EMERGENCY IN THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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This article assesses how the Court of Justice of the European Union (CJEU) engages with emergency argumentation, understood as legal argumentation that seeks to justify a particular application or interpretation of the law on the basis of the exceptionality of an emergency scenario, typically by means of a vocabulary that emphasises necessity and urgency. To this end, the contribution analyses three lines of emergency argumentation and how they impact the legal reasoning of the Court in various cases belonging to different areas of European Union (EU) law. Ultimately, with its conclusions, the article seeks to enhance predictability as to the likelihood of success of emergency argumentation before the Court.

1 INTRODUCTION

Emergencies put legal systems to the test, compelling public authorities to promptly respond, with exceptional means, to unforeseen societal challenges. These responses typically require prioritising output performance and procedural efficacy over input legitimacy and procedural quality, positioning the executive as the ideal wielder of emergency powers. However, viewing the executive as 'unbound'[1] carries significant risks for democracy. Such risks became especially evident to Europeans after the tragic experience of the emergency clause enshrined in Article 48 of the Weimar Constitution, which contributed to enabling the rise to power of the Nazi Party.[2] Rejecting Schmittian exceptionalism,[3] post-war European constitutional orders have thus strived to encapsulate emergency responses within the boundaries of the rule of law. Subjecting emergency action to the rule of law entails, inter alia, recognising a role for the judiciary in enabling and constraining the use of emergency powers.[4]

Recent challenges faced by the EU have sparked the interest of EU institutions and scholars in the legal arsenal at the disposal of the EU and its Member States to respond to

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[1] Eric A Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press 2013).

[2] Frederick Mundell Watkins, *The Failure of Constitutional Emergency Powers Under the German Republic* (Harvard University Press 1939).

[3] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press 1985).

[4] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006) 59; Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2021) 19(5) International Journal of Constitutional Law 1498, 1518–1526 and 1534.

emergency scenarios.[5] In this context, 'EU emergency law', as a nascent field of study, has been described by De Witte as a 'set of rules found in many different parts of primary and secondary law, supplemented by institutional practice and *judicial interpretations*'.[6] But how do such judicial interpretations contribute to shaping EU emergency law? In the absence of an explicit doctrine of emergency in the case-law of the CJEU, legal scholars have mostly focused on measuring the level of deference exercised by the CJEU towards the emergency measures adopted by EU institutions and Member States on the basis of case-studies concerning specific emergency contexts. This article takes a different perspective. Rather than discussing whether the CJEU exercises (or should exercise) judicial deference vis-à-vis emergency measures, it focuses on the extent to which it is possible to identify recurrent patterns in the ways the Court engages with specific lines of 'emergency argumentation'. Emergency argumentation is here understood as legal argumentation that seeks to justify a particular application or interpretation of the law based on the exceptionality of an emergency scenario, typically by means of a 'special constitutional vocabulary'[7] that emphasises necessity and urgency.[8]

The article shows that, while the Court has often been reluctant to engage with the language of exceptionalism (Section 2), it has been nonetheless confronted with emergency argumentation in several cases concerning threats faced by the EU and its Member States. In particular, the contribution analyses how the Court has dealt with three types of emergency argumentation: emergency as an autonomous ground for derogation (Section 3); emergency as an interpretative tool for power-conferring and power-restraining norms (Section 4); and emergency as a justification for the application of the precautionary principle or the adoption of a precautionary approach (Section 5).

A final remark is in order. Every legal case is influenced by context-specific considerations and potentially subject to new legal developments. As a result, the analysis carried out in this work does not claim to offer perfect certainty as to how future cases will be decided. Nonetheless, this contribution aims to enhance the degree of predictability concerning the likelihood of success of specific lines of emergency argumentation before the CJEU. Achieving this objective requires assessing the extent to which emergency can be conceptualised as, borrowing from Beck, an 'extra-legal steadying factor'. The latter is understood as a signpost that serves 'as heuristics that allow for informed, but imperfect reckonability of how the judicial axe will fall'.[9]

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[5] See, e.g., Krzysztof Pacuła (ed), *EU Emergency Law*, vol 1 (XXXI FIDE Congress Katowice 2025, Wydawnictwo Uniwersytetu Śląskiego 2025); Sanja Bogojevic and Xavier Groussot (eds), *Constitutional Dimension of Emergencies in EU Law: The Case of Covid-19, Climate and Migration* (Hart 2026, forthcoming).

[6] Bruno De Witte, 'EU Emergency Law and Its Impact on the EU Legal Order' (2022) 59(1) Common Market Law Review 3, 5 (emphasis added).

[7] Constantinos Kombos, 'Constitutional Review and the Economic Crisis: In the Courts We Trust?' (2019) 25(1) European Public Law 105, 108.

[8] On the notion of emergency, see Guido Bellenghi, 'Neither Normalcy nor Crisis: The Quest for a Definition of Emergency under EU Constitutional Law' [2025] European Journal of Risk Regulation 1.

[9] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2012) 333–334 and 350.

2 THE ABSENCE OF AN EXPLICIT DOCTRINE OF EMERGENCY AND THE COURT'S RELUCTANCE TO ENGAGE WITH THE LANGUAGE OF EXCEPTIONALISM

The role that courts ought to play within emergency contexts is a contested issue. On the one hand, some commentators view thorough judicial review of emergency measures as a key safeguard of emergency powers' legality and legitimacy,[10] or at least as an important tool to define the boundaries of emergency law for the future.[11] On the other hand, swiftness and flexibility required by emergency scenarios bolster arguments in favour of judicial deference.[12] In the EU legal context, these differences result in variegated scholarly perspectives concerning the role that the CJEU should play within emergency scenarios. Such perspectives range from moderate approaches supporting a certain degree of deference[13] to more interventionist positions focusing on the importance of judicial review within EU emergency law.[14] Divergence is not limited to normative assessments (what the CJEU should do) but also extends to descriptive analyses (what the CJEU does). Mostly based on case-studies of specific emergency contexts,[15] scholars have tried to measure the level of deference exercised by the CJEU within emergency scenarios, reaching different conclusions. Allegations of high judicial deference[16] and its (undue) long-term effects on EU law[17] contrast with claims that the Court assesses emergency scenarios 'in entirely

[10] Dyzenhaus (n 4); Andrej Zwitter, 'The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy' (2012) 98(1) Archives for Philosophy of Law and Social Philosophy 95, 110; Nicos Alivizatos et al, 'Respect for Democracy Human Rights and Rule of Law during States of Emergency – Reflections' (Venice Commission 2020) CDL-PI(2020)005rev-e para 85; Zoltán Szente, 'How to Assess Rule-of-Law Violations in a State of Emergency? Towards a General Analytical Framework' (2025) 17(1) Hague Journal on the Rule of Law 117, 132.

[11] David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101(8) Michigan Law Review 2565. This function gives expression to the courts' role as catalysts, as theorised by Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance', (2007) 13 Columbia Journal of European Law 565, 593.

[12] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112(5) The Yale Law Journal 1011, 1034; Mark V Tushnet, 'Defending *Korematsu*? Reflections on Civil Liberties in Wartime' (2003) 1 Wisconsin Law Review 273, 294; Cass R Sunstein, 'Minimalism at War' (2004) 1 The Supreme Court Review 47, 108.

[13] Lisa Conant, 'The Court of Justice of the European Union' in Marianne Riddervold, Jarle Trondal, and Akasemi Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan 2021) 290.

[14] Ester Herlin-Karnell, 'Republican Theory and the EU: Emergency Laws and Constitutional Challenges' (2021) 3 Jus Cogens 209, 223; Christian Kreuder-Sonnen, 'Does Europe Need an Emergency Constitution?' (2023) 71(1) Political Studies 125, 136.

[15] For comparative approaches, see instead Sara Poli, 'Emergencies, Crises and Threats in the EU: What Role for the Court of Justice of the European Union?' in Inge Govaere and Sara Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Nijhoff 2014) 216–217; Eftychia Constantinou, 'A Tale of Four Crises: The European Court of Justice's Response to Crises' [2025] European Journal of Risk Regulation 1.

[16] Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35(2) Oxford Journal of Legal Studies 325, 349–350; Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59(2) Common Market Law Review 433, 464.

[17] Anna Wallerman Ghavanini, 'The CJEU's Give-and-Give Relationship with Executive Actors in Times of Crisis' (2023) 2(2) European Law Open 284, 299.

orthodox legal terms using established and familiar legal tools'[18] and 'does not simply yield to the primacy of politics when political crises loom'.[19]

Difficulties in reaching a definitive conclusion on the Court's level of deference suggest narrowing down the scope of the inquiry, focusing instead on how specific and recurrent lines of emergency argumentation have been assessed by the CJEU across different cases and contexts. This undertaking seems all the more necessary in light of the uncertainty deriving from the absence of an explicit doctrine of emergency in the Court's case-law. The Court does not hesitate to resort to fixed formulas to settle recurrent legal issues with which it is faced – think, for example, of the typical formulas used in citizenship and tax cases to hold that Member States' competences must be exercised in compliance with EU law.[20] However, no such formulas exist to apply and/or interpret EU law in emergency contexts. In this respect, there is a difference with the case-law of other courts, such as the European Court of Human Rights. Consider, for instance, the typical formula used by the Strasbourg Court:

> by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of […] an emergency and on the nature and scope of the derogations necessary to avert it.[21]

This difference may be explained by reference to the absence, under EU law, of a general emergency regime like Article 15 ECHR.[22] While EU Member States may 'avail themselves of Article 15 ECHR […] when they take action in the areas of national defence in the event of war and of the maintenance of law and order',[23] the CJEU will still assess any interference with fundamental rights in accordance with the ordinary standard set out in Article 52 of the Charter.[24] Following this business-as-usual approach, emergency can be factored within the proportionality assessment, but does not in principle warrant an extraordinary application or interpretation of EU law.

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[18] Editorial, 'COVID in the Case Law of the CJEU: Affirming EU Law Orthodoxy Even under Extraordinary Circumstances' (2024) 61(3) Common Market Law Review 581, 591. Likewise Emanuele Rebasti, Anne Funch Jensen, and Alice Jaume, 'Institutional Report' in Krzysztof Pacula (ed), *EU Emergency Law*, vol 1 (XXXI FIDE Congress Katowice 2025, Wydawnictwo Uniwersytetu Śląskiego 2025) 205.
[19] Carolyn Moser and Berthold Rittberger, 'The CJEU and EU (de-)Constitutionalization: Unpacking Jurisprudential Responses' (2022) 20(3) International Journal of Constitutional Law 1038, 1070.
[20] Cf. Case C-465/20 P *Commission v Ireland* EU:C:2024:724 para 370 and case-law cited; Case C-181/23 *Commission v Malta* EU:C:2025:283 para 81 and case-law cited.
[21] Cf., e.g., *Brannigan and McBride v United Kingdom* App nos 14553/89 and 14554/89 (ECtHR, 25 May 1993) para 43; *Dareskizb Ltd v Armenia* App no 61737/08 (ECtHR, 21 September 2021) para 57.
[22] Article 15 ECHR, titled 'Derogation in time of emergency', provides that '[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this 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'.
[23] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.
[24] Cf. the *travaux préparatoires* and in particular Niall Coghlan and Marc Steiert (eds), *The Charter of Fundamental Rights of the European Union: The Travaux Préparatoires and Selected Documents* (European University Institute 2021) 2888. See also Claudia Cinnirella, '"Emergency Powers" of the European Union: An Inquiry on the Supranational Model' (2025) 10 European Papers 525, 547.

Nor do the EU Treaties include, from a procedural perspective, special review mechanisms for emergency measures.[25] The only exception is Article 348 TFEU. This provision allows the Commission or a Member State to bring another Member State directly before the Court if it considers that that Member State is making improper use of the emergency powers foreseen by Article 347 TFEU.[26] In such a case, to ensure a speedy procedure, the Court shall give its ruling *in camera*. This emergency mechanism was triggered only once in the history of EU law, and the Commission withdrew the case before the Court could provide its ruling.[27]

That said, the Court is generally reluctant to engage with the language of exceptionalism. By 'exceptionalism', we refer to the idea that the breach of an empirical regularity justifies deviations from the way in which the law is normally interpreted or applied. In *Gauweiler*, AG Cruz Villalón stressed that the Court was 'confronted with the difficulties which extraordinary circumstances have long presented for public law' – which was well-exemplified, in the AG's view, by Mario Draghi's 'whatever it takes'.[28] And yet, although the *Gauweiler* judgment has been considered by some scholars as establishing the European Central Bank's 'unreviewable discretion', understood as 'a troubling notion derived from the emergency political tradition of (constitutional) dictatorship',[29] emergency argumentation did not play an explicit role in that ruling.[30]

Gauweiler is not the only case in which the Court refrains from explicitly engaging with emergency argumentation to the extent proposed by Advocate Generals. Similar considerations apply to other cases in the field, for instance, of migration[31] and State aid.[32] Moreover, legal commentators have noted that reference to emergency is at times 'oddly absent even from rulings where one might have expected it to play a more prominent role',[33] citing in particular the twin judgments in the Hungarian and Polish cases concerning the Conditionality Regulation.[34] Take, finally, the abovementioned Article 347 TFEU. Research shows that the Court has historically refrained from engaging with any invocation of this

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[25] The Statute of the Court and its Rules of Procedure envisage expedited procedures and an urgent procedure for preliminary rulings in the Area of Freedom, Security and Justice. These procedural rules allow to quickly reach a verdict but do not necessarily concern emergency measures.
[26] Article 347 TFEU allows a Member State to derogate from EU law in the event of an emergency threatening that Member State's external or internal security.
[27] Case C-120/94 *Commission v Greece* EU:C:1996:116.
[28] Opinion of AG Cruz Villalón in Case C-62/14 *Gauweiler* EU:C:2015:7 paras 7 and 3.
[29] Hjalte Lokdam, '"We Serve the People of Europe": Reimagining the ECB's Political Master in the Wake of Its Emergency Politics' (2020) 58(4) Journal of Common Market Studies 978, 984.
[30] Case C-62/14 *Gauweiler* EU:C:2015:400. Noting that, in the judgment, the Court 'avoids any emergency feeling', Pablo Martín Rodríguez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) 12(2) European Constitutional Law Review 265, 276.
[31] See , Opinion of AG Sharpston in Case C-646/16 *Jafari* EU:C:2017:443, paras 231-243. Cf. text to note 67.
[32] See Opinion of AG Pitruzzella in Case C-209/21 P *Ryanair v Commission (Swedish License)* EU:C:2023:223, paras 91 and 93. Cf. text to note 129.
[33] Editorial (n 18) 586. Likewise Michael Dougan, 'EU Competences in an Age of Complexity and Crisis: Challenges and Tensions in the System of Attributed Powers' (2024) 61(1) Common Market Law Review 93, 114–115.
[34] See Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97 and Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98, concerning 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 [2020] OJ L433I/1.

clause, so that its interpretation has so far been discussed only in the opinions of Advocate Generals.[35]

Reluctance to engage with the language of exceptionalism, however, cannot spare the Court from having to rule on cases concerning, for instance, economic emergencies, natural disasters, pandemics, and wars. In such cases, the Court is often faced with lines of argumentation which rely on the exceptionality of the emergency context to justify, typically by reference to necessity and urgency, a certain interpretation or application of EU law.

3 EMERGENCY AS AN AUTONOMOUS GROUND FOR DEROGATION

The first type of emergency argumentation discussed in this article concerns those instances in which the occurrence of an emergency is invoked as a sufficient ground to adopt exceptional measures. By 'exceptional measures', we refer to measures that derogate from more general rules. The core reasoning is essentially: *since an emergency occurred, the adoption of exceptional measures was justified*.

Evidently, the Court recognises emergency as a sufficient ground to justify recourse to exceptional measures when this is foreseen by the Treaties. Let us consider, for instance, the legal bases enshrined in Articles 78(3) and 122(1) TFEU, which allow the Council to adopt exceptional measures in emergency situations. In *Slovakia and Hungary v Council*, the Court had to assess the legality of the Emergency Relocation Decision adopted by the Council on the basis of Article 78(3) TFEU.[36] This Treaty provision permits the Council to adopt provisional measures '[i]n 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 Court's assessment, thus, focused on whether an emergency as defined by this legal basis existed.[37] In a similar vein, in *Balkan-Import*, the Court upheld the Council's recourse to Article 122(1) TFEU in light of the seriousness, suddenness, and urgency of the situation.[38]

A more interesting question is whether, in the Court's view, urgency and necessity associated with the occurrence of an emergency may autonomously justify derogations from the ordinarily applicable legal framework, beyond or in the absence of *ad hoc* rules of EU law. Answering this question requires investigating the extent to which the Court is prone to accept that the necessity which stems from an emergency may act as an autonomous source of (EU) law. We should note, in this respect, that emergency argumentation of this kind belongs to the broader category of *force majeure* arguments. The Court has recognised *force majeure* as a legitimate defence for Member States in infringement proceedings[39] and as a

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[35] Constantin Stefanou and Helen Xanthaki, *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome: The Former Yugoslav Republic of Macedonia Cases* (Routledge 2019); Jean-Yves Carlier and Eleonora Frasca, 'Libre Circulation Des Personnes Dans l'Union Européenne' (2024) 4 Journal de Droit Européen 180, 190–191.

[36] 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 [2015] OJ 2015 L248/80.

[37] Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* EU:C:2017:631 paras 113-135.

[38] Case 5/73 *Balkan-Import* EU:C:1973:109 para 15.

[39] Case C-1/00 *Commission v France* EU:C:2001:687 para 131; Case C-105/02 *Commission v Germany* EU:C:2006:637 para 89; Case C-481/22 *Commission v Ireland* EU:C:2024:85 para 92.

general principle of EU law justifying individuals for not fulfilling their obligations.[40] EU legislation may contain emergency and safeguard clauses[41] allowing for derogations in emergency contexts and thereby giving 'concrete expression to the concept of *force majeure*'.[42] Yet *force majeure* can in principle also be invoked as a stand-alone argument. As a stand-alone argument, *force majeure* is invoked as an autonomous ground for derogation, regardless of any emergency or safeguard clause. In what follows, the article discusses the likelihood of success of similar stand-alone arguments relating to the occurrence of an emergency. To do so, it analyses case-law in which emergency argumentation is used to justify derogations beyond what EU law expressly allows (subsection 3.1) or when no derogation is envisaged by EU law (subsection 3.2), reflecting then on the remaining leeway for stand-alone *force majeure* defences based on emergency argumentation (subsection 3.3).

3.1 DEROGATIONS BEYOND THOSE ALREADY ALLOWED BY EU LAW

In *McDonagh*, the Court refused to accept that the exceptionally serious consequences stemming from an emergency could warrant the invocation of *force majeure* arguments in situations where EU legislation already envisaged specific rules applicable to 'extraordinary circumstances'. In that case, Ryanair argued that the eruption of Iceland's Eyjafjallajökull volcano constituted not merely 'extraordinary circumstances' within the meaning of the Flight Compensation Regulation, but 'super extraordinary circumstances' going beyond the scope of that Regulation.[43] Accordingly, Ryanair claimed that it should have been released from its obligation to provide care for passengers whose flights had been cancelled. The Court rejected this argument, observing that 'extraordinary circumstances' encompassed 'all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity'.[44] In its COVID-19 case-law, the Court confirmed this interpretation of the Flight Compensation Regulation.[45] Moreover, it extended a similar line of reasoning to the Package Travel Directive.[46] The *UFC* case concerned emergency measures adopted by French authorities in response to the pandemic. These emergency measures introduced derogations beyond those already permitted by the Package Travel Directive's provisions concerning 'unavoidable and extraordinary circumstances'.[47] In particular, they established that, in case of a travel and holiday sales contract rescinded

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[40] Case C-509/11 *ÖBB-Personenverkehr AG* EU:C:2013:613 para 49; Case C-640/15 *Vilkas* EU:C:2017:39 para 53.

[41] While 'emergency' and 'safeguard' clause can be used interchangeably for the purpose of this article, for a discussion on the differences between them see Guido Bellenghi and Luca Knuth, 'EU Food Law and the Politics of the Internal Market: The Challenge of Cultivated Meat' (2024) 17(3-4) Review of European Administrative Law 39, 52–54.

[42] Opinion of AG Medina in Case C-97/24 *The Minister for Children, Equality, Disability, Integration and Youth* EU:C:2025:269 para 33.

[43] Case C-12/11 *McDonagh* EU:C:2013:43 para 16, referring to Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L46/1.

[44] *McDonagh* (n 43) para 29.

[45] Case C-49/22 *Austrian Airlines* EU:C:2023:454 para 46.

[46] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements [2015] OJ L326/1.

[47] Case C-407/21 *UFC* EU:C:2023:449 paras 45-62. See also Case C-540/21 *Commission v Slovakia* EU:C:2023:450 para 60.

during the first wave of the pandemic, organisers and retailers could offer a credit note, instead of a full refund as foreseen by Article 12(2) of the Directive. In the Court's view, the emergency caused by COVID-19 could not justify departing from an orthodox application of the doctrine of pre-emption, which prevents Member States from legislating in areas fully harmonised by the EU.[48] Therefore, no emergency could justify further derogations than those already foreseen by the Directive for unavoidable and extraordinary circumstances.

A similar line of reasoning, albeit in a different legal context, was applied by the Court in *PAN Europe*.[49] That case concerned the emergency procedure envisaged by Article 53(1) of the Plant Protection Products Regulation (PPPR)[50] for authorising the marketing of a pesticide. In particular, the question was whether national authorities could use the emergency procedure to authorise a pesticide which had already been prohibited by the Commission through an *ad hoc* implementing regulation adopted under Article 49(2) PPPR. The latter authorises the Commission to ban seeds treated with plant protection products '[w]here there are substantial concerns that treated seeds […] are likely to constitute a serious risk to human or animal health or to the environment'. The Court observed that the emergency authorisation procedure under Article 53(1) PPPR allows national authorities to take action only '[b]y way of derogation from Article 28', which establishes the ordinary authorisation procedure. Conversely, Article 53(1) PPPR does not mention the possibility of derogating from Commission implementing acts adopted under Article 49(2) PPPR.[51] In essence, the Court reaffirmed that the occurrence of an emergency cannot justify broader derogations than those envisaged by the applicable emergency rules.

This line of reasoning is not limited to internal market legislation. For instance, the Court has recently clarified that 'a significant and sudden influx of third-country nationals seeking temporary or international protection, where that situation is unforeseeable and unavoidable', cannot justify departures from the derogation system established in the Reception Conditions Directive.[52] The Court seems equally unimpressed by the invocation of the constitutional derogation clause included in Article 72 TFEU.[53] In *Commission v Hungary*, Hungary invoked its responsibility to maintain law and order and safeguarding national security under Article 72 TFEU, arguing that it was entitled to declare a crisis situation caused by mass immigration and apply derogatory procedural rules.[54] The Court rejected this argument, observing that Member States' responsibilities under Article 72 TFEU had already been taken into account by the EU legislature. Indeed,

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[48] *UFC* (n 47) para 59. See Article 2(2) TFEU.
[49] Case C-162/21 *PAN Europe* EU:C:2023:30.
[50] Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L309/1.
[51] *PAN Europe* (n 49) paras 36-41.
[52] Case C-97/24 *The Minister for Children, Equality, Disability, Integration and Youth* EU:C:2025:594 para 52, referring to Article 18(9)(b) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.
[53] Article 72 TFEU reads: 'Title [V of the TFEU] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.
[54] Case C-808/18 *Commission v Hungary* EU:C:2020:1029 para 141.

the relevant legislative framework included a system of derogations suitable to deal with individuals posing a threat to national security and unexpectedly large numbers of applicants for international protection.[55] In the same vein, in *M.A.*, the Court refused to accept that the declaration of a state of emergency in Lithuania due to a mass influx of third country nationals could justify Member States' derogations beyond those already allowed by the Asylum Procedures Directive.[56] Similarly, in *NW*, reliance on Article 72 TFEU was not considered sufficient to allow for derogations for a longer period than that envisaged by the escape clauses already contained in the Schengen Borders Code (SBC).[57] Interestingly, the Court's approach cannot be strictly framed as a *Legislative* Priority Rule,[58] as it extends beyond cases concerning legislative acts. For example, the Court stood by its position also in *Commission v Poland and Others*, which concerned an infringement procedure against Member States failing to comply with non-legislative emergency measures adopted by the Council under Article 78(3) TFEU. There, the Court ruled that Article 72 TFEU could not justify further derogations from those emergency measures because the derogatory rules had already been laid down, exhaustively, in the emergency measures themselves.[59] The measures' non-legislative nature thus did not have an impact on the Court's typical reasoning.

Maizena confirms this approach also within the case-law on institutional matters.[60] In that case, the Council had adopted a Regulation without waiting for the Parliament's opinion, as required by the relevant legal basis.[61] The Regulation had been adopted in a period (between May and July 1979) during which the Parliament was not in session. Before reconvening, the Parliament had decided to await the results of the first elections by direct universal suffrage (June 1979) and the subsequent first sitting of the newly elected Parliament (July 1979). The Council argued that the adoption of the Regulation was urgent and that, given the situation, it was impossible to obtain a timely opinion from the Parliament.[62] The Court noted however that the Council had neither made recourse to the emergency procedure envisaged by the Parliament's internal regulation nor requested an extraordinary session under the existing Treaty rules.[63] Existing rules already covered extraordinary circumstances so that no breach of the institutional balance could be justified by the urgency of the situation.

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[55] ibid paras 221-224.
[56] Case C-72/22 PPU *M.A.* EU:C:2022:505 para 74, referring to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60.
[57] Case C-368/20 *NW v Landespolizeidirektion Steiermark* EU:C:2022:298 paras 85-90, referring to 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 [2016] OJ L77/1.
[58] According to the Legislative Priority Rule, 'exhaustive EU *legislation* will become the Court's sole norm of reference against which to assess the impugned national measure, to the exclusion of [Treaty] Articles' (emphasis added), as explained, in the field of free movement of goods, by Eadaoin Ní Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods: A Constitutional Approach* (Oxford University Press 2022) 2–3.
[59] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland and Others* EU:C:2020:257 paras 148-153.
[60] Case C-139/79 *Maizena v Council* EU:C:1980:250.
[61] Council Regulation (EEC) No 1293/79 of 25 June 1979 amending Regulation (EEC) No 1111/77 laying down common provisions for isoglucose [1979] OJ L162/10, adopted under Article 43(2) EEC.
[62] *Maizena* (n 60) paras 8 and 36.
[63] ibid para 37.

3.2 DEROGATIONS IN SITUATIONS WHERE EU LAW DOES NOT ENVISAGE EMERGENCY OR SAFEGUARD CLAUSES

In the cases analysed so far, the Court found that the emergency argument could not justify derogations beyond those already allowed by EU law, because the emergency situations at stake were already covered by existing provisions dealing with extraordinary circumstances. The position of the Court does not seem to change even when the applicable legislative framework does not provide for any emergency or safeguard clause. Such circumstances may be described as governed through a 'business-as-usual' approach, in the sense that, given that no emergency or safeguard clause is foreseen, both ordinary and extraordinary situations are regulated by the same set of rules.[64]

In *AGET Iraklis*, the Court had to deal with a dispute concerning collective redundancies in the context of the acute economic crisis affecting Greece in 2011 and 2012. The CJEU explained that, in the absence of safeguard clauses in the Collective Redundancies Directive, the crisis could not per se justify departure from the Directive.[65] Within EU internal market law, the Court's reasoning is consistent with the legislature's constitutional obligation to include safeguard clauses, 'in appropriate cases',[66] in harmonisation measures adopted under Article 114 TFEU. The Court presumes, in essence, that the legislature has already considered whether it is appropriate to give the Member States the possibility to derogate from EU legislation. This presumption raises the question whether the non-inclusion of a safeguard clause where that would be 'appropriate' could be used as a parameter to assess the validity of internal market legislation.[67] Arguably, the TFEU obliges the legislature to consider and explain – typically in the recitals – whether to include a safeguard clause and how to design it, while leaving the ultimate choice largely to the co-legislators' political discretion.

The Court also adopts a similar approach to the one described above in fields extending beyond internal market law. An example is the Area of Freedom, Security and Justice (AFSJ). In *Jafari*, departing from the Opinion of AG Sharpston, the Court refused to accept that the arrival of an unusually large number of third-country nationals seeking international protection justified departing from the ordinarily applicable framework laid down by the Dublin III Regulation.[68] The question thus arises as to whether the Treaties include a provision establishing an obligation for the EU legislature similar to that included,

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[64] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 88.

[65] Case C-201/15 *AGET Iraklis* EU:C:2016:972 para 106, referring to Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16.

[66] Article 114(10) TFEU. Note that this provision was introduced by the Treaty of Amsterdam, that had been signed but not yet entered into force at the time of adoption of the abovementioned Collective Redundancies Directive.

[67] Arguing for an affirmative answer, Ellen Vos and Maria Weimer, 'Differentiated Integration or Uniform Regime? National Derogations from EU Internal Market Measures' in Bruno De Witte, Andrea Ott, and Ellen Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar 2017).

[68] Case C-646/16 *Jafari* EU:C:2017:586 paras 93-97, referring to Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing 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 (recast) [2013] OJ L180/31. Cf. Opinion of AG Sharpston in *Jafari* (n 31) paras 231-243.

for internal market harmonisation, in Article 114(10) TFEU. Legal literature has identified such an obligation in Article 72 TFEU. This Treaty provision, as a parameter of validity for AFSJ legislation, would include a 'duty of the legislature to make reasonable accommodation for the "safety" needs of the Member States'.[69] Accordingly, the EU legislature would be required to include in AFSJ legislation 'the adjustments, derogations and other exceptions sufficient to ensure that the Member States have a genuine possibility to maintain public order and safeguard internal security on their territory'.[70]

3.3 THE REMAINING SCOPE FOR STAND-ALONE *FORCE MAJEURE* DEFENCES

In light of what has been said so far, the question arises whether any scope remains for stand-alone *force majeure* defences based on the occurrence of an emergency. A similar question was recently raised by the Irish High Court. In particular, the latter sent a preliminary question to the Court of Justice seeking clarification as to the availability of *force majeure* as a stand-alone defence in a State liability claim based on legislation which does not contain an applicable emergency or safeguard clause.[71] While the Court reformulated the question and found that *force majeure* considerations were irrelevant to the case at hand,[72] in her Opinion AG Medina analysed the relevant case-law and offered important clarifications.[73] As also apparent from the judgments discussed above in this contribution, the Court does not accept arguments based on the occurrence of an emergency if it considers that the legislature, by choosing whether to include an emergency or safeguard clause, intended to exhaustively cover the whole spectrum of situations that may occur. Nevertheless, it remains in principle possible that, with its legislative choice, the legislature did not intend to regulate all extraordinary circumstances. AG Medina gave the example of the safeguard clauses included in the Reception Conditions Directive, clearly not meant, in her view, to cover natural disasters or war. Extraordinary circumstances that the legislature clearly did not consider when deciding whether to include an emergency or safeguard clause define the residual margin within which stand-alone *force majeure* defences may successfully be invoked.[74]

In practice, when EU legislation includes an emergency or safeguard clause, the scope left for stand-alone *force majeure* defences is therefore inversely proportional to the breadth of the definition of 'emergency' contained in that clause. Given the typical vagueness of definitions of emergency,[75] this is likely to result in a highly demanding evidentiary threshold. When EU legislation does not include an emergency or safeguard clause, invoking *force majeure* will only be possible if it can be demonstrated, for example on the basis of the legislative

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[69] Hubert de Verdelhan, 'Art. 72 TFEU as Seen by the Court of Justice of the EU: Reminder, Exception, or Derogation?' (2025) 9 European Papers 1330, 1340.
[70] ibid 1340–1341.
[71] *The Minister for Children, Equality, Disability, Integration and Youth* (n 52) para 22.
[72] ibid paras 26 and 56.
[73] Opinion of AG Medina in *The Minister for Children, Equality, Disability, Integration and Youth The Minister for Children, Equality, Disability, Integration and Youth* (n 42).
[74] ibid paras 49-50.
[75] Bellenghi, 'Neither Normalcy nor Crisis' (n 8).

history or contextual interpretation, that the legislature's choice was clearly not intended to cover the extraordinary circumstances of the case.

4 EMERGENCY AS AN INTERPRETATIVE TOOL FOR POWER-CONFERRING AND POWER-RESTRAINING NORMS

Emergency argumentation may lead to change in how rules are interpreted. In particular, rules might be read more broadly to allow for emergency action, whereas restrictions might be interpreted more narrowly so they do not obstruct. In this way, emergencies can become a reason to put an 'emergency-minded interpretive spin'[76] on both the rules that grant power (subsection 4.1) and those that limit it (subsection 4.2). The underlying reasoning here is: *since an emergency occurred, an interpretation that facilitated the response rather than constraining it was legitimate*.

4.1 BROAD INTERPRETATION OF POWER-CONFERRING NORMS

In emergency contexts, rules of EU law can serve different purposes. First, they may allow the Member States to enact derogations from EU law. Second, they may empower EU institutions to adopt measures aimed at countering an emergency scenario.[77]

First, the seriousness of the threat posed by emergency scenarios may justify a broad interpretation of existing derogation grounds. The key difference with the cases analysed in Section 3 is that, here, what is at stake is not the extent of the derogation or the very possibility to derogate. Rather, these cases concern how the grounds for derogation, already provided for under EU law, are interpreted. For example, it is a well-established principle of free movement law that purely economic reasons cannot justify derogations. In particular, the Court has reiterated in various cases that merely economic and commercial considerations relating to self-sufficiency and availability of energy and raw materials at affordable prices do not fall within the meaning of 'public security' under Article 36 TFEU.[78] However, this rigid approach tends to soften in times of emergency.[79] For example, the *Campus Oil* case concerned measures adopted by Ireland during the 1970s energy crisis, requiring importers to purchase a certain proportion of petroleum products at fixed price from a State-owned company. The Court held that the seriousness of the threat affecting a country's oil supply could in principle justify, under Article 36 TFEU, the adoption of such protective measures.[80] Similarly, in a case concerning Article 65(1)(b) TFEU, which envisages a public security justification for national measures restricting the free movement of capital,

[76] Defining this as 'interpretive accommodation', Gross and Ní Aoláin (n 64) 72.
[77] See in detail Guido Bellenghi, 'The European Parliament's Proposal for an EU State of Emergency Clause: A Comparative and Constitutional Analysis' (2024) 20 Croatian Yearbook of European Law and Policy 1, 4.
[78] Case C-106/22 *Xella Magyarország* EU:C:2023:568 para 69; Case C-648/18 *Hidroelectrica* EU:C:2020:723 para 43.
[79] See recently Case C-499/23 *Commission v Hungary* ECLI:EU:C:2025:875 para 75. This is also noted by AG Ćapeta in Opinion in Case C-106/22 *Xella Magyarország* EU:C:2023:267 para 82. In the literature, see Editorial, 'The Passion for Security in European Societies' (2024) 61(2) Common Market Law Review 283, 291.
[80] Case 72/83 *Campus Oil* EU:C:1984:256 paras 34-35.

the Court accepted that 'safeguarding a secure energy supply in that Member State in case of crisis, war or terrorism may constitute a ground of public security'.[81]

Also noteworthy is the judgment in *NORDIC INFO*, where the Court relied on the seriousness of the health threat posed by COVID-19 to expand the grounds for, first, exercising police powers under Article 23(a) SBC and, second, temporarily reintroducing border controls under Article 25 SBC.[82] Those provisions envisage exceptions and should therefore be interpreted narrowly,[83] and at that time neither of them included express reference to public health.[84] However, the Court interpreted those rules broadly and considered that: first, Article 23 SBC implicitly encompassed pandemics; and, second, for the purposes of Article 25 SBC, an emergency of the scale and seriousness of COVID-19 could be classified as a threat to public policy and/or internal security.[85]

Second, legal bases enabling action by EU institutions may be interpreted broadly to permit the adoption of emergency measures. In *ESMA/Short Selling*, AG Jääskinen argued that Article 114 TFEU was the incorrect legal basis for Article 28 of Regulation (EU) No 236/2012,[86] which provided the newly created European Securities and Markets Authority with the power to adopt emergency decisions limiting or prohibiting short selling in case of a threat to the integrity of financial markets. In his view, such emergency scenarios could not justify an expansive interpretation of Article 114 TFEU that would enable the creation of an EU-level decision-making mechanism insufficiently tied to the goal of market harmonisation.[87] Yet the Court reached a different conclusion. It considered Article 114 TFEU to be the appropriate legal basis for Article 28. Crucially, the Court emphasised that Article 28 only applied to 'serious threats to the orderly functioning and integrity of the financial markets or the stability of the financial system in the EU' and could only be used 'as a last resort and in very specific circumstances [and] where necessary'.[88] Emergency argumentation has also led to a broad interpretation of Article 215 TFEU, the external policy legal basis for the adoption of restrictive measures. For example, in *RT France*, a case concerning Russian propaganda with regard to media coverage of Russian aggression against Ukraine, the General Court upheld the Council's unconventional reliance on Article 215 TFEU to impose a broadcasting ban on a media outlet.[89] The Court justified this approach considering, *inter alia*, the urgency of the war and the EU's objective 'to put an end, as quickly as possible, to the aggression suffered by Ukraine'.[90]

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[81] Case C-212/09 *Commission v Portugal* EU:C:2011:717 para 82. Likewise, Case C-244/11 *Commission v Greece* EU:C:2012:694 para 67 and case-law cited.
[82] Regulation (EU) 2016/399 (n 57).
[83] *NW v Landespolizeidirektion Steiermark* (n 57) para 64.
[84] This would have later been changed by 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 [2024] OJ L2024/1717.
[85] Case C-128/22 *NORDIC INFO* EU:C:2023:951 paras 118 and 126-127.
[86] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/1.
[87] Opinion of AG Jääskinen in Case C-270/12 *United Kingdom v Parliament and Council* EU:C:2013:562 paras 50-53, referring to Case C-217/04 *United Kingdom v Parliament and Council* EU:C:2006:279 para 45.
[88] Case C-270/12 *United Kingdom v Parliament and Council* EU:C:2014:18 para 108.
[89] Defining this interpretation as a 'stretch', Viktor Szép and Ramses Wessel, 'Balancing Restrictive Measures and Media Freedom: *RT France v. Council*' (2023) 60(5) Common Market Law Review 1384, 1393.
[90] Case T-125/22 *RT France v Council* EU:T:2022:483 para 55.

4.2 NARROW INTERPRETATION OF POWER-RESTRAINING NORMS

Emergency argumentation might also support a narrow interpretation of Treaty prohibitions that would otherwise hinder the adoption of emergency measures. In her View in *Pringle*, AG Kokott argued that, in light of 'the very purpose and objective of a Union', the no-bailout clause included in Article 125 TFEU could not be interpreted so broadly as to prohibit mutual assistance between the Member States 'in a case of emergency'.[91] While the Court did not go as far as to expressly mention the idea of an 'emergency', it did nonetheless recognise that the necessity arising from severe financial threats could inform the interpretation of Article 125 TFEU. It found that the European Stability Mechanism, created by the eurozone Member States, was compatible with Article 125 TFEU in so far as it allowed financial support to Member States 'which are experiencing or are threatened by severe financing problems only when such support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States'.[92] In essence, Article 125 TFEU could not be interpreted as precluding financial assistance to be granted, under certain conditions, when this was necessary to face an existential threat.

A similar logic was extended to the interpretation of EU secondary law in *Kotnik*[93] and *Dowling*.[94] At stake in those cases was, in a nutshell, the compatibility of emergency measures adopted to address banks' liquidity crises with the Second Company Law Directive.[95] The latter included prohibitions on issuing shares at a price lower than their nominal value and on increasing the share capital of a public limited liability company without shareholders' consent.[96] In both cases, the Court observed that the objective of the Directive was to protect the freedom of establishment by reassuring investors that their rights would be respected in the context of the 'normal operation' of public limited liability companies.[97] By contrast, measures adopted to address a serious disturbance of the economy and financial system of a Member State, in the presence of a systemic risk to the EU's financial stability, fell outside the scope of normal operations.[98] It followed that, according to the Court, the prohibitions contained in the Directive did not apply to the emergency measures at issue.

Emergency argumentation has moreover served to justify a narrow interpretation of the prohibition of non-discrimination. In two cases concerning aid granted by Sweden and Denmark to Scandinavian Airlines (SAS) to compensate it for the damage that it suffered as a result of the restrictions of air travel during the COVID-19 pandemic, Ryanair challenged the Commission's decisions finding such aid compatible with the internal market under

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[91] View of AG Kokott in Case C-370/12 *Pringle* EU:C:2012:675 para 143.
[92] Case C-370/12 *Pringle* EU:C:2012:756 para 142.
[93] Case C-526/14 *Kotnik* EU:C:2016:570.
[94] Case C-41/15 *Dowling* EU:C:2016:836.
[95] Due to the different dates of adoption (2013 and 2011 respectively) of the emergency measures in question, at issue were both: Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1976] OJ L26/1; and the subsequent recast Directive 2012/30/EU [2012] OJ L315/74.
[96] Cf. Articles 8 and 29 of Directive 2012/30/EU.
[97] *Kotnik* (n 93), para 87; *Dowling* (n 94) para 49.
[98] *Kotnik* (n 93) para 88; *Dowling* (n 94) para 50.

Article 107(2)(b) TFEU.[99] The latter provision exceptionally permits the granting of State aid 'to make good the damage caused by natural disasters or exceptional occurrences'. Ryanair argued that, by confirming the compatibility of individual aid granted to SAS but not its competitors (also affected by COVID-19), the Commission had breached the principle of non-discrimination. Non-discrimination is a general principle of EU law, according to which market subjects should be treated as equals if they are in a comparable situation, unless difference in treatment is objectively justified in compliance with the principle of proportionality.[100] Pursuant to the Court's case-law, State aid which contravenes general principles of EU law cannot be compatible with the internal market.[101] In the cases at hand, the Court found that, since Article 107(2)(b) TFEU aims to enable compensation for victims of exceptional occurrences or natural disasters, not allowing the Member States to choose, for objective reasons, which undertaking(s) to compensate would force them to compensate every affected undertaking. In turn, in the Court's view, this would produce a significant deterrent effect, depriving Article 107(2)(b) TFEU of its effectiveness.[102]

Yet, the Court did not provide guidance as to which objective reasons are in principle acceptable, nor did it examine in detail whether such reasons had been put forward, in compliance with the principle of proportionality, by Sweden and Denmark. Notably, whereas the General Court had defined the nature of individual aid as 'inherently exclusive and thus *discriminatory*',[103] the Court of Justice implicitly refused that qualification and rather affirmed that what is inherent in State aid is 'its *selective* nature'.[104] By not requiring evidence of the objective reasons behind the choice of beneficiary of aid granted under Article 107(2)(b) TFEU, and of the proportionality of such a choice, the Court arguably accepted that individual aid may be discriminatory even beyond the selectivity that is inherent in the notion of State aid,[105] thereby restricting the scope of the legal principle of non-discrimination. And, indeed, in a subsequent and similar case the Court admitted that 'by its nature, individual aid introduces a difference in treatment, or *even discrimination*'.[106]

The Court later extended this line of reasoning also to aid granted under Article 107(3)(b) TFEU 'to remedy a serious disturbance in the economy of a Member State'.[107] In this context, the Court even confirmed that there is no obligation for the Commission to examine, through the lens of proportionality, the choice to limit

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[99] Case C-320/21 P *Ryanair v Commission (SAS, Sweden)* EU:C:2023:712 and Case C-321/21 P *Ryanair v Commission (SAS, Denmark)* EU:C:2023:713.
[100] Joined Cases 117/76 and 16/77 *Ruckdeschel* EU:C:1977:160 para 7; Case C-127/07 *Arcelor Atlantique and Lorraine* EU:C:2008:728, para 23.
[101] Case C-390/06 *Nuova Agricast* EU:C:2008:224 para 51; Case C-594/18 P *Austria v Commission* EU:C:2020:742 para 44; Case C-284/21 P *Braesch and Others* EU:C:2023:58 para 96.
[102] *Ryanair v Commission (SAS, Sweden)* (n 99) para 25; *Ryanair v Commission (SAS, Denmark)* (n 99) para 24.
[103] Case T-379/20 *Ryanair v Commission (SAS, Sweden)* EU:T:2021:195 para 77 (emphasis added).
[104] *Ryanair v Commission (SAS, Sweden)* (n 99) para 132 (emphasis added).
[105] Phedon Nicolaides, 'The Court of Justice Allows Member States to Compensate the Undertaking of Their Choice: A Critique' (2023) 22(4) European State Aid Law Quarterly 371, 375–377 and 379. In the subsequent Case C-210/21 P *Ryanair v Commission* EU:C:2023:908 paras 61-64, concerning an aid scheme adopted by France which foresaw as eligibility criterion the holding of a French license, the Court accepted the argumentation that 'the Member States do not have unlimited resources' and that companies holding a French license were comparatively more harmed than Ryanair. This is, however, an 'imperfect method of apportioning aid', as argued by Phedon Nicolaides, *State Aid Uncovered: Critical Analysis of Developments in State Aid 2023* (Lexxion 2024) 192.
[106] Case C-588/22 P *Ryanair v Commission (Finnair II)* EU:C:2024:935 para 104.
[107] Case C-353/21 P *Ryanair v Commission (Finnair I)* EU:C:2024:437 paras 30-31; *Finnair II* (n 106) paras 38-39.

the granting of aid to one undertaking, as long as the Member State is able to demonstrate that undertaking's importance for the national economy.[108] The latter reasoning can also be viewed as the expression of a precautionary approach, as discussed below.

5 EMERGENCY AS A JUSTIFICATION FOR THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE OR THE ADOPTION OF A PRECAUTIONARY APPROACH

The notion of emergency is typically associated with the epistemic uncertainty stemming from the occurrence of unforeseen circumstances and the scarcity of information concerning the seriousness of their potential consequences. In that, emergency measures show structural similarity to risk regulatory decisions under circumstances of prevailing uncertainty as to the existence or extent of a risk.[109] Ondřejek and Horák submit that this feature of emergency warrants a precautionary approach, in the sense that emergency can be 'operationalised as a situation in which the precautionary principle (by a certain margin given by the uncertainty and seriousness) prevails over the principle of *in dubio pro libertate*'.[110] In other words, high uncertainty and seriousness of the risk in a given emergency context would justify the adoption of a lenient standard of review vis-à-vis the protective measures adopted by public authorities. Judicial scrutiny should be limited to manifest errors, since those authorities lacked knowledge about the type and intensity of the threat they were faced with[111] and/or the effectiveness of the related mitigating measures.[112] The core reasoning here is: *since an emergency occurred, the action of public authorities was legitimately informed by a precautionary rationale*.

At the level of EU law, the CJEU has recognised that the precautionary principle is a general principle which may influence decision-making when there is scientific uncertainty concerning threats to the environment, human, animal, or plant health.[113] As a result, the precautionary principle is mostly relevant in fields such as environmental, consumer, and health protection.[114] Conversely, as EU law currently stands, it does not apply to threats to

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[108] *Ryanair v Commission (Finnair I)* (n 107) para 78; *Ryanair v Commission (Finnair II)* (n 106) paras 115-116.
[109] Accordingly, in EU legislation, risk scenarios are typically qualified as 'emergency' situations. See, for instance, Articles 53-54 of 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 [2002] OJ L31/1; Articles 12-13 of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy [2013] OJ L354/22.
[110] Pavel Ondřejek and Filip Horák, 'Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures' (2024) 20(1) European Constitutional Law Review 27, 44.
[111] ibid.
[112] Vincent N Delhomme, '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*' (2024) 20(2) European Constitutional Law Review 307, 324.
[113] Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan* EU:T:2002:283 para 184. See also Communication from the Commission on the precautionary principle, COM(2000) 1 final. *Contra*, arguing that the precautionary principle would not be a general principle of EU law, Joanne Scott, 'Legal Aspects of the Precautionary Principle' (The British Academy 2018) Brexit Briefing.
[114] Kristel de Smedt and Ellen Vos, 'The Application of the Precautionary Principle in the EU' in Harald A Mieg (ed), *The Responsibility of Science* (Springer 2022) 172.

other types of socio-economic interests, such as, for instance, financial stability, energy security, or employment rates.[115] In what follows, this article shows that not only can emergency argumentation trigger the application of the precautionary principle in the fields of health, safety, and environmental regulation (subsection 5.1), but it may also bring to the adoption of a precautionary approach in cases which fall outside the traditional scope of the precautionary principle (subsection 5.2).

5.1 APPLICATION OF THE PRECAUTIONARY PRINCIPLE

In cases concerning health, safety, and environmental regulation, the occurrence of an emergency typically triggers the application of the precautionary principle. In particular, the interaction between the precautionary principle and the principle of proportionality results in the 'precautionary application of proportionality analysis'[116] by the CJEU. In the *BSE* case, concerning the outbreak of the mad cow disease, the Court relied on the high level of scientific uncertainty surrounding the risks posed by the disease to confirm the appropriateness of the emergency measures adopted by the Commission.[117] The juxtaposition of precaution and proportionality does not only influence the assessment of a measure's appropriateness, but also of its necessity.[118] In the *BSE* case, this resulted in the Court's disregard for the potential alternative measures suggested by the UK, since, 'in view of the seriousness of the risk and the urgency of the situation', the general ban on exports of bovine animals, bovine meat, and derived products adopted by the Commission could not be considered as a manifest breach of the necessity requirement.[119]

Similarly, in *NORDIC INFO*, travel restrictions adopted by Belgium in 'the serious public health context resulting from the COVID-19 pandemic [and its] uncontrolled spread' were considered to cause a proportionate interference with fundamental rights.[120] Importantly, the Court referred to the precautionary principle and the uncertainty that the Belgian Government was faced with to broaden the latter's discretion vis-à-vis the intensity, frequency, and selectivity of controls carried out under Article 23 SBC. The Court focused in particular on the difficulty to determine in advance which persons using various modes of transport came from Member States classified as high-risk zones or travelled to such Member States.[121]

Finally, it is noteworthy that the precautionary principle may also limit the efficacy of emergency argumentation. This effect occurs when an emergency is invoked as

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[115] In the pending Case C-769/22 *Commission v Hungary (Valeurs de l'Union)*, Hungary has invoked the precautionary principle to justify the prohibition on LGBTIQA+ content, referring to a risk of harm for minors' development in light of moral, religious, or cultural traditions. AG Ćapeta rightly highlighted that, in the absence of scientific evidence, the Hungarian law at issue is purely arbitrary and unjustified: see Opinion of AG Ćapeta in Case C-769/22 *Commission v Hungary (Valeurs de l'Union)* EU:C:2025:408 paras 107-111. Remarkably, the AG did not contest the applicability of the precautionary principle in the first place, perhaps signaling the silent expansion of this principle's scope of application.

[116] Ondřejek and Horák (n 110).

[117] Case C-180/96 *UK v Commission* EU:C:1998:192 paras 101-103.

[118] Iris Goldner Lang, '"Laws of Fear" in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19' (2023) 14(1) European Journal of Risk Regulation 141, 160.

[119] *UK v Commission* (n 117) para 110.

[120] *NORDIC INFO* (n85) paras 95 and 97.

[121] ibid para 122.

the justification for derogating from precautionary measures. In the abovementioned *PAN Europe* case, Belgium had adopted emergency measures authorising certain plant protection products, although seeds treated with those products had previously been prohibited by the Commission through *ad hoc* implementing regulations. In essence, the Court had to balance the interest pursued by the national emergency measures, adopted to protect plant production where 'necessary because of a danger which cannot be contained by any other reasonable means',[122] against the interest pursued by the Commission's prohibitions, namely the prevention of risks to human and animal health and the environment. While the latter interest is covered by the precautionary principle, the former is not. This difference was highlighted by the Court when observing that the protection of health and the environment takes priority over the improvement of plant production.[123] In other words, the emergency rationale underlying the national measures could not prevail over the precautionary rationale underpinning the Commission's measures.

5.2 ADOPTION OF A PRECAUTIONARY APPROACH BEYOND HEALTH, SAFETY, AND ENVIRONMENTAL REGULATION

Emergency argumentation may prompt the Court to adopt a precautionary approach even outside the typical fields falling within the scope of the precautionary principle. This extension of the precautionary rationale occurs through the broadening of executive discretion (sub-section 5.2.1) and the flexibilisation of procedural duties (sub-section 5.2.2).

5.2[a] Broadening of Executive Discretion

In *Slovakia and Hungary v Council*, the applicants argued that the abovementioned Emergency Relocation Decision adopted by the Council could not be based on Article 78(3) TFEU.[124] The Decision introduced solidarity measures for the benefit of Italy and Greece, responding to the 2015 sudden inflow of third country nationals that had placed significant pressure on those countries' asylum systems. Slovakia and Poland maintained that, while Article 78(3) TFEU is meant to address existing or imminent emergency situations, the Decision at stake went further. Indeed, they argued, the Decision included adjustment mechanisms allowing for the potential extension of the emergency measures to other Member States that might subsequently have been confronted with a similar emergency

[122] Article 53(1) PPPR. It must be highlighted that the case was decided in a context within which emergency authorisations have been often abused by the Member States and have *de facto* (and improperly) become a standard mode for long-term authorisations, rather than a genuine emergency tool. For a detailed discussion, see Pietro Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations: The Role of the EU Principles of Good Administration and the Precautionary Principle in Shaping Better National Administrative Practices' (2025) 8(1) Nordic Journal of European Law 70, 75–76. Having answered the question about the limits to derogations allowed by Article 53 PPPR, unfortunately the Court did not consider necessary to answer the questions concerning the qualification of the 'special circumstances' justifying recourse to Article 53 PPPR itself. Nevertheless, following the judgment, the Commission started for the first time an infringement procedure against a Member State (Romania) for the abuse of emergency authorisations (INFR(2025)2146).

[123] *PAN Europe* (n 49) paras 45-50.

[124] *Slovakia and Hungary v Council* (n 37), referring to Council Decision (EU) 2015/1601 (n 36).

situation.[125] Rejecting these claims, the Court endorsed the Opinion of AG Bot, who had observed that 'an emergency situation is capable of continuing, developing and affecting other Member States'.[126] Consequently, Article 78(3) TFEU must be interpreted as conferring 'a wide discretion on the Council in the choice of the measures to be taken'.[127] In essence, for the Court, the unpredictable nature of emergency scenarios justified the precautionary adoption of measures that could 'evolve and adapt' to 'respond rapidly and efficiently to […] any possible developments in the situation'.[128] In the Court's view, such measures were compatible with Article 78(3) TFEU.

The Court's reasoning cannot be seen as an application of the precautionary principle in the strict sense, as the object of the case falls outside the scope of that principle. Nonetheless, it arguably incorporates a precautionary rationale: it allows the risk manager (in this case, the Council) to take precautionary measures (the adjustment mechanisms in the Emergency Relocation Decision), where there is uncertainty as to the existence or extent of a risk (the potential and unforeseeable developments of the 2015 migration crisis), without having to wait until the reality and seriousness of that risk becomes apparent.

5.2[b] Flexibilisation of Procedural Duties

The application of the precautionary principle has significant procedural and epistemic implications. The broadening of the risk manager's discretion in situations of uncertainty necessitates the creation of procedural duties so as to prevent the exercise of public authority from entirely escaping judicial review. While State aid law is not a typical field for the application of the precautionary principle, recent case-law concerning aid granted in emergency contexts is arguably informed by a precautionary approach. Let us consider, in particular, Article 107(3)(b) TFEU. This provision allows the Commission to exceptionally declare the compatibility with the internal market of State aid granted 'to remedy a serious disturbance in the economy of a Member State'. The Court has clarified that the complex economic and social assessments required for the application of Article 107(3)(b) TFEU, typically characterised by a high degree of uncertainty,[129] justify recognising wide discretion for the Commission.[130] Essential limit to this discretion, in the Court's jurisprudence, is the Commission's obligation to examine the impact of aid on intra-EU trade and weigh its beneficial effects against its adverse effects on trading conditions and competition.[131] As in application of the precautionary principle, thus, the Commission's discretion finds procedural and epistemic restrictions in a duty to assess the factual implications of a given case.

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[125] *Slovakia and Hungary v Council* (n 37) paras 108-111. Cf. Article 4(3) of Council Decision (EU) 2015/1601 (n 36).
[126] Opinion of AG Bot in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* EU:C:2017:618 para 129.
[127] ibid.
[128] *Slovakia and Hungary v Council* (n 37) paras 132-134.
[129] Jakub Kociubiński, 'The Three Poisons of Post-Covid State Aid Control: Emerging Trends in Interpretation and Legislative Approach to Member States' Aid Measures' (2023) 22(1) European State Aid Law Quarterly 4, 8.
[130] Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen* EU:C:2003:510 para 169; *Kotnik* (n 93) para 38.
[131] Case C-372/97 *Italy v Commission* EU:C:2004:234 paras 82-83. See also Case T-68/15 *HH Ferries* EU:T:2018:563 para 207.

As noted by Knuth and Vos, '[t]he precautionary principle not only functions as a normative source of the obligation to generate adequate scientific evidence, but also allows the risk manager to neglect certain aspects at times', in the sense that 'the broadening of risk management discretion affects which factors have to be considered in the course of the scientific assessment' and 'allows the decision-maker to disregard certain factors in its assessment'.[132] The Commission's failure to comply with the obligation to carry out the balancing exercise was at stake in one of the numerous cases brought by Ryanair with regard to aid granted during the COVID-19 pandemic. The General Court held that, since it is in the interest of the EU as a whole that one of its Member States is 'able to overcome a major or possibly even an existential crisis which could only have serious consequences for the economy of all or some of the other Member States', the Commission was justified in not carrying out the balancing exercise since 'its result is presumed to be positive'.[133] The Court of Justice confirmed the General Court's ruling,[134] observing that responding to emergency scenarios is in itself an objective 'of an exceptional nature and of particular weight'.[135] This explained, in the Court's view, why the Commission was not required to carry out an individual assessment.[136] The fact that the EU Courts held that the Commission is not required to carry out the balancing exercise does not rule out, in principle, that the Commission could nonetheless decide to do so. The same logic applies within the framework of the precautionary principle. For the precautionary principle can be invoked as a shield by the risk manager, but the risk manager is not required to do so. In essence, since emergency scenarios may be marked by extreme economic uncertainty, the importance of the objective enshrined in Article 107(3)(b) TFEU justifies the flexibilisation of the Commission's procedural duties.[137] Using State aid control as 'a risk management tool',[138] the Commission is allowed to adopt a precautionary approach and presume that aid granted under Article 107(3)(b) TFEU will have a beneficial effect.

In the context of Article 78(3) TFEU, the Court recognised the broad discretion of the Council in the adoption of emergency measures while confirming the existence of important but flexible procedural guarantees. One of those guarantees is the unanimity required to amend the Commission's proposals under Article 293(1) TFEU. In the *Slovakia and Hungary v Council* case, the applicants had been outvoted in the procedure that led to adoption of the contested decision under Article 78(3) TFEU. Before the Court, they argued that the final decision differed from the original proposal and, therefore, should

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132 Luca Knuth and Ellen Vos, 'When EU Courts Meet Science: Judicial Review of Science-Based Measures Post-Pfizer' in Mark Dawson, Bruno de Witte, and Elise Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar 2024) 216–218.

133 Case T-238/20 *Ryanair v Commission (Swedish License)* EU:T:2021:91, paras 67-68.

134 Conversely, AG Pitruzzella had argued that the General Court should have required the Commission to carry out the balancing exercise. Nonetheless, he also viewed that, in the context of an 'unprecedented health emergency', the 'exceptional nature of the situation' and the 'need for timely intervention' should have been deemed to allow the Commission to carry out a priori a 'general balancing exercise' through the State Aid Temporary Framework (C/2020/1863), rather than an individual case-by-case assessment. See Opinion of AG Pitruzzella in *Ryanair v Commission (Swedish License)* (n 32) paras 84-88 and 91-96.

135 Case C-209/21 P *Ryanair v Commission (Swedish License)* EU:C:2023:905 para 86.

136 ibid para 87.

137 Similar considerations apply to the Court's finding that the Commission does not have to examine whether the circle of beneficiaries of an aid measure should have been widened. See supra text to note 108.

138 Delia Ferri, 'The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis' (2021) 12(1) European Journal of Risk Regulation 176, 193–194.

have been adopted via unanimity.[139] The question was thus whether the Commission had itself amended the proposal, so that unanimity in the Council was not necessary. In the past, the Court had already established that amendments of a proposal by the Commission did not need to be in writing.[140] In the case at hand, the Court went even further and held that the mere presence of two Commission's representatives in the Council's meetings constituted acceptable and sufficient evidence that the Commission had implicitly amended its proposal.[141] The emergency context played a key role in the Court's reasoning. The judges highlighted that, whereas the Court had always interpreted Article 293(1) TFEU with a certain degree of flexibility,

> [s]uch considerations as to flexibility must, a fortiori, prevail in the case of the procedure for adopting an act on the basis of Article 78(3) TFEU, since the purpose of that provision is to make it possible for provisional measures to be adopted quickly so as to provide a rapid and effective response to an 'emergency situation' within the meaning of that provision.[142]

6 CONCLUSIONS

This contribution aimed to investigate how the CJEU engages with emergency argumentation, understood as legal argumentation that seeks to justify a certain application or interpretation of EU law on the basis of the exceptionality of an emergency scenario, typically emphasising the necessity and urgency of the situation. In doing so, the article sought to enhance the degree of predictability of the Court's legal reasoning when three lines of emergency argumentation are brought before it. The article acknowledges the need for further research to establish whether other types of emergency argumentation can be identified and, if so, what their impact may be on the legal reasoning of the Court.

The result of the cross-sectoral analysis of case-law carried out in this contribution is graphically represented in the table below.

[139] *Slovakia and Hungary v Council* (n 37) paras 171-176.
[140] Case C-280/93 *Germany v Council* EU:C:1994:367 para 36.
[141] *Slovakia and Hungary v Council* (n 37) paras 184-188.
[142] *Slovakia and Hungary v Council* (n 37) para 180.

Emergency argumentation	Core reasoning	Functions	Likelihood of success
Emergency as an autonomous ground for derogation	*Since an emergency occurred, the adoption of exceptional measures was justified*	Justifying the adoption of exceptional measures beyond those allowed by EU law	Low
		Justifying the adoption of exceptional measures where EU law does not envisage emergency derogations	
Emergency as an interpretative tool for power-conferring and power-restraining norms	*Since an emergency occurred, an interpretation that facilitated the response rather than constraining it was legitimate*	Broad interpretation of legal bases for EU action and grounds for Member States' derogations	High
		Narrow interpretation of prohibitions	
Emergency as a justification for the application of the precautionary principle or the adoption of a precautionary approach	*Since an emergency occurred, the action of public authorities was legitimately informed by a precautionary rationale*	Broadening of executive discretion	High
		Flexibilisation of procedural duties	

First, the Court typically does not consider emergency as an autonomous ground for derogation. The occurrence of an emergency justifies, evidently, reliance on exceptional EU law provisions aimed precisely at dealing with emergency circumstances. Nevertheless, emergency measures cannot include derogations from the ordinary legal framework that go beyond what exceptional provisions already explicitly permit. Nor can emergency be a justification for derogations when no emergency or safeguard clause is provided for by EU law. As a stand-alone *force majeure* defence, emergency argumentation can only be successful if it is demonstrated – arguably not the easiest task – that the extraordinary circumstances of a case clearly fall outside the scope of the situations that EU legislation is intended to regulate. This finding raises the question as to the existence and extent of a constitutional obligation for the EU legislature to include emergency or safeguard clauses in secondary law. While this article points at elements to address this question in the specific fields of internal market and AFSJ law, a more complete answer requires further research and falls outside the scope of this contribution.

Second, the Court tends to uphold a broad interpretation of rules that enable the adoption of emergency measures and a narrow interpretation of prohibitions that may

hinder the adoption of those measures. This tendency can be detected with regard to both legal bases allowing EU institutions to take action and derogation grounds permitting the Member States to deviate from EU ordinary rules. Although, as explained above, the intensity of permissible derogations is not impacted by emergency argumentation, emergency argumentation can be successful in supporting an extensive interpretation of the grounds for derogation.

Finally, emergency argumentation leads the Court to apply the precautionary principle when the emergency threatens human, plant, and/or animal health and/or the environment. While the precautionary principle remains limited in its scope of application, a precautionary effect may implicitly result, beyond that scope, from emergency argumentation. Indeed, even when the threatened interests are not those strictly covered by the precautionary principle, emergency argumentation may justify the broadening of executive discretion and the flexibilisation of procedural duties.

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