art Notstandsverhinderungsrecht eingestuft.[84] Ähnliches gilt auch mit Blick auf – den oben ebenfalls aufgeführten – Art. 39 Abs. 1 S. 2 GG. Auch diese Vorschrift soll eine nunmehr im Zusammenhang mit dem Parlament stehende Krise verhindern, indem durch die gewährleistete Permanenz des Bundestages eine „parlamentslose Zeit" verhindert werden soll.[85]

c. Finanzverfassungsrecht: Art. 109 Abs. 3 S. 2 GG stellt für eine Ausnahmeregelung von der sog. Schuldenbremse[86] zum einen auf „eine von der Normallage abweichende konjunkturelle Entwicklung" (*Hs. 1*), zum anderen auf „Naturkatastrophen oder außergewöhnliche Notsituationen" (*Hs. 2*) ab:

aa. Der Begriff der *„von der Normallage abweichenden konjunkturellen Entwicklung"* gem. Art. 109 Abs. 3 S. 2 Hs. 1 GG ist dabei weitestgehend unklar.[87] Er wird in der Verfassung nicht näher definiert. Auch konnte die Verwendung des Begriffs durch das Bundesverfassungsgericht in den sog. Staatsverschuldungsentscheidungen von 1989 und 2007 insofern keine weiterführende Klärung bringen,[88] da die 2009

[79] Grundlegend dazu *Heckel*, Diktatur, Notverordnungsrecht, Verfassungsnotstand, AöR 61 (1932), S. 257 (275). Siehe dazu im Übrigen statt vieler u. a. *Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 19. Aufl. 1993, S. 284 o. a. *Klein*, in: Isensee/Kirchhof (Hrsg.), § 168 Rn. 2.

[80] Dazu eingehend u. a. Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 81 Rn. 6 ff. m. w. N.

[81] Zum Hintergrund von Art. 67 GG eingehend u. a. Huber/Voßkuhle/*Epping*, 8. Aufl. 2024, GG, Art. 67, Rn. 2 ff.

[82] Insofern stellt die Vorschrift eine bewusste Abkehr von Art. 54 WRV dar, der die Abwahl des Reichskanzlers (oder auch der Reichsminister) vorsah, ohne dass zugleich eine neue Person bestimmt werden musste. Eingehend dazu u. a. bei Huber/Voßkuhle/*Epping*, 8. Aufl. 2024, GG, Art. 67, Rn. 2 f.

[83] Zu der Frage, inwiefern die Vorschrift allerdings tatsächlich zu einer größeren Regierungsstabilität beiträgt, krit. u. a. Huber/Voßkuhle/*Epping*, 8. Aufl. 2024, GG, Art. 67, Rn. 5.

[84] So maßgeblich u. a. *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 79 u. 152 f., die den grundgesetzlichen Regelungen der sog. Verfassungsstörung in weiten Teilen „antizipativen Charakter" zuspricht.

[85] Siehe dazu u. a. Huber/Voßkuhle/*Schliesky*, 8. Aufl. 2024, GG Art. 39 Rn. 21 o. a. Dreier/*Morlok*, 3. Aufl. 2015, GG Art. 39 Rn. 16.

[86] Dazu schon oben → Fn. 32.

[87] So ausdrücklich auch Dreier/*Heun*, 3. Aufl. 2018, GG Art. 109 Rn. 42.

[88] BVerfGE 79, 311 (333 f.); 119, 96 (138, Rn. 124).

in das Grundgesetz eingeführten Neuregelungen von dem in diesen Entscheidungen statuierten Verständnis nach allgemeiner Auffassung abweichen.[89] Gleichermaßen hilft ein Blick in das (Bundes-)Ausführungsgesetz zu Art. 115 GG[90] nur bedingt weiter. Dessen § 5 Abs. 2 S. 1 definiert zwar, was eine Abweichung der wirtschaftlichen Entwicklung von der Normallage ist. Sie soll dann vorliegen, wenn eine Unter- oder Überauslastung der gesamtwirtschaftlichen Produktionskapazitäten, das heißt eine „Produktionslücke" erwartet wird. Dabei wird jedoch zum einen nicht näher definiert, was überhaupt unter der sog. Normallage verstanden wird, sodass auch das für eine Unter- oder Überlastung der Produktionskapazitäten erforderliche Ausmaß nur schwer bestimmt werden kann. Die Literatur bietet bislang auch keine überzeugenden Auslegungsansätze.[91] Außerdem ist das im *Bundes*ausführungsgesetz zu Art. 115 GG vermittelte Verständnis auch nur im Bund und nicht auf Landesebene entscheidend.[92] Dem jeweiligen (Landes- oder Bundes-)Gesetzgeber wird bei der Beurteilung einer von der Normallage abweichenden wirtschaftlichen Entwicklung deshalb i. E. ein erheblicher Entscheidungsspielraum einzuräumen sein.[93] Der Hinweis auf eine geringe Wirtschaftskraft oder eine hohe Arbeitslosigkeit soll nach allgemeiner Auffassung jedenfalls nicht ausreichen.[94]

bb. Unter „*Naturkatastrophen*" im Sinne von Art. 109 Abs. 3 S. 2 Hs. 2 GG werden – ähnlich wie im Zusammenhang mit Art. 35 Abs. 2 S. 2 und Abs. 3 GG – wiederum unmittelbar drohende Gefahrzustände oder Schädigungen von erheblichem Ausmaß verstanden, die durch Naturereignisse – etwa Erdbeben, Hochwasser, Unwetter, Dürren o. ä. – ausgelöst werden. Gemeint sind also plötzlich auftretende und nicht vorhersehbare Notsituationen.[95] Auch Pandemien sollen nach allgemeiner Auffassung dazu gehören.[96] Dem Begriff der *„außergewöhnlichen Notsituationen"* unterfallen dagegen solche Schadensereignisse, die von einem großem Ausmaß zeugen, von Bedeutung für die Allgemeinheit sind und die durch Unfälle, technisches oder menschliches Versagen

[89] So u. a. Dreier/*Heun*, 3. Aufl. 2018, GG Art. 109 Rn. 42 auch unter Verweis auf *Schmidt*, DVBl. 2009, 1274 (1279); a. A. aber *Lenz*/*Burgbacher*, NJW 2009, 2561 (2563).

[90] BGBl. I S. 2702, 2704, zuletzt geändert durch Art. 245 der Verordnung v. 31.08.2015 (BGBl. I S. 1474).

[91] So auch Dreier/*Heun*, 3. Aufl. 2018, GG Art. 109 Rn. 42.

[92] Siehe dazu auch Dreier/*Heun*, 3. Aufl. 2018, GG Art. 109 Rn. 42.

[93] So auch Dreier/*Heun*, 3. Aufl. 2018, GG Art. 109 Rn. 42 m. w. N.

[94] Sachs/*Siekmann*, 10. Aufl. 2024, GG, Art. 109 Rn. 75 m. w. N., u. a. unter Verweis auf BVerfGE 140, 240 Rn. 140; letztmalig bestätigt durch BVerfG, Urt. v. 15.11.2023 - BvF 1/22, Rn. 33 - *Zweiter Nachtragshaushalt 2021*.

[95] Statt vieler Sachs/*Siekmann*, 10. Aufl. 2024, GG, Art. 109 Rn. 77.

[96] So u. a. Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 109 Rn. 19. Ebenso Huber/Voßkuhle/*G. Kirchhof*, 8. Aufl. 2024, GG Art. 109 Rn. 135 mit konkretem Bezug zur Covid19-Pandemie.

ausgelöst oder von Dritten absichtlich herbeigeführt werden.[97] Auch unter den Begriff subsumiert wird eine plötzliche und extreme Beeinträchtigung der Wirtschaftsabläufe, die auf einen exogenen Schock zurückgeht und aus Gründen des Gemeinwohls aktive Stützungsmaßnahmen des Staates zur Aufrechterhaltung und Stabilisierung der Wirtschaftsabläufe erfordert.[98] Zyklische Konjunkturverläufe werden hingegen nicht unter den Begriff der außergewöhnlichen Notsituation gefasst.[99] Gleiches gilt für Haushaltsnotlagen sowie vorhersehbare und beeinflussbare Ereignisse; auch diese sind nicht tatbestandsmäßig i. S. v. Art. 109 Abs. 3 S. 2 Hs. 2 GG.[100] Aus diesem Grund hat das Bundesverfassungsgericht auch den Klimawandel nicht als Naturkatastrophe im Sinne von Art. 109 Abs. 3 S. 2 Hs. 2 GG eingestuft, da er seit langem bekannt sei.[101]

cc. In allen Fällen, das heißt sowohl bei einer von der Normallage abweichenden konjunkturellen Entwicklung gem. Art. 109 Abs. 3 S. 2 *Hs. 1* GG als auch im Fall von Naturkatastrophen oder sonstigen außergewöhnlichen Notsituationen gem. Art. 109 Abs. 3 S. 2 *Hs. 2* GG, kommt die Ausnahmeregelung ausweislich des Wortlauts der Norm nur dann zum Tragen, wenn sie auf äußeren Einflüssen beruht, die sich der Kontrolle des Staates entziehen und die staatliche Finanzlage erheblich beeinträchtigen. Die Ursachen dürfen also nicht, jedenfalls nicht im Wesentlichen der staatlichen Kontrolle unterliegen.[102] Außerdem muss die staatliche Finanzlage erheblich beeinträchtigt sein. Davon ist auszugehen, wenn der Finanzbedarf – gemessen an der Finanzkraft der entsprechenden Gebietskörperschaft (Bund oder Land) – in Anbetracht der Bewältigung der Katastrophen- bzw. Notsituation außerordentlich hoch ist und andere Maßnahmen nicht ausreichend sind.[103]

d. Wehrhafte Demokratie: Die Vorschriften der Wehrhaften Demokratie stellen auf unterschiedliche Auslöser ab: Den „Kampfe gegen die freiheitliche demokratische Grundordnung" (Art. 18 GG), die „Beeinträchtigung oder Beseitigung der freiheitlichen demokratischen Grundordnung" oder die „Gefährdung des Bestandes der Bundesrepublik Deutschland" (Art. 21 Abs. 2 GG), die „verfassungsmäßige Ordnung" (Art. 9 Abs. 2 GG), die „Treue zur Verfassung" (Art. 5 Abs. 3 S. 2 GG) bzw. die föderale Untergliederung der

[97] Vgl. dazu nur Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 109 Rn. 19 u. a. unter Verweis auf BT-Drs.16/12 410, 11. Statt vieler i. Ü. auch Sachs/*Siekmann*, 10. Aufl. 2024, GG Art. 109 Rn. 78.

[98] Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 109 Rn. 19 erneut unter Verweis auf BT-Drs.16/12 410, 11.

[99] Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 109 Rn. 19 m. w. N.

[100] Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 109 Rn. 19 m. w. N.

[101] BVerfG, Urt. v. 15.11.2023 - BvF 1/22, Rn. 33 - *Zweiter Nachtragshaushalt 2021*.

[102] Eingehend dazu u. a. Sachs/*Siekmann*, 10. Aufl. 2024, GG Art. 109 Rn. 78b ff.

[103] Jarass/Pieroth/*Jarass*, 18. Aufl. 2024, GG Art. 109 Rn. 20 m. w. N.

Bundesrepublik, die Mitwirkung der Länder bei der Gesetzgebung und die in Art. 1 und 20 GG niedergelegten Grundsätze (Art. 79 Abs. 3 GG). Als gemeinsamer Schlüsselbegriff ist insofern die Gefahr für die freiheitliche demokratische Grundordnung zu nennen.[104] Was sich hinter dem Begriff der *freiheitlichen demokratischen Grundordnung* verbirgt, wird im Grundgesetz nicht näher festgelegt. Das Bundesverfassungsgericht hat den Begriff jedoch maßgeblich in seinem sog. *SRP*-Verbotsurteil (1952) geprägt.[105] Dieses Begriffsverständnis wird auch in der *Lit.* regelmäßig herangezogen.[106] Demnach wird unter der freiheitlichen demokratischen Grundordnung diejenige Ordnung verstanden, „die unter Ausschluss jeglicher Gewalt- und Willkürherrschaft eine rechtsstaatliche Herrschaftsordnung auf der Grundlage der Selbstbestimmung des Volkes nach dem Willen der jeweiligen Mehrheit und der Freiheit und Gleichheit darstellt".[107] Zu den grundlegenden Prinzipien dieser Ordnung werden laut Bundesverfassungsgericht mindestens die Achtung vor den im GG konkretisierten Menschenrechten dazugezählt, vor allem das Recht der Persönlichkeit auf Leben und freie Entfaltung, die Volkssouveränität, die Gewaltenteilung, die Verantwortlichkeit der Regierung, die Gesetzmäßigkeit der Verwaltung, die Unabhängigkeit der Gerichte, das Mehrparteienprinzip und die Chancengleichheit für alle politischen Parteien mit dem Recht auf verfassungsmäßige Bildung und Ausübung einer Opposition.[108]

e. Einfachgesetzliche Notstandsregelungen: Die Anwendung der einfachgesetzlichen Regelungen wird von verschiedenen Notstandssituationen ausgelöst, darunter vor allem dem sog. Verteidigungsfall i. S. v. Art. 115a Abs. 1 GG. So hängen etwa die – oben bereits aufgeworfenen – Sicherstellungs- und Vorsorgegesetze[109] in weiten Teilen vom Vorliegen eines Verteidigungsfalls (s. dazu oben unter → *3. a.*) ab. Zum Teil wird auch schon der Spannungsfall gem. Art. 80a GG (auch dazu bereits oben unter → *3. a.*) als ausreichend erachtet.[110] Vereinzelt spielen auch andere außergewöhnliche Ereignisse in

[104] So auch Kaiser, Ausnahmeverfassungsrecht, 2020, S. 155.

[105] BVerfG, Urt. v. 23.10.1952 – 1 BvB 1/51, BVerfGE 2, 1 – *SRP-Verbot*. Bestätigt u. a. in Urt. v. 17.08.1956 – 1 BvB 2/51, BVerfGE 5, 85 (140) – *KPD-Verbot*; Urt. v. 17.01.2017 – 2 BvB 1/13, BVerfGE 144, 20 ff. – *NPD-Verbotsverfahren*.

[106] Vgl. dazu u. a. nur Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 18 Rn. 29 f. o. a. Sachs/*Pagenkopf*, 10. Aufl. 2024, GG Art. 18 Rn. 12.

[107] So grundlegend in BVerfG, Urt. v. 23.10.1952 – 1 BvB 1/51, BVerfGE 2, 1 (12 f.) – *SRP-Verbot*. Später bestätigt durch BVerfG, Urt. v. 17.08.1956 – 1 BvB 2/51, BVerfGE 5, 85 (140) – *KPD-Verbot*; Urt. v. 17.01.2017 – 2 BvB 1/13, BVerfGE 144, 20 ff. – *NPD-Verbotsverfahren*.

[108] Siehe dazu nur BVerfG, Urt. v. 23.10.1952 – 1 BvB 1/51, BVerfGE 2, 1 (12 f.) – *SRP-Verbot*; Urt. v. 17.08.1956 – 1 BvB 2/51, BVerfGE 5, 85 (140) – *KPD-Verbot*; Urt. v. 17.01.2017 – 2 BvB 1/13, BVerfGE 144, 20 ff. – *NPD-Verbotsverfahren*.

[109] Siehe dazu oben → Fn. 40.

[110] Vgl. dazu insbes. Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 80a Rn. 15, der insofern exemplarisch auf einschlägige Notstandsregelungen verweist, darunter insbes. die sog. Sicherstellungsgesetze (s. → Fn. 40). Ähnlich auch Dürig/Herzog/Scholz/*Depenheuer*, 104. EL April 2024, GG, Art. 80a Rn. 64.

Gestalt von Naturkatastrophen, besonders schweren Unglücksfällen, wirtschaftlichen Krisenlagen o. ä. eine entscheidende Rolle.[111] Auch insofern kann (und soll hier) auf die einschlägigen Definitionen an vorangegangener Stelle verwiesen werden.

Question 4

Auch für die Antwort auf die Frage, ob unterschiedliche formale und/oder prozedurale Zwänge einzuhalten sind, um bestimmte Notstandsmechanismen auszulösen, kann und muss zwischen den oben (unter → *Abschnitt 1, 3.*) genannten Regelungsbereichen unterschieden werden:

a. Notstandsverfassung: Innerhalb der Notstandsverfassung sind zunächst die Fälle des sog. regionalen und überregionalen Katastrophennotstands (Art. 35 Abs. 2 und 3 GG), des inneren Notstands (Art. 91 GG) sowie des sog. Verteidigungs- und Spannungsfalls gem. Art. 115a Abs. 1 GG bzw. Art. 80a Abs. 1 GG zu unterscheiden.

aa. Katastrophennotstand: Der Katastrophennotstand gem. Art. 35 Abs. 2 und 3 GG muss – anders als der Verteidigungsfall (dazu sogleich → *Abschnitt 1, 4. cc.*) – nicht förmlich ausgerufen werden. Es reicht, wenn die materiell-rechtlichen Voraussetzungen von Art. 35 Abs. 2 und 3 GG vorliegen.[112] Für die weiteren formellen bzw. prozeduralen Vorgaben i. R. v. Art. 35 GG soll im Folgenden zwischen den Maßnahmen nach Abs. 2 und denjenigen nach Abs. 3 unterschieden werden:

– **Art. 35 Abs. 2:** Formelle Vorgaben legt das Grundgesetz weder für die Anforderungen von Kräften und Einrichtungen der Bundespolizei i. S. v. Art. 35 Abs. 2 S. 1 GG noch für die Anforderungen von Polizeikräften anderer Länder, von Kräften und Verwaltungen anderer Einrichtungen und von Streitkräften i. S. v. Art. 35 Abs. 2 S. 2 GG durch das von einer regionalen Katastrophe betroffene Bundesland fest.[113] Sie können deshalb grundsätzlich auch mündlich erfolgen.[114] Inhaltlich müssen sie indes als Entscheidungsgrundlage dafür dienen können, ob, in welchem Umfang und mit welchen personellen und sachlichen Mitteln durch die ersuchte Stelle Unterstützung

[111] So etwa in § 1 Abs. 1 Nr. 1 b) ESVG.
[112] Zu den Voraussetzungen („Notstandsauslösern"), s. bereits oben → *Abschnitt 1, 3. a. aa.*
[113] Nomos-BR/Wehr BPolG/*Matthias Wehr*, 3. Aufl. 2021, BPolG § 11 Rn. 16.
[114] Nomos-BR/Wehr BPolG/*Matthias Wehr*, 3. Aufl. 2021, BPolG § 11 Rn. 16.

zu leisten ist.[115] Gemäß § 11 Abs. 4 S. 2 BPolG (analog[116]) soll das Anforderungsersuch deshalb alle für die Entscheidung wesentlichen Merkmale des Einsatzauftrages enthalten, damit die ersuchte Stelle umfassend über Art und Ausmaß der bestehenden Störung informiert ist.

Die mit dem Anforderungsrecht des von einem Notstand betroffenen Landes korrespondierende[117] Entscheidung der ersuchten Stelle über die zur Verfügung zu stellenden personellen und sachlichen Mittel trifft wiederum das für diese allgemein zuständige Organ.[118] Die Entscheidung über die Verwendung der Bundespolizei ergeht – im Fall von Art. 35 Abs. 2 GG – also etwa durch das Bundesministerium des Innern, für Bau und Heimat (s. § 11 Abs. 3 BPolG). Der Einsatz der Streitkräfte i. R. v. Art. 35 Abs. 2 GG ist wiederum durch den:die Bundesminister:in der Verteidigung – oder im Vertretungsfall durch das zur Vertretung berechtigte Mitglied der Bundesregierung im Benehmen mit dem:der Bundesminister:in des Innern – anzuordnen (s. § 13 Abs. 2 LuftSiG).

– **Art. 35 Abs. 3:** Weder die Weisung der Bundesregierung gegenüber den Landesregierungen noch ihre Aufhebung unterstehen ausweislich des Gesetzeswortlauts von Art. 35 Abs. 3 S. 1 GG beim überregionalen Katastrophennotstand in Form der Bundesintervention besonderen formellen und/oder prozeduralen Anforderungen. Insofern ist auf die Anforderungen an Weisungen im inneren Notstand gem. Art. 91 Abs. 2 GG zu verweisen (siehe dazu noch unten → *Abschnitt 1, 4. a. bb.*): Sowohl die Anordnung der Weisung als auch ihre Aufhebung müssen demnach ausdrücklich und förmlich durch die

[115] Nomos-BR/Wehr BPolG/*Matthias Wehr*, 3. Aufl. 2021, BPolG § 11 Rn. 16.

[116] § 11 Abs. 4 S. 2 BPolG gilt ausdrücklich nur für Anforderungen der Bundespolizei. Wegen des systematischen Zusammenhangs von Art. 35 Abs. 2 S. 1 und 2 GG sowie des engen sachlichen Zusammenhangs ist jedoch davon auszugehen, dass auch die Anforderungen von Polizeikräften anderer Länder, von Kräften und Verwaltungen anderer Einrichtungen und von Streitkräften i. S. v. Art. 35 Abs. 2 S. 2 GG die in § 11 Abs. 4 S. 2 PolG festgelegten Voraussetzungen (analog) erfüllen müssen, so wohl auch Huber/Voßkuhle/*v. Danwitz*, 8. Aufl. 2024, GG Art. 35 Rn. 88. Auch der systematische Zusammenhang mit dem Amtshilfeersuchen gem. Art. 35 Abs. 1 GG spricht dafür, dass sämtliche Anforderungen i. S. v. Art. 35 Abs. 2 GG hinreichend konkret auszuformulieren sind. Auch das Amtshilfeersuchen nach Art. 35 Abs. 1 GG muss gewisse Bestimmtheitsanforderungen erfüllen, dazu statt vieler Huber/Voßkuhle/*v. Danwitz*, 8. Aufl. 2024, GG Art. 35 Rn. 43.

[117] Dem Anforderungsrecht durch das von einem Notstand betroffenen Land auf der einen Seite entspricht eine Unterstützungspflicht durch die ersuchte Stelle auf der anderen Seite, s. dazu u. a. *Stern,* StR II, 1980, § 56, S. 1464. Diese vom Grundgesetz nicht ausdrücklich festgelegte Rechtsfolge soll sich nach allgemeiner Auffassung aus der *ratio* der Norm ergeben, die darauf gerichtet ist, möglichst schnell und mit allen im Bund zur Verfügung stehenden Mitteln die Notsituation zu bewältigen.

[118] *Stern,* StR II, 1980, § 56, S. 1464.

Bundesregierung als Kabinettskollegium[119] erklärt werden.[120] Dies überzeugt - wie auch bei Art. 91 GG - aus Gründen der Rechtssicherheit und -klarheit und wegen der weitreichenden Rechtswirkungen der Bundesintervention bei überregionalen Katastrophen. Auch für den Einsatz der Bundespolizei sowie der Streitkräfte bedarf es i. R. v. Art. 35 Abs. 3 GG der Entscheidung der Bundesregierung als Kollegialorgan.[121] Dabei entspricht es der Pflicht zu bundesfreundlichem Verhalten, vor Inanspruchnahme der Befugnisse in Abs. 3 S. 1 dem betroffenen Land Gelegenheit zur Stellungnahme zu geben und ein Einvernehmen über die Gefahrenabwehr anzustreben;[122] für den Streitkräfteeinsatz ist die Entscheidung ohnehin im gemeinsamen Benehmen mit den betroffenen Ländern zu treffen (s. § 11 Abs. 3 BPolG u. § 13 Abs. 3 LuftSiG).

bb. Innerer Notstand: Anders als für den Verteidigungsfall (dazu sogleich → *Abschnitt 1, 4. a. cc.*) schreibt das Grundgesetz für den inneren Notstand keinen förmlichen Feststellungsbeschluss vor. Die Rechtsfolgen des inneren Notstands werden demnach ausgelöst, wenn die materiellrechtlichen Voraussetzungen von Art. 91 GG vorliegen.[123]

Allerdings bedürfen die Weisungsunterstellung der Landespolizeikräfte sowie der Einsatz der Bundespolizei gem. Art. 91 Abs. 2 S. 1 GG, genauso wie die Weisungserteilung an die Landesregierungen gem. Art. 91 Abs. 2 S. 3 GG, grundsätzlich einer ausdrücklichen, förmlich bekannt gemachten Anordnung durch die Bundesregierung.[124] Dies ergibt sich zwar nicht explizit aus dem Gesetzeswortlaut, wird jedoch aus Gründen der Rechtssicherheit und -klarheit und wegen der weitreichenden Rechtswirkungen der Weisungsunterstellung

[119] BeckOK GG/*Epping*, 59. Aufl. 2024, GG Art. 62 Rn. 5; Dürig/Herzog/Scholz/*Dederer*, 105. EL August 2024, GG Art. 35 Rn. 162; v. Münch/Kunig/Gubelt/*Goldhammer,* 7. Aufl. 2021, GG Art. 35 Rn. 69. S. auch BVerfGE 115, 118 (149); BVerfGE 132, 1 Rn. 53 ff. BVerfGE 133, 241 Rn. 49, 77.

[120] Dies ergibt sich zwar weder aus dem Gesetzeswortlaut von Art. 35 Abs. 3 GG noch aus der dazugehörigen Literatur, die regelmäßig nur auf den Inhalt, nicht aber auf die Form der Weisung eingeht, s. dazu exemplarisch etwa Dürig/Herzog/Scholz/*Dederer*, 104. EL April 2024, GG Art. 35 Rn. 158 o. a. Huber/Voßkuhle/*v. Danwitz*, 8. Aufl. 2024, GG Art. 35 Rn. 94. Der enge Sachzshg. mit den Regelungen des inneren Notstands gem. Art. 91 GG gebietet es jedoch, die dortigen Anforderungen an eine Weisung der Bundesregierung auch auf den Katastrophennotstand zu übertragen. Dem steht auch nicht entgegen, dass sich die Weisung gem. Art. 91 GG an die Polizei, diejenige gem. Art. 35 Abs. 3 S. 1 GG hingegen an die Landesregierung(en) richtet.

[121] Eine Übertragung bzw. Delegation dieser Befugnisse etwa auf ein einzelnes Mitglied der Bundesregierung ist, auch in Eilfällen, grundsätzlich unzulässig, s. dazu u. a. Dreier/*Bauer*, 3. Aufl. 2015, GG Art. 35 Rn. 33. Andere Auffassung s. BeckOK GG/*Epping*, 59. Aufl. 2024, GG Art. 35 Rn. 163.

[122] Huber/Voßkuhle/*v. Danwitz*, 8. Aufl. 2024, GG Art. 35 Rn. 93. Ebenso BeckOK GG/*Epping*, 59. Ed. September 2024, GG Art. 35 Rn. 35.

[123] Zu den Voraussetzungen s. bereits oben → *Abschnitt 1, 3. a. bb.*

[124] Sachs/*Windthorst*, 10. Aufl. 2024, GG Art. 91 Rn. 42 m. w. N.

verlangt.[125] Die Mitwirkung anderer Bundesorgane, insbesondere die Zustimmung von Bundestag und Bundesrat, ist nicht erforderlich.[126] Auch für die Aufhebung der durch die Bundesregierung nach Art. 91 Abs. 2 GG getroffenen Maßnahmen,[127] die gem. Art. 92 Abs. 2 S. 2 GG entweder nach der Beseitigung der Gefahr oder jederzeit auf Verlangen des Bundesrates zu erfolgen hat, bedarf es einer förmlichen Aufhebungsregelung, die ausdrücklich zu formulieren und förmlich kundzutun ist.[128]

Der Einsatz der Streitkräfte, welcher im inneren Notstand grundsätzlich unter den Voraussetzungen von Art. 87a Abs. 4 GG erlaubt ist, bedarf ebenfalls einer gesonderten Entscheidung durch die Bundesregierung, die diese als Kollegium und in Gestalt eines förmlichen Kabinettsbeschlusses zu treffen hat.[129] Anders als im Spannungs- und Verteidigungsfall ist dabei keine zustimmende Entscheidung durch den Bundestag erforderlich.[130] Das in Art. 87a Abs. 4 S. 2 GG festgelegte Einstellungsverlangen durch Bundestag oder Bundesrat wird insofern als ausreichende Parlamentsbeteiligung erachtet.[131]

cc. Verteidigungs- und Spannungsfall: Sowohl der Verteidigungsfall i. S. v. Art. 115a GG als auch der Spannungsfall gem. Art. 80a GG bedürfen der förmlichen Feststellung, andernfalls treten die jeweiligen Rechtsfolgen nicht ein:[132]

– **Verteidigungsfall, Art. 115a GG:** Die Feststellung des Verteidigungsfalls trifft – unter gewöhnlichen Umständen – der Bundestag auf Antrag der Bundesregierung und mit Zustimmung des Bundesrates; so ergibt es sich aus Art. 115a Abs. 1 GG. Die Entscheidung ergeht dabei im Wege eines förmlichen Feststellungsbeschlusses und setzt gem. Art. 115a Abs. 1 S. 2 GG eine Zweidrittelmehrheit im Bundestag sowie eine einfache Mehrheit im Bundesrat voraus.[133] Unter

[125] So ausdrücklich Sachs/*Windthorst*, 10. Aufl. 2024, GG Art. 91 Rn. 42. Ebenso Huber/Voßkuhle/*Volkmann*, 8. Aufl. 2024, GG Art. 91 Rn. 35.

[126] Sachs/*Windthorst*, 10. Aufl. 2024, GG Art. 91 Rn. 42.

[127] Art. 92 Abs. 2 S. 2 GG bezieht sich trotz seiner systematischen Stellung nach allgemeiner Auffassung sowohl auf Maßnahmen nach Art. 91 Abs. 2 S. 1 GG als auch auf solche nach Art. 91 Abs. 2 S. 3 GG, s. dazu statt vieler Huber/Voßkuhle/*Volkmann*, 8. Aufl. 2024, GG Art. 91 Rn. 44.

[128] Siehe dazu nur *Stern,* StR II, 1980, § 56, S. 1474.

[129] S. dazu u. a. Dreier/*Heun*, 3. Aufl. 2018, GG Art. 87a Rn. 33.

[130] Sachs/*Hummel*, 10. Aufl. 2024, GG Art. 87a Rn. 67.

[131] So ausdrücklich Sachs/*Hummel*, 10. Aufl. 2024, GG Art. 87a Rn. 67 unter Verweis auf BVerfG NVwZ 2010, 1091 (1092 f.).

[132] Die förmlichen Feststellungen gem. Art. 115a Abs. 1 GG und Art. 80a Abs. 1 GG haben demnach konstitutive, nicht nur rein deklaratorische Wirkung, so auch Sachs/*Robbers*, 10. Aufl. 2024, GG Art. 115a Rn. 9.

[133] Eingehend zu den einzelnen Verfahrensschritten, s. u. a. Huber/Voßkuhle/*Grote/Schemmel*, 8. Aufl. 2024, GG Art. 115a Rn. 24 ff.

besonderen Umständen kann auch der Gemeinsame Ausschuss entscheiden, s. Art. 115a Abs. 2 GG. Unter den Voraussetzungen von Art. 115a Abs. 4 GG kann der Feststellungsbeschluss zudem fingiert werden.

– **Spannungsfall, Art. 80a GG:** Den Eintritt des Spannungsfalls stellt wiederum (allein) der Bundestag mit Zweidrittelmehrheit förmlich fest, Art. 80a Abs. 1 GG. Im Gegensatz zum Verteidigungsfall bedarf es hierzu keiner Zustimmung des Bundesrates.[134]

Sowohl im Verteidigungs- als auch im Spannungsfall ist die Feststellungsentscheidung öffentlich bekannt zu geben, das heißt gem. Art. 115a Abs. 3 GG (analog[135]) i. V. m. Art. 82 GG vom Bundespräsidenten im Bundesgesetzblatt zu verkünden. Eine Ausnahme gilt nur dann, wenn die Verkündung nicht rechtzeitig möglich ist. In diesen Fällen ist die Feststellung auf andere Weise bekannt zu geben und die Verkündung im Bundesgesetzblatt nachzuholen, sobald die Umstände es zulassen, s. Art. 115a Abs. 3 S. 2 GG.

b. Verfassungsstörung: Für die Fälle der sog. Verfassungsstörung ist auf die formellen und prozeduralen Vorgaben der jeweiligen Vorschriften[136] zu verweisen. So bedarf der Gesetzgebungsnotstand i. S. v. Art. 81 GG etwa einer förmlichen und im Bundesgesetzblatt zu verkündenden Erklärung durch den Bundespräsidenten.[137] Das konstruktive Misstrauensvotum gem. Art. 67 GG setzt wiederum einen Antrag durch mindestens ein Viertel der Mitglieder des Bundestages oder einer Fraktion von wenigstens gleicher Stärke voraus (s. § 97 GO-BT).[138] Die in Art. 39 Abs. 1 S. 2 GG gewährleistete Permanenz des Bundestages wird wiederum gesetzlich festgelegt, ohne dass dafür ein formales Prozedere durchlaufen werden muss.

c. Finanzverfassungsrecht: Für die im Rahmen von Art. 109 Abs. 3 S. 2 GG dem Bund und den Ländern[139] eingeräumte Möglichkeit, die Regelnettoneuverschuldungsgrenze in Fällen von Naturkatastrophen oder außergewöhnlichen

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[134] Sachs/*Mann*, 10. Aufl. 2024, GG Art. 80a Rn. 2.

[135] Art. 115a Abs. 3 GG gilt ausdrücklich nur für den Verteidigungsfall, ist jedoch nach allg. Auffassung analog auch für den Spannungsfall heranzuziehen, vgl. dazu nur *März*, in: Isensee/Kirchhof (Hrsg.), HStR, § 281 Rn. 12 f.; ebenso Sachs/*Mann*, 10. Aufl. 2024, GG Art. 80a Rn. 2 m. w. N.

[136] Zu einer exemplarischen Aufzählung prominenter Vorschriften, s. bereits oben → *Abschnitt 1, 3. b.*

[137] Zu den verfahrensrechtlichen Voraussetzungen des Gesetzgebungsnotstands, s. im Einzelnen etwa bei Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 81 Rn. 37 ff. oder auch Dürig/Herzog/Scholz/*Herzog*, 104. EL April 2024, GG Art. 81 Rn. 27 ff.

[138] Eingehend zu dem Verfahren des konstruktiven Misstrauensvotums, s. u. a. bei Sachs/*Brinktrine*, 10. Aufl. 2024, GG Art. 67 Rn. 23 ff. sowie Huber/Voßkuhle/*Epping*, 8. Aufl. 2024, GG Art. 67 Rn. 8 ff.

[139] Nur soweit eine Umsetzung im Landesrecht erfolgt ist, *siehe unter → Abschnitt 2, Ziffer 3.*

Notsituationen, die sich der Kontrolle des Staates entziehen und die staatliche Finanzlage erheblich beeinträchtigen, ausnahmsweise zu überschreiten, bedarf es grundsätzlich einer gesetzlichen Regelung des jeweiligen Bundes- oder Landesgesetzgebers, die zugleich eine eigenständige Regelung zur Tilgung der zusätzlichen Kredite vorsehen muss (vgl. Art. 109 Abs. 3 S. 3 GG).[140] Dabei muss es sich nicht zwangsläufig um einen förmlichen Gesetzesbeschluss handeln;[141] ausreichend kann auch ein schlichter Parlamentsbeschluss sein, sofern der Beschluss den jeweiligen (landes- oder bundes-)verfassungsrechtlichen Anforderungen an die parlamentarische Beschlussfassung genügt.[142]

d. Wehrhafte Demokratie: Die Maßnahmen der Wehrhaften Demokratie stellen – auch bedingt durch ihre unterschiedliche dogmatische Einordnung – verschiedene formelle und/oder prozedurale Anforderungen. Im Folgenden soll deshalb zwischen den einzelnen Regelungen unterschieden werden:

- **Art. 18 GG:** Für die *Verwirkung von Grundrechten* bedarf es gem. Art. 18 S. 2 GG einer Entscheidung durch das Bundesverfassungsgericht, die, sofern sie zulasten des Antragsgegners erfolgt, mit einer Mehrheit von zwei Dritteln der Mitglieder des Senats zu treffen ist, s. § 15 Abs. 4 S. 1 BVerfGG.[143] Zuständig ist grundsätzlich der Zweite Senat des Bundesverfassungsgerichts, § 14 Abs. 2 i. V. m. § 13 Nr. 1 BVerfGG.[144]

- **Art. 21 Abs. 2 GG:** Auch für das *Parteiverbot* i. S. v. Art. 21 Abs. 2 GG bedarf es einer Entscheidung des Bundesverfassungsgerichts (s. Art. 21 Abs. 4 GG, § 13 Nr. 2 BVerfGG),[145] abermals durch den Zweiten Senat (§ 14 Abs. 2 i. V. m. § 13 Nr. 2 BVerfGG).

- **Art. 9 Abs. 2 GG:** Ein *Vereinsverbot* i. S. v. Art. 9 Abs. 2 GG wird wiederum von der zuständigen Verbotsbehörde verhängt. Wenn der Verein im gesamten Gebiet der Bundesrepublik Deutschland oder in mehreren Bundesländern tätig ist, handelt es sich dabei gem. § 3 Abs. 2 Nr. 2 VereinsG um das Bundesministerium des Innern. Ist der Verein nur in einem einzelnen Bundesland aktiv, so liegt die Zuständigkeit beim jeweiligen Landesinnenministerium, § 3 Abs. 2 Nr. 1 VereinsG.[146]

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[140] Vgl. dazu nur Sachs/*Siekmann*, 10. Aufl. 2024, GG Art. 109 Rn. 76.

[141] Vgl. insofern nur die Gesetzesbegründung BT-Drs. 16/12 410, S. 13. Siehe i. Ü. auch BVerfG v. 15.11.2023 – 2 BvF 1/22 – *Zweites Nachtragshaushaltsgesetz* = NVwZ 2023, 1892 Rn. 1010 m. w. N., insbes. auf Dürig/Herzog/Scholz/*Kube*, 105. EL August 2024, GG Art. 109 Rn. 210.

[142] Vgl. dazu nur Dürig/Herzog/Scholz/*Kube*, 104. EL April 2024, GG Art. 109 Rn. 210.

[143] Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 18 Rn. 63.

[144] Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 18 Rn. 63.

[145] Eingehend zum Parteiverbotsverfahren u. a. Huber/Voßkuhle/*Streinz*, 8. Aufl. 2024, GG Art. 21 Rn. 242 ff.

[146] Siehe dazu auch Lisken/Denninger/*Marx*, PolR-HdB, 7. Aufl. 2021, I. Rn. 548 f.

– **Art. 5 Abs. 3 S. 2 GG:** Bei der sog. *Verfassungstreueklausel* handelt es sich aus dogmatischer Sicht um eine Einschränkungsmöglichkeit der sog. Wissenschaftsfreiheit gem. Art. 5 Abs. 3 S. 1 GG.[147] Gegenüber einer verbeamteten Professur kann die Lehrfreiheit durch die Treue zur Verfassung begrenzt und bei einem Verstoß mit beamtenrechtlichen Mitteln geahndet werden.[148] Bei angestellten Dozent:innen oder Lehrbeauftragten an einer staatlichen Hochschule bestehen Ahndungsmöglichkeiten im Wege des jeweiligen Dienstrechts.[149] Für Lehrbeauftragte, die keinem besonderen Dienstrecht unterworfen sind, gilt Art. 5 Abs. 3 S. 2 GG hingegen als Grundlage für einen Widerruf, die Nichtverlängerung und/oder die Prognose vor Erteilung eines Lehrauftrages.[150] Soweit wissenschaftliche Lehre in Verbindung mit staatlich anerkannten Abschlüssen von einem Einzelnen privat oder im Rahmen einer Privathochschule betrieben wird, ist die Treueklausel ebenfalls einschlägig; insofern steht als staatliches Sanktionsmittel jedoch nur Art. 18 zur Verfügung, dessen Tatbestand enger gefasst ist und voraussetzt, dass „die Lehrfreiheit […] zum Kampfe gegen die freiheitliche demokratische Grundordnung missbraucht“ wird.[151]

– **Art. 79 Abs. 3 GG:** Die sog. *Ewigkeitsgarantie* stellt eine absolute Grenze für Verfassungsänderungen dar und ist als solche immer, das heißt, ohne nähere formelle oder verfahrensrechtliche Vorgaben rechtswirksam.

e. Einfachgesetzliche Notstandsregelungen: Die Anwendung der einfachgesetzlichen Notstandsregelungen ist regelmäßig davon abhängig, ob ein Staatsnotstandsfall i. S. d. Grundgesetzes vorliegt. Für die Anwendung derjenigen Regelungen, die dabei auf den Verteidigungs- oder Spannungsfall abstellen, bedarf es deshalb ebenfalls des in Art. 115a Abs. 1 GG bzw. Art. 80a Abs. 1 GG vorgesehenen, förmlichen Feststellungsbeschlusses.[152] Bis ein solcher vorliegt, bleiben die einfachgesetzlichen Vorschriften gesperrt. Für die übrigen Fälle des inneren Notstands sowie Katastrophennotstands sind wiederum die materiell-rechtlichen Voraussetzungen von Art. 35 Abs. 2 und 3 GG bzw. Art. 91 GG ausreichend; insofern setzen auch die einfachgesetzlichen Notstandsregelungen keinen förmlichen Feststellungsbeschluss voraus.[153]

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[147] Statt vieler Huber/Voßkuhle/*Paulus*, 8. Aufl. 2024, GG Art. 5 Rn. 549.

[148] So ausdrücklich Huber/Voßkuhle/*Paulus*, 8. Aufl. 2024, GG Art. 5 Rn. 550; Jarass/Pieroth/*Jarass*, 18. Aufl.2024, GG Art. 5 Rn. 150.

[149] Vgl. dazu Huber/Voßkuhle/*Paulus*, 8. Aufl. 2024, GG Art. 5 Rn. 550.

[150] So ausdrücklich Huber/Voßkuhle/*Paulus*, 8. Aufl. 2024, GG Art. 5 Rn. 550.

[151] Huber/Voßkuhle/*Paulus*, 8. Aufl. 2024, GG Art. 5 Rn. 551.

[152] Zu dessen Anforderungen siehe oben → *Abschnitt I, 3. a. cc.*

[153] Siehe auch dazu bereits oben → *Abschnitt I, 3. a. aa. bzw. bb.*

Question 5

Das EU-Recht beeinflusst nicht direkt die rechtlichen Definitionen von Notsituationen in der Bundesrepublik.

Dies gilt auch für die Neuverschuldungsoption bei Naturkatastrophen und in Notsituationen nach Art. 109 Abs. 3 S. 2 Fall 2 GG: Auch wenn das EU-Recht die Zielvorgaben des Art. 109 GG überlagert und die deutsche Haushaltswirtschaft europarechtlich beeinflusst wird,[154] richtet sich die Auslegung von Art. 109 Abs. 2 S. 2 Fall 2 GG vielmehr nach Art. 11 Abs. 2, Art. 35 Abs. 2 S. 2 und Abs. 3 S. 1 GG.[155]

Question 6

Es sind keine Präzedenzfälle bekannt, in denen durch eine vorherige EU-Maßnahme eine Notsituation in der Bundesrepublik unmittelbar ausgelöst und erklärt wurde.

Vielmehr hat die Bundesrepublik in den letzten Jahren vermehrt auf EU-Notfallinstrumente reagiert. Die Bundesregierung hat beispielsweise in Fällen von Naturkatastrophen durch das Gemeinsame Melde- und Lagezentrum von Bund und Ländern beim Bundesamt für Bevölkerungs- und Katastrophenhilfe den Dienst für Katastrophen- und Krisenmanagement des EU Copernicus aktiviert, um Satellitenbildaufnahmen und entsprechende Auswertungen zu erhalten.[156] Im Nachgang von Notsituationen hat die Bundesregierung zudem erfolgreich Anträge auf Finanzbeiträge aus dem EU-Solidaritätsfonds gestellt, beispielsweise nach der Ahrtal-Flutkatastrophe und der Covid19-Pandemie.[157] Nach der Covid19-Pandemie hat die Bundesrepublik ferner auf das SURE-Programm der Europäischen Kommission zur Minderung der Arbeitslosigkeitsrisiken in Ausnahmesituationen (Verordnung (EU) 2020/672 vom 19. Mai 2020, gestützt auf Art. 122 Abs. 1 AEUV) mit einem deutschen SURE-Gewährleistungsgesetz vom 10. Juli 2020 reagiert und das Bundesministerium für Finanzen ermächtigt, die notwendigen Garantien zur Absicherung der

[154] Siehe Dürig/Herzog/Scholz/*Kube*, 105. EL August 2024, GG Art. 109 Rn. 8; BeckOK GG/*Reimer*, 59. Aufl. September 2024, GG Art. 109 Rn. 6.

[155] Siehe anstatt vieler BeckOK GG/*Reimer*, 59. Aufl. September 2024, GG Art. 109 Rn. 65-67.

[156] Bundesministerium des Inneren und für Heimat zusammen mit Bundesministerium der Finanzen, Bericht zur Hochwasserkatastrophe 2021: Katastrophenhilfe, Wiederaufbau und Evaluierungsprozesse, 2022, S. 10, abrufbar unter https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/2022/abschlussbericht-hochwasserkatastrophe.pdf?__blob=publicationFile&v=1 (letzter Aufruf 12.02.2025).

[157] Für einen Überblick der Förderungen durch den EU-Solidaritätsfonds, siehe https://germany.representation.ec.europa.eu/news/wiederaufbau-nach-flutkatastrophe-2021-deutschland-erhalt-uber-612-millionen-euro-aus-dem-eu-2022-12-15_de (letzter Aufruf 12.02.2025).

Kredite der EU zu übernehmen. Dies setzte nach Art. 115 Abs. 1 GG eine Ermächtigung durch Bundesgesetz voraus. Zur Unterstützung der Erholung nach der Covid19-Pandmie wurde Verordnung (EU) 2020/2094 des Rates vom 14. Dezember 2020 bzgl. des temporären Aufbauinstruments „Next Generation EU" (NGEU) und das dazugehörige Aufbauinstrument EURI beschlossen – diese wurde auf Art. 122 Abs. 1 AEUV i. V. m. Art. 311 Abs. 3 und Art. 106a AEUV gestützt. Die Bundesregierung entwarf daraufhin das deutsche Eigenmittelbeschluss-Ratifizierungsgesetz, welches nach erfolglosen Verfahren vor dem Bundesverfassungsgericht[158] rückwirkend zum 1. Januar 2021 in Kraft trat. Seitdem erhält die Bundesrepublik bspw. Finanzhilfen aus der Aufbau- und Resilienzfazilität des NGEU.

Auch hat die Bundesrepublik auf die EU-Notfallverordnung (Verordnung EU 2022/2577) zum beschleunigten Ausbau der Nutzung erneuerbarer Energien, gestützt auf Art. 122 Abs. 1 AEUV, entsprechende Gesetzesänderungen im deutschen Recht vorgenommen.[159]

Mit dem EU-Umsiedlungsprogramm des Rats, gestützt auf die Notfallklausel des Art. 78 Abs. 3 AEUV, und zur Entlastung Griechenlands und Italiens bei der Aufnahme von Schutzsuchenden gedacht, nahm auch die Bundesrepublik zusätzliche Umsiedlungen als Reaktion auf den erklärten Notfall vor.[160]

Abschnitt 2: Der verfassungsrechtliche Rahmen des Notstandsrechts in den Mitgliedstaaten

Question 1

a. Notstandsverfassung: Verfassungshistorisch gesehen ist die sog. Notstandsverfassung (1968) ein Novum im deutschen Grundgesetz. Mit ihren detailreichen Regelungen zu den unterschiedlichen, oben dargestellten Notstandslagen stellt sie eine bewusste Abkehr von der im Rahmen der Weimarer Reichsverfassung (WRV) zuvor geltenden Notstandsgeneralklausel des Art. 48 Abs. 2 WRV dar,[161] die dem Reichspräsidenten weitläufige Befugnisse zur Wiederherstellung der öffentlichen Sicherheit und Ordnung einräumte,

[158] BVerfG, Beschl. v. 31. Oktober 2023 – 2 BvE 4/21, NVwZ 2024, 498; BVerfG, Urteil v. 6. Dezember 2022 – 2 BvR 547/21, 2 BvR 798/21, NJW 2023, 425.

[159] Siehe Novelle des Raumordnungsgesetzes vom 22. März 2023 („Gesetz zur Änderung des Raumordnungsgesetzes und anderer Vorschriften", ROGÄndG), welche zu Änderungen des Windenergieflächenbedarfsgesetzes, Windenergie-auf-See-Gesetzes, Energiewirtschaftsgesetzes und des Gesetzes über die Umweltverträglichkeitsprüfung führte.

[160] Tatsächlich wurden seitens der Bundesrepublik weniger Schutzsuchende aufgenommen als ursprünglich bestimmt, siehe *Heuser*, NVwZ 2018, 364 (365).

[161] S. dazu exemplarisch Huber/Voßkuhle/*Starski*, 8. Aufl. 2024, GG Art. 53a Rn. 9 o. a. Stern/Sodan/Möstl//*Schwarz*, StaatsR, 2. Aufl. 2022, § 24 Rn. 3. Dieses Regelungsmodell stellt auch eine Abkehr von weiteren Vorgängerregelungen, namentlich Art. 110 der oktroyierten preußischen Verfassung vom 5. Dezember 1848 sowie dem preußischen Belagerungszustandsgesetz von 1851 dar, s. *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 129 ff.

darunter insbesondere den Einsatz bewaffneter Streitkräfte sowie die Suspension bestimmter Grundrechte.[162] Wegen der hochgradig umstrittenen Rolle von Art. 48 Abs. 2 WRV[163] sollte das darin statuierte – andernorts auch als „konstitutionelle Diktatur"[164] bezeichnete – Generalklauselmodell[165] nicht wieder im Grundgesetz aufgenommen werden. Stattdessen hat sich der Verfassungs(änderungs)gesetzgeber für ein detailreiches Regelungsmodell[166] entschieden, das an die oben skizzierten Notstandsszenarien bestimmte, konkret ausformulierte Rechtsfolgen knüpft, darunter vor allem Kompetenzverlagerungen bei den obersten Staatsorganen (z. B. Art. 115e GG (nach Leerzeichen einfügen) oder Art. 115b GG), Zuständigkeitsveränderungen im Bund-Länder-Verhältnis (z. B. Art. 115c GG oder Art. 35 Abs. 3, 91 Abs. 2 GG) und Verfahrenserleichterungen (z. B. Art. 115d GG) sowie besondere Grundrechtseinschränkungen (dazu noch eingehend unten → *Abschnitt 2, 5.*)[167]

b. Verfassungsstörung: Auch die Regelungen der sog. Verfassungsstörung sind ein Novum des Grundgesetzes und verfügen weder in der Reichsverfassung von 1871 noch in der WRV über entsprechende Vorgängernormen.[168] Z. T. stellen sie gar eine bewusste Abkehr von den Regelungen der WRV dar. Dies gilt insbesondere für den Gesetzgebungsnotstand gem. Art. 81 GG[169] sowie

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[162] Art. 48 Abs. 2 WRV lautete: „Der Reichspräsident kann, wenn im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls mit Hilfe der bewaffneten Macht einschreiten. Zu diesem Zwecke darf er vorübergehend die in den Artikeln 114, 115, 117, 118, 123, 124 und 153 festgesetzten Grundrechte ganz oder zum Teil außer Kraft setzen."

[163] Vgl. dazu nur *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 140 ff., die dort das Ende der Weimarer Republik und die Rolle von Art. 48 Abs. 2 WRV in diesem Kontext beschreibt.

[164] Dieser Begriff geht maßgeblich zurück auf *Clinton Rossiter*, der das Modell der konstitutionellen Diktatur in dem gleichlautenden Werk „Constitutional Dictatorship" (1948) grundlegend beschrieben und anhand von Beispielen belegt hat. Andernorts wird Art. 48 Abs. 2 WRV auch als sog. „Diktaturartikel" bezeichnet, so etwa bei Dürig/Herzog/Scholz/*Herzog/Klein*, 105. EL August 2024, GG Art. 53a Rn. 2.

[165] Siehe dazu noch eingehend unten → *5.*

[166] Uneinigkeit besteht in der jüngeren Literatur offensichtlich darüber, ob es sich bei diesem Regelungsmodell um ein sog. Differenzmodell – so *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 197 – oder um ein sog. Einheits- (auch „*business as usual*"-)Modell handelt; Letzteres will insbes. *Barczak*, Der nervöse Staat, 2020, S. 173 annehmen. Während sich ein Differenzmodell dadurch auszeichnet, dass es für den Notstand spezifische, im Normalfall nicht geltende Regelungen vorsieht, die üblicherweise geltende (Verfassungs-)Rechtsordnung also ganz oder in Teilen suspendiert wird, zeichnet sich das Einheitsmodell wiederum dadurch aus, dass die Normalrechtsordnung auch in Krisenzeiten fortgilt. Eingehend zu diesen beiden Regelungsmodellen, s. ebenfalls *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 85 ff. sowie *Barczak*, Der nervöse Staat, 2020, S. 149 ff. Grundlegend zu diesen Modellen auch Gross/Ní Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice, 2006.

[167] Eingehend zu den Rechtsfolgen u. a. *Stern*, HStR II, 1980, § 54, S. 1409 ff. (*äußerer Notstand*), § 55, S. 1442 (*Spannungsfall*) sowie § 56, S. 1463 ff., 1471 ff. (*innerer Notstand*).

[168] Für Art. 81 GG so ausdrücklich Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 81 Rn. 2. Für Art. 67 GG, wiederum Huber/Voßkuhle/*Epping*, 8. Aufl. 2024, GG Art. 67 Rn. 1. Für Art. 39 Abs. 1 S. 2 GG, vgl. auch Huber/Voßkuhle/Schliesky, 8. Aufl. 2024, GG Art. 39 Rn. 2.

[169] Er wird als bewusste Abkehr vom Modell des präsidentiellen Notverordnungsrechts verstanden, s. dazu nur Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 81 Rn. 1 f.

das konstruktive Misstrauensvotum gem. Art. 67 GG.[170] Für Art. 39 Abs. 1 S. 2 GG lässt sich dies weniger eindeutig feststellen,[171] auch diese Vorschrift sieht aber inhaltlich das Gegenteil zu den Regelungen der WRV vor.[172]

c. **Finanzverfassungsrecht:** Die erst 2009 eingefügte Notstandsregelung zur Schuldenbremse im Finanzverfassungsrecht – Art. 109 Abs. 3 S. 2 GG[173] – ist ebenfalls ein Spezifikum des Grundgesetzes, das keine Vorläufer in den vorangegangenen Verfassungen kennt.[174]

d. **Wehrhafte Demokratie:** Die Idee einer Wehrhaften Demokratie ist in Deutschland erst nach dem Ende der Monarchie (1918) mit dem Übergang in ein republikanisches (Verfassungs-)System entstanden.[175] Die erste republikanische Verfassung – die Weimarer Reichsverfassung (1919) – wird regelmäßig (noch) als „wertneutral" beschrieben,[176] weil sie ein „defizitäres" und „ineffektives" Schutzinstrumentarium gegen Demokratie- und Verfassungsfeinde vorsah.[177] Die Regelungen im GG sind deshalb als erstes „verdichtetes" System einer streitbaren Demokratie zu verstehen.[178] Wie die Notstandsverfassung (*s. o.*) stellen auch sie somit ein Novum des Grundgesetzes dar und gehen auf keine spezifischen Vorgängernormen in früheren Verfassungen zurück.

e. **Einfachgesetzliche Regelungen:** Viele der einfachgesetzlichen Notstandsregelungen[179] sind entweder im Zusammenhang mit der sog. Wehrverfassung (1956)[180] entstanden oder wurden kurz nach Einführung der Notstandsverfas-

[170] Im Gegensatz zum GG sah die WRV in Art. 54 lediglich ein destruktives Misstrauensvotum vor, das aufgrund der negativen Erfahrungen der Weimarer Republik im GG jedoch nicht mehr aufgenommen werden sollte und stattdessen in ein konstruktives Misstrauensvotum umgewandelt wurde, s. dazu u. a. Huber/Voßkuhle/*Epping*, 8. Aufl. 2024, GG Art. 67 Rn. 1.

[171] Die Vorschrift ist erst später mit einer Verfassungsänderung vom 23.08.1976 (BGBl. I S. 2381) in das GG eingefügt worden und ist damit eher als Reaktion auf den „verlorenen" Misstrauensantrag von Willy Brandt (1972) und der darauffolgenden „parlamentslosen Zeit", denn als Abkehr von der WRV zu verstehen, s. dazu auch Dürig/Herzog/Scholz/*Klein/Schwarz*, 104. EL April 2024, GG Art. 39 Rn. 11.

[172] Denn Art. 23 WRV sah im Gegensatz zu Art. 39 Abs. 1 S. 2 GG (noch) eine „parlamentslose Zeit" vor, indem die Neuwahl gem. Abs. 1 spätestens am sechzigsten Tage nach Ablauf der vorangegangenen Legislaturperiode stattfinden, der (neu gewählte) Reichstag gem. Abs. 2 jedoch zum ersten Mal spätestens am dreißigsten Tag nach der Wahl zusammenkommen musste. Siehe dazu u. a. auch Huber/Voßkuhle/*Schliesky*, 8. Aufl. 2024, GG Art. 39 Rn. 2.

[173] Neu eingeführt am 1.08.2009 durch G v. 29.07.2009 (BGBl. I S. 2248).

[174] So ausdrücklich *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 78.

[175] So *Thiel*, in: Thiel (Hrsg.), Wehrhafte Demokratie, S. 1 (5).

[176] So etwa bei Dürig/Herzog/Scholz/*Dürig/Klein*, 105. EL August 2024, GG Art. 18 Rn. 7.

[177] Auch dazu *Thiel*, in: Thiel (Hrsg.), Wehrhafte Demokratie, S. 1 (5). Z. T. wird gar von einer „wehrlosen Republik" gesprochen, so etwa *Gusy*, Weimar - die wehrlose Republik, 1991, S. 367 ff.

[178] Ähnlich Dürig/Herzog/Scholz/*Dürig/Klein*, 105. EL August 2024, GG Art. 18 Rn. 10, die von einem „neuen Typ der demokratischen Verfassung" sprechen, die das Grundgesetz mit den Regelungen zur Wehrhaften Demokratie etabliert hat.

[179] Zu prominenten Beispielen *s. o.* → Fn. 40.

[180] Änderungsgesetz vom 19.03.1956, BGBl. I S. 111.

sung (1968)[181] erlassen.[182] Wegen ihres unmittelbaren Bezugs zu den seinerzeit neu eingeführten verfassungsrechtlichen Regelungen lassen sich für sie jedenfalls keine Vorläufernormen erkennen; im Gegenteil werden sie – auch wegen ihres (Anwendbarkeits-)Wirksamkeitsvorbehalts, der keine Vorbilder kennt – dogmatisch auch als „neue Kategorie von Bundesgesetzen" bezeichnet.[183]

Question 2

a. Notstandsverfassung: Für die Frage nach der Machtverteilung zwischen den drei Staatsgewalten ist es sinnvoll, zwischen den einzelnen Notstandsinstituten der Notstandsverfassung zu unterscheiden:

aa. Katastrophennotstand: Im Katastrophennotstand gem. Art. 35 Abs. 2 und 3 GG spielt die Exekutive grds. eine starke Rolle. Das gilt sowohl für die Exekutive der betroffenen Länder, als auch die Bundesregierung. So fordern zunächst die zuständigen Exekutivorgane des betroffenen Bundeslandes – in der Regel die allgemeinen Gefahrenabwehrbehörden – Kräfte und Einrichtungen der Bundespolizei oder Polizeikräfte anderer Länder, Kräfte und Verwaltungen anderer Einrichtungen (z. B. das Technische Hilfswerk – THW) oder Streitkräfte an (Art. 35 Abs. 2 S. 2 GG). Über deren Einsatz bestimmt wiederum das für die personellen und sachlichen Mittel der ersuchten Stelle jeweils zuständige (Exekutiv-)Organ: Die Entscheidung über die Verwendung der Bundespolizei ergeht – im Fall von Art. 35 Abs. 2 GG[184] – also etwa durch das Bundesministerium des Innern, für Bau und Heimat (s. § 11 Abs. 3 BPolG). Der Einsatz der Streitkräfte i. R. v. Art. 35 Abs. 2 GG ist wiederum durch den:die Bundesminister:in der Verteidigung – oder im Vertretungsfall durch das zu seiner Vertretung berechtigte Mitglied der Bundesregierung im Benehmen mit dem:der Bundesminister:in des Innern – anzuordnen (s. § 13 Abs. 2 LuftSiG). In den Fällen der Bundesintervention gemäß Art. 35 Abs. 3 GG entscheidet die Bundesregierung. Ihre Weisungsbefugnis gem. Art. 35 S. 1 GG führt jedoch nicht dazu, dass der Bund auch zur Erteilung von Weisungen unmittelbar gegenüber den Polizeikräften ermächtigt wird.[185] Diese unterliegen vielmehr dem Recht und der fachlichen Weisung des jeweiligen Einsatzlandes.[186] Etwas anderes gilt für die i. S. v. Art. 35 Abs. 3 S. 1 GG eingesetzte Bundespolizei sowie die Streitkräfte: Diese

[181] Änderungsgesetz vom 30.05.1968, BGBl. 1968 I S. 709.
[182] Vgl. nur *Stern,* StR II, 1980, § 52, S. 1339 ff.
[183] So ausdrücklich *Stern,* StR II, 1980, § 52, S. 1341.
[184] Im Fall von Abs. 3 gilt etwas anderes, dazu sogleich im Zshg. mit Abs. 3.
[185] Dazu exemplarisch Huber/Voßkuhle/*v. Danwitz*, 8. Aufl. 2024, GG Art. 35 Rn. 94.
[186] Sachs/*Schubert*, 10. Aufl. 2024, GG Art. 35 Rn. 41.

nehmen eine echte Bundeskompetenz wahr, so dass für die Hilfsmaßnahmen des Einsatzes Bundesrecht maßgeblich ist; Entsprechendes gilt für fachliche Weisungen.[187] Außerdem werden die Handlungen der Bundespolizei sowie der Streitkräfte grds. dem Bund zugerechnet.[188]

Anders als im Spannungs- und Verteidigungsfall (dazu sogleich → *cc.*) bedarf es im Katastrophennotstand insbesondere keines gesonderten Parlamentsbeschlusses für den Einsatz der Streitkräfte, stattdessen entscheidet – im Fall von Art. 35 Abs. 2 GG – der Verteidigungsminister oder – im Fall von Art. 35 Abs. 3 GG – die Bundesregierung im Einvernehmen mit den betroffenen Ländern (zu den Anforderungen an einen Streitkräfteeinsatz im Katastrophennotstand siehe auch bereits oben → *Abschnitt 1, 4. a. aa.*).[189] Den Parlamenten kommt damit sowohl auf Bundes- als auch auf Landesebene im Katastrophennotstand nur eine geringe Bedeutung zu. Auch die Gerichte verfügen über keine Ausnahmezuständigkeiten. Für Streitigkeiten über die Rechte und Pflichten von Bundes- und Landesorganen, die sich vor allem im Zusammenhang mit dem überregionalen Katastrophennotstand gem. Art. 35 Abs. 3 GG ergeben können, ist insbesondere auf die Zuständigkeit des Bundesverfassungsgerichts für den sog. Bund-Länder-Streit gem. Art. 94 Abs. 1 Nr. 3 GG zu verweisen.

bb. Innerer Notstand: Auch im Zusammenhang mit dem inneren Notstand gem. Art. 91 GG spielt die Exekutive eine entscheidende Rolle: Während das Anfordern von Polizeikräften anderer Länder sowie von Kräften und Einrichtungen anderer Verwaltungen und des Bundesgrenzschutzes nach Abs. 1 – wie schon im Katastrophennotstand (dazu oben → *aa.*) – durch die zuständigen Exekutivorgane des betroffenen Bundeslandes, in der Regel also durch die allgemeinen Gefahrenabwehrbehörden erfolgen, wird im Fall von Abs. 2 wiederum die Bundesregierung aktiv. Dabei werden sowohl die Polizei in dem betroffenen Bundesland als auch die Polizeikräfte anderer Länder den Weisungen der Bundesregierung unterstellt, das heißt, die Bundesregierung kann in diesen Fällen – anders als im Fall von Art. 35 Abs. 3 S. 1 GG – die ihr unterstellten Polizeibehörden anweisen.[190]

Auch beim Einsatz der Streitkräfte kommt der Bundesregierung eine entscheidende Rolle zu, da Art. 87a Abs. 4 S. 1 GG eine gesonderte Entscheidung der Bundesregierung verlangt.[191] Anders als im Spannungs- und

[187] Sachs/*Schubert*, 10. Aufl. 2024, GG Art. 35 Rn. 41.
[188] Sachs/*Schubert*, 10. Aufl. 2024, GG Art. 35 Rn. 41.
[189] Vgl. dazu auch § 13 Abs. 2 und 3 LuftSiG.
[190] Dazu eingehend(er) u. a. Huber/Voßkuhle/*Volkmann*, 8. Aufl. 2024, GG Art. 91 Rn. 36.
[191] So ergibt es sich ausdrücklich aus Art. 87a Abs. 4 GG.

Verteidigungsfall (dazu sogleich → *cc.*) ist dabei keine zustimmende Entscheidung durch den Bundestag erforderlich.[192] Bundestag wie Bundesrat wird lediglich ein abgeschwächtes Beteiligungsrecht in Gestalt des Einstellungsverlangens gem. Art. 87a Abs. 4 S. 2 GG eingeräumt.[193] Insgesamt kommt der Exekutive damit eine bedeutendere Rolle als der Legislative zu. An deren Zuständigkeiten für die Gesetzgebung ändert sich jedoch nichts.[194] Auch im Hinblick auf die Gerichte gelten keine Besonderheiten. Es kann insofern auf die unten (unter → *Abschnitt 4*) noch näher dargelegte Rolle der Gerichte verwiesen werden.

cc. Verteidigungs- und Spannungsfall: Für die Frage der Machtverteilung im Verteidigungs- und Spannungsfall gilt es zwischen der förmlichen Feststellung einerseits sowie den im Verteidigungs- und Spannungsfall zu treffenden Maßnahmen andererseits zu unterscheiden. Bei der förmlichen Feststellung, ob ein Spannungs- oder Verteidigungsfall vorliegt, kommt zunächst dem Parlament bzw. dem Bundestag, in etwas abgeschwächter Form auch dem Bundesrat[195] sowie unter bestimmten Umständen auch dem Ersatzparlament in Gestalt des Gemeinsamen Ausschusses, eine entscheidende Bedeutung zu. Das Parlament ist sowohl für die Feststellung des Verteidigungsfalls i. S. v. Art. 115a GG als auch des Spannungsfalls gem. Art. 80a GG zuständig (dazu bereits oben → *Abschnitt 1, 4. a. cc.*). Darüber hinaus werden in beiden Fällen noch weitere Verfassungsorgane, respektive die Bundesregierung (mit einem Antragsrecht im Verteidigungsfall, Art. 115a Abs. 1 S. 2 GG) sowie der:die Bundespräsident:in (mit dem Verkündungsrecht gem. Art. 115a Abs. 3 GG (analog) in beiden Fällen) beteiligt (auch dazu bereits oben → *Abschnitt 1, 4. a. cc.*). Bei der Feststellung des äußeren Staatsnotstands wird demnach versucht, durch die Beteiligung verschiedener Verfassungsorgane ein ausgewogenes Machtverhältnis zu gewährleisten.

Für die Zeit während des Verteidigungs- bzw. Spannungsfalls lässt sich wiederum Folgendes festhalten:

– **Verteidigungsfall:** Für die Gesetzgebung sind auch im Verteidigungsfall die üblichen Gesetzgebungsorgane, das heißt Bundestag und Bundesrat auf Bundesebene sowie die Landesparlamente auf

[192] Statt vieler dazu etwa Sachs/*Hummel*, 10. Aufl. 2024, GG Art. 87a Rn. 67.

[193] Auch dazu statt vieler Sachs/*Hummel*, 10. Aufl. 2024, GG Art. 87a Rn. 67 unter Verweis auf BVerfG NVwZ 2010, 1091 (1092 f.).

[194] Dazu eingehend *Schwerdtfeger*, Krisengesetzgebung, 2018.

[195] Diese abgeschwächte Position ergibt sich daraus, dass der Bundesrat nur der Feststellung des Verteidigungsfalls, nicht aber der Feststellung des Spannungsfalls zustimmen muss; s. dazu bereits oben → *Abschnitt 1, 4. a. cc.*

Länderebene zuständig.[196] Im Bund-Länder-Verhältnis sind allerdings die Zuständigkeitsverschiebungen zugunsten des Bundes gem. Art. 115c Abs. 1 u. 3 GG, die vereinfachten Verfahrens- und Formvorschriften gem. Art. 115d GG sowie die besondere Gesetzgebungszuständigkeit des Gemeinsamen Ausschusses gem. Art. 115e GG zu beachten.[197] Im föderalen Verhältnis wird die Gesetzgebung also grundsätzlich zugunsten des Bundes verschoben, insbesondere wird die Verwaltungs- und Finanzorganisation stärker zentralisiert.[198]

Auch innerhalb der Exekutive erfolgt eine Machtkonzentration zugunsten des Bundes,[199] dort vor allem zugunsten der Bundesregierung:[200] So kann die Bundesregierung im Verteidigungsfall etwa, soweit es die Verhältnisse erfordern, den Bundesgrenzschutz im gesamten Bundesgebiet einsetzen (Art. 115f Abs. 1 Nr. 1 GG) und außer der Bundesverwaltung auch den Landesregierungen und, wenn sie es für dringlich erachtet, auch den Landesbehörden Weisungen erteilen und diese Befugnis auf von ihr zu bestimmende Mitglieder der Landesregierungen übertragen (Art. 115f Abs. 1 Nr. 2 GG). Auch im Zusammenhang mit den (einfachgesetzlich geregelten) Notstandsmaßnahmen kommt der Bundesregierung eine entscheidende Rolle zu (siehe dazu auch noch näher unten → *Abschnitt 2, 2. e.*). Eine starke Stellung übernimmt außerdem der:die Bundeskanzler:in: Mit der Verkündung des Verteidigungsfalles geht insbesondere die Befehls- und Kommandogewalt über die Streitkräfte auf ihn bzw. sie über, s. Art. 115b GG.

Der Gerichtsbarkeit kommen im Verteidigungsfall grds. die üblichen Zuständigkeiten und Funktionen zu. Insbesondere hat der Bund bisher nicht von der ihm in Art. 96 Abs. 2 S. 1 GG eingeräumten Ermächtigung zur Errichtung besonderer Wehrstrafgerichte Gebrauch gemacht, die im Verteidigungsfall die Strafgewalt über die Streitkräfte ausüben (sollen).[201] Auch in diesem Punkt bleibt es demnach bei den üblichen Zuständigkeiten. Art. 115g GG unterstreicht zudem die herausragende Bedeutung des Bundesverfassungsgerichts, dessen verfassungsmäßige Stellung und Funktion durch diese Vorschrift auch im Verteidigungsfall gewährleistet wird.[202]

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[196] Vgl. dazu nur *Schwerdtfeger*, Krisengesetzgebung, 2018, S. 11.

[197] Dazu eingehend u. a. *Stern*, StR II, 1980, § 54, S. 1412 ff.

[198] So auch *Stern*, StR II, 1980, § 54, S. 1422.

[199] Beachte allerdings die besondere Zuständigkeit der Landesregierung(en) gem. Art. 115 i Abs. 1 GG für den Fall, dass die Bundesorgane ausfallen.

[200] Auch dazu maßgeblich *Stern*, StR II, 1980, § 54, S. 1414 f.

[201] Vgl. dazu nur Sachs/*Detterbeck*, 10. Aufl. 2024, GG Art. 96 Rn. 8.

[202] Dazu statt vieler etwa Huber/Voßkuhle/Grote/*Schemmel*, 8. Aufl. 2024, GG Art. 115g Rn. 2. Im Übrigen auch *Stern*, HStR II, 1980, § 52, S. 1360 ff.

– **Spannungsfall:** Im Spannungsfall ist zwischen den verfassungsrechtlich vorgesehenen und den einfachgesetzlichen Maßnahmen zu unterscheiden: Im Hinblick auf die in Art. 12a Abs. 5 und Abs. 6 S. 2 GG vorgesehenen Modifizierungen des Arbeitsrechts kommt zum einen dem Gesetzgeber, – mit Blick auf den Einsatz der Streitkräfte gem. Art. 87a Abs. 3 GG wiederum dem:der Bundesminister:in für Verteidigung eine entscheidende Rolle zu.[203] Es wird insofern grds. an den üblichen Zuständigkeiten festgehalten. In den einfachgesetzlichen Regelungen lässt sich durch die weitreichenden Verordnungsermächtigungen zugunsten der Bundesregierung (siehe dazu auch noch eingehend unten → *Abschnitt 2, 2. e.*) wiederum eine gewisse Exekutivlastigkeit feststellen, die häufig durch ein gleichzeitig eingeräumtes Zustimmungserfordernis oder Aufhebungsrecht seitens der Legislative ausgeglichen wird (auch dazu noch näher unten → *Abschnitt 2, 2. e.*). Auch im Spannungsfall wird versucht, eine Machtbalance zwischen Exekutive und Legislative aufrechtzuerhalten. Im Hinblick auf die Judikative bestehen die üblichen Zuständigkeiten fort.

b. Verfassungsstörung: Bei genauerer Betrachtung der einzelnen Vorschriften fällt für die Fälle der sog. Verfassungsstörung auf, dass deren Bewältigung regelmäßig ein Zusammenspiel der obersten Verfassungsorgane erfordert. So dürfen im Fall der Parlamentsstörung gem. Art. 81 Abs. 1 GG nur der:die Bundespräsident:in, die Bundesregierung und der Bundesrat gemeinsam gesetzgeberisch tätig werden.[204] Am konstruktiven Misstrauensvotum gem. Art. 67 GG sind wiederum sowohl der Bundestag als auch der:die Bundespräsident:in maßgeblich beteiligt.[205] Auch insofern versucht das Grundgesetz, durch die Beteiligung mehrerer Verfassungsorgane eine ausgewogene Machtverteilung sicherzustellen.

c. Finanzverfassungsrecht: Im Rahmen der finanzverfassungsrechtlichen Ausnahmeregelung des Art. 109 Abs. 3 S. 2 GG kommt dem jeweiligen (Bundes- oder Landes-)Gesetzgeber eine maßgebliche Rolle zu. Nur auf Basis einer parlamentarischen Entscheidung (siehe dazu bereits oben → *Abschnitt 1, 4. c.*) kann die Regelnettoneuverschuldungsgrenze für den Fall

[203] Der in Art. 115b GG eingeräumte Übergang der Befehls- und Kommandogewalt auf den Bundeskanzler gilt ausdrücklich nur für den Verteidigungsfall. Dies bedeutet im Umkehrschluss, dass im Spannungsfall der Bundesverteidigungsminister gem. Art. 65a GG entscheidungsbefugt bleibt.

[204] Von einem Zusammenwirken von Exekutive und Legislative spricht auch BeckOK GG/*Pieper*, 59. Ed. 15.09.2024, GG Art. 81 Rn. 1. Eingehend dazu i. Ü. auch Huber/Voßkuhle/*Brenner*, 8. Aufl. 2024, GG Art. 81 Rn. 11 ff.

[205] Eingehend zu dem Verfahren des konstruktiven Misstrauensvotums, s. u. a. Sachs/*Brinktrine*, 10. Aufl. 2024, GG Art. 67 Rn. 23 ff. sowie Huber/Voßkuhle/*Epping*, 8. Aufl. 2024, GG Art. 67 Rn. 8 ff.

einer Naturkatastrophe oder außergewöhnlichen Notsituation ausnahmsweise überschritten werden.[206]

d. **Wehrhafte Demokratie:** Im Rahmen der Wehrhaften Demokratie kommt dem Bundesverfassungsgericht eine maßgebliche Rolle zu: Das Bundesverfassungsgericht trifft sowohl die Entscheidung über eine Verwirkung der Grundrechte i. S. v. Art. 18 GG als auch über das Parteiverbot gem. Art. 21 Abs. 2 GG (siehe dazu bereits oben → *Abschnitt 1, 4. d.*). Über das Vereinsverbot i. S. v. Art. 9 Abs. 2 GG darf hingegen die Exekutive in Gestalt des (Bundes- oder Landes-)Innenministeriums entscheiden (auch dazu bereits oben → *Abschnitt 1, 4. d.*). Die übrigen, materiell-rechtlichen Bestimmungen der Wehrhaften Demokratie schränken wiederum den Verfassungsänderungsgesetzgeber (→ Art. 79 Abs. 3 GG) oder die Berechtigten der Wissenschaftsfreiheit (→ Art. 5 Abs. 3 S. 1 GG) ein. Mit diesen Regelungen gehen jedenfalls keine Besonderheiten in der institutionellen Machtverteilung einher.

e. **Einfachgesetzliche Regelungen:** Im Zusammenhang mit den einfachgesetzlich geregelten Notstandsmaßnahmen kommt vor allem der Bundesregierung – entweder als Kollegialorgan oder in Gestalt eines bestimmten Ministeriums – eine entscheidende Rolle zu, indem ihr entweder – wenn es sich nicht um den Spannungs- oder Verteidigungsfall als auslösendes Ereignis handelt – die Befugnis zugesprochen wird, festzustellen, dass eine entsprechende Notstandslage vorliegt (vgl. etwa § 1 Abs. 1 u. 2 ESVG), oder aber sie darf durch Rechtsverordnung die entsprechenden Maßnahmen zur Sicherstellung bzw. Notstandsbewältigung anordnen (vgl. dazu exemplarisch § 4 Abs. 1 ESVG, § 5 VerkSiG o. a. § 5 WiSiG) bzw. die Behörde(n) bestimmen, die bestimmte Maßnahmen ergreifen dürfen (so etwa in § 5 BLG). Die in diesem Zusammenhang von der Bundesregierung erlassenen Rechtsverordnungen bedürfen dabei z. T. der Zustimmung des Bundesrates (vgl. dazu exemplarisch § 4 Abs. 4 ESVG o. a. § 5 Abs. 1 BLG); Bundestag und/oder Bundesrat können die Aufhebung von Rechtsverordnungen verlangen (so etwa in § 4 Abs. 2 ASG o. a. § 7 Abs. 2 S. 2 WiSiG). In der Regel wird also auch hier versucht, eine gewisse Machtverteilung zwischen Exekutiv- und Legislativgewalt sicherzustellen.

Question 3

a. **Regionaler Rechtsrahmen**: Im föderalen System der Bundesrepublik unterteilt sich der regionale Rechtsrahmen primär in Landes- und Kommunalrecht. Das Recht der Bundesländer beinhaltet neben den Landesverfassungen

[206] Vgl. dazu bereits → Fn. 130.

insbesondere auch einfaches Landesrecht, welches sich nach den Regelungen der Gesetzgebungskompetenz in Art. 70 ff. GG bemisst. Die 16 Landesverfassungen der Bundesländer der Bundesrepublik sehen wie auch das Grundgesetz Regelungen für Notfallsituationen vor. Grundsätzlich müssen sich die Vorgaben der Landesverfassungen im Rahmen des Grundgesetzes halten; zudem gehen einfache Bundesgesetze landesrechtlichen Regelungen vor.[207] Die Notstandsmaßnahmen der Länder müssen sich außerdem an dem Grundrechtekatalog des Grundgesetzes und der eigenen Landesverfassung messen lassen.[208] Damit gibt das Grundgesetz den Rahmen für Landesverfassungen und einfaches Landes- und Kommunalrecht vor. In der Konsequenz können landesverfassungsrechtliche Regelungen im Zusammenspiel von Bundes- und Landesrecht praktisch bedeutungslos sein.[209]

Im Folgenden soll überblicksartig auf ausgewählte landesverfassungsrechtliche Regelungen und Notstandsmaßnahmen auf Länderebene eingegangen werden. Zudem werden auch beispielhaft einfache Landesgesetze dargestellt, welche sich ebenfalls mit Notfallsituationen allgemein oder im Besonderen, wie beispielsweise im Falle des Infektionsschutzes, befassen oder thematisch übergeordnete Landesgesetze wie Polizei-, Feuerwehr- oder Versammlungsgesetze.

Landesverfassungen: Die Landesverfassungen sehen unterschiedliche Maßnahmen im Staatsnotstand vor, welche Legislative, Exekutive und auch Private adressieren.[210] Maßnahmen der Legislative variieren von der Einsetzung eines „Notparlaments" bis hin zu Aussetzungen von Wahlen und Abstimmungen. Maßnahmen bzgl. der Exekutive betreffen die Gesetzgebungs- oder Verordnungsermächtigungen der Regierung.[211] Zudem gibt es in einigen Bundesländern die Ermächtigung des Landtags oder der Regierung zur Einschränkung von Grundrechten.[212] Zugleich werden in manchen Landesverfassungen Private aufgefordert, Nothilfe zu leisten.[213]

– **Notparlament / Legislativmodell mit Notausschuss**: Gesondert gewählte Ausschüsse in Form von „Notparlamenten" sollen in Baden-Württemberg und Sachsen in Notfallsituationen das verhinderte Lan-

[207] Vgl. Art. 31 GG.

[208] Bspw. müssen die Nothilferegelungen der Länder die allgemeine Handlungsfreiheit des Art. 2 Abs. 1 GG wahren, vgl. Fischer-Lescano/Rinken/Buse/Meyer/Strauch/Weber/*Blackstein*, Verfassung der Freien Hansestadt Bremen, 2016, Art. 11, Rn. 8.

[209] Vgl. Meder/Brechmann/Funke/*Brechmann*, Die Verfassung des Freistaates Bayern: Kommentar, 6. Aufl. 2020, Art. 48, Rn. 2 mwN.

[210] Siehe Dietrich/Fahrner/Gazeas/von Heintschel-Heinegg/*Hoppe/Risse*, HdB SicherheitsR, 2022, S. 73 ff.

[211] Hessen: Art. 110 HV, Niedersachen: Art. 35 NDSVerf, Nordrhein-Westfalen: Art. 60 NRW Verf, Rheinland-Pfalz: Art. 111, 112 RhPfVerf.

[212] Siehe Hessen: Art. 125 HV, Bayern: Art. 48 BV, Rheinland-Pfalz: Art. 112 RhPfVerf.

[213] Bayern: Art. 122 BV, Brandenburg: Art. 46 BbgVerf, Bremen: Art. 10 BremVerf, Rheinland-Pfalz: Art. 22 RhPfVerf, Saarland: Art. 19 SLVerf.

desparlament ersetzen und dessen Handlungsfähigkeit gewährleisten.[214] In beiden Landesparlamenten wird zu Beginn der Legislaturperiode das Notparlament in Form eines Ausschusses gewählt. Art. 52 BWLV kann in Situationen des inneren Notstands (vgl. Art. 35, 91, 87a Abs. 4 GG), aber auch im Verteidigungsfall (Art. 115a GG) oder im Spannungsfall (Art. 80a GG) in Baden-Württemberg relevant sein.[215] Demzufolge kann ein Ausschuss des Landtags als Notparlament zusammenkommen, wenn der Landtag selbst aufgrund eines Notstands i. S. d. BWLV verhindert ist, sich zeitnah zu versammeln.[216] In Sachsen ist dies bei einem äußeren Notstand im Spannungs- oder Verteidigungsfall gegeben, aber auch im inneren Notstand, welcher zudem bei Naturkatastrophen oder einem besonders schweren Unglücksfall begründet ist.[217] Die Kompetenzen eines solchen Notparlaments sind jedoch je nach Landesverfassung beschränkt.[218] In Sachsen kann das Notparlament bspw. weder die Verfassung ändern, noch dem:der Ministerpräsident:in das Vertrauen entziehen (Art. 113 Abs. 1 S. 2+3 SächsVerf).

In anderen Bundesländern nehmen bestehende Gremien wie Hauptausschuss oder Ältestenrat im Notstandsfall bestimmte Rechte des Parlaments wahr.[219] In Berlin hatte sich der Gesetzgeber während der Pandemie 2020 für die verbleibende 18. Wahlperiode[220] hingegen dazu entschieden, in einer Notsituation die Beschlussfähigkeit des Plenums auf ein vermindertes Quorum von ¼ der gewählten Abgeordneten herabzusetzen, um die Funktionsfähigkeit des Parlaments zu gewährleisten.[221] Andere Bundesländer änderten – wie auch der Bundestag in § 126a GOBT – ihre Geschäftsordnungen während der Pandemie, um die Anforderungen an die Beschlussfähigkeit des jeweiligen Landtags in der Pandemie zu senken und die Funktionsfähigkeit der Landtage zu gewährleisten.[222]

– **Notverordnungen mit Gesetzescharakter / Exekutivmodell mit Notverordnungen:**[223] Klassischerweise konzentriert sich die Rechtssetzung

[214] Baden-Württemberg: Art. 82 Abs. 1 BWLV, Sachsen: Art. 113 Abs. 1 SächsVerf.

[215] Für die sächsischen Definitionen, siehe Baumann-Hasske/Kunzmann/*Kunzmann*, Die Verfassung des Freistaates Sachsen, 3. Aufl. 2011, Art. 113, Rn. 4-10.

[216] Siehe für einen direkten Vergleich des Art. 62 BWLV mit den Notstandsregelungen des GG: Feuchte (Hrsg.), Verfassung des Landes Baden-Württemberg, 1987, Art. 62, Rn. 2.

[217] Siehe Baumann-Hasske/Kunzmann/*Kunzmann*, Die Verfassung des Freistaates Sachsen, 3. Aufl., 2011, Art. 113, Rn. 4-11.

[218] Siehe Art. 62 BWVF, Art. 113 Abs. 5 SächsVerf.

[219] Hessen: Art. 110 HV, Niedersachen: Art. 44 Abs. 1 NDSVerf, Nordrhein-Westfalen: Art. 60 Abs. 1 NRW Verf, Rheinland-Pfalz: Art. 111-112 RhPfVerf, Schleswig-Holstein: Art. 22a SHVerf.

[220] Art. 43 Abs. 7 BLNVerf.

[221] Berlin: Art. 43 Abs. 3-7 BLNVerf.

[222] Vgl. Brandenburg: § 61a BbgGOLT; Schleswig-Holstein: § 59 Abs. 2a GOLT SH.

[223] Hessen: Art. 110 HV, Niedersachsen: Art. 44, 45 NDSVerf, Nordrhein-Westfalen: Art. 60 NRW Verf, Rheinland-Pfalz: Art. 111, 112 RhPfVerf.

in Notlagen auf die Exekutive,[224] wie es auch in der Weimarer Reichsverfassung in Art. 48 Abs. 2 WRV der Fall war. Heute ist dies jedoch lediglich in vier Bundesländern noch der Fall: Hessen, Niedersachsen, Nordrhein-Westfalen und Rheinland-Pfalz. In *Hessen* kann die Landesregierung in Übereinstimmung mit dem ständigen Ausschuss des Landtags in einer Notlage nach Art. 110 HV Verordnungen mit Gesetzeskraft erlassen, welche bei Ausbleiben einer Genehmigung des Landtags bei seiner nächsten Sitzung außer Kraft treten. In *Niedersachsen* kann die Landesregierung gem. Art. 44 NDSVerf mit Zustimmung des Ältestenrats des Landtags bzw. des:der Landtagspräsident:in ebenfalls Verordnung mit Gesetzeskraft erlassen. In diesem Fall kann der Landtag sie anschließend wieder aufheben. In *Nordrhein-Westfalen* kann die Landesregierung mit Zustimmung eines Ausschusses bzw. nach Gegenzeichnung des:der Landtagspräsident:in gem. Art. 60 NRW Verf ebenfalls Verordnungen mit Gesetzeskraft erlassen, soweit sie nicht der Verfassung widersprechen. Sie treten außer Kraft, wenn der Landtag in seinem nächsten Zusammentritt die Genehmigung versagt. In *Rheinland-Pfalz* kann die Landesregierung im Katastrophenfall nach Art. 111 RhPfVerf und im Falle eines inneren Notstands nach Art. 112 RhPfVerf, also jeweils bei aus dem landesinternen Bereich kommenden Gefährdungen,[225] Verordnungen mit Gesetzeskraft erlassen. Rheinland-Pfalz gehört damit zu den wenigen Bundesländern, die auch im nicht-politischen Notstand nach Art. 112 RhPfVerf der Landesregierung besondere Rechte zugesteht; zudem ist es in Rheinland-Pfalz nicht erforderlich, ein Notparlament bzw. einen gesonderten Ausschuss dafür einzuberufen.[226]

– **Aussetzen von Wahlen und Abstimmungen**:[227] Die Aussetzung von Wahlen und Abstimmungen in Notlagen dient der Gewährleistung von allgemeinen, freien und gleichen Wahlen. Ein Verbot von Wahlen und Abstimmung nach Landesrecht besteht in *Baden-Württemberg* nach Art. 62 Abs. 2 BWVF nur, wenn ein Umsturzversuch droht, also nicht bei Naturkatastrophen oder Unglücksfällen.[228] Ähnlich verhält es sich in *Sachsen*, auch hier ist gem. Art. 113 Abs. 2 SächsVerf nur bei einer „Gefahr für den Bestand oder die freiheitliche demokratische Grundordnung des Landes" eine Aussetzung von Wahlen durch den Landtag bzw. das Notparlament.[229]

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[224] *Schmidt*, DVBl 2021, 231 (232).

[225] Brocker/Droege/Jutzi/*Hebeler*, Verfassung für Rheinland-Pfalz, 2. Aufl., 2022, Art. 111, Rn. 1.

[226] Brocker/Droege/Jutzi/*Hebeler*, Verfassung für Rheinland-Pfalz, 2. Aufl., 2022, Art. 111, Rn. 4. Für die unterschiedlichen Definitionen der Notstandslage, siehe Rn. 5 ff. Siehe auch Art. 101 Abs. 2 BremVerf.

[227] Baden-Württemberg: Art. 62 Abs. 2 BWLV, Sachsen: Art. 113 Abs. 2 SächsVerf.

[228] Feuchte (Hrsg.), Verfassung des Landes Baden-Württemberg, 1987, Art. 62, Rn. 17.

[229] Baumann-Hasske/Kunzmann/*Kunzmann*, Die Verfassung des Freistaates Sachsen, 3. Aufl., 2011, Art. 113, Rn. 4-11 + 13-16.

– **Einschränkung von Grundrechten, insbesondere der Freizügigkeit**:[230] Einige Länderverfassungen sehen in Notlagen Einschränkungen von Grundrechten vor. In *Bayern* ist beispielsweise gem. Art. 48 BV bei einer drohenden Gefährdung der öffentlichen Sicherheit und Ordnung die temporäre Einschränkung mehrerer Grundrechte durch die Landesregierung in Form von Rechtsverordnungen möglich, wenn zugleich der Landtag einberufen wird.[231] Allerdings geht der Grundrechtsschutz durch das Grundgesetz vor, so dass Einschränkungen nur im Einklang mit dem GG möglich sind.[232] In *Berlin* ermächtigt zwar Art. 17 BLNVerf zu Einschränkungen der Freizügigkeit, aber auch hier ist der Schutz durch das Grundgesetz grundsätzlich weitergehender und bricht Landesrecht.[233] Art. 15 VerfLSA regelt für *Sachsen-Anhalt* den Notstandsvorbehalt beim Recht auf Freizügigkeit und erlaubt der Landesregierung in Situationen des inneren Staatsnotstands bspw. Ausgangssperren oder Evakuierungsmaßnahmen.[234] Das Recht auf Freizügigkeit ist in *Thüringen* in Art. 5 Abs. 2 ThürVerf geregelt und sieht ebenfalls einen Vorbehalt für den Staatsnotstand[235] (und Katastrophen)[236] vor. Andere Landesverfassungen enthielten ursprünglich Einschränkungsmöglichkeiten von Grundrechten, wie beispielsweise in *Hessen* in Art. 157 Abs. 2 HV; durch Zeitablauf ist diese Norm mittlerweile jedoch gegenstandslos.[237]
– **Kreditermächtigung bei Naturkatastrophen und außergewöhnlichen Notsituationen**:[238] Einige Bundesländer haben von Art. 109 Abs. 3 S. 2 GG Gebrauch gemacht und in ihren Landesverfassungen Finanzregelungen für Notlagen getroffen. Ausgangspunkt ist hier i. d. R. die Terminologie des Art. 35 Abs. 2 S. 2 + Abs. 3 GG.[239] 11 Bundesländer

[230] Bayern: Art. 48 BV, Berlin: Art. 17 BLNVerf, Hessen: Art. 157 HV, Sachsen-Anhalt: Art. 15 VerfLSA, Thüringen: Art. 5 As. 2 ThürVerf.

[231] Die betrifft folgende Grundrechte der BV: Recht der öffentlichen freien Meinungsäußerung (Art. 110), Pressefreiheit (Art. 111), Brief-, Post-, Telegraphen- und Fernsprechgeheimnis (Art. 112) sowie Versammlungsfreiheit (Art. 113).

[232] Meder/Brechmann/Funke/*Brechmann*, Die Verfassung des Freistaates Bayern: Kommentar, 6. Aufl. 2020, Art. 48, Rn. 2.

[233] Vgl. Driehaus/*Driehaus/Quabeck*, Verfassung von Berlin, 4. Aufl., 2020, Art. 17, Rn. 1+2.

[234] Reich, Verfassung des Landes Sachsen-Anhalt, 2. Aufl., 2004, Art. 15, Rn. 2.

[235] Zu der zugrundeliegenden Definition, siehe Brenner/Hinkel/Hopfe/Poppenhäger/Weiden/*von Ammon/Knauff*, Verfassung des Freistaats Thüringen, 2. Aufl., 2023, Art. 5, Rn. 18+19.

[236] Dies ist einfachgesetzlich geregelt in § 31 Abs. 2 Thüringer Brand- und Katastrophenschutzgesetz.

[237] Zinn/Stein, Verfassung des Landes Hessen, Band 2, 1999, Art. 157, Rn. 3.

[238] Bayern: Art. 82 Abs. 3 S. 1 BV, Berlin: zur Haftung in Notlagen Art. 91 BLNVerf, Brandenburg: Art. 103 Abs. 2 S. 2 BbgVerf, Bremen: Art. 131a Abs. 3 BremVerf, Hamburg: Art. 72 Abs. 3 Verf HA, Hessen: Art. 141 Abs. 4 HV, Mecklenburg-Vorpommern: Art. 65 Abs. 2 S. 2 MVVerf, Rheinland-Pfalz: Art. 117 Abs. 1 Nr. 2a RhPfVerf, Sachsen: Art. 95 Abs. 5 SächsVerf, Sachsen-Anhalt: Art. 99 Abs. 3 S. 2 VerfLSA, Schleswig-Holstein: Art. 61 Abs. 3 SHVerf.

[239] Vgl. Fischer-Lescano/Rinken/Buse/Meyer/Strauch/Weber/*Wieland*, Verfassung der Freien Hansestadt Bremen, 2016, Art. 131 a, Rn. 22 oder Meder/Brechmann/Funke/*Hoffmeyer*, Die Verfassung des Freistaates Bayern: Kommentar, 6. Aufl. 2020, Art. 82, Rn. 36; Classen/Sauthoff/*Mediger/Korioth*, Verfassung des Landes Mecklenburg-Vorpommern, 3. Aufl., 2023, Art 65, Rn. 22

haben derartige Ausnahmeregelungen von der Schuldenbremse in den jeweiligen Landesverfassungen umgesetzt. In *Bayern* besteht beispielsweise nach Art. 82 Abs. 3 BV die Option, Notlagenkredite zur Wahrung der Handlungsfähigkeit des Freistaates in Krisensituationen zu gewährleisten.[240] *Brandenburg* sieht ebenfalls seit der Verfassungsreform 2019 eine Ausnahme im Falle von Naturkatastrophen oder außergewöhnlichen Notsituationen nach Art. 103 Abs. 2 S. 2 BbgVerf vor. Auch *Bremen* (Art. 131a BremVerf) hat die Schuldenbremse in der Landesverfassung inkl. einer Ausnahmeregelung zur Krisenbewältigung bei Naturkatastrophen und anderen außergewöhnlichen Notsituationen umgesetzt. Andere Bundesländer adressieren Notlagen an anderer Stelle bzgl. ihrer Finanzregelungen: *Berlins* Landesverfassung beinhaltet beispielsweise eine verfassungsrechtliche Rarität, in dem zum einen Schadensersatzregelungen bei Verstößen gegen die BLNVerf durch Mitglieder des Senats und Bezirksämter und durch Angehörige des öffentliches Dienstes kodifiziert wurden, zugleich aber eine Ausnahme bei Handlungen zur Abwehr einer Notlage in Art. 91 S. 2 getroffen wird.[241]

– **Nothilfe**[242]**:** Derartige landesverfassungsrechtliche Notstandsregelungen, welche nach dem Vorbild des Art. 133 WRV verfasst wurden, folgen einem weiten Notstandsverständnis: Sie beziehen sich beispielsweise auf Notstände, Naturkatastrophen und andere Unglücksfälle, und nicht nur auf den Staatsnotstand im engen Sinn (siehe → *Abschnitt 1, 1.*).[243] Teilweise sind politische Notstände hiervon nicht umfasst.[244] In diesen Fällen sind Private, also Deutsche wie auch Ausländer, im Zuge einer sogenannten „Nothilfe" zur gegenseitigen Hilfe verpflichtet. Letztendlich handelt es sich bei diesen landesrechtlichen Regelungen nicht um ein justiziables Recht, vielmehr wurde von den Landesgesetzgebern eine sittliche oder auch programmatische Pflicht ohne konkrete Handlungspflichten kodifiziert.[245] Handlungspflichten entstehen aber teilweise

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ff.; Brocker/Droege/Jutzi/*Droege*, Verfassung für Rheinland-Pfalz, 2. Aufl., 2022, Art. 117, Rn. 18; Becker/Brüning/Ewer/Schliesky/*Ewer*, Verfassung des Landes Schleswig-Holstein, 2021, Art. 61, Rn. 29.

[240] Meder/Brechmann/Funke/*Hoffmeyer*, Die Verfassung des Freistaates Bayern: Kommentar, 6. Aufl. 2020, Art. 82, Rn. 34 ff.

[241] Driehaus/*Korbmacher/Rind*, Verfassung von Berlin, 4. Aufl., 2020, Art. 91, Rn. 1.

[242] Bayern: Art. 122 BV, Brandenburg: Art. 46 BbgVerf, Bremen: Art. 10 BremVerf, Rheinland-Pfalz: Art. 22 RhPfVerf, Saarland: Art. 19 SLVerf.

[243] Siehe bspw. Art. 122 BV, Art. 46 BbgVerf, Art. 10 BremVerf, Art. 22 RhPfVerf oder Art. 19 SLVerf.

[244] Vgl. Fischer-Lescano/Rinken/Buse/Meyer/Strauch/Weber/*Blackstein*, Verfassung der Freien Hansestadt Bremen, 2016, Art. 11, Rn. 7.

[245] Vgl. bspw. Lieber/Iwers/*Ernst*, Verfassung des Landes Brandenburg, 2012, Art. 46, Rn. 1; Fischer-Lescano/Rinken/Buse/Meyer/Strauch/Weber/*Blackstein*, Verfassung der Freien Hansestadt Bremen, 2016, Art. 11, Rn. 5+6. Eine konkrete Handlungspflicht könnte lediglich aufgrund eines formalen Parlamentsgesetzes entstehen, welches jedoch keines der Bundesländer bisher verabschiedet hat, vgl. Brocker/Droege/Jutzi/*Geis*, Verfassung für Rheinland-Pfalz, 2022, Art. 22, Rn. 9.

durch Umsetzungen im Landesrecht, insb. in Polizei-, Feuerwehr- und/oder Brandschutzgesetzen.[246] Ansonsten besteht bereits eine Hilfspflicht Privater nach einfachem Bundesrecht in Form des BGB und des StGB (§ 323c StGB);[247] ein Pendant auf Ebene des Grundgesetzes gibt es nicht.

Einfaches Landesrecht: Der Katastrophenschutz als Teil der allgemeinen Gefahrenabwehr gehört gemäß Art. 70 Abs. 1 GG zur Gesetzgebungskompetenz der Länder. Jedes Bundesland hat ein eigenes Katastrophenschutzgesetz verabschiedet und damit neben den Regelungen in den Landesverfassungen einen regionalen einfachgesetzlichen Rechtsrahmen gesetzt. Zu unterscheiden ist der Katastrophenschutz vom sogenannten Zivilschutz, also dem Schutz der Bevölkerung vor kriegsbedingten Gefahren durch nicht-militärische Maßnahmen,[248] welcher dem Bund gem. Art. 73 Abs. 1 Nr. 1 GG obliegt. Zusammen bilden Zivilschutz und Katastrophenschutz den Bevölkerungsschutz.[249] Im Katastrophenfall werden Zivil- und Katastrophenschutz zusammengelegt: die Bundesländer können gem. § 12 ZSKG die vom Bund zur Verfügung gestellten Ressourcen zum Zivilschutz als Katastrophenhilfe anfragen.

Diese 16 Landeskatastrophenschutzgesetze, welche innerhalb der Grenzen des Grundgesetzes verabschiedet wurden und bspw. Grundrechte wahren müssen, weisen diverse Gemeinsamkeiten und Parallelen auf:[250]

– Viele Katastrophenschutzgesetze beinhalten eine Legaldefinition der Regelungsmaterie „Katastrophe", welche häufig als Großschadensereignis, als Großeinsatzlage oder als außergewöhnliches Ereignis definiert wird.[251] Sie stellen ein Ausnahmeereignis mit einem außergewöhnlichen Gefährdungspotential dar, weshalb die Zuständigkeiten für den Rechtsgüterschutz auf eine übergeordnete Verwaltungsebene übertragen werden

[246] Für Brandenburg, siehe § 7 PolizeiG, § 18 OBG, oder §§ 29 ff. BrandschG.

[247] Siehe die Begründung zum Gesetzesentwurf zur Änderung der Verfassung des Freistaates Bayern v. 10.12.2012, LT-Drs. 16/15140, S. 8; Meder/Brechmann/Funke/*Schmidt am Busch*, Die Verfassung des Freistaates Bayern: Kommentar, 6. Aufl. 2020, Art. 122, Rn. 5.

[248] Siehe *Lodd*, Die rechtliche Konzeption des Bevölkerungsschutzes, 2023, S. 27.

[249] *Lodd*, Die rechtliche Konzeption des Bevölkerungsschutzes, 2023, S. 30-31.

[250] Vgl. *Becker*, ZG 2022, 270ff. oder *Lodd*, Die rechtliche Konzeption des Bevölkerungsschutzes, 2023, S. 32-35.

[251] *Baden-Württemberg*: § 1 Abs. 2 Bayerisches Landeskatastrophenschutzgesetz, *Bayern*: Art. 1 Abs. 2 Landeskatastrophenschutzgesetz, Berlin: § 1 Katastrophenschutzgesetz, *Brandenburg*: § 1 Abs. 2 Nr. 2 Brandenburgisches Brand- und Katastrophenschutzgesetz, *Bremen*: § 37 Abs. 2 Bremisches Hilfeleistungsgesetz, *Hamburg*: § 1 Hamburgisches Katastrophenschutzgesetz, *Hessen*: § 24 Hessisches Brand- und Katastrophenschutzgesetz, *Mecklenburg-Vorpommern*: § 1 Abs. 2 Landeskatastrophenschutzgesetz, *Niedersachen*: § 1 Abs. 2 Niedersächsisches Katastrophenschutzgesetz, *Nordrhein-Westfalen*: § 1 Abs. 2 Nr. 2 Gesetz über den Brandschutz, die Hilfeleistung und den Katastrophenschutz, *Rheinland-Pfalz* hat keine Definition im Brand- und Katastrophenschutzgesetz, *Saarland*: § 16 Gesetz über den Brandschutz, die Technische Hilfe und den Katastrophenschutz, *Sachsen*: § 1 Abs. 2 Sächsisches Katastrophenschutzgesetz, *Sachsen-Anhalt*: § 1 Abs. 2 Katastrophenschutzgesetz, *Schleswig-Holstein*: § 1 Abs. 2 Landeskatastrophenschutzgesetz, *Thüringen*: § 25 Thüringer Brand- und Katastrophenschutzgesetz.

(Notwendigkeit zentral gelenkter Hilfe- und Schutzmaßnahmen)[252] und eine akteursübergreifende Einsatzleitung ermöglicht wird.[253] Die landesrechtlichen Katastrophenbegriffe sind ursachenoffen.[254]
- Teilweise sind die Katastrophenschutzgesetze nach dem Integrationsprinzip[255] mit anderen Themenbereichen zusammengelegt, wie beispielsweise mit dem Brandschutz, dem öffentlichen Rettungsdienst oder der Hilfeleistung.[256]
- Besteht eine Katastrophe, werden besondere Folgen für Aufgaben und Befugnisse an ihr Vorhandensein geknüpft.[257]

Die Zuständigkeit für den Katastrophenschutz liegt meistens bei den Katastrophenschutzbehörden:
- *Baden-Württemberg*: Landratsämter und Bürgermeisterämter sind untere Katastrophenschutzbehörden, höhere Katastrophenschutzbehörden sind die Regierungspräsidien, oberste Katastrophenschutzbehörde ist das Innenministerium nach § 4 Landeskatastrophenschutzgesetz.
- *Bayern*: Kreisverwaltungsbehörden, Regierungen, Staatsministerium des Innern, für Sport und Integration und auch kreisangehörige Gemeinden nach Art. 2 Abs. 1 S. 1 BayKatSG.
- *Berlin*: Senatskanzlei und die übrigen Senatsverwaltungen, die ihnen nachgeordneten Behörden, sowie die Bezirksämter nach § 3 Katastrophenschutzgesetz.
- *Brandenburg*: Landkreise und kreisfreie Städte sind die unteren Katastrophenschutzbehörden und das für Katastrophenschutz zuständige Ministerium ist die oberste Katastrophenschutzbehörde nach § Abs. 2 S. 2 Brandenburgisches Brand- und Katastrophenschutzgesetz.
- *Bremen*: Senator für Inneres als Landeskatastrophenschutzbehörde koordiniert Katastrophenschutz nach § 38 Bremisches Hilfeleistungsgesetz.
- *Hamburg*: Katastrophenschutz ist Aufgabe aller Behörden und Ämter der Freien und Hansestadt Hamburg nach § 2 Hamburgisches Katastrophenschutzgesetz.
- *Hessen*: Landrät:innen in den Landkreisen und Oberbürgermeister:innen in den kreisfreien Städten sind untere Katastrophenschutzbehörden,

[252] *Becker*, ZG 2022, 272.
[253] *Lodd*, Die rechtliche Konzeption des Bevölkerungsschutzes, 2023, S. 33.
[254] *Lodd*, Die rechtliche Konzeption des Bevölkerungsschutzes, 2023, S. 34.
[255] *Kloepfer*, Handbuch des Katastrophenrechts, § 2, Rn. 23.
[256] Vgl. Brandenburgisches Brand- und Katastrophenschutzgesetz, Bremisches Hilfeleistungsgesetz, Hessisches Brand- und Katastrophenschutzgesetz, Gesetz über den Brandschutz, die Hilfeleistung und den Katastrophenschutz aus Nordrhein-Westfalen, Gesetz über den Brandschutz, die Technische Hilfe und den Katastrophenschutz aus dem Saarland oder das Thüringer Brand- und Katastrophenschutzgesetz.
[257] Siehe hierzu die Übersicht, ausgearbeitet von den Wissenschaftlichen Diensten des Deutschen Bundestags, Katastrophenschutz in den Bundesländern - Struktur und Organisation, Az. WD 3 - 3000 - 112/22 vom 15.08.2022, abrufbar unter https://www.bundestag.de/resource/blob/916926/a4a75c813172c7ccdca7290c4c97dc82/WD-3-112-22-pdf-data.pdf (letzter Aufruf 12.02.2025).

Regierungspräsidium ist die obere Katastrophenschutzbehörde und das für Katastrophenschutz zuständige Ministerium ist die oberste Katastrophenschutzbehörde nach § 25 Hessisches Brand- und Katastrophenschutzgesetz.
- *Mecklenburg-Vorpommern*: Ministerium für Inneres und Europa Mecklenburg-Vorpommern ist die oberste Katastrophenschutzbehörde, das Landesamt für zentrale Aufgaben und Technik der Polizei und den Brand- und Katastrophenschutz Mecklenburg-Vorpommern ist die obere Katastrophenschutzbehörde und die Landrät:innen der Landkreise sowie die Oberbürgermeister:innen der kreisfreien Städte sind die unteren Katastrophenschutzbehörden nach § 3 Landeskatastrophenschutzgesetz.
- *Niedersachen*: Landkreise und kreisfreie Städte sowie die Städte Cuxhaven und Hildesheim sind die unteren Katastrophenschutzbehörden, Niedersächsisches Landesamt für Brand- und Katastrophenschutz ist die obere Katastrophenschutzbehörde, die oberste Katastrophenschutzbehörde ist das für Inneres zuständige Ministerium nach § 2 Abs. 1 S. 1 Niedersächsisches Katastrophenschutzgesetz.
- *Nordrhein-Westfalen*: Aufgabenträger für den Katastrophenschutz sind die Kreise und die kreisfreien Städte, für zentrale Aufgaben des Katastrophenschutzes das Land nach § 2 Gesetz über den Brandschutz, die Hilfeleistung und den Katastrophenschutz.
- *Rheinland-Pfalz*: Aufgabenträger für den Katastrophenschutz sind die Landkreise und die kreisfreien Städte, das Land für die zentralen Aufgaben des Katastrophenschutzes nach § 2 Brand- und Katastrophenschutzgesetz.
- *Saarland*: Die oberste Katastrophenschutzbehörde ist nach § 17 Abs. 1 Gesetzes über den Brandschutz, die Technische Hilfe und den Katastrophenschutz im Saarland das Ministerium für Inneres und Sport, untere Katastrophenschutzbehörden gemäß Abs. 2 die Landkreise und im Regionalverband Saarbrücken die Landeshauptstadt Saarbrücken.
- *Sachsen*: Katastrophenschutzbehörden sind nach § 4 Abs. 1 Nr. 1 Sächsisches Katastrophenschutzgesetz die Landkreise und die kreisfreien Städte als untere Katastrophenschutzbehörden, nach Nr. 2 die Regierungspräsidien als höhere Katastrophenschutzbehörden und nach Nr. 3 das Staatsministerium des Innern als oberste Katastrophenschutzbehörde.
- *Sachsen-Anhalt*: Landkreise und kreisfreie Städte sind untere Katastrophenschutzbehörden, obere Katastrophenschutzbehörde das Landesverwaltungsamt und die oberste Katastrophenschutzbehörde das Ministerium des Innern nach § 2 Abs. 1 Katastrophenschutzgesetz.
- *Schleswig-Holstein*: Die oberste Katastrophenschutzbehörde ist das Innenministerium, untere Katastrophenschutzbehörden die Landrät:innen sowie Bürgermeister:innen der kreisfreien Städte nach § 3 Abs. 1

Landeskatastrophenschutzgesetz. Sonderregelung bezüglich der Gemeinde Helgoland: Bürgermeister:in der Gemeinde Helgoland ist die untere Katastrophenschutzbehörde im Gebiet der Gemeinde Helgoland nach § 3 Abs. 3 Landeskatastrophenschutzgesetz.
- *Thüringen*: Untere Katastrophenschutzbehörden sind Landkreise und kreisfreie Städte nach § 26 Abs. 2 Thüringer Brand- und Katastrophenschutzgesetz, nach Abs. 2 die obere Katastrophenschutzbehörde das Landesverwaltungsamt und nach Abs. 3 die oberste Katastrophenschutzbehörde das für den Katastrophenschutz zuständige Ministerium.

Neben dem Landeskatastrophenschutzrecht beinhalten andere Landesgesetze wie Feuerwehrgesetze oder Infektionsschutzgesetze weitere Regelungen zu Notfallsituationen. In *Bayern* konnte beispielsweise während der Covid19-Pandemie nach Art. 1 Bayerisches Infektionsschutzgesetz a. F.[258] ein Gesundheitsnotstand durch die Staatsregierung festgestellt werden, welcher den Katastrophenfall nach dem Bayerischen Katastrophenschutzgesetz unberührt beließ. Rechtsfolge waren Beschlagnahmemöglichkeiten von Material (Art. 2) oder Anordnungen zur Herstellung von Material (Art. 3).

Auf der untersten Verwaltungsebene der Länder, der Kommunalebene, können zudem ergänzende Regelungen für Notfallsituationen ergriffen werden. Grundsätzlich steht Kommunen die in der Verfassung garantierte kommunale Selbstverwaltung in Art. 28 Abs. 2 GG zu, wenn sie die Angelegenheiten ihrer örtlichen Gemeinschaft in eigener Verantwortung regeln wollen. Auf dieser Grundlage haben mittlerweile über 70 Städte und Gemeinden den Klimanotstand in der Bundesrepublik ausgerufen.[259] Die Erklärung des Klimanotstands erfolgt in Städten und Gemeinden per Beschluss. Allerdings haben diese Beschlüsse keine verbindlichen Rechtsfolgen; sie beruhen auch auf keiner spezifischen kommunalen Rechtsgrundlage. Vielmehr wird mit dieser Erklärung auf kommunaler Ebene durch die Exekutive eine Gefährdungssituation zum Ausdruck gebracht, welche dringenden Handlungsbedarf auf diversen Verwaltungsebenen signalisiert.[260]

b. Vollzug des Bundes- und Landesrechts:
Die Bundesländer führen Bundes- wie auch Landesgesetze gem. Art. 30 GG selbst aus. Der Bund hat jedoch gem. Art. 87 Abs. 3 S. 1 GG das Bundesamt für Bevölkerungsschutz und Katastrophenhilfe (BKK) errichtet, welches dem Bundesinnenministerium zugeordnet ist. Daneben wird auch das Technische

[258] Diese Norm galt lediglich vom 27. März bis 31. Dezember 2020 und ist mittlerweile außer Kraft.

[259] Siehe hierzu das Bundesumweltamt: https://www.umweltbundesamt.de/deutsche-kommunen-rufen-den-klimanotstand-aus#undefined (letzter Aufruf 12.02.2025).

[260] Siehe auch *Juny*, NWVBl 2021, 313.

Hilfswerk tätig, welches primär Tätigkeiten im Rahmen der Amtshilfe nach Art. 35 Abs. 2+3 GG ausführt. Als Folge der Amtshilfe nach Art. 35 Abs. 2+3 GG wird die Zuständigkeitsordnung zwischen Bund und Land im Sinne einer kooperativen Gefahrenabwehr durchbrochen.[261]
Weitere Akteure des Katastrophenschutzes sind Freiwillige und Ehrenamtliche, welche sich beispielsweise dem Deutschen Roten Kreuz, der Johanniter-Unfall-Hilfe, dem Arbeiter-Samariter-Bund, dem Malteser Hilfsdienst oder der Deutschen Lebensrettungsgesellschaft anschließen.

Question 4

Besondere Bestimmungen für den Konfliktfall zwischen der Umsetzung verfassungsrechtlicher Bestimmungen und dem EU- oder Völkerrecht nach Auslösung des deutschen Notstandsrechts gibt es in der deutschen Rechtsordnung nicht. Grundsätzlich zeichnet sich das deutsche Grundgesetz durch seine Völker- und Europarechtsfreundlichkeit aus, welche auch in dem bezeichneten Konfliktfall zum Tragen kommen.[262] Allgemein kann an dieser Stelle zudem auf die Vorrangstellung des EU-Rechts verwiesen werden, welche laut Bundesverfassungsgericht solange besteht, wie der Grundrechtsschutz auf EU-Ebene im Vergleich zum Grundrechtsschutz durch das Grundgesetz angemessen ist.[263] Dem stehen zugleich die Verfassungsidentitätskontrolle[264] und die *ultra vires*-Kontrolle[265] entgegen. Sie sollen gewährleisten, dass der „Anwendungsvorrang des Unionsrechts nur kraft und im Rahmen der fortbestehenden verfassungsrechtlichen Ermächtigung gilt."[266] Die *ultra vires*-Kontrolle bezieht sich auf unionales Handeln in den Grenzen der übertragenen Kompetenzen, während die Identitätskontrolle die über Art. 79 Abs. 3 GG i. V. m. Art. 1 und 20 GG geschützte Verfassungsidentität der Bundesrepublik als absolute materielle Grenze heranzieht.[267] Verfassungsidentität wie auch *ultra vires*-Kontrolle lagen beispielsweise bei den Verfahren vor dem

[261] *Becker*, ZG 2022, 279.

[262] Siehe Art. 23 und 25 GG. Allgemein hierzu *Knop*, Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze, 2013.

[263] Siehe zur Grundrechtskontrolle: BVerfG, Beschl. v. 29. Mai 1974, BvL 52/71, BVerfGE 37, 271 ff. – *Solange I*; BVerfG, Beschluss v. 22. Oktober 1986, 2 BvR 197/83 – *Solange II*.

[264] Abgeleitet aus der Ewigkeitsgarantie des Art. 79 Abs. 3 GG, siehe Dürig/Herzog/Scholz/*Herdegen*, 105. EL August 2024, Grundgesetz, Art. 79, Rn. 174. Siehe hierzu allgemein *Polzin*, Verfassungsidentität: Ein normatives Konzept des Grundgesetzes?, 2018.

[265] BVerfG, Urteil v. 12. Oktober 1993 - 2 BvR 2134/92 und 2 BvR 2159/92, BVerfGE 89, 155 (188) – *Maastricht*.

[266] Vgl. BVerfG, Urteil v. 30. Juni 2009 - 2 BvE 2/08 u. a., BVerfGE 123, 267 (354) – *Vertrag von Lissabon*.

[267] Vgl. Schlaich/Korioth, BVerfG, 13. Aufl. 2025, Art. Rn. 891. Siehe auch die neuere Rspr. des BVerfG zu Identitäts-, Ultra-vires- und Grundrechtskontrolle: BVerfG, Urteil v. 21. Juni 2016, - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 – *OMT*; BVerfG, Urteil v. 5. Mai 2020 – 2 BvR 859/15 u. a.; BVerfGE 154, 17 – *PSPP-Urteil*.

Bundesverfassungsgericht gegen das deutsche Eigenmittelbeschluss-Ratifizierungsgesetz im Zusammenhang mit NGEU und der EURI-Verordnung als Krisenmaßnahme der EU[268] im Fokus;[269] letztendlich trat das Eigenmittelbeschluss-Ratifizierungsgesetz als verfassungsmäßiges Gesetz in Kraft. Dieser Fall zeigt auf, wie das Bundesverfassungsgericht bei der Überprüfung von Zustimmungsmaßnahmen der Bundesregierung bzw. des Bundestags zu EU-Krisenbewältigungsmaßnahmen auf Basis von Art. 122 Abs. 1 i. V. m. Art. 311 AEUV die Wahrung der Verfassungsidentität sowie den *ultra vires*-Gedanken überprüft.

Im Hinblick auf Maßnahmen der EU-Mitgliedstaaten, welche grundsätzlich vom Gedanken der Kooperation getragen sind, sei ein potentieller Konfliktfall aus Zeiten der Covid19-Pandemie erwähnt: Zu Beginn der Covid19-Pandemie (2020) hatte die Bundesregierung zunächst Ausfuhrbeschränkungen für diverse Schutzbekleidung in Drittstaaten und deren Verbringung in EU-Mitgliedstaaten per Anordnung veranlasst.[270] Nachdem die EU tätig wurde und die Durchführungsverordnung (EU) 2020/402[271] in Kraft trat, hob das Ministerium seine Anordnungen in Bezug auf die Verbringung in EU-Mitgliedstaaten wieder auf, so dass nur noch Ausfuhrbeschränkungen für Nicht-EU-Staaten fortbestanden. Ein möglicher Konflikt zwischen der EU-Rechtsordnung und dem nationalen Recht konnte in der Pandemiesituation somit vermieden werden.

Question 5

Bevor auf die unterschiedlichen Formen der (materiell-rechtlichen) Grundrechtssicherung nach dem Grundgesetz eingegangen werden soll, sind zunächst die Möglichkeiten der Grundrechtseinschränkung aufzuzeigen: Anders als viele andere (europäische) Verfassungen sieht das Grundgesetz nämlich keine Suspensionsmöglichkeit im Staatsnotstandsfall vor.[272] Das Grundgesetz stellt vielmehr auf den Normalzustand ab und sieht bestimmte

[268] Allerdings wurde diese Verordnung nicht auf Art. 122 Abs. 1 AEUV, sondern auf Art. 311 Abs. 3 + Art. 106a AEUV gestützt.

[269] BVerfG, Beschl. v. 31. Oktober 2023 – 2 BvE 4/21, NVwZ 2024, 498; BVerfG, Urteil v. 6. Dezember 2022 – 2 BvR 547/21, 2 BvR 798/21, NJW 2023, 425.

[270] Siehe die Anordnungen vom 4. März 2020 (BAnz AT 4. März 2020 B1) bzw. 12. März 2020 (BAnz AT 12. März 2020 B1).

[271] Durchführungsverordnung (EU) 2020/402 der Kommission v. 14. März 2020 über die Einführung der Verpflichtung zur Vorlage einer Ausfuhrgenehmigung bei der Ausfuhr bestimmter Produkte, abrufbar unter https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32020R0402&from=DE (letzter Aufruf 12.02.2025).

[272] Zu den unterschiedlichen Regelungsmodellen im Grundrechtebereich s. eingehend u. a. *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 184 ff.: Gegenüber stehen sich im Wesentlichen ein sog. *Suspensionsmodell*, bei dem die Grundrechte für den Zeitraum des Staatsnotstandsfalls suspendiert werden. Demgegenüber steht das sog. *Einschränkungsmodell*, das im Staatsnotstand grundsätzlich die gleichen Einschränkungsmöglichkeiten, wie im Normalfall zur Anwendung bringt.

Einschränkungsmöglichkeiten (sog. Einschränkungsmodell[273]) vor (→ *a.*). Diesen Einschränkungsmöglichkeiten stehen wiederum drei Kategorien der Grundrechtssicherung gegenüber (→ *b.*).[274]
Vorweggeschickt werden kann, dass der Grundrechtsschutz in prozessualer Hinsicht auch im Staatsnotstand keine Besonderheiten erfährt.[275] Auch insofern sind die gewöhnlichen Verfahrensarten vor dem Bundesverfassungsgericht einschlägig. Bei Grundrechtsverletzungen ist vor allem die sog. Verfassungsbeschwerde gem. Art. 94 Abs. 1 Nr. 4a GG maßgeblich. Für den einstweiligen Rechtsschutz ist auf § 32 BVerfGG zu verweisen. Außergerichtliche Stellen, die – wie z. B. Ombudsstellen und/oder -personen – mit dem Grundrechtsschutz betraut sind, sind nicht bekannt.

a. Die Einschränkungsmöglichkeiten der Grundrechte nach dem Grundgesetz (sog. *Einschränkungsmodell*[276])

Unter bestimmten Voraussetzungen können die Grundrechte unter dem Grundgesetz eingeschränkt werden (sog. Grundrechtsvorbehalte). Im Rahmen der einzelnen Grundrechte ist zwischen einfachen[277], qualifizierten[278] und verfassungsimmanenten[279] Vorbehalten zu unterscheiden. Die einzelnen Grundrechtsvorbehalte differenzieren jedoch nicht zwischen Normal- und Ausnahmezustand.[280] Auch für Extremsituationen gelten demnach die gleichen Grundrechtsvorbehalte.[281] Das Grundgesetz vertraut damit auf die Steuerungs- und Widerstandsfähigkeit der im Normalzustand geltenden Rechtsordnung.[282] Anders als andere europäische Verfassungen sieht es für den Staatsnotstand auch keine Suspension der Grundrechte vor.
Als weitere Möglichkeit der Grundrechtsverkürzung ist darüber hinaus die

[273] So maßgeblich *Kaiser*, Ausnahmeverfassungsrecht 2020, S. 227.
[274] Auch dazu maßgeblich *Kaiser*, Ausnahmeverfassungsrecht 2020, S. 227.
[275] Zu den Rechtsschutzmöglichkeiten im Staatsnotstand und der Rolle der Gerichte eingehend noch unten → *Abschnitt 4.*
[276] Zu der maßgeblich von *Kaiser* verwendeten Bezeichnung: Ausnahmeverfassungsrecht, 2020, S. 221 ff.
[277] Das Grundrecht kann „durch Gesetz oder auf Grund eines Gesetzes" eingeschränkt werden, s. z. B. Art. 8 Abs. 2 GG.
[278] Das Grundrecht verlangt nicht nur, dass der Eingriff „durch Gesetz oder auf Grund eines Gesetzes" erfolgt, es werden zusätzlich auch besondere Anforderungen an das eingreifende Gesetz gestellt, s. z. B. Art. 5 Abs. 2 GG.
[279] Das Grundrecht wird dem Wortlaut nach vorbehaltlos gewährleistet, unterliegt jedoch den sog. verfassungsimmanenten Schranken, d. h. den Grundrechten Dritter und den sonstigen Rechtsgütern mit Verfassungsrang. Auch das vorbehaltlos gewährleistete Grundrecht kann nur „durch Gesetz oder auf Grund eines Gesetzes" eingeschränkt werden.
[280] *Kaiser,* Ausnahmeverfassungsrecht, 2020, S. 227.
[281] Auf der Ebene der qualifizierten Schrankenvorbehalte will *Kaiser* noch einmal zwischen *gewöhnlich* und *außergewöhnlich* qualifizierten Schrankenvorbehalten unterscheiden. Letztere sollen in ihrem Anwendungsbereich auf bestimmte Krisensituationen zugeschnitten und deshalb von den gewöhnlichen Schrankenvorbehalten zu differenzieren sein, *s. Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 229.
[282] Zur Steuerungsfähigkeit des Grundgesetzes sowie des Rechts im Allgemeinen, vgl. auch *Barczak*, Der nervöse Staat, 2020, S. 130 ff.

Verfassungsänderung zu nennen, die dem Verfassungs(änderungs)gesetzgeber allerdings nicht nur in Staatsnotstandszeiten, sondern *per se* zur Verfügung steht.[283] Empirisch lässt sich feststellen, dass von dieser Möglichkeit bislang nur vereinzelt[284] Gebrauch gemacht wurde. Dabei ist erkennbar, dass der Verfassungs(änderungs)gesetzgeber die Grundrechte tendenziell vor allem in Krisenzeiten oder in der Antizipierung zukünftiger Krisen ändert,[285] vorrangig aber auf die anderen Einschränkungsmöglichkeiten zurückgreift.

b. Die drei Kategorien der Grundrechtssicherung

Den Einschränkungsmöglichkeiten der Grundrechte stellt das Grundgesetz drei maßgebliche (materiell-rechtliche) Kategorien der Grundrechtssicherung entgegen, die sowohl dem einfachen Gesetzgeber als z. T. auch dem verfassungsändernden Gesetzgeber[286] entgegengehalten werden können:[287]

aa. ***Erste Kategorie – Verhältnismäßigkeitsprinzip*:** Für gesetzliche Regelungen, die im Zuge einer existentiellen Staatsnotlage getroffen werden, gelten im Rahmen des Grundgesetzes dieselben Schranken-Schranken wie für gewöhnliche Grundrechtseingriffe.[288] Insbesondere findet die bedeutsamste Schranken-Schranke – das Verhältnismäßigkeitsprinzip – uneingeschränkt Anwendung. Somit ist auch in Notsituationen die gesetzliche Grundlage grundsätzlich an den Maßstäben des sog. Verhältnismäßigkeitsgrundsatzes zu messen.[289] Konkret bedeutet das, dass grundrechtseinschränkende hoheitliche Maßnahmen und deren Ermächtigungsgrundlage – *erstens* – daraufhin zu überprüfen sind, ob sie einen verfassungsrechtlich zulässigen Zweck wahren, ob sie – *zweitens* – geeignet sind, den intendierten Zweck zu verfolgen, und – *drittens* – dafür auch erforderlich sind; es darf also kein milderes Mittel ersichtlich sein, das den Zweck in gleich wirksamer Weise erfüllt.[290] Außerdem dürfen die gesetzliche Regelung und konkrete Maßnahme – *viertens* – nicht außer Verhältnis zu dem von ihnen verfolgten Zweck stehen, sie müssen also auch angemessen sein. Dem Gesetzgeber wird dabei regelmäßig eine großzügige Einschätzungsprärogative eingeräumt, die insbesondere auf Ebene der Geeignetheit und Erforderlichkeit greift.[291]

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[283] Vgl. auch dazu maßgeblich *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 231 f.

[284] Laut *Kaiser* (Ausnahmeverfassungsrecht, 2020, S. 232) entfallen nur 10 % der bisherigen Grundgesetzänderungen auf den Grundrechtsteil.

[285] So ausdrücklich *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 232.

[286] Dazu insbesondere → *Abschnitt 2, 5. b. cc.*

[287] Auch dazu grundlegend *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 232 ff.

[288] So auch *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. S. 323.

[289] Zum Verhältnismäßigkeitsprinzip auch noch eingehend unten → *Abschnitt 4, 4.*

[290] Zu den Voraussetzungen des Verhältnismäßigkeitsprinzips, s. statt vieler etwa Sachs/*Sachs/von Coelln*, 10. Aufl. 2024, GG Art. 20 Rn. 149 ff.

[291] Dazu statt vieler *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 234.

Erfahrungsgemäß kommt es im Staatsnotstand dennoch regelmäßig zu einem strukturellen Versagen des Verhältnismäßigkeitsgrundsatzes.[292] Individuelle Interessen stehen hier regelmäßig Kollektivrechtsgütern (z. B. dem Bestand des Bundes) gegenüber, denen im Rahmen der Abwägung im Zweifel immer ein so großes Gewicht zukäme, dass das grundrechtsbeschränkende Mittel nie außer Verhältnis zu dem angestrebten Zweck stünde.[293] Außerdem gestehen die Gerichte dem Gesetzgeber regelmäßig großzügig(er)e Spielräume (als in Normalzeiten) zu und nehmen insofern lediglich eine sog. Vertretbarkeitskontrolle vor, mit welcher sie überprüfen, ob der Gesetzgeber seinen Einschätzungsspielraum in vertretbarer Weise gehandhabt hat oder nicht.[294] Eine entsprechende Praxis hat sich jüngst auch im Zusammenhang mit der Covid19-Pandemie gezeigt.[295] Als Lehren aus dieser Krise werden in der deutschen Literatur deshalb auch gewisse Modifizierungen des Verhältnismäßigkeitsgrundsatzes diskutiert, die dem angezeigten Ausfall im Staatsnotstand entgegenwirken sollen.[296] Für den Fall, dass es dennoch zu einer Entleerung des Verhältnismäßigkeitsprinzips kommt, werden z. T. die Wesensgehaltsgarantie, z. T. die Menschenwürde (→ *Abschnitt 4, 5. b. bb.*) als absolute Grenzen diskutiert, die für einen gewissen Mindestgrundrechtsschutz im äußersten Notfall sorgen sollen.[297] Letztere gilt gem. Art. 79 Abs. 3 i. V. m. Art. 1 Abs. 1 GG dabei insbesondere auch für den verfassungsändernden Gesetzgeber (vgl. dazu auch → *Abschnitt 4, 5, b. cc.*).

bb. ***Zweite Kategorie – Wesensgehaltsgarantie und Menschenwürde*:** Als weitere – nunmehr absolute – Grenzen für einen notstandsbedingten Grundrechtseingriff werden die sog. Wesensgehaltsgarantie einerseits sowie die Menschenwürde andererseits betrachtet.[298]

Ausdrücklich ist ein notstandsbedingter *Wesensgehaltsschutz* nur in einem Fall – namentlich in Art. 9 Abs. 3 S. 3 GG – geregelt. Dieser sieht eine Schranken-Schranke für notstandsbedingte Eingriffe in die Koalitionsfreiheit vor. Für die übrigen Grundrechte gilt wiederum Art. 19 Abs. 2 GG. Nach der dort geregelten allgemeinen Wesensgehaltsgarantie darf ein Grundrecht in keinem (also auch nicht im Notstands-)Fall in seinem Wesensgehalt angetastet

[292] So auch *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. (32 u.) 235 ff. Vgl. i. Ü. auch *Leisner-Egensperger*, NVwZ 2024, 1455; *Lindner,* NJW 2024, 564, beide im Zshg. mit der Covid19-Pandemie.

[293] *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 235 f. u. 239. Ähnlich auch *Leisner-Egensperger*, NVwZ 2024, 1455 (1457 f.) im Zshg. mit der Covid19-Pandemie.

[294] Vgl. dazu u. a. *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 32, die – in Anlehnung an die US-amerikanische Literatur – von einem sog. *judicial law cycle* spricht. Zur gerichtlichen Kontrolle im Staatsnotstand, s. a. noch eingehend unten → *Abschnitt 4.*

[295] Krit. dazu insbes. *Leisner-Egensperger*, NVwZ 2024, 1455; *Lindner,* NJW 2024, 564.

[296] *Leisner-Egensperger*, NVwZ 2024, 1455; *Lindner,* NJW 2024, 564.

[297] So vor allem bei *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 238 ff. u. 241 f.

[298] Als solches ausdrücklich benannt bei *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 238 ff.

werden.[299] Es ist jedoch fraglich, ob und inwiefern diese Wesensgehaltsgarantie auch tatsächlich zu einem absoluten Grundrechtsschutz im Staatsnotstandsfall führt. Schon im Normalfall wird der Wesensgehaltsgarantie kaum Beachtung geschenkt.[300] Es wird deshalb angezweifelt, ob ihr im Krisenfall überhaupt eine Wirkung zukommt.[301]

Als unantastbar gilt im Übrigen auch die Menschenwürde gem. Art. 1 Abs. 1 GG. Schon der Wortlaut, aber auch die Genese[302] dieser Vorschrift verdeutlichen, dass dieses Grundrecht unveränderlich gilt. Dies muss auch bzw. gerade im Staatsnotstand gelten.

cc. ***Dritte Kategorie*** **– Art. 79 Abs. 3 i. V. m. Art. 1 GG:** Die bis hierhin dargestellten Schranken-Schranken gelten vor allem für den einfachen Gesetzgeber. Auch für eine notstandsbedingte Verfassungsänderung legt Art. 79 Abs. 3 i. V. m. Art. 1 GG eine absolute Grenze für Grundrechtseingriffe fest.[303] Andernorts wird insofern auch von einem sog. „diktaturfesten (Grundrechts-)Minimum"[304]oder einer Ausprägung der „militanten Demokratie"[305] gesprochen. Ob von diesen Mindeststandards auch die sog. Wesensgehaltsgarantie umfasst ist, ist umstritten. Diese wird zwar grundsätzlich nicht vom Wortlaut des Art. 79 Abs. 3 GG erfasst, der sich ausdrücklich nur auf Art. 1 *und* 20 GG bezieht, z. T. wird aber angenommen, dass sich ein unabänderlicher Wesensgehaltsschutz implizit über den Schutz der Menschenwürdekerne spezieller Grundrechte ergibt.[306] Wollte man dieser nicht unumstrittenen Ansicht[307] folgen, würde auch die Wesensgehaltsgarantie zum unabänderlichen Grundrechtestandard des Grundgesetzes zählen.

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[299] Zur Bedeutung sowie den Gewährleistungen der Wesensgehaltsgarantie im Einzelnen; statt vieler Huber/Voßkuhle/*Huber*, 8. Aufl. 2024, GG Art. 19 Rn. 106-121 o. a. Sachs/*Sachs/von Coelln*, 10. Aufl. 2024, GG Art. 19, Rn. 33-47.

[300] Dazu u. a. Huber/Voßkuhle/*Huber*, 8. Aufl. 2024, GG Art. 19 Rn. 122 ff.

[301] So ausdrücklich bei *Leisner-Egensperger*, NVwZ 2024, 1455 (1460), die gerade das Fehlen einer hinreichenden Grundrechtsabsicherung durch abwägungsfeste Wesensgehalte moniert.

[302] So heißt es in einem Bericht über den Verfassungskonvent auf Herrenchiemsee, genauer den für Grundrechte zuständigen Unterausschuss I: „Die Überzeugung der vorliegenden Mehrheit des Ausschusses war, daß das Grundrecht der Achtung der Menschenwürde überhaupt nicht suspendierbar sei", s. dazu *Bucher*, Der Verfassungskonvent auf Herrenchiemsee, in: Wernicke/Booms (Hrsg.), Der Parlamentarische Rat, Bd. 2, 1981, S. 230 (inkl. Fn. 127), zit. u. a. in *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 241, Fn. 172.

[303] Auch dazu eingehend *Kaiser*, Ausnahmeverfassungsrecht 2020, S. 241 f.

[304] So ausdrücklich *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 242 in Anlehnung an *Carl Schmitt*, der diesen Begriff u. a. maßgeblich in Die Diktatur des Reichspräsidenten nach Art. 48 der Reichsverfassung, VVDStRL 1 (1924), S. 93 ff. geprägt hat.

[305] Statt vieler Dürig/Herzog/Scholz/Dürig/*Klein*, 105. EL August 2024, GG Art. 18 Rn. 10 m. w. N.

[306] So ausdrücklich u. a. *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 241 unter Verweis auf *Dürig*, in Maunz/Dürig, GG, Erstbearbeitung 1958, Nachdruck von 2003, Art. 1, Rn. 81 u. 85.

[307] Ablehnend insbes. Dreier/*Dreier*, 3. Aufl. 2015, GG Art. 79 Abs. 3 Rn. 28 m. w. N. zum Streitstand.

Question 6

Bekannt sind unter anderem folgende Fälle:

- *Finanzkrise*: Die Maßnahmen nach dem Finanzmarktstabilisierungsgesetz (FMStFG)[308] sahen ursprünglich Begünstigungen aus dem Finanzmarktstabilisierungsfonds nur für Unternehmen mit Sitz in Deutschland vor (vgl. u. a. § 2 Abs. 1 FMStFG a. F.). Dies wurde vor dem Hintergrund der Grundfreiheiten sowie dem allgemeinen Diskriminierungsverbot aus Art. 18 Abs. 1 UAbs. 1 AEUV zu Recht kritisiert.[309] Die heute geltende Fassung enthält diese Beschränkung nicht mehr.
- *Covid19-Pandemie:* Während der Covid19-Pandemie wurden auf nationaler Ebene verschiedene Maßnahmen erlassen, die mit den EU-Grundfreiheiten in Konflikt geraten sind, u. a. ein von der Bundesregierung am 4. März 2020 (BAnz AT 04.03.2020 B1) bzw. 12. März 2020 (BAnz AT 12.03.2020 B1) verhängtes Ausfuhrverbot betreffend medizinische Schutzausrüstung – v. a. Atemmasken, Handschuhe, Schutzanzüge etc. Diese Maßnahmen wurden am 19. März 2020 (BAnz AT 19.03.2020 B11) unter Verweis auf die am 15. März 2020 von der EU-Kommission erlassene Durchführungsverordnung (EU) 2020/402 wieder aufgehoben. Darüber hinaus waren auch weitere, aus Infektionsschutzgründen getroffene Maßnahmen (z. B. Quarantäne, Kontakt- oder Reiseeinschränkungen) vor dem Hintergrund der unionsrechtlich gewährten Freizügigkeit nicht unproblematisch.
- *Migration:* Im Bereich der Migration sind seit 2023 durch die deutsche Bundesinnenministerin zu verschiedenen Zeitpunkten zunächst an einigen, seit dem 16. September 2024 nunmehr an allen deutschen Landesgrenzen Grenzkontrollen angeordnet worden.[310] Ausweislich der offiziellen Begründung durch das Ministerium erfolgen diese zum Schutz der inneren Sicherheit und zur Eindämmung der irregulären Migration.[311] Ein „Migrations"-Notstand ist nicht ausgerufen worden. Diese Kategorie kennt das deutsche Recht im Übrigen auch nicht.

[308] BGBl. 2008 I Nr. 46, S. 1982.

[309] Siehe dazu u. a. *Maurer*, Die gesetzlichen Maßnahmen in Deutschland zur Finanzmarktstabilisierung 2008 und 2009 – verfassungs- und europarechtliche Probleme, in: Tietje/Kraft/Lehmann (Hrsg.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 9, 2010, S. 15 ff.

[310] Vgl. dazu nur die Pressemitteilung des Bundesinnenministeriums (BMI) vom 12.02.2025, abrufbar unter: https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2025/02/binnengrenzkontrollen.html (zuletzt am 15.02.2025).

[311] Vgl. auch dazu nur die Pressemitteilung des Bundesinnenministeriums (BMI) vom 12.02.2025, abrufbar unter: https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2025/02/binnengrenzkontrollen.html (zuletzt am 15.02.2025).

Abschnitt 3: Gesetzliches/exekutives Notstandsrecht in den Mitgliedstaaten

Question 1

Regelungen zu legislativen und exekutiven Bestimmungen befinden sich in verschiedenen Gesetzen insbesondere zu folgenden Sachbereichen: innere Sicherheit/öffentliche Ordnung, Gesundheitswesen, Katastrophenschutz, Wirtschaft, und Verteidigung.
Neben den bereits dargestellten Regelungen im Grundgesetz (Art. 35 GG - Amtshilfe & Katastrophenhilfe, Art. 91 GG - innerer Notstand, Art. 115a–115l GG - Verteidigungs- und Spannungsfall) sowie in den einfachgesetzlichen Notstandsregelungen auf Bundes- und Landesebene, etwa im Bereich des Bevölkerungsschutzes, gibt es ergänzendes einfaches Bundes- und Landesrecht insbesondere in folgenden Sachbereichen:

- So beinhalten beispielsweise die Polizei- und Ordnungsgesetze der Länder besondere Befugnisse in Notlagen wie bei Terroranschlägen;[312] das Bundespolizeigesetz regelt den Einsatz der Bundespolizei in Krisensituationen.[313]
- Das Infektionsschutzgesetz auf Bundesebene definiert für die epidemischen Lagen von nationaler Tragweite nach § 5 Abs. 2 IfSG Rechtsgrundlagen für diverse pandemische Schutzmaßnahmen. Nach Erklärung der epidemischen Lage von nationaler Tragweite etablierte sich in der Praxis der Bundesregierung die sogenannte Ministerpräsidentenkonferenz zusammen mit der Bundeskanzlerin, welche *de jure* nicht existierte.[314]
- Das Luftsicherheitsgesetz beinhaltet Regelungen zur Gefahrenabwehr und Luftsicherheit und gestattet beispielsweise auch den Bundeswehreinsatz im Inneren zur Gefahrenabwehr bei Ausnahmesituationen katastrophischen Ausmaßes.

Der bereits oben erwähnte Klimanotstand,[315] welche von Städten und Gemeinden auf kommunaler Ebene *qua* Beschluss erklärt wurde, basiert auf keinem Rahmenwerk im engeren Sinne. Hier wird lediglich die kommunale Selbstverwaltung nach Art. 28 Abs. 2 GG angeführt.

Question 2

Es sind keine Notfallsituationen bekannt, die zu rechtlichen Konflikten zwischen verfassungsrechtliche und gesetzgeberischer/exekutiver Ebene geführt

[312] Siehe bspw. für *Brandenburg* in §§ 28a-28e BbgPolG oder für *Nordrhein-Westfalen* in §§ 12a, 20c, 34b, 34c Polizeigesetz Nordrhein-Westfalen.
[313] Siehe § 7 BPolG.
[314] Siehe *Meyer*, NVwZ 2023, 1294.
[315] Siehe hierzu Fn. 259.

hätten. Während der Hamburger Sturmflut 1962 wurden auf Initiative des damaligen Hamburger Polizeisenators Helmut Schmidt 40.000 Bundeswehrsoldaten eingesetzt, ohne dass es eine rechtliche Grundlage für den Einsatz der Bundeswehr im Inneren in diesem Fall in der Verfassung gab. Ein juristischer Konflikt vor Gericht wurde jedoch nicht ausgetragen, vielmehr reagierte man mit einer Verfassungsänderung: 1968 erfolgte die Aufnahme der heutigen Fassung von Art. 35 Abs. 2 + Abs. 3 GG sowie des Art. 87a Abs. 2 GG für den Einsatz der Bundeswehr im Inneren.
Im Falle des Luftsicherungsgesetzes entschied das Bundesverfassungsgericht 2006 einen Konflikt einer der Regelungen dieses einfachen Bundesgesetzes im Luftsicherheitsgesetz mit dem Grundgesetz: § 14 Abs. 3 Luftsicherheitsgesetz (LuftSiG) ermächtigte die Streitkräfte, unter bestimmten Bedingungen Luftfahrzeuge, die als Tatwaffe gegen das Leben von Menschen eingesetzt werden sollen, abzuschießen; diese Ermächtigungsgrundlage für eine Notfallsituation wurde mit dem Grundgesetz als unvereinbar und nichtig erklärt.[316]

Question 3

Notstandsmaßnahmen der Bundesregierung unterliegen – wie alle anderen Maßnahmen auch – dem Grundsatz der Gesetzmäßigkeit der Verwaltung gem. Art. 20 Abs. 3 GG, das heißt, sie müssen den Grundsatz des Vorrangs des Gesetzes wie auch den Grundsatz des Vorbehalts des Gesetzes wahren.[317] Notstandsmaßnahmen der Bundesregierung bedürfen also in allererster Linie einer gesetzlichen Grundlage. Ein sog. Notverordnungsrecht – wie es etwa noch Art. 48 Abs. 2 WRV vorsah – kennt das Grundgesetz hingegen nicht. Stattdessen gilt auch für die Ermächtigung zum Erlass von Rechtsverordnungen im Staatsnotstand grundsätzlich Art. 80 GG.

Question 4

Die Einführung einer Notmaßnahme durch die EU zieht auf nationaler Ebene keine (grund-)gesetzlich vorgesehenen Zuständigkeitsveränderung(en) nach sich, weder auf Verbandsebene zwischen Bund und Ländern, noch auf Ebene der obersten Verfassungsorgane.

[316] BVerfG, Urteil v. 15. Februar 2006 - 1 BvR 357/05; BVerfGE 115, 118; NJW 2006, 751.
[317] Dazu eingehend u. a. bei Huber/Voßkuhle/*Sommermann*, 8. Aufl. 2024, GG Art. 20 Rn. 270.

Abschnitt 4: Gerichtliche Überprüfung der Notstandsbefugnisse in den Mitgliedstaaten

Question 1

Für Klagen gegen Maßnahmen zur Bewältigung von Notsituationen haben die Gerichte die üblichen Zuständigkeiten, die auch im Normalfall gelten.[318] Die Zuständigkeit der Verwaltungsgerichtsbarkeit folgt demnach aus §§ 40 ff. VwGO. Die Zuständigkeit des Bundesverfassungsgerichts ergibt sich wiederum aus Art. 94 GG i. V. m. § 13 BVerfGG. Im Übrigen ist auf Art. 101 Abs. 1 S. 1 GG zu verweisen, der Ausnahmegerichte[319] ausdrücklich verbietet. Zählten diese noch zu den typischen Einrichtungen des Belagerungszustands (vgl. nur §§ 10-15 Belagerungszustandsgesetz von 1851), werden sie durch das Grundgesetz nunmehr kategorisch ausgeschlossen.[320] Auch das Recht auf einen gesetzlichen Richter darf gem. Art. 101 Abs. 1 S. 2 GG niemandem entzogen werden. Es gilt uneingeschränkt in Zeiten des Staatsnotstands fort.[321] Von der Ermächtigung zur Errichtung besonderer Wehrstrafgerichte gem. Art. 96 Abs. 2 S. 1 GG hat der Bund bislang keinen Gebrauch gemacht.

Question 2

Besondere verfahrensrechtliche Vorschriften, die für die Gerichte bei der Überprüfung des behördlichen Handelns in Staatsnotfällen gelten, bestehen nicht. Im Gegenteil ist auf die gewöhnlichen Verfahrensregeln zurückzugreifen, die auch im Normalfall zur Anwendung gelangen.[322] Sollen Maßnahmen besonders dringlich überprüft werden, ist insbesondere auf die einschlägigen Eilverfahren gem. § 80 Abs. 5 VwGO bzw. § 32 BVerfGG zu verweisen, die das Hauptsacheverfahren jedoch nicht ersetzen.

Question 3

Ob und inwiefern die Gerichte behördliches Handeln im Notstandsfall vollumfänglich überprüfen können, ist umstritten: Während eine ganz veraltete Auffassung noch davon ausging, dass es sich bei behördlichen

[318] Vgl. dazu v. a. *Stern*, HStR II, 1980, § 52, S. 1359 f. m. w. N.

[319] Gemeint sind damit „Gerichte, die in Abweichung von der gesetzlichen Zuständigkeit besonders gebildet und zur Entscheidung einzelner konkreter oder individuell bestimmter Fälle berufen" sind, s. Huber/Voßkuhle/*Classen*, 8. Aufl. 2024, GG Art. 101 Rn. 8 m. w. N.

[320] Dazu auch *Kaiser*, Ausnahmeverfassungsrecht, 2020, S. 80.

[321] *Stern*, HStR II, 1980, § 52, S. 1359.

[322] Vgl. auch dazu *Stern*, HStR II, 1980, § 52, S. 1359 ff. Dort ist von keinen besonderen verfahrensrechtlichen Regeln die Rede.

Notstandsmaßnahmen um justizfreie Hoheitsakte handelt,[323] streiten sich die gegenwärtigen Stimmen in der Literatur und Praxis lediglich (noch) darüber, ob behördliches Handeln in Notfällen vollständig oder teilweise justiziabel ist. Während die Einen für eine vollständige Überprüfbarkeit behördlicher Notstandsmaßnahmen plädieren und sich insofern auf die Garantie des effektiven Rechtsschutzes gem. Art. 19 Abs. 4 S. 1 GG berufen, die auch für Maßnahmen im Staatsnotstand gelte und eine umfassende inhaltliche Kontrolle des behördlichen Handelns erforderlich mache,[324] beruft sich die Gegenseite wiederum darauf, dass behördliche Maßnahmen jedenfalls dort, wo Beurteilungs- und/oder Ermessensspielräume bestünden, nur bedingt justiziabel seien.[325] Entscheidungen im Staatsnotstand beruhten regelmäßig auf epistemischen Unsicherheiten, weshalb es sich bei diesen Entscheidungen wesensmäßig um politische (Prognose- und Risiko-)Entscheidungen handele, die nur bedingt überprüfbar seien.[326] Die Justiziabilität der Maßnahme(n) beschränke sich insofern auf eine Missbrauchs- bzw. Vertretbarkeitskontrolle.[327]

Question 4

Der Grundsatz der Verhältnismäßigkeit spielt bei der gerichtlichen Überprüfung von behördlichem Handeln in Staatsnotstandsfällen eine wesentliche Rolle.[328] Wegen der uneingeschränkten Geltung von Art. 20 Abs. 3 GG gilt der Verhältnismäßigkeitsgrundsatz im Staatsnotstand uneingeschränkt fort.[329] Die staatlichen Notstandsmaßnahmen, welche auf einer gesetzlichen Grundlage beruhen und einen legitimen Zweck erfüllen müssen, sind auf ihre *a)* Geeignetheit, *b)* Erforderlichkeit und *c)* Angemessenheit hin zu überprüfen.[330] Gemeinsamer Bezugspunkt dieser drei Kriterien ist ein mit der hoheitlichen Maßnahme verbundener (legitimer) Zweck.[331] Auf das Risiko eines strukturellen Versagens des (deutschen) Verhältnismäßigkeitsgrundsatzes im

[323] Dazu u. a. *Jahn*, Das Strafrecht des Staatsnotstands, 2004, S. 117 ff. m. w. N.

[324] Vgl. auch dazu *Jahn*, Das Strafrecht des Staatsnotstands, 2004, S. 121 m. w. N. u. a. auf Denninger/Lisken/*Lisken* K/214 Fn. 307 sowie *Böhm*, Staatsnotstand und Bundesverfassungsgericht, S. 162.

[325] Dazu allgemein etwa Schoch/Schneider/*Geis*, 5. EL Juli 2024, VwVfG, § 40 Rn. 137 ff.

[326] Dazu im Allgemeinen u. a. Schoch/Schneider/*Geis*, 5. EL Juli 2024, VwVfG, § 40 Rn. 163 ff. bzw. Schoch/Schneider/*Riese*, 45. EL Januar 2024, VwGO § 114 Rn. 159. Für den Staatsnotstand im Spezifischen, siehe u. a. *Jahn*, Das Strafrecht des Staatsnotstands, 2004, S. 123.

[327] Auch dazu *Jahn*, Das Strafrecht des Staatsnotstands, 2004, S. 123 m. w. N. S. im Übrigen *Stern*, HStR II, 1980, § 52, S. 1365. Ähnlich auch BVerfGE Bd. 159, 223 Rn. 171 m. w. N. (allerdings im Zshg. mit gesetzlichen und nicht behördlichen Maßnahmen).

[328] Vgl. dazu statt vieler *Stern*, HStR II, 1980, § 52, S. 1348, 1365 u. a.

[329] Die Anwendung des Verhältnismäßigkeitsgrundsatzes im Recht des Staatsnotstands ist unbestritten, so ausdrücklich *Stern*, HStR II, 1980, § 52, S. 1348 m. w. N.

[330] Zu den Elementen des (deutschen) Verhältnismäßigkeitsgrundsatzes s. statt vieler etwa Huber/Voßkuhle/*Sommermann*, 8. Aufl. 2024, GG Art. 20 Rn. 314 oder auch Sachs/*Sachs/von Coelln*, 10. Aufl. 2024, GG Art. 20 Rn. 149.

[331] Dazu statt vieler Sachs/*Sachs/von Coelln*, 10. Aufl. 2024, GG Art. 20 Rn. 149.

Staatsnotstand, insbesondere bei der Grundrechtesicherung (→ *Abschnitt 2, 5. b. aa.*) ist allerdings, genauso wie auf die teilweise vertretene, eingeschränkte Kontrolldichte (→ *Abschnitt 4, 3.*), bereits an vorangegangener Stelle hingewiesen worden.

Unterschiede zwischen dem Grundsatz der Verhältnismäßigkeit nach dem deutschen Recht und dem Grundsatz der Verhältnismäßigkeit nach dem Unionsrecht bestehen in dogmatischer Hinsicht vor allem darin, dass sich der EuGH z. T. auf die ersten beiden Prüfungspunkte, das heißt die Geeignetheit und Erforderlichkeit beschränkt.[332] Eine Abwägung zwischen den widerstreitenden Interessen, die in der deutschen Dogmatik grundsätzlich auf der letzten Ebene der Angemessenheit fällt, wird z. T. gar nicht[333], z. T. nur sehr eingeschränkt[334] vorgenommen. Im Übrigen laufen beide Grundsätze weitestgehend gleich.[335] Dies gilt vor allem auch für die Einschätzungsprärogativen, die dem jeweiligen Hoheitsträger auf allen drei Ebenen, insbesondere bei der Geeignetheit und Erforderlichkeit zugestanden werden.[336]

Abschnitt 5: Umsetzung des EU-Notfallrechts in den Mitgliedstaaten

Question 1

Es sind keine besonderen Grundsätze des deutschen Rechts bei der Umsetzung von EU-Maßnahmen zur Regelung von Krisensituationen bekannt. An dieser Stelle sei daher erneut an die allgemeinen Grundsätze verwiesen: Zum einen spielt die Europarechtsfreundlichkeit des Grundgesetzes eine Rolle (siehe → *Abschnitt 2, 4.*), zum anderen sei auch auf den Kooperationsgedanken verwiesen. Zudem gelten für mitgliedstaatliche Umsetzungsmaßnahmen die gleichen Grundsätze, wie für nationale Maßnahmen, insbesondere müssen sie den Grundsatz der Recht- und Gesetzmäßigkeit wahren und verhältnismäßig sein.

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[332] Das gilt v. a. mit Blick auf früh(er)e Urteile des EuGH, s. dazu *Koch*, Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, 2003, S. 221 f. Vgl. dazu auch *Kischel*, EuR 2000, 380 (401), der schon von einer dreistufigen Grundstruktur, wie im deutschen Recht, ausgeht.

[333] Vgl. auch dazu *Koch*, Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, 2003, S. 222 f.

[334] Vgl. auch dazu *Koch*, Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, 2003, S. 223 ff.

[335] Ein „erstaunliches Maß an Übereinstimmung zwischen den beiden Rechtsordnungen" will auch *Kischel,* EuR 2000, 380 (230) erkennen, auch wenn „Dogmatik und Prüfungsdichte des Verhältnismäßigkeitsprinzips im deutschen und im Gemeinschaftsrecht nicht immer identisch [sind]".

[336] Für den deutschen Grundsatz s. *Koch*, Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, 2003, S. 60 f. Für den unionsrechtlichen Grundsatz s. ebenfalls *Koch*, Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, 2003, nunmehr S. 205 f., 217. Vgl. im Übrigen dazu auch *Kischel*, EuR 2000, 380 (401 f.).

Question 2

Die Umsetzung von EU-Sofortmaßnahmen betrifft grundsätzlich die Ministerialebene, welche in der Öffentlichkeit nicht immer wahrnehmbar ist. Mit Blick auf die Notfallklausel des Art. 78 Abs. 3 AEUV ist bekannt, dass im Rahmen des EU-Umsiedlungsprogramms[337] des Rats zur Entlastung Griechenlands und Italiens bei der Aufnahme von Schutzsuchenden anstelle der ursprünglich erhofften 160.000 Personen insgesamt nur 34.700 Personen in andere Länder umgesiedelt werden konnten. Auch die Bundesrepublik blieb weit hinter den zugesagten Zahlen zurück.[338] Dieses Ergebnis ist jedoch nicht auf die Rechtslage zurückzuführen; vielmehr lag es am mangelnden politischen Willen und anderen faktischen Herausforderungen bei der Umsetzung.

[337] Siehe Beschluss (EU) 2015/1523 vom 15. September 2015, ABl. 2015 Nr. L 239/146 und Beschluss (EU) 2015/1601 vom 22. September 2015, ABl. 2015 Nr. L 248/80, geändert durch Beschluss (EU) vom 29. September 2016, ABl. 2016 L 268/82.

[338] Calliess/Ruffert/*Rossi*, 6. Aufl. 2022, AEUV Art. 78 Rn. 36.

Greece

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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

Emergency, crisis and necessity: notions and concepts in the Greek legal order

The concepts of crisis, necessity and urgency constitute the subject of specific rules of the Constitution and the respective legislation. Thus, they form a matrix of the "law of necessity" applicable to a certain range of exceptional circumstances. Beyond these constitutional and legislative provisions, which have limited application, the concept of necessity/urgency is introduced into positive law through case law and, last but not least, judicial review of constitutionality and legality.

In contemporary constitutional theory, necessity is given two major significations: the "naturalistic" and the "positivist" one. The first can be reduced to the idea that "necessity has no law" – meaning that necessity is mainly, if not exclusively, a political issue – and the second underlines that necessity is an(other) object of specific legal rules, defined, interpreted and applied by legal organs. According to this positivist definition, necessity remains – or must remain – an exception, strictly organized and contained in legal terms. Besides these two dominant perceptions, which have also significant variations, necessity is also considered as a "standard," a legal concept that co-determines the meaning of legal rules.[1]

In this framework, especially in times of crisis, the interpretation of emergency and necessity, through the judicial review and the application of the proportionality principle, is the key for adjusting the law to reality. Thus, besides the specific constitutional and legislative provisions, which have limited application, there is no clear legal distinction between emergency and necessity. Both

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[1] George Karavokyris, "Constitution and Necessity in Times of Crisis: An Alternative Way of Understanding the Complicated Relation between Law and Politics," *European Politeia*, 2, 2015, p. 352. For the notion of standards see: Shirley Leturcq, "Standards et droits fondamentaux devant le Conseil constitutionnel français et la Cour européenne des droits de l'homme," L.G.D.J., 2005; Stéphane Rials, "Le juge administratif français et la technique juridique du standard," L.G.D.J, 1980.

terms refer to the urgent response of the legislator or the administration to an uneven and unpredicted situation. In addition, the very notion of "crisis" is not in fact a legal or a constitutional one, giving meaning to events (for instance, the financial crisis of the previous decade or the pandemic) which are not of legal nature per se but, on the other hand, require significant legal measures, notably the restriction of civil liberties and rights.[2]

Moreover, constitutional theory is not unanimous regarding the issue of introducing strict necessity clauses into the Constitution. On the one hand, constitutional and legislative normality seems sufficient to respond to all forms of crisis or necessity. Furthermore, historical experience demonstrates the eventual instrumentalization of these provisions on the benefit of authoritarian regimes. On the other hand, most of the constitutions adopt explicitly emergency clauses so as to avoid leaving the margin to political power when the democratic order is at stake. The protection and the very existence of the State is dictated by the rule of law and the "raison d'Etat" principle.[3] Giving a specific constitutional form to the "emergency law" and making it part of the legal order becomes finally a major guarantee for political and individual freedom.[4]

Thus, necessity or urgency can be classified into two constitutional categories: the specific constitutional and legislative provisions which address directly extreme situations and the ordinary interpretation of restrictions on constitutional rights, during these extraordinary situations, through the application of the proportionality principle and the general interest rule (judicial review).

Question 2

Constitutional and legislative framework

The constitutional framework for the state of emergency is Article 48 ("state of siege") of the Greek Constitution. This provision applies to threats on national sovereignty and security from external or "internal" enemies of the State. Under these exceptional conditions, the State authorities are entitled to suspend, according to precise procedural and substantial terms, civil rights and liberties (such as freedom of association, the freedom of the press and habeas corpus). Put simply, Article 48 is our last resort when security of the State and the normative force of the Constitution are frontally contested and practically compromised.[5]

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[2] Karavokyris, op.cit., pp. 361–363.

[3] George Karavokyris, "The Constitution and the crisis," *Kritiki*, 2014, p. 197 (in Greek).

[4] For more details see: Konstantinos Remelis, "The constitutional 'law of necessity' and the review of constitutionality," https://www.constitutionalism.gr/i-syntagmatiki-rithmisi-tou-dikaioutis-anagis/ and the respective citations (5–11) (in Greek).

[5] According to Article 48 of the Greek Constitution, "1. In case of war or mobilization owing to external dangers or an imminent threat against national security, as well as in case of an armed

Nevertheless, given the fact that Article 48 is mostly outdated in our democratic times and regimes, the most important and frequently applied provision of "emergency law," is Article 44, para. 1 of the Constitution. The latter is appropriate for facing natural disasters or social and economic disruptions and unexpected events, such as the recent COVID-19 pandemic. The executive power adopts the "Acts of Legislative Content," which can be described as decrees legally equivalent to the Parliament's law. Article 44 (1) provides the executive with flexibility and efficiency, if prudentially applied.[6] A. Kouroutakis underlines that "from environmental crisis to natural disasters and recently on economic emergencies Acts of legislative content have proven to be a useful and chameleon tool on a variety of topics. Therefore, Article 44 of the Greek Constitution is a one size fit all provision that can accommodate

coup aiming to overthrow the democratic regime, the Parliament, issuing a resolution upon a proposal of the Cabinet, puts into effect throughout the State, or in parts thereof, the statute on the state of siege, establishes extraordinary courts and suspends the force of the provisions of articles 5 paragraph 4, 6, 8, 9, 11, 12 paragraphs 1 to 4 included, 14, 19, 22 paragraph 3, 23, 96 paragraph 4, and 97, in whole or in part. The President of the Republic publishes the resolution of Parliament. The resolution of Parliament determines the duration of the effect of the imposed measures, which cannot exceed fifteen days. 2. If the Parliament is absent or if it is objectively impossible that it be convoked in time, the measures mentioned in the preceding paragraph are taken by presidential decree issued on the proposal of the Cabinet. The Cabinet shall submit the decree to Parliament for approval as soon as its convocation is rendered possible, even when its term has ended or it has been dissolved, and in any case no later than fifteen days. 3. The duration of the measures mentioned in the preceding paragraphs may be extended every fifteen days, only upon resolution passed by the Parliament which must be convoked regardless of whether its term has ended or whether it has been dissolved. 4. The measures specified in the preceding paragraphs are lifted ipso jure with the expiration of the time-limits specified in paragraphs 1, 2, and 3, provided that they are not extended by a resolution of Parliament, and in any case with the termination of war if this was the reason of their imposition. 5. From the time that the measures referred to in the previous paragraphs come into effect, the President of the Republic may, following a proposal of the Cabinet, issue acts of legislative content to meet emergencies, or to restore as soon as possible the functioning of the constitutional institutions. Those acts shall be submitted to Parliament for ratification within fifteen days of their issuance or of the convocation of Parliament in session. Should they not be submitted to Parliament within the abovementioned timelimit, or not be approved by it within fifteen days of their submission, they cease henceforth to be in force. The statute on the state of siege may not be amended during its enforcement. 6. The resolutions of Parliament referred to in paragraphs 2 and 3 shall be adopted by a majority of the total number of members, and the resolution mentioned in paragraph 1 by a three-fifths majority of the total number of members. Parliament must decide these matters in only one sitting. 7. Throughout the duration of the application of the measures of the state of emergency taken in accordance with the present article, the provisions of articles 61 and 62 of the Constitution shall apply ipso jure regardless of whether Parliament has been dissolved or its term has ended."

[6] The Article 44, para. 1 of the Constitution stipulates that: "1. Under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, as specified in the provisions of article 72 paragraph 1, within forty days of their issuance or within forty days from the convocation of a parliamentary session. Should such acts not be submitted to Parliament within the above time-limits or if they should not be ratified by Parliament within three months of their submission, they will henceforth cease to be in force." See also: Georgios Karavokyris, "Constitutionalism and COVID-19 in Greece: The Normality of Emergency," https://verfassungsblog.de/constitutionalism-and-covid-19-in-greece-the-normality-of-emergency/

different nature of emergencies."[7] Hence, Article 44, paras. 1 and 48 of the Constitution establish the general part of the constitutional law of "necessity." Furthermore, Article 22, para. 4 of the Greek Constitution provides the prohibition of any form of compulsory work and the requisition of personal services. Special laws shall determine the requisition of personal services in case of war or mobilization or to face defense needs of the country or urgent social emergencies resulting from disasters or liable to endanger public health, as well as the contribution of personal work to local government agencies to satisfy local needs.[8] Moreover, Article 18, para. 3 of the Greek Constitution, regarding the right of property provides the limitation of the rights in cases of emergency.[9] In other words, the Greek Constitution contains both "generic" and "specific" cases of emergency.[10]

On a legislative level, law 5075/2023 ("Restructuring of Civil Protection – National Air Rescue and Air Ambulance Mechanism and other urgent provisions for state aid") has substantially amended law 4662/2020 ("National Mechanism for Crisis Management and Risk Management, restructuring of the General Secretariat for Civil Protection, upgrading of the civil protection volunteer system, reorganization of the Fire Service and other provisions") concerning the prevention, response and relief efforts in case of natural, technological and other disasters and the establishment of the General Secretariat for Civil Protection. The legislative framework provides the National Mechanism for Crisis Management and Risk Management, the restructuring of the General Secretariat for Civil Protection, the upgrading of the civil protection volunteer system and the reorganization of the Fire Service, among other provisions.

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[7] See: the study of Antonios E. Kouroutakis, "The Architecture of the Emergency Framework of Greece: Inactivity and Second Generation Emergencies" (February 12, 2019). Available at SSRN: https://ssrn.com/abstract=3333118 or http://dx.doi.org/10.2139/ssrn.3333118

[8] According to Article 22, para. 4 of the Constitution, "4. Any form of compulsory work is prohibited. Special laws shall determine the requisition of personal services in case of war or mobilization or to face defense needs of the country or urgent social emergencies resulting from disasters or liable to endanger public health, as well as the contribution of personal work to local government agencies to satisfy local needs."

[9] "Requisitions of property for the needs of the armed forces in case of war or mobilization, or for the purpose of facing an immediate social emergency that may endanger public order or health, shall be regulated by special laws."

[10] According to A. Kouroutakis, the provisions of the Greek Constitution "cover a wide range of emergency situations, provide distinct emergency response frameworks, and bestow a wide range of executive powers upon policymakers so they may respond accordingly. The emergency constitutional provisions also use vague terms, such as "public order," "national security," "extraordinary circumstances of an urgent and unforeseeable need," "disasters," thereby giving policymakers further discretion and flexibility to act." See: Antonios Kouroutakis, "The Emergency Constitution of Greece: Ideal on Paper, Inefficient in Reality," *Int'l J. Const. L.* Blog, Mar. 30, 2016, http://www.iconnectblog.com/2016/03/the-emergency-constitution-of-greece-ideal-on-paper-inefficient-in-reality. See also: the report for the Greek legal order on "Law and Emergencies: A Comparative Overview The Minerva Center for the Rule of Law under Extreme Conditions," https://minervaextremelaw.haifa.ac.il/images/Emergency_Laws_and_Regulations-_in_Greece-_19-_Jan2016.pdf

More specifically, the legislator proceeds to a detailed definition and classification of "risks" and establishes a new Committee for Risk Assessment of the occurrence of weather phenomena and all types of civil protection risks at the Ministry of Climate Crisis and Civil Protection.[11] Furthermore, a national air ambulance mechanism shall be established for air ambulance services for cases of critically ill, injured and, generally, persons requiring immediate assistance and urgent medical care from or to the appropriate health care formation, using public and private means. In addition, law 5075/2023 updates civil protection guidelines and planning through the European emergency call number "112"[12] and provides preventive measures for curfews.[13] The law also stipulates the partial suspension of the obligation to work, the suspension of schools, so that no announcements are made through televisions, radios. Finally, it includes the possibility of suspension of outdoor events to be held by a special scientific Committee for Risk Assessment for extreme weather events.[14]

According to the exact provisions of law 4662/2020 "The National Mechanism has as priorities, on the one hand, the prevention, preparedness and protection of life, health and property of citizens, the environment, cultural heritage, infrastructure, natural resources, vital services, tangible and intangible assets from natural and technological disasters and other threats of related origin that cause or may cause emergencies in peacetime and, on the other hand, risk reduction and the response, rehabilitation and minimization of natural

[11] Article 7 of law 5075/2023: "1. A Committee for Risk Assessment of Weather Events and All Types of Civil Protection Risks shall be established at the Ministry of Climate Crisis and Civil Protection. The task of the Committee shall be: (a) the continuous monitoring of all dangerous natural phenomena that may constitute a civil protection risk, (b) forecasting their possible consequences for infrastructure, safety, security, health and life of citizens, (c) giving an opinion on the appropriate State Mechanism's State of Preparedness Status in case of any weather event with potentially significant impacts on infrastructure and citizens' safety and security, (d) assisting the work of the National Civil Protection Mechanism by providing an opinion on the adoption of preventive measures to protect the property, safety and health of citizens, (e) reassessing the duration of preventive measures taken to protect the life, health and safety of citizens during the development of the phenomenon; and (f) providing an opinion on any matter related to the above, following a request from the Secretary General of Civil Protection or the Minister of Climate Crisis and Civil Protection.

[12] Article 39 of law 5075/2023.

[13] Article 26 of law 5075/2023.

[14] Article 28 of law 5075/2023, "Preventive measures in the stage of the Special Civil Protection Mobilisation Phase 1. In the special civil protection mobilisation situation, preventive measures of a preventive nature may be taken for a limited period of time, corresponding to those of declaring an area a civil protection emergency. 2. By joint decision of the Ministers of Climate Crisis and Civil Protection, National Economy and Finance and the Ministers in charge, upon request of the relevant regional governor or mayor and after the opinion of the Risk Assessment Committee, in case the conditions of paragraph d' of Article 6 are met, the following preventive measures may be taken within the boundaries of the affected municipality or the affected region: (a) restriction of traffic, (b) temporary suspension of the operation of businesses, (c) temporary suspension of the operation of schools, educational establishments, private educational establishments and educational institutions of all kinds, (d) temporary suspension of public events, open-air public gatherings, musical events, theatrical performances, concerts and public presentations, (e) temporary suspension of sporting events." See, for a description of the main changes introduced by the law 5075/2023: https://www.e-nomothesia.gr/law-news/demosieutheke-nomos-5075-2023.html

disasters in peacetime" (Article 2 of law 4662/2020). The legislator sets also the institutional framework for the organization and hierarchy of structures and infrastructures. The mechanism is supervised by the Secretary General for Civil Protection, appointed by the Government.[15] The four-tier system of prevention, preparedness, response and recovery is the operational basis of the National Mechanism.[16] According to Article 23 of law 5075/2023 amending Article 25 of law 4662/2020, "1. A civil protection emergency is an urgent and critical situation of a temporary nature which: (a) poses a serious threat to the life, health or safety of citizens; and (b) is of exceptional proportion, nature or extent. 2. The emergency situation is distinguished according to the extent of its consequences and the need for intervention by state agencies to remedy its consequences into: (a) a local emergency, the extent of the consequences of which does not exceed the administrative boundaries of a municipality and is not critical for the national infrastructure, (b) a regional, inter-regional or national emergency, the extent of the consequences of which exceeds the administrative boundaries of a municipality, is regional or inter-regional in scale and is critical by its nature for the national infrastructure."

Question 3

The range of the "emergency law" is not limited only to the protection of the State and national security from dangers and threats regarding the democratic and constitutional order. Our current "societies of risk," as sociologists define them,[17] are often endangered by extreme situations of "political emergency," which require the immediate and efficient response of the State in order to

[15] Article 3 of law 4662/2020 provides that "1. The National Mechanism, which is supervised by the Secretary General of Civil Protection, is structured and operates through the following structures and functions: a. The National Coordination Centre for Crisis Management (NCCC), which is organised and operated by the following functions and functions. b. The Civil Protection Coordination Centre (CPSC). c. The Regional Operational Centers for Civil Protection (RECs). d. The Emergency Management Frameworks (EMFs). The above (b), (c) and (d) operational structures and functions are supported by the support services of the Autonomous Civil Protection Directorates of the Regions and the Autonomous Civil Protection Departments of the Municipalities. 2. The National Mechanism is structured and operates administratively through the following structures: α. The General Secretariat of Civil Protection of the Ministry of Civil Protection, which consists of: aa. the General Directorate of Coordination, bb. the Independent Directorate of Administration and Support, cc. the Independent Directorate of Volunteerism and Training and dd. the Independent Directorate of Information Technology and Technical Support. β. The Civil Protection ESDP Staff Structure. c. The Operational Fund for Risk Prevention and Response (OPRF). δ. The National School of Crisis Management and Risk Response. ε. The Centre for Crisis Management Studies (KE.ME.DI.K.). f. The Permanent Scientific Council for Civil Protection. ζ. The European Forest Fire Centre. η. The Directorate-General for Financial Services (DG Fiscal Services).

[16] Article 4 of law 4662/2020 as amended by Article 3 of law 5075/2023.

[17] See: Ulrich Beck, "Risk Society: Towards a New Modernity," SAGE Publications Ltd; 1st edition (September 3, 1992).

preserve a constitutional and social "normality." For this purpose (i.e., for dealing with the economic crisis or the pandemic or the refugee crisis), the application of a "state of siege" (Article 48) is not the proper institutional tool of the "emergency" law, taking into account the nature of the risk and the extreme limitations – normatively and practically the suspension – of constitutional rights.[18] In fact, there is a constitutional distinction into three types of emergencies: "external emergencies that threat the nation and the statehood, internal emergencies that threat the national security and the Republic, and social emergencies that threat the public order and wellbeing of the people."[19]

Question 4

Article 48 of the Constitution sets the procedural conditions for the application of the "state of siege": the declaration belongs to the Parliament upon a proposal of the Government. In case of absence of the Parliament or impossibility to be convoked, the competence is transferred to the President of the Republic and a decree is issued following again the proposal of the Cabinet of Ministers. The Cabinet shall submit the decree to Parliament for approval as soon as its convocation is possible, even when its term has ended or it has been dissolved, and in any case no later than fifteen days. The duration of the measures may be extended every fifteen days, only upon resolution of the Parliament, which must be convoked regardless of whether its term has ended or whether it has been dissolved. Moreover, the role of the President of the Republique is restricted to examine whether these procedural conditions of this Article are fulfilled, without extending the review to the substantial content of the decision.[20]

Furthermore, it should be underlined that Article 48 has never been put into force after the fall of the dictatorship of the colonels, the transition to democracy and the Constitution of 1975. Therefore, it seems like a rather outdated, not to say a marginal (in practice) constitutional provision, especially when dealing with the major and consecutive crises of our era, like the economic crisis, the refugee crisis, the pandemic and climate change.

On the other hand, Article 44, para. 1 regarding the Acts of Legislative Content recognize the competence of the executive power (the President of the Republic and the Government) to bypass, initially, the Parliament and proceed to a so-called fast-track legislation. However, these acts must be submitted to Parliament for ratification within forty days or within forty days of the convening of a session of Parliament. If they are not submitted to Parliament within

[18] Remelis, op. cit.
[19] Kouroutakis, op. cit.
[20] Kouroutakis, op. cit., Remelis, op. cit.

these periods or if they are not approved by Parliament within three months of their submission, they lose their normative force from now on. Contrary to Article 48, Article 44, para. 1 of the Constitution has frequently been applied during the recent crises, notably in the case of the financial crisis. The extensive use of the Acts of legislative content has been criticized, during this extremely controversial period, as a degradation of the quality of law-making and democracy. However, it has been also qualified as an imperial necessity for restoring the country's financial stability in extreme political, social and economic conditions and moreover for facing unexcepted dangers such as the recent COVID-19 pandemic.[21]

Furthermore, on the legislative ground, law 5075/2023 (Article 5) provides that the Secretary General for Civil Protection decides the declaration of the Red Code "immediately after the occurrence of a disaster or in case of a serious likelihood of a disaster or threat of any kind and maintained throughout the duration of the event and its consequences. The National Mechanism shall be fully mobilised, activating and deploying the necessary human resources and the corresponding needs, materials and means, and launching rapid recovery, relief and support actions to mitigate the effects of a disaster. At this stage, the Secretary General for Civil Protection may declare a Special Civil Protection Mobilisation in order to activate additional resources to address the imminent risk of any third party public or private entity."

The law provides for three distinct states of emergency: the national level, the regional or inter-regional level and the local level – according to (Article 25 of law 5075/2023): "If the state of emergency occurs at regional or inter-regional level, its declaration is carried out by decision of the Minister of Climate Crisis and Civil Protection, following a specially reasoned recommendation of the Secretary General of Civil Protection, on the adoption of specific temporary measures to address it and the immediate removal of its consequences. If the state of emergency is manifested at national level or has particularly severe consequences that require immediate measures of a nationwide nature, it shall be declared by an Act of the Council of Ministers following a specially reasoned recommendation of the Minister of Climate Crisis and Civil Protection."

Regarding the duration of the emergency situation the law stipulates that "[t]he declaration of a state of emergency lasts for thirty (30) days, unless it is revoked due to the removal of its effects or extended" and "[b]efore the state of emergency expires, the competent body under para. 1 after following the same procedure may decide to continue it, for a period not exceeding thirty (30) days at a time, if the state of emergency continues to exist or its effects continue to expand."

[21] See: George Karavokyris "The Constitution and the crisis" (in Greek), *Kritiki*, 2014, pp. 153–163 and George Karavokyris, "Constitutionalism and COVID-19 in Greece: The Normality of Emergency," op. cit.

On the other hand (Article 24 of law 5075/2023): "If the emergency is of local scope, it is declared by decision of the Secretary General of Civil Protection, upon request of the competent Mayor." In this case, "the declaration of a state of emergency is automatically lifted after thirty (30) days, and may be extended for a period not exceeding thirty (30) days at a time, at the request of the competent Mayor and confirmation by the competent decentralized civil protection bodies that the reasons for the declaration still exist. The extension decision shall include specific reasons as to why the effects of the disasters have not yet been dealt with."

Question 5

Not directly or at the regulatory level. During the recent crises, such as the financial crisis and the pandemic, the measures undertaken by the Greek authorities were designed and implemented within the national legal order and without explicit reference to EU law.

Question 6

In view of the refugee crisis of 2015, Greece has activated the EU Civil Protection Mechanism. This voluntary aid has been a competence of the European Commission's Emergency Response Coordination Centre (ERCC) in close cooperation with the Greek authorities and the other participating states in the Mechanism.[22] Greece has also triggered the EU Civil Protection mechanism in the case of facing natural disasters, such as the recent wildfires (most recently August and October 2024).[23]

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

Article 48 of the Constitution depicts broadly the Greek constitutional tradition, despite the negative historical (anti-democratic) connotations of the "state of siege." In this framework, not only the constitutional text maintained the outdated term "state of siege," but essentially repeated the Article 91 of the 1952 Constitution. After the constitutional amendment of 1986, Article 48

[22] For this information see: https://ec.europa.eu/commission/presscorner/detail/it/ip_15_6249

[23] See: https://www.euronews.com/my-europe/2024/08/12/eu-activates-civil-protection-mechanism-to-help-greece-battle-wildfires

recognized the competence of the Parliament and the Government and abolished (para. 5) the President's power to take all necessary legislative or administrative measures. More precisely, the constituents replaced it with the competence of the President of the Republic to issue, after the proposal from the Government, "acts of a legislative nature to deal with urgent needs or to restore more rapidly the functioning of the constitutional institutions."[24] This provision aligned in fact with Article 44 para. 1 which has been introduced for the first time in the Constitution of 1975 and has played a significant role in the emergency law-making, especially during the recent crises (financial crisis, pandemic).[25]

Question 2

The role of the Parliament and the Government in the declaration of the state of siege (Article 48) has been presented above. The same applies for the restricted, under the 1975 Constitution, competence of the President of the Republic to issue, on a proposal of the Government, "legislative acts to deal with urgent needs or to restore the functioning of the constitutional institutions more rapidly." The legal declaration of the state of siege is exempted from the judicial review, as it constitutes an act of administration of political power and therefore falls within the political responsibility of State authorities.[26] The case-law provides the same exemption regarding the review of the "urgent and unforeseeable need" of the Article 44 para. 1 of the Constitution, which is estimated and decided sovereignly by the Cabinet. The President of the Republic cannot legally verify the existence of the substantive conditions, that is, the necessity, for the adoption of legislative acts. He has a binding, not a discretionary power, according to constitutional theory and practice. On the other hand, as K. Remelis defends, there seems to be a consensus regarding the judicial review of constitutionality on the substantial content – and not the existence of the necessity per se – of the measures adopted by the legislative acts of Article 44, para. 1 S. In other words, the legislative acts and the measures implementing them should not evade the constitutionality check and their conformity, especially when restricting rights, with the Constitution and principles such as the general interest and the proportionality principle.[27]

[24] Remelis, op. cit., Kouroutakis, op. cit.

[25] From a critical point of view, see: Dimitrios Kivotidis, "The Form and Content of the Greek Crisis Legislation," *Law Critique* (2018), 29: 57–81, https://doi.org/10.1007/s10978-017-9217-4

[26] Kouroutakis, op. cit.

[27] Remelis, op. cit.

Question 3

For the role of the regional/local authorities in situations of emergencies see law 4662/2020 and 5075/2023, as presented above.

Question 4

There is no specific constitutional provision for this possibility.

Question 5

The protection of fundamental rights has no special status in relation to the application of the law of necessity. Restrictions of constitutional rights are subject to the limitations of their limitations (counter-limitations), the most important of which are the general interest and the principle of proportionality (Article 25, para. 1 of the Constitution). In this sense, the case-law of the courts reviewing the constitutionality and proportionality of the restrictions on rights remains always extremely significant for the protection of rights.

Question 6

There is no specific precedent.

Section 3: Statutory/executive emergency law in the Member States

Question 1

In the field of civil protection (see above: the provisions of law 4662/2020 and 5075/2023).

Question 2

The legislative regime of necessity, in this case the legislative acts, is subject to the relevant constitutional provisions of Article 44, para. 1 S. The same applies to the acts provided for in Article 48 of the Constitution.

Question 3

These are the constitutional limits provided for in Articles 48, 44(1) of the Constitution, as well as in Article 25(1) of the Constitution (see above) and the specific restrictions on each constitutional right.

Question 4

In dealing with crises at national level, there has been no application of the exception clauses of either European Union law or the ECHR.

Section 4: Judicial review of emergency powers in the Member States

Question 1

The implementing measures (laws, administrative acts) of the law of necessity fall under the jurisdiction of the administrative courts and the Council of State (judicial review of constitutionality and legality).

Question 2

The most important restriction of the courts concerns the control of the legislative acts of Article 44, para. 1 of the Constitution. This is because, as far as their legality and constitutionality are concerned, judicial control does not include the substantive assessment of the actual existence of the necessity for the adoption of the act.

Question 3

In the context of reviewing the legality and constitutionality of the measures on the field of constitutional rights, the courts focus in particular on respect for the general interest and the principle of proportionality, in accordance with Article 25(1) of the Constitution. The exceptional nature of the measures does not change the nature of judicial review, but in particular the intensity, as in these cases the judge seems to demonstrate judicial self-limitation. The judicial power does not, therefore, seek to substitute the legislature in substantive considerations in the management of these situations and, respecting the principle

of separation of powers, exercises marginal review.[28] This has been mostly the case both during the economic crisis and during the pandemic.

Question 4

The principle of proportionality is extremely crucial, as a counter-limitation, for the protection of rights, both in normalcy and in crisis situations. The courts examine appropriateness, necessity and stricto sensu proportionality, with no differences in relation to proportionality in EU law. In times of crisis, the interpretation of necessity, through the proportionality test, is the key in adjusting the law to the facts of the crisis. In other words, the judicial interpretation of necessity and proportionality in fact "creates" the legal rule and measures the divergence or the concordance of the legislation with the rational and reasonable common sense. Consequently, it allows the judge and particularly the Supreme Courts to address and estimate the impact of politics or economy on the content of the legal rule. In the Greek paradigm, the austerity measures, the cuts on wages and pensions, the majority of the rules of the memoranda were qualified as necessary, so that the country could escape from bankruptcy and restore its financial stability.[29] In accordance with the principle of proportionality, the pandemic measures, in particular a series of horizontal restrictions on freedom of assembly and freedom of religion, free development of personality and self-determination of the body (compulsory vaccination), etc. case law has consistently stressed the importance of scientific justification of the measures, that is, the justification of the technical judgment of the administration and the legislature, as well as the limits to the exercise of judicial review and the principle of proportionality.[30] Put simply, the application of the proportionality principle in the field of emergency law, directly or indirectly, "represents a good balance between two opposing claims: the sufficient protection of fundamental rights during crises on the one hand, and the ability of authorities responsible for averting the crisis to take effective decisions on the other."[31]

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[28] See: George Karavokyris, "The role of judges and legislators in the Greek financial crisis: A matter of competence," in: L. Papadopoulou, I. Pernice, and J. H. H. Weiler (eds.), *Legitimacy issues of the European Union. Lessons from the financial crisis. Dimitris Tsatsos in memoriam*, NOMOS-HART, 2017, pp. 149–169.

[29] See: Karavokyris, "The Constitution and the crisis," op. cit, pp. 153–165 (in Greek).

[30] See: Karavokyris, "Constitutionalism and COVID-19 in Greece: The Normality of Emergency," op. cit.

[31] Pavel Ondřejek, Filip Horák, "Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures," *European Constitutional Law Review*, 2024, 20(1), https://doi.org/10.1017/S1574019624000051, p. 4

Section 5: Implementation of EU emergency law in the Member States

Question 1

Article 28 of the Greek Constitution provides for the procedure for the reception of EU law into the Greek legal order, regardless of whether it is rules implementing the law of necessity or other rules.[32]

Question 2

There are no such legal data available.

[32] According to Article 28 of the Constitution, "1. The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity. 2. Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement. 3. Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity. ** Interpretative clause: Article 28 constitutes the foundation for the participation of the Country in the European integration process."

Hungary

*Lóránt Csink**
*Álmos Ungvári***

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

The law of Hungary distinguishes between situations of "emergency," "crisis" and/or "necessity." The Fundamental Law of Hungary (adopted in 2011 and entered into force on 1 January 2012, hereinafter: FL) stipulates the term "special legal order" as a comprehensive term embracing three different emergency situations. Under Article 48 of the FL, special legal order shall include state of war, state of emergency and state of danger. The three types of special legal order can be distinguished mainly on the basis of the triggering events and circumstances. They also differ in that which organ is entitled to declare each categories of special legal order. In addition, there is difference between state of war and the other two types of special legal order related the time limit. While the state of emergency and state of danger may be declared for thirty days, the FL does not set a specific time limit for the existence of state of war. Among the common rules it is stipulated that the organ entitled to declare the special legal order shall terminate the special legal order if the conditions for its declaration no longer exist.

In addition, the Hungarian legal system includes several other crisis situations that are not covered by the FL and do not qualify for special legal order, although their main aim is to overcome a certain type of crisis through special provisions.[1] These so-called quasi-special legal order categories are for example: crisis situation caused by mass migration,[2] military crisis situation,[3] state of medical crisis,[4] electricity supply crisis situation,[5] crisis situation in

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[1] Zoltán Nagy and Attila Horváth, "The (Too?) Complex Regulation of Emergency Powers in Hungary," *Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19*, edited by Zoltán Nagy and Attila Horváth. Ferenc Mádl Institute of Comparative Law, Central European Academic Publishing, 2022, p. 161.

[2] Act LXXX of 2007 on Asylum.

[3] Act CXL of 2021 on National Defence and the Hungarian Defence Forces.

[4] Act CLIV of 1997 on Health Care.

[5] Act LXXXVI of 2007 on Electricity.

natural gas supply,[6] crisis situation in the supply of petroleum and petroleum products[7] and coordinated protection action,[8] etc.[9]

Question 2

The FL dedicates a separate chapter (with nine articles) to special legal order that contains all the related regulations. The first article of the chapter enumerates the types of special legal order. For each category, separate articles (Articles 49–51) stipulates the conditions and circumstances of the declaration. Four articles (Articles 52–55) contain common rules for special legal order with regard to the application of the FL, the extent of suspension and restriction of the exercise of fundamental rights, the competence and obligations of the Government and the operation of the Constitutional Court. The last article (Article 56) of the chapter stipulates specific rules applicable to the Parliament (The National Assembly) and the President of the Republic.
Detailed regulations are stipulated in Acts of Parliament, related to the field in question (e.g., National Defense Act, Disaster Management Act, Health Act).

Question 3

The FL sets out in separate articles the triggering events that justify the implementation of each type of special legal order.

State of war may be declared in the event of the declaration of war situation or in the event of danger of war; in the event of external armed attack, an act with an impact equivalent to an external armed attack, or imminent danger thereof; or in the event of the fulfilment of an alliance commitment regarding collective defence.[10]

State of emergency may be declared in the event of an act aimed at overthrowing or subverting the constitutional order or at exclusively acquiring power, or in the event of a serious unlawful act massively endangering life and property.[11] In practice, state of emergency covers a civil war or a coup d'état.

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[6] Act XL of 2008 on Natural Gas Supply.

[7] Act XXIII of 2013 on Emergency Stocks of Imported Petroleum and Petroleum Products.

[8] Act XCIII of 2021 on the Coordination of Defence and Security Activities.

[9] See more: Pál Kádár and István Hoffmann, "A különleges jogrend és a válságkezelés jogi kihívásai: A kvázi különleges jogrendek helye és szerepe a magyar közigazgatásban," *Közjogi Szemle*, vol. 14, no. 3, 2021, pp. 2–7.

[10] Fundamental Law of Hungary, Article 49, para. (1).

[11] Fundamental Law of Hungary, Article 50, para. (1).

State of danger may be declared in the event of an armed conflict, war situation or humanitarian catastrophe in a neighbouring country, or a serious incident endangering life and property, in particular a natural disaster or industrial accident, and in order to eliminate the consequences thereof.[12]

Question 4

State of war and state of emergency may be declared by the Hungarian Parliament with the votes of two-thirds of its Members. Also, the Hungarian Parliament has the competence of extension, if the circumstance serving as grounds for the declaration of the state of emergency continues to exist. Thus regarding these categories qualified parliamentary majority is required for the introduction and the extension. In contrast, state of danger may be declared and extended by the Government. So different bodies are empowered to introduce special legal order, but emergency power is exercised in all cases by the Government. The FL stipulates that during the period of special legal order, the Government may adopt decrees by means of which it may suspend the application of certain acts, derogate from the provisions of acts and take other extraordinary measures. These decrees shall be repealed upon the end of the period of special legal order.[13]

Question 5

EU law had no influence or relevance in defining general or policy specific situations of emergency in the legal order of Hungary.

Question 6

Since the regime change, state of danger was declared in Hungary sixteen times due to floods, inland floods or industrial accidents. The territorial scope of these special legal periods did not cover the whole country, but only a few counties. Moreover, with the exception of the red sludge disaster in Kolontár,[14] the special legal order were not in force for two months. The emergency measures introduced in the framework of state of danger were related to the protection against the risk of floods and internal floods, and were mainly aimed at evacuations, restricting transport

[12] Fundamental Law of Hungary, Article 51, para. (1).

[13] Fundamental Law of Hungary, Article 53, paras. (1); (5).

[14] Because of the industrial accident the Government introduced state of danger by the Government Decree No. 245 of 2010. (X. 6.) on the declaration of a state of danger and the action to be taken in response. This state of danger lasted 267 days.

and freedom of movement, and affected a relatively small number of the population.[15]

More significant, however, are the special legal orders declared in recent years due to the coronavirus pandemic and the war in Ukraine.

In response to the appearance of the coronavirus pandemic in Hungary at the beginning of March 2020, the Government issued a decree declaring a state of danger for the entire territory of the country, in order to prevent the consequences of a human epidemic causing a mass illness endangering the safety of life and property, and to protect the health and life of Hungarian citizens.[16] With the improvement of the situation, at the request of the Hungarian Parliament,[17] the Government abolished the special legal order on 18 June 2020.[18] However, the Government declared a state of medical crisis and epidemiological preparedness,[19] based on the Act CLIV of 1997 on Health, amended by the so-called Transitional Act,[20] as a justification for maintaining several measures and restrictions. After a short period of time, when the health crisis was handled under the ordinary legal system, due to the subsequent waves of the epidemic, the Government declared the state of danger again in early November 2020,[21] and in January 2021.[22] Therefore, the state of danger due to the coronavirus pandemic was in force until 1 July 2022.[23]

As a consequence of the Tenth Amendment to the Fundamental Law, that modified the regulation of state of danger by increasing its triggering events in order to deal with threats and humanitarian crisis posed by the war in Ukraine (see below), the constitutional framework has been provided for the Hungarian Government to introduce a state of danger because of the war situation in Ukraine. The day after the Parliament passed the modification, the special

[15] See more: Attila Horváth, "A különleges jogrend fejlődése Magyarországon a kilencedik Alaptörvény-módosítás tükrében," *A különleges jogrend és nemzeti szabályozási modelljei*, edited by Zoltán Nagy and Attila Horváth. Ferenc Mádl Institute of Comparative Law, 2021, pp. 149–151.

[16] Government Decree No. 40 of 2020. (III. 11.) on the declaration of a state of danger.

[17] Act LVII of 2020 on the Termination of State of Danger.

[18] Government Decree No. 282 of 2020. (IV.17.) on the termination of state of danger declared on 11 March 2020.

[19] Government Decree No. 283 of 2020 (IV.17.) on the introduction of epidemiological preparedness.

[20] Act LXVIII of 2020 on Transitional Rules Related to the Cessation of a State of Danger and Law on Epidemiological Preparedness.

[21] Government Decree No. 478 of 2020. (XI. 3.) on the declaration of a state of danger.

[22] Government Decree No. 27 of 2021. (I. 29.) on the declaration of a state of danger, and on the entering into force of the measures of state of danger.

[23] Government Decree No. 181 of 2022. (V. 24.) on the termination of state of danger declared by Government Decree No. 27 of 2021. (I. 29.) on the declaration of a state of danger, and on the entering into force of the measures of state of danger.

legal order due to the war in Ukraine was declared.[24] Later, since the Ninth Amendment to the Fundamental Law entered into effect, the Government had to issue a new decree[25] to introduce the state of danger again in November 2022. Since then – due to the extensions of the temporal scope[26] – special legal order has been in effect. During this time several emergency government decrees[27] and measures have been taken primarily with regard to the Ukrainian refugees as well as the energy crisis.

Therefore, in Hungary, a special legal regime has been in effect almost continuously since March 2020.

In the above cases, crisis situations were handled by national authorities and national emergency instruments.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

Although the old communist Constitution of 1949 contained some provisions regarding war and other dangers seriously threatening the security of the state as well as the special mandate of the Parliament,[28] there was no constitutional

[24] Government Decree No. 180 of 2022. (V. 24.) on the declaration of a state of danger and certain emergency rules in view of the armed conflict and humanitarian disaster in Ukraine and in order to avert the consequences thereof in Hungary.

[25] Government Decree No. 424 of 2022. (X. 28.) on the declaration of a state of danger and certain emergency rules in view of the armed conflict and humanitarian disaster in Ukraine and in order to avert the consequences thereof in Hungary.

[26] Government Decree No. 479 of 2022. (XI. 28.) on the extension of state of danger declared in view of the armed conflict and humanitarian disaster in Ukraine and in order to avert the consequences thereof in Hungary; Government Decree No. 167 of 2023. (V. 11.) on the amendment of the Government Decree No. 424 of 2022. (X. 28.) on the declaration of a state of danger and certain emergency rules in view of the armed conflict and humanitarian disaster in Ukraine and in order to avert the consequences thereof in Hungary; Government Decree No. 515 of 2023. (XI. 22.) on the amendment of the Government Decree No. 424 of 2022. (X. 28.) on the declaration of a state of danger and certain emergency rules in view of the armed conflict and humanitarian disaster in Ukraine and in order to avert the consequences thereof in Hungary; Government Decree No. 86 of 2024. (IV. 17.) on the amendment of the Government Decree No. 424 of 2022. (X. 28.) on the declaration of a state of danger and certain emergency rules in view of the armed conflict and humanitarian disaster in Ukraine and in order to avert the consequences thereof in Hungary.

[27] This article refers to extraordinary decrees issued by the Government in state of danger as emergency government decrees, in accordance with international legal literature. Although in Hungarian terminology the term "emergency" is related to another type of special legal order, the state of emergency.

[28] See more: Endre Domaniczky, "A különleges jogrend magyar szabályozásának történeti fejlődése (a kezdetektől 2011-ig)," *A különleges jogrend és nemzeti szabályozási modelljei*, edited by Zoltán Nagy and Attila Horváth. Ferenc Mádl Institute of Comparative Law, 2021, pp. 96–107.

regulation on special legal order before the democratic transition. If a country is not under the rule of law, there is no need to regulate extraordinary situations and measures; the state may exercise special power anyway.[29] Therefore, one of the most remarkable changes of the amendment of the Constitution in 1989 and 1990 was the introduction of detailed, albeit dispersed, provisions on the special legal order system.[30] Thus, three categories of special legal order were stipulated: "state of national crisis" in the event of war or danger of war; "state of emergency" in the event of armed actions aimed at overturning constitutional order or at the acquisition of exclusive control of public power; and "state of danger" in the event of natural disasters that endanger the lives and property of citizens. Later, two new categories of special legal order emerged. The "unexpected attack,"[31] as a response to the Balkan war between Serbs and Croatians, which allows the Government to take immediate action in the event of an unexpected incursion of external armed groups into the territory of Hungary. And the "state of preventive defence,"[32] which involves either the danger of external armed attack or the fulfilment of obligations arising from alliance.[33]

The adoption of the FL did not bring significant changes in the content of the legislation of special legal order. The FL introduced the comprehensive term of "special legal order," in addition all the relevant provisions are merged in a specific chapter, separate to the other constitutional provisions. In 2016, the Sixth Amendment to the FL introduced a new type of special legal order: the state of terrorist threat which could be declared in the event of a significant and direct threat of a terrorist attack or in the event of a terrorist attack.

Because of the number of the categories of special legal order and the length of the chapter in the FL, by the end of the 2010s, many scholars found the Hungarian regulation on special legal order rather detailed, extremely complicated and too complex.[34] In addition, the Government's crisis management during the coronavirus pandemic was highly criticized. Namely, the necessity and constitutionality of the introduction of special legal order were queried by several scholars as well as the way and the extent of the restrictions of human rights and freedoms generated public debates.[35] Accordingly, the

[29] Lóránt Csink, "State of Emergency and Human Rights – The Situation of Hungary," *Toruńskie Studia Polsko-Włoskie*, vol. 16, 2020, p. 30, https://doi.org/10.12775/TSP-W.2020.002

[30] Nagy and Horváth, op. cit., p. 149.

[31] Act CVII of 1993 on the Amendment of the Constitution.

[32] Act CIV of 2004 on the Amendment of the Constitution.

[33] Nagy and Horváth op. cit., pp. 149–150; Csink, op. cit., pp. 30–31.

[34] Nagy and Horváth, op. cit., pp. 149–151; Csink, op. cit., p. 30.

[35] See, for example, Tímea Drinóczi, "Hungarian Abuse of Constitutional Emergency Regimes – Also in the Light of the COVID-19 Crisis," *MTA Law Working Papers*, 2020/13, pp. 1–28; Tímea Drinóczi and Agnieszka Bień-Kacała, "COVID-19 in Hungary and Poland: extraordinary situa-

comprehensive reform became necessary. The Ninth Amendment to the FL, which significantly modified the regulation on special legal order, was adopted on 15 December 2020, but these provisions entered into effect later, solely on 1 November 2023. Particularly two remarkable segments of the amendment are worth mentioning. On the one hand, the number of the types of special legal order was reduced to three (state of war, state of emergency, and state of danger). Therefore, all the categories went through minor or major transformation. On the other hand the reform affected the competencies of the Government, as a result of which the Government was empowered to take extraordinary measures and issue decrees during all the cases of special legal order.[36] In addition to the constitutional level of the renewal of the special legal system, the amendment at statutory level – the review of the relevant cardinal acts – was also required. The rules governing the measures taken under the special legal order, the operation of defence and security and defence administration laid down by the Disaster Management Act[37] and the National Defence Act[38] were integrated into a newly adopted law, titled Act XCIII of 2021 on the Coordination of Defence and Security Activities. This act lays down flexible rules to meet the specificities of the challenges of the 21st century, while ensuring a system of guarantees of the rule of law.[39] The separate chapter on special legal order contains provisions with regard to the preparation for special legal order as well as the power of the Government to restrict fundamental rights and take extraordinary measures. Although the comprehensive reform of the Hungarian regulation on special legal order adopted by the Ninth Amendment to the FL has been criticized,[40] it can be stated that the modification simplified the constitutional regulations. The newly created, broadly defined types of special legal order, as well as the wider power of the Government, enable more effective management of new types of crises. The Ninth Amendment with the

tion and illiberal constitutionalism," *The Theory and Practice of Legislation*, vol. 8, no. 1–2, 2020, pp. 171–192; Gábor Halmai and Kim Lane Scheppele, "Don't Be Fooled by Autocrats! Why Hungary's Emergency Violates Rule of Law," *VerfBlog*, 2020, https://verfassungsblog.de/dont-be-fooled-by-autocrats/; Gábor Mészáros, "Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of Covid-19," *MTA Law Working Papers*, 2020/17, pp. 1–19; Gábor Mészáros, "Rethinking the Theory of State of Exception after the Coronavirus Pandemic? – The Case of Hungary," *Regional Law Review: Collection of Papers from the First International Scientific Conference*, edited by Mario Reljanović, University of Belgrade, 2020, pp. 91–100.

[36] With regard to the Ninth Amendment, see, for example, Nagy Horváth, op. cit., pp. 162–164.; Norbert Tribl and Márton Sulyok, "Constitutional Law/Droit constitutionnel 2020 – Hungary/Hongrie," *European Review of Public Law*, vol. 32, no. 4, 2021, pp. 1482–1485.

[37] Act CXXVIII of 2011 on Disaster Management and Amending Certain Related Acts.

[38] Act CXIII of 2011 on National Defence and the Hungarian Defence Forces, and on Measures to be Introduced in the Special Legal Order.

[39] Pál Kádár, "A short overview of the reform of Hungarian defence and security regulations," *Hadtudomány*, vol. 32, no. 1, 2022, pp. 64–65.

[40] See, for example, Gábor Mészáros, "Exceptional Governmental Measures without Constitutional Restraints," 2022, https://helsinki.hu/en/exceptional-governmental-measures-without-constitutional-restraints/, accessed 10 August 2024.

recently passed cardinal acts laid down the foundation of the modern defence and security system.[41]

Although the Ninth Amendment to the FL was adopted in December 2020, the Parliament passed a new amendment in May 2022, even before the comprehensive reform of special legal order entered into force. The Tenth Amendment to the FL modified the regulation of state of danger in order to deal with threats and humanitarian crisis posed by the war in Ukraine. The modification increased the number of the events on the basis of which state of danger can be introduced. According to the new determination, the Government may also declare state of danger in the event of an armed conflict, war situation or humanitarian catastrophe in a neighbouring country.[42] Thus, the Tenth Amendment to the FL allowed the Hungarian Government to introduce a state of danger because of the war situation in Ukraine.

Question 2

As it was mentioned above, with regard to the declaration and extension of special legal order, the Parliament and the Government has competences. The former may declare state of war and state of emergency, the latter may introduce state of danger. In the case of the Parliament is prevented from making such decisions, the President of the Republic shall have the right to declare state of war, to declare and extend state of emergency, and to authorise the Government to extend state of danger. Under the FL the Speaker of the Hungarian Parliament, the President of the Constitutional Court and the Prime Minister, speaking with one voice, shall establish that the National Assembly is prevented from acting if it is not in session and convening it is made impossible by insurmountable obstacles caused by shortage of time and the circumstance serving as grounds for the declaration of special legal order.[43]

During special legal order the Government is empowered to adopt decrees and take extraordinary measures. Moreover, the FL also stipulates that during a state of war, the Government shall exercise the powers delegated to it by the National Assembly, and shall decide on the deployment of the Hungarian Defence Forces abroad or within Hungary, their participation in peacekeeping, their humanitarian activity in a foreign operational area, and stationing them

[41] Kádár, op. cit., p. 72.

[42] Regarding the Tenth Amendment to the FL see, for example, Álmos Ungvári, "State of Danger in Hungary after the Tenth Amendment to the Fundamental Law. A comparative perspective," *Law in Times of Crisis – Jog válság idején*, edited by Gyula Bándi and Anett Pogácsás, Pázmány Press, 2023, pp. 87–89; Álmos Ungvári, "A különleges jogrendi szabályozás átalakítása: Az Alaptörvény kilencedik és tizedik módosítása," *Alkotmánybírósági Szemle*, vol. 13, no. 1, 2022, pp. 33–34.

[43] Fundamental Law of Hungary, Article 56, paras. (1)–(2).

abroad, as well as on the deployment of foreign armed forces in Hungary or departing from the territory of Hungary and stationing them in Hungary.[44] Thus during all the types of special legal order the extraordinary powers are delegated to the Government. Moreover, after the initiation by the Government of the declaration of state of war or state of emergency, the Government may adopt decrees by means of which it may, and to the extent necessary for immediately tackling the circumstances serving as grounds for the declaration, suspend the application of certain acts, derogate from the provisions of acts and take other extraordinary measures[45] – that is, the Government can exercise extraordinary powers without declaring special legal order.

A cardinal act, namely the Act XCIII of 2021 on the Coordination of Defence and Security Activities provides the purposes in order to which the Government may suspend the application of certain Acts, derogate from the provisions of acts and take other extraordinary measures.[46] These objectives are to guarantee the security of life, health, persons, property and rights of citizens and the stability of the national economy. The Act XCIII of 2021 on the Coordination of Defence and Security Activities also stipulates that the Government may exercise this extraordinary power only with regard to specific regulatory issues, to the extent necessary and proportionate to the objective pursued, in order to prevent, deal with, eliminate and prevent or remedy the harmful effects of an event triggering state of war, state of emergency or state of danger. On this basis, the Government's extraordinary measures could relate to: personal freedom and living conditions; economic and supply security; security restrictions affecting communities; public information; the functioning of the State and municipalities; the preservation or restoration of law and order and public safety; national defence and mobilisation; other measures directly related to the prevention, management, eradication and prevention or removal of the adverse effects of an event triggering state of war, state of emergency or state of danger.[47]

The Parliament has mainly control function. Namely, the Parliament may repeal a decree adopted by the Government during the period of, and in accordance with the rules related to, special legal order. The Government shall not adopt again a repealed decree with identical content, unless this is justified by a substantial change in circumstances. Apart from that, the Government is

[44] Fundamental Law of Hungary, Article 49, para. (3).

[45] Fundamental Law of Hungary, Article 54.

[46] Pál Kádár, "A védelmi-biztonsági szabályozás reformjának egyes kérdései az Alaptörvényen túl," *Védelmi-biztonsági Szabályozási és Kormányzástani Műhelytanulmányok*, 2021/11, p. 8; Szabolcs Till, "Az Alaptörvény kilencedik módosítása szerinti intézményrendszer előzetes értékelése a megvalósítási átmeneti idő első évi fejleményei alapján," *Védelmi-biztonsági Szabályozási és Kormányzástani Műhelytanulmányok*, 2021/19, p. 15.

[47] Act XCIII of 2021 on the Coordination of Defence and Security Activities, Article 80.

obliged to continuously inform the Speaker of the Parliament, and its standing committee vested with the relevant functions and powers about any decree adopted during the period of, and in accordance with the rules related to, special legal order. The Government has similar reporting obligation to the President of the Republic.[48]

It should be mentioned that the exclusive and central role of the Government in the exercise of extraordinary power during special legal order is the consequence of the comprehensive reform of the Hungarian legislation of special legal order adopted by the Ninth Amendment to the Fundamental Law. Thus, for example, before the modification the President of the Republic was entitled to take emergency measures during state of emergency. While in case of state of national crisis, the National Defence Council, formed by the President of the Republic, the Speaker of the Parliament, the leaders of parliamentary groups, the Prime Minister, the ministers and – in a consultative capacity – the Chief of the Defence Staff, had competence to exercise extraordinary power.

Question 3

According to the FL, local governments have no competence or special tasks during special legal order. Still, during the pandemic an emergency government decree empowered the mayors to introduce measures of health protection.
Besides, the Disaster Management Act also stipulates certain duties local governments need to fulfil when disaster arises.

Question 4

The FL contains no provision on the possible conflict of EU law and emergency regulations. Both have direct applicability and supremacy over national ("normal time") legislation; there is no known case law on the issue.
Neither does the FL make emergency exceptions from international law; international agreements (including the European Convention on Human Rights) are applicable also in times of emergency.

Question 5

The Hungarian constitutional rules on restricting fundamental rights are generally in line with the general principles of international law and the theory

[48] Fundamental Law of Hungary, Article 53, paras. (2)–(3).

of law.[49] The FL contains a so-called general fundamental rights restriction clause (necessity-proportionality test) which states that a fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the aim pursued while respecting the essential content of that fundamental right.[50]

For the duration of special legal order, the FL provides for the possibility to suspend the exercise of fundamental rights, or restrict it beyond the scope of the general fundamental rights restriction clause. However, the FL defines fundamental rights that may not be restricted even during the period of special legal order. These exceptions are right to life and human dignity, the prohibition of torture, inhuman, or degrading treatment or punishment, certain criminal law-related fundamental rights: presumption of innocence, right of defence in criminal proceedings, principle of *nullum crimen/nulla poena sine lege* and principle of *ne bis in idem*.[51] With regard to the restriction of fundamental rights during special legal order, the Act XCIII of 2021 on the Coordination of Defence and Security Activities contains further detailed rules. On this basis, restrictions on fundamental rights may only be imposed for the purpose of preventing, managing or remedying an event triggering state of war, state of emergency or state of danger or preventing or remedying its harmful effects. To the extent strictly necessary and proportionate to the objective pursued, in relation to the event causing special legal order.[52]

With regard to this topic, the restrictive measures during state of danger due to the health crisis caused by the coronavirus in Hungary are worth mentioning. Due to the nature of the virus, in order to contain the pandemic, the government imposed restrictions on the right to freedom of movement and freedom of assembly, mainly to isolate people and limit their interaction. The extent of these measures varied according to the severity and the moderation of the pandemic. In this period, the Constitutional Court examined several times the constitutional provision on restriction of fundamental rights during special legal order in various contexts, such as discrimination through the use of the immunity certificate, the general ban on assembly, the time limit for the execution of public interest data requests, and the mandatory vaccination of health workers. In these decisions of the Constitutional Court, there are two types of test for restrictions on fundamental rights during special legal order:

[49] Fruzsina Gárdos-Orosz, "Az alapjogok korlátozása," *Internetes Jogtudományi Enciklopédia*, edited by András Jakab, Miklós Könczöl, Attila Menyhárd and Gábor Sulyok, http://ijoten.hu/szocikk/az-alapjogok-korlatozasa 2020, [39].

[50] Fundamental Law of Hungary, Article I, para. (3).

[51] Fundamental Law of Hungary, Article 52, para. (2).

[52] Act XCIII of 2021 on the Coordination of Defence and Security Activities, Article 81.

the general necessity-proportionality test and the test of adequacy.[53] On the basis of the resolution of the Constitutional Court Nr. 15/2021. (V. 13.) declaring the constitutionality of the Government decree extending the deadline for the submission of requests for data of public interest, it does not follow from the FL that all fundamental rights, with the exception of inviolable fundamental rights, can be automatically suspended in times of state of danger.[54] The exceptional situation does not affect the necessity-proportionality test itself, but gives a different context to the examination and the assessment, so the general fundamental rights restriction clause applies in an exceptional situation.[55] In contrast, the resolution of the Constitutional Court Nr. 23/2021. (VII. 13.) examining the unconstitutionality of the general prohibition of assembly during the special legal order stated that the complete exclusion of the exercise of a fundamental right cannot be justified by the state of danger alone. The restriction of a fundamental right is not justified by the declaration of a state of danger, but by the specific circumstances leading to the state of danger. It is therefore necessary to keep under constant review whether the general suspension of a fundamental right is indeed an indispensable means of achieving the objectives pursued by the introduction of special legal order.[56] It is problematic that the resolutions of the Constitutional Court on the restriction of fundamental rights in special legal order refer to the two mentioned decisions in parallel without resolving or drawing attention to the distinction outlined.[57]

Question 6

There were not any precedents in the practice of Hungary in which EU fundamental rights or EU fundamental freedoms of the internal market came into conflict with domestic emergency measures. The emergency government decrees closing the borders because of the coronavirus pandemic affected the free movement of persons based on the Treaty on European Union and the Treaty on the Functioning of the European Union, but these measures were in line with measures taken by other Member States and EU guidelines. Likewise, measures and support to mitigate the negative economic consequences of the coronavirus pandemic have been developed in a coordinated way at EU level.

However, it should be noted that coordinated protection action can be declared due to an event triggering a federal obligation. This obligation may

[53] Lóránt Csink, "Alapjogok a különleges jogrend idején" *Védelmi-biztonsági szabályozási és kormányzástani műhelytanulmányok*, 2022/6, p. 8.

[54] Resolution of the Constitutional Court Nr. 15/2021. (V. 13.), Statement of reasons [34].

[55] Csink, op. cit., p. 7.

[56] Resolution of the Constitutional Court Nr. 23/2021. (VII. 13.), Statement of reasons [36].

[57] Csink, op. cit., pp. 8–9.

arise from planning, organisation, preparedness, readiness, cooperation and capability-based tasks to be performed in the EU framework, in particular in the fields of defence, law enforcement and national security. In the framework of coordinated protection action the Government is entitled to take various restrictive and control measures. In addition, the Government may, by decree, temporarily lay down specific rules of competence and jurisdiction for the exercise of the functions and powers of the central state administration bodies under its control, in order to ensure the coordinated performance of defence activities.[58]

Section 3: Statutory/executive emergency law in the Member States

Question 1

The abovementioned Act XCIII of 2021 on the Coordination of Defence and Security Activities stipulates the detailed rules of the system and basic rules of the obligations relating to defence and security, the basic rules of the civil protection obligation, basic rules of economic and material services, planning and system of defence and security, preparation and mobilization of national economy, governance and coordination defence and security activities, management system of defence and security, as well as the defence and security controls.

Question 2

Legislative regulations must be in line with the general rules of the FL. So far no conflict has emerged.

Question 3

The FL stipulates that emergency regulations cannot suspend the FL itself, neither can they restrict the work of the Constitutional Court. During the pandemic the Constitutional Court case law added that even in emergency situation they supervise the constitutionality of the measures taken and, with the broad interpretation of the FL, they declared that if there is a weak connection between the measure taken and the emergency, they continue using the necessity-proportionality test.[59]

[58] Act XCIII of 2021 on the Coordination of Defence and Security Activities, Articles 5 and 74.
[59] Resolution of the Constitutional Court Nr. 15/2021. (V. 13.).

Question 4

The fact that an emergency measure is introduced by the EU, does not alter in any way the balance and distribution of power in Hungary. Special legal order may be declared due to the events stipulated in the FL. As a result of which the Government is empowered to adopt emergency decrees and take extraordinary measures. These triggering events do not include the introduction of emergency measures by the EU.

Section 4: Judicial review of emergency powers in the Member States

Question 1

Courts and the constitutional court continue operating also in the times of emergency; however, there might be procedural differences. The Constitutional Court reviews the constitutionality of legislation (including emergency legislation) and particular measures according to their original competence.

Question 2

Generally, there are no peculiarities when the Constitutional Court reviews emergency measures. Procedural differences do not pertain to the competences of the court, they relate to the emergency situation (like online sessions during the pandemic).

Question 3

The Constitutional Court first decides on the applicability of the petition, in this regard, there is no difference with the "normal" procedure. When deciding on the substantial constitutionality, the Court first decides if the regulation clearly and directly pertains to the emergency. If it does, the Court does not decide upon economic or practical reasons. If it does not, the Court applies the necessity-proportionality test.

Question 4

As the Constitutional Court may review particular court decisions, courts likely gather constitutional arguments, too. This attitude also prevails in the case of emergency; courts review if the actions of authorities are in line with both the pertaining regulation and the FL.

Section 5: Implementation of EU emergency law in the Member States

Question 1

The issue has not come up in Hungarian jurisprudence.

Question 2

The issue has not come up in Hungarian jurisprudence.

Italy

*Giovanni Pitruzzella**
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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

The occurrence of exceptional facts that are not foreseen and cannot be regulated normatively ex ante, and are therefore capable of jeopardising the preservation and survival of a legal system, is an inevitable event in the life of the latter. Consequently, in order to preserve their structure, the most evolved legal orders have adopted a law of emergency, aimed at coping with such events through recourse to organisational apparatuses and extraordinary instruments, which represent one of the moments of maximum expansion of state authority.

The Italian legal order is no exception.
However, it does not contain an express and precise definition of a crisis or emergency situation, nor does it provide for a formal distinction between emergency, crisis and necessity with which a different legal regime is associated.
These expressions – which identify cases that are often elusive and difficult to define in a rule of statute – are used from time to time by the legislature to allow, in certain areas, the adoption of provisions and measures that derogate temporarily, under certain conditions, from the ordinary regime and procedures. Therefore, these are concepts that, although different, defy a clear-cut classification, and tend to overlap indefinitely, having as their lowest common denominator the fact that they can be traced back to situations of derogation or temporary suspension of ordinary law, so as to allow the crisis to be overcome, the normal order of powers to be restored, and individual and collective freedoms to be fully exercised.[1]

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[1] V. A. Fioritto, *L'amministrazione dell'emergenza tra autorità e garanzie*, Bologna, 2008; R. C. Perin, "Il diritto amministrativo dell'emergenza derivante da cause e fattori esterni all'amministrazione," in *Dir. amm.* 2005, 1, pp. 31 *et seq.*

Although there is no express definition of an emergency in national law, various provisions use synonyms for "emergency" – as a rule, exceptionality, necessity, contingency, extraordinariness, indispensability, urgency – to describe provisions such as "decrees," "plans," "directives," "declarations," "authorisations," "ordinances," which the competent public authorities are called upon to adopt in order to deal with emergency situations.

Question 2

Unlike in other countries such as Spain and France, there is no constitutional framework of the emergency in Italy.

Nonetheless, the legal order is not devoid of instruments of an extraordinary nature that, in the intentions of the Constituents, were intended to address exceptional situations that would escape ordinary regulation.

These are – as will be seen in more detail in Section 2 – individual provisions applicable in emergency situations variously named by the constitutional text (of necessity, urgency, grave danger, etc.), which allow, in the presence of serious internal disturbances or in any case in emergency situations, derogation from the guarantee of the rights to liberty.

The reference is first of all to Articles 77 and 78 of the Constitution. The latter, in particular, provides for the most exceptional situation of all, and regulates thedeliberation of the state of war, adopted by the Houses of Parliament, which grant the government the powers necessary to deal with the actual event. On the other hand, Article 77 of the Constitution gives the Government the power to adopt "provisional measures with the force of law" "in extraordinary cases of necessity and urgency."

It should be added that Italy, as a member country of the Council of Europe and the United Nations, has authorised by law the ratification of a number of international treaties, which guarantee a long list of fundamental rights and are fully effective in the domestic legal order, thus assuming a higher rank than both state and regional laws, pursuant to Article 117, para. 1, of the Constitution.

The reference is to the 1950 European Convention on Human Rights (ECHR), made enforceable by Law No. 848/1955, which provides for the exercise of emergency powers within a Council of Europe member state, with a consequent derogation from the guarantee of the rights to liberty "in the event of war or other public danger" (Art. 15 ECHR), with the exception of certain

rights considered non-derogable (right to life, prohibition of torture and enslavement, prohibition of retroactivity of crimes and punishments).

Similarly, the 1966 UN Covenant on Civil and Political Rights, enforced by Law No. 881/1977, allows derogations to the rights provided for therein "in cases of exceptional public danger" (Art. 4), with the exception of some that cannot be suspended under any circumstances (the same ones mentioned by the ECHR, as well as the prohibition of imprisonment for breach of contract, the right to recognition of legal personality, and freedom of thought, conscience, and religion).

At the legislative level, then, there are several primary sources that intervene to regulate in a general way the exceptional measures that can be taken in situations of emergency (or crisis, of serious danger) and that identify the public administrations with the powers and competences to deal with them.

Among these, of particular relevance are: (i) those relating to health emergencies, such as Law No. 833 of 23 December 1978 on the "Establishment of the National Health Service," (ii) the even more general regulations dictated by Article 2 of Royal Decree no. 773 of 18 June 1931, containing the "Testo Unico delle leggi in materia di pubblica sicurezza – Consolidated Law on Public Security" (hereinafter, T.u.l.p.s.) and by Article 50, para. 5, of Legislative Decree No. 267/200 of 18 August 2000 containing the "Testo unico delle leggi sull'ordinamento degli enti locali – Consolidated text of laws on the organisation of local authorities" (hereinafter, T.u.e.l.), but above all, (iii) Legislative Decree No. 1 of 2 January 2018, containing "Il Codice della protezione civile – The Civil Protection Code."

More specifically. On the subject of "hygiene, public health and veterinary police," Article 32 of Law 833/1978 attributes to the Minister of Health, the President of the Regional Council and the Mayor – respectively on the basis of the territorial extension of the same hygiene, health or veterinary emergency to be faced – the power to issue "ordinances of a contingent and urgent nature."

Article 2, para. 1, of the R.D. 773/1931 assigns the Prefect, in cases of urgency or serious public necessity, the power to "adopt measures indispensable for the protection of public order and public safety." The Prefect is also responsible for adopting – in the event of the suspension or interruption of a pharmaceutical operation "for any reason whatsoever, and from which harm to local pharmaceutical assistance has arisen or may arise" – "emergency provisions" aimed at ensuring the maintenance of such assistance (Art. 129, para. 1, Royal Decree No. 1265 of 1934).

The order of local authorities, pursuant to Legislative Decree No. 267 of 2000, notes:

a) Article 50, para. 5, which gives the Mayor – as representative of the local community – the power to issue "contingent and urgent ordinances" in the event of "health or public hygiene emergencies of an exclusively local nature; of the urgent need for interventions aimed at overcoming situations of serious neglect or degradation of the territory, the environment, the cultural heritage or of prejudice to urban decorum and liveability, with particular reference to the need to protect the tranquillity and rest of residents."
b) Article 54, paras. 4 and 4-bis, which again attributes to the Mayor – this time in their capacity as a government official – the power to adopt, with a "reasoned act," "contingent and urgent provisions" for the purpose of "preventing and eliminating serious dangers threatening public safety and urban security."[2]

In "environmental matters," the provisions of Legislative Decree No. 152 of 2006 refer to the "powers of ordinance" – vested in the Ministry of the Environment and Energy Security, the Ministry of Health, and the heads of the Regional Boards and Local Authorities – "in cases of urgent necessity" to protect water from pollution (Art. 75, para. 2, last sentence); the President of the Regional Council, the President of the Province or the Mayor – again depending on the territorial extent of the individual emergency – are granted the powers to issue "contingent and urgent ordinances to allow the temporary use of special forms of waste management," "when situations of exceptional and urgent need to protect public health and the environment arise, and cannot otherwise be provided for" (Art. 191, para. 1).

Last but not least, the "Civil Protection Code" (Legislative Decree No. 1 of 2018) stands out. Faced with exceptional events other than those of a war-related nature, and rather attributable to calamitous events and catastrophes, the aforementioned Code is the only organic regulation of the matter.

It, in particular:

1) defines the "National Service of Civil Protection" as the "System" that exercises the set of "competences" and "activities" aimed at protecting "life, physical integrity, property, settlements, animals and the environment from

[2] "Public safety" and "urban security" are defined, respectively, as protection of the "physical integrity of the population" (public safety) and as the prevention of and fight against "criminal phenomena or illegality, such as drug dealing, the exploitation of prostitution, trafficking in persons, begging with the use of minors and the disabled," as well as "abusive phenomena, such as the illegal occupation of public spaces, or violence, including those linked to alcohol abuse or the use of drugs" (urban security).

damage or the danger of damage caused by calamitous events of natural origin or resulting from human activity" (Art. 1, para. 1);
2) notwithstanding the literal wording of the epigraph of Ar. 7 ("Typology of emergency events"), the same rule does not typify "emergency events": with the exception of their possible "national importance," such events are consistently defined as "emergencies connected with calamitous events of natural origin or resulting from human activity."
3) Instead the "typification" concerns (Art. 7, para. 1) the "interventions," "means" and "powers" capable of facing the single "emergency." (a); emergencies "which require the coordinated intervention of several bodies and administrations" and which must be tackled "with extraordinary means and powers to be deployed during limited and predefined periods of time" (lett. b); finally, "emergencies of national importance," which must be tackled "with immediacy of intervention," and again "t" (lett. c).
4) Finally, with reference to the activities of "forecasting" and "prevention" of "risks" (Art. 16), capable of translating into emergency events, the typification consists of the following list of scientific reference areas "seismic," "volcanic," "seaquake," "hydraulic," "hydrogeological," "from adverse meteorological phenomena," "from water deficit and forest fires," "chemical," "nuclear," "radiological," "technological," "industrial, "transport," "environmental," "sanitary," "from uncontrolled re-entry of objects and space debris" risks.

It is clear from the above picture that there is a multiplicity of relevant disciplines in the national legal order, each of which is designed to govern circumstances and emergency events of a different nature in certain areas.

For the sake of completeness, it should be noted that the Italian legal system has also resorted to exceptional tools and measures to counter a phenomenon of particular concern and gravity for democratic order and collective security: mafia-related crime. Present since the early days of the Republic, this phenomenon saw a dangerous resurgence, first in 1982 and later in the period of 1992–1993, which justified the introduction of a series of exceptional measures aimed at combating subversive activity, with special rules concerning personal freedom, the confidentiality of communications, investigative techniques, defense rights, detention conditions, and so forth.

This phenomenon, whose repression is now based, among other things, on the definition of specific criminal offenses, a structured organizational framework for counteraction, and personal and asset-related preventive measures as provided in the Anti-Mafia Code (Legislative Decree No. 150 of 2011), has lost its character as a true emergency (or, at the very least, it can be said to constitute a "stabilized emergency") while still representing a serious threat to the demo-

cratic system. A similar observation can be made for the emergency linked to political and subversive terrorism, which, during the 1970s, led to the adoption of a series of emergency laws, now permanently superseded.

Question 3

As mentioned, there is a lack of typification of emergency events in statute. The events that can trigger emergency situations requiring extraordinary intervention are most varied and do not fit into a closed list.

An initial distinction between the emergency events that institutions are called upon to deal with relates to their international or domestic character, although the line between the two is increasingly blurring today.

The first type includes war emergencies as well as those related to international terrorism (e.g., Islamic terrorism).
Calamitous events of natural origin or resulting from human activity that may require the intervention of the Civil Protection Authority, as well as those that endanger public order and public safety or, again, public health and the protection of the environment, fall within the second sphere. These can be damaging events related to industrial activities, exceptional weather phenomena, floods, fires, earthquakes, epidemics, but also the exceptional flow of migrants that under certain circumstances makes it necessary to take emergency measures. In the absence of an express typification, these are only some of the most important examples.

Emergency situations may also well occur in the economic field in the face of crises affecting the real economy or endangering the resilience of the financial system. The Constitution itself – as will be seen – devotes attention to situations of "severe economic recession" and "serious financial crises" in order to allow legislative provisions derogating from the need to balance the budget (Art. 81).[3]

The reference is, inter alia, to those crises that may require urgent government intervention (extraordinary economic support interventions, e.g., as in the case of COVID) or those that, involving banking-financial-insurance institutions, may undermine the stability of the system, justifying the intervention of the national or European banking supervisory authority.
This can also include emergency interventions by the central bank, now part of the system of European central banks, which, in addition to regulating interest

[3] Constitutional Law No. 243/2012 (Art. 6, para. 2) specifies, in particular, that the "exceptional events" that may lead to temporary budgetary deviations are: severe economic downturns and extraordinary events, including severe financial crises and major natural disasters.

rates, can intervene urgently, providing liquidity to individual intermediaries or to the entire system to preserve the necessary liquidity conditions; examples of systemic intervention were seen in the immediate aftermath of the attack on the Twin Towers in 2001 (when the world's major central banks concerted a coordinated action of extraordinary financial support to compensate for the difficulties of regulating the functioning of the financial markets) or in the context of the so-called *Great Financial Crisis* that started in 2007/2008 following the *US subprime mortgage* crisis or what happened in 2023, on a smaller scale, to deal with the crises of the US regional banks and Credit Suisse.

Therefore, the factual scenario of emergencies is extremely rich and complex. Depending on the type of emergency, the sector in which it occurs and its territorial extent, the ordinary legislator identifies the public authorities called upon to intervene and the administrative procedures to be adopted.

Question 4

The lack of an organic regulation, of constitutional or legislative level, on internal danger situations does not allow the identification of a precise and unambiguous model of action for public authorities in managing emergencies. On the other hand, although an emergency event frequently entails the alteration, albeit temporary, of the structure of powers and the compression, more or less intense, of certain rights of liberty, it should be emphasised that the consequences of such an event can be dealt with, within the framework of constitutional principles, either by activating a derogatory regime or by using ordinary procedures and instruments (law and equivalent acts).[4]

In the former case, the aforementioned civil protection legislation is of primary importance, applicable in the case of emergencies related to catastrophes, calamitous events, or when urgent and extraordinary action is required to protect the safety of the civilian population and repair any damage.
This legislation, in relation to the intensity of the emergency to be dealt with, provides for two separate procedures, but which can be used consequently when the events provided for in Article 7, para. 1, lett. c occur. These are, respectively, the "state of mobilisation of the national civil protection service" (Art. 23) and the "state of emergency of national importance" (Art. 24).

With specific reference to the latter, which is of more interest here, according to Article 24 of the Civil Protection Code, it is the Council of Ministers that decides on the state of emergency, based on assessments submitted by the Civil Protection Department. The proposal is formalised by the President of

[4] V. Piergigli, *Il diritto costituzionale dell'emergenza*, Turin, 2023, p. 3.

the Council of Ministers, in agreement with the representatives of the regional boards concerned. This resolution sets the duration of the state of emergency, which may not exceed 12 months (which can be extended for no more than 12 months) and delimits its territorial extension according to the nature and severity of the events.

With the formal declaration of the state of emergency, which may also be adopted at the request of the president of the regional board or autonomous province concerned, the Council of Ministers authorises the issuance of civil protection ordinances in order to coordinate the implementation of interventions. Pursuant to the Code, such ordinances are adopted "in derogation of any provision in force, within the limits and in the manner indicated in the resolution of the state of emergency and in compliance with the general principles of the legal system and the rules of the European Union" (Art. 25).
The activation of the national civil protection service does not exclude the possibility that, in specific emergency situations requiring the declaration of a state of emergency, recourse may also be made, jointly, to urgent decrees. It happened in Italy, for example, during the COVID-19 health crisis, but also during the emergency linked to the Russian invasion of Ukraine. See answers to Section 3, Question 1.

As mentioned above, an emergency, wether domestic or international, can also well be dealt with by using ordinary instruments (laws and equivalent acts), which do not require the declaration of a state of emergency, but are nevertheless subject to certain formal constraints and procedures.

In the case, for example, of serious crises of an economic-financial nature, as well as in the case of any other serious event requiring the preparation of extraordinary measures to counter the emergency, urgent decrees are the principal instrument normally used by the Executive to deal with them.

Significant examples in this regard can be drawn from the financial and sovereign debt crises that hit Italy in 2008 and 2011–2012, respectively, as well as from the interventions to support economic activities during the pandemic crisis in 2020–2022.

Similarly, in the face of the internal political emergency given by the ideological-political matrix terrorism that struck the country between the late 1960s and 1970s (so-called years of lead), the approach of Italian institutions was based on resorting to decree-laws and ordinary legislative sources as instruments to regulate and punish the criminal activities of armed extremist groups and protect the security of citizens (so-called emergency legislation). A similar approach has been followed in the 1980s and 1990s in the efforts to combat mafia-style organized crime, and more recently by the legislature with

the post-2001 Islamic terrorist emergency, the repression of which has been entrusted to the criminal law, duly revised and updated.

According to the Charter, in such exceptional occurrences the Government in its entirety has to deal with emergency situations and thus adopt the decree-law, but the President of the Republic and the Parliament play an equally central role, the former being called upon to issue the decrees that have the force of law, and the latter being able, on conversion, to amend the contents or not to convert the decree.

Special administrative procedures, predefined by law, exist for management of crises involving banking-financial-insurance operators or market infrastructures, such as central counterparties, central depositories and operators of regulated markets. These are situations in which, given the peculiar nature of the functions performed by these operators and their direct impact on the proper functioning of the financial system and the economy in general, the intervention of the public authority, holder of wide discretionary powers as to the provisions to be adopted, is very important.
Management irregularities, loss of assets or liquidity shortages of particular intensity and extent that may jeopardise the continuity of the economic activity are, in general, the prerequisites for activating crisis management procedures, such as extraordinary administration (Arts. 70–75 Consolidated Banking Act) and compulsory administrative liquidation (Arts. 80–95 Consolidated Banking Act). The initiation of both of these procedures requires the adoption of a formal provision by the administrative authority, in particular, a provision by the Bank of Italy (in coordination with Consob for financial intermediaries) for the former, and a decree of the Ministry of the Economy adopted on the proposal of the Bank of Italy, for the latter.[5]

Next to these is the resolution procedure, which is envisaged in the event of the failure or risk of failure of a credit institution and where there is a public interest. It is opened by a formal provision of the Bank of Italy, subject to the approval of the Minister of Economy and Finance (Art. 32, Legislative Decree No. 180 of 16 November 2015). The objectives of this procedure, of European origin, are the continuity of the essential functions of the intermediary, financial stability, the containment of burdens on public finances, the protection of depositors and investors protected by guarantee or indemnity schemes, as well as of clients' funds and other assets (Art. 21).
Against and at the service of this apparatus of administrative measures intrinsically characterised by the rapidity of intervention, there are also mechanisms to accumulate the economic resources that can be used, if need be, to finance

[5] If there are reasons of absolute urgency, the Bank of Italy may order provisional management pursuant to Article 76 Consolidated Banking Act, which has a maximum duration of two months.

the solution of the crisis, pre-constituted through collection from the operators themselves, namely the Depositors' Guarantee Schemes and the Single Resolution Fund, the use of which is subject to verification of compatibility with European state aid rules. See on this Section 1, Question 5.

Question 5

Generally speaking, EU law has had a limited impact on regulating many emergency situations. This is primarily due to the fact that – as is well known – the protection of public order and national security is entrusted to the exclusive competence of each Member State (Art. 4, para. 2 Treaty on European Union, Article 72 Treaty on the Functioning of the European Union) and the same must be said for the areas of civil protection (Art. 6, para. f) and 196 Treaty on the Functioning of the European Union) and health (Art. 6, lett a) and 168 Treaty on the Functioning of the European Union), although the management of "common safety concerns in the field of public health" falls within the competing matters, to be exercised in compliance with the principle of subsidiarity. In all these areas, the European Union limits itself to supplementing, supporting, promoting, coordinating, complementing and encouraging the action of the member states, with an explicit duty to refrain from harmonising national laws and regulations. On the other hand, the lack of a common European model for emergency management explains the heterogeneity of the responses offered by individual jurisdictions during the recent COVID-19 pandemic.

Within this framework, one of the areas in which EU law has had the greatest impact relates to national emergencies on the economic front.
It is useful to recall in this regard that in 2012, in the midst of the sovereign debt crisis, the Italian constitutional legislature introduced the balanced budget rule, to be observed by the State (Art. 81 of the Constitution, amended by Constitutional Law 1/2012), public administrations, regional boards and local authorities.[6] This constitutional provision was decided as a consequence of the severe financial crisis of 2008, which was followed by the conclusion of the Fiscal Compact, a treaty aimed at strengthening the budgetary discipline of the signatory states and increasing the EU's powers of coordination and control over national economic policies.

The area of banking company crises has also been incisively affected by European Union law. Simply recall in this regard that the resolution of intermediaries

[6] As an exception to the general rule, the State is permitted to resort to borrowing "only in order to take into account the effects of the economic cycle, and subject to authorisation by Parliament adopted by an absolute majority, in the event of exceptional events" (Art. 81, para. 2).

is governed by a discipline of direct European emanation that provides for highly harmonised procedures. In particular, Legislative Decrees Nos. 180 and 181 of 16 November 2015, which identify the Bank of Italy as the authority for resolution and management of crises at national level, were adopted when transposing Directive 2014/59/EU (so-called Banking Recovery and Resolution Directive- BRRD).

Since January 2016, for the Eurozone countries, these tasks are carried out within the framework of the Single Resolution Mechanism, complementary to the Single Supervisory Mechanism, established by Regulation 806/2014/EU for handling the insolvency of banks and investment firms and financial institutions falling within the scope of the Single Supervisory Mechanism.
The Single Resolution Mechanism is supported by the aforementioned Single Resolution Fund and consists of the Single Resolution Board (SRB) and the National Resolution Authorities (NRAs), which cooperate closely with the former in the crisis management of Significant Institutions (SIs) and are directly responsible for that of Less Significant Institutions (LSIs). A similar structure will soon be introduced in the insurance sector as a result of the directive on the reorganisation and resolution of insurance undertakings that is currently being finalised.

As far as migration is concerned, the decisions taken in the EU have influenced the management of the emergency at national level. For example, following the virtual closure of the migration route through Greece and the Balkans as a result of the 2016 EU-Turkey Agreement, the flow of migrants and refugees shifted to the central Mediterranean route from Libya to Italy (and Malta). In view of the continuous increase in the number of refugee arrivals in Italy and Greece, in 2016 the EU adopted decisions to redistribute the 160,000 refugees landed in the two countries to other EU countries according to a temporary and exceptional relocation mechanism, which, however, yielded – as is known – modest results due to the refusal of some countries to implement the redistribution plan.[7]

Question 6

There are a number of emergency situations in which European Union intervention has complemented that of national authorities.

The COVID-19 pandemic that broke out in 2020 is a first example of collaborative management of an emergency through both EU and national instruments.

[7] According to Commission data, only 34705 migrants were relocated at the end of the period of validity (September 2017) of the decisions taken.

Following the epidemiological crisis, the difficulties in supplying vaccines encountered by individual countries – Italy in the first place as the country most affected – have been overcome, due in part to the strategy adopted by the European Commission, which from the outset of the health emergency focused its efforts on the study of a safe and effective vaccine and adopted measures to shorten the development time from 10–15 years to 12–24 months. In particular, the Commission concluded Advance Purchase Agreements (APAs) on behalf of individual Member States,[8] that is, agreements in which the Commission shared the risk of vaccine development with anti-COVID vaccine manufacturers and supported the set-up of large-scale production capacities through advance payments from the EU budget. In this way, the EU set up a centralised procurement system for vaccines, which made it possible to meet the supply targets of the member states.
At the same time, the *State Aid Temporary Framework to Support the Economy in the Context of the COVID-19 Epidemic Emergency*, adopted by the Commission in March 2020 (and amended several times), allowed Member States to make full use of the flexibility provided, to ensure that sufficient liquidity was available to businesses and to preserve the continuity of economic activity during the emergency. In accordance with the temporary framework, Italy adopted Decree-Law No. 35 of 19 May 2020[9] (the so-called, decreto Rilancio – Relaunch Decree), providing aid measures such as direct subsidies, guarantees, low-interest loans, and aid to combat COVID-19, which were promptly approved by the Commission.

The management of migratory flows following the crisis that occurred between 2014 and 2015 is also a case in which – as already highlighted – national emergency interventions were combined with extraordinary interventions adopted at the European Union level: worth recalling, in this regard, are the two EU Council Decisions 1523 of 14 September 2015 and 1601 of 22 September 2015 aimed at helping Italy (and Greece) "to better cope with an emergency situation characterised by a sudden influx of third-country nationals into their territory." These decisions, containing measures "designed to alleviate the heavy pressure on the asylum system of Italy and Greece" and applicable to asylum seekers who have applied for international protection in Italy or Greece, both regulated the temporary relocation mechanism and arranged for support for Italy (and Greece) through the EASO and Frontex agencies.

[8] The APAs were financed through the Emergency Support Instrument (ESI), a funding instrument directly managed by the Commission that enables it to provide support within the EU in the event of catastrophes. It is used for interventions that complement and coordinate with efforts under other national and EU initiatives. See: Commission Decision of 18 June 2020, C(2020) 4192 and subsequent approval by each Member State.

[9] The Decree-Law was converted into Law No. 77 of 19 July 2020.

Other examples of joint management of emergency situations are provided by the EU Temporary Protection Mechanism for refugees from Ukraine, which inter alia provides support for Member States hosting refugees to effectively manage arrivals at the border and reduce waiting times, while maintaining a high level of security.

The European Union interventions, which followed the activation of the EU Civil Protection Mechanism, complemented those included in the national system, following the declaration of a state of emergency for the Ukraine (extended until 31 December 2024), focused on two fundamental aspects: humanitarian assistance and hosting in Italy. And furthermore.

In the case of the energy crisis that erupted as a result of the Russian invasion of Ukraine, the EU adopted an emergency regulation to cope with rising energy prices, which, applied from 1 December 2022 to 31 March 2023, introduced, among other things, common measures to reduce the demand for electricity and to collect and redistribute surplus revenues from the energy sector to households and small and medium-sized enterprises and to reduce energy prices. In parallel with the measures taken at the European Union level, the Member States, including Italy, have adopted numerous provisions at the national level, especially of a fiscal nature, to ease the pressure on citizens and businesses.

The handling of certain banking crises is also an example of how decisions within the remit of national authorities can be influenced by interventions adopted at European Union level under the State aid rules. In the national order, this has been particularly clear in recent years.
The reference is, in particular, to that interpretative orientation of the European Commission on State aid[10] that has incisively affected the solution of certain Italian banking crises, with specific reference to the possibility of admitting the optional intervention of mandatory depositor guarantee schemes as an alternative way to avoid the compulsory administrative liquidation of the intermediary in crisis.
In its well-known decision of 23 December 2015 on the Banca Tercas case, the European Commission considered, in particular, that the support granted by the Interbank Deposit Protection Fund for the resolution of Banca Tercas' crisis constituted state aid incompatible with EU law, effectively preventing the bank's rescue.
The decision, which was subsequently annulled by the EU General Court and the Court of Justice, influenced the resolution of the banking crises that were

[10] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis. See also: the reconstruction published on the Bank of Italy website, available at www.bancaditalia.it

ongoing at the time of the decision, in particular by barring the use of the Interbank Fund and requiring the resolution for four Italian banking institutions (Cassa di Risparmio di Ferrara, Banca delle Marche, Banca popolare dell'Etruria e del Lazio, Cassa di Risparmio della Provincia di Chieti, all in special administration) initiated in November 2015.[11]

Similar conditioning has been observed in Italy in relation to the management of other significant corporate crises, among which the most complex is certainly that of the Ilva steel plant in Taranto. The handling of the crisis involving this steel production facility – defined by the legislator as being of national strategic interest – has assumed the characteristics of an outright emergency due to the significant environmental and public health impacts caused by its industrial activities.
The case, at the center of ongoing litigation, has seen over the years a series of numerous interventions adopted at both national and EU levels, which have variedly followed and intertwined with one another, including: (i) the provision of substantial state aids to modernize the plant and facilitate its conversion; (ii) the obligation for Italy to recover a portion of these aids (amounting to €84 million) following a 2017 decision by the European Commission, which confirmed the breach of the prohibition on state aid; (iii) the acquisition of the steel complex in 2018 by the ArcelorMittal group, authorized by the Commission subject to compliance with certain corrective measures; (iv) the subsequent repurchase of the production facility by the State (through Invitalia) in 2023; (v) the initiation of an infringement procedure for violations of the Environmental Liability Directive and the Industrial Emissions Directive; and (vi) various rulings over the years by judicial bodies, including supranational courts, most recently the European Court of Human Rights in January 2019 and July 2022, and the Court of Justice of the EU in June 2024.

Finally, the sovereign debt crisis that hit several countries in Europe, including Italy, between 2010–2011 is worth mentioning. It is well known that central banks adopted unconventional monetary policies on that occasion in order to preserve an adequate transmission of monetary impulses, as well as to contain the risks of deflation that emerged after the financial crisis. In particular, the ECB counteracted these risks by lowering official rates to zero or even negative levels, and also made extensive use, with the "quantitative easing," of purchases of government bonds issued in the Eurozone, including Italian bonds, incisively countering the risk of fostering prolonged recessionary phases and succeeding in decisively easing deflationary pressures.
The European Central Bank's intervention came alongside the emergency measures of financial austerity and support for the credit sector (more exposed

[11] Resolution initiation provision adopted by the Bank of Italy on 21 November 2015 approved by decree of the Ministry of the Economy 22 November 2015.

to contagion risks due to its links with the public sector) launched by the Italian government in the same period.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

As mentioned, there is no rule in the Italian Constitution that expressly regulates the state of emergency. Although the introduction of a constitutional clause on this topic was discussed extensively in the Constituent Assembly, historical reasons, first and foremost related to the fascist experience, led the constituents to forego the inclusion of a specific provision on the matter.
The only emergency situation typified in the Constitution is thus "the state of war," that is, the legal regime set up by the legal order to deal with handling the phenomenon of war. According to Article 78 of the Constitution, it is decided by the Houses of Parliament, which grant the Government the "necessary powers."[12]
Then there is a set of rules applicable in variously named situations, which have as a common matrix a crisis/emergency situation.
First of all, Article 77 of the Constitution, which grants the Government, in the presence of "extraordinary cases of necessity and urgency," the possibility of adopting decree-laws, defined as "provisional measures with the force of law."
The recognition of a primary regulatory power in favour of the Government was dictated by the desire to allow the executive to react promptly and effectively to exceptional situations that had the characteristics of necessity and urgency and that, therefore, required inevitable and undeferrable interventions. However, in view of the fact that the urgent decree alters the principle of separation of powers and introduces an exception to the provision according to which "the legislative function is exercised collectively by the two Houses" (Art. 70), a series of limits, prescriptions and guarantees have been introduced to regulate the exercise of this exceptional power.
These acts, which must be submitted the same day to the Houses of Parliament for conversion, are immediately effective but, in clear discontinuity with what was provided for during the fascist era (Law No. 100/1926), they cease to be effective retroactively if they are not converted within 60 days of their publication.

[12] To complete the picture, further provisions are dictated by the Constitution in the event of a war emergency. In particular, it is up to the Head of State, in their capacity as commander of the armed forces and president of the Supreme Defence Council, to declare war resolved by the Houses (Art. 87, para. 9). In addition, by special law and "only in the event of war" the duration of the Houses may be extended. Finally, at jurisdiction level, the Constitution refers the regulation of the jurisdiction of military courts in wartime to the law.

In the absence of explicit emergency clauses in the Constitution, this rule constitutes the general rule that allows the introduction of a provisional, but immediately effective discipline, albeit with the limitations mentioned above.

In addition to this provision, the Constitutional Charter also contains other provisions, somewhat heterogeneous in content, that provide for specific institutions or remedies to be activated in exceptional cases or circumstances, in order to ensure the protection of values and goods considered primary.

- Pursuant to Article 16, para. 1 of the Constitution, in the presence of health and safety reasons, the law may establish restrictions on freedom of movement.
- Article 120, para. 2 of the Constitution states that, in the event of "serious danger to public safety and security," the Government may take the place of bodies of the Regional Boards, Metropolitan Cities, Provinces and municipalities, subject to compliance with the principles of subsidiarity and loyal cooperation.
- Article 81, para. 2 of the Constitution – subject to the authorisation of the Houses of Parliament, adopted by an absolute majority of their members – allows recourse to debt (i.e., the issuance of new public debt securities of the State) "upon the occurrence of exceptional events": events identified by the legislator as "periods of severe economic recession" and "extraordinary events, beyond the control of the State, including serious financial crises as well as serious natural disasters."[13]

Question 2

Within the institutional framework of emergency powers, the Government plays a central role, as it is responsible for adopting measures and intervention plans. The extraordinary powers it can resort to in such contingencies are typically expressed by issuing acts proper to executive power, namely decree-laws and especially ordinances.

In the first respect, it has already been mentioned that the Government may adopt provisional measures with the force of law, to be submitted to Parliament for conversion.

In the second respect, the President of the Council of Ministers is, according to Article 3, para. 1, lett. a) of the Civil Protection Code the "national civil protection authority and holder of the relevant policies."
In this context, the same Code attributes to the President of the Council of Ministers "the powers of ordinance in matters of civil protection," establishing,

[13] Article 6, para. 2, Law No. 243 of 2012.

however, that "unless otherwise established by the resolution referred to in Article 24 (i.e., with the resolution of the state of emergency) they may exercise them through the Head of the Civil Protection Department" (Art. 5, para. 1).
It is directly the President of the Council of Ministers, moreover, who "determines the civil protection policies to promote and coordinate the activities of central and peripheral State administrations, regional boards, metropolitan cities, provinces, municipalities, national and territorial public bodies and any other public or private institution and organisation present on the national territory" (Art. 5, para. 2).
The Code also states that it is always up to the President of the Council of Ministers to adopt directives with which to give "guidelines for the coordinated implementation of the civil protection activities referred to in Article 2, in order to ensure their unity while respecting the peculiarities of the territories" (Art. 5, para. 2).
Finally, the Code also regulates, in Art. 25, the limits and content of civil protection ordinances, which are adopted "in derogation of any provision in force, within the limits and in the manner indicated in the resolution of the state of emergency and in compliance with the general principles of the legal order and the rules of the European Union."

Alongside the Government, an equally central role is played by the Houses of Parliament through parliamentary control during the conversion of decree-laws presented by the Government, in addition to the usual power to adopt acts of policy and the traditional instruments of information and control on the actions of the Executive.

On the other hand, courts play no active role in emergency situations.
In particular, the Administrative Judge has jurisdiction over the legitimacy of administrative provisions, starting with the declaration of a state of emergency, the decrees of the President of the Council of Ministers, ministerial ordinances and prefectural ordinances, and ending with the contingent and urgent ordinances that can be adopted at local level; this is a review that may lead to the annulment of the provision with *erga omnes* and retroactive effect.
The ordinary Judge, who is responsible for the protection of subjective rights, may dismiss the administrative provision *incidental tantum*, excluding its effectiveness with reference only to the question submitted to their judgement, which may be decided "tamquam non esset." As a consequence of the dismissal, the provision does not produce any effect in the context of the case brought to the court's attention, but remains effective in the general legal order.
Finally, the Constitutional Court is the body called upon to examine the constitutional legitimacy of laws and acts having the force of law, as well as being entrusted with the task of settling conflicts of attribution between State bodies.

Question 3

The Italian Republic, while being united and indivisible, recognises and promotes local autonomy pursuant to Article 5 of the Constitution. In the Constitution itself, and precisely in Title V, Part II, we find the subdivision of competences between the State and the Regional Boards with regard to the matters called into question in an emergency situation.

According to the current multilevel system, which is the result of a constitutional reform that in 2001 considerably extended the margins of autonomy of the Regional Boards and Autonomous Provinces,[14] only the State can enact laws on matters of public order and security (Art. 117, para. 2, lett. h) and international prophylaxis (Art. 117, para. 2, lett. q), while there is a shared competence between the State and the Regions with regard to health protection and civil protection (Art. 117, para. 3), with the consequence that if the State law defines the fundamental principles in these matters, the Regional Boards have the competence to enact laws within the framework provided.
In addition to this, Article 118 of the Constitution distributes administrative competences, regardless of their material scope, among the various administrative levels according to the criteria of subsidiarity, differentiation and adequacy, favouring municipalities and providing for State intervention only for tasks that require unitary exercise throughout the national territory.

That being said, both Law No. 833 of 1978 establishing the National Health Service and the Civil Protection Code recognise significant powers to the Regional Boards in handling emergency situations.
Article 32 of Law No. 833 of 1978 requires that, in the matters referred to in para. 2 (i.e., in matters of hygiene and public health, supervision of pharmacies and animal control police), "ordinances of a contingent and urgent nature be issued by the president of the regional council and by the mayor, with effect extended respectively to the region or to part of its territory comprising several municipalities and to the municipal territory" (para. 3).

In turn, the Civil Protection Code designs the National Civil Protection Service as a widespread and polycentric system involving, in its various activities, state (central and peripheral), regional and local institutions, citizens, voluntary organisations and third sector entities in accordance with the principles of decentralisation and subsidiarity, without renouncing the necessary coordination and unitary requirements ensured at state level.

Firstly, it provides for three types of emergencies according to their respective seriousness and extent, distinguishing between emergencies that can be dealt

[14] Constitutional Law No. 3 of 18 October 2011.

with by the individual competent bodies in the ordinary way and emergencies of regional and national importance, respectively, that require the use of extraordinary instruments.

Within this framework, it states that:

a) in addition to the President of the Council of Ministers, "the Presidents of the Regional Boards and the Autonomous Provinces of Trento and Bolzano, in their capacity as territorial civil protection authorities and on the basis of the legislative power assigned to them, limited to the branches belonging to or dependent on their respective administrations" (Art. 3, para. 1, lett. b), as well as the Mayors and Metropolitan Mayors (Art. 3, para. 1, lett. c).

b) there are articulations of the "National Civil Protection Service," "The Regional Boards" holding concurrent legislative power in matters of civil protection and the Autonomous Provinces of Trento and Bolzano holding exclusive legislative power in matters provided for by the special statutes and their implementing rules (Art. 32, para. 2, lett. b), but see also Art. 4, para. 1);

c) "in compliance with the directives adopted pursuant to Article 15 and with the provisions of regional legislation [...], the Presidents of the Regional Boards, in their capacity as territorial civil protection authorities, exercise the functions of supervision over the integrated and coordinated performance of the same activities (i.e., provided for in Art. 5) by the structures belonging to their respective administrations" (Art. 6, para. 1);

d) "The Regional Boards and the Autonomous Provinces of Trento and Bolzano, in exercising their legislative power, define provisions with purposes similar to those provided for by this article (i.e., civil protection ordinances) in relation to the emergencies referred to in Art. 7, para. 1, lett. b), to be adopted by way of derogation from the regional legislative provisions in force, within the limits and in the manner indicated in the provisions referred to in Art. 24, para. 7" (Art. 25, para. 11).

In addition, the Civil Protection Code itself, in attributing a power of ordinance to the State, more precisely to the Head of the Civil Protection Department attached to the Presidency of the Council of Ministers, establishes that this power is to be exercised in agreement with the Regional Boards concerned, thus delineating a "strong" type of collaboration between the State and the Regional Boards (Art. 25).
Finally, we have already seen how Art. 50 of Legislative Decree No. 267/2000 empowers mayors to issue ordinances.

On the whole, therefore, this is a complex, articulated and probably non-systematic system (given that it draws a set of rules attributing powers, either to the State, or to the Regional Boards, or to the Municipalities, in a manner that is not always clearly ordered) from which it clearly emerges, however, that local autonomies, and in particular, the Regional Boards, are the holders of numerous and significant powers in matters of emergency management.

Therefore, without prejudice to governmental control in handling emergencies of national importance, local autonomies, and in particular the Presidents of the Regional Boards and Mayors, have a significant power to intervene to deal with emergencies of local importance.
For the sake of completeness, it should be added that the aforementioned regulatory fragmentation of "emergency rules" and the allocation of public powers across different levels of government-particularly in the relations between the State and Regions-have proven to be among the most critical points during the recent COVID-19 pandemic crisis. See, for further details, Section 3, Question 1.

Question 4

The remedies for resolving possible conflicts between national emergency regulations and EU or international law are those provided for in the ordinary manner.
The conflicts can be overcome first and foremost through the constitutional legitimacy review exercised by the Constitutional Court, taking into account that, pursuant to Article 117, para. 1 of the Constitution. "Legislative power shall be exercised by the State and the Regional Boards in compliance with the Constitution, as well as with the constraints deriving from the Community order and international obligations."
Then there is the obligation on national courts and public authorities to dismiss a national rule where it violates Community law. State responsibility for breaching EU law can be enforced through the infringement procedure pursuant to Article 258 Treaty on the Functioning of the European Union.
Finally, there is always the possibility of appealing to the ECHR against acts of national authorities for violating one or more human rights guaranteed by the Convention.

Question 5

The topic of protecting fundamental rights and freedoms in the handling of an emergency situation is of crucial importance in any democratic system.

In the Italian legal system, this is primarily ensured by the constitutional provision of the statutory reserve, according to which the regulation of a specific matter is exclusively reserved for a source of legislative rank (law or act having the force of law), excluding subordinate sources. This statutory reserve can be, depending on the case, absolute when the matter must be entirely regulated by law (e.g., Article 13 of the Constitution regarding restrictions on personal freedom) or reinforced when the Constitution itself predetermines certain contents that the law must have (e.g., Article 16 of the Constitution regarding restrictions on the freedom of movement).

As for the limits within which the aforementioned rights and freedoms may be restricted, it should be noted that if the Italian legal order cannot admit or tolerate a suspension of the fundamental rights and freedoms recognised and guaranteed by the Constitutional Charter, not even in emergency situations, it is nevertheless possible to introduce, in such contingencies, a limitation of the same, after a fair balancing of all the constitutional interests at stake, since – as the Constitutional Court has affirmed – there are no tyrannical rights.[15] In other words, no right is absolute and, if a situation of conflict arises in practice, the use of the balancing technique makes it possible to appropriately reconcile the values at stake, without in any case going so far as to infringe their essential content, and in any case on a transitional basis, no longer than is strictly necessary. Even the right to health, which in a pandemic context certainly takes on paramount importance, is not exempt from balancing with other constitutional values of varying degrees[16]: freedom of movement, education, the free conduct of economic activities, and work.

The provision of extraordinary powers and derogatory instruments capable of compressing fundamental rights and freedoms is, therefore, compatible with the legal order, but this is on the condition that the restrictions are introduced, by the public authority, according to precise constitutional, legislative and jurisdictional guarantees.
The verification of compliance with the established limits is exclusively the responsibility of the judicial authority. There are no non-judicial bodies in the Italian legal system tasked with ensuring the protection of fundamental rights of individuals.

As for the entity responsible for carrying out the aforementioned balancing, Parliament, and thus the law, would be the most logical and immediate response. However, this assumption, which is already in crisis during ordinary times, faces further exceptions during emergency phases when it is not uncommon for the balancing to be carried out not directly by the law but at the level of secondary legislation and largely entrusted to the application of

[15] See: Constitutional Court, Sentence No. 85/2013.
[16] See: Constitutional Court, Sentence No. 264/2012.

measures: therefore, to the administration and ultimately to the judge.[17] This aspect will be revisited shortly.

First, a distinction must be made between the two categories of acts through which sovereignty is manifested in practice in emergency phases – i.e., decree-laws on the one hand and ordinances of necessity and urgency on the other – since the level of the guarantees provided to individuals is different.

In the case of decree-laws, these are acts with the force of law that, in imposing limitations on the rights and freedoms of individuals as a result of the aforementioned balancing, are subject to constitutional review by the Constitutional Court: first and foremost in terms of the existence of the conditions of necessity and urgency,[18] but also in terms of the compatibility of the measures introduced with constitutional norms, although in practice the limited period of effectiveness does not easily allow for a judgement of legitimacy before the Constitutional Court, or at least incidentally.[19]
The Court may therefore declare an emergency rule unconstitutional if the limitation of the rights of individuals introduced is unreasonable and disproportionate to the emergency event.
On several occasions, the Court has stated that the protection of rights must always be "systemic and not broken up into a series of uncoordinated and potentially conflicting rules" (264/2012) and that rights must be balanced according to the principles of proportionality and reasonableness. These two principles, although often used in conjunction, have a precise meaning.
The reasonableness of a restrictive measure ordered by the legislature relates to its congruence with higher values, whereas proportionality refers to the relationship between a given purpose and the manner used to achieve it.
Based on the jurisprudence of the European Court of Human Rights and the Court of Justice, the so-called proportionality test consists of a number of fundamental steps that the legislator should respect.
Proportionality is to be assessed first of all in terms of its appropriateness with respect to the tangible situation of danger and the purposes to be pursued; secondly, proportionality is satisfied if, among several interventions equally suited to the purpose, the option falls on the one that is necessary and from which derives the least possible harm to the individual and general rights and interests involved; finally, the sacrifice imposed on the legal situations of individuals and the community must not be greater than the benefits that de-

[17] In this regard, concerning the recent pandemic experience, see: F. Patroni Griffi, Il giudice amministrativo come giudice dell'emergenza, presentation at the Occorsio Foundation webinar, April 12, 2021.

[18] See: Constitutional Court, Sentence No. 29/1995; Sentence No. 171/2007.

[19] Therefore, decree-laws mostly come before the Court of Justice when they have already been converted into law, possibly with amendments.

rive from implementing the restrictive measures, which satisfies the so-called proportionality in the strict sense.

The framework of guarantees becomes more problematic when one considers ordinances of necessity and urgency which, as formally administrative acts, are beyond both parliamentary control and constitutionality review. The only form of control is the possibility of appeal before the administrative judge. For this reason, they are always regarded with some suspicion by whichever party they are adopted (Prime Minister, Extraordinary Commissioners, individual Ministers, Prefects, Regional President, Mayor).
The most significant aspect of these ordinances, which are always adopted by a monocratic body, is that they are able to derogate from the provisions of the law in force (indicating the main rules from which they intend to derogate and complying with the obligation to state reasons), which makes them appear steeped in authoritarian power, being able to introduce measures that severely affect constitutional freedoms such as, for example, freedom of movement and mobility, residence, assembly, economic initiative, religion, worship.
Given the potential "dangerousness" of such provisions, it was the Constitutional Court that took charge of the possible compression of people's rights and freedoms, delimiting the derogatory effectiveness of the ordinance power and also clarifying its compatibility with the constitutional order.[20]
In particular, constitutional jurisprudence has identified respect for the general principles of the legal system as the limit for the admissibility of such orders, including first and foremost the principle of substantive legality, which, in this case, must be supplemented by the formal principle so as to guarantee the boundary of emergency powers and ensure a series of minimum guarantees.
The principle of legality is supplemented by other complementary principles, including the principle of proportionality, understood as the adequacy of the measure and the power exercised with respect to the end pursued, having regard to the sacrifice imposed on the other interests at stake, which must be the least possible.
Also relevant as limits to the power of ordinance are European Union law and international obligations, insofar as they are capable of removing the instrument in question from the realm of exception, bringing it back within the existing legal system and within the scope of the state of emergency.
The right balance between the interest of the community pursued by the

[20] The most significant limits identified are: (i) the prerequisites of necessity and urgency; (ii) the principle of legality, i.e., prior legislative authorisation; (iii) the prohibition of intervention in matters covered by absolute reservation of law; (iv) the provisional nature of interventions, in that derogations from existing legislation must be limited in time; (v) the general principles of the legal system; (vi) the constitutionally recognised sphere of autonomy of the regional boards and the principle of loyal cooperation between the State and the territorial authorities; (vii) the principles of proportionality and reasonableness in view of the wide discretion enjoyed by the competent administrative authorities. See: Constitutional Court, Sentences No. 8/1956, No. 26/1961 and No. 127/1995.

emergency intervention, on the one hand, and the guarantee of people's fundamental rights and freedoms, on the other, ultimately depends on the strict observance of a set of general principles and limits progressively defined by jurisprudence and doctrine.[21]
In this context, it should be noted that, even in a system like the Italian one, which bases the division of competencies between the civil court and the administrative court on rights and legitimate interests, it is the administrative court who assumes a central role during emergency phases as the judge responsible for verifying the legality of administrative actions, even when such actions may interfere with fundamental rights and liberties.
Moreover, as clarified by the Constitutional Court since its ruling No. 140 of 2007, the fundamental nature of a right does not impede the establishment of administrative jurisdiction, which exists whenever a private individual's situation comes into contact with the exercise, whether direct or indirect, of power. Furthermore, where the balancing of constitutional values and interests is not fully carried out by the law, as frequently occurred during the COVID-19 pandemic, the administrative court is entrusted with the oversight of emergency powers through the technique of balancing, a phenomenon that was observed not only in Italy during the pandemic.[22] The range of cases addressed by the Italian administrative judge (many of which were rendered in precautionary proceedings) has been quite diverse: the opening and closing of schools, restrictions on the movement of individuals, the opening and closing of bars, restaurants, and commercial establishments, the use of face masks, the mandatory testing or quarantine upon return from abroad, transparency of the minutes from the technical-scientific committee for the emergency, and so on.

Question 6

In the case of the management of the crisis at the Ilva steel plant in Taranto, the European Court of Human Rights condemned Italy for the breach of two articles (No. 8 and No. 13) of the European Convention on Human Rights. In a judgment delivered in 2019, the judges in Strasbourg found Italy guilty of the "persistence of a situation of environmental pollution" which jeopardizes the health of those living in the surrounding area of the industrial facility; specifically, the Italian authorities failed to adopt all necessary measures to ensure effective protection for the population. Furthermore, Italy was condemned for not providing committees and individuals who lodged complaints with the means to submit grievances and reports to the national authorities.

[21] See: M. Ramajoli, *La gestione dell'emergenza pandemica tra Schmitt e Kelsen, in Rivista interdisciplinare sul diritto delle amministrazioni pubbliche*, 2024, p. 108.
[22] See: F. Patroni Griffi, Il Giudice amministrativo come giudice dell'emergenza.

In 2022, four additional judgments of condemnation were issued by the ECHR, reiterating the urgency of comprehensive action by the State to ensure the safeguarding of the environment and the health of the population.

Even during the COVID-19 pandemic, the interventions adopted on an emergency basis by the President of the Council of Ministers (d.P.C.M.) certainly entailed the compression of certain fundamental rights and freedoms of the internal market (first and foremost, the free movement of persons) guaranteed by the Treaties; however, this was not a real conflict, since the measures were indispensable to contain and counteract the spread of the epidemiological contagion: the limitations introduced were, therefore, justified by pre-eminent public health and safety requirements, adopted albeit with different intensity and extent by many Member States and not contested by the European institutions.

Section 3: Statutory/executive emergency law in the Member States

Question 1

See Section 1, Question 1, with reference to existing legislation on health care, public safety, the environment and civil protection.

The special regime introduced during the epidemiological emergency by COVID-19 must be added to the regulatory framework described, having subjected the system of sources to peculiar tension concerning the relationships between the Government and Parliament, with particular regard to the rights of individuals.[23]
On the occasion of this emergency, the actual choice made by the Italian government was, in fact, not to resort to pre-existing regulatory schemes, but rather to construct a parallel regulatory system, which has elements of originality compared to other emergency regulations that were not repealed but – at the same time – subject to derogation such as, among others, the Civil Protection Code of 2018.[24]
A particularly complex normative chain has been activated (decree laws, Prime Ministerial decrees, ministerial ordinances, ordinances from the Civil Protec-

[23] Above all, Decree-Law No. 6/2020 was not aligned with constitutional standards, as it merely granted authority to the Executive, limited only (including temporally) by its alignment with the broad aim of "protecting national security." Specifically, the decree, after listing nineteen restrictive measures concerning personal freedoms in Article 2, granted the administrative authority the power to adopt "further measures" for the containment and management of the emergency, without specifying their exact nature. Subsequently, Decree-Law No. 19/2020 addressed this issue by remedying such a deficiency.

[24] See, *ex multis*, E. C. Rafflotta, "I poteri emergenziali del Governo nella pandemia: tra fatto e diritto. Un moto perpetuo nel sistema delle fonti," in *Rivista AIC*, 2021, 2

tion and other administrative authorities, as well as regional and municipal ordinances), which has led to a massive and repeated use of acts of a secondary normative nature and has raised critical issues primarily concerning compliance with the principle of legality.

This special system, which has been the subject of several criticisms,[25] was first of all centred not on decree-laws, but on those special ordinances of necessity and urgency that are the decrees of the President of the Council of Ministers (d.P.C.M.): a system, therefore, characterised by the fact that all political and administrative responsibility is assumed by the President of the Council of Ministers and by the marginalisation of Parliament and the rest of the Government, albeit on the basis of a legislative authorisation by Parliament and under the political control of Parliament itself, inherent in the continued confidence assured to the Government.

The first urgent decree attributed, in particular, an enormous atypical power to the President of the Council of Ministers, which was gradually better detailed by the subsequent decrees[26] that brought it more in line with the guidelines of constitutional and administrative jurisprudence.
In particular, after the initial phase, the regulatory framework has been improving: the new rules conferring the power introduced a maximum duration for the measures adopted, provided for the opinion of the technical-scientific committee established at the Civil Protection and also strengthened the role of Parliament, stipulating that the decrees of the President of the Council of Ministers adopted were first of all published in the Official Gazette and were communicated to the Houses of Parliament within the day following their publication; and also that the Prime Minister or a Minister delegated by them should report every fifteen days on the measures adopted and explain in advance to the Houses of Parliament the content of the provisions to be adopted, except in cases of extreme urgency, when this was not possible.[27]
In spite of these corrective interventions, the perplexities of a part of the doctrine have not been completely overcome, which points out that the decrees of the President of the Council of Ministers are not subject to any scrutiny by either Parliament or the President of the Republic, the issuing procedure does

[25] For all, see: I. Nicotra, *Pandemia costituzionale*, Naples, 2021, pp. 56 ff. In the sense of considering the emergency legislation in line with our legal system, M. Luciani, "Il sistema delle fonti del diritto alla prova dell'emergenza," in *Rivista AIC*, 2020, 2.

[26] Decree-Law No. 6/2020, later almost entirely repealed and replaced by Decree-Law No. 19/2020, Decree-Law. 33/2020, Decree-Law 83/2020, Decree-Law 125/2020, Decree-Law 158/2020, Decree-Law 172/2020, Decree-Law 1/2021, Decree-Law 2/2021, Decree-Law 12/2021, Decree-Law 15/2021, etc.

[27] For a diachronic analysis of these interventions, see: R. Rolli-R. Stupazzini, "Il ventaglio degli atti amministrativi dell'emergenza. I tentativi di coordinamento tra interventi statali e regionali in un anno di emergenza pandemica," in *Istituzioni del federalismo*, 2021, 3, pp. 691 *et seq*.

provide for the involvement of the Regions, but it is a "weak" coordination, as it only requires that the regions concerned be heard.
It should be noted, however, that the Constitutional Court, called upon to judge a regional law of Valle d'Aosta, did not fail to affirm the legitimacy of the intervention of the legislature that in the face of "a health emergency with very peculiar features chooses to introduce new regulatory and measure-based responses to it. This is what happened, in fact, following the spread of COVID-19, which – due to the rapidity with which it spreads – forced the use of instruments capable of adapting to the twists and turns of a constantly defining crisis situation."[28]

Question 2

Since a state of emergency is not contemplated in the Constitution, there are no separate regimes, at the constitutional and legislative levels respectively, that could conflict. See Section 2, Question 1.

Question 3

The discretion of the political authority is limited by compliance with constitutional provisions and the fundamental principles of the legal system, primarily the inviolability of individual rights (Art. 2), along the lines indicated by the Constitutional Court. See Section 2, Question 4.

Question 4

Insofar as the adoption of the emergency measure complies, in terms of competence and content, with the rules and principles of Euro-Union law and the envisaged distribution of powers, the framework of national intervention powers should not be unjustifiably altered.

Section 4: Judicial review of emergency powers in the Member States

Question 1

"Emergency" decree-laws, which are primary sources, are subject to constitutionality review under Article 134 of the Constitution in the terms described above.

[28] Constitutional Court, Sentence No. 37/2021.

Provisions of an administrative nature may be challenged before the administrative courts.
This applies first and foremost to the declaration of a state of emergency pursuant to Article 24 of Legislative Decree 1/2018, whose prerequisites for adoption are established by the primary source, with the consequence that their occurrence can, at least in the abstract, be ascertained by the Judge.
Pursuant to para. 1 of the same Article 24, in fact, the declaration can only be adopted "on the basis of the available data and information," data that must prove the existence of the requirements under Art. 7, para. 1, lett. c).
In fact, according to well-established case law, it is an act of high administration, with a great degree of politicity and broad discretionary power, whose only limit is the principle of reasonableness, the scrutiny of which is entrusted to the administrative judge.
With regard to civil protection ordinances, which "where they contain derogations from the laws in force, must contain an indication of the main rules from which they intend to derogate and must be specifically motivated" (Art. 25, para. 2 of the Civil Protection Code), the central importance of the proportionality review must be highlighted: as a limit to the ordinance power and, at the same time, as an instrument in the hands of the administrative judge to assess the legitimate exercise of administrative power.[29]
It presupposes the existence of a reasonable and verifiable link between the measures taken and the event to be handled.
This scrutiny is much more penetrating than the simple review of the excess of power, since it is not limited to assessing the logical-congruity of the choices made by the administration in the exercise of powers attributed to it by law for the care of specific interests, but, through a three-phase enquiry, it goes so far as to review: (i) the suitability of the measure with respect to the purpose to be achieved, (ii) the necessity of the measure, i.e., its less invasive nature with respect to the interests involved, and (iii) its appropriateness, understood in terms of proportionality with respect to the end, i.e., proportion between the situation, the act and the interest pursued.
This avoids restrictions to the private sphere that are not imposed by strict necessity, consistently with the end to which the principle of proportionality in Community law is addressed.
For further details on the control exercised by the administrative judge through the technique of balancing during the recent pandemic crisis, see Section 2, Question 4.

[29] F. Pagano, "Dal decreto legge alle ordinanze di protezione civile. Ampiezza e limiti del sindacato del Giudice amministrativo sul potere extra ordinem del Governo," in *Rivista AIC*, 2011, 4.

Question 2

In general, the rules provided for the abridged procedure under Article 119 of the Code of the Administrative Procedure apply in proceedings concerning such orders. The reasons why the abridged procedure is applied to this type of litigation are linked to the need for a speedy settlement of judgements concerning emergency provisions, as a result, precisely, of their nature.
During the COVID-19 emergency, a series of special rules and "emergency procedures" were introduced by the legislature to ensure the normal functioning of administrative justice, both to prevent the accumulation of backlogs and to guarantee judicial review (especially in interlocutory proceedings) of the acts issued by public authorities in response to the emergency. In this context, some of the primary features introduced in administrative proceedings included, among other things, the suspension of all procedural deadlines, the replacement of collegial interim relief with single-judge relief, and the option for legal representatives to attend hearings remotely.

Question 3

As mentioned above, the principle of proportionality allows the administrative judge to assess the proper exercise of the general emergency power so that it is exercised with the least sacrifice to the private interest.
With regard to the judge's margins of control with reference to the assumptions that legitimise the exercise of *extra ordinem* power and with reference to the declaration of the state of emergency resolved by the Council of Ministers, according to a consolidated line of jurisprudence, these are broadly discretionary acts that find their only limit "in the actual existence of a factual situation from which a danger arises or may arise for the integrity of the person, or for property, settlements and the environment, and in its reasonableness, as well as evidently in the impossibility of otherwise being able to handle the situation."[30]
Jurisprudence is thus inclined to allow a review based on a standard of operational rationality aimed at avoiding arbitrary and irrational decisions, the violation of which is symptomatic of excess of power. This review does not extend to the merits and, therefore, excludes any assessment of the appropriateness or expediency of the contested provision.
With reference to the ordinances, see also Section 4, Question 1 on the importance of the principle of proportionality.

[30] *Ex multis*, Cons. St., 28 January 2011, IV, no. 654.

Question 4

As already noted, the principle plays a key role when scrutinising the legitimacy of the measures and interventions adopted, operating as an internal limitation of the discretion of the authority in charge. There are no major differences with the principle laid down in the European Union's legal system (see Section 2, Question 4).

Section 5: Implementation of EU emergency law in the Member States

Question 1

As previously illustrated, many measures adopted within the EU framework to address crisis situations are intended to interact with the principles and rules of the national legal system.
For example, the emergency measures adopted by the EU regarding vaccine procurement to address the COVID-19 pandemic complemented the interventions undertaken at the national level, supporting the protection of health as provided by Article 32 of the Constitution, both as a fundamental right of the individual and as an interest of the community, which public authorities are called upon to guarantee.

In the case of banking crises, the objective of protecting savings ensured by Article 47 of the Constitution could abstractly interfere with the application of European legislation on the resolution of banking institutions, insofar as depositors' claims are subject to the bail-in mechanism, albeit in a priority order that sees them ranked in the hierarchy of liabilities called upon to contribute to the bank's rescue.
Such a hypothetical conflict, supported by a part of legal doctrine, has never been openly addressed by the Italian Constitutional Court, while it has been clearly rejected by the Council of State, which has ruled out any conflict in the matter.[31]

In managing the environmental emergency linked to the crisis of the steelworks in Taranto (formerly Ilva), now returned to public ownership, the application of EU State aid regulations has interacted with both health protection and environmental protection, both of which are directly safeguarded by the Italian Constitution. Moreover, in the management of irregular immigration, the emergency measures decided at the EU level inevitably impact the protection of public order and security within the national legal system.

[31] CdS, sec. IV, 18 January 2019, No. 474.

Similarly, the emergency measures adopted by the ECB to counter the sovereign debt crisis, including, among others, the so-called quantitative easing, have influenced and affected the management of Italian public debt.
For a broader overview of other instances of interaction, see Section 1, Question 6.

Question 2

With reference to the application of European measures adopted under Article 78.3 TFEU on the management of migration flows, the critical issues related to implementing the decisions taken by the Council on the relocation of asylum seekers come to the fore, as already highlighted. To date, a genuine Common European Asylum System (CEAS) is lacking, while much of the implementation of the CEAS has remained within the competence of the Member States. The burden, including the economic burden, of hosting, assisting and asylum procedures continues to fall on the Mediterranean countries most exposed to the arrival of refugees. The regulation of the identification, registration and allocation of responsibility to a specific Member State provided for in the Dublin III Regulation would probably deserve to be reviewed.

For the sake of completeness, mention should be made of the recent initiative to build first reception centres under Italian jurisdiction, but located in a third country (Albania) for certain categories of migrants, in order to carry out checks on the conditions for entry to the national territory or for return to the country of origin; this wholly innovative affair, which has been subject to intense political debate, as well as to various stances taken by other Member States and the first judicial rulings, is still recent and has not allowed the formation of consolidated guidelines.

Latvia

*Anda Smiltēna**

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

The Law "On Emergency Situation and State of Exception," adopted in 2013, lays down the procedures by which two special legal regimes – "emergency" or "state of exception" are established. Emergency situation may be declared in case of such threat to national security, which is related to a disaster, danger thereof or threat to the critical infrastructure, if safety of the State, society, environment, economic activity or health and life of human beings is significantly endangered. State of exception is a special legal regime to be declared if the State is endangered by an external enemy; internal disturbances which endanger the democratic structure of the State have arisen or are in danger of arising in the State or any part thereof.

"Emergency" and "state of exception" regimes differ in terms of the grounds for their notification, but are similar in terms of scale and limitations.

Question 2

The Constitution of the Republic of Latvia (hereinafter – Constitution), as a special legal regime, provides only for the announcement of a state of exception, which is related to military threats and unrest of the State. However, the general legal framework for both "emergency" and "state of exception" regimes is determined by the Law "On Emergency Situation and State of Exception," which provides for the procedures for the announcement and abolition of special legal regimes, as well as the rights of public administration and local government institutions, natural and legal persons, their restrictions, special obligations and ensuring the rule of law during the period of validity of such legal regimes. Certain issues are also regulated in the Civil Protection and Disaster Management Law and the National Security Law.

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Question 3

As already mentioned in Section 1, Question 1, an emergency situation may be declared in case of such threat to national security, which is related to a disaster, danger thereof or threat to the critical infrastructure, if safety of the State, society, environment, economic activity or health and life of human beings is significantly endangered. State of exception is a special legal regime to be declared if the State is endangered by an external enemy; internal disturbances which endanger the democratic structure of the State have arisen or are in danger of arising in the State or any part thereof.

Question 4

The emergency situation or state of exception shall be declared by the Cabinet of Ministers (hereinafter – Cabinet), the Government, taking a relevant decision (order). The content of the Cabinet decision shall be determined by the Law "On Emergency Situation and State of Exception." A decision regarding the state of exception or amendments to a decision regarding the state of exception, as well as regarding extension or revocation of the state of exception shall be sent without delay for notification in electronic mass media, published on the Internet home pages of local governments and placed in visible places outside the buildings of State administrative and local government institutions, as well as the official electronic publication shall be ensured online on the Internet. Public electronic mass media shall announce a decision regarding an emergency situation or state of exception free of charge, as well as provide other information and recommendations for the actions of residents. The Cabinet shall notify the decision on emergency situation to the Presidium of the Saeima (Parliament of Latvia), which shall immediately include it on the agenda of the meeting of the Saeima. If, when examining the decision of the Cabinet, the Saeima rejects it, the relevant decision shall be repealed and the measures introduced according thereto shall be revoked without delay.

Question 5

We have no information.

Question 6

We have no information.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

Constitution (Satversme) was adopted in 1922 and is historically the only constitution of the Republic of Latvia that was developed shortly after the founding of the Republic of Latvia in 1918. The Constitution envisages as a special rule of law regime a state of exception related to military threats and unrest of the state. Article 62 of the Constitution states: "If the State is threatened by an external enemy, or if an internal insurrection which endangers the existing political system arises or threatens to arise in the State or in any part of the State, the Cabinet has the right to proclaim a state of emergency and shall inform the Presidium within twenty-four hours and the Presidium shall, without delay, present such decision of the Cabinet to the Saeima."

Question 2

The management of an emergency or exceptional situation is the task of the Cabinet. However, the exceptional situation or state of exception cannot be the basis for restricting the competence of the institutions referred to in the Constitution. The Saeima continues to carry out its legislative work and exercise parliamentary control over the activities of the Cabinet. The Saeima takes a final decision on the situation in the country. Neither Constitution nor the Law "On Emergency Situation and State of Exception" restrict the judiciary during the special legal regime. The person has the right to challenge and appeal in court the administrative acts issued during the emergency situation and the state of exception or the actual actions of officials.

According with Section 82 of the Constitution, in case of a court war or state of exception, also military courts shall be adjudicated.

Question 3

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Question 4

The Law "On Emergency Situation and State of Exception" provides that measures for the provision of emergency situations and state of exception may not be in contradiction with international human rights norms binding on the Republic of Latvia.

The same applies to EU law in the light of the primacy principle of EU legislative acts. The Administrative Procedure Law, which also operates during special legal regimes, provides that if a conflict is established between a norm of international law and a norm of Latvian law of the same legal value, the norm of international law shall be applied.

The Constitutional Court has recognised in its case-law that the Cabinet must also evaluate the conformity of the norms of law provided for in the regulatory enactment regulating emergency situations with the norms of higher legal force, including Constitution, international and European Union law (paragraph 13.2.3 of the judgment of the Constitutional Court of 21 December 2023 in Case No. 2022-28-03).

Question 5

The answer to this question is set out in the answer of the previous question.

Question 6

We do not have any information.

Section 3: Statutory/executive emergency law in the Member States

Question 1

In accordance with the Law "On Emergency Situation and State of Exception," in declaring emergency situation, the Cabinet has the right to stipulate:

(1) special movement and gathering procedures or movement and gathering restrictions;
(2) special procedures for the movement of vehicles or restrictions to such movement;
(3) special procedures for economic activity or restrictions to such activity;
(4) special procedures for access to goods, medicinal products, energy resources, services and other material and technical resources;
(5) the right of State administration and local government authorities to take a decision to evacuate inhabitants and their movable property, as well as, if necessary, to ensure the carrying out of the decision taken by forced movement;
(6) the right of officials of State administration and local government authorities to access a private property;

(7) additional right for officials of State administration and local government authorities to detain and hand over persons who refuse to obey lawful requests of officials or commit other infringements, to officials of law enforcement authorities for taking a decision;
(8) the right of State administration and local government authorities to determine a prohibition for persons to be at certain places without authorisation or personal identification documents;
(9) State administration and local government authorities which prepare and distribute official information regarding emergency situation;
(10) complete or partial suspension of execution of the liabilities laid down in international agreements, if execution thereof may have a negative impact on the ability to prevent or overcome threat to national security;
(11) to determine measures necessary in the particular emergency situation, which are provided for the prevention or overcoming of threat to national security and consequences thereof in laws, as well as the competence of State administration and local government authorities in the prevention or overcoming of threat to national security.

Question 2

As mentioned above, as a special legal regime, the Constitution provides only for the promulgation of a state of exception linked to military threats and unrest. However, the general legal framework for both emergency and exceptional situations is determined by the Law "On Emergency Situation and State of Exception."
The exceptional and emergency regimes differ on the basis of their promulgation, but are similar in scope and limitations. The legal literature takes the view that such situations are constitutionally "ambiguous" in that they convey the impression of the similar legal status of the two regimes, which the Government introduces only when assessing the national security threat in question, and that it is therefore necessary to improve the constitutional framework by regulating, in addition to the exceptional situation, the emergency situation.

At the same time, in legal discussion there is a view that it is necessary to be able to apply the existing Constitution and Latvia needs to develop in an increasingly strong principle-driven legal culture, not normative-based culture, because already now the Constitution is sufficient and appropriate regulatory encouragement for each branch of power to be able to fulfil its functions and perform its current tasks. The experience of the crisis caused by the COVID-19 infection in an emergency situation shows that the Constitution (Satversme) is also in such a situation a sufficient legal framework for national action in

defining the objectives, fundamental principles and functions of the action of the constitutional organs.

Question 3

The only limit is in accordance with the Law "On Emergency Situation and State of Exception." Law states that emergency situation and state of exception may not be the grounds for restricting the competence of the authorities referred to in the Constitution.

Question 4

We do not have any information.

Section 4: Judicial review of emergency powers in the Member States

Question 1

Administrative acts issued during an emergency situation and a state of exception or actual actions of officials shall be contested, appealed and examined in accordance with the procedures laid down in the Administrative Procedure Law in an administrative court.

Contesting or appealing a decision shall not suspend the operation thereof, if the relevant decision is directly related to the declared emergency situation or state of exception, as well as in other cases provided for in the Law.

Question 2

Administrative acts issued during an emergency situation and a state of exception or actual actions of officials shall be contested, appealed and examined in accordance with the procedures laid down in the Administrative Procedure Law, which does not provide for special proceedings for the examination of such cases. At the same time, the Law "On Emergency Situation and State of Exception" provides that a decision directly related to the declared Emergency or State of exception may be contested throughout the period of validity of the special legal regime, as well as within one month after the revocation of the special legal regime. Other administrative acts or actual actions of officials within such time period may be contested only if the special legal regime

has affected the possibilities for submitting a complaint and the person can objectively justify it.

Question 3

In administrative proceedings, the court shall apply the following general principles of law:

(1) the principle of respecting the rights of a private person;
(2) the principle of equality;
(3) the principle of the rule of law;
(4) the principle of reasonable application of legal provisions;
(5) the principle of the prohibition of arbitrariness;
(6) the principle of protection of legitimate expectations;
(7) the principle of lawful basis;
(8) the principle of democratic structure;
(9) the principle of proportionality;
(10) the principle of priority of laws;
(11) the principle of procedural equity.

Question 4

The clause 2 of Article 2 of the Administrative Procedure Law stipulates that the one of basic purposes of the Law is to subject actions of executive power relating to specific public legal relations between the State and a private person to the control of an independent, impartial, and competent judicial power. It follows from the mentioned law that control over actions of public authorities is subject to the Administrative Procedure Law.

One of the general principles of law that shall be applied in administrative proceedings is the principle of proportionality. According to the Article 13 of the Administrative Procedure Law the principle of proportionality means that the benefits which society derives from the restrictions imposed on an addressee must be greater than the restrictions on the rights or legal interests of the addressee. Significant restrictions on the rights or legal interests of a private person are only justified by a significant benefit to society. Thus, the principle of proportionality must be considered by the public authorities in the administrative proceedings. The court in the judicial review of actions of public authorities must consider if the public authorities have followed the principle of proportionality.

Regarding the actions of public authorities in situations of emergency it must be mentioned that the paragraph 1 of Article 20 of the Law "On Emergency Situation and State of Exception" stipulates that the administrative acts issued or the actual action of officials during emergency situation or state of exception shall be contested, appealed and examined in accordance with the procedures laid down in the Administrative Procedure Law. Thus, also in the judicial review of actions of public authorities in situations of emergency should be considered if the public authorities have followed the principle of proportionality.

Section 5: Implementation of EU emergency law in the Member States

Question 1

All legislation regulating emergency issues must comply with the European Union law.

Question 2

We do not have any information.

Lithuania

*Audronė Gedminaitė**
*Elena Masnevaitė***
*Vigita Vėbraitė****

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

In Lithuania, the legal framework does indeed distinguish between concepts such as "emergency," "crisis," and "necessity." These concepts are embedded in Lithuanian law, specifically within the context of national security, public safety, and civil protection. Each term is associated with specific legal definitions, procedures, and authorities to handle such situations. Below is an explanation of each category and their differences, along with other closely related concepts.

Emergency situation (lt. Ekstremali situacija)
An "emergency situation" in Lithuania refers to circumstances that arise suddenly, requiring immediate action to prevent harm to the population, the environment, or property. These situations typically involve natural disasters (like floods, fires, or pandemics), technological accidents, or other sudden dangerous events. The concept is regulated by **Law on Crisis Management and Civil Protection** (lt. Lietuvos Respublikos krizių valdymo ir civilinės saugos įstatymas).

Definition: A situation arising from an extreme event that may cause or causes a significant threat to the lives or health of the population, their essential living (or operational) conditions, property, the environment, the performance of vital state functions, public order, or result in death, injury, property damage, or other harm to the population.

The government or local authorities can declare an emergency situation, activating various response mechanisms and special legal provisions to protect the public.

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Crisis (lt. Krizė)
Definition: A state-level emergency situation that cannot be resolved or its consequences cannot be eliminated by applying the state-level emergency management measures provided for in this law, as well as a situation caused by a special event, external or internal incidents, or processes that pose a threat to the national security interests of the Republic of Lithuania or the performance of vital state functions. This term does not include situations or events that pose a threat to the sovereignty, territorial integrity, constitutional order, or public peace of the Republic of Lithuania, where a decision may be made to use the military in response to localized armed incidents and violations of the state border that do not equate to acts of aggression, or to impose martial law.

State of Emergency (lt. Nepaprastoji padėtis)
A "state of emergency" is a legal regime introduced in more severe circumstances where public order or national security is under significant threat. This is a more formalized and serious legal regime than an "emergency situation."

Definition: A special legal regime in the state or part of it, allowing the application of temporary restrictions on the exercise of the rights and freedoms of individuals and temporary restrictions on the activities of legal entities, as provided for by the Constitution and Law on State of emergency (lt. Nepaprastosios padėties įstatymas).
The declaration of a state of emergency can be made by the Seimas (parliament) or the President with the consent of the Seimas. During a state of emergency, certain civil rights can be restricted, and special measures (like curfews, mobilization of resources) can be enacted.
Constitution (Article 144)
When a threat arises to the constitutional system or social peace in the State, the Seimas may declare a state of emergency throughout the territory of the State or in any part thereof. The period of the state of emergency shall not exceed six months.

In cases of urgency, between sessions of the Seimas, the President of the Republic shall have the right to adopt a decision on the state of emergency and convene an extraordinary session of the Seimas for the consideration of this issue. The Seimas shall approve or overrule the decision of the President of the Republic.
The state of emergency shall be regulated by law.
Constitution (Article 145)
Upon the imposition of martial law or the declaration of a state of emergency, the rights and freedoms specified in Articles 22 [private life], 24 [property], 25 [freedom of self-expression], 32 [freedom of movement], 35 [freedom of as-

sociation], and 36 [freedom of assembly] of the Constitution may temporarily be limited.

Necessity (lt. Būtinasis reikalingumas)

"Necessity" in Lithuanian law is a legal principle related to criminal (administrative offences) and civil responsibility, where entities are permitted to take actions that would otherwise be illegal to prevent greater harm in exceptional circumstances.

Definition

In criminal law: A person is not held criminally liable for an act committed to eliminate a threat to themselves, other individuals or their rights, or to the interests of society or the state, provided that the threat could not have been eliminated by other means and the harm caused is less than the harm that was intended to be avoided. (Criminal Code)

In administrative offenses law: A person is not held liable under this code for an act committed to eliminate a threat to themselves, other individuals or their rights, or to the interests of society or the state, provided that the threat could not have been eliminated by other means and the harm caused is less than the harm that was intended to be avoided. (Code of Administrative Offences)

In civil law: Actions in which a person is compelled to cause harm in order to eliminate a threat to themselves, other individuals or their rights, or to the interests of society or the state, thereby avoiding greater harm to the injured party or another person. This is applicable if causing harm in such circumstances was the only way to prevent greater damage. The court, taking into account the circumstances of the case and the principles of fairness and justice, may require the person whose interests the harm-causing individual acted in to compensate for the damage. (Civil Code)

Courts assess whether the conditions of necessity apply, considering the proportionality of the actions taken in relation to the danger faced.

Other relevant categories

Martial law (lt. Karo padėtis)

This is an extraordinary legal regime that applies in times of war or armed conflict. Under martial law, military authorities may take control of civilian functions, and civil rights may be heavily restricted. It is regulated by the Law on Martial Law (lt. Karo padėties įstatymas).

Martial law is introduced by the Seimas (Parliament) when it is necessary to defend the Homeland or fulfil Lithuania's international obligations. In the case

of an armed attack, when the sovereignty or territorial integrity of the state is threatened, the President of the Republic immediately makes a decision on defence against armed aggression, introduces martial law, and submits these decisions for approval to the Seimas at the next session. If the Seimas is not in session, the President immediately convenes an extraordinary session. The Seimas then adopts a decision and, by resolution, either approves or revokes the President's decision.

Public Health Emergencies (lt. Visuomenės sveikatos ekstremalioji situacija)
Public health emergency – circumstances in the development of public health where the impact of environmental factors leads to a sudden: (1) emergence of a risk of group or mass health impairments, or (2) occurrence of group or mass health impairments among the population. This issue is regulated by Law on Health System. (lt. Sveikatos sistemos įstatymas).

Quarantine (lt. Karantinas)
Specific provisions are also made in Lithuanian law for public health emergencies, such as pandemics or large-scale health crises. This concept gained significant attention during the COVID-19 pandemic, and it is governed by Law on the Prevention and Control of Infectious Diseases in Humans (lt. Žmonių užkrečiamųjų ligų profilaktikos ir kontrolės įstatymas).

Question 2

In Lithuania, emergency situations are governed by a general constitutional and legislative framework alongside sector-specific laws. This combined approach ensures flexibility and detailed guidance for handling a wide range of emergencies, from national security threats to public health crises and environmental disasters. The general framework provides the legal basis for declaring and managing emergencies, while sector-specific laws provide more detailed procedures for specific types of crises. This system enables Lithuania to respond effectively and in a coordinated manner to various emergency situations, while respecting constitutional principles and safeguarding public safety.

Question 3

In Lithuania, the triggering events that justify the implementation of the legal framework for situations of emergency vary depending on the type and severity of the crisis. These events fall under specific categories such as natural disasters, national security threats, public health emergencies, and large-scale

civil disturbances. Each of these categories has defined criteria that must be met for the state to invoke emergency powers, and the response may involve either emergency situations or a state of emergency. Below are the key triggering events for the implementation of emergency frameworks in Lithuania, along with the relevant legal provisions.

State of Emergency
A state of emergency is the highest form of emergency, triggered by severe threats to the constitutional order, national security, or public order.

Triggering events could be:
- **Threat to national security**: This includes events such as external aggression, terrorist attacks, or large-scale cyberattacks that threaten the sovereignty, independence, or constitutional order of the state.
- **Civil unrest or public order disruption**: Large-scale riots, mass civil disturbances, or any situation where public order is gravely compromised can trigger a state of emergency.
- **Severe internal conflict**: The potential for violent internal conflict, insurgencies, or significant threats to the stability of the government.
- **Natural disasters or technological accidents** (under exceptional circumstances): Although typically managed through civil protection measures, a state of emergency can be declared in extreme cases of natural disasters, technological accidents, or environmental crises when such events seriously threaten national security or disrupt the functioning of the state.

Emergency Situation
An emergency situation is declared in response to more localized but still serious events, such as natural disasters, technological accidents, or public health crises, which require coordinated response efforts to protect the public, the environment, or property.

Triggering events could be:
- **Natural disasters**: Floods, wildfires, severe storms, earthquakes, or any other natural calamity that poses a threat to human life, health, property, or the environment. These events justify the activation of emergency response measures at the national, regional, or local level.
- **Technological or industrial accidents**: Major industrial accidents, such as chemical spills, explosions, or radiation leaks, that create immediate danger to the population or environment.
- **Public health emergencies**: Large-scale epidemics or pandemics, such as the COVID-19 crisis, where public health is severely threatened by the spread of infectious diseases. This category also includes bioterrorism threats.

- **Environmental crises**: Environmental degradation, pollution incidents, or ecological disasters (such as oil spills) that require rapid intervention to prevent long-term harm.
- **Social or economic disasters**: In certain cases, severe economic disruptions (e.g., major financial crises or a sudden collapse of infrastructure) that directly threaten the public may lead to the declaration of an emergency situation.

Public Health Emergency

A public health emergency is a specific form of an emergency situation that can be triggered when there is a significant threat to public health. This may include epidemics or pandemics, like the COVID-19 pandemic, or other serious health threats.

Triggering events could be:

- **Pandemics and epidemics**: The rapid spread of a contagious disease that threatens large segments of the population. The public health response is triggered when infectious diseases, such as COVID-19, measles, or other serious diseases, spread uncontrollably.
- **Bioterrorism threats**: The intentional release of viruses, bacteria, or other biological agents to cause illness or death in humans, animals, or plants.
- **Severe pollution or toxic exposures**: Any event where environmental pollution (e.g., air, water, or soil contamination) causes a serious public health risk.

Martial Law

Although rare, martial law may be declared when the country is under severe external threat, such as during an armed conflict or foreign invasion. Martial law shifts control of civilian governance to military authorities and involves substantial restrictions on civil liberties.

Triggering events could be:

- **Foreign invasion or armed conflict**: When Lithuania is subject to an armed attack or an imminent threat of such an attack, martial law may be declared to defend the state.
- **Large-scale military threats**: Any other serious military threat that endangers the sovereignty and territorial integrity of Lithuania.

Other Crisis Situations

While "crisis" is not always a formal legal category, crisis situations may still trigger emergency management procedures under various laws or governmental decrees. A crisis can be social, economic, environmental, or security-related, and may require a coordinated response without necessarily invoking a state of

emergency. It can trigger crisis management mechanisms at the governmental or institutional level.

Triggering events could be:
- Economic crisis: Severe economic instability, financial collapse, or widespread unemployment that threatens social order.
- Political or social crisis: Mass protests, strikes, or political unrest that disrupts the functioning of government institutions or public services.
- Critical infrastructure failures: Large-scale failures of vital infrastructure (e.g., electricity grids, water supply systems) that impact national security or public welfare.

Question 4

Yes, in Lithuania, there are specific formal and procedural constraints that regulate how emergencies are handled through legal instruments. These constraints ensure that emergency powers are exercised within a legal framework and provide checks and balances to prevent abuse of authority. Different types of emergencies, such as state of emergency and emergency situations each have their own procedural requirements, which may include declarations from specific authorities, approval by the Seimas (Parliament), and judicial review mechanisms.

Question 5

EU law has had a significant influence on the way Lithuania defines and manages emergencies, particularly in areas like public health, cybersecurity, environmental protection, and national security. While Lithuania retains its sovereignty in declaring and handling emergencies, its legal framework is closely aligned with EU directives, regulations, and mechanisms. EU law provides coordination, financial assistance, and common standards that strengthen Lithuania's capacity to manage both domestic and cross-border emergencies, ensuring that it operates within the broader framework of EU crisis management and civil protection policies.

Public Health Emergencies
EU law has significantly influenced how Lithuania addresses public health emergencies, especially in response to cross-border health threats, such as the COVID-19 pandemic.

EU Decision on Serious Cross-Border Health Threats
Lithuania's legal framework for managing public health emergencies, such as pandemics and epidemics, has been shaped by EU Decision No. 1082/2013 on serious cross-border health threats. This decision establishes a legal basis for coordinating responses to health crises across the EU.

EU Vaccination Strategy
During the COVID-19 pandemic, Lithuania's vaccination campaign and public health measures were heavily influenced by the EU Vaccination Strategy, which coordinated the supply, approval, and distribution of vaccines across EU member states. Lithuania followed EU protocols for vaccine distribution and adhered to European Medicines Agency (EMA) approval procedures.

Civil protection and natural disaster response
The EU Civil Protection Mechanism has also had a strong impact on Lithuania's approach to managing emergency situations caused by natural disasters, technological accidents, or other large-scale emergencies.

EU Civil Protection Mechanism (UCPM)
Lithuania is a participant in the EU Civil Protection Mechanism, which provides a framework for coordinating disaster response efforts across EU member states. This mechanism has influenced Lithuania's Law on Crisis Management and Civil Protection and has contributed to the development of its civil protection capabilities.

EU Solidarity Fund (EUSF)
The EU Solidarity Fund have been used to provide financial assistance to Lithuania in the aftermath of natural disasters. This financial support is designed to cover emergency response costs and recovery efforts, such as rebuilding infrastructure and helping affected populations.

National Security and Cybersecurity
In the area of national security, particularly concerning cybersecurity, EU law has been highly relevant in shaping Lithuania's emergency and crisis response frameworks.

EU Directive on Network and Information Systems Security (NIS Directive)
The NIS Directive (Directive 2016/1148) has had a direct impact on Lithuania's approach to cybersecurity and the handling of emergencies related to cyber threats. This directive, which sets minimum security requirements for essential services and critical infrastructure operators, has influenced Lithuania's legal and institutional framework for cybersecurity.

EU Cybersecurity Act

The EU Cybersecurity Act (Regulation 2019/881) has also influenced Lithuania's preparedness for cyber emergencies by strengthening the role of the European Union Agency for Cybersecurity (ENISA) and enhancing cybersecurity certification schemes. These measures help Lithuania maintain robust cybersecurity protocols, reducing vulnerabilities during crises and ensuring coordinated responses to cyber threats across the EU.

Environmental Emergencies

EU law on environmental protection and the management of environmental risks has also shaped Lithuania's legal framework for handling environmental emergencies.

EU Environmental Directives

Several EU environmental directives, such as the Seveso III Directive (Directive 2012/18/EU) on the control of major accident hazards involving dangerous substances, have influenced Lithuania's legal approach to preventing and managing environmental emergencies. These laws ensure that industrial operators in Lithuania follow strict safety protocols to prevent chemical spills, explosions, and other industrial accidents.

EU Climate Adaptation Strategy

The EU Climate Adaptation Strategy has guided Lithuania's efforts to prepare for and manage emergencies related to climate change, such as floods, heatwaves, and droughts. The strategy encourages the integration of climate resilience measures into national planning, which has shaped Lithuania's policies for disaster risk reduction.

Economic and Financial Emergencies

EU law also plays a role in how Lithuania handles economic and financial emergencies, particularly in the context of EU fiscal rules and financial stability mechanisms.

EU Stability and Growth Pact

Lithuania, as a member of the Eurozone, is bound by the rules of the Stability and Growth Pact (SGP), which set fiscal discipline requirements for EU member states. In cases of severe economic crises, such as the 2008 financial crisis or the COVID-19 economic downturn, the EU has provided flexibility by allowing member states, including Lithuania, to temporarily exceed deficit limits to manage economic emergencies.

EU Financial Support Mechanisms
During economic crises, Lithuania has access to EU financial support mechanisms, such as the European Stability Mechanism (ESM) and EU recovery funds (like the Next Generation EU fund). These tools have been essential in helping Lithuania recover from financial and economic emergencies, such as those caused by the COVID-19 pandemic.

Coordination through the EU'S Integrated Political Crisis Response (IPCR)
The EU's Integrated Political Crisis Response (IPCR) arrangements are designed to coordinate responses to transnational crises, including emergencies that may affect multiple member states. Lithuania, as part of this system, participates in EU-wide coordination efforts during emergencies, such as terrorist attacks, public health threats, or natural disasters. This mechanism facilitates communication and decision-making during emergencies, such as the COVID-19 pandemic or cross-border security threats.

Question 6

Yes, there are notable precedents in Lithuania where situations of "emergency," "crisis," and/or "necessity" have been triggered or handled in coordination with EU action. Several key events highlight how EU and Lithuanian authorities have worked together, using both EU and national emergency instruments, to manage these situations. Below are significant examples: Energy Crisis Following the 2022 Russian Invasion of Ukraine; Migration Crisis on the Belarus Border (2021); COVID-19 pandemic (2020–2021).

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

In Lithuania, the constitutional provisions governing situations of emergency are primarily found in Articles 144 and 145 of the Constitution. These provisions allow for the declaration of a state of emergency and outline the specific legal regimes that may be enacted during such periods.

Article 144 of the Constitution
This article empowers the Seimas (Parliament) to declare a state of emergency in the entire country or in part of it when a threat to the constitutional system or social peace arises. The declaration of a state of emergency is limited to six months, ensuring that it cannot be prolonged indefinitely without additional legislative approval.

If an urgent situation arises while the Seimas is not in session, the President of the Republic is empowered to declare a state of emergency. However, the President must immediately convene an extraordinary session of the Seimas to have this decision reviewed and either approved or overturned by the Seimas.

Article 145 of the Constitution
Article 145 specifies that certain constitutional rights may be restricted during the imposition of martial law or the declaration of a state of emergency. These restrictions can affect the rights guaranteed in Articles 22, 24, 25, 32, 35, and 36 of the Constitution, including:
The right to private life (Article 22); The right to property (Article 24); The right to freedom of expression (Article 25); The right to freedom of movement (Article 32); The right to freedom of association (Article 35); The right to freedom of assembly (Article 36).

These constitutional provisions reflect the post-independence legal and constitutional order established in 1992 following the dissolution of the Soviet Union and the reestablishment of Lithuania as an independent state in 1990. The provisions were influenced by the desire to create a democratic legal framework that would allow for the management of crises while safeguarding human rights and preventing the abuse of power that had been prevalent under Soviet rule.

Historically, the concept of emergency situations was present in Soviet-era legislation, but the legal frameworks were more authoritarian, focusing on maintaining control rather than protecting individual rights. During the Soviet period, emergency powers were often used to suppress dissent and ensure state control rather than protect public safety in democratic terms.
The current Lithuanian Constitution draws heavily on democratic principles, influenced by Western legal traditions. The constitutional safeguards in Articles 144 and 145 were introduced to ensure that any imposition of emergency measures would be temporary, proportional, and subject to legislative oversight, reflecting lessons from both Soviet history and Western democratic practices.

Question 2

The distribution of power in Lithuania during emergency situations is designed to ensure a balance between swift executive action and legislative oversight, with the judiciary playing a crucial role in safeguarding constitutional rights. The Seimas holds the authority to declare and oversee the continuation of emergency measures, while the President and Government are responsible for

initiating and managing these measures. The courts act as a check on executive power, ensuring that emergency actions remain within legal bounds and respect the rights of individuals. This system is structured to prevent the abuse of emergency powers while enabling an effective response to crises.

The Seimas (Parliament)

The Seimas holds a central role in the declaration and oversight of emergency measures in Lithuania.

Its powers include:

Declaring a state of emergency: According to Article 144 of the Constitution, the Seimas is the primary body that can declare a state of emergency in the country or in part of its territory when a threat arises to the constitutional system or social peace. This declaration can last for up to six months.

Approval of the President's decision: If the President of the Republic declares a state of emergency when the Seimas is not in session, the President is required to immediately convene an extraordinary session of the Seimas. The Seimas must then either approve or overturn the President's decision.

Oversight: The Seimas exercises oversight of emergency measures through legislation and parliamentary committees to ensure that the executive actions taken during the emergency are appropriate and proportional. This includes monitoring any restrictions placed on civil liberties.

The President of the Republic

The President of Lithuania plays a critical role, particularly in situations where immediate action is required.

Its powers include:

Declaring a state of emergency in urgent cases: If the Seimas is not in session and a threat arises, the President can unilaterally declare a state of emergency. After declaring an emergency, the President is obligated to convene an extraordinary session of the Seimas to review and approve the decision.

Military command during martial law: In cases of external threats or armed conflict, the President is the Commander-in-Chief of the Armed Forces and is responsible for decisions related to martial law and military defence. In such cases, the President can impose martial law and seek subsequent approval from the Seimas.

The Government

The Government of Lithuania plays a vital role in the implementation of emergency measures.

Its responsibilities include:

Crisis management and coordination: The Government is responsible for managing the practical response to emergencies, including natural disasters, technological accidents, public health crises, or threats to national security.

This involves coordinating efforts between different ministries, agencies, and local authorities.
Declaration of emergency situations: In cases that involve public safety, such as natural disasters or public health emergencies, the Government can declare an emergency situation (lt. extremali situacija) and activate the relevant legal and administrative mechanisms for managing the crisis.
Enacting special measures: During a state of emergency or emergency situation, the Government is responsible for implementing special measures, such as the mobilization of resources, imposing restrictions (e.g., curfews, quarantines), and managing civil protection and law enforcement actions.
Reporting to the Seimas: The Government is required to report to the Seimas on the progress and effectiveness of emergency measures. It is accountable for the execution of emergency-related policies and must ensure that measures comply with the legal framework established by the Constitution and laws.

The Courts
The judiciary, particularly the Constitutional Court of Lithuania and ordinary courts, plays an important role in ensuring that emergency measures comply with the Constitution and the rule of law.
Their responsibilities include:
Reviewing the constitutionality of emergency measures: The Constitutional Court can review laws and governmental actions taken during a state of emergency to ensure they do not violate constitutional rights or overstep the boundaries of the emergency declaration.
Protection of fundamental rights: Courts ensure that any restrictions on civil rights and freedoms during a state of emergency (as provided for in Article 145 of the Constitution) are proportional, necessary, and legally justified.
Adjudication of disputes: Individuals or entities affected by emergency measures may challenge these actions in court. The judiciary can rule on the legality of specific measures, such as property seizures, restrictions on movement, or other limitations imposed during the emergency.

Question 3

Lithuania is a unitary state, meaning that the central government holds most of the decision-making power, including during situations of emergency. However, regional and local authorities still play a significant role in the implementation of emergency measures, even though Lithuania does not have separate regional legislative frameworks like in decentralized states.

Question 4

In Lithuania, the relationship between domestic law, including constitutional provisions, and EU or international law is shaped by both the Constitution and Lithuania's commitments as a member state of the European Union and international legal order. When a situation of emergency is triggered under domestic law, there could potentially be conflicts between national constitutional provisions and EU law or international obligations. Here's how these conflicts would typically be resolved, including specific constitutional provisions and relevant precedents in Lithuanian case law.

Constitutional Provisions on EU and Supremacy of International Law

The Constitution of Lithuania contains several provisions that outline the status of international and EU law in relation to national law:

- Article 135 of the Constitution states that Lithuania shall comply with universally recognized principles of international law and that the country shall follow its international obligations.
- Article 138 establishes that international treaties ratified by the Seimas (Parliament) form part of the Lithuanian legal system and have the force of law. This means that international agreements, once ratified, must be respected by Lithuanian authorities, even during emergencies.
- Article 149 provides the possibility of temporarily restricting certain constitutional rights during a state of emergency or martial law, but these restrictions must comply with Lithuania's international obligations, particularly regarding human rights protections.

While the Constitution does not explicitly state that EU law takes precedence over national constitutional provisions, Lithuania's accession to the EU and its participation in the EU legal order implies adherence to the principle of primacy of EU law, which means that EU law takes precedence over conflicting national laws, including constitutional provisions, where relevant.

Conflict Resolution between Domestic Law and EU Law

If a conflict arises between Lithuanian constitutional provisions and EU law, the following mechanisms would be used to resolve it:

- Primacy of EU Law: As a member state of the European Union, Lithuania adheres to the principle of the supremacy of EU law. This principle, established by the Court of Justice of the European Union (CJEU), means that EU law prevails over conflicting national laws, including constitutional provisions, in areas covered by EU competence. Therefore, if the implementation of an emergency measure under domestic law conflicts with an obligation under EU law, the Lithuanian authorities must ensure that EU law is followed.

- The Role of the Constitutional Court: The Constitutional Court of Lithuania plays a crucial role in resolving conflicts between national law and Lithuania's obligations under EU or international law. The court reviews national laws, including emergency measures, for compliance with the Constitution, which includes the obligation to respect international agreements and EU law. The Constitutional Court has previously confirmed that Lithuania's participation in the EU requires respect for the supremacy of EU law in its rulings.
- Preliminary Rulings of the CJEU: In the case of uncertainty regarding the interpretation of EU law during an emergency, Lithuanian courts may refer questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling. This mechanism helps ensure the uniform application of EU law across member states, including in Lithuania, even in emergency situations.

Conflict Resolution between Domestic Law and International Law

For conflicts between Lithuanian law and international law (outside the scope of EU law), the resolution is guided by the following principles:

- International Treaty Obligations: Under Article 138 of the Constitution, international treaties that Lithuania has ratified are part of domestic law. During emergencies, the Lithuanian Government is still required to uphold its international treaty obligations, particularly in areas such as human rights (e.g., the European Convention on Human Rights) and humanitarian law.
- Judicial Review: Lithuanian courts, including the Constitutional Court, can review whether emergency measures violate international law, particularly in cases involving human rights. International agreements, particularly those related to fundamental rights, must be respected even when domestic emergency powers are invoked.
- European Court of Human Rights (ECHR): In cases where emergency measures conflict with human rights obligations under the European Convention on Human Rights (ECHR), affected individuals can bring claims before the European Court of Human Rights (ECtHR). Lithuania is required to implement the judgments of the ECtHR, which can override national law, including emergency measures, if they are found to violate international human rights obligations.

Specific Provisions or Relevant Precedents

While there are no explicit constitutional provisions detailing a procedure for resolving conflicts between constitutional emergency provisions and EU or international law in Lithuania, several court precedents and legal principles help address this issue:

- Constitutional Court Rulings on EU Law Supremacy: The Constitutional Court of Lithuania has acknowledged the primacy of EU law over domestic

law in several rulings. For instance, in cases involving EU legal acts and domestic legislation, the court has ruled that Lithuanian authorities must ensure the full and effective application of EU law, even when this involves setting aside conflicting national provisions, including constitutional ones.

- International Human Rights Obligations: Lithuania's courts have also recognized that international human rights treaties, such as the European Convention on Human Rights, take precedence over domestic law during emergencies. Courts have struck down emergency measures that violate these international obligations, particularly when they affect fundamental rights such as the right to life, freedom of movement, or freedom of expression.

Precedents in National Case Law

One relevant case involves emergency measures taken during the Covid-19 pandemic. During this crisis, the Lithuanian Government imposed strict measures to contain the virus, including restrictions on movement and public gatherings. These measures were challenged in court on the grounds that they infringed on constitutional rights. The Lithuanian courts reviewed these challenges by assessing the balance between the constitutional right to public health and the right to individual freedoms, while ensuring compliance with Lithuania's international obligations, including the EU Charter of Fundamental Rights.

Question 5

In Lithuania, fundamental rights are protected during emergencies through a combination of constitutional provisions, legislation, judicial review, and non-judicial oversight bodies. The Constitution and laws ensure that restrictions on rights are proportional, necessary, and temporary. Courts, including the Constitutional Court, provide the primary mechanism for ensuring that emergency measures respect these principles, while bodies like the Seimas Ombudsman and the Equal Opportunities Ombudsperson provide additional protection and monitoring.

This system is designed to prevent the abuse of emergency powers while ensuring that the government can respond effectively to crises, safeguarding both public safety and individual freedoms.

Constitutional and Legislative Provisions for Protecting Fundamental Rights during Emergencies

Lithuania's Constitution and specific legislation set clear limits on how far emergency measures can go in restricting fundamental rights. Key provisions are outlined below:

Constitutional Provisions

- Article 145 of the Constitution:
  - This article specifies that during a state of emergency or martial law, certain fundamental rights may be temporarily restricted. However, these restrictions are subject to strict legal boundaries, ensuring that emergency measures do not completely override fundamental rights.

The rights that may be restricted include: The right to private life (Article 22); The right to property (Article 24); The right to freedom of expression (Article 25); The right to freedom of movement (Article 32); The right to freedom of association (Article 35); The right to freedom of assembly (Article 36)
Restrictions must be proportional, necessary, and temporary in nature, meaning that they can only be applied as long as they are needed to manage the emergency.

- **Article 144 of the Constitution**:

This article allows the Seimas (Parliament) or the President to declare a state of emergency when a serious threat arises to the constitutional system or social peace. However, this declaration must comply with Lithuania's international obligations, including human rights conventions.
Legislative Framework

The Law on State of Emergency and the Law on Crisis Management and Civil Protection provide detailed guidance on how emergencies are handled. These laws include provisions on the scope of powers that can be exercised by the government during emergencies, but they also reinforce constitutional protections for fundamental rights.

- Necessity and Proportionality:

Emergency measures must meet the criteria of necessity and proportionality. This means that they should only be implemented to the extent required to deal with the emergency and should be limited in duration and scope.

- Judicial Review:

Both laws provide for the review of emergency measures by the judiciary, ensuring that any restrictions on fundamental rights can be challenged in court.

Role of the Courts in Protecting Fundamental Rights

While the Constitution and laws provide the framework, the courts are essential in interpreting and enforcing these protections during emergencies. The Lithuanian courts, including the Constitutional Court, ensure that emergency measures comply with constitutional provisions and fundamental rights.

- Constitutional Court of Lithuania:

The Constitutional Court has the power to review the constitutionality of laws and government actions, including those implemented during a state of emergency. It ensures that emergency measures do not violate constitutional rights, especially the principle of proportionality. The Court has previously addressed cases where emergency measures were challenged on the grounds of excessive restrictions on individual freedoms. For example, measures during the COVID-19 pandemic were reviewed to ensure compliance with fundamental rights protections.

- Ordinary Courts:

Individuals affected by emergency measures can challenge the legality of these measures in ordinary courts. These courts can assess whether restrictions imposed under emergency law are necessary and proportional in light of the constitutional guarantees of fundamental rights.

- Right to Appeal to International Courts:

In cases where domestic legal remedies are exhausted, Lithuanian citizens may appeal to international courts, such as the European Court of Human Rights (ECtHR), if they believe their rights under the European Convention on Human Rights have been violated by emergency measures.

Specific Non-Judicial Bodies Entrusted with Protecting Fundamental Rights

In addition to the courts, several non-judicial bodies in Lithuania are tasked with overseeing the protection of fundamental rights during emergencies. These institutions ensure that the government's actions are subject to independent scrutiny.

The Seimas Ombudsman's Office (lt. Seimo kontrolieriai)

The Seimas Ombudsman's Office is an independent body responsible for investigating complaints of human rights violations by public authorities, including during emergencies. The Ombudsman can investigate whether emergency measures imposed by the government infringe on individual rights and can issue recommendations to ensure compliance with fundamental rights protections. The Ombudsman's Office plays a crucial role in monitoring public in-

stitutions, particularly during states of emergency, to prevent abuses of power and ensure that fundamental rights are respected.

The Equal Opportunities Ombudsperson (lt. Lygių galimybių kontrolierius)

The Equal Opportunities Ombudsperson ensures that emergency measures do not lead to discrimination based on gender, age, disability, or other protected characteristics. During emergencies, the Ombudsperson can review complaints about discriminatory practices and ensure that vulnerable groups are not disproportionately affected by emergency measures.

The State Data Protection Inspectorate (lt. Valstybinė duomenų apsaugos inspekcija)

During states of emergency, particularly in public health emergencies such as the COVID-19 pandemic, the Data Protection Inspectorate oversees how personal data is collected and used. This body ensures that emergency measures, such as contact tracing or health surveillance, comply with data protection laws, safeguarding citizens' right to privacy.

International Obligations as a Safeguard

Lithuania is bound by international treaties, such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which provide safeguards for the protection of fundamental rights during emergencies.
Article 4 of the ICCPR allows for temporary derogation from certain rights during a state of emergency, but non-derogable rights such as the right to life and freedom from torture must always be protected. Lithuania's international human rights commitments ensure that even during emergencies, fundamental rights are upheld in line with European and international standards.

Question 4

The best-known precedent was emergency situation regarding a mass influx of foreigners on the border of Lithuania. CJEU had also had to issue a preliminary ruling on this emergency. Answers below will describe it in more details.

Section 3: Statutory/executive emergency law in the Member States

Question 1

In the face of increasing national and international challenges, Lithuania has recognized the necessity of a robust and adaptable legal framework to manage emergencies effectively. Recent amendments to various laws reflect a comprehensive approach to addressing public health crises, environmental concerns, cybersecurity, immigration, and national security during emergencies. By integrating lessons learned from past crises, such as the COVID-19 pandemic and the migration crisis, Lithuania aims to create a resilient system capable of responding swiftly to emergencies. The following analysis outlines the essential components of this legal framework, highlighting their significance and any peculiarities that may apply to specific policy-oriented areas.

As mentioned in Section 1, the legal framework for state of emergency (lt. *nepaprastoji padėtis*) is created by the provisions of the Constitution and the Law on State of Emergency. This Law establishes the grounds and procedures for declaring a state of emergency, temporarily restricting the rights and freedoms of individuals, temporarily limiting the activities of legal entities, the temporary powers of state and municipal institutions during a state of emergency, as well as the legality control of these institutions' activities and the procedure for lifting the state of emergency.
The general legal framework for the prevention of crises and emergency situations (lt. *ekstremalioji situacija*), preparedness for such situations, and their management is established in the Law on Crisis Management and Civil Protection. This law defines the concept of an emergency situation and stipulates that, under the conditions and procedures established by the law, during an emergency, a person's rights – such as freedom of movement, property and home inviolability, economic activity freedoms, provision of public and administrative services, and the right to strike – may be temporarily restricted.

Seeking to ensure effective governance across a wide range of sectors, the legal framework is further enhanced by **specialized regulations** tailored to specific policy areas:

Public Health

Management of Emergency Situations and Use of Unregistered Medicines: The Minister of Health is granted the authority to temporarily allow unregistered medicines to be supplied when there are threats from dangerous pathogens, chemicals, toxins, or ionizing radiation. This is particularly

important during emergencies or quarantine. Lessons from the COVID-19 pandemic highlighted the need for rapid use of medicines without adhering to full registration formalities, provided the therapeutic indications and dosages are scientifically justified. The new amendments to the *Pharmaceutical Law* gave the Minister even more flexibility to recommend and mandate the use of medicines in emergency situations.

Management of the Compulsory Health Insurance Fund Resources: The legal framework set out in *the Law on Health Insurance* was amended to establish that the budget of the Compulsory Health Insurance Fund can be utilized for non-reimbursed expenses arising from emergency situations. In cases where funds are inadequate, provisions allow for the withdrawal of resources from the budget reserve designated for risk management. Additionally, during emergencies or quarantine, specific individuals may be excused from paying health insurance contributions, with the requirement that any outstanding amounts are to be paid later in accordance with established regulations.

Employee Health Checks: Under *the Law on the Prevention and Control of Infectious Diseases*, workers engaged in certain activities are required to undergo regular health checks for infectious diseases, especially during a state-level emergency or quarantine. In the event of an outbreak at the workplace, employees may be mandated to undergo health screenings, and employers must implement specified control measures. In addition, when the government declares a state-level emergency or quarantine in Lithuania due to an infectious disease, employees must provide their employers with a document from the Minister of Health. This document must confirm that the employee has either tested negative for the disease, been vaccinated against it, cannot be vaccinated for medical reasons, or has previously recovered from the disease.

Employer and Employee Responsibilities during Emergencies: Under *the Law on the Prevention and Control of Infectious Diseases*, when the government declares a state of emergency or quarantine, employers may require documentation confirming employees' health checks or vaccinations. Employers are permitted to process this information only during the period of the emergency, and they must provide the necessary information to regulatory authorities. In addition, individuals suspected of having or diagnosed with dangerous infectious diseases, cannot continue working in specific jobs or at certain workplaces until they receive permission from their doctor. However, this rule does not apply if they work remotely or if they are reassigned to a different job within the same workplace that is safe for their health.

Social Security

Benefits for Self-Employed Individuals: *Under the Law on Employment*, the benefits for self-employed individuals during emergencies or quarantine aim to provide financial support to those whose economic activities are restricted. Eligible individuals can receive monthly payments equivalent to the minimum consumption needs amount if their income has significantly decreased and they meet specific criteria. This support helps sustain their livelihoods during challenging times while ensuring they can comply with public health measures.

Health and Parental Benefits: The amendments to *the Law on Sickness and Maternity Social Insurance in Lithuania* introduced specific provisions for sickness benefits during emergency situations or quarantines declared by the government. Key changes include provisions for calculating sickness benefits based on a percentage of the employee's compensatory income for individuals engaged in professional activities that require contact with contagious diseases. The law also outlines benefits for caregivers of children or individuals with disabilities during these times, as well as provisions for those affected by mandatory isolation due to travel or exposure to infectious diseases. The updated regulations aim to provide financial support and clarify eligibility criteria for various groups affected by emergencies and health risks.

Social Housing: In the context of social housing, the Lithuanian legislator and government have implemented measures to ensure the stability and accessibility of housing for vulnerable populations during emergencies. *The Law on State Support for the Acquisition or Rental of Housing* sets out that individuals and families, even if their income or asset levels exceed the usual thresholds, can remain on the list of social housing applicants until June 1 of the following year after the declaration of a state-level emergency or quarantine. This provision helps prevent homelessness and ensures that those in need can access affordable housing options.

Disability Protection: The updated legal framework, set out in *the Law on the Fundamentals of Protection of the Rights of Persons with Disabilities*, guarantees the rights of individuals with disabilities, ensuring that their protection cannot be revoked solely due to an emergency. For example, individuals with disabilities are entitled to have a family member or chosen person accompany them during healthcare services, ensuring that this right remains intact even amid emergencies or quarantines.

Environmental Protection

Environmental Protection during the Declaration of an Emergency Energy Situation or Emergency Situation: The legal framework, set out in *the Law on Environment Protection*, establishes critical provisions for managing economic activities during declared energy emergencies. During emergencies, certain exceptions apply to the exploitation of economic activity objects. Specifically, individuals or legal entities involved in operating these objects may temporarily be exempt from the conditions outlined in their permits and environmental regulations. This flexibility is essential for effectively managing and mitigating the impacts of declared emergency energy situations or state-level emergencies. The specific temporary conditions under which economic activity objects may be operated are determined by the relevant crisis management and civil protection provisions. These exceptions are not intended to be applied more broadly or for longer durations than necessary. Operators must still implement all feasible measures to reduce negative effects on the environment and public health. In addition, any decisions regarding the temporary exploitation conditions must be reported to the Ministry of the Environment within ten working days. The Ministry is then responsible for informing the European Commission when required by EU environmental legislation. The amendments to the legal framework, enacted in 2022 and 2024, reflect ongoing legal and administrative adjustments in Lithuania's approach to managing emergency situations effectively.

Air Quality Management: *The Law on Air Quality Protection* states that when pollutant concentrations in the air reach or exceed threshold levels, this is classified as an emergency event. The public is promptly warned and informed about the potential threats to health and the environment, and necessary actions are taken to manage the situation according to the provisions of the Law on Crisis Management and Civil Protection. This proactive approach to environmental management underscores the importance of maintaining ecological integrity and public health, particularly in crisis situations where operational flexibility may be needed. The law mandates swift communication and action to address air quality concerns, reflecting Lithuania's commitment to environmental protection, even amidst emergencies.

Emergency Energy Situation

Declaration of an Emergency: An emergency energy situation is declared when there is a significant reduction in the supply of electricity, natural gas, oil products, or heat, posing threats to public safety, health, or the functioning of the national economy. This situation necessitates a coordinated response from various entities, including energy companies and government authorities, to

ensure effective management and communication during crises. In such emergencies, the government or designated authorities may impose restrictions on the supply of energy resources to consumers. As provided for by *the Law on Energy*, energy companies are protected from liability for damages incurred by consumers due to these supply limitations. It is essential that these restrictions minimally disrupt the domestic market's functioning and are only applied as necessary to manage the emergency. The government is obligated to inform other EU member states and the European Commission about the measures implemented in response to the emergency. The European Commission may recommend modifications to these measures to avoid distorting competition or adversely affecting trade.

Responsibilities of Energy Companies: *The Law on Energy* sets out that when faced with an emergency, energy companies must notify the Ministry of Energy and local government authorities about any supply reductions and the measures being taken to restore energy services. These companies are expected to prioritize domestic consumers' needs, particularly those critical to national security, such as civil safety forces.

Natural Gas: *The Law on Natural Gas* mandates that gas companies prepare for supply disruptions and implement preventive management plans, allowing the government to enforce the use of gas storage facilities during emergencies. Gas companies must also assess future demand and provide security reports, and they have the right to interrupt supply without notice if consumer actions threaten system safety or if an emergency arises.

Nuclear Energy: Emergency management provisions, set out in *the Law on Nuclear Energy*, stipulate that the operation of a nuclear energy facility can be suspended in the event of emergencies, such as a nuclear or radiological accident, initiated by the operating organization, the State Nuclear Power Safety Inspectorate, or the government. Accident management mandates that the license holder is responsible for managing nuclear and radiological accidents and mitigating their consequences, while the government and other state institutions are accountable for alleviating the effects beyond the sanitary protection zone. Protection measures require state and municipal authorities to implement the requirements set by the Ministry of the Interior for the protection of residents.

Cybersecurity

Under *the Law on Cybersecurity, Privacy & Data Protection* (effective from October 18, 2024), a robust framework has been established to ensure crisis management in cybersecurity. The National Cyber Security Center (NCSC) is

tasked with overseeing the preparedness of cybersecurity entities, various institutions, and economic operators. In the event of a cybersecurity incident, these entities will be assigned critical tasks to manage the situation effectively. The NCSC is also responsible for developing a cybersecurity exercise plan aimed at preparing organizations for potential crises. These exercises, alongside regular training sessions, ensure that both public and private sector entities are well-prepared to respond to emergencies in the cyber domain, thereby safeguarding national security and mitigating the risks of significant data breaches or service disruptions. The legal provisions, while addressing national-level cybersecurity preparedness, also contribute to the broader implementation of Directive (EU) 2022/2555 (NIS2), enhancing the overall resilience of essential services across Europe.

Taxes

While the typical legislative process for tax laws includes a waiting period to allow taxpayers to adjust, exceptions are made in emergencies to facilitate prompt action in response to urgent national needs as provided for in *the Law on Tax Administration*.

Immigration

The Law on Legal Status of Aliens includes a significant separate Section X2, specifically addressing its application during states of war, extraordinary situations, or emergencies caused by mass migration. In response to a declared national emergency due to a mass influx of foreign nationals, the Government of Lithuania, upon the National Security Commission's recommendation, may prohibit entry to individuals attempting to cross the state border at unauthorized locations or violating established border-crossing procedures. This restriction applies individually to each foreign national, but exceptions are made for those fleeing armed conflict, persecution (as defined by the Refugee Convention), or seeking humanitarian entry, reflecting the state's commitment to international human rights obligations. Individuals in the border area who violate these rules are not considered to be within Lithuanian territory, and for those denied entry, an assessment of their need for assistance must be conducted, ensuring they receive necessary immediate medical or humanitarian aid.

Public Information

The Law on Public Information establishes a duty to disseminate warning messages during impending or existing emergency situations, such as mobilization, war, or extraordinary circumstances. In such cases, public information pro-

ducers and disseminators are required to promptly publish warning messages from state and municipal institutions free of charge or provide opportunities for these institutions to broadcast warnings directly. The Fire and Rescue Department under the Ministry of the Interior is responsible for determining the protocol for disseminating these warnings, ensuring accessibility for individuals with disabilities. Additionally, during wartime or extraordinary situations, the Seimas (Parliament) may impose restrictions and obligations on public information providers to protect the interests of citizens and society. Failure to comply with these obligations may lead to legal consequences. Furthermore, in emergencies, the government prioritizes funding projects aimed at enhancing public information security and resilience, as outlined in the rules established for projects financed by the special fund.

Electronic Communications

The Law on Electronic Communications outlines essential provisions for ensuring communication during extraordinary circumstances that pose threats to human life, health, or security. Under special circumstances, mobile communication service providers must supply the Ministry of Foreign Affairs with information necessary for consular assistance, including the number of users present in the foreign state. Furthermore, the government has the authority to mandate electronic communications providers to maintain and secure communication networks crucial for public safety and order during emergencies, including preparing for national mobilization. Providers must prioritize emergency communications and ensure uninterrupted access to emergency services while also being responsible for maintaining the flow of public warnings. Additionally, the Law stipulates that electronic communications networks must support emergency communications involving international authorities and organizations, thereby underscoring the importance of reliable communication systems in crisis situations. It is explicitly forbidden to transmit false or misleading emergency signals, and information classified as state or service secrets must not be transmitted over unsecured radio communications.

State Information Resources

The Law on Management of State Information Resources establishes crucial guidelines for the use of data centers, particularly in the context of emergencies such as wartime, states of emergency, or other crises. According to Article 45, entities must maintain copies of state information resources, which are designated for accessibility during such emergencies, not in data centers located within Lithuania but rather in private data centers situated in other EU member states, EEA countries, or NATO member states, as approved by government resolution. In cases where access to these resources is compromised

or their functionality is disrupted within Lithuania, recovery procedures must be implemented using the copies stored in these designated foreign data centers, following the state's information resource continuity management plans. Additionally, Article 10 grants the government the authority to approve a list of state information resources that must be available during crises and to outline the procedures for maintaining and restoring these resources from copies kept in foreign data centers. This legal framework emphasizes the importance of safeguarding state information in times of crisis and ensuring its swift recovery to maintain operational continuity.

Public Procurement

The Law on Public Procurement outlines specific provisions for handling procurement during crises, such as mobilization or emergencies, emphasizing national security. It allows public contracting authorities to reject proposals if suppliers are linked to high-risk countries or if the goods originate from these territories. The law also permits non-public negotiation methods in urgent situations where standard timelines are impractical, ensuring timely access to necessary resources. Suppliers must comply with national security assessments to remain eligible for procurement, reflecting the law's aim to balance efficient procurement practices with the imperative of safeguarding national security.

EU Structural Funds
Emergency provisions under *the Rules for the Administration and Financing of Projects* approved by the Minister of Finance were established to provide a framework for managing and funding projects during the COVID-19 crisis, ensuring that project implementers can adapt to new conditions while maintaining compliance with legal and financial requirements. The rules emphasize flexibility, remote operations, and the eligibility of specific expenses related to the pandemic.

Question 2

The Constitution establishes a broad framework for safeguarding human rights and ensuring national well-being, including public health and national security. It also outlines key provisions related to states of emergency, while legislative and executive rules provide the detailed procedures and operational measures that authorities must follow during such crises.

While the Constitution and legislative/executive rules are designed to work in harmony, doubts about their compatibility may arise in specific situations, as illustrated by the following constitutional cases regarding the COVID-19 crisis.

One notable example is the ruling by the Constitutional Court of the Republic of Lithuania on June 21, 2022, concerning **the authority of the National Public Health Center (NPHC) to impose mandatory infectious disease control measures**. This case questioned the emergency powers of the government. The Court emphasized that the measures established by the legislator for controlling infectious diseases can be detailed in subordinate legal acts, which aim to outline the implementation procedures. It noted that the establishment and implementation of these measures require specific knowledge and professional competence. By regulating these control measures, the legislator also exercised its discretion to designate a competent state authority responsible for public health, confirming that the NPHC is the designated institution entitled to assign mandatory infectious disease control measures under the specified circumstances. The Court affirmed the necessity of ensuring that any restrictions on individual freedoms align with constitutional rights, such as the constitutional right to suitable, safe, and healthy working conditions.

The same position was reaffirmed by the ruling of the Constitutional Court of the Republic of Lithuania dated October 12, 2022, regarding **the delegation to the government to specify areas where employees confirmed to be free of infectious diseases are allowed to work, as well as the suspension from work** of those who have not been confirmed. In this case, the Constitutional Court ruled that the legislator did not delegate to the government the authority to establish legal regulations that can only be set by law, but instead created conditions to implement the requirement established in the law for employees to undergo mandatory health checks. This included specifying the work and activity areas where this requirement applied due to the higher risk of infectious disease spread, as well as regulating the implementation procedures and procedural relationships related to this requirement.

On January 24, 2023, the Constitutional Court ruled on **the limitation of economic activity freedom following the declaration of quarantine**. The Court emphasized that fundamental conditions and restrictions impacting economic activities must be established by law. The Court stressed that the government must operate within constitutional and legal frameworks and cannot exceed its authority (act *ultra vires*). Any measures must be temporary and subject to continuous review. The Court noted that health protection is a state responsibility, especially during crises like the COVID-19 pandemic. Ultimately, it determined that the government was justified in implementing restrictions to protect public health.

This stance was reiterated in the Constitutional Court's May 31, 2023 ruling, which addressed **government-imposed restrictions on the number of close contacts in indoor spaces during quarantine**. The Court reaffirmed that,

under the Constitution, a legal framework may permit the legislator's measures to control infectious diseases to be further detailed in subordinate legal acts, specifying the scope, duration, and implementation of the chosen measures. The Court also emphasized that the imperative to prevent and control infectious diseases that create an exceptional situation in the state – threatening the health and lives of many – may require urgent and decisive action to safeguard public health interests.

On October 4, 2023, the Constitutional Court of Lithuania ruled on the constitutionality of **the health certificate**, which allowed in-person services, economic activities, and events only for individuals meeting certain criteria. These criteria included vaccination with authorized COVID-19 vaccines, a negative COVID-19 test result, or recovery from the disease, while others faced restrictions to specific services. The Court reaffirmed that emergency measures must be temporary and continuously reviewed for necessity. The Court found the regulation did not violate legal state principles or disproportionately infringe on privacy rights.

The constitutional justice cases discussed did not directly establish incompatibility between the constitutional and executive frameworks. However, they provided significant criteria for how governmental powers should be exercised during emergencies. In Lithuania, it was the migration crisis – not the Covid-19 crisis – that ultimately revealed the conflict between constitutional provisions and legislative measures.

On 7 June 2023 the Constitutional Court ruled on **the temporary accommodation of asylum seekers in the foreigners registration center due to a mass influx of foreigners** under an emergency situation. In this constitutional justice case, the Constitutional Court considered Articles 144 and 145 of the Constitution, which allow for the declaration of a state of emergency and the temporary limitation of certain rights. However, such limitations can only apply to specific rights explicitly listed in the Constitution. The Court established that declaring a state of emergency or extraordinary situation does not automatically warrant the restriction of all individual rights, particularly the inviolability of personal freedom. The Court also took into account the standards established in European Union law and international legal acts concerning the restrictions on the rights of asylum seekers. It noted that the contested legal regulation aimed to ensure public order and border security, but any restriction on personal freedom must be based on individual circumstances and specific conditions. The Court emphasized that simply declaring an emergency due to a mass influx of foreigners cannot justify the application of the strictest restrictive measures on all asylum seekers, as this could be equated to detention. Moreover, there must be a provision for judicial review

of the legality and justification of such restrictions, as required by the Constitution. Under these circumstances, it was ruled that this legal regulation failed to comply with the constitutional requirement not to restrict individual rights more than is necessary to achieve a legitimate goal. The contested legislation was deemed incompatible with the constitutional provision that guarantees the right to freedom.

Question 3

The constitutional framework in Lithuania necessitates establishing a balance between safeguarding individual rights and ensuring national well-being during emergencies. Throughout the constitutional cases discussed in the response to Question 9, the Lithuanian Constitutional Court consistently upheld the principle that emergency measures must align with the Constitution, remain proportional, and be subject to continuous review:

- The underlying principles of proportionality, necessity, and respect for fundamental rights are widely recognized as essential to the exercise of emergency powers in constitutional jurisprudence.
- The Constitutional Court indirectly ruled that a more stringent standard of judicial review applies when the essence of freedom is not merely restricted but fundamentally negated. In assessing whether the contested legal regulation undermined the essence of economic freedom, the Court examined whether the measures are applied for a limited duration. Furthermore, it may require establishing that compensation for losses incurred due to the declaration of quarantine and the implementation of related measures is provided (for further details, see: ruling of 24 January, 2023).
- The principle of the hierarchy of the legal acts must be respected at all times. The fundamental conditions and restrictions impacting respective human rights and economic activities must be established by the law. The government may only elaborate on the measures established by the legislator in the law for managing crisis through subordinate legal acts. These acts can specify various aspects, including the scope and duration of the chosen measures. These government emergency powers are justified by the need for urgency and effective decision-making, as well as the necessity for specific knowledge or professional expertise.
- According to the Constitution, including the principles of the rule of law and responsible governance, emergency measures can only be applied temporarily. The legal regulation establishing them must be continuously reviewed, with the necessity of their continued application reassessed.

In summary, the Constitutional Court reaffirmed that while the government may take urgent actions to protect public health or manage crises, such as infectious disease outbreaks, these measures must remain temporary, carefully tailored, and grounded in law, ensuring the protection of fundamental rights. It is the responsibility of the legislator to establish proportionate measures that uphold the core values of democracy and human rights, thereby reinforcing the principle that, even in times of crisis, the rule of law prevails.

Question 4

The introduction of emergency measures by the European Union can indeed affect the balance and distribution of power among Member States, However, the extent and nature of this impact depend on various factors. The COVID-19 pandemic exemplified how EU emergency measures can lead to shared responses that might limit national autonomy. For instance, vaccine procurement and distribution were coordinated at the EU level, which, while effective, also meant Member States had to conform to EU strategies and priorities.

While EU emergency measures can enhance collective response capabilities and improve efficiency in crisis situations, there are instances when national institutions may wish for more swift and flexible measures that align more closely with their national interests. For these reasons, EU emergency rules are not always activated as a first resort. For example, in Lithuania, national measures implemented during migration crises often prioritized national security considerations over the coordinated approaches advocated by the EU legal framework on migration, as illustrated in the case of ECJ C-72/22 PPU.

Ultimately, the overall impact of EU emergency measures is variable, shaped by the specific context of the measures, the legal frameworks invoked, and the prevailing political dynamics.

Section 4: Judicial review of emergency powers in the Member States

Question 1

Different courts in Lithuania have jurisdiction the hear actions challenging situations of emergency. It depends on the applicants and specific applications. In most cases administrative courts would have jurisdiction to hear such cases. The administrative courts hear disputes in the field of public administration. For instance, administrative courts hear many administrative cases concerning state of emergency on the border of Lithuania due to the threat posed by

the mass influx of migrants or heard many administrative cases regarding different restrictions during COVID-19 pandemic.

The Constitutional Court examines a case only when the subjects prescribed by the Constitution address the Constitutional Court with a petition requesting for the determination of the conformity of a law or a legal act with the Constitution. The right to file a petition with the Constitutional Court for an investigation into the constitutionality of a legal act is vested in: (1) the Government, a group of not less than 1/5 of all the members of the Seimas, and courts concerning a law or another act adopted by the Seimas; (2) a group of not less than 1/5 of all the members of the Seimas and courts concerning an act of the President of the Republic; and (3) a group of not less than 1/5 of all the members of the Seimas, courts, and the President of the Republic concerning an act of the Government. The right to file a petition with the Constitutional Court concerning the constitutionality of all above-mentioned legal acts is also granted to every person if he or she believes that a decision adopted on the basis of such a legal act has violated his or her constitutional rights or freedoms, and the person has exhausted all legal remedies. A petition concerning the violated constitutional rights or freedoms may be filed with the Constitutional Court not later than within 4 months of the day that the final and non-appealable decision of the court came into force.

For instance, on 31st of May 2023 the Constitutional Court rendered the ruling on individual petition "On limiting the number of persons having close contacts in enclosed spaces following the declaration of quarantine." The Court found no violation to the Constitution on this question.

Courts of general jurisdiction have jurisdiction to hear cases concerning criminal or administrative offences during situations of emergency or hear cases out of civil liability or labour disputes which arise out of situations of emergency.

Question 2

In laws on situations of emergency, there are no specific procedural rules. General procedural rules set in the Law on Constitutional Court or Law on Administrative proceedings or Codes on Civil Procedure or Criminal Procedure. There is no general rule that such cases are heard according to the procedure of urgency. The court itself can decide to hear such cases urgently. So far there have not been such cases.

It can be mentioned that Supreme Administrative Court asked CJEU to apply urgent preliminary ruling procedure in a case regarding rights of

aliens during state of emergency. CJEU applied such procedure in a case C-72/22 PPU.
Only the Law on the Legal Status of Aliens state that an alien who has received a decision to withdraw the residence permit issued to him or his right to live in the Republic of Lithuania or to withdraw the refugee status, additional or temporary protection granted to him, has the right to appeal it to the Regional Administrative Court within 14 calendar days from days of service of decision. The hearing of the case regarding the withdraw of the residence permit or the right to reside in the Republic of Lithuania, refugee status, additional or temporary protection in the Administrative Court of Regions must be finished and the judgment must be rendered no later than 2 months from the date of receipt of the complaint. The same rules are applied for the appeal procedure in the Supreme Administrative Court of Lithuania.

Question 3

There is no specific legal regulation and no specific court practice on this question in Lithuania. Usually, the courts review the actions of public authorities taken into account the specific situation at the time of adopting a legal act.

For instance, The Constitutional Court in the ruling of the 24th January 2023 "On the restriction of freedom of economic activity following the declaration of quarantine" was noted that "the contested legal regulation established in the Resolution was established after assessing the general unfavourable epidemic situation of the COVID-19 disease and the threat and trends of the spread of this disease, as well as based on the special information available at the time and taking into account the situation novelty and unpredictability. After assessing this, there was reason to believe that such a situation could arise where, if effective measures were not taken in time, irreparable damage would be caused to the values enshrined in the Constitution, among other things, to people's health and life."

It can be noted that in quite many cases related to the COVID-19 emergency, the courts have been lenient with the legislator and interpreted minor flaws in the legislation in favour of the legislator. More flexibility is usually allowed in such cases. For instance, the Constitutional Court in the ruling of the 21st of June 2022 "On the right of the National Public Health Centre to assign binding measures to employees for the control of communicable diseases in humans" said that the powers to impose other measures for the control of communicable disease laid down in the impugned legal regulation may be exercised by the National Public Health Centre only temporarily, that is, until the outbreak of a communicable disease has been contained or the state-level

emergency situation and/or quarantine declared for that disease have/has been lifted. The Constitutional Court made a conclusion that the impugned legal regulation did not violate the requirement, stemming from the provision "Everyone may freely choose a job or business" of paragraph 1 of Article 48 of the Constitution that the right of a person to freely choose an occupation may be restricted by means of a law, as well as the constitutional principles of a state under the rule of law and responsible governance.

Question 4

The principle of proportionality plays an important role during the judicial review of actions of public authorities in situations of emergency. It is also a constitutional principle. The principle of proportionality usually is understood in accordance with EU Law and practice of CJEU. Also practice of ECHR on principle of proportionality is important for courts in Lithuania.

For instance, the Constitutional Court in the ruling of the 7th June 2023 on "On the temporary accommodation of asylum seekers in the event of a mass influx of aliens during a declared extraordinary situation, a state of emergency, or a state of war" was stressed that "[t]he jurisprudence of the CJEU notes that national authorities can detain an applicant for international protection only after verifying in each specific case whether such detention is proportionate to the goals pursued; it is prohibited to detain an applicant for international protection without first examining the necessity and proportionality of this measure and without adopting an administrative or judicial decision specifying the factual and legal grounds for his detention."

Principle of proportionality was one of the grounds for Supreme Administrative Court of Lithuania to ask CJEU for preliminary ruling in an administrative case concerning rights of aliens during the state of emergency because of the influx of migrants to Lithuania. Later the extended panel of judges stressed that the State retains the right to demand applications to be filled out in person and/or at a required place but it cannot utilise this right to hinder or rush the application process for the foreign nationals. This also applies to cases during a state of emergency due to a mass influx of foreigners. Panel of judges stated that having regard to EU law standards, especially principle of proportionality, the fact that an applicant for international protection is staying in the territory of a Member State illegally does not justify detention. Consequently, a third-country national cannot be detained on that basis alone (Case No. A-1091-822/2022).

In a civil case Supreme Court of Lithuania stated that individuals who are at higher risk of contracting COVID-19 is an important factor that should be taken into account when deciding whether to enforce meetings with the child as prescribed, but the mere fact that the child will meet and interact with a parent who does not live with at the same time, directly, it should not be a risk-increasing circumstance in itself. Not allowing the child to communicate with the father only because of the COVID-19 emergency is a violation of the principle of proportionality (Case No. 3K-3-157-916/2021).

Section 5: Implementation of EU emergency law in the Member States

Question 1

There are no specific principles of national law that could prevent from implementing EU measures. Problems mostly arise out of political or social circumstances. It is not always wished to implement EU measures governing situations of emergency in a full manner because of political situation and opinion of society (best example could be immigration situations). Sometimes national security is prioritized over other EU or national rules.

Question 2

Art. 78 (3) TFEU was invoked for Lithuania. Latvia and Poland in year 2021. Many issues arose out of miscommunication between institutions and different views from national and EU institutions. As it has been already mentioned, EU emergency rules are not always activated as a first resort. For example, in Lithuania, national measures implemented during migration crises often prioritized national security considerations over the coordinated approaches advocated by the EU legal framework on migration. On the other hand, technical help of Frontex was very useful.

Many EU legislative measures in the course of the COVID-19 pandemic worked really well. This emergency situation showed that EU measures can be applied quickly and the whole system can react quite flexible and fast. For instance, vaccine procurement and distribution functioned effectively.

Malta

*Ivan Sammut**

A. Background with regards to Maltese Emergency law

Maltese law deals with emergency legislation through Chapter 178 of the Laws of Malta. However, a state of emergency is also described under the Maltese Constitution, which refers to it as a "period of public emergency" under Article 47(2). The Constitution provides three instances where a period emergency may be declared. First, when Malta is involved in a war or, second, the President has the discretion to declare a state of emergency. Third, Parliament may declare a state of emergency having acquired a two-thirds majority of the Members of Parliament's votes, establishing that subversion is threatening democracy.

The state of emergency is not, however, a permanent measure. It is rather temporary, as is evident from Article 47, whereby it holds that the declaration of emergency will end after the lapse of 14 days unless the President revokes it at an earlier stage. Moreover, during the state of emergency, Parliament may pass a resolution extending the declaration for an additional period, not exceeding three months, commencing on the day it would otherwise expire. However, declaring an emergency will not preclude the President from issuing another emergency declaration at or before the period's expiration.

Parliament is to be informed of the circumstance immediately when a declaration of emergency is proclaimed. If the parliamentary session is postponed or adjourned to a day which does not end in ten days, then the President may proclaim a session within five days. Parliament would then continue to function regardless of whether it had been postponed or divided to that day.

The main legislative framework for addressing emergencies is the Emergency Powers Act, which establishes measures to ensure Malta's security in public emergencies. This Act empowers the President of Malta, acting on the recommendation of the Prime Minister, to enact essential laws in addressing the crisis. The later laws are called regulations under Part II, particularly in Article 4. This article highlights the powers entrusted to the President, by which one establishes necessary or effective regulations to ensure Malta's defence, as well as

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the health and safety of the public, amongst other measures for guaranteeing community life. Moreover, the regulations issued by the President are subject to the approval of Parliament and are effective for 2 months, as held under Article 6 of the same Act.

Article 4 of Chapter 178 provides that the President of Malta, acting in accordance with the advice of the Prime Minister, may, subject to the provisions of the Constitution of Malta, make such regulations as appear to him acting as aforesaid to be necessary or expedient for securing the public safety, the public health, the defence of Malta, the maintenance of public Order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.

Without prejudice to the generality of the powers conferred as explained above, the regulations may, so far as appears to the President of Malta acting as aforesaid to be necessary or expedient for any of the purposes mentioned above, make provision for the detention of persons. The President can authorise (i) the taking of possession or control on behalf of the Government of any property or undertaking and (ii) the acquisition of any property other than land on behalf of the Government. The President can also authorise the entering and search of any premises, provide for amending any law, suspend the operation of any law, and apply any law with or without modification.

The President may provide for charging, regarding the grant or issue of any licence, permit, certificate or other document for the regulations; such fee may be prescribed by or under the regulations and also provide compensation and remuneration to persons affected by the regulations. The Regulations may provide for the apprehension, trial and punishment of persons offending against the regulations. They may provide for maintaining such supplies and services as are, in the opinion of the President of Malta acting as aforesaid, essential to the community's life. However, nothing in this law shall authorise the making of provision for the trial of persons by military courts, and nothing in this article shall be construed to authorise the making of any regulation – (i) making provision for the deportation or exclusion of persons from Malta, and (ii) providing for the infliction of the punishment of death. The payment of any compensation or remuneration under the provisions of such regulations shall be a charge upon the Consolidated Fund.

Regulations made under Article 4 may provide for empowering such authorities or persons as may be specified in the regulations to make orders and rules for any of the purposes for which the regulations are authorised by this Act to be made and may contain such incidental and supplementary provisions as appear to the President of Malta acting as aforesaid to be necessary or expedient for the regulations.

Every regulation made under Article 4 and every order or rule made in pursuance of such regulation shall, without prejudice to anything done or omitted to be done thereunder, cease to have effect at the expiration of a period of two months from the date upon which it came into operation unless, before the expiration of that period, it has been approved by resolution passed by the House of Representatives. Any such regulation, Order, or rule may, without prejudice to anything done or omitted to be done thereunder, be amended or revoked by resolutions passed by the House of Representatives.

Every regulation made under Article 4 and every order or rule made in pursuance of such regulation shall have effect notwithstanding anything inconsistent in addition to that contained in any law. Any provision of a law which is inconsistent with any such regulation, Order or rule shall, whether that provision has or has not been amended, modified or suspended in its operation under this Act, to the extent of such inconsistency, have no effect so long as such regulation, order or rule remains in force.

Every document purporting to be an instrument made or issued by the President of Malta or other authority or person in pursuance of this Act, or of any regulation made under Article 4, and to be signed by or on behalf of the President of Malta or such other authority or person, shall be received in evidence, and shall until the contrary is proved, be deemed to be an instrument made or issued by the President of Malta or that authority or person.

B. Some historical examples of the use of Emergency powers in recent history

On 21 April 1958, Prime Minister Dom Mintoff declared that his Government would be resigning and further stated that the Maltese people would need to demonstrate the extent to which they are ready to fight for their rights. This statement resulted in demonstrations and public unrest, whereby law enforcement officers found it difficult to control. On 23 April, Mintoff expressed his intention to serve office on a caretaker basis, issuing an order to suspend several senior officers, withdrawing mounted police and prohibiting baton strikes against protestors. However, These orders were disregarded by Governor Laycock (who acknowledged the Government's resignation). Mintoff held a national protest on 28 April, which included strikes, temporary closure of businesses and schools, and disrupting the island's communications infrastructure. On 29 April, Governor Laycock received authorisation to declare a state of emergency due to the increase in chaos and then Opposition Leader Borg Olivier's refusal to create an alternate government. Direct colonial rule was then followed for more than three years.

Another relevant case, though not dealt with under the Emergency Powers Act, was the spread of COVID-19, a highly infectious disease, that led the World Health Organization, also referred to as WHO, to declare it a Public Health Emergency of International Concern on 30 January 2020, due to the increase of infected persons. When several infected individuals reached Malta in March 2020, a Public Health Emergency was declared under Legal Notice 115 on 1 April 2020, which came into effect on 7 March 2020.

Declaring a Public Health Emergency empowers the Superintendent of Public Health with broad authority to take any action necessary to mitigate, eliminate or eradicate the COVID-19 threat. These measures may include evacuation of any person from any place within Malta, limiting vehicle travel, restricting access to locations, isolating or separating persons, amongst many other actions. Under the Public Health Act, the Superintendent also has the power to, amongst other things, order the destruction of any material or item. Additionally, the Superintendent is empowered to regulate the number of persons who can occupy an area to avoid crowding. Any individual who disregards an instruction from the Superintendent would be committing an offence.

Regarding enforcement, orders which impose specific measures were issued through legal notices which carry out such measures. Legal Notice 96 of 2020 relates to the order regulating the closure of outlets or shops providing non-essential services and non-essential retail businesses. This regulation holds that any person who violates the terms of this order would be considered to have committed an offence and would be punished with a fine of EUR 3,000. Legal Notice 98 of 2020, entitled Enforcement of the Order Relating to Self-Isolation of Diagnosed Persons Regulations holds that any individual who violates the provision of the order would be guilty of an offence and, upon conviction, be liable to pay EUR 10,000. Legal Notice 100 of 2020 held the order to close organised events temporarily.

It also included a clause whereby if a person violates this order, they may be subject to a EUR 3,000 fine. Lastly, Legal Notice 113 of 2020 refers to the order regarding the number of persons allowed in a public space, which also provides a penalty clause of EUR 100 for any person violating this order. Legal Notice 232 of 2020, published on 3 June 2020, repealed various regulations, including some enforcement measures and those issued earlier in the year.

C. Analysis of Maltese Emergency Law

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

Malta's law does not distinguish between situations of "emergency," "crisis," and/or "necessity." Chapter 178 deals with emergencies that can lead to public unrest. COVID, a health emergency, was dealt with under the Public health law, which is not normally used for emergent situations.

Question 2

The Constitution of Malta mentions urgent situations governed through Chapter 178, as described above. However, as was the case during the COVID-19 pandemic, a policy-specific sector may be used if necessary, such as in the case of a health emergency.

Question 3

Normally, a big public interest is to avoid harm to society in general and a serious political situation that can lead to a lack of public order or a great national calamity.

Question 4

There are no specific constraints.

Question 5

At present, EU law does not influence this regard.

Question 6

There is no precedent.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

A state of emergency is also described under the Maltese Constitution, which refers to it as a "period of public emergency" under Article 47(2). The Constitution provides three instances where a period emergency may be declared. First, when Malta is involved in a war or, second, the President has the discretion to declare a state of emergency. Third, Parliament may declare a state of emergency having acquired a two-thirds majority of the Members of Parliament's votes, establishing that subversion is threatening democracy.

Question 2

To continue from the point above, during the state of emergency, Parliament may pass a resolution extending the declaration for an additional period, not exceeding three months, commencing on the day it would otherwise expire. However, declaring an emergency will not preclude the President from issuing another emergency declaration at or before the period's expiration.

Parliament is to be informed of the circumstance immediately when a declaration of emergency is proclaimed. If the parliamentary session is postponed or adjourned to a day which does not end in ten days, then the President may proclaim a session within five days. Parliament would then continue to function regardless of whether it had been postponed or divided to that day. The courts play no role unless once claim a breach of fundamental rights by filing an action in court.

Question 3

Malta is the most centralised state in the EU, and no regional frameworks are applicable to emergencies.

Question 4

There is no precedent in this regard. Barring the COVID-19 scenario, Malta has never resorted to any emergency law in recent history. Hence, there are no specific court judgments.

Question 5

There are no specific provisions in Malta. The normal courts will deal with the matter as in cases involving fundamental rights.

Question 6

No, there are no precedents.

Section 3: Statutory/executive emergency law in the Member States

Question 1

As in the case of the COVID-19 scenario described above, the Public Health law was used, and through subsidiary legislation, under the Parent Act, the Minister and the Supridentent of Public Health were able to issue directives that could be changed and adapted as necessary.

Question 2

This is not applicable for Malta.

Question 3

Yes. The state of emergency is not, however, a permanent measure. It is rather temporary, as is evident from Article 47, whereby it holds that the declaration of emergency will end after the lapse of 14 days unless the President revokes it at an earlier stage. Moreover, during the state of emergency, Parliament may pass a resolution extending the declaration for an additional period, not exceeding three months, commencing on the day it would otherwise expire. However, declaring an emergency will not preclude the President from issuing another emergency declaration at or before the period's expiration.

Parliament is to be informed of the circumstance immediately when a declaration of emergency is proclaimed. If the parliamentary session is postponed or adjourned to a day which does not end in ten days, then the President may proclaim a session within five days. Parliament would then continue to function regardless of whether it had been postponed or divided to that day.

Question 4

It should not alter in any way the balance and distribution of power in Malta.

Section 4: Judicial review of emergency powers in the Member States

Question 1

In their constitutional jurisdiction, the civil courts have the ordinary jurisdiction to hear any challenges that breach the Maltese Bill of Rights found in the Constitution or the European Convention on Human Rights. Such actions can be brought here.

Question 2

No normal law applies.

Question 3

As above.

Question 4

Normal human rights principles would apply. The courts will look at ECHR case law for inspiration. If the emergency is related to EU law, then the CJEU case could be applied.

Section 5: Implementation of EU emergency law in the Member States

Question 1

EU law is domestic law under Chapter 460 of the Laws of Malta. Hence if the emergency measure results from an EU implementing measure, EU law would apply.

Question 2

There are no gaps identified though the experience obtained during the COVID-19 period is discussed above.

The Netherlands

Ben Vermeulen
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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

The Dutch legal order aims to guarantee the fundamental rights and the democratic constitutional state, as explicitly expressed since 2022 in the **General introductory article of the Constitution**. Accordingly, Dutch emergency law has to fulfil two tasks. On the one hand, it has to provide for a legal foundation that authorizes the state **to effectively act** in situations of emergency, which implies the competence to take heavy measures that can intervene deeply in the sphere of individuals and organizations. On the other hand, it has to guarantee that even in situations of emergency these measures rest upon a democratic legal basis, are compatible with fundamental rights and are supervised by Parliament and the judiciary. In short, Dutch emergency law must **enable** the **legitimate use**, and **exclude the illegitimate abuse** of emergency powers.

The complexity of combining these two tasks is a main source of the complexity of emergency law. Dutch emergency law is surely no exception: **emergency** law is very complicated and is described in a wide intricate range of legal terms, concepts, rules and principles. An essential category is the "extraordinary circumstance" [*buitengewone omstandigheid*], the term used in the Coordination of Exceptional Circumstances Act [*Coördinatiewet uitzonderingstoestanden*], to denote those circumstances which may warrant proclaiming a *general* state of emergency [*algemene noodtoestand*] or a *limited* state of emergency [*beperkte noodtoestand*]. The **Coordination of Exceptional Circumstances Act** – hereafter: **Coordination Act** – implements **Article 103 of the Constitution** [*Grondwet*], the source of what is called "staatsnoodrecht" – **state emergency law.** Article 103 provides the constitutional basis for the proclamation by royal decree[1] of a *state of exception* [*uitzonderingstoestand*], that is qualified as a general or limited state of emergency.[2]

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[1] A royal decree is a decision by the government (King and minister(s)), Article 47 Constitution.

[2] Article 103 of the Constitution in conjunction with Article 1 Coordination Act.

The term "extraordinary circumstance" is used in some **forty acts**, listed in the Coordination Act, which cover a wide range of policy areas and contain various emergency powers that may be activated inside a state of emergency. The law does not provide a definition of the concept of an "extraordinary circumstance." In legal doctrine the term is generally **defined** as a situation in which (1) a vital interest is threatened, while (2) the general, ordinary competences are insufficient to avert the threat created by that situation, and (3) therefore requires the use of extraordinary competences, that is: emergency powers.

Furthermore, in quite a number of Acts that do not fall under the scope of Article 103 of the Constitution and the Coordination Act, other competences can be found that because of their extraordinary character are emergency powers in the *material sense*. Sometimes this is referred to as **crisis law** (*crisisrecht*). There is **not a specific formal term** to denote these emergency or crisis powers: we give but a few examples of the variety of terms used. The term **crisis** [*crisis*] is primarily used in the Security Regions Act [*Wet veiligheidsregio's*], which concerns measures taken by local authorities in the event of **crises** and **disasters** [*rampen*]. A crisis is defined in the Security Regions Act (Article 1) as a situation in which a vital societal interest has been affected or is in danger of being affected. The function of the terms crisis and disaster in the Security Regions Act is to describe local emergency law competences of municipalities and security regions.

In various Acts **other descriptions of circumstances** that may require the use of emergency powers can be found. They define situations that justify the use of emergency powers, such as:

- "riotous movement, other serious disturbances or disasters, as well as significant fears of their occurrence" [*oproerige beweging, van andere ernstige wanordelijkheden of van rampen, dan wel van ernstige vrees voor het ontstaan daarvan*]: Article 175 Municipal Act [*Gemeentewet*];
- "a threat to public health which is so severe that it is necessary to avert it" [*de bedreiging van de volksgezondheid [is] dusdanig ernstig ... dat afwending van die dreiging noodzakelijk is*]: Article 58b Public Health Act [*Wet publieke gezondheid*];
- "accident' [*ongeval*]: Article 38 Nuclear Energy Act [*Kernenergiewet*];
- "unacceptable risks" [*onaanvaardbare risico's*]: para. 19.2a of the Environmental Law (*Omgevingswet*);
- "danger" [*gevaar*]: para. 19.4 of the Environmental Law;
- "seriously and immediately at risk" [*ernstig en onmiddellijk in gevaar*]: Articles 6.1 and 6.2 Financial Supervision Act (*Wet financieel* toezicht).

In legal doctrine generally the view is held that these ***de facto*** emergency competences were unjustifiably disregarded by the legislature when introducing

the term "extraordinary circumstance" in 1997 as the central and defining concept in emergency law. One should read these other provisions containing *de facto* emergency powers as also referring to an extraordinary circumstance defined above: a situation in which a vital interest is threatened and normally adequate, available (general, ordinary) competences are insufficient to avert the threat created by the extraordinary circumstances at hand.

Question 2[3]

As already observed, Dutch emergency law has a hybrid character. On the one hand, part of it has a **constitutional basis** in Article 103 of the Constitution and a legislative framework established on that constitutional basis, governing general and limited states of emergency that have to be formally proclaimed in accordance with Article 1 of the Coordination Act. Article 103 Constitution enumerates the **constitutional provisions** which – for reasons of external or internal safety (*uitwendige of inwendige veiligheid*) – **can be derogated from** in a state of exception [*uitzonderingstoestand*], and lays down the **procedural** requirements for proclaiming and revoking a state of exception. This part, called *state emergency law*, furthermore consists of a large number of **provisions** that attribute specific emergency competences to national and local governments in various policy sectors. These provisions are found in some forty Acts of Parliament. Some acts, like the War Act [*Oorlogswet*] and the Emergency Food Supply Act [*Noodwet voedselvoorziening*] consist mostly or entirely of substantive emergency law. Other acts, such as the Inland Navigation Act [*Binnenvaartwet*], contain only a single emergency provision.

A royal decree declaring a state of general or limited emergency does not, by itself, confer any emergency powers. Proclaiming a limited or a general state of emergency merely permits the **subsequent activation** – by a second royal decree – of provisions mentioned in resp. the appendices A and B of the Coordination Act. The **limited state of emergency** allows the activation of provisions (listed in appendix A) that *deviate from constitutional provisions concerning the competences of municipal and regional authorities*, thus enabling a shift of powers to the central executive, the government. The **general state of emergency** *additionally* enables the activation of provisions (listed in appendix B**,** which by the way also contains list A) that *derogate from certain fundamental constitutional rights provisions*, going beyond the specific limitation clauses included in those provisions.

[3] For a broad, general overview of the legal principles regulating emergency law, see: the Venice Commission, *Interim Report on the measures taken in the EU Member States as a result of the Covid-19 crisis and their impact on democracy the rule of law and fundamental rights* (requested by the President of the European Parliament, CDL-AD(2020)018 (October 2020).

The laws listed in the appendices A and B of the Coordination Act include many emergency powers which – from the constitutional perspective – do not need a declaration of a state of emergency authorizing their activation, as they do not derogate from the Constitution. The legislature nevertheless considers these emergency powers to be so far-reaching, that procedural safeguards in the form of a **prior activation by royal decree in combination with parliamentary oversight**, as provided for by a state of emergency, is required.[4] However, as these provisions do not derogate from the Constitution, they may *also* be activated **outside a state of emergency** (the so-called separate activation). The facility of such **separate activation** reflects the attempt of the legislature to enable a flexible application of emergency measures, relating the (formal and material) conditions of the application to their intrusiveness as well as the severity of the situation to which they are meant to respond.

In sum, it is necessary to distinguish between the following categories of emergency provisions.

(1) Provisions listed in the Coordination Act that **derogate from constitutional rights** mentioned in Article 103 of the Constitution and can *only* be activated in a general state of emergency;
(2) Provisions listed in the Coordination Act that **derogate from the constitutional powers of local authorities** and can therefore only be activated in a general or limited state of emergency;
(3) Provisions listed in the Coordination Act that **do not derogate from the Constitution**, but nevertheless are of a "far-reaching/intrusive character," which can (also) be activated *outside* a (limited or general) state of emergency[5]: the so-called **separate activation**.
(4) Provisions not listed in the Coordination Act that do not derogate from the Constitution and can be used *outside a state of emergency* **without prior activation**.

Furthermore, Dutch courts have also recognized the existence of so-called **unwritten emergency law**, in *force majeure* circumstances (i) allowing for derogations from Acts of Parliament or even from the Constitution, thus going beyond the constraints of Article 103 of the Constitution, and (ii) functioning as a basis for competences not attributed by written law "necessity breaks and creates law."[6]

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[4] Such powers may be used to limit constitutional fundamental rights, but only in accordance with the limitation clauses included in the relevant constitutional fundamental rights provisions.

[5] There are also some emergency provisions with *activation procedures* that are not included in the appendices A and B of the Coordination Act. See, for example: the Public Health Act [*Wet publieke gezondheid*], Article 20 in conjunction with Articles 58a–58za (activation by ministerial regulation).

[6] For instance, the royal decrees of the Dutch war-cabinet in London during the second world war, which are regarded as legal acts at the same level as Acts of Parliament.

After World War II **neither a limited nor a general state of emergency** has been declared. And in less than a handful of cases emergency provisions have been activated outside a state of emergency, *via* the instrument of *separate activation* (category (3) just mentioned). Legal doctrine suggests there is a psychological barrier amongst politicians and policy makers to use emergency instruments that evoke upsetting images of war and large-scale societal disruption.

Two recent examples of separate activation may perhaps signal a (modest) change in attitude. First, during the COVID-19 pandemic the emergency provision of Article 8 Civil Authority Special Powers Act [*Wet buitengewone bevoegdheden burgerlijk gezag*] was briefly activated in order to implement a **nocturnal curfew**. As its use was initially challenged with success in preliminary relief proceedings, government resorted to the creation of a (regular) statutory basis for the curfew in the Temporary Measures COVID-19 Act [*Tijdelijke wet maatregelen COVID-19*]. However, the initial use of this emergency competence withstood judicial scrutiny later on in appeal and cassation (see Section 4, Question 3).

Second, the accommodation of Ukrainian asylum-seekers and other **displaced persons** after the Russian invasion in 2022 was assigned to municipal governments by means of activation and subsequent application of Article 4 of the Population Evacuation Act [*Wet verplaatsing bevolking*].[7] Usually, the accommodation of asylum-seekers is handled and organized by central authorities. In this case the government regarded the use of emergency law as an acceptable instrument to provide a legal basis for and hence ensure the continuation of a task that municipalities in fact already were undertaking voluntarily.

The use of emergency provisions that do not require prior activation (category (4) above) is much more common. For instance, the emergency powers of municipal and regional authorities (found in the Municipal Act and the Security Regions Act) are frequently used in case of serious threats to public order and safety.

Question 3

In accordance with Article 1 of the Coordination Act a limited or general state of emergency can be declared by royal decree in case of an "extraordinary circumstance." As noted above, this term refers to a situation in which a vital interest is threatened and existing competences are insufficient to adequately avert that threat. In scholarly literature the following classification of **vital**

[7] Royal Decree of 31 March 2022, activating Articles 2c and 4 of the Population Evacuation Act (*Wet verplaatsing bevolking*).

interests is used: territorial security; economic security (including undisturbed trade); ecological security (including protection of the environment); physical security (including public health); social and political stability; and international stability and legal order. These vital interests are assumed to be contained in the phrase "external or internal safety" [*uit- of inwendige veiligheid*] in Article 103 Constitution, and therefore also included in the Coordination Act. The principles of **proportionality and subsidiarity** govern the question whether the threat to such vital interests warrants the declaration of a state of emergency. This is implied by the term "*extraordinary* circumstance" as commonly interpreted, as well as in the text of the Coordination Act (Article 1), which requires that the measure is *necessary* to maintain external or internal safety.

The same type of triggering event ("extraordinary circumstance") justifies activating and using individual emergency provisions outside a state of emergency (the so-called separate activation). Here too, the activation and use of specific emergency provisions is governed by the principles of proportionality and subsidiarity.

Finally, a variety of triggering events can be found in emergency (or crisis) provisions that may be used **without prior activation**. Already mentioned, as an example, is a situation triggering the mayoral competence to issue an emergency order [*noodbevel*] on the basis of Article 175 Municipal Act: in that case there have to be riotous movements, other serious disturbances or disasters.

Question 4

A rather self-evident requirement in Dutch emergency law flows from the **principle of legality**: the use of emergency powers must be authorized by Acts of Parliament, outlining the powers and specifying the circumstances when they may be used.

Apart from this fundamental requirement, the use of emergency powers may be constrained and regulated by certain **procedural restrictions**. These are the requirements of:

(1) proclamation of a (limited or general) state of emergency and parliamentary supervision;
(2) subsequent activation of emergency provisions within a (limited or general) state of emergency and parliamentary supervision;
(3) activation of emergency provisions outside of a state of emergency ('separate activation') and parliamentary supervision.

We will briefly describe these procedural constraints.[8]

(1) The proclamation of a (limited or general) state of emergency requires a royal decree [*koninklijk besluit*, a government decision] on recommendation of the Prime Minister (reflecting the notion that such a decree is *Chefsache*, a matter of great general interest). The proclamation must be communicated to Parliament [*Staten-Generaal*] immediately (Article 3 Coordination Act). Parliament in united assembly (both Second and First Chamber) **may at any moment decide on the (dis)continuation** of the state of emergency. Termination of a state of emergency is also possible by royal decree. These formalities are laid down in the Coordination Act, which implements the framework indicated by Article 103 of the Constitution.

(2) *Within* a (limited or general) state of emergency, any of the provisions mentioned in respectively the appendices A (limited) and B (general) of the Coordination Act may be activated, but subject to conditions of necessity, proportionality and subsidiarity. Activation and deactivation take place by a royal decree on recommendation of the Prime Minister. Again, formalities are laid down in the Coordination Act. The substantive emergency provisions are contained in the Act governing the specific policy domain in question. Three specific aspects are worth noting. First, when Parliament decides that a state of emergency is not justified (any more), that itself not only immediately terminates the state of emergency but **also** the activation of specific provisions. Second, the use of emergency provisions in a state of emergency **requires *two* royal decrees** – (i) one to proclaim a state of emergency and (ii) another one to activate specific emergency provisions (although in practice these distinct decrees could be combined). Third, formal parliamentary oversight is limited to a decision about the (dis)continuation of a state of emergency: Parliament **lacks** a competence in emergency law to deactivate **specific** emergency provisions. However, the institution of ministerial responsibility is in fact another, more flexible instrument of parliamentary control, see Section 2, Question 2.

(3) In order to facilitate a flexible emergency response, the legislator has also introduced the possibility of activating certain emergency provisions *outside* a state of emergency (**separate activation**). This competence is intended for situations that are not serious enough to warrant the proclamation of a state of emergency, but which do require the use of one or more emergency powers. It concerns emergency provisions listed in the forementioned ap-

[8] A legislative proposal to revise the Coordination Act is currently being considered. If this proposal is enacted, the limited state of emergency will be abolished (since it mostly permits the activation of provisions that can also be activated separately, outside a state of emergency), and the declaration of a state of emergency and activation of emergency provisions will be merged into one royal decree, instead of two.

pendices A and B that do not derogate from the Constitution (in the sense of Article 103 Constitution). The procedural conditions are specified in every such Act containing emergency competences, in a uniform manner. Activation of such provisions takes place by royal decree on recommendation of the Prime Minister, after which a **proposal for an Extension Law** [*verlengingswet*] must be sent to Parliament without delay. This legislative proposal enables Parliament to decide on **(dis)continuing the activation of the emergency provision** in question. If Parliament **rejects** the legislative proposal the provisions are **deactivated by royal decree**. If Parliament accepts the proposal, it can continue to monitor the actual, concrete use of the emergency powers by applying its regular supervisory powers flowing from the principle of **ministerial responsibility**, but it lacks a formal competence to force the deactivation of specific emergency provisions. As noted before, these formalities are laid down in the Act in which the substantive emergency provision is contained.[9]

Finally, there are various provisions containing emergency powers that in general are not conditioned on prior activation or other formalities (the fourth category mentioned in Section 1, Question 2). They consist if a variety of emergency powers of central, regional and municipal governments. See, for instance, Article 46 of the Nuclear Energy Act; Article 39 of the Security Regions Act; and Articles 175 and 176 of the Municipal Act.

Question 5

The interactions between EU law and the Dutch national legal order are so diverse that it is hard to formulate a comprehensive answer. In general, there is some kind **of co-actorship**. Three different types of co-actorship can be distinguished (see below), but there are various other and more complex constellations of interaction between EU-law and state emergency measures (see Section 1, Question 6).

(1) The first type concerns a situation of emergency falling within a policy area where the **EU is competent to identify** that emergency as defined in **EU law**, and accordingly activates **necessary emergency measures**.[10] One example is the activation of a regime of **temporary protection in 2022** by the Council (Article 5 of Directive 2001/55[11]), in reaction to the Russian invasion of Ukraine and the increasing number of displaced persons from

[9] For example, see: article 52 Security Regions Act.
[10] This is also the case when the EU activates the coordination mechanism of Article 222 TFEU.
[11] The Directive is based on Article 78(2)c TFEU.

Ukraine arriving in the EU.[12] Subsequently, Dutch authorities have applied and still apply Dutch law that implemented the Directive.

(2) A second type is when EU law provides for **specific** escape clauses or **specific** exemption of EU rules that **allow Member States to derogate in case of emergency from their general obligations under EU law**. An example of such an escape clause is Article 346(1) b of the TFEU, that allows Member States to take such measures as they deem necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material. For example, when necessary and appropriate, the Dutch Ministry of Defence invokes this exception in the procurement of military goods.

Another example is Article 107 of the TFEU (state aid), that offers the possibility of financial state support in specific situations of crisis, such as natural disasters or exceptional occurrence (Article 107(2)b) or a serious disturbance in the economy of a Member State (Article 107(3)b. For example, this possibility was used by the Commission in response to the financial crisis (2007–2009), as well as in response to the COVID-19 pandemic (2020–2022) by providing a smoother framework for the provision of state aid. These instruments did not *define* the crisis, but did shape the Member States' responses based on Article 107(3) TFEU.

(3) A third type of case is when **general rules of EU law** that do not refer to emergency cases as such, nevertheless, allow for **derogations by Member States, thereby enabling them to apply emergency measures**. An example is the restriction clause of Article 36 TFEU, that in general terms allows the Member States to derogate from the rules governing free movement of goods "on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants," etc. This general exception does not define an emergency nor determines the emergency measures to be taken by Member States, but allows Member States discretion to apply restrictions on import and export (of course respecting general EU law requirements of proportionality, necessity and pre-emption as to the choice of the measures and the manner in which they are implemented).

[12] Council Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

Question 6

In addition to the examples mentioned in Section 1, Question 5 we address examples of interaction between EU and national emergency law in three policy areas.

(1) **Financial and monetary policy**
During the **financial crisis** in 2008 the Dutch government granted state aid to several Dutch financial institutions, like Fortis Bank and ABN Amro Group, in order to prevent their bankruptcy. These state aid measures were notified and approved by the Commission on the basis of a new **communication**, clarifying the state aid regime in the financial crisis.[13]

This crisis made clear that the instruments of government to deal with urgent problems in the financial sector were inadequate. In 2012, the Financial Supervision Act was amended and new instruments were introduced to ensure the stability of the financial system as a whole. Articles 6:1 and 6:2 of the Financial Supervision Act since then contain emergency provisions that permit the Minister of Finance to take immediate measures, including the expropriation of financial assets, in deviation from existing legislation. On this basis the Minister of Finance decided in 2013 to expropriate SNS Reaal Bank, because there was a serious and immediate threat to the stability of the financial system.[14]

The Dutch legislature chose to **maintain** these provisions after the introduction of the Single Resolution Mechanism in 2015. This competence is henceforth conditioned on the European resolution regime for banks not having provided a solution. The same holds for a number of provisions in the Financial Transactions Emergencies Act [*Noodwet financieel verkeer*], that attribute emergency competences to the Minister of Finance in the field of monetary policy – such as determining the interest rate and issuing emergency currency – which in normal circumstances falls within the exclusive remit of the European System of Central Banks.

(2) **Gas supply and storage**
In 2022, the EU obliged Member States to meet filling targets for their underground gas storage facilities, and to further diversify their gas suppliers with a view to reducing their dependence where that may endanger the security of energy supply or the essential security interests of the Union or its Member States.[15] At the time, the Netherlands was already obliged under certain condi-

[13] Communication (2008/C 270/02) – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis,

[14] The Council of State upheld this decision: 25 February 2013, ECLI:NL:RVS:2013:BZ2265.

[15] Regulation (EU) 2022/1032 of the European Parliament and of the Council amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage.

tions to provide gas in the spirit of solidarity to Member States directly connected to its gas transmission network.[16] In order to fulfill these obligations, the Netherlands sought to import Liquified Natural Gas (LNG), the transportation of which required building temporary floating LNG terminals with generators that **exceeded the applicable NOx emission limits**. As the issuance of a permit would require a lengthy assessment procedure, the competent Minister – after considering the proportionality of the installations and taking into account all public interests – requested the competent authority (Province of Groningen) to **postpone** enforcing the relevant national legislation (itself the implementation of an EU directive)[17] until 1 April 2023.

National legislation did not provide for an explicit exception for this situation. In this case, the balance struck by the government primarily considered interests (social rights) included in the Dutch Constitution: on the one hand, the concern and duty of the authorities to secure the means of subsistence and the health of the population (Article 20 and 22 Constitution) and, on the other hand, the concern and duty of the authorities to keep the country habitable and to protect and improve the environment (Article 21 Constitution). EU law, although relevant, did not have a decisive impact on the weighing of interests in this constitutional context. However, the solidarity required by EU law seems to have had at least some impact on the assessment of the urgency and the weighing of interests of the national measures that have been taken.

(3) **Food safety – Chernobyl**

Article 22 of the Dutch Constitution requires national authorities to take steps to promote the health of the population. This obligation could interfere with the EU acquis when national emergency measures are taken in order to fulfill it. An example is the situation after the Chernobyl accident, that required immediate legislative action and was a test for effective decision-making, characteristic in emergency situations related to public health.

After the Chernobyl accident the Netherlands experienced the first radiation effects on 2 May 1986, when a radioactive cloud reached the country, particularly due to rainfall early May. For public health reasons it was deemed necessary to take a number of measures regarding the **production and marketing of certain foods**: large number of agricultural products from Eastern European countries turned out to be seriously radioactively contaminated. Therefore, in order to protect public health, a number of trade measures were taken against

[16] Regulation (EU) 2017/1938 of the European Parliament and of the Council concerning measures to safeguard the security of gas supply.

[17] Directive (EU) 2015/2193 of the European Parliament and of the Council on the limitation of emissions of certain pollutants into the air from medium combustion plants.

Eastern European countries in an EEC context.[18] These Regulations were all implemented in the Netherlands. A **total suspension** of import was declared on cattle, pigs, fresh meat, milk, vegetables and fruit from several Eastern European countries. In the meantime, negotiations were taking place within the EEC on maximum levels of radioactive contamination. No agreement could be reached in the short term.

At the end of May 1986, an agreement was finally reached within the EEC on maximum levels of radioactive contamination to be used with regard to caesium-137 concentration in *imported* food.[19] The Dutch government chose, in the absence of clear European rules for the *marketing* of contaminated food on the common market, to **incorporate** in national legislation the maximum permissible levels of radioactive contamination laid down in the Regulation on imported food and feed. The goal was to be sure that these standards would be immediately applicable in case of a new accident.
Nowadays, the Commission can adopt an Implementing Regulation that allows for a quick response in order to establish **maximum permitted levels of radioactive contamination**.[20] The Commission can also take emergency measures for food and feed of Community origin or imported from a third country on the basis of the General Food Law Regulation (EU) No. 178/2002. However, this might still not be quick enough for a Member State to be able to take the necessary public health measures. That is why this Regulation limits the competence of the Commission to situations in which the risk cannot be contained satisfactorily by means of measures taken by the Member State(s) concerned (Article 53[21]), and allows Member States to adopt temporary emergency measures (until the Commission has acted) while immediately informing the other Member States and the Commission (Article 54). Thus, such immediate national emergency provisions concerning food safety may be introduced, but only a long as a European response has not been forthcoming.

[18] Council Regulation (EEC) No. 1388/86 on the suspension of the import of certain agricultural products originating in certain third countries.

[19] Council Regulation (EEC) No. 1707/86 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power-station.

[20] Council Regulation (Euratom) 2016/52 laying down maximum permitted levels of radioactive contamination of food and feed following a nuclear accident or any other case of radiological emergency.

[21] For example: Commission Implementing Regulation (EU) No. 297/2011 imposing special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

Article 103 of the Constitution formulates the procedural requirements for proclaiming and revoking a state of exception for reasons of external or internal security, and enumerates the constitutional provisions that permit derogation in a state of exception. The constitutional provisions that permit derogation are those concerning the competences of municipal and regional governments (Articles 123–133) and the fundamental rights provisions of Articles 6(2) (freedom of religion), 7 (freedom of the press), 8 (freedom of association), 9 (freedom of assembly), 12 (domiciliary rights), 13 (privacy of correspondence) and 113 (no institution of mobile courts) of the Constitution.[22] The procedural requirements are included in the Coordination Act, which distinguishes between a general and a limited state of emergency. Specific emergency provisions that derogate from the Constitution may only be activated inside a (limited or general) state of emergency and are listed in the appendices A and B of the Coordination Act.

The current text of Article 103 of the Constitution was introduced in 1983. The aim of maintaining "external or internal security," which today is presumed to cover **all vital interests**, including economic and ecological interests, can already be found in the precursor of the Dutch Constitution, the Bataafse Staatsregeling of 1798 (Article 106). Originally the constitutional provision only concerned the protection against external threats of war and internal threats of riots or civil unrest. The Constitution of 1887 (Article 187) introduced two corresponding states of emergency – the "state of war" [*staat van oorlog*] and the "state of siege" [*staat van beleg*] [23] – and enumerated a number of constitutional provisions that allow derogation in those states of emergency. It permitted the subordination of national civil authorities to military authorities, which the current wording of Article 103 of the Constitution no longer allows, guaranteeing **civil supervision** of the military. The Coordination Act of 1997 introduced the current system of the general and limited states of emergency and was accompanied by the enactment of new versions of the War Act and the Civil Authority Special Powers Act, which now only include substantive emergency provisions. It also introduced the facility of *separate activation* of emergency provisions.

[22] It must be assumed that derogation of these fundamental rights – allowing restrictions outside their limitation clause – only is allowed under a situation of a general state of emergency: *Kamerstukken II* 1993/94, 23790, nr. 3, p. 2.

[23] This distinction is of French origin and was first introduced when the French law of July 10, 1791 – which referred to an "état de guerre" and an "état de siege" – was declared binding by Imperial decree in 1810 and 1811.

Question 2

A fundamental principle of the Dutch constitutional order is the **primacy of the legislature**,[24] that is linked with democracy and requires that the **essential aspects** of the legal order are determined by choices of the legislature in its Acts of Parliament. The judiciary and the executive must respect this primacy and should not substitute their own decisions for those of the legislature. This principle is reflected in emergency law in at least two distinct ways. First, the legislature by Acts of Parliament has introduced a large number of emergency provisions in a range of policy areas that identify and circumscribe the competences of executive authorities, and it has – on the basis of Article 103(1) of the Constitution – provided for a **legal framework** within which these competences must be exercised. In doing so, the legislature has attempted to ensure the **legality** of the governmental response, even in cases of extreme emergency.[25]

Second, activation and use of emergency provisions must obey procedural safeguards that enable Parliament to exercise a supervisory role during the emergency response. Parliament (in a united assembly of Second and First Chamber) can at any moment (and with direct effect) **decide to end a general or limited state of emergency** (Article 103(3) Constitution). When Parliament decides that the state of emergency is terminated, the activated emergency provisions automatically are de-activated (Article 6 Coordination Act).

Third: when emergency provisions are activated outside a state of emergency (separate activation) the legislature decides on the continued legal effect of the (**separately activated)** emergency provisions, through an Extension Act. Immediately after activation of these provisions government sends a legislative proposal for such an Extension Act to the Second Chamber, and immediately deactivates the emergency provisions if Parliament (Second or First Chamber) rejects this proposal.
Finally, the government, declaring a state of emergency and/or activating and using emergency powers, is controlled by the principle of **ministerial responsibility** towards Parliament (Articles 42(2) and 68 Constitution), that is sanctioned by the so-called unwritten **confidence rule** [*vertrouwensregel*]. According to this unwritten constitutional principle a minister or cabinet must resign (or call new elections) when they lose the confidence of (the Second Chamber[26] of) Parliament.

[24] The legislature consists of government and Parliament combined (Article 81 Constitution).

[25] The legislature, nevertheless, has accepted the existence of unwritten emergency law, and it has chosen – when introducing the current wording of Article 103 Constitution – not to regulate all conceivably necessary derogations from the constitution (for instance, the case when Parliament is prevented from assembling, but legal acts with the validity of Acts of Parliament are essential, see Section 1, Question 2).

[26] It is unclear whether the confidence rule also applies in the relation between First Chamber and cabinet, when it regards the entire cabinet.

The **primacy of the legislature** notwithstanding, there are several ways in which the **government takes the lead** in emergency situations. First, Parliament lacks a competence in emergency law to force the deactivation of *individual* emergency provisions in a state of emergency (although it may enforce that by invoking the confidence rule). Hence, Parliament's role appears primarily to assess whether the circumstances are serious enough to warrant the declaration of a state of emergency. The government generally is in the best position to initially determine the appropriate emergency response, which includes the selection of the necessary emergency powers.

Second, the legislature lacks a competence in emergency law to force the deactivation of a separately activated emergency provision **after** it has passed the relevant Extension Act (although Parliament may, again, enforce that by invoking the confidence rule[27]). Here, too, the role of the legislature appears primarily to assess whether the circumstances are serious enough to warrant the activation of emergency provisions, while government is primarily responsible for determining the appropriate application of these provisions.
Finally, with regard to the use by authorities of emergency provisions that do not require formal activation (such as Article 46 Nuclear Energy Act) there are **no procedural safeguards** for a role of Parliament, over and above its regular supervisory powers.

Courts do not play a role in the declaration of a state of emergency or the initial implementation of emergency measures. They may, however, review the lawfulness of such measures (see Section 4 below).

Question 3

The Netherlands is a decentralised state, with autonomous authorities such as provinces and municipalities. On the other hand, there is not a strong constitutional guarantee of their autonomy: central legislation prevails over decentralized legislation and Acts of Parliament **can limit local autonomy**.

Municipal and regional authorities bear primary responsibility for the maintenance of municipal and regional public order and safety. The emergency powers of local and regional authorities are laid down in the Municipal Act and the Security Regions Act.[28] Provisions in the Municipal Act attribute to **mayors** the competence to issue **emergency orders** [*noodbevel*, Article 175]

[27] Furthermore, it can ensure that after a certain period the adoption of a new extension act or an extension decision that requires the approval of Parliament is necessary. The Temporary Measures COVID-19 Act contained such a clause. After several extensions the First Chamber in 2022 refused to approve a further extension, which resulted in the expiration of the Act.

[28] The Netherlands counts 12 provinces, 25 security regions and over 340 municipalities.

or **emergency ordinances** [*noodverordening*, Article 176] to maintain public order and safety in light of (significant fears of) riots or other serious disturbances or disasters. Such orders or ordinances may derogate from laws other than the Constitution, must be temporary, and cannot be used on a structural basis. Limitations of fundamental rights, such as the freedom of speech or the freedom of assembly, are permitted only with the aim of preventing serious disorder. Article 5 Security Regions Act attributes to the mayor "supreme command" [*opperbevel*] in the event of (significant fears of) a disaster. This competence is generally regarded as a further specification of the competence to issue emergency orders, empowering mayors to direct all those involved in countering and limiting the disaster, even if they are not otherwise subordinate to their authority. The municipal council [*gemeenteraad*] supervises the use of these emergency powers, and must ratify emergency ordinances, that otherwise will expire (Article 176(3) Municipal Act).

In the event of a disaster or crisis with a **regional** character that exceeds municipal boundaries, the **chair of the security region** (the mayor of one of the main municipalities within the security region) is responsible for the emergency response and may exercise the emergency competences of all mayors within the security region (Article 39 Security Regions Act). This attribution of mayoral competences is itself an emergency competence. The chair reports to the municipal councils of all affected municipalities, but only the Minister of Justice and Security is competent to intervene (no ratification by municipal councils is required).

Other emergency provisions in the Security Regions Act become relevant if a crisis or disaster takes on a supra-regional or national character. The King's Commissioner [*Commissaris van de Koning*, chair of the provincial executive] can give orders [*aanwijzingen*] to the chair of the security region when the crisis or disaster takes on a supra-regional character (Article 42 Security Regions Act). In case of a national disaster, after activation on the basis of Article 52 of the Security Regions Act the Minister of Justice and Security is competent to give orders to the King's Commissioner and the mayors, and can even take over there competences (Article 53 and 54 Security Regions Act).

Many other emergency provisions allow for the possibility of enlisting municipal or regional governments in a national emergency response. We already mentioned, for instance, Article 4 of the Population Evacuation Act, which requires to provide housing for populations that have been evacuated as the result of an order by the Ministers of the Interior and Defence, or – as was the case of Ukrainians in 2022 – have been displaced. Another, more extreme,

example is that military authorities (after activation of Article 27 War Act in a general state of emergency) may – within their responsibilities – impose ***any duty*** to civil authorities (other than members of High Councils of State [*Hoge Colleges van Staat*, such as the government and Parliament], ministers and members of the judiciary). This example again indicates that the military may under certain circumstances direct the actions of local and regional governments. However, the military remains subordinate to national civil authorities, and is bound by court decisions.

The early phase of the COVID-19 pandemic provides for an example how national and **regional emergency responses can be entangled.** On the basis of the fourth paragraph of Articles 6 and 7(1) of the Public Health Act, the Minister of Public Health ordered the chairs of the security regions to fight the pandemic. Consequently, the chairs of the security regions proclaimed that the crisis trespassed municipal boundaries in the sense of Article 39 Security Regions Act. On the basis of that provision, the mayoral competence to issue emergency ordinances was transferred to the chairs of the security regions. Between 16 March and 30 November 2020, the chairs of the security regions issued 19 successive emergency ordinances that contained the applicable emergency measures. Issuing these ordinances was ordered by the Minister of Public Health on the basis of Article 7 of the Public Health Act. The use of emergency ordinances was criticized in scholarly literature and advisory reports,[29] for being in conflict with democratic and rule of law principles, as Parliament had no role in the attribution of emergency powers to the chairs of security regions and the regular division of powers including the ministerial responsibility to Parliament was affected. In response the legislature introduced a "normal" legal basis for the emerge9 Act, in force December 2020), creating an adequate legal basis for emergency measures (in the Temporary Measures COVID-1ncy measures by central authorities (government, minister), replacing the emergency ordinances of the chairs of the security regions.

Question 4

According to Dutch case law and doctrine, **EU law by itself has primacy over national law**, as follows from case law such as *Costa/ENEL* and *Melloni*.[30] In the Dutch legal order this primacy, based on a **pure monist view** of the relation between EU law and national law, is unconditional, even with regard to Dutch constitutional law. Furthermore, the Netherlands has no Constitutional

[29] For example, by the Advisory Division of the Council of State (Raad van State), *Van noodwet tot crisisrecht, Ongevraagd advies* (15 December 2021), https://www.raadvanstate.nl/adviezen/@127907/w04-21-0291/.

[30] Court of Justice 15 June 1964, 6/64, *Costa/ENEL,* ECLI:EU:C:1964:4; CJEU 26 February 2013, C-399/11, *Melloni*, ECLI:EU:C:2013:107.

Court or an equivalent court that could set limits to or introduce conditions to the primacy of EU law. Therefore, EU law always overrules national law should a conflict between the two occur. An emergency situation in principle does not change that.

One specific, theoretical scenario may form an exception to this rule. On the basis of *unwritten emergency law*, it is possible to derogate from (constitutional) law,[31] which might include EU law. If EU law were to be derogated from (which however seems rather unlikely because of its many existing exceptions that enable to take into account emergency situations, see Section 1, Question 5), its primacy does not seem to be fully recognized, as Dutch law would overrule EU law in the situation in question.

With respect to **international law**, the Dutch Constitution contains provisions regulating the relationship between international treaties and the Dutch legal order. This system will be elaborated upon in Section 2, Question 5, but it already should be stressed here that international treaties, similar to EU law, overrule national law in case of a conflict (once again: apart from the theoretical possibility of an exception on the basis of unwritten emergency law). Contrary to the primacy of EU law, which is assumed to flow from EU law by itself, the primacy of international law in this respect flows from the Dutch Constitution. Regardless of this difference, the result is similar: both EU law having direct effect and self-executing treaty law have priority in case of a conflict with national Dutch law.

Question 5

As indicated above, the Netherlands does not have a Constitutional Court. Moreover, the Dutch Constitution in Article 120 **prohibits judicial review of Acts of Parliament** [*wetten in formele zin*] against constitutional provisions.[32] All courts, however, are allowed to review national law against self-executing/directly effective international treaties, such as the European Convention on Human Rights (ECHR) as well as EU law, including the Charter of Fundamental Rights of the European Union (Charter).[33] When national emergency

[31] See, for example, Supreme Court 30 October 1946, ECLI:NL:HR:1946:87; Supreme Court 15 February 1952, ECLI:NL:HR:1952:159. We acknowledge that unwritten emergency law is a ***very dangerous concept***, creating wide opportunities for **extreme abuse and oppression**. It may be, however, that it cannot be missed in *force majeure* situations.

[32] This does not imply that there is no check at all as to the constitutionality of Acts of Parliament. The *ratio* of Article 120 Constitution is that is not up to the courts but to democratic organs (government and parliament) to make sure that Acts of Parliament do not conflict with the Constitution. See hereafter.

[33] See, for example, J. Gerards, "The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It," *Revue interdisciplinaire d'études juridiques*, 2016/2 (Vol. 77), pp. 207–233;

measures are not contained in an Act of Parliament but, for instance, have been adopted by government (royal decree) or by municipal or regional authorities (ordinances), courts **can test these measures against the Constitution**, as the prohibition of constitutional review does not apply to "lower" legislation. Hence, the lack of constitutional review is only an issue where it concerns Acts of Parliament.

As regards judicial review against international treaty law, the Dutch legal order could be described as a "modified monist system."[34] According to Article 93 Constitution, when a provision of international law "is sufficiently clear so that this provision can have direct effect by virtue of its contents" – in other words is "self-executing" – it can be relied upon before a court.[35] The provisions of the ECHR fulfil this criterion. Article 94 of the Constitution adds that such provisions prevail in case of conflict with national provisions. It is up to the national courts – every Dutch court – to guarantee that this hierarchy is respected. Thus, even though Dutch courts cannot review Acts of Parliament against constitutional provisions, they **must apply self-executing treaty provisions**, overruling provisions of national law in case they would conflict. In practice, a review against international treaties such as the ECHR provides for a judicial remedy which guarantees a protection of fundamental rights equivalent to that by a constitutional court.

Article 103 of the Constitution also contributes to the protection of fundamental rights, as it exhaustively lays down the specific conditions for the proclamation of a state of exception [*uitzonderingstoestand*], in which derogations to the protection of certain constitutional rights outside the scope of already existing constitutional restriction clauses become possible (Article 103(2) Constitution).

Additionally, prior to the adoption of Acts of Parliament, there are various **procedural safeguards** that contribute to the quality of legislation, also from a fundamental rights perspective.[36] The ministries themselves, in particular the Ministry of the Interior and the Ministry of Justice, take special care for the constitutional quality (including compatibility with fundamental rights norms) of draft legislation such as draft emergency laws. The Advisory Division of the Council of State also assesses the quality and constitutionality of draft legislation. Furthermore, the Second Chamber endeavours to strengthen

T. Barkhuysen and M. L. van Emmerik, "Europese grondrechten en het Nederlandse bestuursrecht," De betekenis van het EVRM en het EU-Grondrechtenhandvest, Kluwer, 2023.

[34] Gerards, "The Irrelevance of the Netherlands Constitution," p. 216.

[35] Ibidem, pp. 216–217.

[36] These safeguards not only relate to compatibility of national legislation with international and European Union law, but also with the Constitution and fundamental legal principles.

the quality of its constitutional screening. And the First Chamber traditionally regards such screening as an essential part of its role.[37]

Question 6

Although there have been cases where the question whether EU fundamental rights or EU fundamental freedoms of the internal market came into conflict with domestic emergency measures has been raised, there are no precedents to the effect that domestic emergency measures according to case law amounted to a breach of such fundamental rights and freedoms. See for an overview of case law Section 4 below.

Section 3: Statutory/executive emergency law in the Member States

Question 1

Emergency provisions are included in many laws governing **specific policy areas**, from public health to road transport and from social security to cultural heritage. It would be impossible to give an exhaustive description of all these emergency provisions here. We only make some general observations. First, the traditional core of "hard" Dutch emergency law can be found in the War Act and the Civil Authority Special Powers Act. The provisions in these Acts contain far-reaching powers of military and civil authorities (in particular the Ministers of Defence and of Justice and Security) to guarantee public order and safety in response to war or significant internal unrest. Many of these provisions may only be used in a general state of emergency. But there are exceptions. For instance, as mentioned in Section 1, Question 2, Article 8 of the Civil Authority Special Powers Act was briefly separately activated outside a state of emergency to implement a nocturnal curfew during the COVID-19 pandemic.

Second, a significant part of Dutch emergency legislation concerns **expropriation and scarcity regulation**.[38] For instance, the Rationing Act [*Distributiewet*] aims to ensure an efficient distribution of goods in case of an emergency for the benefit of public safety, national economy and defence. The Rationing Act

[37] The Nationale Ombudsman and the Dutch Council for Human Rights also play an important role as regards the protection of fundamental rights.

[38] See, especially, the Prices (Emergency Situations) Act [*Prijzennoodwet*], Prices Act [*Prijzenwet*], Food Supply (Emergencies) Act [*Noodwet voedselvoorziening*], Agricultural Production (Emergencies) Act 1939 [*Bodemproductiewet 1939*], the Reservation of Shipping Space Act 1939 [*Wet behoud scheepsruimte* 1939], Requisition Act [*Vorderingswet*], Expropriation Act [*Onteigeningswet*], and the Rationing Act [*Distributiewet*].

includes a distribution scheme for rationing – permitting the regulation of trade, stockpiling, use, and transport – as well as an obligation, introduced in 2005, for more fine-grained redistribution. This Act was last used to regulate the sale of petrol during the Oil crisis of 1973.

Third, the Administration of Justice (Emergencies) Act [*Noodwet rechtspleging*] ensures the **functioning of the judicial process** in emergency situations. It allows for temporary changes in jurisdiction, appointment of substitute judges, deviations from legal procedures – including the institution of mobile courts in a general state of emergency – and extensions of deadlines during emergencies.

Finally, many other policy areas include a single emergency provision that allows the government or the competent Minister (after activation of the provision in extraordinary circumstances) to derogate from (parts of) the law in question.[39] They reflect the general tendency in emergency law to **concentrate emergency powers in the executive**, in particular central administrative/governing authorities.

Question 2

Dutch emergency law has a hybrid character (see Section 1, Question 2), with legislative emergency provisions being integrated into a constitutional framework that requires certain procedural conditions being met before derogations from the Constitution are possible. Since all substantive emergency powers are contained in regular legislation, while the constitutional framework is largely limited to the procedures that condition their use, conflicts with the Constitution are unlikely to occur and we are not aware that they have occurred.

Question 3

In the Dutch context, emergency powers governed by legislative/executive (as opposed to constitutional) provisions are those (i) that can be (separately) activated outside a state of emergency and those (ii) that do not require any prior activation. The constitutional limitations on these emergency powers are

[39] See, for example, Article 53 Inland Navigation Act [*Binnenvaartwet*], Article 2a Commodities Act [*Warenwet*], article 32 Medical Research Act [*Wet medisch-wetenschappelijk onderzoek*], Article 8b Driving Instruction (Motor Vehicle) Act [*Wet rijonderricht motorrijtuigen 1993*], Article 8.1 lid 1 Government Accounts Act 2016 [*Comptabiliteitswet*] 2016, Article 19 lid 1 National Service Framework Act [*Kaderwet dienstplicht*], Article 60 Carriage of Dangerous Substances Act [*Wet vervoer gevaarlijke stoffen*], Article 111 Aliens Act 2000 [*Vreemdelingenwet 2000*], and Article 37a Shipping Traffic Act [*Scheepvaartverkeerswet*].

those that limit all government action. Significant constitutional limitations of emergency powers include fundamental rights – enumerated in the Constitution and in international treaties such as the ECHR and the Charter – as well as the principle of ministerial accountability, ultimately sanctioned through the confidence rule (see Section 1, Question 4).

First, as explained in the previous sections, government cannot derogate from the Constitution (including fundamental constitutional rights) when making use of emergency powers outside a state of exception. Of course, an emergency response outside a state of exception may legally and legitimately restrict fundamental rights. But restrictions on fundamental rights are permitted only if they **conform to the restriction/limitation clauses** of the constitutional provision in question, which generally require that restrictions are based on legislative (not executive) provisions, and – depending on the clause – may require that they satisfy specified purposes (such as public health or the prevention of disorder). Furthermore, in particular the notions of necessity and proportionality are relevant criteria.[40] Solely under a **general state** of emergency restrictions on the fundamental rights mentioned in Article 103(2) of the Constitution that go beyond their limitation clauses are allowed.

A second important constitutional constraint can be found in the **principle of ministerial responsibility** (Article 42(2) and 68, Constitution) and the unwritten confidence rule (mentioned above). On the basis of these **constitutional principles**, an individual minister, several ministers, or the whole cabinet must resign if they lose the confidence of (the Second Chamber of) Parliament – for instance, when Parliament concludes that a minister has abused his emergency competence.

Question 4

If an emergency measure is introduced by the EU, it is primarily the duty of the legislature or the government to implement or execute this measure. They will have to consider how and at what level the measure can best be implemented or executed within the Dutch legal order, taking into account the existing distribution of power. This implies that a change of balance or a redistribution of powers between government and parliament or between central and decentralized government often will not be an issue. However, a serious emergency will often entail that it can only be dealt with in a coordinated fashion when the necessary powers are concentrated at the regional or even the central level.

[40] Cf., for instance, the restriction clauses in the second paragraph of Articles 8–11 of the ECHR, which have such a structure.

Various provisions in Dutch emergency law enable such concentration of powers, see Section 1, Question 3 and Section 3, Question 1.

Article 103(2) of the Constitution implies that some autonomous competences of provinces and municipalities, protected by the Constitution, can be further restricted in a general or limited state of emergency. It is, however, not quite evident what that means, given the hierarchy of norms, and the possibility that by Act of Parliament such competences can be restricted. The main restriction of local autonomy probably would be the case where an Act of Parliament gives wide discretionary powers to the government to regulate the functioning of local authorities.

Section 4: Judicial review of emergency powers in the Member States

Question 1

We assume that this question solely concerns emergency measures taken by public authorities (government, ministers, local authorities, etc.). Since 1994 the General Administrative Law Act [*Algemene wet bestuursrecht*] regulates the procedures of administrative decision-making and provides a general framework for judicial protection against decisions taken by public authorities in individual cases. Generally, appeals against such administrative decisions can be made to the administrative courts in the first instance, with the possibility of a subsequent and final appeal to the Administrative Jurisdiction Division of the Council of State [*Afdeling bestuursrechtspraak van de Raad van State*].

Some administrative decisions are excluded from appeal to administrative courts, two types of which are relevant here. First, administrative courts are not competent to hear appeals against **general rules/regulations**, including emergency regulations. So appeals against Acts of Parliament, orders in council (general royal decrees), ministerial regulations, ordinances of regions or mayors – cannot be brought before them.[41] Second, **decisions based on legislative measures falling under the scope of the Coordination Act** cannot be appealed before the administrative courts.[42] In those cases, civil courts have jurisdiction: in the first instance the district court, in appeal the Court

[41] Article 8:3 of the General Administrative Law Act. However, in an appeal to an administrative court against an individual decision one may not only challenge that decision but also the legal rule ***as applied*** in that decision.

[42] Article 8:4, section 2a of the General Administrative Law Act. Part of the laws under the Coordination Act. However, there are some exceptions to this exclusion, laid down in the Bevoegdheidsregeling bestuursrechtspraak, in which cases individual decisions can be appealed before the administrative court.

of Appeal and – in most cases – in final instance the Supreme Court [*Hoge Raad*] (the court of cassation) can be addressed.[43]

Question 2

In principle, apart from the aforementioned limitations with regard to the jurisdiction of administrative courts, there are no procedural specificities applicable when courts have to review actions of public authorities in situations of emergency. Please note, however, that the intensity/strictness of judicial review in situations of emergency is a vital question. We will discuss that in Section 4, Question 3 and Section 4, Question 4.

Question 3

As explained above, the Dutch Constitution in Article 120 prohibits courts to judicially review the constitutionality of national emergency measures when they are laid down in an Act of Parliament. However, it is possible for Dutch courts to review whether Acts of Parliament are in conformity with self-executing provisions of international law, which includes the provisions of the ECHR, as well as provisions of EU law having direct effect, including the Charter (see Section 2, Question 4 and Section 2, Question 5).

During the COVID-19 pandemic quite often emergency measures laid down in general rules/regulations were challenged in preliminary relief proceedings before a civil court judge. Generally, the standard of review in full proceedings on the merits differs from the provisional assessment by the judge in preliminary relief proceedings. Furthermore, as regards the admissibility of requests for interim measures, it may be noted that the judicial test may differ as regards the requirement to demonstrate urgency. Whereas in administrative cases mere financial interests that may be compensated at a later date are generally not considered to meet the urgency requirement for preliminary relief proceedings, whereas in civil cases courts tend not to set this threshold.

Observing the case law regarding the introduction of COVID-19 measures, it must be noted that civil courts in **general upheld most of the challenged general measures** taken by the Dutch government or local authorities.[44]

[43] Article 17 Constitution guarantees the right to a court, without the restrictions of Article 6 ECHR.

[44] See, for instance, Court of Appeal The Hague 14 December 2021, ECLI:NL:GHDHA:2021:2453 (mandatory face masks); Court of Appeal The Hague 31 August 2021, ECLI:NL:GHDHA:2021:1603 challenging various COVID-19 measures); The Hague District Court 12 March 2021, ECLI:NL:RBDHA:2021:2295 (closing shop); The Hague District Court, 14 December 2020,

There are a few exceptions in which emergency measures have initially been successfully challenged, but in second instance were found to be justified. We give two examples.

In an injunctive ruling of 31 December 2020 the interim relief judge ordered the government to allow plaintiffs to return to the Netherlands **without a negative PCR-test**.[45] At that time, there was no valid legal basis for a mandatory PCR-test for travellers, that obligation later on has been included in the Temporary Measures COVID-19 Act. In the subsequent case, again concerning a request for interim measures, the interim relief judge considered that now there was a sufficient legal basis for the measures, laid down in a new ministerial regulation.[46] In this ruling the court rejected the arguments brought by plaintiffs in relation to the infringement of their fundamental rights (physical integrity; freedom of movement) and held that the measure could be justified by the overriding interest of the protection of public health.

On 16 February 2021, the interim relief judge of The Hague District Court deactivated the **nocturnal curfew** in the Netherlands. The curfew was based on the Civil Authority Special Powers Act. This Act offers government the option of imposing a curfew in very urgent and exceptional circumstances, by activating competences laid down in that Act and enacting a ministerial regulation on the basis of these competences, without first having to go through a legislative process involving Parliament. The interim relief judge ruled that the introduction of the curfew was not justified by the great urgency required to be allowed to make use of the Civil Authority Special Powers Act. Although emphasising that the minister had a wide margin of appreciation, the judge nevertheless concluded that the necessity of the curfew was not demonstrated. The curfew was therefore lifted immediately.[47] At the request of the government this ruling was suspended the very same day by the Court of Appeal in The Hague.[48] And on 26 February 2021, after subsequent hearings, the Court of Appeal reversed the injunctive ruling of the interim relief judge.[49]

ECLI:NL:RBDHA:2020:12689 (education and closing schools); The Hague District Court, 9 December 2020, ECLI:NL:RBDHA:2020:12449 (public health and usage PCR test); The Hague District Court, 27 October 2020, ECLI:NL:RBDHA:2020:10755 (Freedom of movement of goods and capital, closing bars and restaurants); Amsterdam District Court 19 August 2020, ECLI:NL:2020:4057 (mouth mask); The Hague District Court, 24 July 2020, ECLI:NL:RBDHA:2020:6856 (public health and withdrawal all COVID-19 measures); Middle-Netherlands District Court, 14 May 2020, ECLI:NL:RBMNE:2020:1851 (Sport and promotion football clubs); Amsterdam District Court, 7 April 2020, ECLI:NL:RBAMS:2020:2126 (Health and freedom of association/public gathering and prohibition of demonstration); The Hague District Court, 3 April 2020, ECLI:NL:RBDHA:2020:3013 (public health and request for a full lock down).

[45] The Hague District Court 31 December 2020, ECLI:NL:RBDHA:2020:13643.

[46] The Hague District Court 8 January 2021, ECLI:NL:RBDHA:2021:63.

[47] The Hague District Court 16 February 2021, ECLI:NL:RBDHA:2021:1100.

[48] Court of Appeal The Hague 16 February 2021: ECLI:NL:GHDHA:2021:252.

[49] Court of Appeal The Hague 26 February 2021, ECLI:NL:GHDHA:2021:285.

In the meantime, in response to the injunctive ruling, within a few days a new (regular) statutory basis for the curfew in the Temporary Measures COVID-19 Act was established.[50] Finally, the Supreme Court confirmed the ruling of the Court of Appeal, considering that the emergency measure was justified given the exceptional context in which vital interests were at stake.[51]

As regards judicial review by administrative courts, in most cases originating from the COVID-19 period, it was held that the concrete emergency measures, as well as ministerial regulations or the ordinances of chairs of a security region they were based upon, **were justified**.[52] It should be noted, however, that most appeal cases before the Jurisdiction Division of the Council of State are still pending.

Question 4

The principle of proportionality does play a rather difficult role in judicial review of actions of public authorities in situations of emergency. On the one hand, it could be argued that a thorough proportionality test is called for, in particular where fundamental rights are at stake. On the other hand, it could be argued that some sort of **judicial restraint** is called for, because often there are complex issues and decisions involved. This is particularly so when there are **competing claims based on various fundamental rights** – for instance, the right to privacy or property or non-discrimination[53] on the one hand, and the duty of care for life and health on the other. If the latter perspective – leaving the authorities a **wide margin of appreciation** – prevails, a high threshold will apply for the qualification of an emergency measure as disproportional.[54] A large margin of appreciation is the more so likely in summary proceedings before a civil court that addresses the legal (lack of) quality of general emergency measures *as such*. The cases mentioned in Section 4, Question 3 show that that is the dominant approach of civil and administrative courts.[55]

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[50] Staatsblad 2021, 85. See also: the Advisory Division of the Council of State (February 2021) on the draft law (*Kamerstukken II* 2020/21, 35732, nr. 4).

[51] Supreme Court, 18 March 2022, ECLI:NL:HR:2022:380.

[52] Jurisdiction Division of the Council of State (hereafter: Council of State) 15 March 2023, ECLI:NL:RVS:2023:1028; Council of State 4 September 2024, ECLI:NL:RVS:2024:3577. An exception is Council of State 9 November 2022, ECLI:NL:RVS:2022:3206.

[53] See, for instance, The Hague District Court 6 October 2021, ECLI:NL:RBDHA:2021:10863 (discrimination of unvaccinated persons?).

[54] Cf. Court of Appeal The Hague 14 December 2021, ECLI:NL:GHDHA:2021:2453 (mandatory face masks).

[55] See, besides the other cases we just mentioned: Council of State 25 February 2013, ECLI:NL:RVS:2013:BZ2265, where the court allowed the Minister of Finance a **large margin of appreciation** in the procedure to expropriate SNS Reaal Bank, because there was a serious and immediate threat to the stability of the Dutch financial system.

Under EU law the principle of proportionality has been developed by the Court of Justice. In the Court's case law, two elements of the proportionality principle can be distinguished. In the first place, the national measure must be appropriate to ensure, in a consistent and systematic manner, **the attainment of the objectives pursued**. In the second place, the measure must not go beyond what is necessary to attain those objectives, it being understood that there **must be no less restrictive measures available** to adequately attain the objective pursued. In legal doctrine a "third" element of the European principle of proportionality is defined: the proportionality principle *stricto sensu*.

In recent years Dutch (administrative) courts have changed their approach to the principle of proportionality, leaning towards a **stricter and more refined test**.[56] Like the Court of Justice and the European Court of Human Rights, Dutch courts review whether a decision or measure is appropriate to reach a legitimate goal and is the least restrictive means available. However, Dutch courts also assess the proportionality in a specific case in view of the specific circumstances. The intensity of the proportionality test is determined by several factors, including the nature and weight of the objectives to be served by the decision, the nature of the interests involved and the extent to which these interests are affected by the decision. This approach has also been adopted by Dutch civil courts in cases not regarding emergency measures.[57] However, whether that approach will also be applied in future cases involving emergency law is yet unclear.

Section 5: Implementation of EU emergency law in the Member States

Question 1

As previously explained in Section 2, Question 4, the primacy of EU law is absolute in the Netherlands, and unconditionally prevails over principles of national law. In addition, national authorities are bound by the **principle of sincere cooperation** in the implementation of EU law. This means that they must "facilitate the achievement of the Union's tasks and refrain from any measures which could jeopardize the attainment of the Union's objectives."[58]

[56] See: Council of State 2 February 2022, ECLI:NL:RVS:2022:285, Council of State 1 March 2023, ECLI:NL:RVS:2023:772; and College van Beroep voor het bedrijfsleven 26 March 2024, ECLI:NL:CBB:2024:190.

[57] Supreme Court 4 April 2024, ECLI:NL:PHR:2024:642.

[58] Article 4(3) TEU.

Question 2

We are not aware of shortcomings as regards the implementation of measures following from an act adopted on the basis of Article 78(3) TFEU or Article 122 TFEU. The measures the EU has taken on the basis of Article 122 TFEU during the energy crisis of 2022 were mostly Regulations. Therefore, these measures had direct effect and did not always require national implementation measures. Most EU legislative measures introduced in the course of the COVID-19 pandemic were also laid down in Regulations. However, in some other cases it was necessary to change rules or set up rules for the implementation of EU legislative measures.[59] Still, we did not identify gaps or shortcomings in the implementation of EU emergency measures in the course of the COVID-19 pandemic. Anyway, there are no different or special implementation practises for such measures, other than that these measures had to be adopted through an abbreviated urgency procedure.

A final observation: it may be that the new Dutch cabinet will request the Commission to address the Council **in order to activate Article 78(3) TFEU**, arguing that in the Netherlands there is now an emergency situation (an "asylum crisis"), caused by a sudden inflow of third country nationals, and ask for provisional measures to solve that "crisis."[60]

[59] A legal basis for some rules, necessary for the implementation of Regulation (EU) 2021/953, was created in Article 6ba of the Public Health Act. And certain provisions of the Genetically Modified Organisms Environmental Management Decree 2013 [*Besluit genetisch gemodificeerde organismen milieubeheer 2013*] had to be temporarily disapplied with a view to a proper implementation of Regulation (EU) 2020/1043.

[60] An opt-out á la Denmark seems out of the question; that would require a change of the TFEU. Nevertheless, the Dutch cabinet did ultimately choose this route and, by letter dated September 18, 2024, informed the Commission that the Dutch cabinet will call for an opt-out in case of Treaty amendment. The cabinet further pointed out that, in the meantime, it will prioritize the implementation of the European Pact on Migration and Asylum.

Norway

*Stian Øby Johansen**

Introduction

Norwegian emergency law is characterized by its highly fragmented nature, with provisions applicable in emergencies scattered around Norwegian statutes and regulations.[1] Some of the relevant law even remains uncodified, as customary (constitutional) law. The various emergency law regimes also tend to have a chiefly domestic pedigree.

Norway's peculiar relationship with the European Union affects the extent to which EU emergency law is applicable to Norway, and how it is implemented within the Norwegian legal system.

Through the Agreement on the European Economic Are (EEA Agreement),[2] Norway is a member of the internal market. Acts of EU emergency law that fall within the scope of the internal market, thus being "EEA relevant,"[3] are applicable to Norway after they have been incorporated into the EEA Agreement by the EEA Joint Committee.[4] The main part of the EEA Agreement also contains certain provisions of an emergency law nature, which generally mirror provisions in the TFEU.[5]

However, much EU emergency law has a legal basis in policy areas outside the internal market. Some of those acts are nevertheless applicable to Norway due to our close cooperation with the EU also outside the internal market. The EEA Agreement Protocol 31 contains a mechanism for cooperation in specific fields outside the internal market, which has been used to make certain acts of EU emergency law applicable to Norway. Norway also has well over 100 additional agreements with the EU, some of which make provisions of EU emergency law applicable to Norway.

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[1] Høgberg et al., "Rettslige rammer for krisehåndtering," pp. 59–60.

[2] Agreement on the European Economic Area (EEA) [1994] OJ L1/3. For an introduction to the agreement, see: Fredriksen and Franklin. For a detailed commentary in English, see: Arnesen et al.

[3] On the notion of EEA relevance, see: e.g., Dystland et al., "Article 102," pp. 807–10.

[4] See: EEA Agreement articles 98–103.

[5] See, e.g., EEA Agreement article 61(2)(b), which mirrors TFEU article 107(2)(b).

Section 1: The concept of "emergency" and other associated notions in the Norwegian legal order

Questions 1–3

Norwegian law contains several distinct legal regimes that can broadly be grouped under the "emergency law" umbrella. Key among them is the doctrine of constitutional necessity ("konstitusjonell nødrett"), which constitutes the only general and centralized regime. In addition, an array of sector-specific law concerning situations of crisis or emergency are scattered around in Norwegian statutory law.

The doctrine of constitutional necessity is, as its name indicates, concerned with states of constitutional necessity *stricto sensu*.[6] It is only applicable in truly extraordinary situations, where major societal interests would suffer if certain constitutional rules remained in force.[7] A classic example of such a situation is the German occupation of Norway from 1940–1945, during which the parliament ("Storting") delegated its legislative powers to the executive branch (King-in-council).[8] Without such delegation, it would have been practically impossible to pass legislation during the occupation.

Further emergency law regimes are found in statutes, and these are generally sector-specific. A selection of such statutes are described under Section 3 below.

These emergency statutes and statutory provisions refer to various triggering events, using terms such as crisis ("krise"), catastrophe ("katastrofe"), and unwanted events ("uønskede hendelser"). The term crisis ("krise") seems to be most frequently used, although sometimes coupled with additional criteria (see Section 3 for details). Moreover, the meaning of a term found in several statutes, such as crisis ("krise"), may vary from statute to statute.

In 2019, a government-appointed commission ("Beredskapshjemmelutvalget") proposed a general statute applicable in times of extraordinary crises ("ekstraordinære kriser").[9] The proposed statute § 3 defined extraordinary crises as situations where critical functions of society or other major societal interests are threatened due to one or more serious incidents, such as major natural disasters, terror attacks, pandemics, or hybrid events. When an extraordinary crisis occurs, § 4 of the statute would have authorized the executive branch (King-in-council) to enact regulations that supplement or derogate from exist-

[6] For a brief overview of this doctrine, see: Høgberg et al., "Rettslige rammer for krisehåndtering," pp. 73–75.

[7] Castberg 350; NOU 2019: 13 p. 79.

[8] Høgberg et al., "Rettslige rammer for krisehåndtering," p. 73.

[9] NOU 2019: 13 *Når krisen inntreffer* [When crisis strikes].

ing legislation to the extent necessary to manage the crisis – provided that there were risks involved in waiting for the parliament to act.

This proposal was not followed up by the legislator. However, it did influence a temporary statute in force for about two months during the initial phase of the COVID-19 crisis in 2020 ("koronaloven").[10] See Section 3 for further details about this temporary statute.

Question 4

Under the doctrine of constitutional necessity, there are no requirements of a formal or procedural nature that constrain or condition how to handle an emergency.

Under the various statutory regimes, there are some requirements that can be considered formal or procedural in nature. Notably, several of the sector-specific emergency statutes and provisions explicitly require that the regime is activated through a decision by the King-in-council (at least in peacetime). It may be that those statutes are merely restating a general requirement under § 28 of the Norwegian Constitution, according to which all matters of importance ("saker av viktighet") shall be dealt with by the King-in-council. The activation or use of statutory emergency law will often qualify as such a situation of importance. Emergency law regimes and provisions that, in their text, provide for activation or use at a lower level of administration therefore have to be read with the requirement in § 28 of the Constitution in mind. If the activation or use of an emergency law regime qualifies as a situation of importance, the decision to active the regime must be taken by the King-in-council.[11] That said, if the situation is so extraordinary and pressing that the doctrine of constitutional necessity applies, the requirement in § 28 of the Constitution could potentially be set aside.

Question 5

If one excludes provisions of EU emergency law that have been implemented into Norwegian legislation (which are dealt with in Section 5), EU law does not seem to have had much influence on general or sector-specific emergency regimes in Norwegian law. At least not in the sense that provisions of Norwegian emergency law has been inspired by EU law provisions.

[10] Act of 27 March 2020 no. 17 (repealed 27 May 2020).

[11] The Norwegian "lockdown" measures of 12 March 2020, during the initial phase of the COVID-19 pandemic, were formally enacted by the Directorate of Health. This violated § 28 of the Constitution. For details, see: Høgberg et al., "Smittevernloven," pp. 135–38).

That said, the preparatory works of some sector-specific emergency regimes mention provisions of EEA law or other provisions of EU law that are applicable to Norway through separate agreements. Sometimes it is merely stated that the provisions of emergency law in question are compatible with EEA law.[12] Occasionally, where there are more obvious questions about the compatibility of a proposed provision of emergency law and provisions of EU law applicable to Norway, there are more extensive discussions in the preparatory work. For example, when the Immigration Act[13] was amended in 2016, to include a provision allowing for refusal to examine asylum applications on the merits in a crisis situation with extraordinary high number of arriving asylum seekers, the compatibility of that provision with several acts of EU law applicable to Norway was discussed in the preparatory work.[14]

Question 6

There does not seem to have been situations of emergency triggered by EU action.
On the contrary, due to the close cooperation between Norway and the EU – both within and outside the internal market – there are several instances where the two have cooperated in the handling of emergencies.

During *the financial crisis*, in the fall of 2008, most European states – including Norway – chose to establish support schemes for crisis-struck banks. Such schemes may constitute state aid under the provisions of the EEA agreement (which mirror the state aid provisions in the TFEU).

In October 2008, A swap scheme was established, which allowed banks to borrow government bonds in exchange for Norwegian covered bonds, with a ceiling of NOK 350 billion. This was found to not constitute state aid.[15] Then, in November 2008, Eksportfinans ASA, a company providing long-term financing for the Norwegian export sector, was given a loan to ensure that it would continue providing such financing despite the crisis. This scheme was notified to EFTA Surveillance Authority (ESA), who found it not to constitute state aid.[16]

Around the same time, in late October 2008, the Commission adopted guidelines on the application of state aid rules in the TFEU to measures supporting

[12] See, e.g., Prop.111 L (2010–2011) section 5.3.3, where it is stated in passing that the emergency law regime in question is compatible with the EEA law prohibition against discrimination on the basis of nationality.

[13] Act of 15 May 2008, no. 35.

[14] Prop.90 L (2015–2016) sections 5.2.3.4, 5.2.3.5, 5.2.3.7, and 5.2.3.9.

[15] NOU 2012: 2, p. 403.

[16] EFTA Surveillance Authority Decision No. 36/09/COL.

crisis-struck banks. Shortly thereafter, in January 2009, the ESA adopted corresponding guidelines on the application of the state aid rules under the EEA Agreement. A Norwegian support scheme for crisis-struck banks in line with those guidelines was then approved by ESA in May 2009.[17]

A recent, and more multifaceted, example of cooperation between Norway and the EU in handling an emergency is *the COVID-19 pandemic*.[18] In this connection, EU law served as both a constraint and a toolbox for handling the crisis.

The EEA agreement and the Schengen *acquis* (which is applicable to Norway through the Schengen Association Agreement)[19] served as legal frameworks for many Norwegian emergency measures during the pandemic. Restrictions on entry, quarantine requirements, and obligatory COVID-testing in connection with the crossing of the border had to comply with the rules on free movement of persons under the EEA Agreement and the Schengen Borders Code.

As during the financial crisis, state aid measures unprecedented in scope were enacted. Again Norwegian authorities and ESA cooperated well, so that aid schemes could be swiftly approved. The first scheme Norway had to notify to ESA, the so-called guarantee scheme for small and medium-sized businesses, was notified on 25 March 2020 and approved the following day.[20] In total, ESA approved 55 state aid schemes notified by Norway in 2020. Moreover, some support schemes enacted by the Norwegian government during the pandemic fell under the emergency exception in article 61(2)(b) of the EEA Agreement, which correspond to TFEU article 107(2)(b), and thus did not qualify as state aid.

Public sector bodies also suddenly had to purchase a vast amount of goods, notably medical equipment. Using the emergency provisions in the public procurement directives, public purchasers were able to purchase critical goods directly,[21] and through accelerated procedures.[22]

In addition to serving as a constraint and legal framework, the COVID-19 pandemic demonstrated that EU law and cooperation with the EU can serve as a toolbox for crisis management. A few examples of this deserve to be mentioned.

[17] EFTA Surveillance Authority Decision No. 205/09/COL.

[18] For a detailed overview, see: Johansen, "Rammene i EØS-retten og Schengen"; Johansen, "Kriseregulering gjennom avtaler med EU."

[19] Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis [1999] OJ L176/36.

[20] EFTA Surveillance Authority Decision No. 28/20/COL.

[21] Directive 2014/24/EU on Public Procurement [2014] OJ L/94/56 article 32(2)(c).

[22] Directive 2014/24/EU article 27(3).

Since Norway is a member of the European Center for Disease Control (ECDC) through protocol 31 of the EEA Agreement, the Norwegian Institute of Public Health contributed data to ECDC on an equal basis with public health institutes in EU member states. Advice from the ECDC also influenced Norwegian authorities, although they sometimes chose to enact measures than the ECDC recommended.

Within the scope of the EEA Agreement, rapidly enacted amendments adopted by the EU institutions rapidly adapted existing directives and regulations to the extraordinary situation created by the pandemic. However, since all those amendments had to be agreed in the EEA Joint Committee before becoming part of the EEA Agreement, there was a not insignificant delay compared to what would have been the case if Norway was an EU member state.

Norway also participated in joint purchases of medical equipment through the Joint Procurement Agreement (JPA). However, since Norway had not acceded to that agreement prior to the pandemic, it missed out on some of the first rounds of joint procurement. The JPA entered into force for Norway on 3 April 2020, just days after an early joint procurement of ventilators.

The joint purchase of COVID vaccines constitutes a particularly interesting example of EU-Norway cooperation. While these vaccines could have been purchased jointly using the JPA, the EU instead chose to organize the purchase of vaccines through the so-called Emergency Support Instrument.[23] The Emergency Support Instrument falls outside the scope of the EEA Agreement, and there are no other agreements that extend its applicability to Norway. Moreover, extending this instrument to Norway would have been technically difficult, since measures taken under it are financed by the EU budget. Despite these difficulties, a pragmatic solution was found. Norway was allocated a portion of the vaccines from the joint purchase, but that allotment was technically given to Sweden. Sweden then resold that allotment to Norway. The willingness of the EU to accommodate Norway in this manner is a testament to the close relationship between them.

When novel medicinal products against COVID-19 became available, they had to be approved by the Commission, on the advice of the European Medicines Agency (EMA), before being marketed.[24] Such an approval, called a marketing authorization, has direct effect in the EU member states. In Norway, the Norwegian Directorate of Medicinal Products has to enact a "copy decision,"

[23] Regulation (EU) 2016/369 on the provision of emergency support within the Union [2016] OJ L70/1.

[24] Regulation (EC) 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L136/1 articles 5(2) and 10.

which mirrors the Commission's approval.[25] During the pandemic this happened rapidly, often the same day as the Commission's approval.

For approved medicines, such as the COVID-vaccines from BioNTech/Pfizer, Moderna, AstraZeneca and Janssen, the EMA Pharmacovigilance Risk Assessment Committee (PRAC) is responsible for assessing and monitoring their safety.[26] PRAC consists of experts from EU member states, as well as the EEA/EFTA states Norway and Iceland. This committee was brought into the limelight when reports from, in particular, Norway indicated an unusually high frequency of a rare but deadly blood-clotting condition. Despite these reports, PRAC chose not to recommend altering the product information of the AstraZeneca vaccine to add a warning about the risk of this blood-clotting condition.[27] The Norwegian member of PRAC disagreed and had his contrary opinion stated in the record. This did not constitute a formal dissent, though, since the EEA/EFTA members of PRAC lack voting rights.[28] A few weeks later, PRAC found the evidence of an increased risk of blood-clotting to be sufficient enough to warrant a change in the product information.[29]

Section 2: The constitutional framework governing emergency law in the Member States

Questions 1 and 2

The Norwegian Constitution distinguishes itself from most other constitutions by not containing a general and explicit regulation of situations of emergency.[30] There are only a couple of provisions in the Constitution applicable in exceptional situations, through these do not establishing a fully-fledged emergency law regime. The Norwegian Constitution § 25 contains a provision allowing foreign military forces on Norwegian territory if they are engaged in collective self-defense in support of Norway. The recently enacted § 54 of the Constitution authorizes decisions to postpone a parliamentary election, or the organizing of a reelection, in cases where a significant part of the electorate are unable to vote due to extraordinary events. Some institutional provisions also accommodate particular situations of emergency, such as § 68. It authorizes parliament to meet outside the capital (Oslo), if necessary due to extraordinary

[25] EEA Agreement, Annex II, Chapter XIII, fourth paragraph. For an introduction to the EEA phenomenon of "copy decisions," see: (Fredriksen and Mathisen, 276–80).

[26] Commission Implementing Regulation (EU) No. 520/2012 on the performance of pharmacovigilance activities [2012] OJ L159/5 article 21(5).

[27] PRAC Decision EMA/PRAC/146285/2021, pp. 4–5.

[28] EEA Agreement, Annex II, Chapter XIII, 13th paragraph.

[29] PRAC Decision EMA/PRAC/199751/2021, pp. 4–5.

[30] Høgberg et al., "Rettslige rammer for krisehåndtering," p. 70.

circumstances, such as an armed attack or the outbreak of a communicable disease. However, apart from a few scattered provisions of this kind, the constitution applies in full during most emergencies.

Outside the written constitution a *doctrine of constitutional necessity* exists.[31] This doctrine constitutes Norway's only general and centralized emergency law regime. It authorizes temporary suspension of specific constitutional provisions, in situations of necessity, in compliance with the spirit of the Constitution.[32] Thus, its nature is constitutional, rather than revolutionary.[33]

A situation of constitutional necessity arises when major societal interests would suffer if certain constitutional rules remained in force.[34] Whether these requirements are fulfilled must be assessed concretely, on a case-by-case basis. It is not sufficient that an emergency situation renders it more practical or reasonable to circumvent ordinary rules and procedures in the Constitution.[35]

In a situation of constitutional necessity, a wide array of acts are authorized. However, acts contravening or suspending provisions of the Constitution are only authorized by the doctrine of constitutional necessity insofar as they are necessitated by the situation at hand.[36]

A branch of government may, for example, exercise the competences of a different act of government. During the German occupation of Norway from 1940–1945, during which the parliament ("Storting") delegated its legislative powers to the executive branch (King-in-council).[37] Without such delegation, it would practically have been impossible to pass legislation during the occupation. Also during the occupation, on 15 April 1940, the Norwegian Supreme court acted in constitutional necessity when establishing an administrative council for Norway, which for a few months exercised non-political executive authority on Norwegian territory, in the absence of the regular government and King (who were in exile abroad).

A branch of government may also act in contravention of constitutional prohibitions or limits. For example, it may be necessary to urgently conclude a treaty to handle an emergency situation without following the regular procedures for parliamentary involvement in § 26(2) of the constitution.[38] As for the question

[31] For a brief overview of this doctrine, see: Høgberg et al., "Rettslige rammer for krisehåndtering," pp. 73–75).
[32] Castberg 347.
[33] Castberg 347.
[34] Castberg 350; NOU 2019: 13, p. 79.
[35] Castberg 351.
[36] Castberg 351.
[37] Høgberg et al., "Rettslige rammer for krisehåndtering," p. 73.
[38] During the COVID-19 pandemic Norway acceded to the EU Joint Procurement Agreement

of whether the doctrine of constitutional necessity may authorize the suspension of fundamental rights provisions, see below.

Procedural rules and rules of form may also be set aside using the doctrine of constitutional necessity. For example, Norway's exit from the Union with Sweden in 1905 necessitated major constitutional amendments. These were enacted immediately, setting aside the requirement in § 121 of the constitution that proposals for constitutional amendments must be submitted more than a year before a parliamentary election, and be voted on only after that election has been held.

Question 3

(Not applicable, since Norway is a unitary state.)

Question 4

The Norwegian legal system takes a dualist approach to international law. Thus, if there is a direct norm conflict between provisions of Norwegian law and obligations under international law (including the EEA Agreement and other agreements between the EU and Norway), Norwegian law will prevail.[39]

Measures authorized by the doctrine of constitutional necessity appear to be of a constitutional nature, and thus *lex superior* to ordinary legislation. Consequently, measures authorized by the doctrine of constitutional necessity should also prevail if there is ever a direct norm conflict between such measures and Norway's international obligations.

It should be emphasized that direct norm conflicts are a rare phenomenon in Norwegian law. Courts and others applying Norwegian law must attempt to avoid such norm conflicts through interpretation. The so-called presumption principle, according to which Norwegian law should be presumed to comply with international law, provides that Norwegian law must as far as possible be interpreted in compliance with Norway's international legal obligations. That said, it is contested whether the "presumption principle" applies to interpretation of constitutional provisions.

(JPA) without parliamentary approval. Although parliamentary approval of treaties is not always necessary, the JPA appears to meet the conditions for when § 26(2) of the Constitution requires parliamentary approval. Some discussions were held about whether this was an incident of constitutional necessity or simply a breach of § 26(2) of the Constitution, although consensus appears to be that the latter view is correct. For details, see: Høgberg et al., "Regjeringen og forvaltningens myndighetsutøvelse," pp. 167–71.

[39] See: the judgment of the Norwegian supreme court in Rt. 1997 s. 580 (*OFS*).

Question 5

It is uncertain whether and to what extent the doctrine of constitutional necessity allows for suspending the fundamental rights provisions in the Constitution.[40] There seems to be agreement in the literature that suspension of fundamental rights provisions of the Constitution is only possible when vital societal interests are at risk, and where the measures taken are necessary and proportionate.[41]

There are no specific constitutional or legislative provisions that give any guidance on the applicability of fundamental rights in a situation of constitutional necessity. The legislator has left these issues to be resolved by government organs acting in a situation of constitutional necessity and, in the last instance, by Norwegian domestic courts.

Question 6

During the COVID-19 pandemic, the potential for conflict between Norwegian emergency measures and the fundamental rights and freedoms protected under the EEA Agreement was readily apparent. Many of the Norwegian measures enacted to prevent the spread of COVID-19 constituted obvious restrictions on freedom of movement, in the form of border closures, quarantine, mandatory COVID testing, etc.

Due to the vast amount of temporary measures enacted during the pandemic, and the near-constant amendment of their scope and conditions while they remained in force, it is impossible to provide a comprehensive overview over the issues they raised in relation to rules on free movement and fundamental rights under the EEA Agreement.[42] Instead, the focus in this report is on the measures that are most likely to have contravened free movement and fundamental rights under the EEA Agreement.

For several months in 2020 and 2021, a temporary law prohibited the entry into Norwegian territory by foreigners, unless they were covered by a set of exceptions listed in an executive regulation.[43] At first, the only EEA citizens exempted were those who were resident or worked in Norway. Further exceptions applicable to EEA citizens in other situations were, however, added fairly soon. Then, on 29 January 2021, most of the exceptions were stripped away.

[40] Høgberg et al., "Rettslige rammer for krisehåndtering," p. 74.

[41] Castberg 356 cf. 351; Høgberg et al., "Rettslige rammer for krisehåndtering," p. 74.

[42] For a more extensive overview than the one provided here, but still far from exhaustive, see: Johansen, "Rammene i EØS-retten og Schengen," pp. 288–304.

[43] Temporary Act on Entry Restrictions of 19 June 2020, no. 83.

From that point in time, and for several months, only those resident in Norway, and their family members, were allowed entry.

Through newspaper reports, it became known that the residency requirement in the Temporary Law on Entry Restrictions was practiced by Norwegian authorities as a requirement that the EEA citizen in question has to be a *registered* resident in Norway. However, many EEA citizens that in practice had lived and worked in Norway for months and years were, for various reasons, not formally registered as resident in Norway. Consequently, EEA citizens that had lived in Norway for a long time, but exited Norwegian territory briefly – for example, to attend a funeral abroad – were refused entry when they returned to Norway.

As the author of this report has argued extensively elsewhere,[44] this practice violated the free movement rights of EEA citizens that had lived more than three months in Norway (but not formally registered as residents) and then took a brief trip abroad. That is because article 29 of the Citizen's Rights Directive[45] prohibits expulsions after three months of residence. This three month period is not restarted following a brief trip abroad.[46] Moreover, the notion of "residence" in the directive is autonomous, and does hinge on domestic regimes for residency registration.[47]

This illegal practice was never reviewed by courts, probably because the victims did not have the resources to pursue their case. One case came closed to being reviewed, though, but it was settled. In the settlement agreement, the Norwegian government paid the claimant the full amount claimed, as well as his attorney fees, on an *ex gratia* basis (i.e., without admitting wrongdoing).

The vast majority of the measures enacted by Norwegian authorities during the pandemic constituted less extreme restrictions on free movement of persons. Key among them were restrictions in the form of mandatory quarantine and COVID-testing triggered by the entry into Norwegian territory from abroad. These are traditional infection control measures, which are definitively suitable for pursuing legitimate public health aims. However, the proportionality of the quarantine and testing regimes were hotly debated during the pandemic.

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[44] Johansen, "Koronabortvisning av EØS-borgere og unionsborgerdirektivet artikkel 29(2)"; Johansen, "Rammene i EØS-retten og Schengen," pp. 297–300.

[45] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

[46] Likewise: Guild et al., *The EU Citizenship Directive*, p. 290.

[47] This residence registry was separate from, and additional to, the registration scheme for EEA citizens in Norway, which is authorized by article 8(2) of the Citizen's Rights Directive.

A few cases concerning such restrictions also eventually made their way to the Norwegian Supreme Court. The first case was brought by Norwegian residents who owned cabins in Sweden.[48] They contended, *inter alia*, that the requirement to quarantine if they visited their cabin – even though they drove their own car and stayed far away from other people – constituted a disproportionate restriction on their right to free movement of capital. Unsurprisingly, the Supreme Court found the measures proportionate, noting in particular the risk that not everyone would respect requirements to keep their distance from the local population.[49]

A second Supreme Court case concerned the hotel quarantine scheme.[50] In that case, a Swedish citizen resident in Norway was obliged to check into a quarantine hotel for 7 days after having visited his family in Sweden. He refused, and was fined NOK 24,000 (approximately EUR 2,000). The Supreme Court found this to be necessary and proportionate.

Two cases concerning mandatory COVID testing were also litigated before the Norwegian Supreme Court in 2024.[51] In both cases the appellant had refused a mandatory COVID test, and were fined between NOK 10,000 and 12,250 (EUR 850–1,000). The Supreme Court found that mandatory COVID-testing was necessary and proportionate in both cases.

Regardless of one's view on these judgments from the Norwegian Supreme Court, there are good reasons to believe that the quarantine and testing regimes were generally compliant with EEA law during the pandemic. However, there might have been particular cases where the application of those measures were disproportionate and thus contravened EEA law. Since fundamental rights (notably the right to family life) were often at play, there must surely have been some individuals that found themselves in a particular situation in which the application of at least the quarantine regime was disproportionate.

Another question that arose in connection with the Norwegian infection control measures at the border was the compatibility of those measures with the Schengen Borders Code (SBC).[52] According to SBC article 22 the internal borders may be crossed at any point without a border check on persons being carried out. This is a foundational principle of the SBC, and restrictions in the

[48] HR-2022-718-A (*Cabin Quarantine*).

[49] HR-2022-718-A (*Cabin Quarantine*), particularly at paras. 117–118.

[50] HR-2024-1107-A (*Hotel Quarantine*).

[51] HR-2024-1109-A (*COVID-test I*); HR-2024-1110-A (*COVID-test II*).

[52] Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1, as amended by up to and including Regulation (EU) 2017/458 [2017] OJ L74/1.

form of border controls may only be temporary introduced under conditions laid down in Articles 25–31. Unilateral, temporary introductions have maximum duration of six months.[53]

Norway, nevertheless, repeatedly notified the Commission about extending the reintroduction of border controls well beyond six months. Thus, from mid-October 2021 the reintroduction of border controls at the internal borders appears to have been illegal. In 2022, the Eidsivating Court of Appeals found that the border control measures did violated the six month time-limit in the SBC in a criminal case concerning a fine for an illegal border crossing.[54] This judgment was appealed by the prosecuting authority to the Supreme Court, but the appeal was withdrawn when the prosecutor found alternative grounds for acquittal in an ancient exchange of notes between Norway and Sweden regarding border residents.[55]

In the two COVID-test cases of 2024,[56] the SBC issue was again put before the Norwegian Supreme Court, and this time it was allowed to weigh in. As explained above, these two cases concerned COVID-testing, as well as the related duty to register your arrival in Norway online. The Supreme Court discussed whether this constituted a border control measures, and concluded that it did not. Given that the cases did not concern border control measures *stricto sensu*, this conclusion may reflect a correct interpretation and application of the SBC.

Surprisingly, however, the Supreme Court went further, discussing *obiter dictum* whether the measures would have been legal if they had been characterized as border control measures. The Supreme Court found that the evolution of the COVID-19 virus, regularly resulting in new and more contagious variants, constituted new threats that essentially restarted the six month time-limit for temporary reintroduction of border controls. In doing so, the Supreme Court paid lip service to the criteria set out in the CJEU case of *NW,* according to which a new threat must be "distinct from the threat initially identified" and "capable of justifying […] fresh application" of the time-limits.[57] However, it is doubtful whether the CJEU would have applied that test so leniently as the Supreme Court did. The risk of new and more infectious variants is one of the most well-recognized risks associated with pandemics. Moreover, if the time-limits and other conditions in the SBC were considered to be too strict, they could have been amended. This has indeed happened before, following

[53] SBC article 25(4).

[54] Case LE-2022-68294.

[55] Exchange of Notes between Norway of Sweden of 30 August 1917.

[56] HR-2024-1109-A (*COVID-test I*); HR-2024-1110-A (*COVID-test II*).

[57] Joined cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark* [ECLI:EU:C:2022:298] para. 81.

the so-called refugee crisis, when a provision was added to the SBC to allow the reintroduction of border controls for up to two years.[58]

Finally, it should be added that when drafting the temporary statute in force for about two months during the initial phase of the COVID-19 crisis in 2020 ("koronaloven"), it was envisaged that measures authorized by it could – if necessary – contravene EEA law. According to the preparatory work, this should only be done in exceptional situations and only so far as strictly necessary.[59] No measures contravening EEA law were ever enacted under this temporary law.

Section 3: Statutory/executive emergency law in Norway

Question 1

Some key pieces of legislation and legislative provisions addressing situations of emergency etc. are outlined in the following. However, given the highly fragmented nature of Norwegian emergency law, this report does not provide an exhaustive overview.

In § 7–12 of the Infections Diseases Act ("smittevernloven"),[60] there is an emergency provision authorizing the King-in-council to enact legislative provisions that, if necessary, derogate from existing legislation. This provision is only applicable if there is an outbreak of an infectious disease dangerous to the general public ("allmennfarlig smittsom sykdom") and delaying entails risk ("fare ved opphold"). This provision was relied on several times during the COVID-19 pandemic, particularly during its initial phase.

The Health Preparedness Act ("helseberedskapsloven")[61] is an emergency statute for the healthcare and social services sector. It is applicable in wartime and during a peacetime crisis ("krise") or catastrophe ("katastrofe").[62] To ensure provision of healthcare services in such situations the act authorizes, *inter alia*, requisition of private property, ordering healthcare workers to work longer hours and at different locations, and reorganization of healthcare providers.[63] The Health Preparedness Act was used extensively during the COVID-19 pandemic.[64] It was also activated when the airspace

[58] SBC article 29(1).
[59] Prop. 56 L (2019-2020) section 4.2.
[60] Act of 5 August 1994, no. 55, as amended.
[61] Act of 23 June 2000, no. 56.
[62] Health Preparedness Act § 1–5.
[63] See, respectively, Health Preparedness Act § 3–1, § 4–1, and § 5–2.
[64] Høgberg et al., "Rettslige rammer for krisehåndtering," p. 87.

over Norway was closed due to volcanic ash clouds from the *Eyjafjallajökull* eruption in 2010.[65]

A temporary, emergency statute ("koronaloven") was hastily enacted during the initial phase of the COVID-19 pandemic in March 2020, and remained in force for a couple of months.[66] It constituted a general, sector-independent emergency regime – although only for measures necessitated by the pandemic. Yet, the brief time it was in force, it distinguished itself sharply from the otherwise sector-specific forest of statutory emergency law in Norway. The purpose of "koronaloven" was to enable the executive to enact measure to deal with the COVID-19 pandemic and, if necessary, to derogate from or supplement existing legislation. This temporary statute proved to be an important tool for handling the initial phase of the pandemic, where there was a particularly urgent need to adapt existing legislation to manage the pandemic emergency.

While emergency law regimes in the health sector have been in the spotlight recently, such regimes exist in an array of other sectors. To mention some examples:

The Act of Business and Industry Preparedness ("næringsberedskapsloven")[67] aims to alleviate the supply-related consequences of crises ("kriser") by strengthening the supply of goods and services and by ensuring necessary assignment of priorities for, and redistribution of, goods and services. It is applicable in situations where it – due to a risk of demand shock, supply shortage, or logistical failure – is necessary to ensure the needs of the population or of the armed forces.[68]

In the financial services sector, there are multiple emergency law regimes and provisions. The Securities Trading Act[69] § 13–6 authorizes the suspension of all trading on a stock exchange in exceptional circumstances ("ekstraordinære situasjoner"). The Central Bank Act[70] § 3–9 authorizes the enactment of measures to restrict capital movements when such movements may cause serious balance-of-payments problems or serious disturbances of the financial system. The Financial Institutions Act[71] chapter 20 contains a regime for handling capital inadequacy and insolvency of banks, mortgage credit institutions and

[65] NOU 2019: 13, p. 61.

[66] Act of 27 March 2020, no. 17 (repealed 27 May 2020). For an analysis, see: Høgberg et al., "Koronaloven."

[67] Act of 16 December 2011, no. 68, as amended.

[68] Act of Business and Industry Preparedness § 6 and § 8.

[69] Act of 29 June 2007, no. 75.

[70] Act of 21 June 2019, no. 31.

[71] Act of 10 April 2015, no. 17.

financial groups. This regime is to a large extent an implementation of the Bank Recovery and Resolution Directive.[72]

The Civil Protection Act[73] aims to protect life, health, environment, critical infrastructure, etc. by the use of non-military force. It is applicable during wartime and when there is a risk of war, as well as when unwanted events ("uønskede hendelser") occur in peacetime.[74] This act also establishes the standing Norwegian Civil Defence, and persons between 18 and 55 years resident in Norway may be drafted into it.[75] When it is applicable, the Civil Protection Act authorizes Norwegian Civil Defence to take on various tasks – for example, to evacuate the civil population in an area and order members of the public to assist in urgent situations.[76] The Civil Protection Act also contains provisions authorizing requisition of private property by governmental authorities. Moreover, directive 2008/114/EC[77] is implemented in chapter VI A of the Civil Protection Act.

The Petroleum Act contains a provision authorizing the executive branch to order producers of petroleum to make petroleum available to Norwegian authorities.[78] This provision is triggered in case of war or other extraordinary crises ("ekstraordinære kriseforhold").

Question 2

There are two key factors differentiating Norwegian constitutional and statutory emergency law regimes. Firstly, the doctrine of constitutional necessity is a general emergency law regime, while the statutory emergency law regimes and provisions are sector-specific. Second, the doctrine of constitutional necessity is only triggered in exceptional situations of strict necessity. The triggering events in the various statutory emergency law regimes are generally less exceptional.

There does not seem to have been any conflicts between the doctrine of constitutional necessity and statutory emergency law regimes. This may be due to the fact that Norway has probably not experienced a situation of constitutional necessity since 1945. If there is ever a norm conflict between acts authorized

[72] Directive 2014/59/EU [2014] OJ L173/190, as amended.
[73] Act of 25 June 2010, no. 45.
[74] Civil Protection Act § 1.
[75] Civil Protection Act § 4 and § 8.
[76] Civil Protection Act § 5.
[77] Directive 2008/114/EC on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection [2008] OJ L345/75.
[78] Act of 29 November 1996, no. 72 § 4–13.

by the doctrine of constitutional necessity and acts authorized by statutory emergency regimes, the former will prevail as *lex superior*.

Given the fragmented nature of statutory emergency law in Norway, conflicts between the different statutory emergency law regimes and provisions cannot be ruled out. However, in preparing this report, no particular (historical) examples have been encountered.

Questions 3 and 4

The Norwegian Constitution applies in full during a situation of emergency, unless specific constitutional provisions have been suspended using the doctrine of constitutional necessity (see Section 2). As this doctrine can only be used in the most extreme circumstances of necessity, it will not be applicable in most cases where Norwegian authorities make use of statutory emergency law.

Legislation contained in statutes cannot affect the constitution, which is *lex superior*. Nor can the introduction of emergency issues by the EU, to the extent they are applicable to Norway (see Section 5), affect the constitutional balance and distribution of powers between the Norwegian branches of government.

Consequently, in almost all instances the ordinary limits, constraints, and procedures of the Norwegian Constitution apply when governmental authorities make use of emergency powers granted to it by statutory emergency law regimes.

Section 4: Judicial review of emergency powers in Norway

Questions 1 and 2

There are no provisions of Norwegian law restricting or altering the jurisdiction of Norwegian domestic courts in an emergency situation. Nor are there rules restricting or altering their jurisdiction when measures to address a situation of emergency are challenged.

Norwegian courts thus have – as in ordinary times – jurisdiction to review any act of the legislative and executive branches of government.

Moreover, there does not appear to be any specific procedural rules that apply when Norwegian courts are reviewing the actions of public authorities in situations of emergency.

Question 3

The standards of review used by Norwegian courts when reviewing acts of public authorities in situations of emergency are the same as those used in ordinary times.

That said, Norwegian law contains some standards of review that are quite flexible. For example, Norwegian courts show deference to executive (expert) bodies in, for example, the assessment of scientific evidence in the public health field.[79] In an emergency situation, the inherent flexibility in these standards of review may cause Norwegian courts to show even further deference.

Question 4

Whether a general principle of proportionality forms part of Norwegian (administrative) law is debated. References to proportionality are, however, found in various Norwegian statutory regimes – including in several emergency law regimes. For example, the Infections Diseases Act ("smittevernloven") provides in § 1–5 that measures enacted under that law must be, *inter alia*, "necessary for reasons of infection control."

When applying such proportionality review during the COVID-19 pandemic, the Norwegian Supreme Court tended to equate the proportionality assessment under the Infections Diseases Act § 1–5 with that under the ECHR and EU law.[80] However, fundamental rights were at play in those cases – notably the right to private and family life. It is uncertain whether this equation of the Norwegian (statutory) concept of proportionality and the EU/ECHR law principle of proportionality is more broadly applicable in situations of emergency.

Section 5: Implementation of EU emergency law in Norway

Questions 1 and 2

Only some instruments of EU emergency law are applicable to Norway through its well over 100 agreements with the EU. Notably, EU emergency law acts that form part of the internal market are applicable to Norway as soon as they have been incorporated into the EEA Agreement by the EEA Joint Committee.[81]

[79] See, e.g., the judgment of the Norwegian supreme court in HR-2022-718-A (*Cabin Quarantine*) paras. 75–76.

[80] HR-2022-718-A (*Cabin Quarantine*) paras. 137 and 157; HR-2024-1107-A (*Hotel Quarantine*) paras. 98 and 128.

[81] See: EEA Agreement articles 98–103.

The forthcoming Internal Market Emergency and Resilience Act (IMERA) is a current example of such "EEA relevant" EU emergency law. Another, more well-known example is the Bank Recovery and Resolution Directive,[82] which is implemented in chapter 20 of the Financial Institutions Act.[83]

Through amendments to protocol 31 of the EEA Agreement (on cooperation in specific fields outside the internal market) the EEA Joint Committee has also made acts of EU emergency law applicable to Norway. For example, both the EU Civil Protection Mechanism[84] and the ECDC regulation[85] have been included in protocol 31.

Moreover, Norway is bound by further acts of EU emergency law through other agreements. Emergency law provisions in the Schengen *acquis* are applicable to Norway through the Schengen Association Agreement.[86] Other agreements are *ad hoc*, and only concern single instruments of EU emergency law. For example, Norway entered into a bilateral agreement with the EU on its participation in the provisional relocation scheme for asylum seekers set up in 2015.[87]

EU measures taken under TFEU Article 78(3) fall outside the scope of the EEA Agreement. The same is true for measures taken under TFEU article 122. Neither of the provisions form part of the Dublin or Schengen *acquis*. Measures taken under those two provisions are therefore only applicable to Norway if it has entered into specific agreements with the EU making them applicable also to Norway. The above-mentioned agreement on Norway's participation in the 2015 provisional relocation scheme for asylum seekers is an example of such an agreement.

Most EU emergency law measures taken under TFEU articles 78(3) and 122 are not covered by any agreements between the EU and Norway, and are thus inapplicable to Norway – at least for the time being. Examples include the Emergency Support Instrument (ESI),[88] the regulation establishing a frame-

[82] Directive 2014/59/EU [2014] OJ L173/190, as amended.

[83] Act of 10 April 2015, no. 17.

[84] Decision 1313/2013/EU on a Union Civil Protection Mechanism [2013] OJ L347/924.

[85] Regulation (EC) 851/2004 establishing a European Centre for disease prevention and control [2004] OJ L142/1.

[86] Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis* [1999] OJ L176/36.

[87] Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80. Note article 11 of the decision, which is the legal basis in Union law for such bilateral agreements.

[88] Regulation 2016/369 on the provision of emergency support within the Union [2016] OJ L 70/1.

work of measures for ensuring the supply of crisis-relevant countermeasures in the event of a public health emergency,[89] the EU COVID recovery assistance fund (ReactEU),[90] and the 2022 regulation on an emergency intervention to address high energy prices.[91]

Implementation of the instruments of EU emergency law that are applicable to Norway seems to have caused few issues. Norway has mostly acted in support of other European states under those instruments, rather than being on the receiving end. For example, Norway figured among the top relocators under the 2015 asylum seeker relocation scheme, and it regularly contributes personnel and materiel through the EU Civil Protection Mechanism.[92]

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[91] Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices [2022] OJ LI261/1.

[92] For example, to fight the forest fires in Sweden in 2018 and in Greece in 2022.

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Poland

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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

Polish law and case law use all three concepts: "emergency," "crisis," and "necessity."

Emergency. The word "emergency" does not have a direct equivalent in Polish. The closest Polish notion is a "sudden accident" (pol. *nagły wypadek*). At the same time, the Polish constitutional equivalent of the English concept of a "state of emergency," as employed in comparative constitutional law,[1] is an "extraordinary state" (pol. *stan nadzwyczajny*). To avoid confusion, in the replies to this questionnaire, the English notion of a "state of emergency" will be used to translate the Polish idea of the "extraordinary state."

Unlike "crisis" and "necessity," the notion of "emergency" is expressly enshrined in the Polish Constitution of 1997. Its Chapter XI is devoted to the "states of emergency."[2] Dormant for years, a discussion regarding the states of emergency has recently re-emerged in Polish constitutional and legal scholarship in the context of the COVID-19 pandemic and the migration crisis on the Polish-Belarussian border.

Chapter XI of the Constitution foresees three types of emergencies: (1) the state of war,[3] (2) the state of exception (a *coup d'etat* or another threat to public

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[1] David Dyzenhaus, "States of Emergency," *The Oxford Handbook of Comparative Constitutional Law*, edited by in Michel Rosenfeld and András Sajó. Oxford University Press, 2012, pp. 442–462.

[2] Polish National Assembly, The Constitution of the Republic of Poland of 2 April 1997. *Dziennik Ustaw*, 1997, no. 78, item 483, https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (English translation).

[3] In English-language literature concerning Polish constitutional law, the notion of "martial law" is often used rather than the "state of war." However, "martial law" means a military rule that replaces a civilian government, which to some extent occurred in Poland in 1981–1983. However, this notion no longer corresponds to what the Constitution of 1997 calls the "state of war." The "state of war" under the Constitution of 1997 implies neither a replacement of the civilian government nor the suspension of the rule of law, but only some emergency legal measures adopted by the executive. This is why in this questionnaire the notion of the "state of war" will be used in reference to the Constitution of 1997.

order), and (3) the state of natural disaster. The executive branch can declare one of these states of emergency. When doing so, it remains, in principle, under the legislature's supervision. When a state of emergency is declared, emergency law-making powers are transferred to the executive, albeit in a strictly limited fashion. The purpose of this transfer is to enable the executive to address the emergency efficiently and restore the ordinary functioning of the State promptly.

On top of that, ordinary legislation foresees extra-constitutional states of emergency: a "state of epidemic threat" and a "state of epidemic."[4] Both extra-constitutional states of emergency are governed by the same legal framework, which implies a transfer of law-making powers to the executive.[5] However, the detailed provisions governing "extra-constitutional states of emergency" have raised constitutional reservations, which will be discussed in further replies.

On the contrary, the Constitution does not mention a "crisis" or "necessity" as circumstances justifying exceptional legal measures. Nonetheless, these notions have appeared in case law and academic literature.

Crisis. The Polish Constitutional Tribunal referred to the "economic crisis" on many occasions in the early 2010s, while upholding the constitutionality of cuts in public spending during the global financial crisis and the Eurozone crisis. During this period, Poland was subject to the EU Excessive Deficit Procedure. This case law stirred up a debate regarding the constitutional protection of socio-economic rights, as evidenced by frequent dissenting opinions of certain judges of the Constitutional Tribunal. This case law and these dissenting opinions will be discussed in subsequent replies.[6]

Necessity. The notion of "necessity" in addressing emergencies appeared in case law as a transplant from criminal law, first in the context of the constitutional review of laws addressing the threat of terrorist attacks through hijacked planes.[7] In 2004, the parliament adopted an amendment to the aviation law explicitly allowing State authorities to shoot down a plane hijacked for terrorist purposes, even if this would cause the death of the crew and the passengers. The First President of the Supreme Court contested this amendment before

[4] Polish Sejm, Act of 5 December 2008 on preventing and combatting infections and infectious diseases in humans. *Dziennik Ustaw*, no. 234, item 1570, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20082341570

[5] Mateusz Radajewski, "Stan zagrożenia epidemicznego oraz stan epidemii jako formy prawne ochrony zdrowia publicznego," *Przegląd Legislacyjny*, no. 4, 2021, pp. 59–86.

[6] See, in general: Michał Krajewski, "The Constitutional Quandary of Social Rights: Questions in Times of the Polish Illiberal Turn," *International Journal of Constitutional Law*, vol. 21, no. 1, January 2023, pp. 156–186, https://doi.org/10.1093/icon/moad018

[7] Polish Constitutional Tribunal, Judgment of 30 September 2008, Case K 44/07, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=328&sprawa=4371

the Constitutional Tribunal. The Tribunal recalled that the 1997 Constitution regulates the states of emergency exhaustively and, in none of these states, does it allow the executive to suspend the "essence" of the right to life and human dignity (Articles 38 and 30). The Tribunal declared the amendment unconstitutional because, being worded in a too general way, it did not ensure that the shooting down of the plane with the passengers and crew would only be a means of last resort. At the same time, the Tribunal considered that the lives of the passengers and the crew on the one hand, and the lives of people remaining on the ground and being potentially affected by the terrorist attack on the other hand, have the same value, so they cannot be subject to balancing as competing constitutional values.[8] Nonetheless, the Tribunal admitted that State authorities might still decide to shoot down a plane used for terrorist attacks under general provisions of criminal law, which allow one to commit a criminal act in self-defence or "higher necessity" (exculpatory circumstances). "Higher necessity" means here that the sacrificed value is not inferior to the value one seeks to protect; for instance, some lives are sacrificed to save others without triggering criminal liability. For the Tribunal, when relying on "higher necessity," representatives of the State authorities should be aware that they risk criminal liability, which may only exceptionally be lifted if "higher necessity" is later confirmed by the system of justice. The Tribunal considered this solution as more restrictive than "legalising" the shooting down of planes and, consequently, more appropriate to protect human life and dignity. Overall, the Tribunal aimed not to make the shooting down of planes an "ordinary" instrument of dealing with terrorist threats.[9]

Moreover, scholars debated whether the notion of "necessity" could be instrumental in justifying instances in which public authorities, in circumstances of a severe constitutional crisis, must exceed the confines of their legally conferred powers to defend higher constitutional values.[10] In this vein, scholars proposed a doctrine of "constitutional necessity" to justify why, in 2015–2016, the Polish Constitutional Tribunal could disapply certain legislative constraints ad hoc and only *subsequently* declare them unconstitutional.[11] These rulings were issued during severe constitutional and political controversies regarding the Tribunal's role and independence, and the extent to which the parliament was authorised to lay down legislative provisions governing the Tribunal's operation in great detail.[12] These controversies have been widely discussed

[8] Polish Constitutional Tribunal, Judgment of 30 September 2008, Case K 44/07, section III.7.5

[9] Polish Constitutional Tribunal, Judgment of 30 September 2008, Case K 44/07, section III.10.

[10] Krzysztof Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytutcji RP*. Zakamycze, 1999, pp. 261–270.

[11] Mikołaj Małecki and Maciej Pach, "Stan wyższej konieczności konstytucyjnej," *Państwo i Prawo*, no. 7, 2018, pp. 38–57.

[12] See further: Wojciech Sadurski, *Poland's Constitutional Breakdown*. Oxford University Press, 2019. See, in particular: Chapter 3 "Dismantling of Checks and Balances (I): The Remaking of the Constitutional Tribunal."

in scholarly literature as part of a "constitutional crisis"[13] or "constitutional breakdown" in Poland.[14]

In one of these cases, the Tribunal considered that specific organisational and procedural statutory provisions enacted by a newly elected parliamentary majority hindered effective constitutional review, including the Tribunal's ability to rule on the constitutionality of those very provisions in good time. As such, they must be disapplied. Those provisions concerned such organisational details as the order of cases on which the Tribunal should rule[15] and the time in which the rulings were to be issued.[16] Also, the rulings were to be decided by a qualified 2/3 majority of the judges, replacing the previous rule of a simple majority. In parallel, the rules for appointing the Tribunal's president and vice-president changed, and the minimum number of judges required for the Tribunal to act as a "ull court" was raised.

The Tribunal considered that it must break the "vicious circle of unconstitutionality" (not using these exact terms). In other words, it held it cannot be subject during the constitutional review process to the very same legislative provisions that are contested before the Tribunal as potentially unconstitutional, as well as provisions that hinder effective constitutional review. The Tribunal prioritised that case, even though the contested provisions did not allow for that. Thus, it disapplied *ad hoc* these and other provisions (including those on the minimum number of judges and the qualified majority) before formally declaring them unconstitutional.[17] In another case, the Tribunal decided to rule on a case in a chamber of five judges, even though the applicable legislative provisions required it to rule as a full court (at least eleven judges). A full court ruling was impossible because some newly appointed judges refused to adjudicate. The Tribunal prioritised the constitutional principle requiring it to perform its tasks of constitutional review effectively and disapplied the provision requiring it to act as a "full court" in that case rather than a standard chamber of five judges.[18]

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[13] Marcin Wiącek, "Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle," *Defending Checks and Balances in EU Member States*, edited by Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski, and Matthias Schmidt. Springer, 2021, pp. 15–33.

[14] Wojciech Sadurski, *Poland's Constitutional Breakdown*. Oxford University Press, 2019.

[15] According to the order in which they were brought, so one "difficult case" for which more time was needed could block rulings in many "easy cases."

[16] The Constitutional Tribunal could not speed up proceedings in cases requiring prompt rulings.

[17] Judgment of the Constitutional Tribunal of 9 March 2016, Case K 47/15, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=16939&sprawa=16641

[18] Polish Constitutional Tribunal, Judgment of 7 November 2016, Case K 44/16, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=16940&sprawa=17892

Inspired by the "higher necessity" concept from criminal law, Małecki and Pach argued that "higher constitutional necessity" justified why the Constitutional Tribunal could disapply in those cases the legislative provisions that hindered constitutional review, thus sacrificing legality (lesser value) to safeguard constitutionality (higher value).[19] However, Radziewicz argued that this new notion was unnecessary because it would be enough to justify these rulings by referring to the constitutional provision that says that constitutional judges are subject to the Constitution only, unlike ordinary judges who are subject to both the Constitution *and the parliamentary statutes*. The juxtaposition of these two provisions might be interpreted as meaning that constitutional judges are entitled to disapply *ad hoc* statutes that would hinder the exercise of their tasks.[20] According to an alternative view, before the Tribunal issued those unprecedented decisions the mainstream considered that the constitutional judges are not bound only by those statutes that they declare unconstitutional, having carried out the constitutional review process beforehand. At the same time, they are bound by all procedural and organisational rules enacted by the parliament. This is why, Małecki and Pach considered it necessary to introduce the new concept of "higher constitutional necessity."[21] The crux of the dispute between the above authors is the doctrinal understanding of the constitutional provision according to which constitutional judges are subjected to the Constitution only. The underlying question is what "emergency powers" can reasonably be derived from it.

Question 2

Chapter XI of the Constitution provides a general constitutional framework for the three states of emergency. Its objectives are twofold: enabling and constraining.[22] On the one hand, the Constitution enables the executive to address emergencies effectively by delegating to it somewhat greater power to limit constitutional freedoms and rights during an emergency. On the other hand, the Constitution restricts the executive's discretion by subjecting it to the legislature's supervision, thereby upholding the rule of law during a state of emergency.[23]

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[19] Mikołaj Małecki and Maciej Pach, "Stan wyższej konieczności konstytucyjnej," *Państwo i Prawo*, no. 7, 2018, pp. 38–57.

[20] Piotr Radziewicz, "O niedostatkach teorii stanu wyższej konieczności konstytucyjnej," *Państwo i Prawo*, no. 11, 2018, pp. 114–126.

[21] Piotr Małecki and Maciej Pach, "W obronie teorii stanu wyższej konieczności konstytucyjnej (odpowiedź na polemikę P. Radziewicza)," *Państwo i Prawo,* no. 2, 2023, pp. 154–167.

[22] See, in general: David Dyzenhaus, "States of Emergency," *The Oxford Handbook of Comparative Constitutional Law*, edited by in Michel Rosenfeld and András Sajó. Oxford University Press, 2012, pp. 442–462.

[23] Krzysztof Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Temida 2, 2005, pp. 14–15.

In addition, the parliament enacted ordinary legislation introducing "extra-constitutional states of emergency," which were declared during the COVID-19 pandemic: a "state of epidemic threat" and "state of epidemic." The constitutionality of this legislation was debated, which will be discussed below.

Moreover, it is a common practice of the Polish legislature to adopt "temporary statutes" (pol. *ustawy epizodyczne*) or "special statutes" (pol. *specustawy*) to address "exceptional challenges" rather than "emergencies." These statutes establish extraordinary legal frameworks derogating from ordinary rules in a specific area. Take an act on assistance to the citizens of Ukraine due to the armed conflict on the territory of that country.[24] Radziewicz also mentions a statute concerning the damages caused by the great flood in Silesia in 1997, as an example.[25]

However, this legislative practice is considered too frequent in Poland and, as such, it has been criticised in legal literature concerning legislative technique. Introducing parallel "extraordinary legal regimes," which derogate from ordinary rules, is said to undermine the legal order's coherence, stability, and predictability, which are fundamental components of the rule of law. Special laws are often adopted to facilitate the completion of public infrastructural projects. They may include, for instance, derogations from ordinary public procurement rules. The application of such statutes tends to get extended in time and scope.[26]

Recently, a special statute was also adopted to address the COVID-19 pandemic.[27] That legislation tackled a myriad of issues, such as providing financial assistance to entrepreneurs whose businesses have been adversely affected by the pandemic, providing special social benefits, healthcare, changing labour law (telework), the functioning of prisons, and so on.

[24] Polish Sejm, Act of 12 March 2012 on assistance to the citizens of Ukraine due to the arm conflict on the territory of that country, *Dziennik Ustaw*, 2012, item 583, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220000583

[25] Piotr Radziewicz, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, edited by Piotr Czarny, Monika Florczak-Wątor, Bogumił Naleziński, and Piotr Radziewicz. Wolters Kluwer, 2023, p. 655; Polish Sejm, Act of 17 July 1997 on the application of special solutions due to the elimination of the effects of the flood that took place in July 1997, *Dziennik Ustaw*, 1997, no. 160, item 1087, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970800491

[26] Michał Gajewski, "Wpływ przepisów epizodycznych na praktykę specustaw," *Acta Iuris Stetinensis*, no. 2, 2022, pp. 77–91.

[27] Polish Sejm, Act of 2 March 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them, *Dziennik Ustaw*, 2024, item 340.

Question 3

As regards the three constitutional states of emergency, Article 288(1) of the Constitution specifies that a state of emergency can be introduced in case of *exceptional threats* that cannot be sufficiently addressed with *ordinary measures*. This provision is understood as a general condition for introducing any of the three states of emergency.[28] Apart from that, one of the more specific conditions for introducing a state of emergency must be met.

(1) ***The state of war*** (Article 229 of the Constitution) can be introduced in case of an external threat or armed aggression against the State or when Poland is obliged to join common defence by virtue of international agreements.[29] Prokop argues that an external threat justifying the state of war must have a military character, which rules out introducing the state of war as a response to, for instance, economic sanctions.[30] On the contrary, Działocha argues that contemporary equivalents of military aggression – which also threaten the nation's safety, such as terrorism or financial measures – may justify declaring a state of war.[31] Implementing statutory provisions also mention cybersecurity threats.[32] These provisions specify that external threats are to be generally understood as "deliberate acts undermining the independence, indivisibility, important economic interest of the Republic of Poland or when they are aimed at hindering or seriously disturbing the ordinary functioning of the State by external entities."[33]

(2) ***The state of exception*** (Article 230 of the Constitution) can be introduced in case of "threats to the constitutional system of the State, the safety of citizens or public order."[34] It is argued that this condition leaves considerable interpretive discretion to the executive.[35] Steinborn mentions the following

[28] Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja RP. Tom II. Komentarz do art. 87–243,* edited by Marek Safjan and Leszek Bosek. Beck, 2016, p. 1610; Krzysztof Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytutcji RP*. Zakamycze, 1999, p. 250.

[29] Evidently, the latter part of this provision reflects Article 5 of the NATO Treaty on common defence. Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja RP. Tom II. Komentarz do art. 87–243*, edited by Marek Safjan and Leszek Bosek, Beck. 2016, p. 1616.

[30] Krzysztof Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Temida 2, 2005, pp. 47–48. See also: Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja RP. Tom II. Komentarz do art. 87–243,* edited by Marek Safjan and Leszek Bosek. Beck, 2016, p. 1615.

[31] Kazimierz Działocha, "Artykuł 299," p. 2, *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom IV*, edited by Leszek Garlicki. Wydawnictwo Sejmowe, 2005.

[32] Polish Sejm, Act of 29 August 2002 on the state of war […]. *Dziennik Ustaw*, no. 156, item 1301, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20021561301, in Article 2.

[33] Ibidem, in Article 1a.

[34] Polish Sejm, Act of 21 June 2002 on the state of exception, *Dziennik Ustaw*, no. 113, item 985, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20021130985

[35] Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja RP. Tom II. Komentarz do art. 87–243,* edited by Marek Safjan and Leszek Bosek. Beck, 2016, p. 1619.

situations that might result in the state of exception: a "violent *coup d'etat*" or "an attempt to undermine the integrity of the state by internal separatist movements," as well as violent riots, terrorist attacks, or sabotage of public infrastructure.[36] It is argued that the state of exception is supposed to address threats comparable to those addressed by the state of war, whereas their origin should be internal to the State.[37] Interestingly, some scholars believe that the state of exception could also be declared to address an economic or financial crisis, provided that the crisis was of such magnitude that it would threaten the public order.[38] However, it is also argued that this would be unnecessary because the 1997 Constitution leaves the legislature very broad discretion in limiting socio-economic rights.[39] Even a severe limitation of socio-economic rights could be considered an "ordinary" measure under the 1997 Constitution, so declaring a state of exception to enact such limitations would simply be redundant. Wojtyczek noted that one of the draft constitutions considered by the authors of the 1997 Constitution provided for a "state of economic emergency" too, but this idea was not accepted.[40]

(3) ***The state of natural disaster*** (Article 232 of the Constitution) is defined in the implementing legislation as a "natural catastrophe or a technical incident the effects of which pose a danger to the life or health of a great number of people, property of great size, or the environment in significant areas […]."[41] Steinborn argues that a natural catastrophe or a technical incident that would cause only an economic hindrance to the State should not result in declaring a state of natural disaster.[42] The implementing legislation contains further definitions. A "natural catastrophe" is a "phenomenon caused by the forces of nature such as seismic shocks, strong winds, intensive rains, extreme air tem-

[36] Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja RP. Tom II. Komentarz do art. 87–243,* edited by Marek Safjan and Leszek Bosek. Beck, 2016, pp. 1619–1620.

[37] Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja RP. Tom II. Komentarz do art. 87–243*, edited by Marek Safjan and Leszek Bosek. Beck, 2016, p. 1619.

[38] Kazimierz Działocha, "Artykuł 230," p. 4. *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom IV*, edited by Leszek Garlicki, Wydawnictwo Sejmowe, 2005. Cf. Krzysztof Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytutcji RP*. Zakamycze, 1999, p. 254. Steinborn seems to argue that the state of exception could be declared to address an acute stage of the financial crisis, as the state of exception must be time limited. Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja RP. Tom II. Komentarz do art. 87–243*, edited by Marek Safjan and Leszek Bosek. Beck, 2016, p. 1620.

[39] Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja RP. Tom II. Komentarz do art. 87–243*, edited by Marek Safjan and Leszek Bosek, Beck, 2016, p. 1620. See also: Michał Krajewski, "The Constitutional Quandary of Social Rights: Questions in Times of the Polish Illiberal Turn," *International Journal of Constitutional Law*, vol. 21, no. 1, January 2023, pp. 156–186, https://doi.org/10.1093/icon/moad018

[40] Krzysztof Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytutcji RP*, Zakamycze, 1999, p. 254 (footnote 21).

[41] Polish Sejm, Act of 18 April 2002 on the state of natural disaster, *Dziennik Ustaw*, no. 62, item 558, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20020620558

[42] Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja RP. Tom II. Komentarz do art. 87–243,* edited by Marek Safjan and Leszek Bosek, Beck, 2016, p. 1626.

peratures, landslides, fires, draughts, floods […], a massive infestation of plant or animal pests and diseases or contagious human diseases […].” A “technical incident” can be a sudden, unexpected breakdown or damage of a building or technical device (for instance, an electrical plant).[43]

Epidemic. As already mentioned, ordinary legislation allows also declaring an extra-constitutional state of “epidemic threat” or “epidemic” when threats of this kind arise. The legislation contains only general indications as to what kind of events justify a declaration of one of the said states of emergency, so the executive seems to enjoy broad discretion in this regard.[44] However, scholars argue that, when responding to the COVID-19 pandemic, it would have been more appropriate to declare a constitutional state of natural disaster.[45] Notably, the state of natural disaster, according to the implementing legislation quoted above, can be introduced in case of “contagious human diseases.”

Financial crisis. A “triggering event” for recognising a “financial crisis” in the case law of the Constitutional Tribunal should also be discussed. Interestingly, the fact that Poland was subjected to the EU Excessive Deficit Procedure meant for the Tribunal that the legislature acted in the context of a “financial crisis” and had to protect the constitutional value of “budgetary balance” or the “balance of public finance.” In this context, the Tribunal upheld the constitutionality of limitations to existing socio-economic rights and general principles, such as the protection of legitimate expectations and the principle of citizens’ trust towards the State and its laws (for instance, trust towards previously established statutory rules governing the pension system). In its early case law in the 1990s, the Tribunal considered that financial difficulties of the State could not justify any lowering of constitutional standards because the Constitution does not formally lay down a state of “economic emergency,” which could be officially declared like the state of natural disaster or war.[46] However, in subsequent cases, the Constitutional Tribunal did not follow the same reasoning and treated “budgetary balance” as a self-standing constitutional value, which needed special protection during “economic emergencies.”

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[43] Polish Sejm, Act of 18 April 2002 on the state of natural disaster, *Dziennik Ustaw*, no. 62, item 558, in Article 3, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20020620558

[44] Mateusz Radajewski, “Stan zagrożenia epidemicznego oraz stan epidemii jako formy prawne ochrony zdrowia publicznego,” *Przegląd Legislacyjny*, no. 4, 2021, pp. 59–86, p. 64.

[45] Piotr Tuleja, “Pandemia Covid-19 a konstytucyjne stany nadzwyczajne,” *Palestra*, no. 9, 2020, pp. 5-20, https://palestra.pl/pl/czasopismo/wydanie/9-2020/artykul/pandemia-covid-19-a-konstytucyjne-stany-nadzwyczajne

[46] Polish Constitutional Tribunal, Judgment of 11 February 1992, Case K 14/91, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&dokument=43&sprawa=3192

Nonetheless, the Tribunal admitted having difficulty recognising whether a "triggering event" for the state of "financial crisis" occurred. In one of the controversial cases, which resulted in dissenting opinions of some judges, the Tribunal admitted that:

> Even using official indicators, [the Constitutional Tribunal] has difficulties assessing categorically the state of Polish public finances, in particular, whether there is a threat to the budgetary balance as an important constitutional value, whereas this would have an impact on assessing whether the impugned provisions comply with the Constitution. Even the ratio of public debt to GDP, a fundamental indicator for assessing the State's financial condition, can be determined differently in the case of Poland, depending on the calculation method. Calculated following the "national methodology," it amounted to 53.5% in 2011 […], but calculated following the "EU methodology," it amounted already to 56.4% [...]. This difference is of fundamental importance since the second prudential threshold was established at the level of 55% [...] the Constitutional Tribunal is not competent to assess which methodology for calculating the public debt to GDP ratio is more accurate […]. However, it cannot ignore the disturbing conclusions resulting from the level of the public debt to GDP ratio calculated according to the "EU methodology."
>
> There is no doubt that the Polish sovereign debt tends to grow […]. This trend has intensified in recent years, which has led to Poland being subjected to the procedure provided for in Article 126 of the Treaty on the Functioning of the European Union, known as the excessive deficit procedure […].[47]

Even if the excessive deficit procedure was not the exclusive reason for the Constitutional Tribunal to "trigger" the "budgetary balance" doctrine, it was one of the important arguments for doing so. To illustrate how this doctrine worked in practice, it should be noted that, in the case at hand, the Constitutional Tribunal invoked the "budgetary balance" to uphold a "freeze" of the indexation of judicial salaries. According to the Constitution, the judges' pay must correspond to the "dignity of their office."[48] Consequently, this pay should be significantly higher than the average pay in the public sector and generally tend to grow over a more extended period. In case of difficulties with public finances, this pay should enjoy special protection, as it is a crucial safeguard of judicial independence.[49] Nonetheless, in that case, the Tribunal prioritised the "budgetary balance." It ruled that it was constitutional to

[47] Polish Constitutional Tribunal, Judgment of 12 December 2012, Case K 1/12, section III.3.2., https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&dokument=8559&sprawa=8356

[48] Polish National Assembly, The Constitution of the Republic of Poland of 2 April 1997. *Dziennik Ustaw*, 1997, no. 78, item 483, in Article 178(2), https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (English translation).

[49] Polish Constitutional Tribunal, Judgment of 12 December 2012, Case K 1/12, section III.5.1.2. and the case law cited, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&dokument=8559&sprawa=8356

"freeze" the indexation of judicial pay in the context of the public finance crisis, even though it was shown that judges' pay played a minimal role in the overall State budget.

On the one hand, the Tribunal seemed to draw some red lines. It said it would never be acceptable to *decrease* the judicial pay unless the constitutional limit of 3/5 GDP for the sovereign debt were reached (although the absence of nominal indexation might imply a decrease of the actual value of the pay).[50] On the other hand, one of the dissenting judges argued that "the argument of budgetary balance in this case is unconvincing to me. I do not want to say that I disregard its significance. I want to say that the lawmaker does not use this argument in a reliable way. While freezing the judicial pay, it raises the pay of other groups" (with the effect that the overall amount of the increase was greater than the overall cost of the judicial pay). That dissenting judge argued that by proceeding in this way, the lawmakers deprived the constitutional protection of judicial pay of any practical significance, whereas this was the only "pay" of a specific professional group protected in the Constitution explicitly.[51] Another dissenting judge pointed out that the Tribunal had not verified the documents from the legislative process to see whether the lawmakers had actually examined whether the freeze of judicial pay had been unavoidable and whether alternative options had been duly considered. In that judge's view, relevant documents could demonstrate that the lawmakers had made an arbitrary decision.[52] In the context of those dissenting opinions, it seems that the "financial crisis" argument was crucial for the Tribunal in deciding this case, seeing the weight of contrary constitutional arguments.

Question 4

The first constraint relates to "legality" or "legal basis." Under Article 288(2) of the Constitution, a constitutional state of emergency may be introduced only *based on a statute*. This means the executive authorities cannot declare a state of emergency based only on the relevant constitutional provision. The legislature must first adopt implementing statutory provisions governing the three states of emergency in more detail than the Constitution. These statutory provisions must specify how public authorities ought to operate during states of emergency and, most importantly, whether and how individual freedoms

[50] Polish Constitutional Tribunal, Judgment of 12 December 2012, Case K 1/12, sections III.5.1.5. and III.5.1.6., https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&dokument=8559&sprawa=8356

[51] Mirosław Granat, Dissenting opinion, Case K 1/12, paragraph 3, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&dokument=8559&sprawa=8356

[52] Wojciech Hermeliński, Dissenting opinion, Case K 1/12, paragraph 2.2., https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&dokument=8559&sprawa=8356

and rights can be limited.[53] At present, there are three statutes concerning states of emergency:

(1) the statute of 29.8.2022 on the state of war and the powers of the Supreme Commander of Armed Forces and the principles regarding his supervision by the constitutional authorities of the Republic of Poland,[54]
(2) the statute of 21.6.2002 on the state of exception,[55]
(3) the statute of 18.4.2002 on the state of natural disaster.[56]

Once these statutory provisions are in force, the President of Poland can declare states of war or a state of exception by issuing a regulation at the request of the Council of Ministers. Within 48 hours, the President must submit this regulation to the Sejm (the lower chamber of the parliament). The Sejm can repeal the regulation by an absolute majority. Also, the regulation must be publicly announced. The state of war can be declared for as long as necessary, whereas the state of exception can be declared for a maximum of 90 days, but the President can prolong it, with the consent of the Sejm, for another 60 days.[57] As regards the state of natural disaster, the Council of Ministers can declare it by issuing a regulation. The President of Poland is not involved. The Council of Ministers can declare a state of natural disaster for a maximum of 30 days. It can prolong this state with the consent of the Sejm.[58]

The authority declaring a state of emergency – the President of Poland or the Council of Ministers – must indicate in its regulation which fundamental freedoms and rights are to be limited and how (for instance, a ban on public assemblies). This authority must follow the detailed constraints established in Article 233 of the Constitution and the three above statutes. Article 233 lays down some general lines for acceptable and unacceptable restrictions. At the same time, the implementing statutes contain relatively precise "lists" of acceptable restrictions, from which the executive authority declaring a state of emergency can choose and further specify and narrow down the restrictions.

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[53] Sławomir Steinborn, "Rozdział XI. Stany Nadzwyczajne." *Konstytucja RP. Tom II. Komentarz do art. 87–243*, edited by Marek Safjan and Leszek Bosek, Beck, 2016, p. 1611.

[54] Polish Sejm, Act of 29 August 2002 on the state of war […]. *Dziennik Ustaw*, no. 156, item 1301, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20021561301

[55] Polish Sejm, Act of 21 June 2002 on the state of exception, *Dziennik Ustaw*, no. 113, item 985, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20021130985

[56] Polish Sejm, Act of 18 April 2002 on the state of natural disaster, *Dziennik Ustaw*, no. 62, item 558, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20020620558

[57] Polish National Assembly, The Constitution of the Republic of Poland of 2 April 1997, *Dziennik Ustaw*, 1997, no. 78, item 483, in Articles 229–231, https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

[58] Polish National Assembly, The Constitution of the Republic of Poland of 2 April 1997, *Dziennik Ustaw*, 1997, no. 78, item 483, in Article 232, https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

This procedure results in that only *minimal* law-making power is delegated to the executive. The executive does *not* receive powers to *create* new laws, even temporary ones. It is authorised to merely "activate" and further specify restrictions already foreseen in the Constitution and statutes concerning the states of emergency.

As mentioned, each regulation declaring a state of emergency must be submitted to the Sejm. First and foremost, the Sejm must review whether the conditions for introducing a specific state of emergency have been met (whether the "triggering event" has indeed occurred). At the same time, the Sejm must approve the restrictions of fundamental freedoms and rights envisaged by the President of Poland and/or the Council of Ministers. Florczak-Wątor points out that it is problematic that the Sejm cannot introduce amendments to these restrictions (for instance, alleviate them). It can only approve or repeal the regulations in their entirety. This means that if the Sejm agreed with declaring a state of emergency but considered specific restrictions unjustified, it would have to repeal the entire regulation and count on the President of Poland or the Council of Ministers to issue a new one that would better reflect the Sejm's view. To Florczak-Wątor, it is also unclear whether the Sejm can repeal the regulation only at the time of its submission within 48 hours or later as well, should it conclude that the state of emergency should be lifted at some point. Moreover, it is unclear why a regulation declaring a state of natural disaster does not have to be submitted to the Sejm at all.[59] The authors of the Constitution might have considered that the need to address natural disasters would be less "contentious" or "political." Finally, it should be noted that the Constitution of 1997 is silent on the judiciary's role in declaring the states of emergency.

The extra-constitutional states of an epidemic threat and epidemic are declared in an analogical manner, that is, through regulations, although the catalogue of authorities empowered to declare a state of epidemic threat or epidemic is broader: a voivode (regional governor), a minister, or the Council of Ministers. These authorities must also specify the necessary restrictions on fundamental freedoms and rights. However, as discussed below, it is argued that the statute leaves too much leeway in defining these restrictions to the executive, which is said to be more than the Constitution allows.

[59] Monika Florczak-Wątor, "Konstytucyjna regulacja stanów nadzwyczajnych w świetle dotychczasowej praktyki jej (nie)stosowania," *Państwo i Prawo*, no. 10, 2022, pp. 333–350, pp. 338–339.

Question 5

There seems to have been no such influence regarding the definition of constitutional states of emergency. However, as already mentioned, launching the Excessive Deficit Procedure in respect of Poland triggered the Constitutional Tribunal's doctrine in the early 2010s regarding the protection of "budgetary balance." Moreover, the Constitutional Tribunal found a legal basis for this doctrine in Chapter X of the Polish Constitution, which concerns the discipline of public finance. The Treaty of Maastricht inspired this chapter.[60] Article 220, contained in this Chapter, stipulates that, while adopting the annual State budget, the parliament cannot increase the level of sovereign debt proposed by the Council of Ministers. Moreover, Article 221 states that the central bank cannot finance the sovereign debt. Crucially, according to Article 216(5) of the Constitution, the sovereign debt cannot exceed 3/5 of the annual GDP. The authors of the Constitution introduced the latter provision, modelled upon the Treaty of Maastricht, wishing to avoid the excessive deficit that occurred in Poland in the 1970s and, in the long run, contributed to the economic crisis and the ensuing fall of the communist regime. Moreover, the authors of the Constitution wished to align Polish law with EU law, given the expected Polish accession to the EU. Therefore, the influence of EU law on defining the situation of "economic emergency" in Polish constitutional case law may seem indirect but is nonetheless visible.[61]

Question 6

Financial crisis. In the early 2010s, the Polish authorities consulted with EU institutions and implemented a series of policies in the context of the EU Excessive Deficit Procedure. Poland imposed a freeze on public wages, a gradual increase and equalisation of the retirement age for men and women to sixty-seven years, and a review of social expenditures and their efficacy, among other measures.[62] Some of these policies were challenged before the

[60] Polish National Assembly, Constitutional Committee, Debate of 23–24 January 1996, *Bulletin of the Constitutional Committee of the National Assembly*, vol. 29, 1996, pp. 49–54, https://bs.sejm.gov.pl/F?func=direct&doc_number=000007248&CON_LNG=POL&local_base=bis01. See also: Interview by Zbigniew Bujak with Jerzy Ciemniewski, Member of the Constitutional Committee of the National Assembly, in Zbigniew Bujak, *Konstytucja starsza niż myślisz*, Wydawnictwo ZB, 2017, pp. 293 and 300–301.

[61] Michał Krajewski, "The Constitutional Quandary of Social Rights: Questions in Times of the Polish Illiberal Turn," *International Journal of Constitutional Law*, vol. 21, no. 1, January 2023, 156–186, p. 167, https://doi.org/10.1093/icon/moad018

[62] See: European Commission, "Commission Assessment of the action taken by Poland in response to the Council Recommendation to Poland with a view to bringing an end to the situation of excessive government deficit," COM(2010)24, 3 February 2010, p. 4. See also: Council of the European Union, "Council Recommendation with a view to bringing an end to the situation of an excessive government deficit in Poland," Council doc. 10561/13, 21 June 2013.

Constitutional Tribunal. While examining their constitutionality, the Tribunal considered that they had been adopted in the financial crisis and emphasised the constitutional protection of the "budgetary balance." The following cases can illustrate this approach.[63]

In 2012, the Constitutional Tribunal had to decide whether lawmakers could change the indexation mechanism for retirement benefits for one year. That year, the lawmakers introduced an *ad hoc* mechanism for a nominal indexation by a fixed amount paid to all beneficiaries, thus replacing the standard percentage indexation mechanism linked to the increase in the prices of goods and salaries. This change was designed so that more resources were transferred to the recipients of the lowest benefits while the overall cost for the State budget of these benefits remained unchanged.

According to established case law, the Polish Constitution protects the right to social security, which includes the right to an indexation of social benefits, because the actual value of these benefits should correspond to the socio-economic reality. Nonetheless, according to the Constitutional Tribunal, the constitutional protection of indexation is minimal. It would be breached only if the value of benefits dropped below the minimum subsistence level (necessary for survival).[64]
In that specific case, the Constitutional Tribunal referred to the "financial crisis" and found that:

> Growing disparities between the financial situation of the recipients of social benefits and the capacity of the State budget in the face of a crisis of public finance in EU Member States, to which the Polish economy is organically linked […], forced the Polish lawmakers to search for optimal mechanisms of indexation in 2012. The Tribunal holds that by introducing ad hoc in 2012, through a temporary law, the indexation of social benefits by a fixed amount, the lawmakers did not breach the essence of the right to social security, while the principle of balance in public finance and social solidarity justified this action.[65]

A few dissenting judges argued, among other things, that in that case, the Constitutional Tribunal should have prioritised the constitutional protection of trust towards the State. They noted that the social security system is based on the contributions of persons insured. The State "promises" these people will be paid their retirement benefits in the future, the value of which should

[63] See further: Michał Krajewski, "The Constitutional Quandary of Social Rights: Questions in Times of the Polish Illiberal Turn," *International Journal of Constitutional Law*, vol. 21, no. 1, January 2023, pp. 156–186, pp. 172–183, https://doi.org/10.1093/icon/moad018

[64] Polish Constitutional Tribunal, Judgment of 19 December 2012, Case K 9/12, section III.3.4.2., https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=8649&sprawa=8553

[65] Polish Constitutional Tribunal, Judgment of 19 December 2012, Case K 9/12, section III.6.1.24., https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=8649&sprawa=8553

remain predictable and stable. By decreasing the value of benefits unexpectedly, in an *ad hoc* manner, the lawmakers did not foster trust towards the social security system, thus breaching the Constitution. Some judges opined that the principle of equal treatment was breached in that case too (as all the recipients of benefits were treated in the exact same way regardless of how much they contributed to the social security system) and that the constitutional protection of the indexation mechanism, aimed at maintaining the stable value of social benefits, should have been stronger.[66]

Around the same time, the Tribunal ruled in another high-profile case concerning the transfer of obligatory retirement savings from private commercial funds to the State budget. These private institutions invested only in safe State bonds. The lawmakers considered that those investments in the State bonds were made with public money (only entrusted to the private institutions), so they passed legislation "invalidating" these bonds, thereby nominally decreasing the amount of sovereign debt. This move helped the government to meet the goals set within the EU Excessive Deficit Procedure.[67] The Tribunal confirmed that the funds were considered public in character, so lawmakers could decide how to manage them without breaching the constitutional principle of trust towards the State. The Tribunal noted that, in any case, the State remains constitutionally and legally obliged to pay the retirement benefits to the persons insured, so the constitutional principle of trust was not breached no matter who kept and managed the contributions to the social security system: a public institution or private funds.[68]

Dissenting judges counter-argued that by prioritising the budgetary balance during the public finance crisis, the lawmakers weakened the right to social security of future recipients of retirement benefits. They considerably limited one of the pillars of the social security system, which was supposed to be internally diversified and, thus, more stable and resilient. That pillar was private funds managing a significant part of contributions for retirement benefits; those funds were to remain independent from the State budget, making the system more resilient overall. It was pointed out that, after the transfer, the contributions effectively ceased to exist as the transfer consisted of "invalidating" State bonds. According to the dissenting judges, the persons insured had the constitutionally protected right to trust the State's earlier promise that their

[66] Maria Gintowt Jankowicz, Dissenting opinion, Case K 9/12; Mirosław Granat, Dissenting opinion, Case K 9/12, Piotr Tuleja, Dissenting opinion, Case K 9/12, Polish Constitutional Tribunal, Judgment of 19 December 2012, Case K 9/12; all available at https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=8649&sprawa=8553

[67] Polish Constitutional Tribunal, Judgment of 4 November 2015, Case K 1/14, section I.6, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=12983&sprawa=12798

[68] Polish Constitutional Tribunal, Judgment of 4 November 2015, Case K 1/14, sections III. 9.5. and 9.6., https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=12983&sprawa=12798

contributions would remain covered by capital and managed independently of the State budget.[69]

Another policy change during that period was introducing a gradual increase and levelling up of the retirement age for both men and women (67 years of age).[70] This reform was also challenged before the Tribunal.[71] The Tribunal found no breaches of the constitutional protection of trust and acquired rights as the reform was justified in the context of the financial crisis and the need to protect the budgetary balance. This ruling also attracted multiple dissenting opinions. The dissenting judges criticised the absence of impact assessments that would consider alternative options and provide for mitigating policies. Those judges also argued that the lawmakers did not consider the length of life of persons insured in good health after reaching the new retirement age, given the state of healthcare in Poland.[72]

Migration crisis on the Polish-Belarussian border. It has been reported that since August 2021 the Belarussian authorities have been using migrants, transporting them to the Polish-Belarussian border, encouraging and facilitating irregular migration, to undermine border control as part of "hybrid warfare" against the EU.[73] Bodnar and Grzelak, among others, report on many controversies regarding how the Polish authorities have handled the situation, including information about unlawful push-backs and restrictions upon activists.[74] The President of Poland declared a state of exception in September 2021 to address this situation. At the same time, in November 2021, the Council of the EU enhanced restrictive measures against Belarussian authorities[75]

[69] Mirosław Granat, Dissenting Opinion, Case K 1/14; Wojciech Hermeliński, Dissenting opinion, Case K 1/14; Teresa Liszcz, Dissenting opinion, Case K 1/14; all available at https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=12983&sprawa=12798

[70] Council of the European Union, "Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Poland and delivering a Council opinion on the updated Convergence Programme of Poland, 2011–2014," 2011/C 217/02, OJ C 2017/5, Article 3.

[71] Polish Constitutional Tribunal, Judgment of 7 May 2014, Case K 43/12, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=10805&sprawa=10378

[72] Zbigniew Cieślak, Dissenting opinion, Case K 43/12; Granat, Mirosław, Dissenting opinion, Case K 43/12; Marek Kotlinowski, Dissenting opinion, Case K 43/12; Liszcz, Teresa, Dissenting opinion, Case K 43/12; all available at https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=10805&sprawa=10378

[73] Ondřej Filipec, "Multilevel Analysis of the 2021 Poland–Belarus Border Crisis in the Context of Hybrid Threats," *Central European Journal of Politics*, vol. 8, 2022, pp. 1–18, p. 1, https://doi.org/10.24132/cejop_2022_1

[74] Adam Bodnar and Agnieszka Grzelak, "The Polish–Belarusian Border Crisis and the (Lack of) European Union Response," *Białystok Legal Studies*, vol. 28, no. 1, 2023, pp. 57–86, pp. 66–70, https://doi.org/10.15290/bsp.2023.28.01.04

[75] Council of the European Union, Council Regulation 2021/1986 of 15 November 2021 amending Regulation 765/2006 concerning restrictive measures in respect of Belarus, OJ L 405/3, https://eur-lex.europa.eu/eli/reg/2021/1986/oj; Council of the European Union, Council Regulation 2021/1985 of 15 November 2021 amending Regulation 765/2006 concerning restrictive measures in respect of Belarus, OJ L 405/1, https://eur-lex.europa.eu/eli/reg/2021/1985/oj

and partially suspended the EU-Belarus Visa Facilitation Agreement.[76] In December 2021, the Commission proposed emergency measures for Poland, among others, under Article 78(3) TFEU.[77] Bodnar and Grzelak argued that those measures were not effective and that the EU and Polish institutions should focus not only on security-related considerations but also on the human rights dimension of the migration crisis.[78]

COVID-19 pandemic. During the COVID-19 pandemic Polish authorities declared an extra-constitutional state of epidemic threat and epidemic, and adopted a special law addressing this challenge, as already mentioned. Among other things, this special legislation provided for financial assistance for entrepreneurs, which coincided with more lenient EU rules concerning State aid.[79]

***Ban on imports of grain from Ukrain*e.** The Russian invasion of Ukraine has significantly surged the Ukrainian export of grain to Poland, among other neighbouring countries. The Commission introduced limits on the imports of these goods.[80] However, this measure was lifted in 2023, and because of this, Poland, among others, introduced unilateral restrictive measures, except for goods transited to other EU countries.[81]

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

History. The authors of the 1997 Constitution created a separate Chapter XI to govern the three states of emergency. Arguably, they wished to avoid abuses of fundamental freedoms and rights similar to those that had occurred during

[76] Council of the European Union, Council Decision 2021/1940 of 9 November 2021 on the partial suspension of the application of the Agreement between the European Union and the Republic of Belarus on the facilitation of the issuance of visas, OJ L 396/58, https://eur-lex.europa.eu/eli/dec/2021/1940/oj

[77] European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM(2021) 752 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A752%3AFIN

[78] Adam Bodnar and Agnieszka Grzelak, "The Polish–Belarusian Border Crisis and the (Lack of) European Union Response," *Białystok Legal Studies*, vol. 28, no. 1, 2023, pp. 57–86, https://doi.org/10.15290/bsp.2023.28.01.04

[79] European Commission, Polska Tarcza Antykryzysowa Zatwierdzona, 22 April 2020, https://poland.representation.ec.europa.eu/news/polska-tarcza-antykryzysowa-zatwierdzona-2020-04-22_pl

[80] European Commission, Commission Implementing Regulation (EU) 2023/903 of 2 May 2023 introducing preventive measures concerning certain products originating in Ukraine, OJ L 114/1, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32023R0903

[81] Polish Minister of Growth and Technology, Regulation of 15 September 2023 concerning the import of agricultural products from Ukraine, *Dziennik Ustaw*, item 1898, https://dziennikustaw.gov.pl/DU/2023/1898

the so-called state of war 1981–1983, also known in the English literature concerning Polish history as martial law.[82] This "state of war" or "martial law" was introduced in 1981 by the members of communist authorities to address strikes and protests organised by the *Solidarność* movement.[83]

A similar solution was adopted already in the communist 1952 Constitution. Under Article 28, the Council of State (the collegial head of state) could introduce a state of war on the entire or part of the territory of the State, considering the need to defend it. However, the 1952 Constitution did not provide further details regarding the state of war or any other "states of emergency," such as a "state of exception" or similar. As argued by Brzeziński, its authors generally believed that a state of exception due to internal threats has no place in socialist constitutions. They considered this state to be a Western invention that had been instrumentalised against political opponents and, in particular, socialist activists in an anti-democratic way. On the contrary, the socialist State was supposed to represent the dominant working class genuinely, so it was inconceivable that the working class could stand against its socialist State, thereby giving rise to the need to declare a "state of exception" or similar.[84] Nonetheless, it was argued that the "state of war," under Article 28 of the 1952 Constitution, encompassed both external threats (military aggression) and internal threats (internal security).[85] That Article of the Constitution of 1952 was not used in practice for a few decades. Neither was there an implementing parliamentary statute, whereas the constitutional provision itself was incomplete, so it could not be applied directly. That constitutional provision did not even say what legal effects a state of war was supposed to produce, which freedoms and rights could be curtailed, for how long, and so on. [86]

The Council of State adopted implementing legislative decrees only in 1981 in the face of massive anti-governmental protests by *Solidarność*. It declared a state of war simultaneously. However, it was subsequently pointed out that the Council of State did not have the power to adopt such decrees as a session of the Sejm (which held the ordinary legislative power) had been ongoing when the decree was adopted. According to the 1952 Constitution, the Council of State could adopt legislative decrees only *between* the sessions of the Sejm.[87]

[82] Rafał Mańko, "'Our Fatherland has found itself on the verge of an abyss': Poland's 1981 martial law, or the unexpected appearance of the state of exception under actually existing socialism," *States of Exception: Law, History, Theory*, edited by Cosmin Cercel, Gian Giacomo Fusco, Simon Lavis. Routledge, 2020, pp. 140–166.

[83] Polish Constitutional Tribunal, Judgment of 16 March 2011, Case K 35/08, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=6583&sprawa=4934

[84] Michał Brzeziński, *Stany nadzwyczajne w polskich konstytucjach*, Wydawnictwo Sejmowe, 2007, pp. 13–14 and 128–130.

[85] Ibidem, pp. 136–137.

[86] Ibidem, pp. 140–147.

[87] Polish Constitutional Tribunal, Judgment of 16 March 2011, Case K 35/08, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=6583&sprawa=4934

Subsequently, in 1983, new legislation created the possibility of introducing a "state of exception." The Council of State or its president could declare a state of exception due to internal threats or natural disasters. Parliamentary statutes were supposed to specify the details of these states of emergency and their consequences.[88] At the same time, different concepts were introduced in the public debate and legal doctrine, such as the state of "higher necessity," to justify the introduction of the "state of war" ("martial law") in 1981.[89]

Moving further to the past, it can be added that the 1935 Constitution (the "April Constitution" introducing an inter-war quasi-authoritarian presidential regime) also mentioned a state of emergency. According to its Chapter XII, the Council of Ministers, upon the consent of the President of the Republic, could declare a "state of emergency" in case of an external threat, internal riots, or a *coup d'état*. Both chambers of the parliament could repeal this declaration. During the state of emergency, the Council of Ministers could suspend civil rights and exercise extraordinary powers, as determined by a statute on the state of emergency. Compared to the 1997 Constitution, the chapter of the 1935 Constitution on the states of emergency was much more succinct. It did not specify which civil rights could be suspended and to what extent. It did not seem to require a legislative basis for such a suspension. Moreover, in case of an external military threat, the President of the Republic could declare a "state of war," during which he had the power to issue legislative decrees, reduce the composition of the parliament, and postpone its sessions.[90] Overall, the 1935 Constitution gave much greater and unconstrained power to the executive during a state of emergency, especially since the President of the Republic could control, in practice, the parliament and the Council of Ministers.

Finally, the earliest democratic Constitution of independent Poland of 1921 (the "March Constitution") introduced a provision about the state of emergency in Chapter V concerning constitutional freedoms and rights. It stipulated that only freedoms and rights specifically listed in this Chapter (personal freedom, the inviolability of one's dwelling, the freedom of the press, the secrecy of correspondence, and the freedom of association) could be *temporarily* suspended during a state of emergency, as declared by the Council of Ministers upon the consent of the President of the Republic. Therefore, the 1997 Constitution, which provides for a list of rights and freedoms that can or cannot be curtailed during specific states of emergency, is somewhat reminiscent of the 1921 Constitution. According to the latter, the state of emergency could be introduced in case of war, a threat of war, internal riots or *coup d'etat*. The state of emergency

[88] Polish Sejm, Act of 5 December 1983 on the state of exception, *Dziennik Ustaw*, no. 66, item 297, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19830660297/O/D19830297.pdf

[89] Michał Brzeziński, *Stany nadzwyczajne w polskich konstytucjach*, pp. 14–15.

[90] Constitutional Act of 23 April 1935, in Articles 78–79, https://iura.uj.edu.pl/Content/344/PDF/Konstytucja%20kwietniowa%2035%2030%20227%2023%2004%201935.pdf#page=22.59

needed to be approved by the parliament as soon as possible. Otherwise, it was automatically repealed.[91] Therefore, the executive's powers during the state of emergency were significantly restrained.

Current constitutional provisions on the states of emergency. Returning to the current 1997 Constitution, it should be noted that Chapter XI concerning the states of emergency is structured in the following way. Article 228 lays down robust principles protective of individual freedoms and rights, which apply in all types of the state of emergency:

1) **Subsidiarity**. The state of emergency can be introduced if "ordinary constitutional measures are insufficient" to address "the situations of exceptional danger."
2) **Legality**. A state of emergency can be introduced only based on parliamentary statutes addressing the specific types of states of emergency. The statute must also specify how public authorities should operate during a state of emergency and how the executive can limit freedoms and rights.
3) **Compensation**. A statute may also lay down rules for compensating damages caused by restrictions of freedoms and rights during a state of emergency. It is argued that passing such legislation is optional to facilitate legal claims for compensation for damages caused by activities undertaken in the context of states of emergencies. The lawmakers can also decide that citizens themselves will have to bear a part of the costs incurred by the State. The Polish parliament passed such legislation in 2002.[92] It restricts compensation to be paid out to the damages actually suffered (*damnum emergens*), whereas the general principle of Polish law is to compensate for lost profits too (*lucrum cessans*). An administrative decision concerning the compensation is issued by a voivode (regional governor) and is amenable to judicial review.[93]
4) **Proportionality and adequacy**. Any actions during a state of emergency must be proportionate to the level of danger and aimed at "*restoring the normal functioning of the State as soon as possible*".
5) **Constitutional and legislative "moratorium."** During a state of emergency, the Constitution, electoral laws, and laws governing states of emergency cannot be changed.
6) **Electoral "moratorium."** During a state of emergency and 90 days after its lifting, there can be no referendum or election (parliamentary, presidential, local). The relevant authorities' office terms (the parliament, the President of the Republic, and local governments) are automatically extended.

[91] Polish Sejm, Act of 17 March 1921 – the Constitutional of the Republic of Poland, *Dziennik Ustaw*, no. 44, item 634, Article 124, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19210440267/O/D19210267.pdf#page=1.00&gsr=0

[92] Polish Sejm, Act of 22 November 2022 on the compensation of property losses resulting from the restriction of human and civil freedoms and rights during the state of emergency, *Dziennik Ustaw*, no. 233, item 1955, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20022331955

[93] Krzysztof Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Temida 2, 2005, pp. 26–27.

Articles 229, 230–231, and 232 concern the states of war,[94] exception and natural disaster, as discussed earlier. Article 233 is crucial since it lists freedoms and rights that *cannot* be limited during states of *war* and *exception* (negative limits): human dignity, citizenship, the protection of life, humanitarian treatment, the safeguards concerning criminal liability, the right to a fair trial, the right to privacy, the freedom of religion and conscience, the right to bring petitions, the rights of a family and children. This provision also rules out limiting rights and freedoms based on race, gender, language, religion or lack thereof, social background, origin, or assets. The same provision lists freedoms and rights that *can* be limited during the state of *natural disaster* (positive limits): the freedom of business, personal freedoms, the inviolability of one's dwelling, the freedom to move and reside on the territory of Poland, the right to strike, the right to property, the freedom of labour, the right to safe and hygienic conditions of work, the right to rest after work.

Finally, Article 234 gives the President of the Republic the power to issue legislative decrees if the Sejm cannot be convened during the state of war. However, the potential scope of such legislative decrees is minimal. They can only concern matters not yet regulated in the statute on the state of war (i.e., they could, for instance, introduce additional possibilities to limit freedoms and rights during the state of war or to compensate the damages suffered by people affected by war).

Question 2

As discussed in Section 1, Question 4 above, the states of emergency can be declared by the President of Poland at the request of the Council of Ministers (the state of war, the state of exception) or by the Council of Ministers (the state of natural disaster) through regulations. Such regulations need a statutory basis, meaning they can only "activate" restrictions upon freedoms and rights already foreseen in the parliamentary statutes on the states of emergency. Moreover, the Sejm can repeal these regulations but not amend their specific provisions. Overall, there seems to be no delegation of "genuinely creative" law-making power upon the executive during states of emergency.

In addition, there is also an extra-constitutional state of epidemic threat and epidemic, provided for in ordinary legislation, which can be declared by the Council of Ministers, a minister, or a voivode. The constitutionality of this

[94] The state of war should be distinguished from declaring 'war' and 'peace' to other States, which can be done by the Sejm or, exceptionally, the President of Poland. Polish National Assembly, The Constitution of the Republic of Poland of 2 April 1997. *Dziennik Ustaw*, 1997, no. 78, item 483, in Article 116, https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

legislation is questioned. It is argued that this legislation delegates more law-making power to the executive than the 1997 Constitution allows, which will be discussed below.

The implementation of the emergency measures remains in the hands of the administration and courts. The role of judicial review will be discussed in the following section.

Question 3

Poland is a unitary state, so there are no regional emergency regimes. If a constitutional state of emergency is declared, the autonomy of local governments is limited. During a state of war, the Council of Ministers may determine how the local governments function. It can also suspend their functioning in the territories affected by war activities while the Minister of Defence supervises how local governments discharge their tasks related to State defence. The voivode can also address orders to local governments, and the Prime Minister can remove local governments if they are not sufficiently effective.[95] During a state of exception, the Prime Minister or the voivode coordinates and controls the activities of local governments, depending on whether the state of exception is declared on the territory of one or multiple voivodeships.[96] During a state of natural disaster, the local governments on the territories affected by the natural disaster may form a hierarchy (the authorities of a commune may be subordinated to the authorities of the department, whereas the latter may be subordinated to the voivode), depending on the territories affected. This hierarchy, in which higher echelons may give direct orders to the lower ones, is supposed to ensure more efficient management of the consequences of the natural disaster. Outside the state of natural disaster, local governments on each level have separate tasks and powers and are independent of each other. However, the voivode supervises them all in terms of the legality of their actions. During a state of natural disaster, the competent minister also receives additional supervisory powers over the local governments whose territories have been affected.[97]

[95] Polish Sejm, Act of 29 August 2002 on the state of war […]. *Dziennik Ustaw*, no. 156, item 1301, in Chapter 2, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20021561301

[96] Polish Sejm, Act of 21 June 2002 on the state of exception, Dziennik Ustaw, no 113, item 985, in Chapter 2, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20021130985

[97] Polish Sejm, Act of 18 April 2002 on the state of natural disaster, *Dziennik Ustaw*, no. 62, item 558, in Chapter 2, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20020620558

Question 4

There are no specific provisions in this regard. In general, both directly effective international law and EU law should take precedence over Polish statutory and infra-statutory law, including the statutory provisions governing the states of emergency and regulatory provisions declaring a state of emergency and introducing specific restrictions.[98]

As mentioned, during the financial crisis, the EU Excessive Deficit Procedure triggered the Constitutional Tribunal to apply the doctrine of budgetary balance, which meant that EU law and constitutional law requirements were aligned, although – according to dissenting judges – constitutional provisions concerning socio-economic rights and related issues deserved stronger protection irrespective of the goals set by EU institutions for Poland's public deficit. Moreover, there have been voices, including in legal scholarly literature, concerning non-compliance of Polish measures addressing the migration crisis on the Polish-Belarussian border with international law and Polish law. Those will be discussed below.

Question 5

The parliamentary statutes on the three states of emergency specify how freedoms and rights can be limited if specific states of emergency are declared. See a general overview in the table below. If the box is empty, this means that this type of restriction is *not* provided by the statute for the given state of emergency.

Restriction	State of war	State of exception	State of natural disaster
Restrictions of the personal freedom (arrest) of persons that may constitute a threat to the State		Art. 17	
Searches of persons who constitute a threat to the State, searches of their apartments and seizure of their belongings	Art. 20		
A duty to undergo medical examinations/ quarantine			Art. 21(1)(5–6)
A preventive censorship of the press	Art. 21(1)	Art. 20(1)(1)	

[98] Polish National Assembly, The Constitution of the Republic of Poland of 2 April 1997, *Dziennik Ustaw*, 1997, no. 78, item 483, in Articles 90–91, https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

A duty of the media to make specific announcements			Art. 26
A control and restriction of correspondence/telecommunication	Art. 21(2–4), Art. 24(5)	Art. 20(1)(2–4), Art. 21(6)	Art. 25
Restrictions on the freedom of association/ organise events and gatherings	Art. 22	Art. 16(1) (1–2 and 6)	Art. 21(1)(14)
A duty to always carry one's ID	Art. 23(1)	Art. 18(1)	
Restrictions of the freedom of movement, transport or residence on the Polish territory (or a duty to leave specific areas)	Art. 26, Art. 23(2)(1–3)	Art. 18(2)(1–3), Art. 21(5)	Art. 21(1) (12–13 and 15), Art. 24
Restrictions on the possibility to record (audio/video) of specific places	Art. 23(2)(4)	Art. 18(2)(4)	
Restrictions on the freedom of information/access to documents	Art. 24(7)	Art. 21(8)	
Restriction on access to consumer goods	Art. 24(1)	Art. 21(1)	Art. 21(1)(4)
Restrictions on the freedom of business and labour (including, for instance, a duty to perform specific work in the public interest or produce specific goods)	Art. 24(2), Art. 25(1–3), Art. 29	Art. 21(2)	Art. 21(1)(1–3 and 19)
A duty to use specific plant/animal protection products			Art. 21(1)(7–9)
Restrictions on the freedom of education	Art. 24(3)	Art. 21(3)	
Restrictions on the freedom of payments/ movement of capital	Art. 24(4)	Art. 21(4)	
Restrictions on the right to possess/carry weapons	Art. 24(6)	Art. 21(7)	
Taking over private buildings, facilities, or vehicles, or using them without the owner's consent	Art. 25(4–5), Art. 27		Art. 21(1)(16)
A duty to leave specific buildings or to demolish them			Art. 21(1) (10–11)
Restriction on the right to strike and workers/farmers/students' protests	Art. 19	Art. 16(1)(3–5)	Art. 21(1)(17)
Restriction of the right to safe and hygienic working conditions (without directly endangering the worker's life)			Art. 21(1)(18)

Overall, constitutionally and legally acceptable restrictions on freedoms and rights seem less serious during a state of natural disaster and they also seem more tailored to the specificity of natural disasters. At the same time, the range of restrictions that can be introduced during states of war and exception seems broadly comparable and more serious.

Moreover, the range of restrictions foreseen by the statute on the states of epidemic threat and epidemic are more tailored to the type of emergencies that this statute addresses, including limits on business activities, the freedom of movement, the duty to undergo a quarantine, a ban on public events, etc.[99]

One could ponder the added value of the above lists of acceptable restrictions on freedoms and rights. Arguably, any such restrictions can be introduced in most European constitutional systems in line with the principle of proportionality, even without declaring a state of emergency. Indeed, under Article 31(3) of the Constitution of 1997, restrictions upon constitutional freedoms and rights can be laid down in a statute when they are necessary to protect the security of the State, public order, the natural environment, public health, public morality, or freedoms and rights of other persons. The restrictions cannot infringe upon the "essence" of freedoms and rights.

The added value seems to lie in the fact that, in normal circumstances, the executive in Poland cannot introduce restrictions to fundamental freedoms and rights. All essential elements of such restrictions should be contained in a statute.[100] During a constitutional state of emergency, the executive received greater power to introduce restrictions. Admittedly, it is still bound by the lists of acceptable restrictions laid down in the statutes on the states of exception, but entries on these lists are rather general, and so the executive have some broader discretion to specify what the actual restriction consists of.

Moreover, Article 288 of the Constitution on the states of emergency is an exception (*lex specialis*) to Article 33(1) concerning the general principle of proportionality. According to Florczak-Wątor, during a state of emergency the essential meaning of the principle of proportionality changes because the reference point of "necessity" changes from the "least onerous measures" to the "most effective measures." In other words, during a state of emergency, the effectiveness of the restriction for restoring the ordinary functioning of the State prevails over the requirement to introduce the least onerous measures for individuals.[101] Consequently, constitutional review should be more concerned with whether the restrictive measures are adequate and effective in fulfilling their main goal rather than whether they are the least restrictive for individuals. Moreover, the ban on limiting the "essence" of constitutional freedoms and rights is narrower in scope because Article 233 lays down the range of rights that cannot be limited.

[99] Polish Sejm, Act of 5 December 2008 on preventing and combatting infections and infectious diseases in humans, *Dziennik Ustaw*, no. 234, item 1570, Articles 46, 46a, 46b, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20082341570

[100] Mateusz Radajewski, "Stan zagrożenia epidemicznego oraz stan epidemii jako formy prawne ochrony zdrowia publicznego," *Przegląd Legislacyjny*, no. 4, 2021, pp. 59–86, p. 74.

[101] Monika Florczak-Wątor, "Konstytucyjna regulacja stanów nadzwyczajnych w świetle dotychczasowej praktyki jej (nie)stosowania," *Państwo i Prawo*, no. 10, 2022, pp. 333–350, p. 341.

The Sejm is the main authority tasked with reviewing the constitutionality and legality of the states of emergency, including whether individual freedoms and rights are limited in accordance with the Constitution and statutes. The Constitution is silent on the powers of courts. However, Florczak-Wątor argues that the Sejm's powers are insufficient to protect fundamental freedoms and rights for several reasons.[102] First, the Sejm cannot *introduce substantive amendments* to the regulation adopted by the President of Poland or the Council of Ministers introducing specific restrictions during the state of emergency. The Sejm can only approve or reject this regulation, as already mentioned. In practice, there may be broad consensus regarding the need to introduce a state of emergency, whereas controversies may concern detailed restrictions of freedoms and rights. It is in line with the legislative role of the Sejm that this body should have the last word on the level and form of restrictions, according to Florczak-Wątor. Second, it is uncertain whether the Sejm, having initially approved the emergency regulation, can repeal it later, should the Sejm change its mind after a while, depending on how the emergency unfolds. Third, it is not entirely logical that, under Article 232 of the Constitution, the Sejm does not have the power to approve or repeal the regulation introducing the state of natural disaster.[103] As already mentioned, the authors of the Constitution of 1997 must have assumed that the need to introduce a state of natural disaster and measures to address it will appear as "objective" or that the Council of Ministers, as an executive body possessing the adequate expertise and responsible for internal affairs, will be best placed to address it.

At the same time, Florczak-Wątor argues that the Constitutional Tribunal *cannot* review the constitutionality of the regulations introducing the states of emergency under the general rules setting out its jurisdiction. Under Article 188(3) of the Constitution, the Constitutional Tribunal can review, among other things, "legal provisions issued by central State authorities." According to case law, such legal provisions must be "normative" in character, which means they must lay down legal norms that are "general and abstract." Florczak-Wątor believes that the regulations introducing the states of emergency are not 'normative' because they do not introduce new legal norms but only confirm which statutory restrictions – pre-defined and pre-included on the statutory list of acceptable restrictions – are supposed to apply during a specific emergency.[104]

Nonetheless, some authors disagree with this interpretation. Radajewski argues that regulations declaring states of emergency have a hybrid "individual-normative" character,[105] but crucially, they are "normative" inasmuch

[102] Ibidem.
[103] Ibidem, p. 338.
[104] Ibidem, p. 339.
[105] Mateusz Radajewski, "Treść, charakter prawny oraz kontrola legalności rozporządzeń dotyczących stanów nadzwyczajnych w świetle Konstytucji RP," *Ruch Prawniczy, Ekonomiczny*

as they allow for the application of specific restrictions of freedoms and rights, even though these restrictions are based on pre-determined statutory provisions.

While this discussion is not settled in Polish literature, it could be argued that specific legal norms become applicable in response to concrete emergencies (a specific flood, a specific pandemic), but such a specific cause does not make these norms individual and concrete. The concrete reason for enacting legal norms is irrelevant to their general and abstract character. A legal norm is "general" when it is addressed to a certain potentially open class of addressees indicated through their objective characteristics (for instance, the residents of Warsaw rather than Michał Krajewski). That a legal norm is *abstract* means that it mandates or bans certain conduct described in the abstract, that is, in isolation from concrete events that occur or are supposed to occur in reality. Consequently, this norm can be executed, followed or breached *an unspecified number of times*. For instance, a legal norm saying that the residents of Warsaw must "refrain from organising public gatherings of more than five people" is *general* and *abstract*. In contrast, a legal norm saying that the residents of Warsaw "cannot participate in the concert of artist *x* that was supposed to take place on day *y* in venue *z*" is *general* but *concrete*. This norm relates to a concrete, one-off event; the norm can be executed, followed, or breached *only once*. Therefore, we would rather call this a *decision* rather than *law*.

While declaring states of emergency, the executive authorities decide on the final form of the applicable restrictions of freedoms and rights. They can add significant specifications to the broader categories of restrictions included on the "statutory lists." Therefore, it could be argued that the executive authorities make specific general and abstract legal norms become applicable during the states of emergency, whereas the pre-existing statutes lay down only a broad framework for these restrictions. These restrictions are general and abstract because they govern certain categories of conduct of certain classes of people. The fact that they apply for a limited time is irrelevant for their normative character. For instance, an emergency restriction could say: "No one can organise gatherings on the territory of commune *x* during the next 30 days." This norm is general ("no one") and abstract (the mandated behaviour is not a one-off action but a continuous conduct that consists of refraining from organising gatherings; consequently, the norm can be executed, followed or breached *an unspecified number of times*, although in the limited period of

i Socjologiczny, no. 4, 2018, pp. 133–146, pp. 141–142; Michał Brzeziński, *Stany nadzwyczajne w polskich konstytucjach*, p. 187. Cf. Piotr Tuleja, "Pandemia Covid-19 a konstytucyjne stany nadzwyczajne," *Palestra*, no. 9, 2020, pp. 5-20, p. 11, https://palestra.pl/pl/czasopismo/wydanie/9-2020/artykul/pandemia-covid-19-a-konstytucyjne-stany-nadzwyczajne (who argues that a regulation declaring a state of emergency is a general act of law application).

30 days).[106] Therefore, it should be concluded that emergency regulations are "normative" (making general and abstract norms become applicable)[107] and, as such, amenable to constitutional review before the Constitutional Tribunal.

If the Constitutional Tribunal accepted this view (there is no precedent yet), this would mean that the Tribunal could verify, first, whether the general conditions (exceptional threats and the insufficiency of ordinary measures) and one of the specific conditions (external threats, internal threats, natural disaster) for declaring a state of emergency have materialised, and, second, whether restrictions upon freedoms and rights are effective in restoring the normal functioning of the State (proportionate to this goal). The Tribunal would likely apply a deferential standard of review in this regard, leaving a degree of discretion to the political branches.

In any case, ordinary courts (administrative courts, civil courts, criminal courts, etc.) can undoubtedly review the constitutionality and legality of regulations introducing the states of emergency incidentally, that is, while hearing ordinary court actions, such as actions against sanctions imposed for breaches of emergency-related restrictions or actions against the State for the compensation of damages caused by such restrictions.[108] According to Article 178(1) of 1997 Constitution, the ordinary judges are subject to the parliamentary statutes and the Constitution only, which is commonly interpreted as meaning that executive regulations do not bind them if they find these regulations unlawful. Therefore, ordinary courts are constitutionally authorised to review executive

[106] See: Sławomira Wronkowska and Zygmunt Ziembiński, *Zarys Teorii Prawa*, Ars Boni et Aequi, Poznań, 2001, pp. 26–27 (on the meaning of "general" and "abstract" legal norms).

[107] This view was also presented in Aleksander Jakubowski and Janusz Roszkiewicz, "Problem stosowania nielegalnych aktów wykonawczych przez organy administracji publicznej (na przykład rozporządzeń epidemicznych)," *Studia Iuridica*, vol. XCIV, 2022, pp. 92–121, pp. 99–100, https://doi.org/10.31338/2544-3135.si.2022-94.7. Radajewski argues that the part of such regulations that declares a state of emergency, that is, states that a certain event justifying the declaration indeed occurred, is not normative as such, so this part cannot be reviewed by the Constitutional Tribunal, among others. Only the part of regulations that lays down specific restrictions of freedoms and rights (general and abstract legal norms) is normative and amenable to judicial review. Mateusz Radajewski, "Stan zagrożenia epidemicznego oraz stan epidemii jako formy prawne ochrony zdrowia publicznego," *Przegląd Legislacyjny*, no. 4, 2021, pp. 59–86, pp. 66–69. However, it is unclear how a court could review the proportionality of a restriction independently and fully, while being bound by an authoritative non-normative statement of the executive that an event justifying the restriction has indeed occurred. Can a court declare that a specific restriction is disproportionate because the event, invoked by the executive, does not really amount to a "natural disaster" within the meaning of the Constitution and the implementing statute, for instance? The "two parts" of regulations, the one in which a state of emergency is declared and the one in which restrictions are introduced, seem intrinsically connected. One could argue that a court has full competence to assess the constitutionality and, in particular, proportionality of a restriction, even if it cannot formally repeal the sole declaration of the state of emergency and only specific restrictions.

[108] Monika Florczak-Wątor, "Konstytucyjna regulacja stanów nadzwyczajnych w świetle dotychczasowej praktyki jej (nie)stosowania," *Państwo i Prawo*, no. 10, 2022, pp. 333–350, p. 340.

regulations constitutionality and ordinary legality. Their rulings in this regard produce *inter partes* effects. They are not bound to make a preliminary reference to the Constitutional Tribunal in this respect, the preliminary reference being optional, whereas a ruling by the Constitutional Tribunal would have *erga omnes* effects. This incidental judicial review will be discussed in Section 4 about the judicial review of emergency measures.

Question 6

Migration crisis and the state of exception on the Polish-Belarussian border. Starting in 2021, a "migration crisis" unfolded on the Polish-Belarusian border. Belarusian authorities have been fostering an irregular migration through Poland, Lithuania and Latvia, where the border runs through forested and difficult-to-access places. The president formally announced a state of exception to address this situation, which was in force for a few months in 2021 and 2022. According to the President's regulation, the state of exception involved restrictions on the freedom of movement in the designated areas, freedom of assemblies and public events, freedom to photograph or record border infrastructure and access to public information about protecting State borders and managing migration.

According to civil society, the executive did not provide sufficient justification for declaring a state of exception. The Polish Ombudsman and civil society also argued that restrictions were disproportionate and were not really aimed at restoring the ordinary functioning of border control but, rather, hindering assistance provided by civil society to migrants and asylum seekers and the ability of civil society to hold public authorities to account for how they handle migration and asylum applications. It was also argued that those restrictions breached EU laws aimed at enabling civil society to assist asylum seekers in exercising their rights.[109]

[109] Polish Ombudsman, Letter to the Prime Minister, 6 September 2021, https://bip.brpo.gov.pl/sites/default/files/RPO_do_premiera_stan_wyjatkowy_6.09.2021.pdf; Helsinki Foundation for Human Rights, Written Comments to the European Court of Human Rights in Case *Epler and Skubiszewski vs. Poland*, Applications no. 8520/22 and 10335/22, https://hfhr.pl/upload/2023/10/epler_amicus_hfpc.pdf; European Parliament and of the Council of the European Union, Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180/60, Article 8(2): "Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible."

The Polish Supreme Court shared this view and held that the restrictions on the Polish-Belarussian border breached Article 10(1) of the European Convention of Human Rights regarding the freedom of speech. In the Supreme Court's view, these restrictions prevented the journalists from obtaining and conveying information about how the situation on the border unfolded.[110] A case concerning the restriction upon the freedom of assemblies in the said area is currently pending before the European Court of Human Rights.[111]

Moreover, a regulation by the Minister of Internal Affairs and Administration[112] and an amendment to the 2021 Foreigners Act[113] authorised the border guard to order irregular migrants to leave the Polish territory immediately. Grześkowiak argues that this emergency legal regime might, in practice, limit procedural safeguards that should be offered to persons applying for asylum and, for this reason, it was not in line with EU asylum law,[114] including the right to asylum and the right to protection in the event of removal, expulsion or extradition, as enshrined in Articles 18 and 19 of the Charter of Fundamental Rights,[115] given the risks for migrants in Belarus, which the European Court of Human Rights confirmed.[116] Grześkowiak pointed out that other EU fundamental rights, such as the right to an effective remedy, might also be breached in that case.[117] At the same time, Chlebny seems to argue that this

[110] Polish Supreme Court, Judgment of 18 January 2022, Case I KK 171/21, https://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20kk%20171-21.pdf

[111] *Epler and Skubiszewski v. Poland* (Applications nos. 8520/22 and 10335/22).

[112] Polish Minister of Internal Affairs and Administration, Regulation of 20 August 2021 amending the regulation concerning a temporary suspension or limitation of border traffic on specific border crossings, *Dziennik Ustaw*, item 1536.

[113] Polish Sejm, Act of 14 October 2021 amending the act on foreigners and some other acts, *Dziennik Ustaw*, item 1918.

[114] European Parliament and the Council of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98; European Parliament and the Council of the European Union, Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180/60.

[115] Maciej Grześkowiak, "Od aktywizmu do 'polityki przyzwolenia'. Komisja Europejska wobec nieregularnej migracji w latach 2015–2021 ze szczególnym uwzględnieniem kryzysu humanitarnego na granicy polsko-białoruskiej," *Państwo i Prawo*, no. 3, 2023, pp. 21–47, pp. 30–31. See also: Grażyna Baranowska, "Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021," *Polish Yearbook of International Law*, vol. XLI, 2021, pp. 193–211.

[116] Maciej Grześkowiak, "Od aktywizmu do 'polityki przyzwolenia'. Komisja Europejska wobec nieregularnej migracji w latach 2015–2021 ze szczególnym uwzględnieniem kryzysu humanitarnego na granicy polsko-białoruskiej," *Państwo i Prawo*, no. 3, 2023, pp. 21–47, p. 31. This author refers to the European Court of Human Rights, Judgment of 23 July 2020, Joined Cases 40503/17, 42902/17 and 436 43/17, *MK et al vs. Poland*, paragraph 178, https://hudoc.echr.coe.int/eng?i=001-203840; European Court of Human Rights, Judgment of 8 July 2021, Case 51246/17, *DA et al vs. Poland*, paragraph 63, https://hudoc.echr.coe.int/eng?i=001-210855

[117] Maciej Grześkowiak, "Od aktywizmu do 'polityki przyzwolenia'. Komisja Europejska wobec nieregularnej migracji w latach 2015–2021 ze szczególnym uwzględnieniem kryzysu humanitarnego na granicy polsko-białoruskiej," *Państwo i Prawo*, no. 3, 2023, pp. 21–47, p. 32. See also: Maciej

legal regime can still be interpreted in accordance with the said procedural guarantees and EU asylum law.[118]

Section 3: Statutory/executive emergency law in the Member States

Question 1

Apart from the general constitutional framework regarding the three states of emergency, there is also ordinary legislation concerning the state of epidemic threat and epidemic. Moreover, as mentioned, Polish lawmakers frequently enact "temporary laws" or "special laws" dealing with specific challenges considered "exceptional." This legislative practice is considered deficient from the rule of law standards perspective because it undermines the clarity, coherence, and predictability of the legal order. Nonetheless, such "special" legislation is, in principle, in line with the Constitution if it complies, in particular, with constitutional rights and the principle of proportionality.[119]

Question 2

Debate on the state of epidemic. In addition to the constitutional regime for the three states of emergency, the Polish parliament adopted an act on preventing and combating infections and infectious diseases in humans in 2008.[120] Among other things, Article 5 of this statute imposes, in a general manner, certain duties on persons present on the territory of Poland, including duties to undergo medical examinations, vaccinations, quarantine, and refrain from certain activities. Moreover, this act introduces extra-constitutional "states" of "epidemic threat" and "epidemic," which can be declared by a voivode, a minister or the Council of Ministers. In Articles 46 as well as 46a and b, which the parliament added to address the COVID-19 pandemic specifically, the said authorities are empowered to impose and specify far-reaching restrictions of fundamental freedoms and rights, such as the duty to use specific medical measures, undergo quarantine in a specific place, or cease business activities.

Grześkowiak, "The 'Guardian of the Treaties' is No More? The European Commission and the 2021 Humanitarian Crisis on Poland-Belarus Border," *Refugee Survey Quarterly*, vol. 42, no. 1, March 2023, pp. 81–102, https://doi.org/10.1093/rsq/hdac025

[118] Jacek Chlebny, "Zawrócenie cudzoziemca na granicy," *Zeszyty Naukowe Sądownictwa Administracyjnego,* no. 5, 2023, pp. 9–30.

[119] See in general, Piotr Radziewicz, "Rozdział XI. Stany Nadzwyczajne," *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, edited by Piotr Czarny, Monika Florczak-Wątor, Bogumił Naleziński, Piotr Radziewicz. Wolters Kluwer, 2023, pp. 654–655.

[120] Polish Sejm, Act of 5 December 2008, *Dziennik Ustaw*, No. 234, item 1570, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20082341570

Scholars argued that this statutory delegation of lawmaking power to the executive was unconstitutional. According to Article 33(1) of the Constitution, limitations on exercising freedoms and rights can be imposed *only in a parliamentary statute*, not an executive regulation. This provision is interpreted in Polish constitutional law very strictly in the aftermath of the negative experience of the authoritarian communist State apparatus before 1989. At that time, powerful executive and administrative authorities decided to restrict individual freedoms and rights unilaterally without being bound by or observing statutory provisions. This is why contemporary constitutional law in Poland rules out almost entirely a delegation of lawmaking power, which could result in limiting constitutional freedoms and rights, to executive or administrative authorities.

The problem with the legislation on the state of epidemic was that the duties imposed on citizens in that legislation were considered as worded too generally.[121] They required specification in implementing regulations by the executive. This meant that the executive largely determined the form and content of specific restrictions imposed on people residing in Poland during the COVID-19 pandemic, rather than the parliament. It was argued that it would have been more in line with the Constitution to declare a state of natural disaster and issue executive regulations on this basis. There were no doubts about the constitutionality of the statute on the state of natural disaster, unlike the statute on the state of epidemic.[122]

Scholars and public commentators argued that the executive refrained from declaring the constitutional state of natural disaster because it wished to avoid the need to pay compensation provided for in the Constitution and the statute on compensation for damages suffered during the states of emergency, such as compensation to business owners who had to cease their activities. It was also argued that the executive wished to avoid postponing the 2020 presidential election, which would occur automatically in case of declaring a state of natural disaster under the 1997 Constitution.[123]

There was an additional dimension of the conflict between statutory rules related to the state of epidemic and constitutional rules. Rybski points out

[121] Mateusz Radajewski, "Stan zagrożenia epidemicznego oraz stan epidemii jako formy prawne ochrony zdrowia publicznego," *Przegląd Legislacyjny*, no. 4, 2021, pp. 59–86, pp. 74–75.

[122] Piotr Tuleja, "Pandemia Covid-19 a konstytucyjne stany nadzwyczajne," *Palestra*, no. 9, 2020, pp. 5-20, p. 11, https://palestra.pl/pl/czasopismo/wydanie/9-2020/artykul/pandemia-covid-19-a-konstytucyjne-stany-nadzwyczajne. See also: Polish Ombudsman, Letter to the Prime Minister of 7 March 2020, https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-rozporzadzenia-MZ-niezgodne-z-ustawa

[123] Rzeczpospolita, Dlaczego Rząd Nie Wprowadza Stanu Nadzwyczajnego?, 3 April 2020, https://www.rp.pl/urzednicy/art793971-dlaczego-rzad-nie-wprowadza-stanu-nadzwyczajnego. Nonetheless, the presidential election was postponed anyway.

that during the state of epidemic the executive issued a myriad of regulations introducing far-reaching restrictions. To enforce them, administrative authorities sought to rely on Article 54 of the Code of Contraventions, which provided for a fine of 500 PLN (approximately 120 EUR) for breaching "provisions concerning public order in public places." However, as noted by Rybski, this notion had hitherto been interpreted as referring to rules enacted by local governments and aimed at maintaining public order (for instance, in parks, forests, close to rivers, etc.). Rybski argued against the application of Article 54 of the Code of Contraventions to enforce pandemic-related restrictions, as that provision, criminal in nature, was not issued by the legislature for this purpose. As part of criminal law in a broad sense, argues Rybski, Article 54 should not be interpreted dynamically and expansively by law enforcement authorities to impose quasi-criminal sanctions for breaching restrictions of an entirely new category.[124]

Many people lodged applications to administrative courts, as well as other types of courts in some cases, for the judicial review of sanctions imposed on them for breaches of pandemic-related restrictions (such as running businesses or not wearing masks). A massive amount of these applications turned out to be successful. Administrative courts performed incidental constitutional review of executive regulations introducing the said restrictions and frequently found them unconstitutional.[125] The reason for that was both that restrictions of fundamental freedoms and rights cannot be introduced in executive regulations and that, in any case, executive regulations often went beyond what was authorised in the statutory provisions concerning the states of epidemic threat and epidemic. For example, a provision of the parliamentary act on the state of epidemic allowed the introduction of a *temporary* restriction on *specific* ways of moving around. In contrast, an executive regulation introduced a complete ban on moving around on the territory of Poland in 2020, due to the pandemic, albeit with some exceptions, thereby exceeding the confines of the statutory authorisation and breaching the essence of the freedom of movement on the Polish territory without declaring a state of emergency.[126]

However, there was also a contrary view expressed in literature by Bosek, according to which the mechanism under the legislation on the state of epidemic threat and epidemic was in line with the Constitution. The main argument was that Article 68 of the Constitution of 1997 obliges public authorities to

[124] Robert Rybski, "Stan epidemii a stany nadzwyczajne," *Przegląd Konstytucyjny*, no. 1, 2022, pp. 139–165, pp. 143–145, https://doi.org/10.4467/25442031PKO.22.006.15732

[125] See extensively: Stanisław Trociuk, *Prawa i wolności w stanie epidemii*. Wolters Kluwer, 2021. See also: Aleksander Jakubowski and Janusz Roszkiewicz, "Problem stosowania nielegalnych aktów wykonawczych przez organy administracji publicznej (na przykład rozporządzeń epidemicznych)," *Studia Iuridica*, vol. XCIV, 2022, pp. 92–121, https://doi.org/10.31338/2544-3135.si.2022-94.7

[126] Stanisław Trociuk, *Prawa i wolności w stanie epidemii*. Wolters Kluwer, 2021, pp. 25–30.

protect public health actively. It was also argued that the duties of individuals defined by the parliament in this legislation were sufficiently precise and that the parliament could leave some discretion to the executive to specify these restrictions in regulations further. Moreover, it was contended that applying this ordinary legislation was more proportionate than declaring a state of natural disaster. After all, the Constitution allows the executive to declare a state of emergency only when ordinary measures have proven insufficient.[127]

Against this line of reasoning, it was argued, more generally, that it is not possible to introduce any "extra-constitutional states of emergency" as those are exhaustively listed in the Constitution.[128] According to a more moderate view, the main problem was not that the parliament created extra-constitutional states of emergency – the state of epidemic threat and the state of epidemic – but that those were intended as having the same legal effects as the constitutional states of emergency. The difference between the two should lie in the level of law-making power transferred to the executive and the principle of proportionality. The constitutional states of emergency "loosen up," to some limited extent, the principle that the legislature has monopoly on restricting freedoms and rights, and the proportionality principle; during a state of emergency, the latter is no longer about introducing restrictions that are *the least onerous* for those subject to these restrictions but those that are the *most effective* in restoring the ordinary functioning of the State. Any "legislative states of emergency" cannot have the same effect, so they must comply with the ordinary principles of legislative monopoly and proportionality.[129] The Constitutional Tribunal confirmed this interpretation in 2009 in a case in which it reviewed the idea of a "crisis situation" introduced by the statute on crisis management.[130]

Question 3

As mentioned in the answer to the previous question, a "legislative state of emergency" cannot have the same effects as a "constitutional state of emergency." Legislative provisions introducing extra-constitutional states of emergency

[127] Leszek Bosek, "Anti-Epidemic Emergency Regimes under Polish Law in Comparative, Historical and Jurisprudential Perspective," *European Journal of Health Law*, vol. 28, no. 2, 2021, pp. 113–141, https://doi.org/10.1163/15718093-BJA10039; Leszek Bosek, "The Normative Structure of the State of Epidemic Under Polish Law," *Medicine, Law & Society*, vol. 14, 2021, pp. 209–228, https://doi.org/10.18690/mls.14.2.209-228.2021

[128] Piotr Tuleja, "Pandemia Covid-19 a konstytucyjne stany nadzwyczajne," *Palestra*, no. 9, 2020, pp. 5–20, p. 11, https://palestra.pl/pl/czasopismo/wydanie/9-2020/artykul/pandemia-covid-19-a-konstytucyjne-stany-nadzwyczajne

[129] Monika Florczak-Wątor, "Konstytucyjna regulacja stanów nadzwyczajnych w świetle dotychczasowej praktyki jej (nie)stosowania," *Państwo i Prawo*, no. 10, 2022, pp. 333–350, p. 345.

[130] Polish Constitutional Tribunal, Judgment of 21 April 2009, Case K 50/07, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=4&dokument=672&sprawa=4404

cannot "loosen up" the proportionality principle.[131] Moreover, executive authorities must remain strictly bound by the parliamentary statutes. The parliament must establish the range of acceptable restrictions upon freedoms and rights in a statute.

Question 4

There seems to be no such legal effect. Following the negative experience of the communist authoritarian regime, the Polish constitutional order is based on a strict hierarchy of legal acts. The executive and administration's legal acts and activities must be strictly subordinated to parliamentary statutes, including during states of emergency, to reduce the risk of unlawfulness and abuse of power. Any non-directly effective legal measures adopted by EU institutions and bodies, including those adopted as "emergency measures," must be implemented in the Polish legal order in accordance with the internal hierarchy of legal acts. In practice, implementing new EU legal acts in Poland frequently requires the adoption of new parliamentary statutes.

Section 4: Judicial review of emergency powers in the Member States

Question 1

Undoubtedly, the Constitutional Tribunal can carry out the constitutional review of ordinary legislation addressing the situations of emergency, just like any other statute. However, as already explained in the reply to Section 2, Question 5, it is debated whether the Constitutional Tribunal can conduct the constitutional review of regulations introducing "constitutional" states of emergency. At the same time, there is no doubt that ordinary courts can review the regulations' constitutionality incidentally.

Some argue against the judicial review of measures addressing emergencies or, at least, for significantly limiting its scope. It has recently been argued in case law (by a court chamber found not to fulfil the requirements of Article 6 of the European Convention of Human Rights[132]) that decisions regarding whether at least some of the substantive criteria to introduce a state of emergency are fulfilled – that is, for instance, whether there is a genuine threat to the constitutional system of the State – are essentially political. As such, as is argued,

[131] Monika Florczak-Wątor, "Konstytucyjna regulacja stanów nadzwyczajnych w świetle dotychczasowej praktyki jej (nie)stosowania," *Państwo i Prawo*, no. 10, 2022, pp. 333–350, p. 345.

[132] European Court of Human Rights, Judgment of 23 November 2023, Case 50849/21, https://hudoc.echr.coe.int/?i=001-229366

these decisions should not be amenable to judicial review on the merits.[133] In a similar vein, it was argued in the literature that courts should review only compliance with formal, that is, "objective," requirements, such as adequate forms of legal acts and procedures through which states of emergency are introduced.[134] It appears that, following this view, courts could not review the proportionality of emergency measures. Moreover, it has been argued that the Constitution rules out both ordinary judicial review (by ordinary courts) and constitutional judicial review (by the Constitutional Tribunal) of regulations declaring states of emergency because the 'review' of these measures belongs to the Sejm and is political. At the same time, the judicial review of the compliance of specific restrictions with the statutory provisions of the acts on the states of emergency seems more acceptable even to those arguing for limiting the scope of judicial review of emergency measures.[135]

One could argue that it would be difficult to defend the limited judicial review of emergency measures under Polish constitutional law, in which the right to a judicial remedy and a fair trial (Article 45(1) of the Constitution; Article 77(1) of the Constitution) and constitutional judicial review (Article 188 of the Constitution) play a prominent role. In Polish constitutional law, courts and constitutional judicial review are seen as the main instruments for the protection of fundamental freedoms and rights, which would suggest that any exceptions and exclusions of the judicial review of how the executive uses its prerogatives should be explicit. The political review by the Sejm is usually not seen in Polish law as a sufficient safeguard of fundamental rights.[136]

In any case, administrative courts have already confirmed their readiness to review – although on *formal* grounds only – the constitutionality of regulations introducing restrictions upon freedoms and rights of individuals during the "extra-constitutional" state of epidemic threat and epidemic. According to many courts, the constitutional problem during the pandemic was that pandemic-related restrictions were not introduced in line with constitutional requirements. As introduced employing executive regulations rather than par-

[133] This view was expressed by the Supreme Court (the Chamber of Extraordinary Review and Public Affairs) in a case concerning a protest against the presidential election in 2020, which was postponed despite the fact that the Council of Ministers had not declared the state of natural disaster. Supreme Court, Decision of 28 July 2020, Case I NSW 2849/20, https://www.sn.pl/sites/orzecznictwo/Orzeczenia3/I%20NSW%202849-20.pdf

[134] Michał Brzeziński, *Stany nadzwyczajne w polskich konstytucjach*, Wydawnictwo Sejmowe, 2007, p. 43.

[135] Krzysztof Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, *Temida* 2, 2005, p. 30.

[136] Under Article 31(3) of the Constitution of 1997, all limitations of fundamental rights must be determined in a statute adopted by the parliament (and not an infra-statutory act), which evidently does not exclude the constitutional review of these statutes by the Constitutional Tribunal.

liamentary statutes, they were seen as violating the rule of law. These executive regulations imposed restrictions upon individual freedoms and rights, being only loosely constrained by general statutory provisions. However, according to Articles 33 and 92 of the Constitution, restrictions of fundamental freedoms and rights can be imposed only by parliamentary statutes, and it is impossible to delegate this power to the executive. Executive regulations can relate only to purely procedural, technical or organisational matters. Somewhat broader power is delegated to the executive only when constitutional states of emergency are declared. Then, executive authorities can issue regulations specifying which restrictions, pre-defined and pre-listed in the statutes on the states of emergency, are to be applicable.

As succinctly explained by the Supreme Administrative Court in a case concerning a penalty imposed on a citizen who did not comply with pandemic-related restrictions after his foreign trip:

The possibility to issue a regulation depends on the existence of a so-called legislative authorisation (rule-making competence) […] According to Article 92 of the Constitution, regulations are issued by authorities listed in the Constitution based on a precise authorisation contained in a statute and aiming at its implementation. The authorisation should specify the authority competent to issue a regulation and the scope of matters to be regulated as well as guidance as to the contents of this act […]. Undoubtedly, it follows from the case law of the Constitutional Tribunal that only provisions that are technical in character can be contained in a regulation and that they should have no significance for the rights and freedoms of individuals […]. It is not acceptable to lay down blank authorisations leaving to the executive authorities discretion to determine the final form of limitations [to the rights and freedoms of individuals] and in particular to determine their scope […]. Rules contained in a regulation issued based on a statutory authorisation that do not strictly and unambiguously correspond to the contents of this authorisation cannot be applied […].

The provisions laid down in the Regulation of the Council of Ministers, issued based on the statutory authorisation under Article 46a and 46b of the act on fighting infectious diseases, aim to protect the public health […]. [However,] it is necessary to share the view represented in case law that neither practical or pragmatic considerations nor the expediency of the contested provisions do not justify exceeding the limits of statutory authorisations. Therefore, even if the bans, duties, and restrictions at issue can be considered as justified to fight the pandemic, the procedure in which they were introduced lead to breaching fundamental constitutional standards and rights concerning the freedom of movement.

Subsequently, the Supreme Administrative Court compared the statutory authorisation at issue, which mentioned the possibility of imposing a quarantine and the specification of this duty in the regulation. It held that the authorisation was not sufficiently specific. It did not contain any "guidance" for the Council of Ministers, which, according to the Constitution, must always be provided by the parliament in the statute to further limit the executive's discretion. Moreover, the Court noted that the statutory duty to undergo a quarantine was meant for persons *who had been in close contact with sick persons*. In contrast, the Council of Ministers imposed quarantine duty on *all persons returning from foreign trips*. Thus, the Council of Ministers' regulation did not align with the statutory authorisation.[137] In another case, among many cases concerning pandemic-related restrictions, the Regional Administrative Court in Warsaw found that the same statutory provisions did not authorise the executive to impose a duty to wear masks in public places.[138] Similar rulings were issued in favour of entrepreneurs who did not comply with regulatory bans on their economic activities during the pandemic.[139]

Although the judicial review of the pandemic-related restrictions turned out to be significant in quantitative terms (administrative courts massively repealed administrative penalties imposed on people or businesses breaching pandemic-related restrictions), it is important to note that they did not relate to the merits, contents or legal and empirical justification of the introduced restrictions, including, for instance, their compliance with the principle of proportionality. Due to the faulty formal way the executive introduced these restrictions, the courts focused on the formal constitutional safeguards only. Thus, Polish administrative courts operated in their "safe zone," namely the area of *formal legality review*, without stirring up any major doubts concerning the separation of powers in determining the substance and proportionality of pandemic-related restrictions.

Question 2

Although Polish laws on judicial procedures foresee urgent or accelerated procedures on various grounds, there is no specific procedure for reviewing the actions of public authorities in situations of emergency.

[137] Supreme Administrative Court, Judgment of 19 October 2021, Case II GSK 1224/21, https://orzeczenia.nsa.gov.pl/doc/F9BEFD128C

[138] Regional Administrative Court in Warsaw, Judgment of 26 November 2020, Case VIII SA/Wa 491/20, https://orzeczenia.nsa.gov.pl/doc/87D3417CAD

[139] For instance, Regional Administrative Court in Wrocław, Judgment of 8 July 2022, Case IV SA/Wr 835/21, https://orzeczenia.nsa.gov.pl/doc/1B50261266

Question 3

Constitutional review. As regards the general constitutional review of fundamental rights in situations of emergency, it should be noted that, on the one hand, according to the Constitutional Tribunal, even an extraordinary challenge to the safety of people and public order, such as the post-9/11 "war on terrorism," did not justify lowering the standard of the constitutional protection of fundamental rights by the legislature outside the framework of the constitutional states of emergency.[140] On the other hand, certain dissenting judges of the Constitutional Tribunal argued that the Tribunal had accepted a certain lowering of constitutional standards in an extraordinary situation concerning the financial crisis, as already discussed.

The judicial review of administrative acts and incidental constitutional review on the 'merits'. As Polish administrative and common courts had to focus on the formal constitutionality of executive regulations introducing pandemic-related restrictions, they did not have a chance to develop the grounds and standard of review with regard to the "merits" of these regulations, including whether they had a proper empirical basis, served a legitimate purpose, and were proportionate. However, based on the general principles of Polish constitutional law, arguably, any acts and actions of public authorities issued in situations of emergency would have to comply with the principle of proportionality, which the courts should ensure. However, the principle of proportionality would have a different focus (the least restrictive measures or the most effective measures) depending on whether a state of emergency is declared.

Question 4

According to EU case law issued in the context of pandemic-related restrictions, national legislation introducing such restrictions (undergoing screening tests, observing a quarantine) must be clear and precise, appropriate for attaining the objective of general interest pursued, such as the protection of public health, be limited to what is strictly necessary, and result from a balancing of the importance of the objective and the seriousness of the interference with the rights and freedoms of the persons concerned.[141] In Polish constitutional law, as already mentioned, during a state of emergency, the focus would move from "limited to what is strictly necessary" to "focused on what is most effective" in addressing the emergency and restoring the ordinary functioning of the State.

[140] Polish Constitutional Tribunal, Judgment of 30 September 2008, Case K 44/07, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=328&sprawa=4371.

[141] Court of Justice of the European Union, Judgement of 5 December 2023, Case C-128/22, *Nordic Info vs. Belgium*, ECLI:EU:C:2023:951, para. 77.

Section 5: Implementation of EU emergency law in the Member States

Question 1

According to Article 9 of the 1997 Constitution, Poland must observe international law binding upon it, which is interpreted as implying a constitutional obligation to implement relevant EU measures. Arguably, this general obligation also applies to the implementation of EU emergency measures.

Question 2

EU Relocation Decisions. In 2020, the Court of Justice ruled that, "by failing to indicate at regular intervals, and at least every three months, an appropriate number of applicants for international protection who can be relocated swiftly to its territory," Poland failed to fulfil implement the Council Decision 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and the Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. This way, Poland also failed to fulfil its subsequent relocation obligations. To justify why the decision was not implemented, the Polish government argued that the relocation mechanism did not work properly, and the relocation would undermine public security.[142] The Court dismissed this defence.

NGEU. Poland has encountered serious challenges in implementing reforms in its judicial system as part of its plan submitted under the NextGenerationEU, the Recovery and Resilience Facility (RRF), and REPowerEU. The Council approved the Polish "National Recovery Plan" on 17 June 2022,[143] but Poland submitted its first payment request on 15 December 2023 only, following the parliamentary election and the formation of a new government. According to the Commission, the new government "has satisfactorily fulfilled the two "super milestones" to strengthen important aspects of the independence of the Polish judiciary through reforming the disciplinary regime for judges."[144] Poland needed to fulfil these conditions to receive this payment, which was subject to serious controversies with the previous Polish government. These

[142] Court of Justice of the European Union, Judgment of 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, *Commission vs. Poland*, ECLI:EU:C:2020:257.

[143] See: European Commission, Poland's Recovery and Resilience Plan, https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/country-pages/polands-recovery-and-resilience-plan_en

[144] European Commission, Poland's efforts to restore rule of law pave the way for accessing up to €137 billion in EU funds, 29 February 2024, https://ec.europa.eu/regional_policy/whats-new/newsroom/29-02-2024-poland-s-efforts-to-restore-rule-of-law-pave-the-way-for-accessing-up-to-eur137-billion-in-eu-funds_en

controversies concerned the legal regime for disciplinary action concerning judges and its impact on judicial independence in Poland, among other things. In February 2024, the Commission assessed that "the disciplinary regime applicable to Polish judges has been comprehensively reformed […], the Disciplinary Chamber of the Supreme Court was abolished and replaced by an independent and impartial court established by law […]; the disciplinary regime has been reformed, and safeguards are in place so that judges no longer face a risk of disciplinary liability for the content of their judgments or for applying EU law […]; All judges affected by the rulings of the Disciplinary Chamber have had the right to have their case reviewed by a new Supreme Court Chamber […]." However, Łacny argues that these reforms were insufficient.[145] Łacny points out that the Disciplinary Chamber of the Supreme Court was abolished by law adopted already by the previous government and replaced by another new chamber, the composition of which also raises doubts.[146] At the same time, the disciplinary regime was changed only by a technical decision of the Minister of Justice regarding the appointment of independent disciplinary officers for investigations against judges.[147] The internal debate regarding the strengthening of judicial independence in Poland is ongoing.[148]

[145] Justyna Łacny, "Wyboista droga Polski przez kamienie milowe do krajowego planu odbudowy," *Europejski Przegląd Sądowy*, no. 4, March 2024, pp. 4–19, p. 18.

[146] OKO Press, 13 February 2024, https://oko.press/sn-izba-odpowiedzialnosci-zawodowej-nie-jest-legalnym-sadem-ma-ustrojowa-i-strukturalna-wade

[147] Polish Minister of Justice, Order of the Minister of Justice of 15 February 2024 on the manner of cooperation between the Minister of Justice and the disciplinary officers of the Minister of Justice, https://www.gov.pl/web/sprawiedliwosc/du-24-020. See also: Polish Ministry of Justice, Polish Minister of Justice presents Action Plan for restoring the rule of law, https://www.gov.pl/web/justice/polish-minister-of-justice-presents-action-plan-for-restoring-the-rule-of-law

[148] See, for instance: Anna Wójcik, "Restoring the Rule of Law in Poland: An Assessment of the New Government's Progress," Policy Brief, June 2024, German Marhsall Fund, https://www.gmfus.org/sites/default/files/2024-06/Wojcik%20-%20Poland%20RoL%20-%20brief.pdf

Portugal

*Ana Rita Gil**
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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

I. The Portuguese legal system distinguishes between situations of *emergency* or *crisis* and situations of *necessity*. The former are generally dealt with through the enactment of a special temporary regime, adopted to respond to the specific challenge, and lead to the activation of special rules and powers to respond to the crisis. It is normally preceded by a formal *declaration* issued by the competent powers. Administrative acts made in a context of *necessity* are different and fall in the traditional category of *state of necessity* of Administrative Law. It recognises that, in emergent situations, the public administration can take measures that are necessary and appropriate to quickly respond to unusual dangers, but which are in the margins of strict legality. Once the emergent situation has ended, the public administration must reestablish the *status quo*, if necessary, using remedial measures. The state of administrative necessity "is atypical, it does not declare itself – it simply erupts unexpectedly – and demands immediate action, which cannot be postponed and has instantaneous or intrinsically precarious effects."[1] The *state of necessity* works, therefore, as an exception, usually punctual, to the normal functioning of the public administration. In other words, the state of administrative necessity is not planned.

In cases of *administrative necessity*, a certain action is deemed admissible, even if the regular procedural of formal rules were not complied with. The Code of

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[1] See: C. Amado Gomes, "O estado de necessidade administrative," in C. Amado Gomes, R. Pedro (coord.), *Direito administrativo de necessidade e de exceção*, Lisboa: AAFDL, Lisboa, 2020, p. 37. See also: J. M. Sérvulo Correia, "Revisitando o estado de necessidade," in *Escritos de direito público*, I, Coimbra: Almedina, 2019, pp. 135–162; P. Gonçalves, *Manual de direito administrativo*, I, Coimbra: Almedina, 2019, pp. 388–398; D. Freitas do Amaral, M. G. Dias Garcia, "O estado de necessidade e a urgência em direito administrative," *Revista da Ordem dos Advogados*, issue 59/II, 1999, pp. 447–518.

Administrative Procedure (CPA)[2] reads as follows: "administrative acts carried out in a state of necessity, disregarding the rules established in this Code, are valid, as long as their results could not have been achieved in any other way, but the injured parties have the right to be compensated under the general terms of the responsibility of the Administration."

Responses to crisis or emergencies may, however, take the form of the enactment of a temporary and special legal regime. These responses are what is called *situational responses* or even cases of *constitutional or administrative exceptions*. Contrarily to the former case, these categories require an act from the competent authority, in which a particular scenario is formally recognised, opening the door for the application of exceptional rules during its duration.

II. In the context of *situational exceptions*, the Portuguese law distinguishes situations of *constitutional exceptions* and contexts of *administrative exceptions*.[3]

The first situation encompasses the only two cases that may, under the Portuguese Constitution, trigger limits to the normal application of the Constitution: the state of siege and the state of emergency. They are both foreseen in the Constitution and have different levels of severity, the first being the stronger.[4] They are further regulated in a parliamentary law: the Legal Regime of the State of Siege and of Emergency (hereinafter RSSE).[5]

Differently, there are numerous cases of *administrative exceptions*, which may be declared in less serious situations. The most important legal regime in this context is enshrined in the Basic Law on Civil Protection (hereinafter BLCP).[6] This bill allows the public administration to declare that there is a crisis that demands special measures in order to prevent collective risks, to mitigate their effects, and to protect and help people and goods in danger. According to this law, depending on the specific circumstances, there may be a declaration of *situation of alert*, *situation of contingency*, or, the most serious one, *situation*

[2] See: Article 3 CPA. Articles 176 and 177 set forth the same principles as regards the execution of decisions.

[3] See: A. R. Gil, "Separando as águas: estado de emergência e estado de calamidade – um reforço da sua diversa relevância constitucional," Aa.Vv., *Católica talks. Direito em tempos de pandemia*, Lisboa: Universidade Católica Editora, 2022, pp. 77–110. Dubbing these two states as *constitutional exception law* and *simple emergency law*, see: J. C. Loureiro, "Bens, males e estados (in) constitucionais: socialidade e liberdade(s): notas sobre uma pandemia," *Revista Estudos Institucionais*, issue 6/3, 2020, pp. 794–795.

[4] See: Article 19 of the Constitution.

[5] Approved by Law no. 44/86, of 30th September, amended by Organic Law no. 1/2012, of 11 May.

[6] Approved by Law no. 27/2006, of 3 July, as last amended by Law no. 80/2015, of 03 August.

of calamity. All these declarations activate a situation in which special powers may be given to the public authorities and some limitations to fundamental rights may be put in place.

Another example worth mentioning regards asylum and migration law. In parallel with EU Law, Portuguese law also provides for special responses in cases of mass influx of migrants. These responses are foreseen in the Law on the Temporary Protection of Displaced Persons (hereinafter, LTP),[7] which transposed the EU Directive on Temporary Protection,[8] and also maintained a national regime for temporary protection. In order to activate the application of this regime, in the part where it can act independently from the EU institutions, the Government may decide to confer temporary protection in other humanitarian crises.[9] In these situations, by a decision of the Council of Ministers, the Portuguese asylum law and immigration law will not be applied to the persons encompassed by the temporary protection.

Question 2

The Portuguese legal system provides for a general constitutional framework to cover situations of *constitutional exception* in Article 19 of the Constitution. As mentioned above, it is further regulated at the legislative level in a Parliamentary Law: the RSSE.

As for the *administrative exception*, the CPA sets forth general principles that may be applied in urgency or state of necessity in general. There are, then, several sector-specific bills which deal with emergency in different areas – for example, civil protection, expropriations, public health, temporary protection of internationally displaced persons, bank resolution, etc. All these special regimes have been drafted to balance the need to protect the public order and fundamental rights, and to be in conformity with the constitutional principles governing the public administration.[10]

Question 3

I. Regarding the *constitutional exceptions*, emergency *lato sensu* encompasses cases that trigger the state of siege and the state of emergency. According to

[7] Law no. 67/2003, of 23 August.

[8] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[9] See: Article 4(3) LTP.

[10] See: Articles 266 *et seq.* of the Portuguese Constitution.

the Portuguese Constitution, state of siege or state of emergency may only be declared, in all or part of the national territory, in cases of actual or imminent aggression by foreign forces, of a serious threat or disturbance of the democratic constitutional order or of public calamity.[11]

The RSSE further details on when each state must be applied. The state of siege is the most serious response to disruptive events. It shall be declared before the occurrence or in the imminence of acts of force or insurrection that endanger sovereignty, independence, territorial integrity, or the democratic constitutional order. Being an *ultima ratio* response, it shall be declared only when these menaces cannot be eliminated by the normal means provided for in the Constitution and the ordinary laws or through the state of emergency. The state of emergency, on the other hand, shall be declared when less serious situations occur, namely when cases of public calamity actually or possibly occur.[12] These situations are not listed, and the law does not provide for examples.

II. As for the *administrative exceptions*, some are foreseen as open clauses, like *urgency* and *state of necessity*, namely, as mentioned, in the CPA. Sector-specific statutes do mention, however, cases where the declaration of exceptional states may occur.

The BLCP foresees several special *states* which may be declared when certain types of events take place. The law puts forward the concepts of *serious accident* and of *catastrophe*. The former "is an unusual event with relatively limited effects in time and space, likely to affect people and other living beings, property or the environment," whilst the latter is defined as "a serious accident or series of serious accidents capable of causing extensive material damage and, eventually, victims, intensely affecting living conditions and the socioeconomic fabric in areas or the entire national territory."[13] Using these concepts, the law then establishes a tiered system that distinguishes three different types of situations in a gradation of severity: (i) a *situation of alert* may be declared when, given the occurrence or imminent occurrence of one or more accidents or catastrophes, the need to adopt preventive measures and/or special reaction measures is recognized; (ii) a *situation of contingency* may be declared when, given the occurrence or imminent occurrence of one or more of such events, the need to adopt preventive measures and/or special reaction measures cannot be made at the local level; (iii) finally, the most serious is the *situation of calamity*, which may be declared when, due to the occurrence or danger of occurrence of one or more accidents or catastrophes, and their predictable

[11] See: Article 19(2) of the Portuguese Constitution.
[12] See: Article 19(3) of the Portuguese Constitution and Articles 8-9 RSEE.
[13] See: Article 3 of the BLCP.

intensity, exceptional measures designed to prevent, react, or restore normal living conditions in areas affected by its effects must be adopted.[14]

The Law on the Surveillance of Public Health (hereinafter LSPH) sets forth specific measures when a *public health emergency situation* is to be declared. Such declaration may take place when cases of contagious diseases and other health risks, which may cause serious consequences to public health, occur or may occur. A *public health emergency* is defined as "any extraordinary occurrence that constitutes a risk to public health due to the increased probability of spreading signs, symptoms, or diseases that require a coordinated response at the national level."[15]

Finally, the temporary protection to migrants is to be enacted, pursuant to the TPL, when the Council of the EU declares a mass influx of persons.[16] However, as already mentioned, the Government may also activate this type of protection in cases in which the EU Council did not activate the Directive. This may happen in cases of urgency and also when displaced persons face important risks, and the Government must also balance the need of protection with the protection of public order national security in each case.[17]

Question 4

I. Declarations of *constitutional exceptions* (state of siege and state of emergency) follow a thorough and complex procedure, in which three sovereignty bodies must intervene for it to be approved: the Government, which requests them, the President of the Republic, who has the competence to issue them, and the Parliament, which authorises them.[18] They are subjected to a tight control aimed at preventing and removing excess or arbitrariness of the public powers. The declaration issued by the President of the Republic must establish the measures to be taken and its duration, which is "limited to what is necessary to safeguard the rights and interests they are intended to protect and to restore normality," and which must not exceed 15 days.[19]
After the end of the *exceptional constitutional states*, all the acts that were practiced by the Government during its period of validity are subjected to political control by the Parliament, through the presentation of a governmental report.[20]

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[14] See: Article 9 of the BLCP.
[15] See: Article 7(4) of the LSPH.
[16] See: Article 4(1) TPL.
[17] See: Article 4(3) TPL.
[18] See: Articles 134(d), 138(1), 161(l), and 179(1)(f) of the Portuguese Constitution, and Articles 11–12 and 23–28 RSSE.
[19] See: Article 19(5) of the Portuguese Constitution and Articles 5(1), 14(1), and 29 RSSE.
[20] See: Article 29 RSSE.

II. The declaration procedures for the *situations of calamity*, *contingency*, and *alert* foreseen in the LBPC follow a much more simplified procedure. It is within the competences of the entities responsible for civil protection, after consulting with the local authorities. Only the procedure for the declaration of the *situtation of calamity* is an exception: it must be approved by the Government and takes the form of a resolution of the Council of Ministers.[21] While in the states of constitutional exception, there is a clear separation between the body that declares it and the entity that executes it, this does not happen in the situation of administrative calamity: the whole period of administrative exception is conducted exclusively, in its various moments, by the Executive, without any parliamentary or presidential intervention.

As for the LSPH, a *public health emergency situation* may give rise to a declaration of state of calamity or, in more serious circumstances, to a declaration of state of emergency. In the latter case, its declaration is proposed to the President of the Republic by the Government, upon a proposal of the National Council of Public Health based on a report from the Emergency Coordinating Committee.[22] If declared, the corresponding procedures are then applicable. In these cases, the Emergency Coordinating Committee which will have the responsibility to evaluate and accompany the situation.[23]

Finally, the enactment of temporary protection to displaced persons is decided by the EU Council. The Government will then constitute an interministerial commission to take the appropriate measures, which shall be presided by the Ministry of the Interior. In cases of mere national activation, the competence to declare the applicability of the temporary protection relies on the Government, through a resolution of the Council of Ministers. The same rules on execution shall then be applied.[24]

Question 5

Some of the sector-specific topics, which have been discussed so far, have relevant connections with EU law.
As far as civil protection is concerned, the National Emergency and Civil Protection Authority is responsible to establish and develop relations with the

[21] Resolutions of the Council of Ministers may, or may not, have normative content – see: Article 138(2)(b) of the Code of Administrative Procedure; in the case they do, there are regulations. There is no doubt that the Resolutions of the Council of Ministers which declare the *situation of calamity* have normative content considering its material scope – see: Article 21(1) and (2) of the BLCP.

[22] See: Articles 4(1), 7(2)(b), and 18 LSPH.

[23] See: Article 7 LSPH.

[24] See: Articles 4 and 5 TPL.

competent services of the European Union, namely within the European Civil Protection mechanism.[25]
In terms of public health, the LPSH foresees the need to coordinate efforts with the EU in this area.[26]
Finally, the TPL, being a transposition of the Directive on Temporary Protection, is fully in line with the EU regime.

Question 6

There are several precedents in the practice of Portugal in which a situation of *emergency*, *crisis* and/or *necessity* was triggered by prior EU action, or which has been handled together by the EU and national authorities through both EU and national emergency instruments.

I. First, one must mention the responses adopted during the so-called 2015 European migratory crisis. In this context, and following the EU decisions, enshrined in particular in the EU Agenda for Migration,[27] Portugal quickly adhered to the relocation programme, offering more vacancies than those that had been originally calculated by the EU institutions.[28] Moreover, in order to implement the EU decision it adopted a national relocation programme, which activated a series of responses from the public powers and also the civil society at large. A national "platform for the welcoming of refugees" was created, whereby several entities received public funds to provide housing for asylum seekers.[29] The program was an exceptional *ad hoc* response to those who were relocated from Italy and Greece, and encompassed an inclusion period of 18 months, whereby the beneficiaries would receive public support, with the goal to prepare them to be autonomous within the Portuguese society.

II. In 2020, the Portuguese State had to implement again an exceptional measure decided at the European level. Indeed, during the COVID-19 pandemic crisis, Portugal introduced travel restrictions that were harmonized with EU measures in this regard, namely on the restriction of movements in the Schen-

[25] See: Article 7(3) of Decree-Law n. 45/2019, of 1 April, which approved the organisation of the National Emergency and Civil Protection Authority.

[26] See: Article 5(1) and (2) LSPH.

[27] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration (COM (2015) 240 final).

[28] According to the EU decision, Portugal should welcome 1642 asylum seekers, relocated from Italy and Greece. However, the country offered 10.000 places. See: L. Sousa, P. M. Costa, R. Albuquerque, O. Magano, B. Bäckström, *Refugiados recolocados em Portugal: práticas de Acolhimento*, Lisboa, Universidade Aberta, 2019, p. 11.

[29] The Portuguese Government created the Working Group for the European Agenda on Migration, which started working on 28 September 2015. See: Decision no. 10041-A/2015, of 3 September 2015.

gen Area.[30] It introduced travel restrictions and border controls, including measures for restricting non-essential travel, health checks, and quarantine requirements.[31] It was part of Portugal's effort to align with EU regulations and public health guidelines to limit the spread of the virus. Later on, the presidential decree that renewed the declaration of state of emergency maintained the suspension of the right to international circulation: it decreed that border controls on people and goods, including sanitary and phytosanitary controls in ports and airports, could be established by the competent public authorities, in particular in conjunction with the European authorities and in strict compliance with the European Union Treaties, with the purpose of preventing the entry or exit into or from the national territory or making this entry or exit subject to compliance with the conditions necessary to avoid the risk of spreading the epidemic or overloading resources allocated to combating it. This could include suspending or limiting arrivals or departures from or to certain origins, imposing a SARS-CoV-2 diagnostic test or compulsory confinement and prophylactic isolation of people, in a location defined by the competent authorities, with the Government being able to establish differentiated rules for certain categories of citizens, notably for professional or teaching reasons, such as Erasmus students.[32]

Finally, when vaccines became available, the EU introduced measures to facilitate the safe movement of people across borders, including the development of the Digital COVID Certificate (also known as the EU Digital COVID Certificate or EU Digital Green Certificate).[33] Portugal required travellers from other EU countries to present a valid EU Digital COVID Certificate to enter the country. Moreover, the certificate was also used for entrance into large

[30] On 17 March 2020, the European Council agreed to implement temporary restrictions on non-essential travel into the EU for 30 days. Restrictions initially targeted travellers from outside the EU, with exceptions for essential travel and EU citizens and residents returning home (Conclusions on COVID-19 measures, 17 March 2020). In April 2020, the European Commission recommended further measures to prevent the spread of COVID-19, and the initial 30-day period was extended multiple times throughout 2020. In June 2020, the EU began to ease some travel restrictions within the Schengen Area, as Member States started to reopen their borders in a coordinated manner. However, in October 2020, multiple new cases of COVID-19 appeared. As such, the European Commission introduced the "COVID-19 Travel Map" to provide a color-coded system for assessing the risk levels in different regions. This map helped Member States implement travel restrictions and health measures based on the risk status of different areas.

[31] See: Decree-Law no. 20/2020, of 1 March, which was the first legal act to be adopted in this matter.

[32] See: Presidential Decree no. 11-A/2021, of 7 January.

[33] The development of this certificate was made following the introduction of vaccines against COVID-19. The certificate was designed to support safe and free movement within the EU for those who were vaccinated, had a negative test result, or had recovered from COVID-19. See: Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic.

public events, as well as to access certain services and establishments, such as restaurants, bars, and gyms.[34]

III. After the COVID-19 crisis, another "crisis" emerged in the EU: the humanitarian crisis following the war in Ukraine. As a response to this scenario, Portugal activated the national temporary protection mechanism, foreseen in the TPL, as early as 3 March 2022, even before the activation of the Temporary Protection Directive at the EU level. A Governmental working group was soon created, in order to prepare the integration of displaced persons seeking protection.[35] However, in the following days, the EU Council activated the TPDs at the EU level.[36] As a result, the Portuguese Government had to modify its first decision, namely by extending the scope of protection to all foreigners that were encompassed by the EU Council's decision and were not protected by the national decision. Indeed, initially the national decision only protected Ukrainian national citizens and their family members. Citizens of other nationalities would only benefit from such protection if they were family members of Ukrainian nationals. However, after the EU's TPDs activation, the Portuguese Government extended the scope of the protection to all foreigners encompassed by the EU Council's decision.[37] First, to foreign citizens of other nationalities or stateless persons who benefited from international protection in Ukraine, as well as to their family members. Second, to permanent residents in Ukraine, as well as their family members. Finally, to foreigners who were living in Ukrainian territory with a temporary residence permit, or who benefited from a long-term visa for obtaining this type of permit, and whose "safe and lasting return to their country of origin" was not possible, were also covered. As the extension of the protection to some of the mentioned categories of persons was merely optional for the Member States, it is clear that in this second version Portugal chose the highest scope of protection provided for in the Council decision.

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[34] Several acts regulated the use of the EU Digital COVID Certificate in Portugal: Decree-Law no. 28-A/2021, of 5 April, which provided the legal basis for the recognition and application of the certificate; Decree-Law no. 28-A/2021, of 11 March, 2021, which set the detailed rules for the use of the EU Digital COVID Certificate in Portugal, including its role in travel, access to services, and other public health measures; and Resolution of the Council of Ministers no. 45-A/2021, of 15 March 2021, which outlined the general principles and operational aspects of the certificate, particularly concerning its role in facilitating safe movement.

[35] For more details on this activation, see: A. R. Gil, "The implementation of the Temporary Protection Directive in 2022 in Portugal to persons fleeing the war in Ukraine," in S. Mantu, K. Zwaan, T. Strik (eds.), *The Temporary Protection Directive: central themes, problem issues and implementation in selected Member States*, Enschede: Ipskamp Printing, 2023, pp. 71–88.

[36] The Council of the European Union decided to activate the temporary protection scheme on the 4th March 2022 (Decision no. 2022/382).

[37] This extension was made by the Resolution of the Council of Ministers no. 29-D/2022, of 11 March.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

I. Article 19 of the Constitution governs situations of emergency. Although its title reads "suspension of fundamental rights," and it is inserted in the Chapter regarding fundamental rights, it deals more broadly with the regime of *constitutional exception states* (state of siege and state of emergency). Its main principles are the following:

(i) Sovereign bodies cannot, jointly or separately, suspend the exercise of rights, freedoms and guarantees, except in the case of state of siege or state of emergency (no. 1);

(ii) The state of siege or the state of emergency may only be declared, in all or part of the national territory, in cases of effective or imminent aggression by foreign forces, of a serious threat or disturbance of the democratic constitutional order or of public calamity (no. 2);

(iii) The state of emergency is reserved to be declared in less serious cases and may only determine the suspension of some of the rights, freedoms and guarantees (no. 3);

(iv) The principle of proportionality is the paramount principle that governs all *constitutional exception states*. The choice between declaring the state of siege or the state of emergency, as well as its extension, duration, means used, and execution are limited to what is strictly necessary to the ready reestablishment of constitutional normality (no. 4). The declaration of the state of siege or state of emergency must be adequately substantiated and contain the specification of the rights, freedoms and guarantees which are suspended. It further sets forth a time limit: each state of siege or state of emergency must not last longer than fifteen days, or the duration established by law when as a result of the declaration of war, without prejudice to possible renewals, safeguarding the same limits (no. 5);

(v) The declaration of the state of siege or state of emergency may in no case affect the rights to life, personal integrity, personal identity, civil capacity and citizenship, the non-retroactivity of criminal law, the right to defence on criminal law matters and the freedom of conscience and religion (no. 6);

(vi) The declaration of the state of siege or state of emergency may only alter constitutional normality under the terms provided for in the Constitution and the law, and must not affect the application of constitutional rules relating to the competence and functioning of sovereign bodies and of self-government of the autonomous regions or the rights and immunities of their respective holders. The declaration of the state of siege or state of emergency gives the authorities the powers to take all necessary and appropriate measures for the prompt restoration of constitutional normality (no. 7).

II. Even though *constitutional exception states* were at least mentioned in all three nineteenth century monarchical Constitutions,[38] the first time they were substantively regulated at the national level – and where one can find a Portuguese model in which the current Constitution got some inspiration from – was in the republican Constitution of 1911.[39] It was determined therein that it was the competence of the legislature to "declare the state of siege, with total or partial suspension of the constitutional guarantees, in one or several parts of the national territory, in the case of imminent or effective aggression by foreign forces or in the case of internal perturbation." If the Congress was not in session, the competence was to be exercised by the executive power – that is, the President of the Republic.[40] During the state of siege, the executive power, however, could only impose the detention in a place not reserved to common criminal defendants in terms of repressive measures. Within 30 days after the resumption of Congress' sessions, the executive power had to report and present reasons for the exceptional measures taken."[41] This regime was never developed by ordinary law.

[38] The previous monarchical Constitutions had provisions about the topic, but with a less dense regulation. See: Article 211 of the 1822 Constitution: "In cases of declared rebellion or invasion by enemies, if the security of the state requires that some of the aforementioned formalities regarding the arrest of offenders be dispensed with for a certain period of time, this can only be done by special decree of the Cortes. / In this case, at the end of said period, the government will send the Court a list of the arrests it has ordered, explaining the reasons justifying them; and the Secretaries of State, as well as any other authorities, will be responsible for the abuse they have made of the power, beyond what is required by public security."

Article of 145 (33) and (34) the 1826 Constitutional Charter: "The Constitutional Powers may not suspend the Constitution with regard to individual rights, except in the cases and circumstances specified in the following paragraph. / In cases of rebellion or invasion by enemies, the security of the State requests that some of the formalities guaranteeing individual liberty be dispensed with for a certain period of time, which may be done by special act of the Legislative Power. However, if the Parliament is not assembled at that time, and the Homeland is in imminent danger, the Government may exercise this same measure as a provisional and indispensable measure, suspending it as soon as the urgent need that motivated it ceases, and in either case it must send the Cortes, as soon as they are assembled, a reasoned list of the arrests and other preventive measures taken; and any Authorities who have ordered them to be carried out will be responsible for the abuses they have practised in this regard."

Article 32 of the 1838 Constitution: "Individual guarantees may be suspended by act of the Legislative Power in cases of rebellion or invasion by the enemy, and for a certain and determined period of time. / § 1 – If the Cortes are not assembled, and one of the aforementioned cases occurs, and the Homeland is in imminent danger, the Government may provisionally decree the suspension of guarantees. / § 2 – The suspension decree shall include in the same context the summoning of the Cortes to meet within forty days, failing which it shall be null and void. / § 3 – The Government shall immediately revoke the suspension of guarantees decreed by it as soon as the urgent need that motivated it ceases. / § 4 – The law or decree that suspends guarantees shall expressly designate those that are suspended. / § 5 – Under no circumstances may the government suspend guarantees during the period of general elections for Members of Parliament. / § 6 – When the government has suspended guarantees, it shall inform the Cortes, as soon as they meet, of the reason for the suspension and shall present them with a documented report of the preventive measures it has taken on this occasion."

[39] See: A. Damasceno Correia, *Estado de sítio e de emergência em democracia*, Lisboa: Vega, 1989, p. 112.

[40] See: C. Blanco de Morais, *O estado de exceção*, Lisboa: Cognitio, 1984, pp. 57–61.

[41] See: Article 26(16) of the Portuguese Constitution of 1911.

The dictatorial Constitution of 1933 reserved the competence to "declare the state of siege, with total or partial suspension of the constitutional guarantees, in one or several parts of the national territory, in the case of imminent or effective aggression by foreign forces or in the case public security and order are seriously disturbed or threatened" to the National Assembly.[42] The legislative regime gave the Government broad discretion to exercise its regulatory powers, but always supposedly within the limits "imposed by the needs of public salvation" and having to "observe the dictates of natural justice"; however, as typical from an autocratic regime, the rights and freedoms suspended by default were ample, even including, for example, the inviolability of the home and the right to detain all suspicious or dangerous individuals, regardless of a judicial warrant or the establishment of charges.[43] In the constitutional amendment of 1971, already close to the overthrow of the regime by the revolution of 1974, the executive powers were further increased and the parliamentary powers and oversight correspondingly reduced. It was added that "if the National Assembly [was] not in session and cannot be convened in time, or if it [was] prevented from meeting, the Government [could] provisionally declare a state of siege"; in that case, it "[could] not last for more than ninety days without the decree-law having been expressly ratified by the National Assembly, unless it [continued] to be absolutely impossible for the National Assembly to meet. Once the state of siege [was] over, the government [should] send the Assembly an account of the measures taken during its validity."[44] It also allowed the Government, "when the declaration of a state of siege [was] not justified," and in "the event of serious subversive acts occurring in any part of the national territory" to "adopt the necessary measures to repress the subversion and prevent its spread, with the restriction of individual freedoms and guarantees that [proved] indispensable; however, the National Assembly must, when the situation is prolonged, pronounce itself on its existence and seriousness."[45]

The model that stems from these two precedents allows one to identify the following traits: (i) the need for a formal declaration for constitutional states of emergency to be activated; (ii) imminent or effective aggression by foreign forces and internal perturbation as requisites for the declaration of state of siege; (iii) the limitation of the acts allowed under states of constitutional emergency to the actual needs of public salvation; (iv) the possibility of suspension

[42] See: Article 91(8) of the Portuguese Constitution of 1933.

[43] See: Article XXXI(3) and (4) of Law no. 2084, 16 August 1956.

[44] See: Article 109(5) of the Portuguese Constitution of 1933, after its 1971 amendment.

[45] See: Article 109(6) of the Portuguese Constitution of 1933, after its 1971 amendment. This particular regime seems to have been justified by the occurrence of terrorist acts in the African colonies, in the context of the war that was taking place at the time between the Portuguese State and independence movements in Angola, Guinea-Bissau, and Mozambique – see: C. Blanco de Morais, *O estado de exceção*, p. 59.

of fundamental rights, but need to spell them out; and (v) the accountability of the executive before the legislature.

Question 2

The declaration of a state of siege or emergency follows a complex and demanding procedure, involving several constitutional bodies in a coordinated manner, established in the Constitution and regulated in further detail in the RSSE.

The President of the Republic has the exclusive competence to declare the state of siege and the state of emergency. Before doing so, however, the President must hear the Government. The declaration must then be approved by Parliament – or, when the latter is not in session and cannot be convened immediately, its Standing Committee, in which case it has to be ratified by the Plenary as soon as it is possible to convene it – it must have ministerial countersignature and is finally published in the Official Journal.[46] The approval procedure is extremely urgent, prevails over all others, and most of the deadlines and formalities laid down in the Rules of Procedure of the Parliament for other procedures are waived in this case.[47] The declaration must mention the grounds for the declaration, its territorial scope, the fundamental rights suspended, the additional powers entrusted to the Executive and to the armed forces (if any), and its duration.[48] As mentioned before, each declaration can only last for 15 days and its renewal must follow the same procedure.[49] Due to the specificity of the procedure that is in its genesis, the presidential decree is considered to have the nature of a complex normative act, having the force of law and, therefore, being subject to constitutional review.[50]

The Government is responsible for the execution of the declaration at the national level, which involves the adoption of the necessary measures to respond

[46] See: Articles 134(d), 138, 161(l), 179(3)(f), and 197(1)(f) of the Constitution; Articles 10–11 and 24–28 RSSE; and Articles 174–182 of the Rules of Procedure of the Assembly of the Republic, approved by the Rules of Procedure of the Assembly of the Republic no. 1/2020, of 31 August, in its current wording.

[47] See: Article 28 RSSE; and Articles 60(2)(b), 144(5), and 174(2) of the Rules of Procedure of the Assembly of the Republic.

[48] See: Article 19(5) of the Constitution and Article 14(1) RSSE.

[49] See: Article 19(5) of the Portuguese Constitution and Articles 5(1), 14(1) and 29 RSSE.

[50] See: C. Blanco de Morais, "Declaração e execução dos estados de emergência e de calamidade pública em Portugal durante a pandemia: um direito em construção?," in C. Blanco de Morais, M. Nogueira de Brito, M. Assis Raimundo (coord.), *Impacto da pandemia da Covid-19 nas estruturas do direito público*, Coimbra: Almedina, 2022, pp. 38–45; C. Santos Botelho, "Os estados de exceção constitucional: estado de sítio e estado de emergência," in C. Amado Gomes, R. Pedro (coord.), *Direito administrativo de necessidade e de excepção*, p. 83; G. Bargado, "O estado de exceção constitucional – teoria e prática," O Direito, issue 152/II, 2020, pp. 293–294.

to the crisis within the framework established by the declaration. This includes appointing the authorities that coordinate the implementation of the declaration of a state of emergency in mainland Portugal, at the local level, and the possibility of nominating commissioners of its own choosing to ensure the regular functioning of certain public institutions.[51] The Executive is entrusted with these powers, because, under the Portuguese Constitution, it is the sovereign body that conducts the country's general policy and simultaneously the highest body of the public administration. As such, the most adequate way to respond to the crisis is, indeed, to give exceptional powers to the Government, given the information it has access to and the special organisational powers at its disposal.[52]

One fundamental principle ruling the *exceptional constitutional states* is that they should not alter, in any way, the application of constitutional rules relating to the competence and functioning of sovereign bodies and self-governing bodies of the autonomous regions and the rights and immunities of their respective holders.[53] However, the meaning of this provision is far from unambiguous. In fact, read purely literally, this clause would even prevent the state of emergency from being executed. Since there is no mechanism for the parliamentary ratification of decree-laws in the proper sense, the Government would be forced, in the middle of a state of emergency, to request successive legislative authorisations every time it needed to legislate to adversely affect fundamental rights.[54] In fact, the best interpretation of this clause is that it is a duty "not to affect the core of the political organisation inherent in the rule of law"[55] – as would be the case, for example, with granting full powers to just one sovereign body.[56] As will be seen further, this norm gave rise to several jurisdictional decisions during the several states of emergency declared during the COVID-19 pandemic.[57]

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[51] See: Articles 17, 20(4), and 21 RSSE.

[52] See: T. Fidalgo de Freitas, "A execução do estado de emergência e da situação de calamidade nas regiões autónomas – o caso da pandemia COVID-19," e-Pública, setembro 2020, pp. 75–79; Provedoria de Justiça, *Cadernos da pandemia – Estado de direito*, Provedor de Justiça: Lisboa, 2021, p. 21.

[53] See: Articles 19(7) of the Constitution; and Article 3(2) RSSE.

[54] As it has been argued in T. Fidalgo de Freitas, "A execução do estado de emergência e da situação de calamidade nas regiões autónomas – o caso da pandemia COVID-19," pp. 79–80.

[55] See: Cfr. J. de Melo Alexandrino, *Direitos fundamentais*, 2nd ed., Cascais: Principia, 2011, p. 144, note 447. Apparently defending a similar position, see: L. Heleno Terrinha, "A suspensão de direitos fundamentais em estado de exceção biopolítico: revisitação após dois anos de pandemia," in F. Pereira Coutinho, D. Lopes, C. Santos Botelho (coord.), *O direito público e a crise pandémica*, Lisboa: Nova School of Law, 2022, pp. 47–51.

[56] See: C. Blanco de Morais, *Justiça constitucional*, I, 2nd ed., Coimbra: Coimbra Editora, 2006, p. 85.

[57] See, for example, for a critical analysis, P. Fernández Sánchez, "Sobre os poderes normativos do Presidente da República e do Governo em estado de exceção," *Revista da Ordem dos Advogados*, issue 81/3–4, 2021, pp. 755–805; Id., "A modificação das regras de competência dos órgãos de soberania em estado de exceção: o caso exemplar da aprovação de normas sem autorização parlamentar em matéria penal," *Revista Portuguesa de Direito Constitucional*, n.º 1, 2021, pp. 103–139.

Citizens fully maintain the right to access the courts to defend their rights, freedoms and guarantees.[58] The Ombudsperson's Office and the Attorney General's Office also remain in permanent session to ensure the full exercise of its powers to defend the democratic legality and the citizens' rights.[59]

Question 3

As mentioned above, the declaration of state of siege or state of emergency should not affect the application of constitutional rules relating to the competence and functioning of self-governing bodies of the autonomous regions of Azores and Madeira.[60] This means that the regional autonomy is therefore especially preserved.

In what the approval procedure of the declaration state of siege or state of emergency is concerned, it is important to point out that the Parliament must consult the self-governing bodies of the autonomous regions, whenever the declaration of a state of siege or state of emergency refers to the respective geographic scope.[61] This must be done following the quickest and most appropriate means.

Moreover, in accordance with the principles of autonomy of these regions, the law has established that the execution of the declaration of state of emergency or of state of siege for autonomous regions is of the competence of the Representative of the Republic, in cooperation with the regional government and in accordance with the Government's guidelines.[62] However, after the 2004 constitutional amendment, this option is constitutionally questionable and functionally inadequate.[63] It is constitutionally questionable because the RSSE is not in accordance with the constitutional amendment of 2004, which has stripped the Representative of the Republic of all legal and administrative powers; instead of being a governmental delegate or commissioner, it is since then solely a representative of the President of the Republic with political competences and only responds before the latter.[64] And it is functionally inadequate due to the fact that it lacks the autonomy, the appropriate tools and means, as well as the procedures to structurally be able to carry out these functions: its staff is very limited and not technically specialised in civil protection,

[58] See: Articles 6 and 22(2) RSSE.

[59] See: Article 18(2) RSSE.

[60] See: Articles 19(7) of the Constitution; and Article 3(2) RSSE.

[61] See: Article 229(2) of the Constitution and Article 25(4) RSSE.

[62] See: Articles 20(1), (2), and 17 RSSE.

[63] The argument is fully developed in T. Fidalgo de Freitas, "A execução do estado de emergência e da situação de calamidade nas regiões autónomas – o caso da pandemia COVID-19," pp. 61–81.

[64] See: R. Medeiros, T. Fidalgo de Freitas, R. Lanceiro, *Enquadramento da reforma do Estatuto Político-Administrativo da Região Autónoma dos Açores*, Lisboa: s.n., 2006, pp. 130–131.

home affairs, defence, and public health, it does not have powers of direction, superintendence, or control over the peripheral administration of the Republic based in the archipelago's territory or over the regional administration, which does not allow it to mobilise the means and human resources with the necessary knowledge and diligence.

Question 4

There are no special rules as regards possible conflicts between the implementation of constitutional provisions and EU or international law on situations of emergency. As such, general norms foreseen in Articles 7(6) and 8(4) of the Constitution shall remain applicable. The latter norm recognizes the principle of primacy in EU law, albeit it sets forth some limits to it: the primacy of EU law does not impair the respect of the fundamental principles of democracy and rule of law. As such, it can be argued that rules on suspension of fundamental rights, as enshrined in Article 19 of the Constitution, as well as the rules regarding competence and functions of the sovereign constitutional bodies must not be challenged by the EU Law, as they will correspond to the core of values that Article 8(4) aims to preserve. Even though, according to the Constitutional Court's perspective, a possible clash seems unlikely.

The Constitutional Court has affirmed several times that EU Law retains autonomy in relation to the domestic legal order: the domestic law is not affected, in terms of validity, by European standards; nor is the European legal order, in principle, affected in terms of its validity — even when its norms are applied domestically — because it contradicts the national Constitution. The Court recognises that, due to the principle of autonomy of EU Law, only the Court of Justice is competent to assess the invalidity of European law, by reference to its own parameters.[65] This principle of autonomy of EU law was expressly affirmed in the Constitutional Court's famous Ruling no. 422/2020.[66] In this ruling, the Court interpreted Article 8(4) of the Constitution: in its reasoning, it affirmed the principle of primacy of EU Law, with the above-mentioned limits – primacy could not override the fundamental principles of democracy and rule of law. However, the Court considered that these limits receive the

[65] CJEU Ruling of 22 October 1987, Foto-Frost, case 314/85.

[66] See: also Ruling no. 294/2023. For a commentary to Ruling no. 422/2020, see: M. J. Rangel de Mesquita, "Comentário ao Acórdão n.º 422/2020 do Plenário do Tribunal Constitucional," *e-Pública*, vol. 10/2, 2023; R. Medeiros, "The primacy of European Law over the Portuguese Constitution according to the Constitutional Court – comment on Constitutional Court judgment 422/2020," *Católica Law Review*, vol. V/1, 2022, pp. 111–124; C. Santos Botelho, "O lugar da Constituição portuguesa no constitucionalismo transconstitucional contemporâneo – Comentário ao Acórdão do Tribunal Constitucional n.º 422/2020, a propósito de um subsídio à exportação," in R. Costa (coord.), *Direito das empresas – reflexões e decisões*, Coimbra: Almedina, 2022, pp. 345–375.

same protection in EU law itself, since primary EU Law is grounded on the constitutional identity of Member States. As such, and obeying to the principle of autonomy, only the CJEU could declare an EU norm to be invalid for breaching such limits. An eventual competence of the Court to declare such norm to be unconstitutional on the grounds of Article 8(4), *in fine*, could only occur if the Portuguese constitutional principle at stake was not considered, under EU Law, as having the same parametric value as it had under the Portuguese Constitution. As a consequence, the Court considered that, pursuant to Article 8(4) of the Constitution, it could only judge and refuse to apply an EU norm if it was incompatible with a fundamental principle of the democratic rule of law which, within the specific scope of EU Law, would not enjoy a parametric value materially equivalent to that recognized in the Constitution. As such, in a case of clash between a constitutional fundamental principle and an EU norm, when such principle is protected and recognised by the EU Law has having a higher value in the EU legal framework, the Court considers that the competent body to decide on the EU's norm's legality is the CJEU only.

As regards emergency measures, a specific mention can be made to the Constitutional Court's decision, dated of 8 May 2024, on the need to present the EU Digital COVID certificate in restaurants.[67] The appeal was not grounded *per se* in any allegation of conflict between the Constitution and the EU provisions regarding the EU Digital COVID certificate. Indeed, the object of the constitutional review was a norm enshrined in a Portuguese act – Decree-Law no. 28-B/2020, of 26 June, which regulated the use of the EU certificate – and introduced restrictions to fundamental rights as a result. The Court considered that the Government had the power to introduce such restrictions during a state of calamity (since it was authorised by a parliamentary law – the BLCP). Moreover, it decided that the constitutional principles were respected, namely the principle of proportionality. The Court considered that the measure was necessary – given that other feasible solutions, in particular the prohibition of visiting public places open to the public or carrying out tests upon entry, appear more serious and with a greater potential for affecting fundamental rights – and unequivocally suitable for achieving the prevention of the spread of the disease. It also dismissed the allegations that the use of this certificate would demand "internet access and a display capable of showing the digital certificate – with the resulting discrimination against citizens of legal age, 'info excluded,' without the capacity economical to have access to a 'smartphone' or without the ability to know how to use one." Indeed, access to the portal of the National Health Service could be done in person in several places, through assisted care, and a printed version of the EU Digital COVID Certificate could be obtained there.[68]

[67] Ruling no. 354/2024.

[68] See: Article 2(3) of Decree-Law no. 54-A/2021, of 25 June, which implemented Regulation (EU) 2021/953.

As such, the measure would not amount to a breach of the principle of non-discrimination.

Question 5

The protection of fundamental rights in cases of national emergency depends on the type of response adopted to react to such emergency. *Constitutional exceptions* (state of siege and state of emergency) allow for more serious interferences with fundamental rights: they are the only cases in Portugal whereby rights, freedoms and guarantees protected under the Constitution can be *suspended*.

There is not a unanimous definition, among legal scholars, on what suspension of fundamental rights is. Most scholars distinguish suspension from restriction due to the temporary nature of the former[69]: the suspension is designed for situations "in which it is not feasible to define *ex ante* the content of the measures to be adopted," which is why the suspension of the exercise of rights is determined to authorise the competent authorities to adopt measures that, given the specific circumstances, prove necessary and appropriate. On the contrary, restrictions would be used when it is possible to anticipate the type of measures to be adopted.[70]

Some scholars consider, however, that the suspension of fundamental rights foreseen in the Portuguese Constitution is not a genuine suspension, but "a type of atypical and more serious legal restriction."[71] The same is to say that if both the declaration and the execution of the state of exception are limited to what is strictly necessary for the reestablishment of normality, then "rights are not properly suspended, but rather 'weakened'" in the face of the possibility of being restricted or compressed.[72]

In terms of the effects of the suspension of rights,[73] some scholars consider that the suspension of fundamental rights achieves "certain protective effects of the

[69] See: J. Pereira da Silva, *Direitos fundamentais. Teoria geral*, Lisboa: Universidade Católica Editora, 2018, p. 222.

[70] See: P. Machete, "Direito administrativo de necessidade e de exceção – os fins justificam os meios?," in C. Amado Gomes, R. Pedro (coord.), *Direito administrativo de necessidade e de excepção*, p. 12.

[71] See: C. Santos Botelho, "Os estados de exceção constitucional: estado de sítio e estado de emergência," p. 58. Close to this perspective, see: M. Nogueira de Brito, "A crescente uniformização dos modelos de emergência constitucional," in C. Blanco de Morais, M. Nogueira de Brito, M. Assis Raimundo (coord.), *Impacto da pandemia da Covid-19 nas estruturas do direito público*, pp. 175–178.

[72] See: J. C. Vieira de Andrade, *Os direitos fundamentais na Constituição Portuguesa de 1976*, 5th ed. Coimbra: Almedina, 2012, p. 315.

[73] For an overview, see: G. de Almeida Ribeiro, "Compreender o estado de exceção constitucional," Julgar, issue 44, 2021, pp. 139–150.

norm of fundamental rights, and not the norm of fundamental rights itself, nor its object, nor its content."[74] Others, however, adopt a maximalist perspective and argue that the root of the difference between suspension and restriction of fundamental rights lies in the fact that the first determines that, for the entire period in which it is in force, the fundamental right is as if "erased": "it is as if in that period the fundamental right ceased to exist."[75] Structurally, this would mean that, as a result of the suspension, the fundamental rights norm is temporarily changed, or, more specifically, its structure is affected.[76] Indeed, a suspension limits the exercise of a right in such a way that the limitation becomes the rule, despite being accompanied by possible exceptions in which the citizens may exercise the suspended right.[77]

The Constitution imposes numerous limits to fundamental rights suspensions, as it will be developed *infra*. Besides being only possible during state of siege or state of emergency, they must comply with the principle of proportionality: the declaration of these constitutional exception states must set forth in detail the rights that are suspended, and in which modalities, and some rights are non-derogable. Only those modalities of exercise of fundamental rights that may indeed impair the responses to the crisis may be suspended. Their connection to the triggering event must, thus, be clear and grounded.[78] These limits are complemented with additional ones set forth by the RSSE, which also determines that the suspension of the exercise of fundamental rights must always respect the principle of equality and non-discrimination, gives a higher degree of protection to the guarantee of *habeas corpus* and to home searches.[79]

Outside the states of siege and emergency, no suspension of fundamental rights may occur, nor may suspensions of rights already carried out in previous states of emergency be prolonged, even under the pretext that they were "already in force." As such, the cases of administrative exception cannot justify the suspensions of any fundamental rights, even if they were already in force. Once

[74] See: J. de Melo Alexandrino, *Direitos fundamentais. Introdução geral*, p. 144.

[75] See: J. Reis Novais, *Manual de direitos fundamentais*, Lisboa: AAFDL 2024, pp. 232–237; Id., "Direitos fundamentais e inconstitucionalidade em situação de crise – a propósito da epidemia COVID-19," *e-Pública*, issue 7/1, 2020, p. 92. Not far, J. de Bacelar Gouveia, *Estado de exceção no direito constitucional. Uma perspetiva do constitucionalismo democrático. Teoria geral e direito português*, Coimbra: Almedina, 2020, p. 169, considers the suspension of fundamental rights as an "ablation" of the right, which would imply the "freezing of powers" that the rights confer on their respective holders.

[76] See: P. Moniz Lopes, "Significado e alcance da «suspensão» do exercício de direitos fundamentais na declaração de estado de emergência," *e-Pública*, issue 7/1, 2020, p. 134.

[77] See: A. R. Gil, "Em busca de uma perspetiva substancial do conceito de 'suspensão de direitos fundamentais,': in A. C. Nascimento Gomes, B. Albergaria, M. Rodrigues Canotilho (coord.), *Diálogos em homenagem ao 80.º aniversário de J. J. Gomes Canotilho*, Belo Horizonte: Editora Fórum, 2021, pp. 631–646.

[78] See: Article 19 of the Constitution.

[79] See, for example, Article 2 RSSE.

the constitutional exception state ceases, fundamental rights suspensions are no longer admissible.

Question 6

The rapporteurs are not aware of any precedents in Portugal in which EU fundamental rights or EU fundamental freedoms of the internal market came into conflict with domestic emergency measures. Indeed, the only cases where such freedoms were restricted were allowed by EU Law itself. That was the case of the introduction of temporary controls in the Schengen borders, in some contexts that required special national security measures. Indeed, the Schengen Borders Code provides Member States with the capability of temporarily reintroducing border controls at the internal borders in the event of a serious threat to public policy or internal security.[80]

Portugal introduced such measures four times, outside the above-mentioned context of the COVID-19 pandemic. The first time occurred in 2004, when Portugal hosted the 2004 football Euro championship. The measure was justified with the fact that "the holding of events such as the Rock in Rio music festival and the European Football Championship – Euro 2004 will bring hundreds of thousands of foreign citizens to Portugal, not only to attend music concerts and football matches, but also attracted the party atmosphere and tourist promotions associated with these events," and also that "the success of Rock in Rio and Euro 2004 necessarily involves safeguarding the safety of participants and spectators." However, the Government grounded the decision not only on the need to guarantee internal security, but also to prevent illegal immigration.[81]

In 2010, due to the organisation of a NATO summit in the country, the Government decided to reintroduce internal border checks for the second time. It justified this measure with the "size, media visibility and complexity of the event, with representation at the highest level from the 28 member states, other partner countries and participating organizations," which posed a clear need to guarantee internal security. The Government further added that it was "necessary to prevent the entry into the country of citizens or groups known to be habitually causing conflicts or changes in public order or whose behaviour is likely to compromise the security of national citizens and foreign citizens who, as a result of this event, will flock to our country."[82]

[80] See: Article 25 *et seq.* Schengen Borders Code, approved by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders.

[81] See: Resolution of the Council of Ministers no. 65/2004 of 12 May.

[82] See: Resolution of the Council of Ministers no. 86/2010, of 10 November.

In 2017, as part of the Pope's visit to Portugal, the Government decided to reintroduce internal controls again,[83] stressing that such measure was an "exceptional measure to the regime of absence of controls on people when crossing internal borders provided for in the Schengen Borders Code." The Government grounded this decision on "the size, characteristics, complexity of the event, its media visibility, the huge influx of people expected and the current threat context," which created "a clear need to guarantee internal security, through appropriate measures, including prevention the entry into national territory of citizens or groups whose behaviour may be likely to compromise the security of national and foreign citizens who will participate in the event."

In the summer of 2023, during the World Youth Day, where Pope Francis visited the country, Portugal reintroduced the control again.[84] It used the exact same motives used in 2017, concluding that it was necessary for reasons of internal security and public order, to reintroduce, on an exceptional basis, document control at internal national borders, during the period of the event, similarly to the procedure previously adopted in 2017.

Section 3: Statutory/executive emergency law in the Member States

Question 1

The regime of state of siege and state of emergency is regulated in the Constitution and further detailed in a statutory act, the RSSE. Even though it is a legislative act, it is still aimed at regulating the states of *constitutional* exception.

As for special statutory regimes, one must first point out the BLCP, which sets forth the main principles on civil protection, defined as "the activity carried out by the State, autonomous regions and local authorities, by citizens and by all public and private entities with the purpose of preventing collective risks inherent in situations of serious accident or catastrophe, mitigating their effects and protecting and rescue people and property in danger when those situations occur." Civil protection is seen as a permanent activity, pertaining to the responsibility of several central, regional and local bodies. It sets forth the duty of all citizens and other private entities to collaborate in achieving the purposes of civil protection, observing the preventive provisions of laws and regulations, complying with orders, instructions and advice from the bodies and agents responsible for internal security and

[83] See: Resolution of Council of Ministers no. 49/2017, of 4 April.
[84] See: Resolution of the Council of Ministers no. 71/2023, of 14 July.

civil protection and promptly satisfying requests made by the competent authorities.[85]

The competent bodies may, depending on the nature of the events to be prevented or faced and the severity and extent of their current or expected effects, declare three *exceptional states*: the state of alert, the state of contingency, and the state of calamity. Under these circumstances, public authorities may adopt "appropriate and proportionate" measures to face the risks at stake. The principle of subsidiarity is to be applied while distinguishing whether to apply each and one of these declarations, being the calamity the most serious one. The declarations may also refer to any part of the territory, adopting an infra-local, local, supra-local, regional or national scope. The powers to declare an alert or contingency situation are limited by the territorial scope of competence of the respective bodies. The declaration of a state of calamity must always be made by means of a resolution of the Council of Ministers.

The acts that declare a state of alert, contingency, or calamity give rise to significant legal effects. They take the form of an order and expressly mention (a) the nature of the event that gave rise to the declaration; (b) the temporal and territorial scope; (c) the procedures for the technical and operational coordination of civil protection services and agents, as well as the resources to be used; (d) the preventive measures to be adopted. The contingency declaration must also mention the (e) inventory procedures for damage and losses caused; and (f) the criteria for granting material support. Finally, the state of calamity allows for more public powers, such as (g) the civil mobilization of people, for determined periods of time; (h) the establishment of limits or restrictions on the movement or presence of people, other living beings or vehicles; (i) the establishment of sanitary and security fences, and (j) rationalization of the use of public transport, communications, water and energy supply services, as well as the consumption of basic goods.[86] The declaration of a calamity situation is sufficient to grant exceptional powers to the public authorities, including free access to private property in the relevant area, as well as the use of private natural or energy resources, as strictly necessary, the temporary requisition of goods and services (rules relating to compensation for the temporary requisition of properties contained in the Expropriations Code apply, with due adaptations),[87] the mobilisation of civil protection and relief agents (which includes public servants, agents, and other employees of the direct and indirect Public

[85] See: M. Silva Gomes, "As declarações situacionais na Lei de Bases da Proteção Civil: alerta, contingência e calamidade," in C. Amado Gomes, R. Pedro (coord.), *Direito administrativo de necessidade e de excepção*, pp. 97–165.

[86] See: Articles 13–17 BLPC.

[87] See: M. Melo Egídio, "A requisição de pessoas e bens," in C. Amado Gomes, R. Pedro (coord.), *Direito administrativo de necessidade e de excepção*, pp. 385–412.

Administration, including self-employed). Other special rules are to be applied, namely concerning land use (which implies the suspension of territorial planning plans), and public procurement for public works, supply of goods and acquisition of services, temporarily derogating from the *normal* legal norms.[88]

These declarations also determine the activation of territorially competent institutional and political coordination structures. They further imply a special obligation for the media to collaborate, including broadcast and telecommunications operators.

The LSPH, in turn, sets forth specific measures when a situation of *public health emergency* is declared. This law gives special powers aimed at the prevention, alert, control, and response measures to cases of risks to public health. The member of the Government responsible for the health area may take essential exceptional measures in the event of a public health emergency, including the restriction, suspension or closure of activities or the separation of people who are not sick, means of transport or goods, who have been exposed, in order to avoid the possible spread of infection or contamination.[89] He or she may also issue guidelines and regulatory standards with immediate executive force.

Finally, in line with the EU common policy on asylum, Portugal has transposed the Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons, through the already mentioned TPL, which, in the event of a mass displacement of persons, declared either by the EU Council for all the EU Member States, or by the Portuguese Government for the Portuguese territory, foresees a special regime for providing international protection for persons. Thus, derogations from the general law on asylum may be applicable. These derogations can be decided by Portugal alone, as the TPL allows for a mere national declaration of mass influx of persons.

Question 2

I. In Portugal, *states of constitutional exception* are regulated both by constitutional and legislative provisions. As for *states of administrative exception*, they are regulated by statutory provisions, which must, naturally, respect all constitutional limits. In this regard, *states of administrative exception* do not alter the normal application of Constitutional norms. Only the constitutional

[88] See: Articles 19–30 BLPC.
[89] See: Article 17 LPSH.

states of siege or of emergency, for being expressly foreseen by the Portuguese Constitution, imply a true scenario of *constitutional exception*.[90] Its statutory regime – both in terms of procedure and of substantial requirements – is anchored in the Constitution.

States of administrative exception, on the contrary, are purely a creation of ordinary law. This means that the Constitution continues to be fully applied. In other words, "administrative exceptions" act in contexts of "constitutional normality."[91]

There are several differences between the administrative and the constitutional states of exception. First, suspension of fundamental rights can only occur during the *constitutional exceptions*, and not during the *administrative exceptions*[92]; the latter only allows for restrictions to fundamental rights which must be strictly authorised by the pre-existent applicable law. The declaration procedure is also different: whereas the *constitutional exceptions* must follow a strict and demanding procedure which involves three sovereign bodies – the Government, which requests it, the President of the Republic, who issues it, and the Parliament, which authorises it – the procedure for declaring a *situation of alert*, *of contingency or of calamity* foreseen in the BLCP follows a more simplified formalism, pertaining exclusively either to the local authorities or to the Government.

II. In the context of the pandemic caused by COVID-19, Portugal used mainly two instruments to adopt exceptional measures to respond to the crisis: the declaration of *state of emergency*, foreseen the Constitution and regulated in the RSSE, and the *declaration of situation of calamity*, under the BLCP. Albeit different in nature, these two systems followed one another almost permanently, depending on the seriousness of the pandemic at each moment. This led to some confusion and also to some measures that were then declared unconstitutional. In reality, though, there was an even complex normative framework, in which three distinct legal regimes overlapped: the constitutional regime of the state of emergency, the legislative regime of the calamity situation and, finally, "emergency legislation adopted by the Government, often without

[90] However, the state of siege and of emergency do not correspond to suspensions of the Constitution itself. Indeed, it is the Constitution that foresees its application in some scenarios, and its purpose is the defence of the constitutional order itself, when it is being severely challenged. Legal scholars have insisted that there are not two material Constitutions – one for normal situations and another one for those of crisis, but only one Constitution, based on the same principles and values, although with appropriate rules to the diversity of situations. See, among others: J. J. Gomes Canotilho, V. Moreira, *Constituição da República Portuguesa anotada*, 4th ed., Coimbra: Coimbra Editora, 2007, p. 403; and J. Miranda, *Manual de direito constitucional*, IV, 3rd ed., Coimbra: Coimbra Editora, 2000, p. 343.

[91] See: A. R. Gil, "Separando as águas: estado de emergência e estado de calamidade," pp. 77–110.

[92] See: Article 19(1) of the Constitution.

parliamentary authorization and others obtaining it through ratification of dubious contours."[93]

The first act adopted was Decree-Law no. 10-A/2020, of 13 March, which restricted several fundamental rights, such as the right to education, the right to access certain places, and the exercise of economic freedom. This governmental legislative act was issued without legislative authorization, and outside the context of a state of exception or a state of calamity, reason why its constitutionality was contested.[94] Its norms and effects were ratified by parliamentary Law no. 1-A/2020, of March 19, but this atypical ratification was also constitutionally dubious, not only but also because the Constitution does not allow retroactive restrictions of fundamental rights.[95]

On 18 March 2020, the first state of emergency was declared, through Decree of the President of the Republic no. 14-A/2020, which was renewed twice. This presidential decree also ratified all previous legislative and administrative acts, and its constitutionality was also contested.[96] After the last renewal, several states of calamity were declared, on the basis of both the BLCP and the LSPH. On November 9, 2021, a state of emergency was declared again, which was renewed eleven times during the end of 2020 and until April 2021.

This frequent sequences of *states of constitutional exception* and *administrative exceptions* led to some confusions, as in some cases the Government adopted measures, in a context of state of calamity, that could only be applied in cases of state of emergency.

Shortly after the first declarations of a state of emergency, which occurred in the first half of 2020, and whose effects ended on May 1 of that year, the Government declared a situation of calamity. During that period, however, some measures that had been adopted during the state of emergency continued in force, although with a view to progressively easing them. Some of these measures raised some doubts regarding their constitutionality.

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[93] See M. Nogueira de Brito, "Modelos de emergência no direito constitucional," *e-Pública*, issue 7/1, 2020, pp. 9–34. Similarly, see L. Sousa da Fábrica, "Os decretos de declaração e de execução do estado de emergência – aspetos constitucionais e administrativos," *Revista do Ministério Público*, special issue, 2020, pp. 26–29.

[94] According to Article 165(1)(b) of the Constitution, only parliamentary laws may legitimately limit fundamental rights, unless the Parliament authorises the Government to do so.

[95] Article 18(3) of the Constitution. With a critical perspective on this ratification, see: P. Fernández Sánchez, "Sobre os poderes normativos do Presidente da República e do Governo em estado de exceção," pp. 797–805.

[96] See additionally: J. Reis Novais, "Direitos fundamentais e inconstitucionalidade em situação de crise," pp. 122–123, note 15.

In the first declaration of a situation of calamity, it was stated that "the Government opts for a less intense list of restrictions, suspensions and closures than the one that was in force, without prejudice to the gradual lifting of restrictions and the need to maintain scrupulous compliance by the Portuguese population with the physical distancing measures essential to contain the infection."[97] However, some measures were maintained. For some authors, the mandatory confinement, in a health establishment, at home or elsewhere, of sick people and those under active surveillance raised some doubts, as such measure was not expressly foreseen in the BLCP itself – although it was referred to in the Basic Health Law (Base 34),[98] and fits within the wide range of public health response measures. Some authors consider, for example, that outside the legal framework of a state of emergency, prophylactic isolation measures could only be carried out through decision of a Court, in accordance with the right to freedom and security guaranteed in the Constitution.[99]

The Constitutional Court had the opportunity to decide several cases regarding deprivation of liberty imposed by the Government during a mere state of calamity. In the Ruling no. 88/2022,[100] it considered that a norm, contained in the Resolution of the Council of Ministers declaring a situation of calamity, and foreseeing a possible detention of an indefinite group of people for a period of 13 days, based on an administrative order and without judicial control, would be unconstitutional. Indeed, the Court considered that the Government did not have the necessary authorisation to issue that provision, which amounted to a breach of the right to personal freedom and also of the Parliament's legislative competence.[101]

In addition to these measures taken under pre-existing legislative acts, others were adopted in bills specifically approved to regulate the situation of calamity. Decree-Law no. 20/2020, of 1 May, for example, provided for the use of masks and visors to access to certain spaces and authorized the taking of body temperature measurements of workers for the purpose of accessing and remaining in the workplace.[102] Some scholars claimed that this governmental act

[97] Council of Ministries' Resolution no. 33-A/2020, dated of 30th April 2020.

[98] Law no. 95/2019, of 4 September.

[99] See: J. Alves Correia, "As patologias da declaração do estado de calamidade e os limites constitucionais do direito administrativo da pós-emergência," *Revista de Direito Administrativo*, issue 9, 2020, p. 54.

[100] Ruling no. 88/2022, of 1 February 2022.

[101] See: Articles 27 and 165(1)(b) of the Constitution. See also: Ruling no. 89/2022 and Ruling no. 90/2022 of the Constitutional Court regarding detention ordered by the Aliens and Borders Service; for a critical comment on the former, see: C. Blanco de Morais, "Declaração e execução dos estados de emergência e de calamidade pública em Portugal durante a pandemia: um direito em construção?," in C. Blanco de Morais, M. Nogueira de Brito, M. Assis Raimundo (coord.), *Impacto da pandemia da Covid-19 nas estruturas do direito público*, pp. 67–68.

[102] See: Articles 13-B and 13-C of Decree-Law no. 20/2020, of 1 May.

restricted fundamental rights without parliamentary authorization.[103] However, the Constitutional Court did not consider that a similar norm, enshrined in Decree-Law no. 28-B/2020, of June 26, which imposed the obligation to use masks or visors, was unconstitutional. For the Court, the BLCP gave the necessary permission for the Government to establish such obligations and to consider their breach as a mere administrative offence.[104]

Question 3

I. There are several constitutional limits on Parliament or Government when making use of emergency powers governed by legislative/executive provisions. The main tenet is that the general principles of the rule of law must be respected in several dimensions. The Constitutional Court summarised these limits as follows: "in the material plan, […] the principle of proportionality in a broad sense – comprising the requirements of adequacy, necessity and fair measure – fully operative at the time of the execution of the state of exception, with the norms and acts of the executive power decreed and carried out in this context […]. At the institutional level, the Government is responsible vis-à-vis the President of the Republic and the Assembly of the Republic […], with the execution of the declaration of a state of siege or state of emergency being the specific subject of parliamentary supervision […], thus seeking to establish a system of checks and balances that reconciles the need for expeditious and effective action in circumstances of crisis, to which the executive power is focused, with the mechanisms of deliberation, publicity, and control typical of a democratic and representative regime."[105]

II. The first limit to be mentioned is related to the set of rights that must not be suspended. They are generally referred to as non-derogable fundamental rights: the rights to life, to personal integrity, to personal identity, to civil capacity and citizenship, the non-retroactivity of the criminal law, the accused persons' right to a defence, and the freedom of conscience and religion.[106] The RSSE establishes further limits, by setting forth that the suspension of the exercise of fundamental rights must always respect the principle of equality and non-discrimination, by ensuring the right to *habeas corpus*, and the guarantees on the realisation of home searches. This bill further establishes that the suspension of any kind of publications, radio and television broadcasts, cinematic or theatrical shows, or the apprehension of any publications cannot

[103] See: P. Gonçalves, "Abdicação parlamentar na emergência e continuação da abdicação na calamidade," Observatório Almedina, 21st May 2020.

[104] Ruling no. 58/2024, of 18 January. See also, as regards the competence to develop administrative offences during the BLCP's exceptional situations: Ruling no. 170/2024 of 29 February 2024.

[105] Ruling no. 352/2021, of 27 May.

[106] See: Article 19(6) of the Constitution.

imply any form of prior censorship. Finally, meetings of the statutory bodies of political parties, unions, and professional associations may not be dissolved or submitted to prior permission.[107] These limits clearly stem from the ultimate guarantees of the democracy and rule of law, which must be respected even in a context of *constitutional exception*.

III. During the *constitutional exception states*, the most important principle stemming from the rule of law is undoubtfully the principle of proportionality.

This principle is present in several moments and dimensions, as required by the Constitution and the RSSE, which several times refers to the need for respect for the principle of proportionality. The very declaration of state of siege or state of emergency must obey to this principle and may be declared only in cases where there is a serious threat or disturbance of the democratic constitutional order or public calamity. Of the two states of constitutional exception, the least severe must be chosen if it is sufficient to tackle the threat. The Constitution sets forth important limits to the suspension of fundamental rights. In addition to the prohibition of suspension of certain rights under any circumstances, already mentioned, it requires that other rights should be only partially suspended, if possible. On the other hand, the principle of proportionality shall regulate both the content of declaration of state of siege or emergency (regarding the number of rights suspended, its territorial scope, its duration, etc.), and its execution: pursuant to this norm, suspensions and limitations to rights must be limited to what is strictly necessary to allow the prompt reinstatement of constitutional normality.[108] The RSSE repeats these principles in several provisions. The concretisation of the principle of proportionality faces several difficulties at this stage, as there is often a need to react urgently to a situation that may be not completely known. These situations will necessarily result in a dynamism of the measures that will need to be "constantly monitored and re-evaluated so as to determine whether they can or should be reviewed."[109]

The execution of the state of siege and emergency – by the Government – shall also respect the principle of proportionality. Such principle operates in this context in two dimensions. First, the Government is strictly limited by the content of the presidential declaration: besides what is expressly allowed by that act, the Government cannot exercise any powers that it does not have in contexts of constitutional normality. Second, even within the powers that were actually conferred to it by the presidential declaration, the Govern-

[107] See: Article 2(2) RSSE.

[108] See: Article 19(3) and (4) of the Constitution.

[109] See D. Lopes, "O papel do princípio da proporcionalidade num cenário de direito administrativo de necessidade e de excepção," in C. Amado Gomes, R. Pedro (coord.), *Direito administrativo de necessidade e de excepção*, p. 85.

ment may not have to exhaust all possibilities: if it is not strictly necessary to suspend or to restrict a certain right as intrusively as authorised by the presidential decree, the Government may only act to a lesser extent – provided that such extent is sufficient to protect the interests at stake. Finally, when evaluating the effects of the measures to be adopted, the Government must take into account not only the rights that were expressly suspended, but also on other rights that are dependent on the full exercise of the former ones – for example, the right to maintain a contact with children of divorced parents may be subjected to a "chain suspensions" if there is a suspension of the right to free movement.

Being a general principle that also limits administrative activities,[110] the principle of proportionality also plays a paramount important role in the *states of administrative exception*. The BLCP sets forth the need to respect the principle of proportionality also during the states of alert, contingency and calamity. It enshrines the principle of subsidiarity, according to which, the higher-level civil protection scheme – that is, the situation of calamity – should only be declared if and to the extent that the objectives of civil protection cannot be achieved by the immediately less severe schemes – that is, the situations of contingency and alert. In particular, "the situation of calamity may be declared when, in the face of occurrence or danger of occurrence of [accident or catastrophe], and its predictable intensity, there is a recognized need to adopt exceptional measures aimed at preventing, reacting or resetting the normality of living conditions in the areas reached by its effects." All these measures shall be "proper and proportional to the need to face increasing degrees of risk"[111] in a logic of "gradualist flexibility."[112]

IV. Besides the principle of proportionality, another important corollary of the rule of law is the principle of legal certainty. In this regard, the declaration of state of siege or emergency must clarify which rights are suspended or restricted, as well as the scope of suspension.[113] Accordingly, the declaration of state of siege or emergency is not a mere direct authorisation to the Administration to carry out any measures it has by convenient or appropriate. Citizens must know with clarity which fundamental rights are suspended and which actions are deemed authorised in any given moment.

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[110] See: Article 266(2) of the Constitution and Article 7 CPA. See, among others: M. Aroso de Almeida, *Teoria geral do direito administrativo*, 8th ed., Coimbra: Almedina, 2021, pp. 138–144; P. Gonçalves, *Manual de direito administrativo*, I, pp. 246–251, 410–411; P. Otero, *Direito do procedimento administrativo*, I, Coimbra: Alnedina, 2016, pp. 174–182; M. Rebelo de Sousa, A. Salgado de Matos, *Direito administrativo geral*, I, 3rd ed., Lisboa: Dom Quixote, 2008, pp. 214–216.

[111] See: Articles 5, 8(2), and 9 BCLP.

[112] See: C. Blanco de Morais, *O estado de exceção*, pp. 71, 77.

[113] See: Article 14(1) RSSE.

The principle of legal certainty is also important in the context of *states of administrative exception*, namely regarding the declaration of situation of calamity. The law allows for the adoption of several restrictive measures: for example, the civil mobilisation of persons, for certain periods of time; limits to the circulation or permanence of persons, animals or vehicles, sanitary and safety fences, rationalization of transportation, communications, water and energy supply and consumption goods. Contrary to what is foreseen in the case of states of constitutional exception, in which the Government's powers are framed and limited by the declaration of the President of the Republic, in the situation of calamity the Government (or, in the other states of administrative exception, the local authorities) directly decide the measure to be adopted and, therefore, which rights are affected.[114] To respect the principle of legal certainty, the declaration of situation of alert, contingency (by the local authorities), or calamity (by the Government) must identify in as much detail as possible the specific measures to be taken by the public administration.

Question 4

The fact that an emergency measure is introduced by the EU does not alter in any way the balance and distribution of power among sovereign bodies or with other administrative institutions and bodies in Portugal. Indeed, the rules regarding the distribution of power are non-derogable,[115] which means that they should be recognised as fundamental principles of the rule of law of the democratic State. Consequently, the primacy of European Union Law may not override these principles.[116]

Section 4: Judicial review of emergency powers in the Member States

Question 1

During all emergency situations – including those of constitutional nature – citizens maintain the full right of access to the courts, for defending their rights, freedoms and guarantees.[117]

The organisation of the courts in Portugal is divided in two parallel jurisdictions: the judicial courts and the administrative courts.[118] In general, administrative courts are competent to review actions and decisions taken by the

[114] See: Articles 21(2) and 26 BCLP.
[115] See: Article 19(7) of the Constitution.
[116] For the purposes of Article 8(4) of the Constitution.
[117] See: Article 6 RSSE.
[118] See: Article 209 of the Constitution.

public administration,[119] as a rule, including in emergency cases. However, all measures related to deprivation of liberty, as well as convictions related to criminal and administrative offences, are dealt with by the judicial courts. Finally, the content of the declaration of state of siege or emergency can be reviewed by the Constitutional Court.

Administrative and Tax Courts are competent to analyse whether decisions taken by the authorities during the situations of emergency were lawful: whether they were authorised by the declaration, whether they have followed the necessary procedure, whether there was any abuse of power, etc. These courts are also competent to deal with execution acts, which may include the possible payment of damages in case of civil liability. Indeed, citizens whose fundamental rights have been violated by the declaration of state of siege or emergency, or measures adopted under its execution, which were illegal or unconstitutional, are entitled to the corresponding compensation, in the general terms.[120] Procedural actions on responsibility of the State and other public law persons fall under the jurisdiction of the Administrative and Tax Courts.[121]

The Code on Procedures on Administrative Courts (hereinafter CPTA)[122] sets out several procedural means that can be used to control the public administration's acts during emergencies, such as: the review of administrative decisions, the declaration of illegality of administrative norms, or the order of the public powers to decide or to act in a specific way, or not to act or decide.[123] A special mention must be made to the specific procedural mean aimed at guaranteeing fundamental rights: the injunction for the protection of rights, freedoms, and guarantees.[124] This is an urgent procedure that may be used when private parties are confronted with an illegal administrative action that is breaching their fundamental rights and which cannot be averted by interim relief measures. This procedural means ended up becoming extremely important during emergency contexts as an urgent measure whereby citizens may challenge any public decision or act that interferes with their fundamental rights. Administrative and Tax Courts may also decide interim relief requests: namely the suspension of the effects of some decisions or acts, or even anticipatory remedial measures.[125]

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[119] Article 212 of the Constitution and Article 4 of the Statute of the Administrative and Tax Courts, approved by Law no. 13/2002, of 19 February, last amended by Decree-law no. 74-B/2023, of 28 August.

[120] Article 2(3) RSSE.

[121] Law no. 67/2007, of 31 December, last amended by Law no. 31/2008 of 17 July.

[122] Law no. 15/2002, of 22 February, as last amended by Law no. 56/2021, of 16 August.

[123] Article 37 CPTA. For an overview in English, see: J. M. Sérvulo Correia, "Judicial resolution of administrative disputes: Administrative procedure in Portugal," in D. Moura Vicente (org.), *Direito comparado: perspectivas luso-americanas*, Coimbra: Almedina, 2006, pp. 323–336.

[124] Article 109 CPTA.

[125] Article 112 *et seq.* CPTA.

In some cases, it is up to the Judicial Courts to protect private individuals during crisis and emergencies scenarios. That is the case, first, of criminal matters. In this context, citizens who violate the provisions of the declaration of the state of siege or the state of emergency, namely, as to their execution, commit the crime of disobedience.[126] Judicial Courts are competent to deal with criminal matters, including during exceptional states, as these do not alter the division of competences between the two jurisdictions. Judicial Courts remain competent, moreover, to decide *habeas corpus* requests.

Finally, the Constitutional Court is competent to review the constitutionality of all norms enacted by the Parliament, the Government or the regional governments,[127] including norms that are decreed during emergency conjunctures.

Question 2

In principle, there are no procedural specificities applicable to the Courts when reviewing the actions of public authorities in situations of emergency. The same rules of procedure are to be applied in all cases, unless the declaration of state of siege or emergency decides otherwise. Indeed, declarations of *states of constitutional exception* may indeed introduce some temporary changes on the functioning of courts, pursuant that access to courts and the guarantees of defence in criminal law matters are respected. That was precisely the case during the states of emergency decreed in 2020 as a response to the COVID-19 pandemic. The Parliament enacted Law no. 1-A/2020, of 19 March,[128] which regulated deadlines and procedural steps, applying the judicial holiday regime until the end of the pandemic.[129]

[126] Article 7 RSSE.

[127] Article 277 *et seq.* of the Constitution.

[128] The Constitutional Court had the opportunity to decide on the constitutionality of some norms of this law, namely, the suspension of the limitation period for administrative offences – see: Ruling no. 500/2021.

[129] For some of the issues raised by this regime, see: M. Teixeira de Sousa, J. H. Delgado de Carvalho, "As medidas excepcionais e temporárias estabelecidas pela L 1-A/2020, de 19/3 (repercussões na jurisdição civil)," 2020, available at https://blogippc.blogspot.com/2020/03/as-medidas-excepcionais-e-temporarias.html; I. Alexandre, "Audiências à distância em processo civil e princípio da publicidade das audiências," *Revista da Faculdade de Direito da Universidade de Lisboa*, issue LXI/1, 2020, pp. 261–289. For the Administrative and Tax Courts, see: J. D. Coimbra, "A justiça administrativa em tempos de emergência e de calamidade," *e-Pública*, issue 7/1, 2020, pp. 297–343; J. D. Coimbra, M. Caldeira, T. Serrão, *Direito administrativo da emergência*, Coimbra: Almedina, 2020, pp. 131–176. For an overall assessment, see: Centro de Estudos Judiciários, *Estado de emergência – Covid-19. Implicações na justiça*, 2nd ed., Lisboa: CEJ, 2020.

Question 3

There are no specific rules on the standard of review used by the Courts regarding the actions of public authorities in situations of emergency. During the COVID-19 pandemic, the case-law was variable, with some Courts adopting more deference to the public powers' decisions than others. Decisions were at times fluctuant even in the same Court, with some decisions facing many dissenting opinions and the same case even leading to different decisions, depending on the group of judges sitting in the Chamber. Within this backdrop one of the factors that may explain such divergences might be the fact that the constitutional state of emergency declared to fight the COVID-19 pandemic was the first ever constitutional state of exception ever declared in Portugal, which can justify some instability in the courts, as no previous case-law existed before.

I. Judicial Courts generally adopted a proactive role regarding the defence of the fundamental right to liberty, namely on *habeas corpus* cases following decisions on medical confinement. For example, in a leading case decided in the context of the COVID-19 pandemic, dated of 15 May 2020, the Judicial Court of Ponta Delgada, Azores, ordered the immediate release of a person quarantined in a hotel in the Azores, following a petition of *habeas corpus*. The measure had been approved by the Regional Government of the Azores and its norms were deemed unconstitutional by the court and were therefore disapplied.[130]
The Constitutional Court reviewed the decision of the Judicial Court of Ponta Delgada and decided that the norms that imposed a mandatory confinement, for 14 days, of passengers landing in the Autonomous Region of the Azores, were unconstitutional. It concluded that the measure at stake amounted to a deprivation of liberty and, as such, only the Assembly of the Republic (or the national Government, if so authorised by the former) could approve such a measure on the adoption of a such measure.[131]

II. Differently, the Supreme Administrative Court adopted a deferential approach in cases in which *administrative exceptions* – namely the situation of calamity – were concerned.[132] The challenged measures were all adopted by the Government as administrative regulations which legal basis were the

[130] See: Ruling of the Judicial Court of the Azores of 15 May 2020, press release available at https://comarcas.tribunais.org.pt/comarcas/noticia.php?com=acores&id_noticia=690. For a comment on this decision, see: T. Fidalgo de Freitas, "A execução do estado de emergência e da situação de calamidade nas regiões autónomas – o caso da pandemia COVID-19," pp. 59, 87–98.

[131] For breaching Articles 165(1)(b) and 27 of Constitution, see: Ruling no. 424/2020.

[132] For a critical overview, see: R. A. Pereira, "Parâmetros de Estado de direito em pandemia – uma análise da jurisprudência do Supremo Tribunal Administrativo sobre o 'regime a situação de calamidade," *Revista Portuguesa de Direito Constitucional*, n.º 3, 2023, pp. 9–32.

BLPC and the LSPH, both of which had been approved by the Assembly of the Republic. The former allowed for the Council of Ministers to determine the "mobilisation of people for specific periods of time," for "setting limits or restrictions on the movement or stay of people, other living beings or vehicles, for reasons of personal safety or the safety of operations," and for "the erection of health and safety fences." The latter foresaw the governmental competence for "the restriction, suspension, or closure of activities or separation of persons who were not ill, means of transport or goods that have been exposed, in order to prevent the possible spread of infection or contamination."[133] Even though recourse to the BLPC was subject to contention among scholars,[134] it was the one of the laws systematically invoked by the Government.

The first case decided by the Supreme Administrative Court[135] concerned the limitations of gatherings of people above a certain number which was variable according to the risk of transmission of the COVID-19 disease in territorial district.[136] The Supreme Administrative Court concluded that not unconstitutional because it was exceptional and temporary, had its legal basis in a parliamentary law (mostly the LSPH, but also the BLPC) which meant it followed a "concrete uninterrupted chain of democratic legitimation," and was legitimised through international technical internormativity and the comparison and interdependence between the measures adopted by the several States.[137]

The second case concerned regarded the ban on the travel of citizens outside their residence's municipality in the period between midnight of 30 October 2020 and 6 a.m. of 3 November 2020, except for health reasons or other urgent reasons; this was the weekend of the day to remember the dead, in which it was traditional for citizens to travel to their hometowns and, in particular, visit the cemeteries to pay homage to their dead loved ones. The breach of such

[133] See, respectively, Articles 21(2)(a)-(c) and BLPC and Article 17 LSPH.

[134] See, namely: J. de Melo Alexandrino, "Dez apontamentos sobre o recurso à Lei de Bases da Proteção Civil," 2021, available at https://www.icjp.pt/sites/default/files/papers/dez_apontamentos_sobre_o_recurso_a_lbpc3.pdf; C. Amado Gomes, "Legalidade em tempos atípicos: notas sobre as medidas de polícia sanitária no âmbito da pandemia," *Revista do Ministério Público*, special issue, 2020, pp. 68–76; J. Alves Correia, "As patologias da declaração do estado de calamidade e os limites constitucionais do direito administrativo da pós-emergência," pp. 52–55. Less critical of this option, see: J. C. Loureiro, "Bens, males e estados (in)constitucionais," pp. 800–303.

[135] Only cases in which the court decided the substance of the case will be analysed, and not those in which the case ended in acquittal for purely procedural reasons. A sample of the latter can be found in the following list: Rulings of the Supreme Administrative Court of 31 October 2020, case number 01958/20.9BELSB, of 5 February 2021, case number 012/21.0BALSB, of 13 September 2021, case number 0104/21.6BALSB, of 21 October 2021, case number 086/21.4BALSB, of 10 February 2022, case number 04/22.2BALSB, of 3 November 2022, case number 038/21.4BALSB.

[136] Established by Article 14(1), (2), and (8) of Resolution of the Council of Ministers no. 55-A/2020, of 31st July.

[137] See: Ruling of the Supreme Administrative Court of 10 September 2020, case number 088/20.8BALSB. The plaintiff appealed the decision, but it was unanimously dismissed – see: Ruling of the Supreme Administrative Court (Full Chamber) of 25 March 2021, with the same case number.

measure would amount to a crime of disobedience.[138] The Supreme Administrative Court rejected that the challenged rule would constitute a suspension of fundamental rights, but rather an "aggravated recommendation," and decided that it was an exceptional measure which had been approved in accordance with the legal bases mentioned above. As for the three subprinciples of the proportionality analysis, it considered that (i) regarding suitability: "the number of confirmed cases per municipality varies, which in itself justifies the fact that reducing mobility between municipalities is an appropriate measure to limit the spread of a virus that is transmitted (a public and notorious fact) through interpersonal contact"; (ii) in terms of necessity: "the scientific uncertainty about this new pandemic disease [was] still significant (a public and notorious fact) and that so far there has been a significant increase in the number of infections, despite the various measures and recommendations that have already been adopted […], and that this number gives rise to a proportional increase in the number of serious cases requiring hospital care, [including chains of intergenerational chains of contagion] whose response capacity is limited"; and, finally, (iii) the proportionality *stricto sensu* analysis: it passes an overall weighing judgment "in view of the limited period of time for which the measure is imposed, its specific content, which is […] very elastic, and the imperative nature of the ultimate goals that the adoption of the measure is intended to achieve (safeguarding the response capacity of health services to provide care for all, those who suffer from a serious form of COVID-19 and others who need hospital care during the pandemic, with the aim of protecting human life in dignified conditions)." The Court concluded by adding that "the lack of a special legislative framework for the powers of authority in the context of a pandemic cannot, in the context of a state of constitutional normality such as the current one, totally prevent the adoption of measures which are necessary to manage the risk of the spread of the disease, provided that they find their source of parliamentary legitimisation through chains of legislation and respect the proportionality required of them."[139] In 2024, the Constitutional Court declared that such provision was unconstitutional for a lack of parliamentary delegation, which would allow the Government to create, *ex novo*, a crime of disobedience under a mere administrative emergency scenario. The Court stressed that "in the case of a period of constitutional normality, the Government lacked the competence to approve a rule such as the one considered here without being authorized to do so by the Parliament."[140]

[138] Established by Articles 12–13 of Resolution of the Council of Ministers no. 89-A/2020, of October 26.

[139] See: Ruling of the Supreme Administrative Court of 31 October 2020, case number 0122/20.1BALSB. For a critical analysis, see A. R. Gil, "Separando as águas: estado de emergência e estado de calamidade," pp. 104–106.

[140] Ruling no. 416/2024, of 28 May 2024. As regards other cases of unconstitutionality of norms declaring as crime of disobedience some behaviours, which were adopted by the Government in contexts of administrative exception under the BLCP, see: Ruling of the Constitutional Court no. 350/2022.

The third and fourth cases concerned a similar ban on travel from 15h00 of 25 June 2021 and 06h00 of 28 June 2021, but limited to the Metropolitan Area of Lisbon.[141] The Court reached similar conclusions regarding its organic conformity with the Constitution and its proportionality.[142]

The fifth case was related to the obligation of prophylactic isolation at home for 14 days for passengers coming on flights from the United Kingdom who "[did] not have an EU Covid Certificate or proof of full vaccination in the UK."[143] The Court considered this was a limitation of the right to travel, and not of the right to liberty, and that it was proportional because there was, at the moment, "a specific risk factor constituted by the spread of the so-called Delta variant of the virus, which [had] spread with particular speed and scope in the United Kingdom, despite the high vaccination rate achieved there."[144]

III. The Constitutional Court decided several times on the constitutionality of measures adopted both during the state of emergency and the state of calamity.[145] Its case-law is highly variable, and it is difficult to trace a tendency. In any case, the standard of review seems to be more demanding during the *states of administrative exception* than during *states of constitutional exception*. This can be justified by the fact that the Government is indeed invested with more powers during the several states of emergency than during the situation of calamity, as in the latter case its action must respect ordinary constitutional limits and is strictly framed by the law under which it is – in the case, the BLPC and also, at times, the LSPH. It is also worth noting that the Court, in its case-law, opted for not qualifying interferences with fundamental rights as *suspensions* or *restrictions*, choosing instead, in most cases, to merely analyze whether the Government was indeed invested with the powers to adopt the challenged measures.

Some cases are worth mentioning. Starting with the analysis of some of the measures adopted during the states of emergency, one of the most discussed cases was that in which the Governmental measures that establish that some behaviours would amount to crimes of disobedience. Indeed, the definition of crimes falls

[141] Established by Article 3-A of the regime annexed to Resolutions of the Council of Ministers no. 74-A/2021, of 9 September, and no. 77-A/2021, of 24 June.

[142] See: Rulings of the Supreme Administrative Court of 27 June 2021, case number 085/21.6BALSB, and of 27 June 2021, case number 086/21.4BALSB.

[143] Established by Articles 30 and 32 of the regime annexed to Resolutions of the Council of Ministers no. 101-A/2021, of 30 July, and no. 114-A/2021, of 20 August, as well as Despacho no. 7746-A/2021, of 6 August.

[144] See: Rulings of the Supreme Administrative Court of 27 June 2021, case number 085/21.6BALSB, and of 27 June 2021, case number 086/21.4BALSB.

[145] The Court provided, until 2022, a list of the decisions it had already issued related to the pandemic – see: https://www.tribunalconstitucional.pt/tc/file/dossier_covid_outubro2022.pdf?src=1&mid=6909&bid=5516

under the Parliament's legislative competence,[146] and the state of emergency is not supposed to change the allocation of competences.[147] According to the RSSE – which is a parliamentary law – breaches of the declaration of a state of siege or state of emergency or of that law, especially regarding its execution, would amount to a crime of disobedience.[148] However, there were some doubts on whether this law would allow for the Government to declare autonomously that the disobedience of some orders would be criminally punishable.

Decree no. 2-A/2020, of 20 March, was one of such cases: according to its Article 3(2), the violation of the obligation of confinement by citizens in relation to whom the health authority or other health professionals had determined active surveillance would constitute a crime of disobedience.[149] The first rulings in this realm considered that the Government did not exceed its powers by taking this measure.[150] The Court considered that this norm was allowed by a Parliamentary Law – the RSSE – which mentioned that the violation of the provisions of the declaration of a state of siege or state of emergency, especially regarding its execution, amounted to a crime of disobedience. For the Court, when mentioning *execution* of the state of emergency, this provision also encompassed behaviours that disrespected the government regulations of the declaration of the state of emergency. As a result, when legislating about the crime of disobedience, the Government was merely executing what was allowed by the RSSE. However, after this first approach, other rulings, decided by other chambers of the Court, adopted a different perspective. They considered that Article 7 RSSE had a narrower scope, only encompassing violations of norms present in RSSE and in the decrees of the President of the Republic declaring a state of emergency. When the Government determined that non-compliance with orders was a crime in the decree that regulated and executed the Presidential declaration, it created crimes *ex novo*. Consequently, these measures were unconstitutional, for organic and formal reasons.[151] Since there were contradictory rulings in this regard, the Constitutional Court issued a ruling to make its case-law consistent.[152] In this decision, it adopted the broader interpretation of Article 7 RSSE, concluding that it also encompassed, as crimes of disobedience, breaches of the governmental decrees that implemented the state of emergency. As such, the decree did not create *ex novo* the crime of disobedience.[153]

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[146] See: Article 165(1)(c) of the Constitution.

[147] See: Article 19(7) of the Constitution.

[148] See: Article 7 RSSE.

[149] Punishable under the terms of Article 348(1)(a) of the Criminal Code.

[150] Rulings no. 921/2021 and no. 617/2022.

[151] Ruling no. 557/22.

[152] Ruling no. 196/2023. The procedural means applicable to make the jurisprudence uniform is expressly foreseen in Article 79-D, no.1 of the Law of Procedure in the Constitutional Court, approved by Law no. 28/82, of 15 November.

[153] Naturally, this conclusion had several dissenting opinions – namely, of the judges that had decided the opposing view in the Ruling no. 557/22.

In a second situation, which was also about the powers of the Government in relation to the crime of disobedience, the Court was again deeply divided. In this case, it discussed whether in its decree for the execution of the state of emergency declaration the Government could aggravate the penalties foreseen in the Criminal Code. Indeed, the Governmental Decree no. 2-B/2020, of 2 April, established the duty to comply with legitimate orders of the competent authorities and further determined that failure to do so would be punished as disobedience, increasing the minimum and maximum limits of its penalty by a third.[154] The first rulings considered that the *state of constitutional exception* allowed the Government to exercise extraordinary powers, including legislative powers that in contexts of constitutional normality would belong to the Parliament.[155] According to the Court's point of view, "the Government does not need authorization from the Parliament or the President of the Republic to enact the rules it deems necessary on matters that are part of the reserve of parliamentary law: once a state of emergency or a state of siege has been declared, the Executive begins to act within the framework of an exceptional organisation of public power, which cannot only establish standards of conduct incompatible with the regular exercise of the fundamental freedoms covered by the presidential decree – as occurs with the imposition of a general duty of home confinement – but also approve measures in matters of crimes and penalties closely related to their function of defending the constitutional order."[156] The third ruling, however, decided by another chamber, considered that the governmental measure that had aggravated the penalties foreseen in the Criminal Code for the mentioned cases of disobedience would indeed be unconstitutional.[157] The clash between the two different rulings had, once again, to be decided in a special appeal for making the case-law uniform. On the 30 May 2023, the Court finally decided that the norm was unconstitutional for the reasons mentioned.[158] The Court noted that both the RSSE and the presidential declaration referred to the crime of disobedience as it was drafted in the Criminal Code, which meant that the Government would not have the power to change the penalties foreseen therein. By doing so, lacking a parliamentary authorisation and without such power having been conferred by the presidential declaration, the Government had, indeed, surpassed its powers.

[154] Article 43, paras. 1 and 6.

[155] Ruling no. 352/2021, of 17 May 2021, and Ruling no. 193/2022, of 17 March 2022. These two rulings had several dissenting opinions. For critical comments, see: C. Blanco de Morais, "Declaração e execução dos estados de emergência e de calamidade pública em Portugal durante a pandemia," pp. 56–61; M. Nogueira de Brito, "A crescente uniformização dos modelos de emergência constitucional," pp. 179–187; P. Fernández Sánchez, "A modificação das regras de competência dos órgãos de soberania em estado de exceção," pp. 110–112, 123–125.

[156] Ruling no. 352/2021, of 17 May 2021, §12.

[157] Ruling no. 678/2022.

[158] Ruling no. 326/2023. For a scholarly overview of this topic, see: A. Lamas Leite, ";'Desobediência em tempos de cólera': a configuração deste crime em estado de emergência e em situação de calamidade," *Revista do Ministério Público*, special issue, 2020, pp. 165–191; S. Oliveira e Silva, "Entre a desobediência e a propagação de doença: como se punem as condutas 'irresponsáveis' de contágio?'," *Revista do Ministério Público*, special issue, 2020, pp. 193–225.

If there were some difficulties as regards deciding on exceptional powers of the Executive during the state of emergency, constitutional justices were less divided in what *states of administrative exception* are concerned. Indeed, in many cases the Court considered that the Government had surpassed its constitutional powers in the context of the administrative situation of calamity. Very early on, the Court considered the measures that imposed a mandatory confinement, for 14 days, of passengers landing in the Autonomous Region of the Azores as unconstitutional.[159] It considered that the regional government had disrespected the Assembly of the Republic's legislative competence, by imposing a restriction to the fundamental right of personal freedom, without being authorized to do so. Later on, in a different case, the Court declared the unconstitutionality of a similar measure for the same reasons. In this case, the provision concerned was a norm, issued by the national Government, that decreed the mandatory confinement in a series of situations.[160] The Court considered that such norm would allow that any citizen could be deprived of liberty based on administrative order and without judicial control.[161] As there was no declaration of state of siege or emergency in force at the time, the Court considered that the Government had gone beyond its competence. Several decisions followed regarding matters, and the Court maintained its line of decision: mandatory confinements (considered as deprivations of liberty) or restrictions to the freedom of movement which were decided by a simple act of the Government during administrative states of exception would be unconstitutional.[162]

IV. Finally, it is to be noted that in the described Constitutional Court's case-law, the Court opted to not qualify interferences with fundamental rights as *suspensions* or *restrictions*, and chose, in most cases, to merely analyse whether the Government was indeed invested in the powers to adopt the questioned measures.

The difference in the degree of deference used to review governmental decisions by the Supreme Administrative Court and by the Constitutional Court – whose leniency was criticised by several scholars[163] – can tentatively be explained by several factors. On the one hand, by the moment in time

[159] See: Ruling no. 424/2020. These rules were contained in points 1 to 4 and 7 of the Resolution of the Council of Government of the Azores no. 77. /2020, of 27 March, and in points 3(e) and 11 of the Resolution of the Council of Government of the Azores no. 123/2020, of 4 May.

[160] Ruling no. 336/2022.

[161] This norm was enshrined in Article 3(1)(b) of the regime annexed to the Resolution of the Council of Ministers no. 157/2021, of 27 November.

[162] See, among others, Ruling no. 350/2022, of 12 May 2022, Rulings no. 465/2022 and no. 466/2022, of 24 June 2022, Rulings no. 489/2022 and no. 490/2022, of 14 July 2022. More recently, see: Ruling no. 415/2024, of 28 May 2024.

[163] See, for example, C. Blanco de Morais, "Declaração e execução dos estados de emergência e de calamidade pública em Portugal durante a pandemia," pp. 62–75.

in which each court had to decide: whereas the Supreme Administrative Court was called upon during the actual pandemic, when the challenged measures were in force (and were necessary to effectively fight the public health crisis that was unfolding, according to the Government's view), the Constitutional Court acted *ex post* as a rule, when there was no emergency anymore. Similarly, this meant that in the moment when the Supreme Administrative Court had to review the challenged governmental decisions there was limited knowledge regarding certain aspects of the decisions, and those were taken according to the best evidence available in the Government's view; when they were reviewed by the Constitutional Court, rarely did this court place itself in the decision maker's shoes at the time the decision was taken. Finally, if the Government had the possibility of defending its measures before the Supreme Administrative Court as a party, presenting scientific evidence and legal arguments, that did not happen in most cases before the Constitutional Court, which meant that such measures were left defenceless. This is due to the structure of the Portuguese system of concrete review of constitutionality,[164] which does not require the body which had approved the challenged norm to be summoned to be a party in the proceedings before the Constitutional Court.

Question 4

As mentioned above, the principle of proportionality is of paramount importance for the judicial review of actions of public authorities in situations of emergency: it is both the criterion for their declaration and execution, and the limit of the legislative and administrative actions taken under these states. It is not only foreseen in several constitutional and legislative provisions for the *states of constitutional exception*,[165] but is also a central element of the constitutional and legislative rules governing the *states of administrative exception*.[166]

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[164] For a thorough analysis of the system of concrete review of constitutionality, see: C. Blanco de Morais, *Justiça constitucional*, II, 2nd ed., Coimbra: Coimbra Editora, 2011, pp. 595–981. For shorter explanations in English, see: M. L. Amaral, R. A. Pereira, "The Portuguese Constitutional Court," in A. von Bogdandy, P. M. Huber, C. Grabenwarter (eds.), *The Max Planck handbooks in European public law*, III – Constitutional *adjudication: institutions*, 3rd ed., Oxford: OUP, 2020, pp. 696–699, 701, 706–708; A. Cortês, T. Violante, "Concrete control of constitutionality in Portugal: A means towards effective protection of fundamental rights," *Penn State International Law Review*, vol. 29/4, 2011, pp. 759–776. For a thorough analysis of the shortcomings of such system, cfr., among others, J. Reis Novais, *Sistema português de fiscalização da constitutionalidade. Avaliação crítica*, 3rd ed., Lisboa: AAFDL, 2021, pp. 145–241.

[165] See: Article 19(3), (4), and (5) of the Constitution, as well as Articles 1(1), 3, 4, 5, and 9(2) RSSE. See: J. Bacelar Gouveia, *Estado de exceção no direito constitucional*, pp. 162–170.

[166] See: Articles 18(2) and 266(2) of the Constitution, as well as Articles 8(2), (3), (4), and (6) BLCP, Article 17(3) LSPH, and Article 3(2) CPA.

The Supreme Administrative Court, in its review of the restrictive measures approved by the Government, consistently applied the three prongs of this principle. See, as an example, the proportionality analysis made in the Ruling of the Supreme Administrative Court of 31 October 2020, case number 0122/20.1BALSB, described above.

The Constitutional Court did the same. For example, in its Ruling no. 365/2024, the Court analysed the constitutionality of a measure that imposed a penalty for not abiding to the duty to hold and present the EU Digital Covid Certificate inside catering establishments during a situation of calamity.[167] In this case, the Court concluded that the measure was proportional: (i) it was appropriate "for the pursuit of the aims pursued by the legislator, namely the prevention of the spread of the disease"; (ii) necessary, "given that other possible solutions, in particular a ban on attending public places open to the public or tests at the entrance, appear to be more burdensome and have a greater potential to affect fundamental rights"; and (iii) in accordance with proportionality *stricto sensu*: "taking into account, on the one hand, the constitutional rights and values in conflict, including the intensity of the threat to public health in question and, on the other hand, the relative relevance of the restriction in question, the constitutional requirements relating to laws restricting" fundamental rights are respected. The Court also signalled that "it [was] not true that the requirement to present the EU Digital COVID Certificate [required] 'access to the internet and a display capable of showing the digital certificate – with the resulting discrimination against 'infoexcluded' older citizens, without the economic capacity to have access to a smartphone or without the capacity to know how to use one,' and even provided "for the possibility of presenting proof of 'negative SARS-CoV-2 diagnostic tests' as an alternative to the EU COVID Certificate."

The anatomy of the principle of proportionality in the Portuguese legal order[168] is essentially similar to that of its structure in EU Law. If there is a difference worth noting, it is the fact that in Portugal, unlike in EU Law,[169] its three prongs, including the balancing inherent in the proportionality *stricto sensu* subprinciple therein, are openly and consistently applied.

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[167] See: Article 2(d)(i) of Decree-Law no. 28-B/2020, of 26 June.

[168] For the Portuguese version of proportionality, see: J. Reis Novais, *Princípios estruturantes de Estado de direito*, 2nd ed., Coimbra: Almedina, 2021, pp. 99–162; for a monographic treatment, see: V. Canas, *O princípio da proibição do excesso na conformação e no controlo de atos legislativos*, Coimbra: Almedina, 2017.

[169] As noted by, for example, P. Craig, *EU administrative law*, 3rd ed., Oxford: OUP, 2019, pp. 643–644, who claims that "there has been greater uncertainty as to whether the third element, often referred to as proportionality *stricto sensu*, is also part of the EU test," concluding that "although the Union Courts do not always make reference to this aspect of the proportionality inquiry, they do so when the applicant presents arguments directed specifically to it."

Section 5: Implementation of EU emergency law in the Member States

Question 1

There are no specific principles of Portuguese law that may be anticipated as relevant to take into account when implementing EU measures governing situations of emergency that would interact with principles and rules of EU Law.

In any case, during COVID-19, the Portuguese Government decided that foreign citizens who had submitted visa, residency, asylum, refugee, or subsidiary protection applications and their cases were pending on 18 March 2020, when the state of emergency was declared, were considered to be regularly staying in Portuguese territory.[170] The aim was to protect the more vulnerable in a time of crisis, and a consequence of the entrenchment of the principle of human dignity as a fundamental norm and value in the Constitution.[171]

Question 2

No particular gaps or shortcoming have been identified in the practice of Portugal implementing EU emergency measures in the past. The only aspect that ought to be noted is that, within Article 78(3) TFEU, the relocation decisions fell short of the vacancies Portugal had offered. Moreover, several migrants left the country before the end of the welcoming period, that was of 18 months.[172] The entities working in the field explained that some of these abandonments were mainly caused by lack of family or social ties within the country. Indeed, until 2015, there were almost no Syrian communities in the country. The same can be said regarding the other nationalities that were encompassed by the relocation decision.

[170] See: para. 1 of Despacho no. 3863-B/2020, of 27 March. On this topic, see: A. R. Gil, "Asilo em estado de emergência," in C. Amado Gomes, R. Pedro (coord.), *Direito administrativo de necessidade e exceção*, pp. 440–441.

[171] See: Article 1 of the Constitution.

[172] A. Dias Cordeiro, "Quase metade dos 1500 refugiados que chegaram já deixou Portugal," Público, 16.10.2017.

Romania

*Marieta Safta**

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

The Constitution of Romania expressly enshrines in Article 93 – Emergency measures, the concepts of "state of emergency" and "state of siege," without defining them.
The constitutional provisions are developed in Government Emergency Ordinance No. 1/1999 on the regime of the state of siege and the state of emergency,[1] approved by Law No. 453/2004[2] which states in Article 1 that "the state of siege and the state of emergency concern crisis situations that require emergency measures that are established in cases determined by the appearance of serious dangers to the country's defence and national security, to constitutional democracy or to prevent, limit or remove the consequences of disasters."
Distinguishing between the two concepts, the Government Emergency Ordinance No. 1/1999 defines the state of siege in Article 2, as follows: "the set of emergency measures in the political, military, economic, social and other fields, applicable throughout the country or in certain administrative-territorial units, established to adapt the capacity of the country's defence, including cyber defence, to serious, current or imminent dangers, which threatens the sovereignty, independence, unity or territorial integrity of the State."

The state of emergency is defined in Article 3 of the Government Emergency Ordinance No. 1/1999, as being "the set of emergency measures in the political, economic and public order fields, applicable throughout the country or in some administrative-territorial units, shall be established in the following situations: (a) the existence of current or serious imminent dangers regarding Romania's national security, including cyber security for reasons of national security, or the functioning of constitutional democracy; (b) the imminence of the occurrence or production of calamities that make it necessary to prevent, limit or remove, as the case may be, the consequences of disasters."

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[1] Official Gazette no. 22 of 21 January 1999.
[2] Official Gazette no. 1.052 of 12 November 2004.

Two other related concepts, which are not found in the Constitution, but only in the infra-constitutional legislation, are "the situation of emergency" and "the state of alert." They are defined in the Government Emergency Ordinance No. 21/2004 on the National Emergency Management System,[3] subsequently amended and supplemented. Thus, according to Article 2 (a) of the Government Emergency Ordinance No. 21/2004, the situation of emergency represents: "exceptional events, non-military ones, that threaten the life or health of the person, the environment, material and cultural values, and in order to restore the state of normality, the adoption of urgent measures and actions, the allocation of specialized resources and the unitary management of the forces and means involved are required" and according to Article 41, "the state of alert represents the response to an emergency situation of special magnitude and intensity, determined by one or more types of risk, consisting of a set of temporary measures, proportional to the level of severity manifested or predicted and necessary to prevent and eliminate imminent threats to life, human health, the environment, important material and cultural values or property."

In the context of the COVID-19 pandemic, it was adopted Law No. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic[4] which sets out the legal regime of the state of alert with reference to this specific context, defining it in Article 2 as representing: "the response to an emergency situation of special magnitude and intensity, determined by one or more types of risk, consisting of a set of temporary measures, proportional to the level of severity manifested or predicted and necessary to prevent and eliminate imminent threats to life, human health, the environment, important material and cultural values or property."

Apart from the mentioned concepts, the Constitution of Romania also uses the concept of "extraordinary situations" in Article 115 – *Legislative delegation*. Thus, the Government can adopt emergency ordinances only in extraordinary situations,[5] the regulation of which cannot be postponed. In the absence of any definitions in the Constitution, the Constitutional Court of Romania (CCR) characterized the extraordinary situation, noting that "for the issuance of an emergency ordinance it shall exist an objective, quantifiable state of fact, independent of the will of the Government, which endangers a public interest."[6]

[3] Official Gazette no. 361 of 26 April 2004.

[4] Official Gazette no. 396 of 15 May 2020.

[5] The concept of "extraordinary situation" (Article 115 of the Constitution of Romania) is different from that of "emergency situation" (Article 93 of the Constitution), the latter having distinct regulations and specific rules

[6] Decision No. 14/2011, Official Gazette no. 266 of 15 April 2011.

Question 2

The legal regime of the state of siege and the state of emergency is provided in general terms at the constitutional level, being then developed at the infra-constitutional level by the Government Emergency Ordinance No. 1/1999 on the regime of the state of siege and the state of emergency regime[7] approved by Law No. 453/2004, subsequently amended and supplemented.

Thus, the Government Emergency Ordinance No. 1/1999 defines the state of emergency (Article 1 in conjunction with Article 3), establishes the fundamental rights and freedoms that cannot be prohibited (Article 31) and the duration of the state of emergency (Article 5 in conjunction with Article 15), envisages the possibility to restrict the exercise of certain rights and freedoms and the conditions under which the said restriction can occur (Article 14 in conjunction with Article 4 and Article 32), which are the public authorities competent to manage public affairs in a state of emergency and their powers (Article 7, Article 9, Article 10, but also Chapter III and Chapter V), the legal acts of the public authorities in a state of emergency, the content and legal effects of some of these acts (Article 14, Article 201 and Chapter IV), namely the procedure for establishing the state of emergency (Chapter II) and the sanctions for non-compliance with the provisions of the Government Emergency Ordinance No. 1/1999 (Chapter VII).[8]

As for the legal regime of the situation of emergency and the state of alert, it is defined in the Government Emergency Ordinance No. 21/2004 on the National Emergency Management System,[9] subsequently amended and supplemented.

Likewise, Law No. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic[10] sets out the legal regime of the state of alert "in the context of the crisis situation caused by the COVID-19 pandemic," noting in the preamble that "it deems necessary the adoption by the Parliament of Romania, by law, of restrictive measures, essentially temporary and, as the case may be, gradual, proportional to the forecasted or manifested level of gravity, necessary to prevent and remove imminent threats to conventional, union rights and constitutional rights to the life, physical integrity and health of persons, in a non-discriminatory manner, and without prejudice to the existence of other fundamental rights or freedoms." Thus, the purpose of the law is "to establish, during the state of alert declared under the law, in order to prevent and combat the effects of the COVID-19 pandemic, temporary and,

[7] Official Gazette no. 22 of 21 January 1999.

[8] See: Bogdan Dima, "Considerations regarding the constitutional and legal regime of the state of emergency," *Revista de Drept Public (Public Law Review)*, Issue No. 01–02, 2020, pp. 63–78.

[9] Official Gazette no. 361 of 26 April 2004.

[10] Official Gazette no. 396 of 15 May 2020.

as the case may be, gradual measures, in order to protect the rights to life, physical integrity and health protection, including by restricting the exercise of other fundamental rights and freedoms."

Question 3

The events that can justify the establishment of the states of siege, emergency, situations of emergency or states of alert are described in the legal definitions cited in point 1. In all cases, we are referring to events with a high degree of deviation from the usual, likely to justify the establishment of exceptional measures. The difference, embodied in the adequacy of the measures taken by the authorities, is given by the intensity/severity of the danger/threat to the state and the population. The assessment of this seriousness and the establishment of one or another of the mentioned exceptional measures depends on the assessment of the authorities to whom the Constitution and the infra-constitutional legislation assign powers in the matter, based on the guiding criteria established by law.

Question 4

According to Article 73 (3) (g) of the Constitution, *the regime of the state of siege and the state of emergency* is regulated by organic law. In the internal hierarchy of the regulatory acts, organic laws take the next place after constitutional laws, being adopted by the Parliament with an absolute majority of deputies and senators.

According to the Constitution, the Government can also regulate in the field of organic law, but exceptionally, by emergency ordinance, under the conditions expressly set forth in the Constitution in Article 115 – *Legislative delegation*. Thus, the Government can only adopt emergency ordinances only in exceptional cases,[11] the regulation of which cannot be postponed. The emergency ordinances are subject to the approval of the Parliament and the Constitution make their entry into force conditional on being submitted to the Parliament for debate in the emergency procedure. The Chambers of the Parliament, if they are not in session, must be convened within 5 days after submittal. Given the specific regime, the emergency ordinances seem the most suitable for a quick intervention in exceptional situations such as those determined by the state of emergency. In order to prevent the abuse of the executive in matters

[11] The concept of "extraordinary situation" (Article 115 of the Constitution of Romania) is different from that of "emergency situation" (Article 93 of the Constitution), the latter having distinct regulations and specific rules.

of legislation, on the occasion of the revision of the Constitution, in 2003, the possibility of primary regulation of the Government was substantially limited, establishing that "the emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutional of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly." Given this legal regime, the emergency ordinances adopted during the COVID-19 period that restricted the exercise of certain fundamental rights were found to be unconstitutional, an aspect that we will present in the following sections.

The constitutional and legal framework require specific formalities/distinct acts for the establishment of the state of emergency/siege or the state of alert. As we are referring exceptional measures, their establishment usually entails a mechanism of collaboration/shared competences between the authorities, as we will duly present below.

Question 5

The Constitution of Romania requires compliance with the obligations undertaken by the act of accession to thhe EU, which means the adequacy/correlation of legislative measures with the general regulatory framework of the EU regardless of the field.

Thus, according to Article 148 (2) and (4) of the Constitution, "(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. […] (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented."

Article 6 (1) of Law No. 24/2000 regarding the technical legislative standards for the elaboration of normative acts[12] provides in this regard that: "The draft normative act must establish necessary, sufficient and possible rules that lead to as much stability and legislative efficiency as possible. The solutions it includes must be thoroughly substantiated, taking into account the social interest, the legislative policy of the Romanian state and the requirements of correlation with all internal regulations and the harmonization of national legislation with Community legislation and international treaties to which Romania is a party."

[12] Official Gazette no. 139 of 31 March 2000.

Question 6

We have not identified such situations.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

For the constitutional and legal framework in the matter, see Section 1, Question 1.
As for the history regarding the establishment of the current constitutional provisions regarding the state of siege and the state of emergency, the works of the Commission for drafting the Constitution and the Constituent Assembly recorded in the transcripts from that time[13] provide important landmarks. In the doctrine,[14] strong debates were noted on the side of these provisions, especially the limits of competence of the authorities involved, marked by the fear of the danger of re-establishing the dictatorship (through the method of election and the powers granted to the President of Romania). Following the debates, the Commission for drafting the draft Constitution formulated a text that was finally adopted by the Constituent Assembly, characterized as "the result of a compromise."[15] Thus, the majority of the Constituent Assembly accepted the idea that, in these exceptional situations, the Parliament should exercise double review over the powers of the President: (i) an ex-post parliamentary review – the subsequent approval of the measure adopted by the head of state – and (ii) an ex-ante parliamentary review – the establishment of the state of emergency or siege can only be ordered by the head of state in accordance with an organic law on the legal regime of the state of emergency or siege, leaving the President of Romania a discretionary power in assessing the moment at which he actually establishes the state of emergency or the state of siege.

Question 2

Article 93 (1) of the Constitution of Romania provides that: "The President of Romania shall, according to the law, establish the state of siege or state of emergency in the entire country or in some territorial-administrative units, and ask for the Parliament's approval for the measure adopted, within 5 days

[13] See: *Genesis of the Constitution of Romania 1991. Works of the Constituent Assembly*, R. A Monitorul Oficial Publishing House, 1998.

[14] Bogdan Dima, "Considerations regarding the constitutional and legal regime of the state of emergency," pp. 63–78.

[15] Ibidem.

of the date of taking it, at the latest." In carrying out this constitutional power, according to Article 100 (1) of the Constitution, the President shall issue "decrees, which shall be published in the Official Gazette of Romania," which shall be countersigned by the Prime Minister, pursuant to Article 100 (2) of the Basic Law and approved by a resolution of the Parliament.

Therefore, according to the Constitution, in the field of establishing the state of emergency, the State authorities shall carry out shared competence (Decision no. 152/2020, paragraph 92):

- *the Parliament* – "shall legislate, through an organic law, the regime of the state of emergency, establishing the premise situations that can lead to the establishment of the state of emergency, the procedure for establishing and terminating the state, the powers and responsibilities of the public authorities, the possibility of restricting the rights and fundamental freedoms of citizens, the obligations of the individuals and legal entities, the measures that can be ordered during the state of siege, the sanctions applicable in case of non-compliance with the legal provisions and the ordered measures";
- *the President of Romania* – "has the constitutional power to establish the state of emergency and to enforce the legal provisions of the regime of the state of emergency, as they were established by the legislator";
- *the Parliament* – "after the adoption of the decree by which the state of emergency is established, it has the obligation to verify the fulfilment of the legal conditions related to the establishment of the state of emergency, approving or not this measure, by adopting a resolution in the joint meeting of the two Chambers (the Senate and the Chamber of Deputies)."

Thus, in the context of the COVID-19 pandemic, the President of Romania established the state of emergency through Decree 195 of 16 March 2020,[16] which he extended through Decree no. 240 of 14 April 2020.[17] The Parliament adopted Resolution no. 3/2020 for the approval of the measure adopted by the President of Romania regarding the establishment of the state of emergency on the entire territory of Romania[18] and Resolution no. 4/2020 for the approval of the measure adopted by the President of Romania regarding the extension of the state of emergency on the entire territory of Romania.[19]

As for *the state of alert*, according to Article 42 of the Government Emergency Ordinance No. 21/2004, "it is declared at the local level, of the municipality of Bucharest, county or national, when the analysis of the risk factors reveals the need to amplify the response to an emergency situation, for a limited

[16] Published in the Official Gazette of Romania, Part I, no. 212 of 16 March 2020.
[17] Published in the Official Gazette of Romania, Part I, no. 311 of 14 April 2020.
[18] Published in the Official Gazette of Romania, Part I, no. 224 of 19 March 2020.
[19] Published in the Official Gazette of Romania, Part I, no. 320 of 16 March 2020.

period of time, which cannot exceed 30 days. (2) The state of alert can be extended whenever the analysis of the risk factors reveals the need to maintain the amplified response for an additional period of time, which cannot exceed 30 days. (3) The state of alert ends, before the deadline for which was declared or extended, when the analysis of the risk factors reveals that it is no longer necessary to maintain an amplified response. (4) In the application of paragraphs (1)–(3) the following risk factors are analysed cumulatively: (a) the extent of the emergency situation, namely the generalized manifestation of the type of risk at the local level, of the municipality of Bucharest, county or national level; (b) the intensity of the emergency situation, namely the speed of evolution, recorded or forecast, of the destructive phenomena and the degree of disruption of the state of normality; (c) insufficiency and/or inadequacy of response capabilities; (d) demographic density in the area affected by the type of risk; (e) the existence and degree of development of the infrastructure suitable for the management of the type of risk." In the same regard there are the provisions of Article 4 of Law No. 55/2020, adopted in the context of the COVID-19 pandemic, which provide that the state of alert is established by the Government by decision, upon the proposal of the Minister of Internal Affairs, and cannot exceed 30 days, which can be extended for valid reasons for a maximum of 30 days by Government decision upon the proposal of the Minister of Internal Affairs.

Although the state of emergency has a profoundly derogatory constitutional and legal regime, the measures adopted must be in accordance with the constitutional order of Romania, governed by the principle of the rule of law. The state, through its authorities, has both the duties of managing and eliminating the social, economic, sanitary and political effects of the crisis situations, but also the obligation to respect and promote the principle of the primacy of the Constitution and respect for the law. That is why all the acts adopted by the authorities in this framework can be subject to the review of either the Constitutional Court or the courts of law, depending on the category of the act and the competences of each of the respective courts.

An important role, in terms of protecting fundamental rights and freedoms, lies with the Advocate of the People. It can refer directly to the Constitutional Court to rule upon the constitutionality of laws, before their promulgation [Article 146 (a) thesis I of the Constitution] and to decide on the exceptions of unconstitutionality regarding the laws and ordinances after their promulgation and publication [second thesis of Article 146 d) of the Constitution], which allows it to take action quickly and effectively when it considers that through the regulations adopted by the parliament or the Government, as the case may be, it violates/affects the fundamental rights. During the COVID-19 pandemic, the Advocate of the People played an active role in this regard.

Question 3

The state of siege or the state of emergency (regulated at the constitutional level) require, by their scale and severity, a coordinated approach at the national level. Thus, in the context of the COVID-19 pandemic, through the Decree of the President of Romania no. 195/2020[20] regarding the establishment of the state of emergency on the territory of Romania, the "integrated coordination" of medical and civil protection response measures to the emergency situation caused by COVID-19 was established, "which is carried out by the Ministry of Internal Affairs, through the Department for Emergency Situations, in collaboration with the Ministry of Health and the other institutions involved in accordance with the provisions of the Government Decision no. 557/2016 on the management of risk types. The measures ordered for the prevention of COVID-19 as a result of the decisions of the National Committee for Special Emergency Situations shall be applicable and published in the Official Gazette of Romania, Part I." Likewise, it was established the obligation of the leaders of public authorities, other legal entities, as well as natural persons to respect and apply all the measures established by decree and the ordinances issued by the Minister of Internal Affairs. In the field of public order, it was established that the Local Police is operationally subordinated to the Ministry of Internal Affairs.

The Government Emergency Ordinance No. 1/1999 provides that in the event of the establishment of a state of siege, exceptional measures applicable to the entire territory of the country or in some administrative-territorial units can be taken. Likewise, the state of alert can be established on the entire territory of the country or only on the territory of some administrative-territorial units, as the case may be. Article 43 of the GEO No. 21/2004 distinguishes in this regard on the authority's powers, as follows: "The local committee for emergency situations declares, with the approval of the prefect, the state of alert at the local level, as well as its extension or termination. The county committee for emergency situations declares, with the approval of the minister of internal affairs, the state of alert at the level of one or more localities in the county or at the level of the entire county, as well as its extension or termination. The Committee of the Municipality of Bucharest for Emergency Situations declares, with the approval of the Minister of Internal Affairs, the state of alert at the level of the Municipality of Bucharest. The national committee for emergency situations declares, with the approval of the prime minister, the state of alert at the level of several counties or at the national level, as well as its extension or termination."

[20] Official Gazette no. 212 of 16 March 2020.

Question 4

The Constitution of Romania includes three articles that regulate the international sources of law and their relationships to the Romanian legal system:
(a) Article 11 – *International law and national law*;
(b) Article 20 – *International treaties on human rights*;
(c) Article 148 – *Integration into the European Union*.

The basic constitutional text for the relationships between international law and national law (Article 11) establishes the following rules:
(a) only treaties ratified by Parliament are part of national law;
(b) the ratification of a treaty which comprises provisions contrary to the Constitution shall only take place after the revision of the Constitution;
(c) the Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to.

From the interpretation of Article 20 of the Constitution two rules emerge:
(a) the interpretation and enforcement of the constitutional provisions concerning the citizens' rights and liberties shall be made in compliance with the international instruments on human rights Romania is a party to;
(b) the international regulations shall take precedence in case of inconsistency with the national laws unless the Constitution or national laws comprise more favourable provisions.

The reference in the text of the Constitution to other regulatory acts and the enshrinement of their constitutional interpretive value, even if they are not formally part of the text of the Constitution, is subject to the concept of "block of constitutionality,"[21] in the overall sense ("block") of regulatory acts with constitutional value.

As for Article 148, introduced in the Constitution during the revision in 2003, it establishes the following:
(a) the position of the founding treaties of the European Union and the derived regulations in relation to the national laws (the provisions of the founding treaties and other binding regulations shall take precedence over the contrary provisions of the national laws);
(b) the obligations of the public authorities as a result of the accession to the European Union.

[21] The concept of "block of constitutionality" is a creation of the French doctrine and the case law of the Constitutional Council of France, denoting the possibility of incorporating into the constitutional text other norms relating to fundamental rights and freedoms that are not formally part of the body of the Constitution; in other words, all norms with constitutional value contained both in the text of the Constitution and in other acts form the "block of constitutionality."

Regardless of the situation (therefore also in the case of exceptional situations), the relationships between the national and the international/EU legal order, as well as the possible conflicts of rules shall be settled according to the same rules described above, which give priority to international treaties in the field of human rights to which Romania is a party when they comprise more favourable provisions and, respectively, gives priority to mandatory EU regulations in case of conflict with the national laws.

A complex and topical discussion in Romania is the so-called debate priority vs primacy of the EU law in relation with the Constitution, because the CCR in an established case law ruled on the primacy of the Constitution, interpreting that the phrase "national laws" (provided in Article 148 of the Constitution and in relation to which it establishes the priority of mandatory EU rules) refers to the infraconstitutional legislation and not to the Constitution (supreme law). This debate has not influenced or caused conflicts regarding the exceptional measures.

As for the specific situation of the COVID-19 pandemic, the application of the provisions of Article 20 of the Constitution is relevant, in terms of the proportional limitation of the derogatory measures that can be ordered in case of war or other public danger that threatens the life of the nation (see Article 15 of the ECHR).

On 17 March 2020, the Permanent Representation of Romania registered a verbal note with the General Secretariat of the Council of Europe announcing that part of the emergency measures established by the Presidential Decree no. 195/2020, by which the state of emergency was declared, entails derogations from the obligations undertaken by the ECHR.

Question 5

The measures adopted in exceptional situations, such as states of emergency, inevitably lead to the restriction on the exercise of certain rights and freedoms. In Romania, the Constitution expressly provides the conditions of this restriction in Article 53, according to which: "(1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. (2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom."

In the context of the COVID-19 pandemic, a constitutional issue arose due to the Government's emergency ordinance restricting fundamental rights and freedoms. The Advocate of the People invoked the unconstitutionality regarding the restriction on the exercise of fundamental rights and freedoms by the Government emergency ordinance, calling into question the concept of "law" comprised in the cited article. Examining the criticisms formulated by the Advocate of the People, the CCR decided, by a majority of votes, that the concept of law in Article 53 of the Constitution must be approached in its narrow sense, as an act of Parliament. The regulatory act which restricts/affects citizens' fundamental rights and freedoms or fundamental institutions of the State can only be a law, as a formal act of the Parliament, adopted in compliance with the provisions of Article 73(3) letter (g) of the Constitution, as an organic law. In order to uphold this interpretation, the Court also invoked the provisions of Article 115 of the Constitution – *Legislative Delegation*, which prohibit the Government from adopting emergency ordinances that "may affect" the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights. The Court thus found the unconstitutionality of the Government Emergency Ordinance No. 34/2020 for amending and supplementing the Government Emergency Ordinance No. 1/1999, because through its normative content it aimed at restricting the exercise of the right to property, the right to work and social protection, the right to information, economic freedom.[22]

This decision really had a significant impact both in terms of citizens and public authorities. Likewise, the decision of the CCR determined the adoption of Law No. 55/2020 by the Parliament on some measures to prevent and combat the effects of the COVID-19 pandemic. The preamble of the Law states, inter alia, the very fact that a law adopted by Parliament shall be necessary "since, in accordance with the provisions of Article 53 of the Romanian Constitution, republished, the exercise of certain rights or freedoms may be restricted only by law and only if required, as the case may be, inter alia, for the protection of order, public health, but also the citizens' rights and freedoms; given that, in the context of the crisis situation caused by the COVID-19 pandemic, the Parliament of Romania must adopt, by law, restrictive measures, essentially temporary and, where appropriate, gradual, proportional to the level of severity predicted or manifested, necessary to prevent and eliminate imminent threats to conventional, union and constitutional rights to life, physical integrity and health of persons, without discrimination, and without infringing on the existence of other fundamental rights or freedoms."

[22] Decision of the CCR No. 152/2020, Official Gazette no. 387 of 13 May 2020; see also: Decision of the CCR No. 157/2020, Official Gazette no. 397 of 15 May 2020.

Question 6

No, there are not.

Section 3: Statutory/executive emergency law in the Member States

Question 1

As we stated in the previous answers, the Constitution expressly enshrines the concepts of state of emergency and state of siege, regulating the regime of the regulatory acts as well as the authorities with competences in the field. The interpretation of these texts is established by the Constitutional Court, as guarantor of the Constitution, through decisions which, according to Article 147 of the Constitution, are generally binding.

In the application of the constitutional reference framework, there were adopted both laws (by the Parliament) and emergency ordinances (by the Government) detailing the measures of emergency. As regards the restriction on the exercise of certain rights and freedoms, this may be ordered only by law, adopted by the Parliament. The enforcement of the emergency laws and ordinances is carried out through Government decisions or other acts of central and local administration authorities (orders, decisions, provisions). As a rule, within these regulations, the exact fields of intervention and types of intervention are established, covering a wide area of social relationships. For example, through Decree no. 195/2020 issued by the President of Romania, "measures of first emergency with direct applicability" were established, structured in the following areas: public order, economy, health, work and social protection, justice, foreign affairs, other measures.

A specific act for the state of emergency is the military ordinance. According to Article 23 of the Government Emergency Ordinance No. 1/1999, "Military ordinances shall be issued within the limits established by the decree establishing the exceptional measure, as follows: 1. during the stage of siege: (a) by the Minister of National Defence or the Chief of the General Staff of Defence, when the state of siege was established throughout the country; (b) by the commanders of large units in the territorial area for which they were authorized by the Chief of the General Staff of Defence, when the state of siege was established in certain administrative-territorial units; 2. during the state of emergency: (a) by the Minister of Internal Affairs or his/her deputy of right, when the state of emergency has been established throughout the country; (b) by the officers empowered by the Minister of Internal Affairs or their deputies of right, when the state of emergency has been established in certain

administrative-territorial units. (2) In the event of the establishment of the exceptional measure for causes concerning cyber security or defence under the conditions of Article 2 and Article 3 (a), the issuers of the military ordinances request the prior and consultative opinion of the Cyber Security Operative Council."

Question 2

Since the regulatory system in Romania includes both constitutional and legislative/executive rules on emergency situations, the eventual conflict of rules shall be settled by taking into account the principle of normative hierarchy, which requires the compliance of the subsequent acts with the act on the basis of which it was adopted. According to the category of the regulatory acts, they may be subject to the constitutional review (for primary regulatory acts, that is, laws or ordinances/emergency ordinance of the Government, review carried out by the Constitutional Court) or legality review (administrative acts implementing the law, such as Government decisions, orders of ministers, etc., review carried out by administrative courts of law).

Emphasizing, for example, in terms of the shared competences, the limits of the powers conferred on the President of Romania in the field, the CCR noted that "given the legal force is lower than the law, the decree of the President may not derogate from, replace, or add to the law and may not therefore contain basic regulatory provisions. It is undeniable that legislation providing for the legal regime of crisis situations requiring exceptional measures to be taken requires a greater degree of generality than the legislation applicable during the normal period, precisely because the crisis situation is characterised by a deviation from normal (exceptionality), and the unpredictability of the serious danger that affects both society as a whole and each individual. However, the generality of the primary rule cannot be mitigated by infralegal acts that would supplement the existing regulatory framework. Therefore, the decree of the President shall comprise only the measures that organize the execution of the legal provisions and specify and adapt those provisions to the existing factual situation, to the essential areas of activity for the management of the situation that led to the establishment of the state of emergency, without deviating (through amendments or supplements) from the framework subject to the rules with force of law."[23]

[23] Decision of the CCR no. 152/2020, cited above, para. 90.

Question 3

The constitutional limits of the action of the authorities when making use of emergency power are governed by the regime of separation and balance of powers in the State, expressly set forth in Article 1 (4) of the Constitution. In the decisions issued during the COVID-19 pandemic, the CCR emphasized that "public authorities must carry out their activities in accordance with the provisions of the Constitution, even under the decreed state of emergency. They cannot assign new powers or violate the powers of other public authorities, since the principle of legality is not limited or suspended during the state of emergency. [...] The powers of the public authorities must be carried out during this state in such a way as not to harm or endanger the values in consideration and safeguarding of which the decree was issued. Therefore, the interpretation of the constitutional provisions during the state of emergency must be carried out taking into account the existence of the decree establishing it, which means that the measures adopted by the public authorities within their margin of appreciation must support the values at risk, without violating/derogate/suspend the provisions of the Constitution."[24]

Compliance with these limits is ensured by applying the instruments specific to the mechanism of check and balance enshrined by the constitutional rules, as well as jurisdictional review. Thus, for example, according to the Constitutional Court, the Decree of the President of Romania establishing the state of emergency can be subject to a two-step review: an ex officio review carried out by the Parliament of Romania, under the obligation set forth in Article 93 (1) of the Constitution, and which sets up the expression of the legal relationship established between the two public authorities regarding the shared competence of the constitutional power regarding the establishment of the state of emergency; a review carried out, upon notification by the legal subjects provided for by law, by the Constitutional Court, through the resolution of the Parliament approving or not approving the state of emergency, under Article 146 (l) of the Constitution.[25] Therefore, the decree of the President of Romania establishing the state of emergency can be subject to the constitutional review, but not directly (because the Constitution does not provide any power of the Constitutional Court in this regard), but within another power, namely that of review of the resolutions of the Parliament, regulated by Article 27 of Law No. 47/1992 on the organization and operation of the Constitutional Court of Romania, which establishes in paragraph (1), as follows: "The Constitutional Court shall pronounce on the constitutionality of the Standing Orders of Parliament, resolutions by the Plenary of the Chamber of Deputies, resolutions by the Plenary of the Senate and resolutions by the Plenary of the joint Chambers

[24] Decision of the CCR No. 156/2020, Official Gazette no. 478 of 5 June 2020.
[25] Decision of the CCR No. 152/2020, cited above, para. 94.

of Parliament, when a case is submitted to the Court by one of the Presidents of the two Chambers, by a parliamentary group or by a number of at least fifty Deputies or at least twenty-five Senators."

During the COVID-19 pandemic, the Constitutional Court sanctioned the exceeding of the competence limits of the Government which adopted measures to restrict the exercise of certain rights and freedoms in violation of Article 53 of the Constitution. Likewise, it sanctioned the legislative measures adopted by the Parliament which tended to circumvent the constitutional framework regarding the acts of the Government. Thus, under the conditions in which the initially ordered state of emergency was replaced by a more relaxed "state of alert" framework that has no constitutional enshrinement, being regulated exclusively by law, the Parliament tried to create an institution similar to that of the state of emergency in terms of the executive-legislative relationships. It was established in this regard, through Article 4 (1) of Law No. 55/2020, that the Government is competent to declare the state of alert by decision, "approved in full or with amendments" by the Parliament. However, in this way, the constitutional regime of the Government decisions was changed, which, instead of administrative acts of law enforcement, subject to the review of the courts of law, became administrative acts approved by the Parliament, avoiding the review carried out by the courts of law. Upon referral by the Advocate of the People, the Court found the unconstitutionality of this "construction," namely of the Government decision approved by the Parliament.[26] The Court held that, in relation to the constitutional provisions, it follows that "the Government decisions are regulatory or individual administrative acts, an expression of the original competence of the Government, provided for in the Constitution, typical for its role as a public authority of the executive power. The organization of the enforcement of laws through decisions is an exclusive power of the Government, and cannot, in any case, be a power of the Parliament, which, moreover, adopted the main law/regulatory act. As a result, the Government decisions shall always be adopted on the basis of and with a view to the enforcement of the laws, aiming at their implementation or fulfilment. When a government decision violates the law or supplements the provisions of the law, it can be challenged in the administrative litigation court of law under Article 52 and Article 126 (6) of the Constitution of Romania, republished, and the provisions comprised in the special law in the matter, Law No. 554/2004 on administrative litigation, subsequently amended and supplemented" (paragraph 42). "By approving a government decision, Parliament combines the legislative and executive powers, with the consequence of violating the principle of separation and balance of powers in the State, enshrined in Article 1 (4) of the Constitution. Furthermore, a confusing legal regime of the government decisions is established, likely to raise the issue of their exemption and, thus,

[26] Decision of the CCR No. 457/2020, Official Gazeete no. 578 of 1 July 2020, para. 48.

avoiding the judicial review under the conditions of Article 126 (6) of the Constitution, with the consequence of violating the provisions of Article 21 and Article 52 of the Constitution, which enshrines the free access to justice and the right of the person injured by a public authority" (paragraph 60). According to the Court, "no law can establish or remove, by expanding or restricting, a competence of an authority, if such an action is contrary to the provisions or principles of the Constitution."

In the same idea of the limits of competence of the public authorities and of the relationships between the legislature and the executive in the matter, the Constitutional Court sanctioned the rules that allowed the minister of health to supplement the regulations relating to the conditions in which people with communicable diseases are obliged to declare, to undergo treatment or be hospitalized, as well as the freedom to amend these regulations at any time and without respecting certain limits. Even if the state of emergency caused by a pandemic presents a specific configuration, in the sense of a prominent (some might say dominant) role played by the medical-scientific experts,[27] with whom the minister and the ministry of health are in direct contact, it cannot be accepted the medical-scientific expert metamorphose from decision making input into decision maker,[28] as the metamorphosis of an administrative authority that enforces legal provisions into a legislating authority cannot be accepted. According to the Court, "putting in charge the relevant minister [A/N the Minister of Health] to supplement the regulations regarding the conditions under which people with communicable diseases are bound to declare, undergo treatment or be hospitalized, as well as the freedom to amend these regulations at any time and without respecting certain limits, the provisions of the second sentence of Article 25 (2) of Law No. 95/2006 acquire an unpredictable, uncertain character and difficult to anticipate, contrary to the provisions of Article 1 (5) of the Constitution, from which result the conditions regarding the quality of the legal norm." The Court noted that the effects of the stated flaw of unconstitutionality appear more significant if it is taken into account that the matter regulated by the second sentence of Article 25 (2) of Law No. 95/2006 concerns measures that affect the fundamental rights and freedoms, as such as the mandatory hospitalization of people with communicable diseases, which violates the individual freedom. In this regard, the Court also invoked Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the case law of the European Court of Human Rights, noting that "the legal detention of a person likely to transmit a contagious disease represents a deprivation of freedom that can be accepted

[27] Eric Windholz, *Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy* (2020), https://doi.org/10.1080/20508840.2020.1796047, Monash University Faculty of Law Legal Studies Research Paper No. 3659002, available at: SSRN: https://ssrn.com/abstract=3659002 or http://dx.doi.org/10.2139/ssrn.3659002

[28] Ibidem.

within a society in order to ensure public health and security, but which may be allowed only with the fulfilment of the conditions and the procedure established by law, arbitrariness being excluded." Likewise, "any person must enjoy the possibility of referring to the court of law the measure of social medical detention in a short period of time, so that, in the event of the illegality of the ordered measure, he/she can be discharged. In other words, the person to whom the measure of social and medical detention is applied must benefit from an effective right of access to justice, which ensures a quick trial of the action and orders the release of the illegally detained person." Noting that the provisions of Law No. 95/2006 are not accompanied by such guarantees, the Court stated that the constitutional provisions enshrining the individual freedom, the restriction on the exercise of certain rights and freedoms, those relating to the acceptance in the national law of the provisions of the international treaties Romania is a party to, are violated, by reference to the provisions of Article 5 (1) (e) and (4) and (5) of the Convention for the Protection of Human Rights and Fundamental Freedoms and of Article 9 (1) of the International Covenant on Civil and Political Rights.

Question 4

We have not identified such situations.

Section 4: Judicial review of emergency powers in the Member States

Question 1

The measures to address situations of emergency can be challenged, according to the act by which they were ordered, before the Constitutional Court (constitutional review) or before the courts of law (legality review).

The CCR is organized and operates according to the centralized, European model of constitutional review, being the exclusive authority of constitutional jurisdiction, with powers both in the sphere of constitutional review of primary regulatory acts, as well as of facts, acts, attitudes, including the settlement of legal conflicts of a constitutional nature between public authorities of constitutional rank.[29] The CCR shall adjudicate on the laws (adopted by the Parliament), before promulgation, upon notification of the subjects provided for by Article 146 (a) of the Constitution, or after their entry into force, through the

[29] See: Tudorel Toader, Marieta Safta,"The settlement of disputes of a constitutional nature: Inside the Romanian constitutional Court's rulings on the role and competencies of the public authorities," *Revista de Drept Constituțional nr. 2/2018 (Constitutional Law Review)*, pp. 51–72, https://www.ceeol.com/search/article-detail?id=797218

exception of unconstitutionality raised before the courts of law or commercial arbitration court, or directly by the Advocate of the People, according to Article 146 (d) of the Constitution. Through the exception of unconstitutionality, the Court can also adjudicate on the constitutionality of the government ordinances and government emergency ordinances. According to Article 147 (4) of the Constitution of Romania, the decisions of the Constitutional Court are final and generally binding. The binding nature refers both to the operative part and the recitals of the decisions.

As for the review carried out by the courts of law, its subject-matter can be the Government decisions or other administrative acts, if they do not fall into the category of those that are absolutely exempt from review in administrative litigation (command acts of a military nature and acts of the authorities in their political relationships with the Parliament). Administrative acts can be challenged by persons who consider that their rights and legitimate interests were infringed by those acts at the administrative litigation courts of law, pursuant to Law No. 554/2004 on administrative litigation.[30]

Law No. 55/2020, adopted in the context of the COVID-19 pandemic, established through a general rule set forth in Article 72 that the provisions of this law are supplemented by the general regulations applicable in the matter, insofar as that the latter do not infringe the provisions of the law. By Decision No. 392/2021 of the Constitutional Court,[31] an exception of unconstitutionality was upheld, stating that the legislative solution in Article 72 (1) of Law No. 55/2020, according to which the provisions of this law are supplemented by general regulations applicable in the matter with regard to the settlement of actions filed against the Government decisions establishing, extending or terminating the state of alert, as well as orders and instructions which establishes the application of some measures during the state of alert, is unconstitutional. The CCR found the violation of access to justice by the fact that the person interested in challenging a government decision or an order or an instruction issued pursuant to Law No. 55/2020 cannot identify the applicable procedural regulations so as to comply with them.[32] Ensuring a right of effective access to justice must also be analysed in view of the effects that the court decision has on the rights of the person who addressed the justice. Therefore, the absence of procedural provisions in Law No. 55/2020, or in the general law on administrative litigation, is unconstitutional. This lack hampers the timely resolution of cases related to administrative documents that declare or extend the state of alert. As a result, it undermines the effective right of access to justice.[33]

[30] Official Gazette no. 1.154 of 7 December 2004.

[31] Official Gazette no. 688 of 12 July 2021.

[32] Decision of the CCR No. 392 of 8 June 2021, Official Gazette of Romania, no. 688 of 12 July 2021, paras. 35–38.

[33] Ibidem, paras. 43–28.

Question 2

According to Article 5 (3) of Law No. 554/2004, "the administrative acts issued for the application of the regime of the state of war, the state of siege or the state of emergency, those regarding national defence and security or those issued for the restoration of public order, as well as for removing the consequences of natural disasters, epidemics and epizootics, **can only be challenged for excess of power**."

These acts can be challenged before the administrative litigation courts of law with a request for annulment, but **their enforcement cannot be suspended by the court of law** (exception set forth in Article 5 (4) of Law No. 554/2004).

Question 3

There is no different standard în such situations.

Question 4

The principle of proportionality plays an important role in the judicial review of actions of public authorities in situations of emergency. Thus, for example, in the context of the COVID-19 pandemic, the Advocate of the People invoked the unconstitutionality of some provisions of the Government Emergency Ordinance No. 1/1999, invoking, *inter alia*, the fact that the administrative offences are not established by law, but by numerous administrative acts enforcing the law (Government decisions, military ordinances, orders and any other related normative acts) whose regulatory object, in reality, covers distinct fields. However, in the case of administrative offences, in order to comply with the principle of legality, the legislator must clearly and unequivocally indicate their material object within the very content of the legal norm or it can be easily identified by referring to another regulatory act of equal rank with which the sanctioning text is connected, in order to establish the existence of the administrative offence. It is obvious that such a regulatory manner does not remove the subjective or discretionary elements that may occur when the ascertaining agent interprets and applies the rules contained in the military ordinances or in the other regulatory acts. Failure to comply with the principle of illegality also harms the application of administrative sanctions, which must be carried out in compliance with the criteria set forth in Article 21 of Government Ordinance No. 2/2001 regarding the legal regime of administrative offences, regarding the limits of sanctions, namely the proportionality of the sanction with the degree of social danger of the deed,

taking into account the circumstances in which the deed was committed, the manner and means of commission, the purpose pursued and the outcome, the personal circumstances of the offender. As such, when establishing the proportionality of the sanction with the degree of social danger of the deed, the ascertaining agent who applies the sanction must take into account both the stated criteria and other special criteria, if applicable. Likewise, the Advocate of the People argued that the amount of the main contravention sanction of the fine has increased considerably (up to 20,000 lei, for individuals, and up to 70,000 lei, for legal entities).

The Court upheld the exception of unconstitutionality, finding that the impugned rules do not specifically provide for the facts that attract the contraventional liability, but establish a general obligation to comply with the law in the undifferentiated task of the heads of public authorities, legal entities, as well as individuals **to respect and apply all the measures established** in the Government Emergency Ordinance No. 1/1999, *in the related regulatory acts,* as well as in the military ordinances or in the orders, specific to the established state. The Court found that in such a way, the establishment of the facts whose commission constitutes administrative offences is left, arbitrarily, to the discretion of the police agent, without the legislator having established the criteria and conditions necessary for the operation of ascertaining and sanctioning the administrative offences. Likewise, in the absence of a clear representation of the elements that constitute the administrative offence, the judge himself does not have the necessary benchmarks in the application and interpretation of the law, on the occasion of the settlement of the complaint directed against the record of finding and sanctioning the administrative offence. Thus, the principles of legality and proportionality that govern contravention law are violated, as well as the right to a fair trial, enshrined in Article 21 (3) of the Constitution, including its component regarding the right of defence, a fundamental right set forth in Article 24 of the Constitution. Likewise, the Court held a series of recitals regarding the requirements of proportionality that must be respected regarding the restriction on the exercise of certain rights and freedoms, ruling that the provisions of Article 28 of the Government Emergency Ordinance No. 1/1999 – criticized and found to be unconstitutional, not only that they do not specifically provide for the facts that attract contravention liability, but establish in an undifferentiated manner for all these acts, regardless of their nature or gravity, the same main administrative offence. As for the complementary administrative offences, although the law provides that they are applied depending on the nature and gravity of the act, as long as the act is not circumscribed, it is obvious that neither its nature nor its gravity can be entailed in order to fairly establish the complementary applicable sanction.

Section 5: Implementation of EU emergency law in the Member States

Question 1

See the relationships between national and EU rules explained Supra.

Question 2

We have not identified such situations.

Slovakia

*Lucia Mokrá**

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

The amendment to the Constitution, the Constitutional Law No. 9/1999, Coll. of laws[1] provides new Article 51(2) and Article 102(3) defining the blanket provisions relating to crisis situations.

Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency[2] defines **crisis situation** as "a period during which the security of the State is imminently threatened or disturbed and the constitutional authorities may, after fulfilling the conditions laid down in this Constitutional Law for its resolution, declare war, declare a state of war or a state of alarm or a state of emergency" (Article (4)).

Additionally, in the Government Resolution No. 523 of 6th July 2005 on *A glossary of crisis management terminology and principles for its use*, the working definition of crisis situation was provided as: "A legal state declared by a competent public authority in a particular territory to deal with a crisis situation in direct relation to its nature and extent (war, state of war, state of alarm, state of emergency). It is associated with the failure of generally applicable management procedures, instruments and mechanisms and with the need to apply the principles of crisis management, including the temporary restriction of fundamental rights and freedoms."[3]

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[1] Constitutional Law No. 9/1999, Coll. of laws, amendment to the Constitution of the Slovak Republic. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1999/9/

[2] Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/227/vyhlasene_znenie.html

[3] Government Resolution No. 523 of 6th July 2005 on *A glossary of crisis management terminology and principles for its use*. Online: https://www.minv.sk/?Krizove_stavy

State of emergency is regulated by the Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency[4] as amended, in the Article 5, without providing definition. The constitutional law provides the conditions for its declaration, principles and limitations, without the definition of the status itself. Similarly, also the state of necessity is regulated in Article 4 of the same constitutional law, without the definition of the state itself, rather providing the procedural guidelines for its declaration and constitutional limits.

According to the Law No. 387/2002, Coll. on the management of the state in crisis situations outside times of war and martial law, as amended, an **emergency situation** is a period of threat or a period of exposure to the effects of an emergency on life, health or property. In this context, an **emergency** is defined as a natural disaster, a technological accident, a terrorist attack or the accumulation of their effects – a catastrophe (Law No. 42/1994, Coll. on civil protection of the population, as amended). The most frequent emergencies affecting the Slovak Republic every year are floods, windstorms and snow calamities. Technological accidents accompanied by explosions and large-scale fires are less frequent.[5]

Question 2

Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency[6] is the general law, which was amended several times. Due the emergency situation declared with regard to pandemic of COVID-19, the partial amendment to the law was adopted as the Constitutional law no. 414/2020, Coll. of laws.[7] It introduces the specific amendment to the Article 5(1), by providing: "A state of emergency may be declared by the Government only on the condition that there has been or is imminent danger to the life and health of persons, including in causal connection with the occurrence of a pandemic, danger to the environment or danger to substantial property values as a result of a natural disaster, catastrophe, industrial, transport or other operational accident."

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[4] Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/227/vyhlasene_znenie.html

[5] Ministry of Interior of the Slovak Republic. Crisis situations. Online: https://www.minv.sk/?Krizove_stavy

[6] Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/227/vyhlasene_znenie.html

[7] Constitutional Law No. 414/2020, Coll. of laws, amendment to the Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/414/20201229.html

Additionally, the Law No. 387/2002, Coll. of laws on the management of the state in crisis situations outside times of war and martial law[8] was adopted, to provide legal framework for the powers of public authorities in the management of the state in crisis situations outside times of war and martial law, the rights and obligations of legal entities and natural persons in preparing for and dealing with crisis situations outside times of war and martial law, and penalties for breaches of that obligations.

Question 3

Factors justifying the declaration of the state of emergency are stated in the Article 5(1) of the Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency as amended in 2020,[9] and are listed as imminent danger to the life and health of persons, including in causal connection with the occurrence of a pandemic, danger to the environment or danger to substantial property values as a result of a natural disaster, catastrophe, industrial, transport or other operational accident.

Question 4

The formal nature of crisis situation is regulated in the Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency as amended in 2020,[10] while division of competences between public authorities and legal procedures are regulated by the Law No. 387/2002, Coll. of laws on the management of the state in crisis situations outside times of war and martial law.[11] The competence in general jurisdiction is distributed between the president and the government on the national level.

As crises may happen and can be declared on the regional, local and municipal level, the legal basis is provided by the Law No. 42/1994, Coll. of laws on civil protection of the population.[12]

[8] Law No. 387/2002, Coll. of laws on the management of the state in crisis situations outside times of war and martial law. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/387/vyhlasene_znenie.html

[9] Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency as amended in 2020. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/414/20201229.html

[10] Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency as amended in 2020. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/414/20201229.html

[11] Law No. 387/2002, Coll. of laws on the management of the state in crisis situations outside times of war and martial law. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/387/vyhlasene_znenie.html

[12] Law No. 42/1994, Coll. of laws on civil protection of the population. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1994/42/vyhlasene_znenie.html

As all decisions of public authorities are considered legal acts or delegated legal acts, they are subjects of the judicial scrutiny according to §177(1) of the Law No. 162/2015, Coll. of laws on the administrative procedure code[13] and subject of the constitutional compliance review according to the Article 125(1) of the Constitution or individual constitutional complaint challenging the violation of the human rights according to the Article 127 of the Constitution.

Question 5

The Slovak Republic is acting in compliance with its obligation to the EU law, as established in the Treaty on Accession and the Article 7(2) of the Constitution. The EU had a leading role in adopting the state of emergency and provided guidance and coordination over the implementing actions, see in accordance to implementation of the Council Directive 2005/94/EC of 20 December 2005 on Community measures for the control of avian influenza.[14] Although in the enormous number of situation the Slovak Republic is implementing the EU decision in general or policy-specific situations of emergency, there is one exception – the migration policy.

Question 6

The state of emergency was invoked in Slovakia several times. First time was the state of emergency declared by the Resolution of the Government of the Slovak Republic No. 752/2011 of 28 November 2011[15] in the territorial jurisdiction of 13 district offices, 1, concerning 16 inpatient health care providers. "At the same time, a work obligation was imposed to ensure the provision of health care to employees of inpatient health care providers located in that territorial districts."[16] For the second time, the Government declared a state of emergency by the Government Resolution No. 114/2020 of 15 March 2020,[17] in connection with the pandemic. "The state of emergency was declared locally for the districts under the territorial jurisdiction of 12 district authorities concerning 22 inpatient

[13] Law No. 162/2015, Coll. of laws on the Administrative Procedure Code. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/162/20240315.html

[14] COUNCIL DIRECTIVE 2005/94/EC of 20 December 2005 on Community measures for the control of avian influenza and repealing Directive 92/40/EEC. Online: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf

[15] Government Resolution No. 752/2011 of 28 November 2011, declared on the legal basis of the Constitutional Law No. 227/2002, Coll. of laws, published in the official journal of the SR under the number 421/2011.

[16] S. Gaňa, Zásah do základných práv a slobôd počas núdzového stavu [Intervention to human rights and freedoms in the state of emergency], in T. Ľalík et al., Obmedzovanie ľudských práv [Limitation to human rights]. Bratislava, 2021, p. 141. Online: https://www.snslp.sk/wp-content/uploads/Obmedzovanie-ludskych-prav.pdf

[17] Government Resolution No. 114 of 15 March 2020. In: The list of government resolutions for managing the Covid-19 pandemics. Online: https://www.minv.sk/?okresne-urady-klientske-centra&urad=65&odbor=4&sekcia=uradna-tabula#popis

health care providers with the imposition of a labour obligation on the employees of these inpatient health care providers, including a prohibition on the exercise of the right to strike."[18] The declaration of a third state of emergency in Slovakia was also linked to the spread of the coronavirus and aimed at slowing the spread of the pandemic. By the Government Resolution No. 587/2020 587 of 30 September 2020 with effect from 1 October 2020,[19] the Government declared a state of emergency throughout the Slovak Republic for 45 days. The fourth and last state of emergency was declared by the Resolution of the Government No. 695/2021 of 24 November 2021 and expires on 22 February 2022.[20]

Additionally, the emergency was announced due the meteorological situations, but also in relation to several global health crises and the Russian war in Ukraine. Emergency has been always applied to a specific area or region affected by flooding, most recently in 2024, but before that in 1998 and 2020. Global health crises were linked to the adoption of short-term emergency measures in relation to avian influenza in 2005 or the prohibition of import of beef meet from the United Kingdom in 2007.[21] Lately, in accordance with the Russian war in Ukraine and the fleeing people, the Government initiated another short-term emergency measure to support the Ukrainian people in Slovakia, for example, by the Government Resolution No. 131/2002, Coll. of laws on certain measures in the field of subsidies within the competence of the Ministry of Labour, Social Affairs and Family of the Slovak Republic in times of emergency, state of emergency or state of exception declared in connection with the mass influx of foreigners to the territory of the Slovak Republic caused by the armed conflict on the territory of Ukraine.[22]

With the time-limits for the state of emergency, the institute of the state of necessity was applied to prolong several restrictions during the pandemic period of 2020–2023. The emergency situation declared by the Government of the Slovak Republic as of 12 March 2020 due to a public health threat of level II as a result of the COVID-19 disease caused by the SARS-CoV-2 coronavirus for the territory of the Slovak Republic was terminated on 15 September 2023 at 06.00 a.m. by the Government of the Slovak Republic by Resolution No. 446/2023 of 13 September 2023.[23]

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[18] S. Gaňa, Zásah do základných práv a slobôd počas núdzového stavu, p. 142.

[19] Government Resolution No. 587/2020 of 30 September 2020. In: The list of government resolutions for managing the COVID-19 pandemics. Online: https://www.minv.sk/?okresne-urady-klientske-centra&urad=65&odbor=4&sekcia=uradna-tabula#popis

[20] The list of government resolutions for managing the COVID-19 pandemics. Online: https://www.minv.sk/?okresne-urady-klientske-centra&urad=65&odbor=4&sekcia=uradna-tabula#popis

[21] https://svet.sme.sk/c/3422765/v-unii-plati-zakaz-dovozu-britskeho-masa.html

[22] Government Resolution No. 131/2002, Coll. of laws on certain measures in the field of subsidies within the competence of the Ministry of Labour, Social Affairs and Family of the Slovak Republic in times of emergency, state of emergency or state of exception declared in connection with the mass influx of foreigners to the territory of the Slovak Republic caused by the armed conflict on the territory of Ukraine. Online: https://www.epi.sk/zz/2022-131

[23] Ministry of Interior of the Slovak Republic. Online: https://www.minv.sk/?odvolanie-mimoriadnej-situacie-v-suvislosti-covid-19-ouke

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

The original text of the Constitution of the Slovak Republic (Constitutional Law No. 460/1992, Coll. of laws) did not provide the definition of emergency, crisis or necessity. The amendment to the Constitution, the Constitutional Law No. 9/1999, Coll. of laws,[24] provides new Article 51(2) and Article 102(3) defining the blanket provisions relating to crisis situations. Additionally, by the next amendment to the Constitution, the Constitutional Law No. 90/2001, Coll. of laws,[25] amended Article 51(2) by the text: "The conditions and extent of restrictions on fundamental rights and freedoms and the extent of obligations in times of war, martial law, state of necessity and state of emergency shall be laid down by constitutional law." By adopting the blanket constitutional provision, in the Constitution of the Slovak Republic 2001 it was envisaged to adopt the implementing constitutional law, by which the respective constitutional authorities should have declared a crisis situation (war, state of war, state of alarm and state of emergency). "The parliament should have provided for the optional possibility of restriction of fundamental rights and freedoms as well as the possibility of imposing obligations (also) during the duration of the state of emergency, namely by the constitutional law envisaged by the Constitution of the Slovak Republic 2001, ergo not by ordinary laws, nor by sub-legislative norms of the Office of Public Health of the Slovak Republic."[26] Therefore, in 2002, there had been adopted Constitutional Law No. 227/2002, Coll. of laws, on state security in time of war, state of war, state of emergency and state of necessity[27] defining the crisis situation. Although the same law does not provide the definition of "necessity," it regulates conditions under which it may be declared according to Article 4 as follows: "A state of necessity may be declared on the condition that there has been or is imminent a terrorist attack, widespread street disturbances associated with attacks on public authorities, looting of shops and warehouses, or other mass attacks on property, or other mass violent unlawful acts, the extent or consequences of which substantially

[24] Constitutional Law No. 9/1999, Coll. of laws, amendment to the Constitution of the Slovak Republic. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1999/9/

[25] Constitutional Law No. 90/2001, Coll. of laws, amendment to the Constitution of the Slovak Republic. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2001/90/20020101.html

[26] G. Noé, K nemožnosti obmedzovať práva a ukladať povinnosti v núdzovom stave nad rámec ústavného zákona o bezpečnosti štátu [On the impossibility of restricting rights and imposing obligations in a state of emergency beyond the scope of the Constitutional Law on State Security], in: Právne listy (2023). Online: https://www.pravnelisty.sk/clanky/a1222-k-nemoznosti-obmedzovat-prava-a-ukladat-povinnosti-v-nudzovom-stave-nad-ramec-ustavneho-zakona-o-bezpecnosti-statu.

[27] Constitutional Law No. 227/2002, Coll. of laws on state security in time of war, state of war, state of emergency and state of emergency. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/227/vyhlasene_znenie.html

threaten or disrupt public order and the security of the State." Declaration of the state of necessity is time limited and can be prolonged only under extraordinary circumstances, as it allows "to restrict fundamental rights and freedoms to the extent and for the time necessary, according to the gravity of the threat" (Article 4 (4)).

The specific definition of the necessity is also regulated in the Rules of Procedure of the National Council of the Slovak Republic,[28] in §86: "In exceptional circumstances (if necessary), where fundamental human rights and freedoms or security may be threatened or where there is a threat of significant economic damage to the State, the National Council may, on a proposal from the Government, agree to a shorten legislative procedure on a draft law."

Question 2

The division of competences and legal procedures are regulated by the Law No. 387/2002, Coll. of laws on the management of the state in crisis situations outside times of war and martial law.[29] It is outlined that the distribution of competences is distributed between the president and the government on the national level.

The constitutional authority	The crisis situation	The legal basis	The legal framework
The president	The state of necessity	At the proposal of the Government of the Slovak Republic (only in the affected or immediately threatened area and for the necessary time, up to maximum 60 days).	Constitutional Law 227/2002, Coll. of laws, as amended
The government	The state of emergency	Only in the affected or imminently threatened area and for the necessary period of time, up to a maximum of 90 days.	Constitutional Law 227/2002, Coll. of laws, as amended
The government	The emergency situation	If the extent of the affected area exceeds the jurisdiction of the district office, and the municipality, legal entity and natural person.	Law No. 42/1994, Coll. of laws

[28] Law No. 350/1996, Coll. of laws on the Rules of Procedure of the National Council of the Slovak Republic. Online: https://www.nrsr.sk/web/Static/sk-SK/NRSR/Doc/zd_rokovaci-poriadok.pdf

[29] Law No. 387/2002, Coll. of laws on the Management of the State in Crisis Situations Outside Times of War and Martial Law. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/387/vyhlasene_znenie.html

Slovakia resorted to constitutional states of emergency that did not provide for specific forms of parliamentary oversight and, therefore, the national parliament resorted to ordinary oversight procedures to exercise its oversight functions.[30]

Question 3

As some of the crisis situation may happened and can be declared on the regional, local and municipal level, the legal basis is provided by the Law No. 42/1994, Coll. of laws on civil protection of the population.[31]

The public authority	The crisis situation	The legal basis	The legal framework
Regional office	The emergency situation	In its territorial district	Law No. 42/1994, Coll. of laws
Local office	The emergency situation	In its territorial district	Law No. 42/1994, Coll. of laws
The mayor	The emergency situation	In its territorial district	Law No. 42/1994, Coll. of laws

In the case of national situations of emergency, the regional and local authorities play a significant role, by exercising the adopted Government Resolutions, within the hierarchical system of executive power organisation, according to the Law No. 575/2001, Coll. of laws on the organisation of government activities and the organisation of the central state administration.[32]

Question 4

The principle of international and EU supremacy is ensured in the Constitution of the Slovak Republic. According to Article 1(2) of the Constitution: "The Slovak Republic recognises and observes the general rules of international law, the international treaties by which it is bound and its other international obligations." Especially, the supremacy is granted to international treaties on

[30] See: N. Atanassov, H. Dalli, C. Dumbrava et al., States of emergency in response to the coronavirus crisis: Situation in certain Member States II, EPRS, European Parliament, May 2020, p. 6; and Z. Alexandre, M. Del Monte, G. Eckert et al., States of emergency in response to the coronavirus crisis: Situation in certain Member States IV, EPRS, European Parliament, July 2020, p. 11.

[31] Law No. 42/1994, Coll. of laws on civil protection of the population. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1994/42/vyhlasene_znenie.html

[32] Law No. 575/2001, Coll. of laws on the organisation of government activities and the organisation of the central state administration. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2001/575/20090601.html

human rights, in accordance with Article 7(4) and Article 7(5). The supremacy of the EU law is granted by the Article 7(2) of the Constitution of the Slovak Republic, as worded: "The legally binding acts of the European Communities and the European Union take precedence over the laws of the Slovak Republic." These constitutional provisions have the leading role, in compliance with the Article 13 of the Constitution, which established limits for the fundamental rights and freedoms and conditions for setting the obligations in the Slovak Republic.

Question 5

The Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency as amended in Article 5(3) and in the context of Article 51(2) of the Constitution of the Slovak Republic, according to which the conditions and extent of restrictions on fundamental rights and freedoms and the extent of obligations in times of war, martial law, state of emergency and emergency shall be established by constitutional law. In this context, the possibility of limiting fundamental rights and freedoms to the extent necessary and for the time necessary, according to the gravity of the threat, should be emphasised.

Non-judicial bodies with the competence to monitor the implementation of the fundamental rights and freedoms safeguards are mainly ombuds-offices, particularly the Office of the Public Defender of rights, Commissioner for the Rights of the Child, Commissioner for the Rights of Persons with Disabilities.[33]

As underlined in the Article 151a(1) of the Constitution of the Slovak Republic: "The Public Defender of Rights is an independent body of the Slovak Republic which, to the extent and in the manner provided by law, protects the fundamental rights and freedoms of natural persons and legal entities in proceedings before public administration bodies and other public authorities if their actions, decision-making or inaction are contrary to the legal order. In cases provided for by law, the Public Defender of Rights may participate in the application of the liability of persons acting in public authorities if these persons have violated a fundamental right or freedom of natural persons and legal entities. All public authorities shall provide the Public Defender of Rights with the necessary cooperation."[34]

[33] Law no. 176/2015 on the office of the Commissioner for the Rights of the Child, Commissioner for the Rights of Persons with Disabilities. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/176/20240315.html

[34] Constitution of the Slovak Republic. Law No. 564/2001, Coll. of laws on the Public Defender of Rights. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2001/564/l

Specific monitoring competence in area of health care services (including providing health care services in the state of emergency) is provided by the Law No. 581/2004, Coll. of the laws on the health care supervisory authority.[35] The authority is entitled to review complaints, lodged by a person who considers that his or her rights or legally protected interests have been violated in the provision of healthcare or in the implementation of public health insurance (hereinafter referred to as the person concerned), or his or her legal representative.

Question 6

The Article 21 TFEU guarantees the right for free movement and residence in the European Union. Although this right is not absolute and the Article 45(3) TFEU provides limitations justified on grounds of public policy, public security and public health, the implementation of the obligatory quarantine in the state facilities for all citizens and family members returning to Slovakia after declaration of state of emergency was considered by the Constitutional Court of the Slovak Republic as not proportionate, not justified and contrary to the rule of law. Therefore, also in contradiction with the fundamental freedom of the EU.

As the Constitutional Court argued in its findings PL ÚS 4/2021 of 8 December 2021: "A law allowing deprivation of liberty must meet certain qualities, which means that it can only allow deprivation of liberty if it is sufficiently specific (precise), predictable in its application, because only then can the danger of arbitrariness be excluded. Deprivation of liberty may be justified only if other less severe measures have been weighed and considered insufficient to protect the interest requiring the deprivation of liberty (principle of proportionality). The more serious the restrictions and interferences with fundamental rights that may result from the use of an empowering provision, the more precisely it must define the limits within which the empowered public authority may operate. In such cases, reliance cannot be placed solely on vague legal concepts (necessary scope); otherwise, not only would the guarantee of the legality of interferences and restrictions on fundamental rights and freedoms be undermined, but also, and above all, the balance in the system of the separation of powers as one of the principles of the rule of law would be undermined."[36]

[35] Law No. 581/2004, Coll. of laws on on health insurance companies, health care supervision and other laws as amended. Online: https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2004/581/

[36] Constitutional Court of the SR, finding No. PL ÚS 4/2021 of 8 December 2021. Online: https://www.ustavnysud.sk/docDownload/ac961569-c4a9-4309-b402-be9bcfb826e4/%C4%8D.%207%20-%20PL.%20%C3%9AS%204_2021.pdf

Section 3: Statutory/executive emergency law in the Member States

Question 1

n/a

Question 2

According to Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency,[37] the competence is conferred to the president and parliament, depending on the character of crisis situation (state of emergency, emergency situation, necessity, etc.). Beyond that, in some of the crisis situation the competence is conferred to the regional, local and municipal level, the legal basis is provided by the Law No. 42/1994, Coll. of laws on civil protection of the population.[38] The first distinguishing sign is the character of the crisis situation (as the state of emergency and state of necessity may be called only on national level) and the second one is the territorial jurisdiction, corresponding to the public administration governance.

Question 3

In general, the principle of constitutional review is applicable. According to the Article 125 (1, a) of the Constitution of the Slovak Republic,[39] the Constitutional Court is reviewing the compliance of laws with the Constitution, with constitutional laws and with international treaties to which the National Council of the Slovak Republic has given its consent and which have been ratified and promulgated in the manner prescribed by law. As underlined in the finding of the Constitutional Court of the Slovak Republic No. PL ÚS 13/2020,[40] the court "assesses the shortened (emergency) legislative procedure basically in the context of the protection of debate and the formation of the will of the MPs."

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[37] Constitutional Law No. 227/2002, Coll. of laws on the national security in time of war, state of war, state of alarm and state of emergency as amended. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/414/20201229.html

[38] Law No. 42/1994, Coll. of laws on civil protection of the population. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1994/42/vyhlasene_znenie.html

[39] Constitution of the Slovak Republic. Constitutional Law No. 460/1992, Coll. as amended. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20230701.html

[40] Finding of the Constitutional Court of the Slovak Republic No. PL ÚS 13/2020. Online: https://www.ustavnysud.sk/docDownload/4740660d-2f89-4e01-9fa4-305644d67a2b/%C4%8D.%201%20-%20PL.%20%C3%9AS%2013_2020.pdf

Question 4

No, based on the Treaty on Accession of the Slovak Republic to the European Union[41] the contracting party is represented by the Government of the Slovak Republic, which also according to the Article 108 of the Constitution of the Slovak Republic[42] is the supreme body of the executive power. The emergency measure introduced by the EU, does not have any impact on the balance and distribution of power of Slovakia.

Section 4: Judicial review of emergency powers in the Member States

Question 1

The power of the courts to review acts issued by public administration bodies is given in Article 142(1), second sentence of the Constitution of the Slovak Republic: "Courts shall also review the legality of decisions of public administration bodies and the legality of decisions of measures or other interventions of public authorities, if so provided by law." Natural and legal persons, as recipients of public powers execution by public administration bodies, must be able to seek judicial review of administrative acts and activities on an administrative body if their subjective rights have been violated.
The Law 162/2015, Coll. of laws on the administrative procedure code[43] introduced "the judicial review in public administration – those of decision and measure, both rendered by administrative authorities. Administrative decision is examined by court if it established, modified, revoked or declared rights and obligations of natural persons or legal entities, or by which the rights and interests protected by law, or duties of natural persons or legal entities may be directly affected. Administrative measure is subject to judicial review if the rights and interests protected by law or duties of natural persons or legal entities may be directly affected by it."[44]

[41] Treaty on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union. OJ EU L236, 23 September 2003. Online: https://eur-lex.europa.eu/legal-content/SK/TXT/?uri=OJ:L:2003:236:TOC

[42] Constitution of the Slovak Republic. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/19921001.html

[43] Law No. 162/2015, Coll. of laws on the Administrative Procedure Code. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/162/20240315.html

[44] M. Džačková, Rozhodnutie a opatrenie orgánu verejnej správy a ich súdny prieskum. *Právny obzor*, 101, 2018, No. 1, pp. 62–82. Online: https://www.legalis.sk/sk/casopis/pravny-obzor/rozhodnutie-a-opatrenie-organu-verejnej-spravy-a-ich-sudny-prieskum.m-398.html

Additionally, the Constitutional Court of the Slovak Republic according to the Article 125(1) may implement the constitutional review the cases of compliance:

(b) government regulations, generally binding legal regulations of ministries and other central government bodies with the Constitution, constitutional laws and laws;
(c) generally binding regulations of local self-government bodies with the Constitution and laws;
(d) generally binding legal regulations of local state administration bodies with the Constitution, laws and other generally binding legal regulations.

Individuals may also seek the constitutional protection, in accordance with the Article 127 (1) of the Constitution: "The Constitutional Court decides on complaints from natural persons or legal entities if they allege a violation of their fundamental rights or freedoms."

Question 2

None of the courts within the judicial review of administrative legal acts, neither the constitutional review is applied ex officio. The submission of the complaint by the authorised person whose human rights or fundamental freedoms were violated is requested. According to the §178(1) of the Administrative Procedure Code: "A claimant is a natural person or a legal person who alleges that, as a party to an administrative procedure, he or she has been deprived of his or her rights or legally protected interests by a decision of a public administration body or by a measure of a public administration body."

Also, the prosecutor may seek the judicial review of the administrative legal act according to the §178(2) of the Administrative Procedure Code: "The prosecutor may bring an administrative action against a decision of a public administration body or a measure of a public administration body if the public administration body has not satisfied his/her protest and has not annulled the decision or measure contested by him/her."

Submission of the written constitutional complaint by the individual natural or legal person, represented by the registered attorney is requested by the §41(1) of the Law No. 314/2018 Coll. of laws on the Constitutional Court of the Slovak Republic as amended.[45] A constitutional complaint is admissible if all available remedies have been exhausted.

[45] Law No. 314/2018, Coll. of laws on the Constitutional Court of the Slovak Republic as amended. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2018/314/20240715.html

Question 3

Principle of proportionality is applied as the minimum standard of the review by the courts in Slovakia. Principle of the proportionality is mainly underlined in relation to legal and limited restriction of fundamental rights and freedoms, as well as regarding the time of application of restrictive measures.

The Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency as amended in Article 5(3) and the Article 51(2) of the Constitution of the Slovak Republic provides the guidelines for the application of the principle of proportionality of adopted measures in the crises times, including the state of emergency or emergency situation.

The general guidelines for any limitations of fundamental rights and the application of the principle of proportionality is essential the Article 13 of the Constitution of the Slovak Republic, as follow:

"Obligations may be imposed:
(a) by or under the law, within the limits of the law and while preserving fundamental rights and freedoms;
(b) by an international treaty, as referred to in Article 7(4), which directly creates rights and obligations for natural or legal persons, or;
(c) by a government decree pursuant to Article 120(2).

(2) The limits of fundamental rights and freedoms may be modified under the conditions laid down in this Constitution only by law.

(3) The legal limitations of fundamental rights and freedoms must apply equally to all cases which meet the conditions laid down.

(4) In limiting fundamental rights and freedoms, regard must be paid to their nature and meaning. Such limitations may be used only for the stated purpose."

The principle of subsidiarity is applied in the constitutional review, when according to the Article 127 of the Constitution, the individual constitutional complaint is admissible only when all remedies had been exhausted.

Question 4

The principle of proportionality is the leading principle of the judicial review of actions of public authorities in situations of emergency. The legal basis is presented by the Constitutional Law No. 227/2002, Coll. of laws on the national security during war, state of war, state of alarm and state of emergency as amended in Article 5(3) and the Article 13(1) and 51(2) of the Constitution

of the Slovak Republic. There is no outlined distinction in understanding the principle of proportionality under national law and the principle of proportionality under EU law.

The principle of proportionality was applied in the constitutional court findings PL. ÚS 22/2020, the first regarding the pandemic COVID-19, when the Constitutional Court of the SR reviewed the Government Regulation No. 269/2020, Coll. of laws, adopted for the implementation after the state of emergency was declared. The court ruled that the decision declaring a state of emergency, or an emergency and any subsequent decisions have been taken in accordance with the Constitution or a constitutional law. For the first time the Constitutional Court reviewed the Government Regulation and its compliance with the Constitution.

Section 5: Implementation of EU emergency law in the Member States

Question 1

The general principle of EU law supremacy is applied in accordance with the Article 7(2) of the Constitution of the Slovak Republic. The example is the first EU declaration of the state of emergency related to COVID-19 pandemic, allowing EU Member States to either adopt constitutional, statutory regimes and/or ordinary legislation. The Slovak Republic declared a state of emergency and also implemented a special statutory regime.[46]

Question 2

The emergency competence in the Article 78(3) TFEU, which empowers the Council, in an emergency situation caused by a sudden inflow of nationals from third countries, to adopted provision measures for the benefit of the Member State concerned, was fully implemented by the Slovak Republic with increased arrival of the people fleeing the war in Ukraine. The Slovak Republic acted in compliance with the Council response to the Russian invasion of Ukraine in 2022 and activated Temporary Protection Directive.[47] As

[46] See more in: EP: States of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Membe States during the first wave of the pandemic. European Parliamentary Research Service, 2020. Online: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf

[47] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. OJ L 212, 7.8.2001. Online: http://data.europa.eu/eli/dir/2001/55/oj

response the National Council of the Slovak Republic adopted the amendment to the Law No. 480/2002, Coll. of law on the asylum[48] and the legislative package Lex Ukraine. Several laws had been amended to provide the accommodation support, social benefits, education and access to labour market to Ukrainians.

This differs substantially with the challenges the Slovakia had with the implementation of Council Decision (EU) 2015/1604 of 22 September 2015 establishing the provision measures in the area of international protection, when even filed lawsuit against the adopted EU's refugee relocation scheme, arguing by the procedural mistake. The Court of Justice of the EU reject the action seeking the annulment of the decision.[49]

The emergency competence provided in the Article 122 TFEU establishes a legal basis that allows the EU to grant financial assistance to Member States in exceptional circumstances, only if they are threatened with severe difficulties. Article 122(1) TFEU, in particular, links Union assistance to the existence of "severe difficulties […] in the supply of certain products, notably in the area of energy." In this regard, the Slovakia was facing difficulties to find alternative gas resources, as well as renewable energy, in compliance with the application of Council Regulation to reduce gas demand (2022/1369), Council Regulation to coordinate gas purchases across the EU (2022/2576), Council Regulation to accelerate the deployment of renewable energy (2022/2577), Council Regulation to address the high energy prices (2022/2578).

Article 122(2) TFEU, on the other hand, allows the Union to grant financial assistance to a Member State imminently threatened by or currently suffering severe difficulties "caused by natural disasters or exceptional occurrences beyond its control." The Slovak Republic was more than thankful for the structural and immediate support from the Union resources activated in this regard connected to the flood in September 2024.

[48] Law No. 480/2002, Coll. of laws on asylum as amended. Online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/480/20240701.html

[49] CJEU – Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the European Union, 6 September 2017. ECLI:EU:C:2017:631. Online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0643

Slovenia

*Rok Dacar**

Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

From a constitutional law perspective, two relevant concepts can be distinguished, namely the state of emergency and the state of war. The legal effects of declaring a state of emergency and a state of war are identical. However, a state of war can only be declared in the event of an armed attack, whereas a state of emergency can be declared in the event of other developments that justify the declaration of a special legal situation (such as uncontrollable waves of migration or natural disasters). The Constitution[1] sets out the conditions for the declaration of a state of emergency (see Question 3) and the procedure for such a declaration. In the absence of such a declaration, no state of emergency can exist despite the possible occurrence of an emergency situation.

Question 2

The Slovenian legal framework provides for both a general constitutional framework and sector-specific regulations. An emergency situation in the constitutional sense can lead to the derogation of several fundamental rights and significantly shift the institutional balance. However, even if there is an emergency situation (such as floods, forest fires, the coronavirus outbreak, etc.), this does not per se mean that there is also a state of emergency. For this to be the case, it must be declared in accordance with the relevant procedure. In addition to the state of emergency in the constitutional sense (with all its consequences), various legal acts lay down measures to be applied in emergencies. However, these measures may not derogate fundamental rights, as this is only possible if a constitutional state of emergency has been declared. Examples of policy-specific emergency regulations include the Communicable

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[1] Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia no. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a in 92/21 – UZ62a.

Diseases Act,[2] which contains provisions on how to deal with an epidemic or pandemic, and the Act Establishing Intervention Measures Following the Floods and Landslides of August 2023.[3] In addition, the Defense Act[4] also contains provisions on the declaration of a state of emergency. However, this law defines the criterion for declaring a state of emergency slightly differently to the Constitution.

Question 3

Two different positions must be distinguished. First, if no formal state of emergency has been declared, the statutory provisions on emergency situations (e.g., those in the Communicable Diseases Act) can be invoked if the conditions in the act prescribing them are met. These conditions naturally vary from act to act and depend on the nature of the emergency covered by the said acts. The conditions for the application of provisions that deal with emergency situations but do so outside a declared state of emergency (such as those in the Communicable Diseases Act or the Act Establishing Intervention Measures Following the Floods and Landslides of August 2023) are specified in each individual act. It should be noted that the activation of the aforementioned provisions, even if they refer to emergencies, does not mean that the state of emergency has been declared – therefore, the specific legal consequences of the declaration of the state of emergency are missing in such cases.

Secondly, several particularly strict conditions must be met for a formal (constitutional) state of emergency to be declared. According to the Constitution, a state of emergency can only be declared if a great and general danger threatens the existence of the state. It should be noted that three conditions must be met cumulatively, namely: the existence of the state must be endangered, and the danger must be both great and general. In other words: If one of the above conditions is not met, a state of emergency cannot be declared. Since a state of emergency has not yet been declared in Slovenia, it is not clear when exactly the above conditions are met. However, it is widely established in Slovenian constitutional theory that a danger, even if it is large and general, but endangers only a certain part of the country, cannot be a sufficient reason for declaring a state of emergency (such as floods or forest fires only in a (small) part of the country), as it can hardly endanger the existence of the state. Fur-

[2] Communicable Diseases Act (Official Gazette of the Republic of Slovenia no. 33/06 – consolidated text, 49/20 – ZIUZEOP, 142/20, 175/20 – ZIUOPDVE, 15/21 – ZDUOP, 82/21, 178/21 – odl. US in 125/22).

[3] Act Establishing Intervention Measures Following the Floods and Landslides of August 2023 (Official Gazette of the Republic of Slovenia no. 95/23).

[4] Defense Act (Official Gazette of the Republic of Slovenia no. 103/04 – consolidated text, 95/15 in 139/20).

thermore, the criterion that a major and general danger endangers the existence of a state must not be understood literally and narrowly as the yardstick for declaring a state of emergency, since even the most violent situations can hardly endanger the existence of the state itself. Rather, it must be understood to mean that such a situation threatens the territorial integrity, independence and sovereignty of the state as well as its constitutional structure.[5]

However, the Defense Act,[6] which also contains provisions on the declaration of a state of emergency, defines the criterion for the declaration of a state of emergency somewhat differently. Accordingly, a state of emergency can be declared if a major or general danger threatens the existence of the state. The danger must therefore be either general or great, but not also general and great, as required by the Constitution. The differences in the definition of the conditions for declaring a state of emergency between the Constitution and the Defense Act are somewhat confusing. It should also be noted that armed aggression cannot constitute a general and/or great danger that requires the proclamation of a state of emergency, as it requires the proclamation of a state of war.

Question 4

If a state of emergency in the constitutional sense is to be declared, this must be done in accordance with the procedure laid down in the Constitution. The National Assembly may decide to declare a state of emergency at the proposal of the Government. The National Assembly may either accept or reject the Government's proposal, but it cannot declare a state of emergency without a proposal from the Government. The National Assembly declares a state of emergency or a state of war by means of a decree requiring the support of a majority of the votes cast by all the deputies present. If the National Assembly is unable to convene, a state of emergency is declared by the President of the Republic, who must submit this decision to the National Assembly for confirmation immediately after its next meeting. In accordance with Article 279 of the Rules of Procedure of the National Assembly,[7] the decision that the National Assembly cannot be convened is taken by the President of the National Assembly. The President of the Republic imposes the state of emergency

[5] Igor Kaučič, "Ustavnopravni temelji izrednega stanja." *Ustava na robu izrednega stanja* (Constitutional Bases for the State of Emergency – The Constitution on the Brink of the State of Emergency), edited by Sašo Zagorc and Samo Bardutzky, Pravna fakulteta Univerze v Ljubljanui, 2024, p. 113.

[6] Defense Act (Official Gazette of the Republic of Slovenia no. 103/04 – consolidated text, 95/15 in 139/20).

[7] Rules of Procedure of the National Assembly of the Republic of Slovenia (Official Gazette of the Republic of Slovenia no. 92/07 – consolidated text, 105/10, 80/13, 38/17, 46/20, 105/21 – odl. US, 111/21 in 58/23).

by means of a decree with the force of law, which he issues on the proposal of the government. Here, too, the President of the Republic may refuse to declare a state of emergency.

In the case of emergency measures established by law, the decision to activate them is made by the authorized institution of the executive branch (usually the responsible ministry).

Question 5

While there were several cases where exceptional or emergency situations were addressed using a combination of EU and national instruments, no cases were identified where a situation was defined as an emergency solely on the basis of EU law.

In particular, the transposition of various EU directives and regulations into Slovenian law has created a framework for dealing with certain types of emergencies. For example, the transposition of Directive 2014/59[8] by the Act on Bank Resolution and Compulsory Liquidation[9] established comprehensive measures for dealing with banking crises. Even during the COVID-19 pandemic, Slovenia's responses have been significantly shaped by EU-level recommendations and frameworks, demonstrating the crucial role of EU law in shaping national emergency policies. However, it is important to note that in these cases it was a combination of EU guidelines and national legislative measures and not the unilateral application of EU law to define an emergency.

Question 6

A recent example of joint action by the EU and the Member States was the measures taken to deal with the consequences of the floods of August 2023, which caused considerable damage to infrastructure and residential buildings and was the largest flood disaster in recent history. The European Commission has approved an advance payment of 100 million euros under the European Union Solidarity Fund. Almost at the same time, the Slovenian National As-

[8] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, pp. 190–348.

[9] Act on Bank Resolution and Compulsory Liquidation, Official Gazette of the Republic of Slovenia no. 92/21 in 133/23.

sembly passed the Act on the Determination of Intervention Measures for Reconstruction after the Floods and Landslides of August 2023, which sets out the measures for reconstruction. In addition, the Act on Measures to Address the Crisis Situation in the Energy Supply[10] deals with energy supply issues in connection with Regulation 2022/2576.[11] Prior to this, the EU emergency measures for the recovery and resolution of banks set out in Directive 2014/59 were transposed into Slovenian law with the Act on the Resolution and Compulsory Liquidation of Banks.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

The state of emergency is regulated by three articles of the Constitution. Article 92 contains provisions on the state of war and the state of emergency. It states: "A state of emergency is declared when a great and general danger threatens the existence of the state. The declaration of war or a state of emergency, the emergency measures and their lifting shall be decided by the National Assembly on a proposal from the Government. The National Assembly decides on the deployment of the defense forces. If the National Assembly is unable to convene, the President of the Republic shall decide on the matters referred to in paragraphs 1 and 2 of this article. These decisions must be submitted to the National Assembly for confirmation immediately after its next meeting." Article 108 also states: "If the National Assembly is unable to convene due to a state of emergency or war, the President of the Republic may, on a proposal from the Government, issue decrees having the force of law. These decrees may, in exceptional cases, restrict the rights and fundamental freedoms of individuals in accordance with Article 16 of this Constitution. The President of the Republic must submit decrees with the force of law to the National Assembly for confirmation immediately after its next meeting." The Constitution contains several other articles that refer to the state of emergency but do not regulate it. Articles 81 and 103 extend the term of office of the National Assembly and the President of the Republic if it ends during a state of emergency or a state of war, while Article 116 contains special rules for the submission of a proposal for the election of a new Prime Minister and the election itself during a state of emergency or a state of war. The rules for the state of emergency have not yet been invoked.

[10] Act on Measures to Address the Crisis Situation in the Energy Supply, Official Gazette of the Republic of Slovenia no. 121/22, 49/23 in 38/24 – EZ-2.

[11] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders, OJ L 335, 29.12.2022, pp. 1–35.

Question 2

First, it is important to distinguish between emergency measures that are declared and/or implemented without a state of emergency being declared and emergency measures that are declared and/or implemented during a declared state of emergency or state of war. If a state of emergency is not declared, the institutional balance between the relevant actors does not change and all measures are declared and/or implemented according to regular procedures. At the same time, all constitutional guarantees remain intact. However, if a formal state of emergency is declared, the institutional balance shifts considerably. As a rule, the exercise of legislative power remains with the National Assembly (parliament), which decides whether to declare a state of emergency on the proposal of the government. However, if the National Assembly is unable to convene, the situation shifts considerably.[12] In such a case, Article 279 of the Rules of Procedure of the National Assembly stipulates that the President of the National Assembly must inform the President of the Republic of the inability of the National Assembly to meet. This leads to a transfer of "emergency powers" to the President of the Republic. In other words, the role of the President of the Republic in a state of emergency is a subsidiary one that only comes into play when the National Assembly cannot be convened.[13] In this case, the President of the Republic can issue legal acts with the same legal force as ordinary laws, which leads Žgur to refer to him as a substitute legislator.[14] The President is authorised to issue decrees with the force of law on the proposal of the Government, which may in particular also restrict most of the fundamental rights guaranteed by the Constitution – with the exception of the right to the inviolability of human life, the prohibition of torture, the protection of human personality and dignity, the presumption of innocence, the principle of legality in criminal law, legal guarantees in criminal proceedings and freedom of conscience (which have the status of absolute rights in the Constitution).[15] However, according to paragraph 3 of Article 108 of the Constitution, the President of the Republic must submit these decrees to the National Assembly for approval immediately after its next meeting. It is not clear from the text of the Constitution what the institutional interaction between the Government and the President of the Republic is in such situations.

[12] As the National Assembly is comprised of 90 deputies that come from all parts of the Republic of Slovenia, it could well be the case that a quorum of 46 deputies could not be reached in case of an extraordinary development which would warrant the declaration of a "state of emergency," due to, for example, logistical difficulties with the transport to the National Assembly.

[13] Lovro Šturm, *Komentar Ustave Republike Slovenije*, Fakulteta za podiplomske državne in evropske študije, 2002, p. 839.

[14] Matija Žgur, "State of Emergency: Powers and the Responsability of the President under the Slovenian Constitution." *Ustavni položaj predsednika republike*, edited by Igor Kaučič, Institute for Local Self-Governance and Public Procurement Maribor, 2016, p. 446.

[15] A restriction of absolute rights is never permissible. On the contrary, relative rights can be restricted if the proportionality test is satisfied.

In other words, it is not clear whether the President of the Republic: (1) is fully bound by the Government's proposals and must issue the proposed decrees with the force of law; (2) may refuse to issue a decree with the force of law; (3) may issue decrees with the force of law at his own prerogative.[16] The declaration of a state of emergency has no organisational impact on the functioning of the judiciary. The Constitution expressly states in Article 126 that the establishment of extraordinary courts is prohibited, while the establishment of military courts is only permitted in the event of a declaration of a state of war. Therefore, neither extraordinary nor military courts may be established during a state of emergency.

Question 3

Slovenia is a centralized state. However, local authorities have some powers in emergency situations. First, based on the Minor Offences Act[17] and other acts regulating various types of emergency situations (e.g., the Communicable Diseases Act in the case of virus outbreaks), they can determine which actions constitute misdemeanors. This jurisdiction was used extensively during the coronavirus outbreak to restrict the movement of people. In addition, the municipalities have powers in the area of protection and rescue on the basis of the Act on Protection against Natural and Other Disasters.[18]

The system of protection and rescue is organized as a unified and comprehensive system in which all rescue services and other appropriately organized units for protection and rescue are interconnected. The main activities take place at the local/municipal level, where the municipality manages and implements protection against natural and other disasters and organizes and directs protection, rescue and assistance in its territory. Municipalities issue ordinances for protection against natural and other disasters, which establish, organize and operate headquarters, units and services of civil protection and other forces for protection, rescue and assistance in the event of natural and other disasters and war, mobilize, activate and manage forces and resources, define and implement protection measures, implement the public fire department, organize information, warn and alert of imminent danger and issue instructions for protection, rescue and assistance. This system is most frequently activated in the event of floods and landslides.

[16] Žgur, "State of Emergency," p. 447.

[17] Minor Offences Act, Official Gazette of the Republic of Slovenia no. 29/11 – consolidated text, 21/13, 111/13, 74/14 – odl. US, 92/14 – odl. US, 32/16, 15/17 – odl. US, 73/19 – odl. US, 175/20 – ZIUOPDVE, 5/21 – odl. US in 38/24.

[18] Act on Protection against Natural and Other Disasters, Official Gazette of the Republic of Slovenia no. 51/06 – consolidated text, 97/10, 21/18 – ZNOrg in 117/22.

Question 4

Such conflicts would be resolved in accordance with the general hierarchy of legal norms and the principle of primacy of EU law. Neither the Constitution nor other legal acts contain provisions on such conflicts of law, and no relevant precedents were identified.

Question 5

The declaration of a state of emergency may lead to a temporary suspension or restriction of fundamental rights. However, according to Article 16 of the Constitution, such a restriction must be strictly proportionate, as fundamental rights may only be restricted for the duration of the state of emergency and only to the extent required by the circumstances. Furthermore, the measures adopted must not lead to unequal treatment based solely on ethnicity, national origin, gender, language, religion, political or other opinion, material situation, birth, education, social status or other personal circumstances.[19] In other words, the measures adopted must not lead to legally unjustified discrimination. It is important to point out that a suspension or restriction of fundamental rights can only be imposed by a law passed by the National Assembly (if the National Assembly can convene) or by a decree issued by the President of the Republic with the force of law (if the National Assembly cannot convene). In this context, it is particularly important to note that the suspension or restriction of fundamental rights that are not based on a law or a decree with the force of law is not permitted. This was demonstrated by the Slovenian Constitutional Court in its decision U-I-132/21,[20] which concerned several provisions of the Regulation on the temporary ban on public gatherings and other events in public places in the Republic of Slovenia and the ban on freedom of movement outside municipalities.[21] The latter regulation, issued by the government, restricted the movement of persons during the outbreak of the coronavirus pandemic to the territory of the municipality in which they lived. It must be emphasised that a state of emergency was not declared due to the coronavirus outbreak. The Constitutional Court came to the conclusion that the decree was unconstitutional, as the relevant restrictions could only have been imposed had they been foreseen by a law passed by the National Assembly.

[19] Also see: Franc Grad, Igor Kaučič, and Saša Zagorc, *Ustavno pravo*, Litteralis, 2022, pp. 775–777.

[20] Ruling of the Constitutional Court of 2nd June 2022, no. U-I-132/21.

[21] Regulation on the temporary ban on public gatherings and other events in public places in the Republic of Slovenia and the ban on freedom of movement outside municipalities (Official Gazette of the Republic of Slovenia no. 52/20, 58/20 in 60/20).

The declaration of a state of emergency does not in itself give the President of the Republic the power to issue decrees with the force of law. To do so, two conditions must be cumulatively fulfilled: firstly, the state of emergency must be declared and, secondly, the National Assembly must be unable to convene. Furthermore, even if a state of emergency is declared, some fundamental rights that are considered particularly important may not be suspended or restricted, namely: the inviolability of human life, the prohibition of torture, the protection of personality and human dignity, the presumption of innocence, the principle of legality in criminal law, legal guarantees in criminal proceedings and freedom of conscience. As a state of emergency has not yet been declared in the Republic of Slovenia, the exact circumstances and conditions under which fundamental rights may be suspended or restricted are not entirely clear from a practical point of view. For example, it is not clear whether the suspension or restriction of fundamental rights must be based on the regular proportionality test. The latter is regularly used as a means of deciding whether a fundamental right can be restricted. This test involves the assessment of three aspects of the intervention: (1) Is the intervention necessary in the sense that the objective cannot be achieved without any intervention (of whatever kind) or without the specific intervention assessed, which by its nature may be less intrusive? (2) Is the assessed intervention appropriate to achieve the intended objective in the sense that the intended objective can actually be achieved by the intervention? If it cannot be achieved, the intervention is not appropriate; (3) Is the severity of the consequences of the assessed intervention for the rights of the subject proportionate to the value of the intended objective or to the benefits of the intervention (principle of proportionality in the strict sense). If all three aspects are fulfilled, an interference with the fundamental right is permissible. However, I am of the opinion that the proportionality test does not apply if a state of emergency has been declared. The latter test is used to determine when interferences with fundamental rights are permissible in a normal state of law – in other words, when there is no state of emergency. The situation in which a state of emergency is declared cannot be compared with a situation in which this is not the case, both on factual grounds (exceptional occurrence) and on legal grounds (declaration of a "state of emergency"). Since the two positions are not comparable, it is not possible to transfer the proportionality test from the normal state to the state of emergency. Furthermore, the Constitution clearly defines which fundamental rights can be restricted or suspended under which conditions during a state of emergency. A teleological interpretation of the aforementioned provisions shows that the constitutional legislator intended to introduce rules for the suspension or restriction of fundamental rights that differ from the rules that apply when no state of emergency is declared and that offer greater possibilities for the suspension or restriction of fundamental rights as a generally applicable proportionality test.

Question 6

No such case has been identified.

Section 3: Statutory/executive emergency law in the Member States

Question 1

There are several examples of such acts. The following acts are particularly relevant:

The Defense Act regulates the organisation of national defense. Unsurprisingly, it contains several provisions on the state of emergency and/or the state of war. For example, it defines when and under what conditions a state of emergency can be declared. In this respect, it deviates somewhat from the Constitution. The Defense Act provides that in the event of a state of emergency or a state of war being declared, the National Assembly may issue decrees obliging citizens to work and/or provide material assistance. The said act also enables the Slovenian Armed Forces to issue special rules for determining the disciplinary responsibility of military personnel in a state of emergency or war. Importantly, this act also defines the responsibilities of the National Assembly, the Government and the President of the Republic in a state of emergency and a state of war, supplementing their rather narrow regulation in the Constitution.

The Communicable Diseases Act regulates emergency situations in connection with the outbreak of infectious diseases. This act provides the legal framework for the declaration and management of epidemics and pandemics. It outlines the responsibilities of the health authorities, including the Ministry of Health and the regional health institutes, in monitoring and analysing epidemiological situations. In the event of a virus outbreak, specific measures can be taken to control the spread of the disease. These measures include quarantine, isolation and restriction of movement, as well as the mobilisation of resources and personnel necessary for effective disease management and the protection of public health. The act ensures that public health measures are timely and effective in mitigating the impact of communicable diseases on the population. It must be emphasised that the said act does not deal with emergencies in the constitutional sense, but rather contains provisions that can be used to deal with emergency situations.

The Courts Act[22] lays down the rules for the organization of the judiciary. The said act provides that, in the event of an extraordinary event, the President of

[22] Courts Act (Official Gazette of the Republic of Slovenia no. 94/07 – consolidated text, 45/08, 96/09, 86/10 – ZJNepS, 33/11, 75/12 – ZSPDSLS-A, 63/13, 17/15, 23/17 – ZSSve, 22/18 – ZSICT, 16/19 – ZNP-1, 104/20, 203/20 – ZIUPOPDVE in 18/23 – ZDU-1O).

the Supreme Court may issue decrees regulating the operation of the courts according to the needs arising from the extraordinary event. An example of such an extraordinary event was the coronavirus pandemic, which led to court hearings being moved online and the possibility of teleworking for court staff being extended. However, if such a regulation is not issued, the functioning of the courts will not be affected by the declaration of a state of emergency.

The Act on Emergency Measures to Eliminate the Consequences of Floods and Landslides of August 2023[23] provides for emergency measures to deal with the severe floods and landslides that occurred in Slovenia in August 2023. It includes financial aid for affected individuals, businesses and municipalities, supports the reconstruction of housing and temporary shelters, finances infrastructure repair and environmental restoration projects and introduces simplified administrative procedures to speed up relief and recovery measures. The act aims to facilitate rapid recovery and ensure the well-being of affected communities.

The Act on Protection against Natural and Other Disasters provides Slovenia's legal framework for dealing with disasters. The act defines the roles and duties of state and local authorities, public institutions and citizens in disaster prevention, preparedness, response and recovery. It prescribes the development of national and municipal emergency plans, the coordination of disaster response units and public education initiatives to raise awareness and preparedness. The act also contains provisions for early warning systems, evacuation procedures and the provision of assistance to the affected population. In addition, it includes measures for the use of private property and resources in emergencies, the responsibilities of disaster response units and the integration of disaster management into urban planning and development.

Question 2

A state of emergency in the constitutional sense can only be declared in accordance with the procedure laid down in the Constitution. If it is declared, relative fundamental rights can be suspended and it can also lead to a significant shift in the institutional balance. However, selected types of emergency situations are also covered by legislative and executive provisions (e.g., measures to be taken in the event of a virus outbreak, conditions hindering the functioning of the courts, floods, etc.). Measures taken on the basis of these legal acts cannot suspend fundamental rights, but only restrict them

[23] Act on Emergency Measures to Eliminate the Consequences of Floods and Landslides of August 2023,
Official Gazette of the Republic of Slovenia no. 95/23, 117/23, 131/23 – ZORZFS in 62/24.

in accordance with the general principle of proportionality. The legislative and executive provisions on emergency situations can only be applied if the conditions laid down in the individual legal acts are met, while the state of emergency can be declared in any situation in which the conditions for its declaration are met. Therefore, a state of emergency can be declared both in cases that are already regulated by legislative and/or executive regulations and in cases that are not regulated by such regulations. Since a state of emergency has not yet been declared in Slovenia, there was no possibility of conflict between the constitutional and legislative/executive framework regulating the same emergency situation.

Question 3

When such measures are implemented and no constitutional state of emergency has been declared, the usual constitutional limits restricting the actions of the authorities apply, in particular the principle of proportionality and the principle of legality. In this context, it is important to mention the ruling of the Constitutional Court of May 13, 2021 U-I-79/20-24, in which five government decrees (executive acts) were declared unconstitutional because the provisions of the Law on Communicable Diseases on which they were based were also unconstitutional. The Constitutional Court thus emphasises that the principle of legality must be strictly observed even in emergency situations, especially in connection with laws that restrict fundamental rights.[24]

Question 4

No, it does not.

Section 4: Judicial review of emergency powers in the Member States

Question 1

If an emergency measure is declared and implemented without a state of emergency having been declared (such as the restriction of freedom of movement during the coronavirus outbreak), it must meet all the criteria required for a measure restricting fundamental rights under the proportionality test applied by the Constitutional Court. Individual and specific legal acts (usually

[24] Also see: Franc Grad, "Delovanje vlade in njeno razmerje do Državnega zbora v posebnih razmerah." *Ustava na robu izrednega stanja*, edited by Sašo Zagorc and Samo Bardutzky, Pravna fakulteta Univerze v Ljubljanui, 2024, p. 96.

an administrative decision) can be challenged in accordance with the provisions of the General Administrative Procedure Act[25] and the Administrative Dispute Act.[26] Accordingly, such a legal act can be challenged before the administrative authority of second instance as part of the administrative complaint procedure. If the appeal is unsuccessful, the act can be contested before the Administrative Court in administrative dispute proceedings. The judgement of the Administrative Court can be challenged before the Supreme Court. Finally, an individual and specific legal act that is considered to violate fundamental rights can also be challenged before the Constitutional Court as part of the constitutional complaint procedure. However, the prerequisite for this is that all other legal remedies have previously been applied without success. If the legal act in question is a general and abstract legal act (e.g., a state regulation), it can only be challenged before the administrative court if it is only general and abstract in form, but individual and specific in content. Such cases are rare. A general and abstract legal act can also be challenged before the Constitutional Court as part of the procedure for reviewing constitutionality and legality. However, individual petitioners must prove a legal interest, which is difficult to achieve. On the other hand, some institutional petitioners (such as the government, the National Assembly or the National Council) can file a petition without having to prove a legal interest. When a formal state of emergency is declared, the situation is somewhat different. If the National Assembly is unable to convene, the President of the Republic can issue restrictive measures in the form of a presidential decree, which has the force of law. The only legal recourse is therefore the constitutionality review procedure before the Constitutional Court. If the National Assembly is able to convene, the situation is somewhat more complicated. According to Article 108 of the National Assembly's Rules of Procedure,[27] it can declare a state of emergency and issue restrictive measures by decree. However, it is not entirely clear whether a decree can be used to restrict fundamental rights or whether this is only possible by means of a law.

Question 2

There are no procedural peculiarities that apply to the courts when they review the actions of public authorities in emergency situations.

[25] Administrative Procedure Act, Official Gazette of the Republic of Slovenia no. 24/06 – consolidated text, 105/06 – ZUS-1, 126/07, 65/08, 8/10, 82/13, 175/20 – ZIUOPDVE in 3/22 – Zdeb.

[26] Administrative Dispute Act, Official Gazette of the Republic of Slovenia no. 105/06, 107/09 – odl. US, 62/10, 98/11 – odl. US, 109/12, 10/17 – ZPP-E in 49/23.

[27] Rules of Procedure of the National Assembly of the Republic of Slovenia, Official Gazette of the Republic of Slovenia no. 92/07 – consolidated text, 105/10, 80/13, 38/17, 46/20, 105/21 – odl. US, 111/21, 58/23 in 35/24.

Question 3

If no formal state of emergency has been declared, the same standard of review applies as for measures taken without a state of emergency. The ordinary courts and the Constitutional Court apply the standard proportionality test. This test involves examining three aspects of the interference:

- Whether the intervention is necessary (required) in the sense that the goal cannot be achieved without any intervention or that the goal cannot be achieved with another, less drastic measure without the assessed (specific) intervention;
- Whether the assessed intervention is suitable to achieve the intended goal in the sense that the goal can actually be achieved by the intervention; if the goal cannot be achieved, the intervention is not suitable;
- Whether the weight of the consequences of the assessed interference on the human right concerned is proportionate to the value of the objective pursued or the benefit derived from the interference (principle of proportionality in the narrow sense).[28]

The Constitution contains no provisions on the standard of review in the case of a declared state of emergency, nor has the Constitutional Court addressed this issue in its case law. The lack of explicit codification leads to the conclusion that the standard of review does not change during a declared state of emergency. However, as most fundamental rights can be suspended in such a situation, interference with these rights would not be unconstitutional.

Question 4

The proportionality test described above must be met in all cases in which an official measure violates a fundamental right (which is almost inevitably the case with emergency measures adopted by the authorities). The proportionality test applied by the Slovenian courts is closely linked to the proportionality test as it is understood in EU law.

Section 5: Implementation of EU emergency law in the Member States

Question 1

No special national principles were identified.

[28] OdlUS XII, 86, U-I-18/02, Ur. l. 108/03.

Question 2

Slovenia's implementation of the EU emergency measures under Article 78(3) TFEU, Article 122 TFEU and the legislative measures introduced during the COVID-19 pandemic shows both successes and challenges. Article 78(3) TFEU, which is intended to address sudden migration crises, was applied during the 2015 refugee influx, when the EU adopted a mandatory relocation programme to distribute asylum seekers from overburdened countries such as Greece and Italy. Slovenia, which is located on the Western Balkans migration route, had considerable difficulties in fulfilling these obligations. Although Slovenia relocated some of the refugees as requested, this was slower than expected due to various capacity bottlenecks. The country's asylum infrastructure was overwhelmed by the sheer number of refugees crossing its borders, and the lack of sufficient accommodation, social services and processing capacity hampered the country's ability to meet EU resettlement targets. Public and political resistance has also significantly hampered Slovenia's response to this migration crisis.

In the economic field, Article 122 TFEU provided the legal basis for the EU's extensive financial support to Member States during the COVID-19 pandemic. This included important programs such as the Support to mitigate Unemployment Risks in an Emergency (SURE) and the NextGenerationEU recovery package, both of which provided crucial assistance to Slovenia. Under the SURE program, Slovenia received financial support to secure jobs through short-time work, while the Recovery and Resilience Facility (RRF) was intended to boost the economy by investing in infrastructure and digitalization. Although these funds were available, there were considerable delays in the distribution of funds in Slovenia. Administrative bottlenecks and a lack of coordination between national and local authorities slowed down the implementation of projects that were intended to support economic recovery. Smaller companies and municipalities in particular had difficulties accessing EU funds, often hampered by overly complex bureaucratic procedures.

During the COVID-19 pandemic, the EU has taken a number of legislative measures to combat the public health crisis and ensure economic stability. Slovenia participated in these efforts by implementing measures such as the EU Digital COVID Certificate to facilitate free movement and participating in joint procurement programmes for vaccines and medical supplies. Although Slovenia has complied with these EU measures, there have been significant problems with their practical implementation. For example, the introduction of vaccines in Slovenia was delayed due to problems in logistics and the supply chain, which hampered the initial phase of the vaccination campaign. This delay was exacerbated by public opposition to vaccines, mandatory masks and

other health protocols. This led to protests and undermined the government's efforts to enforce EU health directives. Public distrust of the government's pandemic measures and inconsistent communication further complicated the enforcement of travel restrictions and quarantine rules. In some regions, regulations were applied inconsistently, leading to confusion and inconsistent compliance across the country.

Overall, Slovenia's response to the migration crisis and the COVID-19 pandemic highlights several structural weaknesses in the effective implementation of EU emergency measures. Inefficient administrative procedures, coupled with political resistance and public scepticism, contributed to delays and inconsistencies in the enforcement of EU legal acts. While Slovenia generally complied with EU directives, its ability to respond quickly to crises and ensure full compliance with EU policies was often hampered by domestic political challenges.

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Spain

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Section 1: The concept of "emergency" and other associated notions in the legal orders of the Member States

Question 1

Concerning emergency, Spanish law makes a crucial distinction. On the one hand, there are three types of situations in which some derogations from ordinary legal rules and guarantees are constitutionally permissible. The Constitution calls them "states of alarm, exception and siege." In this report we will refer to them conventionally as "extraordinary states." On the other hand, one finds any other conceivable emergency, provided that no extraordinary state has been proclaimed. This is usually the case. But the fact that the exorbitant powers inherent to extraordinary states are not used in a given emergency does not necessarily imply that the applicable rules are of a purely statutory nature. Some constitutional provisions (beyond those regulating extraordinary states) can be relevant in emergency situations. For example, the Constitution allows the Council of Ministers (i.e., the Cabinet, as the highest executive organ) to adopt norms with statutory force "in cases of extraordinary and urgent need." As for ordinary legislation, there are different statutes that contain provisions intended to cope with needs, crisis, etc. However, beyond the above-mentioned constitutional principles, Spanish law does not have any general framework for emergencies, so the relevant provisions are normally to be found in specific areas (e.g., health, food, natural catastrophes, etc.). It goes without saying that the circumstances that justify their application (as well as the potential measures that can be adopted) vary from one piece of specific policy-oriented legislation to another. These constitutional and statutory aspects of emergency law will be presented in detail below, in Sections 2 and 3.

Question 2

As has just been said, there is no general statutory framework in this respect. This fact explains that, apart from the extraordinary states envisaged by the Constitution, there is no uniform terminology concerning emergencies, nor statutory provisions of general application.

* Judge at the Supreme Court of Spain.

Question 3

The situations that may justify the adoption of emergency measures are heterogeneous, covering form natural catastrophes to public riots, from health crises to interruption of public services, etc.

Question 4

This question will be answered in detail below, in Sections 2 and 3.

Question 5

To my knowledge, there is no major example of policy concerning emergency situations that has been determined by European Union law. Perhaps migration and asylum crises could be a partial exception to that.

Question 6

The most relevant emergency that was first handled at national level, even before the European Union took any initiative, is undoubtedly the COVID-19 pandemic.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

Only one provision in the Spanish Constitution is specifically related to emergency situations: Art. 116. It will be examined immediately. However, it is worth noting that other constitutional provisions can be used to cope with some emergencies, even if they are not especially designed for that purpose.
The most relevant of those constitutional provisions is undoubtedly Art. 86. It envisages decree-laws, which are norms with statutory force adopted by the Council of Ministers. It means that decree-laws may regulate any question or matter constitutionally reserved to statutes, and consequently also repeal or modify previous statutes. Only a few fields are banned to decree-laws: those explicitly mentioned in Art. 86 (constitutional organisation, fundamental rights, electoral law, distribution of competences between the national government and the autonomous regions) and those which, according to other constitutional provisions, require a qualified majority in Parliament for their

regulation. This is notably the case of matters constitutionally reserved to organic laws (Art. 81 of the Constitution). Decree-laws derive from a purely executive decision and come into force immediately, but they must be ratified by absolute majority in the Chamber of Deputies (i.e., the lower house of the national Parliament) within 30 days. Otherwise, they lose their force. A literal reading of Art. 86 could lead to conclude that decree-laws were thought for emergency situations: after all, the circumstance that empowers the Council of Ministers to pass them is "extraordinary and urgent need." But this clause has always been applied flexibly, as equivalent to any situation where the time needed for parliamentary law-making would be too long. To determine if this is the case involves basically a political question, which explains why the Constitutional Court (except when the absence of urgency is obvious) tends to be deferent with the Council of Ministers' use of decree-laws. Many commentators disagree with such approach, stressing that the high number of decree-laws is unjustified, constitutes an abusive practice and devalues the role of Parliament in favour of the Executive. Art. 86 of the Spanish Constitution was inspired by Art. 77 of the Italian Constitution, which has raised similar problems. In any event, Art. 86 has proved to be useful and even sufficient in many emergency situations. Such situations fall, by definition, within its proper scope: if the situation can be addressed by simply adopting some statutory norms, decree-laws are the right tool.

Having said this, Spain can be included among those countries where the Constitution envisages specific and exorbitant powers (true derogations from ordinary law) for serious emergencies; powers that are regulated in general terms and, above all, may be exercised only once an abnormal and serious situation is declared through the corresponding procedure. In this sense, it differs from those systems where generic *pleins pouvoirs* are conferred on a given authority (e.g., Art. 16 of the French Constitution) or where urgent executive decisions without sufficient legal basis are validated *ex post* (e.g., the British bills of indemnity).

The relevant provision in this respect is Art. 116 of the Spanish Constitution, which envisages the above-mentioned extraordinary states whose proclamation authorises to exercise exorbitant powers. They are called "alarm, exception and siege." Art. 116 must be read in connexion with Art. 55 of the Constitution, which regulates the suspension of fundamental rights. It is apparent that the states of alarm, exception and siege are thought as a scale of intensity or intrusiveness, with alarm at the bottom and siege at the top. For example, in the state of alarm no suspension of fundamental rights is allowed. However, it is not clear in the Constitution if each of these situations is designed for certain types of situations or if all of them can be used irrespective of the nature of the emergency, the choice then depending on the powers required to confront it. This question is clarified by *Ley Orgánica 4/1981* (the organic law that contains a detailed development of Art. 116) in the sense that each of the extraordinary

states envisaged by that constitutional provision is reserved for different sorts of emergencies. The state of alarm can be used in case of natural catastrophes, health crises, interruption of public services and shortage of basic supplies; the state of exception in case of serious breach of public order, and serious threat to institutional functions or to fundamental rights; and the state of siege in case of sedition and aggression to sovereignty or national territory. Overlapping is, in principle, excluded.

The scope of emergency powers varies from one situation to another. Certain measures (centralisation of decisions in the national Executive, injunctions on private individuals and corporations, administrative sanctions, etc.) may be adopted in all of them. But suspension of some fundamental rights (personal freedom, inviolability of domicile and communications, free movement within national territory and right to strike) is allowed only in the states of exception and siege. In the latter it is possible to suspend the arrested person's rights, too. The state of siege also allows to use the armed forces and to apply martial law, although military commanders remain always under the authority of the Council of Ministers.

It is worth noting that, while decree-laws find a source of inspiration in Italy and have some antecedents in Spanish history, Art. 116 of the Constitution does not reflect any previously established experience.

To have a full vision of emergency law in Spain, a short reference to Art. 155 of the Constitution should be made. This constitutional provision allows national authorities (Parliament and the Executive jointly) to put an autonomous region under control if it "does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interest of Spain." Art. 155 has been used only once, to cope with the (clearly unlawful and seditious) unilateral declaration of independence made by the Catalan Parliament in 2017. However, Art. 155 of the Constitution has marginal relevance for this report, because it has to do only with serious institutional crises in the context of political decentralization.

Question 2

Concerning the balance between Parliament and the Executive in the context of Art. 116 of the Constitution, there are relevant differences from one situation to another. The state of alarm is proclaimed by the Council of Ministers on its own authority, but after 15 days its prolongation must be authorised by the Chamber of Deputies. The state of exception is proclaimed by the Council of Ministers with prior authorisation of the Chamber of Deputies and its duration may not exceed 30 days, although the Chamber of Deputies can prolong it (only once) for another 30 days. The state of siege must be proclaimed by absolute majority of the Chamber of Deputies at

a request of the Council of Ministers, and its duration is determined by the parliamentary proclamation itself. It is thus clear that the weight of Parliament is directly proportional to the intensity of each extraordinary state. In any event, except for the first 15 days in the state of alarm, the decision to declare or extend any of those extraordinary states may not be taken without parliamentary consent.

Constitutionally speaking, the states of alarm, exception and siege do not alter the relationship between Parliament and the Executive. Art. 116 explicitly says that they will not affect the functioning of constitutional organs and provides that Parliament must be in session while any of those extraordinary states is in force. Elections may not be called in the meantime. The relationship of confidence and political accountability, which is at the heart of parliamentarism, is not interrupted at all. Furthermore, the procedure to amend the Constitution may not be initiated in that time, either (Art. 169 of the Constitution).

As for the courts, there is no restriction of judicial review of administrative action during the states of alarm, exception and siege. The final paragraph of Art. 116 is explicit in this respect. But two qualifications should be made: first, if a given fundamental right is suspended in the states of exception or siege, the courts should dismiss *a limine* any suit or application based on such fundamental right; second, martial courts (instead of ordinary courts) could be competent in some criminal cases during the state of siege. Having said this, the political branches of the State and administrative bodies remain fully subject to the principle of legality and to control by the judiciary.

A different question is to what extent the courts could (or should) be more deferent towards the Executive in those extraordinary states. Neither the Constitution nor *Ley Orgánica 4/1981* impose any criteria, so it is a matter open to judicial prudence and practice, as will be explained below in Section 4.

If one looks at the practical experience about Art. 116 of the Constitution, the truth is that it had been applied only once before the COVID-19 pandemic, namely in 2010, to put an end to a wild strike of air controllers that had blocked almost all national airports. The state of alarm was proclaimed (having air control personnel as the only addressees) and the crisis was settled in a few days. This first experience is important in a legal perspective because later the Constitutional Court ruled that the proclamation of the state of alarm, even if decided by the Council of Ministers on its own authority, is not technically an executive decision but one with "statutory force" (judgement 83/2016). The practical consequence is that, according to Art. 163 of the Constitution, such decision may be challenged only before the Constitutional Court itself, not before ordinary courts.

During the COVID-19 pandemic, the state of alarm was proclaimed on three occasions. The first one was in March 2020 and it lasted for nine weeks. Among other measures, it involved the lock down of the whole population. A second

proclamation in October of that year affected only the region of Madrid for a few days. And the third one was at the end of October, introducing again severe restrictions for the whole nation with a duration of more than six months. The measures taken under the umbrella of the state of alarm raised many legal problems (not very different from what happened in other countries). In hindsight and from a purely constitutional perspective, what deserves attention is that the Constitutional Court declared both nationwide proclamations of the state of alarm unconstitutional, even though it did it after the crisis was over and without questioning the proportionality of the specific measures adopted to confront the pandemic. The objections of the Constitutional Court had to do with the adequacy of the state of alarm to decide a lock down and with the way of prolonging it after the first 15 days.

The first proclamation of the state of alarm was declared unconstitutional because the Constitutional Court held that the lockdown of the whole population amounted to a suspension of the fundamental rights to freedom of movement and freedom of reunion, something that is beyond the scope of the state of alarm. In the Court's view, the state of exception should have been used to attain this end (judgement 148/2021). However, this holding is not shared by all commentators, because the state of exception (as noted above) is thought for serious breaches of public order, not for health crises. In addition, the lack of basis for the restriction of some fundamental rights during the state of alarm could have been solved by an organic law authorising such restriction. But the Council of Ministers (for unclear reasons) refused to follow such course of action. Still in this context, whereas a lockdown is clearly a general restriction of movement, it is not obvious that it technically amounts to a suspension of the fundamental right. In other words, restriction and suspension of rights are not necessarily the same thing.

The other proclamation of the state of alarm at a national level was declared unconstitutional for an undisputable reason (judgement 183/2021): after the first 15 days, the Council of Ministers requested the Chamber of Deputies (and obtained from it) to prolong the state of alarm for a period of six months, instead of asking for parliamentary renewal every fortnight as had been done during the first state of alarm. And periodical renewal every 15 days is what the Constitution unquestionably requires.

It is worth adding that the other two extraordinary states (i.e., exception and siege) have never been proclaimed since the adoption of the Constitution in 1978.

Question 3

Spain is a politically decentralised country. Autonomous regions (formally called *Comunidades Autónomas*) are competent in many areas that can be

touched by an emergency, such as transport, health care, environment, civil protection, etc. This means that any response to such emergency must take regional competences into account. If uniform measures at a national level are needed and they affect regional competences, two courses of action are open. One is to proclaim the state of alarm if the situation is sufficiently serious. In this case, as seen above, centralisation of power may be adopted, so some regional administrative authorities could be temporarily subordinated to the national Executive and bound by its orders.

The other course of action, normally followed, is to pass "basic legislation" in some of those fields where Art. 149 of the Constitution allows it: national basic legislation is binding on regional legislative assemblies, thus introducing a sort of minimum common regulation in a field. An important number of areas of regional competence are constitutionally open to national basic legislation (health, environment, energy, administrative procedures, etc.), not to mention that there are two general clauses in Art. 149 that allow to introduce basic legislation practically in any field: "regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their constitutional rights and the fulfilment of their constitutional duties" and "bases and coordination of general planning of economic activity." Through basic legislation some uniformity can thus be achieved. The practice and the case-law are extremely rich in this respect.

It should be noted that basic legislation is not at all a specific tool for emergency situations. However, as happens with decree-laws, some ordinary forms of law-making can be particularly useful in such situations. One should also consider that some general laws governing areas that are sensitive in emergencies and crises are technically basic legislation, and consequently binding on regional legislative and executive authorities. For example, the national statues on health, food, civil protection, etc.

Question 4

Emergency situations do not alter the relationship between national law and international or European Union law. There is no provision in the Spanish legal system envisaging a derogation from international or European norms in such situations. Not even if the states of alarm, exception and siege are proclaimed. A different question, of course, is whether international or European Union law themselves authorise not to apply some of their rules in certain cases. But this would not be a unilateral, national circumvention of international or European obligations.

Question 5

As explained above, fundamental rights (and not all of them) may be suspended only in the states of exception and siege. It has also been seen that judicial protection is not interrupted even in those extraordinary states, nor are the standards of control lowered. It is significant that, during the first state of alarm in 2020, deadlines were frozen for all judicial proceedings, with some exceptions that included the special procedure for the protection of fundamental rights against public administration. Concerning non-judicial control, Spanish law does not envisage any special body for the protection of rights in emergency situations: the *Defensor del Pueblo* (i.e., the national Ombudsman) remains in function, like in ordinary times.

Question 6

In relation to measures adopted during the COVID-19 pandemic, many suits were filed alleging a violation of some European Union freedoms. However, most of those claims have been dismissed as ill-founded. More generally, one cannot find a precedent of a major, serious clash between national law and European Union law due to an emergency.

Section 3: Statutory/executive emergency law in the Member States

Question 1

In Spanish law, there are some statutes and by-laws that include provisions for emergency situations in specific areas. It would be difficult to offer a complete list of them. The most visible ones concern civil protection and health. Civil protection is governed in general terms by *Ley 17/2015*. This national statute envisages the types of measures that the Executive (normally the Council of Ministers) may adopt in case of natural catastrophes (droughts, floods, earthquakes, fires, volcano eruptions, etc.) and other emergencies (technological risks, pollution, terrorism, etc.). The statute organises a national system of civil protection, which implies active participation of all the levels of governance (national, regional and local) and programs of coordination among them. It regulates both preventive policies and reactive measures. Among those measures envisaged by *Ley 17/2005* an important role, especially in case of natural catastrophes, is played by the so-called proclamation of catastrophic area. This is an official declaration made by the Council of Ministers, that provides help (fundamentally subsidies and tax exemptions) for the affected area.

Still in relation to civil protection, it is worth mentioning that Spain has a special military force for those emergency situations that require human and technical means beyond the reach of police and fire forces. It is the *Unidad Militar de Emergencias* set up by an executive order in 2005. Now it is integrated in the national system of civil protection. But that military force may not be legally used to implement preventive policies, only to confront actual disasters. Obvious considerations about the rule of law justify such limit.
Concerning health, the most relevant statutory provisions are those enabling the Executive to order quarantines, to prohibit the distribution of food and pharmaceutical products, or to decide the sacrifice of animal stock. Measures of this kind have a long tradition everywhere, so they do not deserve special comment.

Question 2

Measures as those described in the previous paragraph, which are based on statutes or by-laws, clearly may not prevail over (nor derogate from) measures adopted in conformity with one of the extraordinary states proclaimed according to Art. 116 of the Constitution. The reason has to do not only with the hierarchy of norms (i.e., a constitutional legal basis for action should be considered superior to a statutory legal basis), but also with substantive considerations: the states of alarm, exception and siege are precisely designed to face those situations for which other norms would be insufficient. In this sense, they can be seen as *lex specialis*.
As explained above, except for the COVID-19 pandemic, there is practically no experience of applying Art. 116 of the Constitution. Consequently, no conflicts between constitutional and statutory rules for emergency situations have arisen so far. However, during the pandemic some scholars held that the lock down could have been decided without proclaiming the state of alarm, simply by making recourse to the statutory rules about quarantines. This was a minority view.

Question 3

The use of emergency powers governed by statutes or by-laws is subject to the usual limits and controls inherent to executive action. The only potential exception would arise if a statutory norm envisaged a derogation in this respect. But such derogation, given its statutory origin, could not be founded on Art. 116 of the Constitution. Consequently, in order to be constitutionally valid, that derogation should satisfy a test of proportionality and, above all, of respect for the fundamental right of access to justice.

Question 4

The adoption of acts by the European Union does not involve any change in the national distribution of power. Neither between the central government and the autonomous regions, nor at a national level between Parliament and the Executive. No rule or principle of the Spanish legal system provides it in general terms, not to mention that the Constitutional Court has always held that being a member of the European Union does not affect the domestic distribution of powers and competences. See, for example, judgements 258/1988 and 41/2002, among other decisions of the Constitutional Court. The clause of national identity (Art. 4 of the Treaty of the European Union) probably confirms such criteria at the level of European Union law.

A different question is to what extent a special national statutory provision could introduce some form of centralisation (or decentralisation) of powers to better apply and enforce an emergency measure adopted by the European Union. The answer would be affirmative in the context of the extraordinary states of Art. 116 of the Constitution, that are explicitly a sufficient basis to centralise the management of crises. Probably, the answer would also be affirmative even outside the reach of Art. 116 if some piece of basic legislation authorised it. But, as explained above, basic legislation may be introduced only in some areas and must be proportionate.

Section 4: Judicial review of emergency powers in the Member States

Question 1

It was explained in Section 2 that situations of emergency do not restrict the right of access to justice. Measures adopted during a situation of emergency may be challenged in the same way as at any other time. The rules governing the jurisdiction of courts and the judicial procedures are, in principle, the same. It means that administrative action taken to face an emergency may be controlled by administrative courts and, if fundamental rights are at stake, also by the Constitutional Court in last instance through individual complaint by the affected person (*recurso de amparo*).

It is worth noting that Spanish administrative courts do not constitute a structure separated from ordinary (civil and criminal) courts. They belong to the judiciary as well, and consequently their members are judges with the same status as those hearing civil or criminal cases. Administrative courts are simply specialised *ratione materiae*. In addition, Spanish administrative courts have jurisdiction not only to decide applications about the legality of administrative action (i.e., to invalidate administrative decisions found to be unlawful), but also about non-contractual liability of administrative bodies and officials (i.e., to grant compensation for damages caused by the Executive).

Question 2

As just said, there are no procedural specificities when the courts review measures taken in emergency situations.
However, during the COVID-19 pandemic a national statute conferred a sort of preventive task on some high administrative courts. It was passed in September 2020 as *Ley 3/2020*. It provided, among other things, that measures adopted by the national Executive or by autonomous regions implying a restriction of fundamental rights for an indeterminate plurality of people (in that context, basically closing a town or imposing a curfew) ought to be previously authorised by the competent administrative court. This amounted to make those administrative courts co-deciders of measures whose nature was unquestionably executive or administrative. Such legislative reform was challenged as contrary to the principle of separation of powers, and more specifically to Art. 117 of the Constitution, according to which courts may not carry out any function different form adjudication. An exception is possible, since Art. 117 allows the courts to exercise other functions if they "are expressly allocated to them by law as a guarantee of some right." The Constitutional Court convincingly said that the prior judicial authorisation of collective measures for health reasons was not "a guarantee of some right," thus quashing the law as unconstitutional (judgement 70/2022). Nevertheless, as with the proclamations of the state of alarm, the Constitutional Court judgement arrived only once the pandemic was over, so it had a merely declaratory nature.

Question 3

It has already been said that no constitutional or statutory norm lowers the standard of judicial review to be used by courts when controlling the legality of administrative action in emergency situations. A different question is to what extent some courts (including the Supreme Court and the Constitutional Court) are more deferent to the political branches of the State in these circumstances. An assessment of the administrative courts' attitude concerning the COVID-19 crisis should be nuanced, its details being beyond the purpose of this report.

Question 4

No doubt, the principle of proportionality plays a crucial role in judicial review of both legislation and administrative action in emergency situations. The meaning and practical application of the principle of proportionality in Spanish law does not present any peculiar characteristic.

However, judicial practice during the COVID-19 pandemic showed that the principle of proportionality (crucial whenever restrictive measures are adopted) can end up being incompatible with the principle of prevention, which is also relevant in some emergency situations. This was apparent when reviewing executive decisions to close a town or to impose a curfew: should the decision be balanced against its (human, social, economic) costs for the affected population, or should it rather be rejected if a serious risk for collective health existed? The judgement was different depending on the answer, because prevention is more demanding than proportionality. And it was far from obvious which principle ought to be applied.

Section 5: Implementation of EU emergency law in the Member States

Question 1

In the Spanish legal system and practice, the criteria governing the relationship between European Union law and national law do not undergo any change or qualification because emergency measures adopted by the European Union must be implemented. This point has already been explained above, when dealing with fundamental rights and with judicial protection in emergency situations.

Question 2

To my knowledge, there is no serious legal gap in Spanish law concerning the implementation of emergency measures adopted by the European Union.

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Copyediting and proofreading of English-language texts
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Cover design
Tomasz Tomczuk

The photograph on the cover comes form the archive PTWP

Technical editor
Małgorzata Pleśniar

Typesetting
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Initiating editor
Marcin Buczyński

Publishing coordinator
Alicja Uthke

ISBN 978-83-226-4494-2 (digital edition)

The primary referential version of this book is its electronic (online) version.
Published under Creative Commons
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https://doi.org/10.31261/PN.4294
EU emergency law / [editor: Krzysztof Pacuła].
– First impression. – Katowice : Wydawnictwo
Uniwersytetu Śląskiego, copyright 2025.
– (XXXI FIDE Congress Katowice 2025 : congress
publications ; vol. 1)

Publisher
Wydawnictwo Uniwersytetu Śląskiego
ul. Jordana 18, 40-043 Katowice
https://wydawnictwo.us.edu.pl
e-mail: wydawnictwo@us.edu.pl

First impression. Printed sheets: 53.0. Publishing sheets: 70.5. PN 4294.

Free copy

ISBN 978-83-226-4494-2

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