INTERNAL MARKET EMERGENCY

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'Internal market emergency' is a new legal concept in EU Law. During such an emergency, the Council of the European Union may decide to activate the Internal Market Emergency Mode, which grants emergency powers to the Council and the European Commission and restricts the scope of exceptions in case of emergency available to the Member States under the treaties. This article analyses this concept in the light of existing EU emergency powers and the balance of power between the sovereign Member States and the supranational EU-institutions. The focus is the legal definition of 'internal market emergency' and how this new legal concept fits in the framework of existing EU emergency law. The article concludes that the concept causes terminological confusion, splits our understanding of emergency into 'EU emergencies' and 'emergencies in the EU' and may have far-reaching consequences for the Member States' possibility to rely on treaty-based derogations in case of emergency.

1 EMERGENCY MEASURES BECAUSE OF EMERGENCY MEASURES

During COVID-19, most EU Member States (if not all) adopted measures in response to the threat posed by the virus. These uncoordinated measures restricted free movement, both of goods and of persons, and they interrupted supply chains in the internal market. There were export bans between Member States. There was a lack of transparency and poor access to information, which made it difficult for economic operators to make informed business decisions. It has been suggested that the emergency measures taken even turned out to be detrimental to their intended aims, mainly because they were taken in an ad-hoc uncoordinated way.

Clearly, the pandemic was a crisis on an abnormal scale, and it is perfectly normal for a society to learn from experience and for a political body to adapt, for example by introducing improved legislative measures, and on October 9, 2024 the Internal Market Emergency and Resilience Act (IMERA) was adopted.[1] The adoption of the IMERA is linked to our shared experiences of the COVID-19 pandemic[2] although it is not a health protection act. Citing Articles 114, 46 and 21 TFEU as its legal basis, it establishes a *general* framework

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[1] Regulation (EU) 2024/2747 of the European Parliament and of the Council 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) [2024] OJ L2024/2747 (IMERA). The regulation is in force and shall apply from 29 May 2026 (Article 48 IMERA).

[2] See Recitals 1-10 of the IMERA preamble and Commission, 'Proposal for a regulation of the European Parliament and the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98' COM(2022) 459 final (Proposal for SMEI/IMERA), 1.

for emergency measures aiming to protect the internal market in future emergencies.[3]

Frameworks of emergency law are present in many EU-Member State jurisdictions, where the legal system contains provisions that trigger a state of legal exception from the normal rules.[4] An important function of such frameworks is to regulate under which conditions, and under whose authority, the emergency measures apply. In short, these rules create a constitutional distinction between *normalcy,* which is managed with the normal rules, and *emergency,* which is managed with exceptional rules.

The EU treaties do not contain such a state of emergency clause. Instead, the vast majority of provisions applicable in case of emergency are scattered across different policy areas, thus reinforcing the image that EU emergency powers have developed incrementally in reaction to hard earned experience.[5] The available powers either grant the EU institutions exceptional powers under certain circumstances[6] or allow Member States to make exceptions to binding rules under various conditions, including emergencies.[7]

In recent legislative developments, we have seen that the EU legislature has adopted *permanent emergency frameworks* (PEFs),[8] which are general frameworks of emergency law. The IMERA is a recent example of such a framework, empowering the Council of the European Union (the Council) and the European Commission (the Commission) to 'effectively anticipate, prepare for and respond to the impact of crises on the internal market'.[9] The PEF in the IMERA is forward looking, it installs a gradual response to crises and emergencies that is proportionate to the severity of the factual circumstances, and it grants quite far-reaching powers to the Commission.[10] It is for the Council to decide, on proposal from the Commission, to activate either the internal market vigilance mode (IMVM) or the internal market emergency mode (IMEM), depending on the severity of the situation.

The activation of the IMEM requires that the Council determines the existence of an internal market emergency (IME). It is this novel concept of EU law that has inspired this article. The aim of this contribution is to situate the concept 'internal market emergency' in

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[3] Somssich fears that the regulation may not be as useful as a general crisis management instrument as was its aim. He argues that the legislator had too much focus on the experiences gained during COVID-19 in the drafting of the regulation, and fears that this will make the regulation suboptimal as a general framework. Réka Somssich, 'How Resilient will the Internal Market Emergency and Resilience Act Be? [pre-publication]' (2025) Common Market Law Review 1, 36.

[4] The recent FIDE report on EU Emergency law includes 21 country reports. Eighteen of these states report general emergency frameworks in their constitutional structure. Daniel Sarmiento, 'TOPIC I – EU Emergency Law, General report' in Krzysztof Pacuła (ed), *EU Emergency Law. XXXI FIDE Congress* (University of Silesia Press 2025) 26.

[5] See for example Mark Rhinard, Neill Nugent and William E Paterson (eds), *Crises and challenges for the European Union* (Bloomsbury Publishing 2023), especially the contribution by Jeffrey J Anderson, 'The History of Crisis in the EU'.

[6] See for example Article 122(1) TFEU.

[7] See for example Articles 78(3) or 346 TFEU.

[8] Emanuele Rebasti, Anne Funch Jensen, and Alice Jaume, 'TOPIC I – EU Emergency Law, Institutional report' in Pacuła (ed), *EU Emergency Law. XXXI FIDE Congress* (University of Silesia Press 2025) 216. In 2022 de Witte identified the same trend, but chose to distinguish between the functions of emergency prevention and emergency management, and consequently spoke about frameworks from that point of departure, Bruno De Witte, 'EU emergency law and its impact on the EU legal order' (2022) 59(1) Common Market Law Review 3, 11.

[9] IMERA (n 1) Article 1(1).

[10] Cf. Somssich (n 3) 18: 'IMERA gives very important executive powers to the Commission once the various modes are activated'.

the context of EU emergency powers to inform research based, responsible future use of these powers. The analysis will consider the reasons for introducing this concept into EU law and for establishing a permanent emergency framework of measures related to it. The analysis is based on a constructivist approach to law as a social phenomenon and holds that the legal conditions for activating the IMEM, as well as the measures made available to the Council upon activation, are contingent on how an internal market emergency is understood which in return is shaped by the application of the rules. The understanding of the concept informs the definition of the legal term which controls the activation of the emergency powers. The reasons for applying the legal constructions (the emergency powers) form part of the materials analysed in order to zoom in on a conceptual understanding of 'internal market emergency'.[11] In short, the article will discuss what an internal market emergency can be understood to be, what the available emergency powers entail, and how this new legal concept fits with the set of rules that make up EU emergency law.

The following Section will give an overview of the emergency powers granted in EU law to make it possible to position the IMERA in that specific legal context. It should be noted that this Section is not intended to provide a comprehensive analysis of the field as such, but to serve as a backdrop for the analysis of the IME. The article then shifts focus to the IMERA itself and to the legal concept 'internal market emergency'. Following a textual analysis of the regulation's provisions governing the 'internal market emergency', the article unpacks the 'internal market emergency mode' with a specific focus on what powers the IMEM grants the EU institutions,[12] how these powers fit into the general framework of EU law, and how the application of these provisions may influence the development of the concept 'internal market emergency'. Thereafter, a concluding discussion will summarize the findings of the article and hopefully shed some light on whether this new legal development contributes to further convergence, or fragmentation, of EU emergency law.[13]

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[11] Regarding social constructivism, see Peter L Berger and Thomas Luckmann, *The social construction of reality: a treatise in the sociology of knowledge* (1st edn, New York: Anchor Books 1967), and John R Searle, *The construction of social reality* (Allen Lane 1995). Regarding application of the theory in legal scholarship see Ulf Petrusson and Mats Glavå, 'Law in a Global Knowledge Economy – Following the Path of Scandinavian Sociolegal Theory' (2008) 53 Scandinavian Studies in Law 93. An example of a social-constructivist approach to EU law can be found in Martin Steinfeld, 'A social-constructivist approach towards the evolution of EU citizenship' in Dora Kostakopoulou, Daniel Thym, and Martin Steinfeld (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022).

[12] This means that the institutional governance structure (IMERA Title I, Chapter II, Articles 4-8), the rules on internal market contingency planning (IMERA Title II, Articles 9-13), the state of 'internal market vigilance' and the measures available in that mode (IMERA Title III, Articles 14-16), the internal market response measures during an internal market emergency (IMERA Title IV, Chapter III, Articles 26-33), the specific measures that applies to public procurement (IMERA Title V, Articles 36-41), data protection and digital tools (IMERA Title VI, Articles 42-44) will not fall within this article's scope. Even though the regulation has not yet received much attention among scholars, the following articles cover some of the aspects left out of the scope of this article: Somssich (n 3), Guido Bellenghi, 'Good Health and Bad Memory' (*EU Law Live Weekend Edition No230*, 17 May 2025) <https://eulawlive.com/weekend-edition/weekend-edition-no230/> accessed 17 November 2025.

[13] In the final sentence of his equally comprehensive and impressive article discussing a definition of 'emergency' under EU law, Bellenghi hints that this development is likely to cause more fragmentation. Guido Bellenghi, 'Neither Normalcy nor Crisis: The Quest for a Definition of Emergency under EU Constitutional Law' [2025] European Journal of Risk Regulation 1, 20.

2 A LEGAL PERSPECTIVE ON EU EMERGENCY POWERS

There are many conceptual definitions of both 'emergency' and 'emergency powers' in the literature on emergency and exception. The literature connects academic disciplines such as, for example, philosophy, political science and law. Certain contributions base their definitions on normative theory,[14] while others turn primarily to empirical evidence.[15] A common feature of the literature is the exploration of the relation of the concepts of normalcy and emergency in the context of sovereignty, and this contribution is intended to connect and contribute to that discussion in the specific context of EU law. It deals specifically with how the authority to declare (internal market) emergency is regulated and what consequences this novel power may bring for the constitutional balance between the EU institutions and the EU Member States in the specific context of governing crises and emergencies.

This article construes EU emergency power as provisions of EU law, both primary and secondary, that apply under specific circumstances (emergency) and enable measures not applicable under normal circumstances (normalcy).[16] The decisive element defining emergency power is that the measure specifies the conditions under which exclusive powers become available in order to better govern the emergency at hand. Thus, the most important feature of emergency law is that it applies because the rules in place to govern normalcy are no longer suitable.

The conceptualization used in this article is 'narrow' and 'formalist' according to Greene.[17] This is not a normative choice on my behalf, and there will be no evaluation of how well the chosen conception protects values such as the rule of law. The choice is made for methodological purposes, as a narrow conception is easier to apply compared to a thick one. The choice of conceptualization is both inspired by and aligns with previous academic work in the specific field of EU emergency law,[18] although this article will not engage in an argument for a particular definition of that specific field. This does not mean that a distinction cannot, or should not, be made between – in particular – EU crisis law and EU emergency law, but in consideration of the aim of this article the question of categorization of legal fields is not important. Instead, this article is interested in EU legal

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[14] Carl Schmitt and Hans Kelsen are two thinkers representing this camp, although they argue in diametrically opposed directions. Carl Schmitt (translated by George Schwab), *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2024); Hans Kelsen (translated by Max Knight), *Pure Theory of Law* (University of California Press 1967).

[15] Giorgio Agamben, *State of exception* (University of Chicago Press 2005); Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006); Christian Bjørnskov and Stefan Voigt, 'The architecture of emergency constitutions' (2018) 16(1) International Journal of Constitutional Law 101.

[16] This means that the approach does not consider emergency powers as an extra-legal state of exception, as did for example Carl Schmitt and Giorgio Agamben. Instead, this approach follows a tradition where emergency powers are part of a constitutional emergency framework, and therefore the article will emphasize the importance of conceptual and terminological clarity as regards 'emergency' as a legal concept and term.

[17] Alan Greene, 'States of Emergency and the Rule of Law' in Michael Sevel (ed) *Routledge Handbook of the Rule of Law* (Routledge 2025)

[18] In particular Bellenghi, 'Neither Normalcy nor Crisis (n 13) 4: 'emergency law must define, first, what constitutes an emergency and second, how an emergency is handled by the legal order once it manifests itself'. See also De Witte (n 8) 4: 'EU emergency law is a narrower concept [than EU crisis law, author's note]: it refers to the rules of primary and secondary EU law that serve to address *sudden* threats to the core values and structures of the Union and its Member States'.

provisions that fit the conceptualization above, whether or not these are categorized as EU emergency law (by someone else). Consequently, the article primarily speaks about EU emergency powers instead of EU emergency law, while still acknowledging that categories such as EU emergency law and EU crisis law are useful for other purposes.

Avoiding categorization of legal fields does not mean that the article does not address the issue of 'disentangling' emergency from crisis.[19] While I agree with De Witte's suggestion to consider how sudden and unexpected an event is when making a distinction between emergency (law) and crisis (law), and incorporating the former in the latter, I choose to understand his text on a conceptual level, rather than on the level of defining legal fields. In that perspective, his text serves as a starting point for the discussion in this article.[20] I share this approach with Bellenghi (that the distinction between crisis law and emergency law is important on a *conceptual level*) who convincingly argues that blurred conceptual boundaries lead to a blurred distinction between normalcy and emergency, which opens the door for a permanent state of emergency.[21]

The IMERA does not make a clear distinction between crisis and emergency, neither as concepts nor as legal terms, although it clearly deals with emergency powers available exclusively when a state of emergency has been declared. Therefore, this article aspires to contribute to the issue of 'disentangling' emergency from crisis, and paradoxical as it may seem it does so partly by disentangling EU emergency powers from the specific category of EU emergency law.

2.1 EMERGENCY POWERS UNDER EU PRIMARY LAW[22]

Although EU emergency powers relate to a concept of emergency, the treaty rules rarely mention emergency as a legal term. In fact, the word emergency only appears in two articles in the TEU and TFEU combined,[23] and the conceptualization applied in this article allows

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[19] Bellenghi, 'Neither Normalcy nor Crisis (n 13) 4: 'Defining emergency from a legal perspective poses however a double challenge, in that the notion of emergency needs to be distinguished from "normalcy" and disentangled from "crisis"'.

[20] De Witte (n 8) 4.

[21] Bellenghi, 'Neither Normalcy nor Crisis (n 13) 6. See also Szente, who has constructed a scheme for the assessment of rule of law violations in emergency situations. Zoltán Szente, 'How to Assess Rule-of-Law Violations in a State of Emergency? Towards a General Analytical Framework' (2025) 17 Hague Journal on the Rule of Law 117.

[22] EU emergency powers and EU emergency law are gaining a lot of attention from legal scholars of late. The field is heterogenous in terms of approaches, theoretical starting points and findings. Some recent examples include De Witte (n 8); Bellenghi, 'Neither Normalcy nor Crisis (n 13); Christian Kreuder-Sonnen, 'Does Europe Need an Emergency Constitution?' (2023) 71(1) Political studies 125; Julia Fernándes Arribas, 'Regulating European emergency powers: towards a state of emergency of the European Union' (2024) 295 Policy Paper, Jacques Delors Insitute. <https://institutdelors.eu/content/uploads/2025/04/PP295_Regulating_European_Emergency_Powers_Arribas_EN.pdf> accessed 17 November 2025; Jonathan White, 'Constitutionalizing the EU in an Age of Emergencies' (2023) 61(3) Journal of Common Market Studies 781; Vojtěch Belling, 'Legality and Legitimacy of the EU "Emergency Governance"' (2018) 73(2) Zeitschrift für Öffentliches Recht 271. There are also several edited volumes dealing with EU crisis mangement, emergency governance etc., often adopting an interdisciplinary European studies-approach, such as for example Marianne Riddervold, Jarle Trondal, and Akasemi Newsome (eds), *The Palgrave handbook of EU crises* (Palgrave Macmillan 2021) and Rhinard, Nugent, and Paterson (n 5).

[23] The word 'emergency' only appears once in the Treaty on European Union (Article 30 TEU) and once in the Treaty on the Functioning of the European Union (Article 78(3) TFEU).

for many more provisions to be included in the emergency powers framework. Furthermore, the EU-treaties contain no specific provision that enables a general emergency scheme, such as a state of exception clause,[24] and there is no rule in the EU Charter on Fundamental Rights (EUCFR) that corresponds to Article 15 ECHR.[25]

A possible explanation to this 'constitutional silence' is that the Member States do not perceive of the EU-treaties as a constitutional treaty on par with national constitutions. Dealing with emergencies in their respective jurisdictions is still considered the province of each individual Member State and thus remains within their retained powers (as in powers not conferred on the EU). In those cases where emergencies have warranted a coordinated response from several EU Member States these have typically been handled by referring to specific treaty-based exceptions,[26] or outside of the framework of the treaties in an ad hoc manner,[27] although the introduction into the treaties of an EU state of emergency clause has been proposed.[28]

The most common type of emergency power in primary law applies to emergencies that arise in the territory of one of the Member States and therefore can be seen as an emergency *in that state*. These powers are typically provisions that make it easier for the Member States to fulfil their EU law obligations while governing emergencies. Article 78(3) TFEU grants the power to the Council to adopt provisional measures in cases where one or more Member States are 'confronted by an emergency situation characterised by a sudden inflow of nationals of third countries'. This emergency power was first used in 2015 when Italy and Greece received an unprecedented number of asylum-seekers. The Council adopted a temporary relocation scheme applying to 40 000 people.[29]

Another example connected to emergencies that arise in the territory of a Member State is Article 107 TFEU which includes several exceptions to the general prohibition on state aid, and some of these are potentially applicable depending on the type of emergency. More importantly, Article 107(3)(e) TFEU makes it possible for the Council to decide that a certain 'category of aid' is compatible with the internal market, which is a versatile article that may untie a government's hands from the restraints of state aid obligations during an emergency.[30]

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[24] De Witte (n 8) 5.
[25] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR). Derogation clauses are otherwise a common feature in human rights regimes as emergencies typically involve challenges to maintain adequate levels of protection of individual rights. Claudia Cinnirella, '"Emergency Powers" of the European Union: An Inquiry on the Supranational Model' (2025) 10(3) European Papers (Online periodico) 525, 531.
[26] Cf. Kreuder-Sonnen (n 22), who in 2023 posed the question: 'Does Europe Need an Emergency Constitution?'. See also Rebasti et al (n 8).
[27] Flore Vanackère and Yuliya Kaspiarovich, 'European Institutions Acting Outside the EU Legal Order: The Impact of the Euro Crisis on the EU's "Single Institutional Framework"' (2022) 7(1) European papers (Online periodico) 481.
[28] European Parliament, 'Report on Proposals of the European Parliament for the Amendment of the Treaties' (2023) 2022/2051 (P9_TA(2023)0427) OJ C4216. See 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; Cinnirella (n 25).
[29] 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 [2105] OJ L239/146.
[30] Juan Jorge Piernas López, 'The COVID-19 State Aid Judgments of the General Court … Every Man for Himself?' (2021) 20(2) European state aid law quarterly 258; Juan Jorge Piernas López and Michelle Cini, 'State Aid Control: Rule Making and Rule Change in Response to Crises' in Diane Fromage, Adrienne

The treaty-based rules on accepted justifications for violations of the rules on free movement of goods, persons, services and capital found in Articles 36, 52, 62 and 65(1)(b) TFEU are also emergency powers. These rules regulate the scope of a valid exception in case of an emergency in a particular Member State. It is often claimed that Member States retain a large margin of discretion when it comes to the scope of these justifications but ultimately it is for the CJEU to decide on the legality of the exception, taking non-discrimination and proportionality into account. In this way, these provisions, and the adhering case law, control the scope of emergency measures taken by the Member States in their own territory. The articles serve the same function as Article 78(3) TFEU but it is the individual Member State that decide to trigger the power, not the Council.

Articles 346 and 347 TFEU, which are sometimes referred to as 'national escape clauses', should also be mentioned in the context of primary law emergency powers. The articles explain that there are circumstances under which the obligations under the treaties are exempt. In the early years of EU integration, there were more of this kind of 'safeguard clauses', but these were abandoned through the EEC implementation periods and subsequent treaty revisions.[31] However, just as in the case of valid exceptions to the rules on free movement, it is the CJEU who interprets the scope of these clauses which means that the EU has the power to restrict the scope of Member State emergency measures and therefore these articles are included in the category of emergency powers under EU primary law.

As we can see, there are several EU emergency powers under the treaties that are designed to facilitate emergency governance on the *Member State level.* These are typically designed as exceptions to obligations under EU law. In some cases, it is for the Council to decide that the Member State is granted an exception (including the extent of the exception) while in others it is up to the Member State to decide on the emergency measure. However, in both situations the scope of the exception is controlled not by the Member State courts, but by the CJEU.

Another type of emergency power under the treaties is designed to deal with emergencies on the supranational *EU level.* Among these powers we find Article 66 TFEU, which authorizes the Council to adopt 'safeguard measures' with regard to third countries in order to protect the operation of the economic and monetary union, and Article 122(1) TFEU, which is an emergency power connected to common economic policy. Article 122(1) TFEU is probably the article that is the most open-ended emergency power in the treaty. It is also less connected to the territorial jurisdiction of a particular Member State than previously mentioned emergency powers. Under Article 5 TFEU, the Member States shall coordinate their economic policies. The coordination of economic policy is an obligation for all Member States, irrespective of participation in the common monetary policy (the Euro) and Article 122(1) TFEU allows the Council to decide on 'measures appropriate to the economic situation'. This article has received quite a lot of attention from academia in recent years, and it is perhaps the attributed power that most resembles a general

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Héritier, and Paul Weismann (eds), *EU Regulatory Responses to Crises: Adaptation or Transformation?* (Oxford University Press 2025).

[31] Cinnirella (n 25) 533.

constitutional emergency clause.[32] The article has been part of Union law since the Rome Treaty, but recent examples of application include measures taken to counter the effects of COVID-19 on the economy,[33] to secure the supply of medical equipment during the pandemic[34] as well as measures taken to address the energy crisis that followed the Russian full-scale invasion of Ukraine.[35] The scope of Article 122(1) TFEU is potentially far reaching, and while there is general agreement on that Article 122(1) TFEU can be used for emergency type situations, some scholars argue that an emergency is not required for legal recourse to Article 122(1) TFEU.[36]

Lastly, there are obligations under EU law that arise when an EU Member State is 'the object of a terrorist attack or the victim of a natural or man-made disaster'[37] or the victim of armed aggression on its territory.[38] In Article 222 TFEU, the obligation extends to 'the Union and its Member States' who shall act 'jointly in a spirit of solidarity', but this requirement is not part of the obligation in Article 42(7) TEU. These obligations are clearly part of EU law, and they most definitely concern emergencies, but they do not contain any derogations from legal obligations nor enable any special emergency measures for the EU institutions. Consequently, they are not a clear-cut example of emergency powers as defined in this article. On the other hand, Cinnirella includes Articles 42(7) and 222 TFEU in what she calls the 'core framework' of EU emergency powers, which demonstrates that there are differing perspectives on what constitutes emergency power, just as in the case of emergency and crisis law, and that the categories vary depending on context.[39]

2.2 EMERGENCY POWERS UNDER SECONDARY LAW

Emergency powers under secondary law are legislative acts that set up permanent emergency frameworks '*pro futoro*'.[40] These PEFs typically include the authority to adopt implementing

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[32] Daniel Calleja, Tim Maxian Rusche, and Trajan Shipley, 'EU Emergency – Call 122? On the Possibilities and Limits of Using Article 122 TFEU to Respond to Situations of Crisis' (2023) 29 Columbia Journal of European Law 520; Cinnirella (n 25) 535-538. For an overview of the use of Article 122 TFEU see Merijn Chamon, 'The use of Article 122 TFEU' (2023) European Parliament PE 753.307.

[33] 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 [2020] OJ L433I/23; 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 [2020] OJ L159/1.

[34] 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, [2022] OJ L314/64.

[35] Council Regulation 2022/1369 on coordinated demand-reduction measures for gas [2022] OJ L206/1; Council Regulation 2022/1854 on an emergency intervention to address high energy prices [2022] OJ L261I/1.

[36] See for example Merijn Chamon, 'The non-emergency economic policy competence in Article 122(1) TFEU' (2024) 61(6) Common Market Law Review 1501. The authors of the FIDE Institutional report conclude (Rebasti et al (n 8) 174): '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'.

[37] Article 222 TFEU.

[38] Article 42(7) TEU.

[39] Cinnirella (n 25) 552.

[40] Cf. Rebasti et al (n 8) 211.

acts[41] which means that they fulfil the same function as the enabling emergency powers in the treaties, for example Article 78(3) TFEU. In this sense, the PEFs perform the same function as treaty articles enacted with unanimity.

Adoption of PEFs through the ordinary legislative procedure (OLP) is a fairly new approach. Among their general distinguishing features we find that PEFs are often sector specific and that they provide the possibility for the EU-institutions to activate an 'emergency mode' which allows for the adoption of pre-defined emergency measures and, perhaps most interesting of all in the context of this article, they can be adopted on *normal* legal bases as distinct from the treaty provisions granting emergency powers.[42] Some recent examples include the Regulation on serious cross-border threats to health,[43] the Regulation on a reinforced role for EMA,[44] the Chips Act,[45] the 2024 amendments to the Schengen Border Code[46] and of course the regulation in focus in this article: the IMERA.

This new development has not yet received as much attention as it probably should. There is an interesting, almost counter-intuitive aspect of using powers conferred to harmonize, coordinate or support an area to create general emergency measures. Harmonization is the instrument used to eliminate regulatory diversity, whereas emergency powers are needed under exceptional circumstances. In a way, one could argue that this is the exact opposite of harmonization. So, the goal is not to harmonize the material content of EU law – to make the conditions of for example intra-community trade the same in all Member States – but to make sure that the Member States are unable to adopt measures that create differences in the regulation. In this sense, the logic behind the PEFs is similar to the logic that motivates a distinction between shared and exclusive competence, which is the same logic that underpins the rule of pre-emption.[47]

Furthermore, the distinction between supportive and shared competence is also called into question. As an example, the Union has been given the 'competence to carry out actions to support, coordinate or supplement the actions of the Member States' in the area of protection and improvement of human health.[48] This competence is reflected in Article 168 TFEU in Title XIV of the TFEU, a title named 'Public Health'. Article 168(5) TFEU gives the EU legislator the competence to adopt measures, inter alia to 'combat the major cross-border health scourges'. However, Article 168(5) TFEU may not be used to harmonize Member State legislation. Still, the Regulation on Serious Cross-border Threats to Health was adopted on 23 November 2022 on the basis of Article 168(5) TFEU.[49]

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[41] Article 291 TFEU.
[42] Cf. Rebasti et al (n 8) 217.
[43] 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 [2022] OJ L314/26.
[44] 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 [2022] OJ L20/1.
[45] 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 [2023] OJ L229/1.
[46] 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.
[47] Article 2(2) TFEU.
[48] Article 6(a) TFEU.
[49] Regulation (EU) 2022/2371 (n 43). Cf. Rebasti et al (n 8) 217.

The regulation includes emergency measures that are triggered by the Commission declaring a 'public health emergency at Union level'[50] which enables certain predefined measures.[51] This means that the EU legislator, applying the ordinary legislative procedure has used a coordinating competence to create an emergency framework activated by the Commission – that put emergency law in place that is binding on all Member States in the same way – through an implementing act, in an area where harmonization is forbidden.

Another example of a PEF with a potentially far-reaching harmonizing effect is the IMERA. The IMERA's potential scope of application is much broader than for example the scope of PEFs based on Article 168(5) TFEU, or indeed any other sectoral approach, but more importantly, while a regulation such as Regulation 2022/2371 serves to protect public health (that is, the health of individuals residing in the territory of the EU Member States), the IMERA serves to protect the internal market (a social institution).

2.3 CRISES AND EMERGENCIES ON DIFFERENT LEVELS

The overview of EU emergency powers presented above portrays a framework of legal provisions whose main common feature is that they apply in situations where the normal legal measures are insufficiently effective to govern the situation at hand. Sometimes the exceptional circumstances are referred to as a 'crisis' and sometimes as an 'emergency'. Sometimes the crisis or emergency takes place on the Member State level, and sometimes it takes place on the EU level. There are EU emergency powers available to handle many kinds of exceptional circumstances but are the provisions that govern these powers sufficiently clear?

2.3[a] What? A Crisis or an Emergency?

The activation of emergency powers under EU law is not always connected to a decision declaring an emergency. Emergency may, in some rare cases, be a legal pre-requisite to access emergency powers, but in most cases the term is not used. Emergency powers available to a democratic polity have an impact on said polity's ability to uphold the rule of law.[52] How big an impact depends on their construction, but also on the existence of other checks and balances in the polity's constitutional set up.

It is quite possible that conceptual ambiguity accentuates the lack of precision required to activate EU emergency powers, leading to what Kreuder-Sonnen calls 'rule bending',[53] which in turn invites abuse of emergency powers.[54] It should, however, be noted that in the case at hand the risks associated with the emergency powers available under the IMERA are not comparable with the risks most political thinkers associate with the question of emergency and the rule of law because of the nature of the powers granted. The IMERA does not create an indefinite state of exception that sets fundamental rights protection aside, to name but one example. However, that does not mean that it is unimportant for the constitutional balance of the EU. The question of sovereignty lies directly in this balance,

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[50] Regulation (EU) 2022/2371 (n 43) Article 23.
[51] ibid Article 25.
[52] Greene (n 17); Szente (n 21).
[53] Kreuder-Sonnen (n 22) 128.
[54] Bellenghi, 'Neither Normalcy nor Crisis (n 13) 3-4.

and since the power to govern emergencies is a power closely connected to the sovereign state – as proven by the discussion on constitutional emergency – the power to override Member State executive decisions on emergency is potentially interruptive to the EU constitutional architecture.

In this context it is equally possible to argue that the power to activate emergency powers should be 'narrowly' construed as it is to argue the contrary. However, both arguments require conceptual clarity on the distinction between crisis and emergency, as it is only under emergencies that emergency power can be activated.

2.3[b] Where? An EU Emergency or an Emergency in the EU?

The overview of EU emergency powers in this article shows that most of them concern emergencies that take place in the territory of a Member State. Sometimes, the emergencies affect several Member States at the same time, but that is not necessarily recognized by the emergency powers in EU law, as for example in Articles 36 or 78(3) TFEU. In other situations, such as for example the declaration of a public health emergency at EU level,[55] the international dimension of the emergency is recognized.

On the other hand, provisions such as Article 122(1) TFEU or the IMEM[56] provide emergency powers to protect the integrity of the *internal market*. Since an economic emergency, or an internal market emergency, is something very different compared to a sudden natural disaster or a terrorist attack, it is important to acknowledge the potential need to treat these two kinds of emergency powers as different kinds of emergency powers.

The reason for bringing attention to this aspect of EU emergency powers is that it is connected to sovereignty and conferral of power, although it may have taken a 'peculiar form'.[57] The question of where the emergency takes place is intimately connected to the question of who, as Carl Schmitt famously put it, decides on the exception.[58] One reason why there are provisions such as Article 36 TFEU in the treaty is because the sovereign Member States understood that the conferred power to establish an internal market would most likely, on occasion, limit the scope of unilateral Member State action within the scope of non-conferred, or retained, power. This link to sovereignty and conferral is what makes the power to deal with *EU emergencies* especially interesting to identify, analyse and monitor.

3 THE CONCEPT OF INTERNAL MARKET EMERGENCY

The focus of this article is internal market emergency, but activation of the IMEM is only one of all the emergency powers made available through the IMERA. To inform the conceptual discussion of the IME, a short description of the regulation is provided.

The IMERA creates an institutional structure at the disposal of the Commission to carry out the task 'to effectively anticipate, prepare for and respond to the impact of crises on the internal market'.[59] The regulation establishes an institutional framework that consists

55 Regulation (EU) 2022/2371 (n 43) Article 23.
56 IMERA (n 1) Article 18.
57 Kreuder-Sonnen (n 22) 126.
58 Schmitt (n 14).
59 IMERA (n 1) Article 1(1).

of the Internal Market Emergency and Resilience Board[60] an Emergency and resilience platform[61] and Liaison offices.[62] Once the IMERA is applicable, the Commission may adopt implementing acts setting up more bodies as part of the Contingency framework.[63]

The Board shall consist of one representative from each Member State and one from the Commission. The Commission shall chair the Board and invite the European Parliament to appoint a permanent observer.[64] The mere observation status shows both that the IMERA channels decision-making power away from the legislative branch, a common feature of emergency frameworks, and that the Council is first and foremost seen as part of the executive in this context. The Board may adopt opinions, recommendations and reports.[65] The role of the Board is to assist and advise the Commission on various tasks for the purpose of 'internal market contingency planning',[66] the IMVM[67] and the IMEM.[68]

As a means to prepare for crises and emergencies, the IMERA empowers the Commission to adopt implementing acts to create a contingency framework regarding crisis preparedness and in particular communication structures for the vigilance and emergency modes. Organisation of training, simulations and stress tests all form part of the envisaged tasks for the Commission's 'internal market contingency planning'.

When the Commission considers that there is a 'threat of a crisis that has the potential to escalate to an internal market emergency within the next six months'[69] it shall propose to the Council to activate the IMVM through a Council implementing act. When activated, the competent Member State authorities shall monitor supply chains of goods and services of designated 'critical infrastructure', and the free movement of goods and persons involved in the production of those goods and services.[70] Member States shall set up a confidential inventory of the relevant economic operators in the national territory (that operate in the field of goods and services of critical importance).

In brief summary the IMERA harmonizes crisis management relevant to the functioning of the internal market. The Commission, with the assistance of the Board, is tasked to gather and analyse crisis-related relevant information gathered by Member States and/or the Commission and may, if the need arises, take measures that involve requirements on the Member States or propose to the Council to adopt implementing acts that allow for such measures. As noted by Somssich, these executive powers are quite far reaching.[71]

3.1 UNDERSTANDING INTERNAL MARKET EMERGENCY THROUGH THE COMMISSION'S PROPOSAL

[60] ibid Article 4.
[61] IMERA (n 1) Article 7.
[62] ibid Article 8.
[63] ibid Article 9.
[64] In the original proposal, the Commission was not obliged to invite the European Parliament to appoint an observer – Somssich (n 3) 17.
[65] IMERA (n 1) Article 4(10).
[66] ibid Article 5(1). The planning process is described in described in Title II (Articles 9-13).
[67] ibid Article 5(2), described in Title III (Articles 14-16).
[68] ibid Article 5(3), described in Title IV (Articles 17-35).
[69] ibid Article 3(2).
[70] ibid Article 16(1).
[71] Somssich (n 3) 18.

The Commission's proposal to enact the IMERA was presented on 19 September 2022.[72] The first paragraph of the proposal explains that the European economy relies on a well-functioning single market and that the pandemic and Russia's invasion of Ukraine have demonstrated that the single market and its supply chains are vulnerable in case of 'unforeseen events'. Therefore, 'the functioning of the Single Market needs to be guaranteed in times of emergency'.[73]

Even though the problem to be solved, as described by the Commission, seems easy to understand, the Commission does not connect the dots between a pandemic or an unlawful use of force against a state bordering the EU on the one hand, and the vulnerability of the internal market and its supply chains on the other. The real reason why the internal market is at risk is because of the barriers to free movement the Member States raise as emergency measures when hit by emergencies such as a pandemic and a sudden spike in the number of refugees seeking asylum. It is the uncoordinated Member State responses to emergency that cause the disruptions that threaten the internal market.

This aspect of the problem description is acknowledged in the preamble of the IMERA,[74] and there is no doubt that the Commission could have pointed this out in the proposal. Instead, the Commission wrote that

> However, the existing EU frameworks generally lay down rules concerning the day-to-day functioning of the Single Market, outside of any specific crisis scenarios. There is *currently no horizontal set of rules* and mechanisms which address aspects such as the contingency planning, the crisis anticipation and monitoring and the crisis response measures, which would apply in a coherent manner across economic sectors and the entire Single Market.[75]

The emphasis on necessary rules currently unavailable shows that the Commission focused on making a distinction between the two different perspectives on the same emergency – the Member States' perspective(s) and the supranational/internal market perspective.[76] The Commission then goes on to explain that the Single Market Emergency Instrument (IMERA)[77]

> is not intended to lay down a detailed set of EU level provisions which should be exclusively relied upon in the case of crisis. Instead, the instrument is intended to lay down and ensure the coherent application of possible combinations between provisions taken at EU level together with rules on the coordination of the measures taken at the level of the Member States.[78]

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[72] Proposal for SMEI/IMERA (n 2). At the time, the IMERA was called the SMEI. It was renamed in February 2024, ibid, 3.
[73] ibid 1.
[74] Cf. IMERA (n 1) recitals 2 and 3 in the preamble.
[75] COM(2022) 459, p. 8 (emphasis added).
[76] Cf. the distinction between an *emergency in the EU* and an *EU emergency* emphasised above.
[77] The name was changed to Internal Market Emergency and Resilience Act on the European parliament's proposal at the final stages of the legislative process (February 2024). Regarding the symbolic meaning of the name change Somssich argues that since 2019, certain regulations have consistently been named 'acts' in order to grant them 'privileged status', see Somssich (n 3) 9-10.
[78] Proposal for SMEI/IMERA (n 2) 8.

The intentions of the Commission in this regard may be true about the level of detail in the proposed measures, but they are not particularly relevant as the potential of pre-emption does not depend on the Commission's intentions. What is more relevant is the emphasis on 'coherent application' and 'rules on the coordination' which indicates that the Member States are no longer trusted to unilaterally handle national emergencies according to their defined best interests as this has proven too detrimental to the functioning of the internal market. In other words, the treaty provisions that grant the Member States the possibility to derogate from internal market law in a case of emergency are considered too lax, and now the Commission proposes secondary law that will limit the scope of such treaty-based derogations.

As regards maintaining a distinction between crisis and emergency, the Commission proposal follows the same pattern as previous regulation of EU emergency powers by treating the two as overlapping and practically interchangeable in most cases and on occasion as synonyms. On the other hand, the Commission makes a clear distinction between EU emergency and Emergency in the EU but the proposal does not make an explicit distinction along the lines this article has done above, nor does it elaborate on how the two relate to each other and what consequences the duality brings.

3.2 UNDERSTANDING INTERNAL MARKET EMERGENCY THROUGH THE IMERA'S DEFINITION OF CRISIS

The full title of the IMERA is Regulation (EU) 2024/2747 of the European Parliament and of the Council *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.[79] The regulation does indeed establish a comprehensive framework of measures, and they are definitely related to maintaining a resilient internal market in case of an internal market emergency. But, even though 'internal market emergency' is part of the title of Regulation 2024/2747 (IMERA) and appears as a legal term in the regulation's preamble and operative parts respectively, there is no definition of the term in the regulation. The term crisis, however, is defined in Article 3(1) IMERA, and the definition includes several of the qualities that, according to on-going academic debate, distinguishes an *emergency* from a crisis.[80] In particular, the definition states that a crisis is 'exceptional, unexpected and sudden' and of 'extraordinary nature and scale'. This indicates that an IMERA-crisis is an event that is very similar to what is often described as an emergency.

Given the importance of clear criteria for the activation of emergency powers, a clear definition of the legal term 'internal market emergency' is vital, especially since the concept internal market emergency is new. Therefore, a textual interpretation of the regulation's descriptions of both the concept and the term is warranted.

Article 3.3 IMERA, which defines the internal market emergency mode, explains that the IMEM is a 'framework for addressing a crisis with a significant negative impact on

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[79] Emphasis added.

[80] Article 3.1 states that: '"crisis" means an *exceptional*, *unexpected* and *sudden*, natural or man-made event of *extraordinary nature and scale*' (emphasis added). Cf. Greene (n 17), De Witte (n 8), Bellenghi, 'Neither Normalcy nor Crisis (n 13), Bellenghi, 'The European Parliament's Proposal for an EU State of Emergency Clause' (n 28) 7, Cinnirella (n 25) 527.

the market'. Given its name, it is reasonable to assume that the IMEM only handles internal market emergencies, and consequently Article 3.3 IMERA could be understood as providing an implied definition of an IME, in the absence of an explicit one.[81] However, that conclusion would mean that an (internal market) emergency remains undistinguished from a crisis on a conceptual level, which would be undesirable as it would add to blurring the lines between emergency and crisis.

The fact that Article 3(3) IMERA defines the 'internal market emergency mode' rather than an 'internal market emergency' is interesting in its own right, but it does not seem to carry any particular meaning for the activation of the IMEM.[82] There are criteria for the activation of the IMEM in Article 17(1) IMERA, that complement Article 3(3) IMERA, which means that to establish what an IME is requires that Articles 3(3) and 17(1) IMERA are read in conjunction. Article 17(1) IMERA stipulates that when the Commission and the Council set out to determine whether the conditions in Article 3(3) IMERA are fulfilled, they must assess whether the obstacle(s) to free movement created by the crisis has an impact on 'at least one sector of vital societal functions or economic activities in the internal market'.[83] These conditions must be met in order to activate the IMEM. Furthermore, it is the Commission who proposes to the Council to activate the IMEM where the Commission 'considers that there is an internal market emergency'[84] and according to Article 18(1) IMERA, the Council may only activate the IMEM 'if the criteria laid down in Article 17(1) are fulfilled'. Although there is no reference made to Article 3(3) IMERA in Article 18 IMERA, one ends up there via 17(1) IMERA. To conclude, these three articles read together tell us that the IME is not exhaustively defined through the contextual interpretation of Article 3(3) IMERA.

Ironically enough, while the article that provides the criteria to activate the IMEM does not mention the term 'internal market emergency', the article that activates the internal market *vigilance* mode does:

> internal market vigilance mode' means a framework for addressing the threat of a crisis that has the potential to escalate into an internal market emergency within the next six months.[85]

This means two things. On the one hand, it means that Article 3(2) IMERA refers to a third type of crisis, namely one that has the potential to escalate into an internal market emergency, but is different from the type of crisis defined in Article 3(1) IMERA. On the other, it means that Article 3(2) IMERA also relies on a definition of internal market emergency.

Consequently, in order to make sense of the definitions in Articles 3(1)-3(3) IMERA, one needs to accept that a crisis (as defined in Article 3(1) IMERA) can be placed in one of

[81] Bellenghi claims that Article 3(3) IMERA provides a definition of an IME, but I would respectfully disagree. First and foremost on purely formalistic grounds, but also for reasons that will be developed below. Bellenghi, 'Good Health and Bad Memory' (n 12) 4.
[82] It should be noted that since Article 3(2) defines the 'internal market vigilance mode', thre is an argument that it is Article 3.1, defining 'crisis' which is out of place.
[83] IMERA (n 1) Article 17(1).
[84] ibid Article 18(3).
[85] ibid Article 3(2).

three different categories:

1) Article 3(3)-type: A type of crisis that allow for activation of the IMEM;
2) Article 3(2)-type: A type of crisis that allow for activation of the IMVM;
3) Article 3(1)-type: A type of crisis that does not allow for the activation of either of the modes mentioned above.

To understand the legal concept of internal market emergency, and to work out a definition of the legal term that corresponds to this concept, we will analyse in what way an Article 3(3)-type of crisis differs from an Article 3(1)-type of crisis.

Article 3.1-type of crisis	Article 3.3-type of crisis
'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	a crisis with a **significant** negative impact on the internal market *which severely* disrupts the free movement of goods, services and persons or, *where such a severe disruption has been or is likely to be subject to divergent national measures*, the functioning of its supply chains

There are two conditions that are common to both definitions. The first one is the degree of the crisis' negative impact and the second is the effect(s) of the negative impact.

In an Article 3(1)-type of crisis the *potential* of '*severe* negative impact on *the functioning of* the internal market' is required. For the crisis to become an Article 3(3)-type of crisis, there can no longer only be a potential for a crisis, and the condition 'severe' must have deteriorated to a '*significant* negative impact *on* the internal market'. There is also a difference regarding the object of the negative impact, i.e. what is negatively affected. In the Article 3(1)-type it is the 'functioning' of the internal market, and in the Article 3(3)-type it is 'the internal market' itself.[86]

The second condition that distinguishes the two is the effect(s) of the negative impact. In an Article 3(1)-type of crisis the 'severe negative impact' must disrupt *either* the free movement of goods, services and persons *or* the functioning of the supply chains (of the internal market).[87] Thus there are two alternative effects that both, individually or collectively, may meet the definition of an Article 3(1)-type of crisis. For the crisis to be defined as an Article 3(3)-type of crisis, the 'significant negative impact' must *severely* disrupt free movement of goods, services and persons. This is a sharpening of the required effect of

[86] It is difficult to say whether this distinction was intentional. Based on the Commission's proposal and a contextual interpretation of the text, my analysis would be that it probably was not intended to have a legal effect.

[87] After serious consideration I have decided to consider the 'and' included between 'market' and 'that' to be a typo, and that it should not be included in the sentence. My reason for doing so is that keeping it would give the text the meaning that disruption of the free movement and of the functioning of the supply chains are cumulative conditions for the severe negative impact, and not effects of the severe negative impact. I acknowledge that this interpretation goes against the textual interpretation of the article and that this may be a mistake on my part.

the negative impact on free movement. However, when it comes to the effect on the functioning of the internal market's supply chains this is still an alternative condition, but it comes with a qualification. For it to apply in an Article 3(3)-type of crisis, the disruption must have been, or be seen as likely to be, subject to divergent national measures. This is an unexpected, significant limitation on the condition compared to the definition in Article 3(1). It could be seen as an attempt to separate the less severe crises from more severe ones, but it seems excessive if not unnecessary as it is difficult to see both how the national measures would be identical (as opposed to divergent) unless harmonized and why not mere national measures (without 'divergent') would potentially disrupt supply chains equally hard. Frankly, it is difficult to picture an event that has a significant negative impact on the internal market which severely disrupts free movement, that has not been subject to divergent national measures, so the point of the condition is most likely moot.

On the other hand, although it may seem challenging to imagine a severe disruption to the functioning of supply chains which in itself is not a severe disruption to the free movement of goods or services, one should keep in mind the situation during COVID where the disruption in supply chains meant that domestic production of certain necessary goods was equally impossible as the importation of equivalent goods. This experience may be the reason why a severe disruption of the functioning of the market's supply chains may suffice to fulfil the conditions of an Article 3(3)-crisis.[88] The future will show whether it was a wise move to make a distinction between 'supply chains' and the free movement of goods and services. I remain sceptical, as I struggle to see what kind of measure could disrupt supply chains while escaping the Dassonville-formula – unless it is a poorly drafted attempt to escape the proportionality test under free movement law (poorly drafted as no measures are immune to a potential proportionality test).

3.2[a] What distinguishes an internal market emergency from a crisis?

The conclusion reached following a closer analysis of the two definitions is that even though there are two conditions in common (degree of negative impact and effect(s) of negative impact), they lack a clear and coherent structure – a shared understanding of the components of crisis – on which to gauge the severity of the crisis and distinguish between the three different kinds.

In order to distinguish between (1) a crisis, (2) a crisis that has the potential to escalate into an internal market emergency within six months and (3) what must be assumed to be an internal market emergency (the situation described in Article 3(3) IMERA), the Commission and the Council must navigate a multitude of different legal conditions and requirements scattered across several different articles in the regulation, which makes the provisions difficult to apply. This may in turn inspire litigation since some Member States may find it hard to accept not being allowed to govern emergencies in their respective jurisdictions. Most importantly, as is shown in detail in the analysis above, the text is highly complex.

Unless the drafters of the regulation actively chose to understand *crisis* and *emergency* as

[88] Cf. IMERA (n 1) Article 17(1) which elaborates and expands on the criteria for activation of the IMEM, compared to Article 3(3).

synonyms, the fact that there is a legal definition of crisis while one of emergency is left out makes no sense at all. Whether the drafters were confused on the precise relationship of the two terms (crisis and emergency), or perhaps could not agree, or whether the confusion is intentional, is impossible to deduce based on the text of the proposal. Either way, the regulation is a worse piece of legislation for it. As a prime example of this confusion, one could point out that while the name of the regulation is the 'Internal market emergency and resilience act', and not the 'Internal market crisis and resilience act', it is crisis, and not emergency, that is defined in the first section of the article entitled 'Definitions' (Article 3 IMERA).[89]

In spite of this deficiency, it is submitted here that a legal definition of the term 'internal market emergency' is necessary. Firstly because of the test in Article 3(2) IMERA, but more importantly because the institution called 'internal market emergency mode' addresses 'internal market emergencies' – not mere 'crises'.

Based on the reasoning presented above, drawing inspiration from Articles 3(1) and 3(3) IMERA, a definition of an internal market emergency could be:

> an internal market emergency 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 with a significant negative impact on the internal market which severely disrupts the free movement of goods, services and persons or, where such a severe disruption has been or is likely to be subject to national measures, the functioning of the internal market's supply chains.

In a way, one might say that the IMERA is motivated by a 'need for emergency measures in case of emergency measures' and that an internal market emergency is created by the Member States when they govern emergencies. It is true that also other Member State actions than those taken to govern emergencies may be the cause of an internal market emergency, and it is equally true that the definition above, as well as the definitions of the three types of crisis, include events that have negative impact on the internal market irrespective of Member State actions, but it is difficult to find examples in practice. The Eyjafjallajökull volcanic eruption in 2010 is perhaps such an event, as the plume of volcanic ashes created immediate danger for air traffic between EU Member States and thereby may have had a significant negative impact on the internal market severely disrupting free movement, but on the other hand the air traffic control measures taken to prevent accidents would probably be the cause of a decision to activate the IMEM.

Furthermore, the legal basis of IMERA is Articles 21, 46 and 114 TFEU.[90] Articles 46 and 114 TFEU are legal bases for measures taken to secure the *establishment and functioning* of the internal market, and Article 21 TFEU is to protect the free movement of EU citizens who cannot rely on the free movement rights realized through Article 46 TFEU. The inclusion of Article 21 TFEU as a legal basis is important for our understanding of

[89] I have used the popularized name of the regulation to make this point, but the point still stands in relation to the formal name of the regulation.

[90] Based on the voting procedure used when adopting this measure (codecision, Article 294 TFEU), we can conclude that Article 21(3) TFEU was not part of the legal basis. The Commission's proposal suggested Article 45 TFEU, not 46, but this was not accepted by the Council and the European Parliament.

the concept of 'internal market emergency'. This conferred legislative power[91] is not for the establishment or the functioning of the internal market, but to protect individual rights guaranteed to EU citizens – rights that are not secured by the proper functioning of the internal market. This inclusion of Article 21 TFEU therefore identifies a secondary objective of the IMERA, the objective to protect the rights of these individuals against national measures preventing their right to free movement under the treaties. The important point here is that the type of obstacles to free movement envisioned by Article 21 TFEU can only be introduced by the Member States. In conclusion, the type of emergencies that inspired the adoption of IMERA are caused by the actions of Member States, and a definition of the internal market emergency should have acknowledged this fact.

However, against such a conceptualization, one could point to the fact that it is mainly Articles 20-22 IMERA that address Member State actions preventing the functioning of free movement and the internal market and that the regulation includes many more provisions[92] that are most useful in internal market emergencies not caused by Member State measures (to the extent that such emergencies will occur). The powers granted to the Commission during an IMEM include the authority to request and coordinate information from both Member States and economic operators in relation to crisis-relevant goods and services. There are also rules on coordinated public procurement on behalf of the Member States, as well as the setting up and maintaining digital tools or IT infrastructures supporting the objectives of the regulation. All of these measures are examples of the benefits of using IMERA in an emergency, internal market or not, and that there are pertinent reasons for maintaining a definition of an internal market emergency that allows for activation of an IMEM also when Member State measures are not the cause of the internal market emergency.[93] However, the pertinent question then becomes whether these measures in and of themselves are necessary harmonizing measures for the establishment and functioning of the internal market, which has significant implications for the motivation of the necessity of the regulation in the first place.

On balance, it is submitted here that under the IMERA it is the internal market which is the primary victim of the emergency (victim in the sense that it is the internal market that suffers the effects of the emergency). The Member States, and consequently the people who live in these Member States, are secondary victims. This is different from most other types of emergencies regulated by EU emergency law, if not all, and it shows without doubt that the IMERA is an EU emergency power primarily designed to handle *EU emergencies* – not *emergencies in the EU*.

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[91] The conferred legislative power is found in Article 21(2) TFEU.

[92] These include for example the information requests to economic operators (Article 27 IMERA), the priority-rated requests (Article 29 IMERA), the rules on coordinated distribution (Article 34 IMERA) and the rules on public procurement by the Commission on behalf of the Member States (Title V IMERA).

[93] Even though these are not the type of situations emphasized in the preparatory acts, nor in the regulation's preamble, and indeed are quite difficult to imagine. The best example I can come up with would be a situation where a 'severe disruption' to the functioning of supply chains is caused by events that take place outside of the EU Member States jurisdiction. One such example could, perhaps, be inspired by the case when the *Ever Given* ran aground and blocked the Suez Canal for six days in March 2021. The losses Maersk incurred because of the incident have been calculated to around $89M, and one can only imagine what the effects of the six day block of the Suez Canal meant for businesses in the EU. Nguyen Khoi Tran et al, 'The costs of maritime supply chain disruptions: The case of the Suez Canal blockage by the 'Ever Given' megaship' (2025) 279 International Journal of Production Economics 109464.

To conclude, an 'internal market emergency' is not the same thing as an 'emergency', nor a 'crisis'. It is caused by sudden, unexpected events and the internal market – not the Member State(s) – is the victim.

3.3 UNDERSTANDING INTERNAL MARKET EMERGENCY THROUGH THE IMEM

As a main rule, implementation of EU law is carried out by the Member States through national legislation. However, the case of internal market emergency, which concerns an EU emergency rather than an emergency in the EU, 'uniform conditions for implementing legally binding acts' were deemed 'needed'.[94] Under such circumstances, Article 291(2) TFEU stipulates that implementing powers can be conferred on the Commission, and in 'duly justified cases' on the Council. The CJEU has emphasised the importance of a clear motivation of those circumstances in its case law, highlighting that Council implementation is an exception that must be construed narrowly and be properly motivated.[95] Implementing acts are normally adopted by the Commission, and Council implementing acts are rare.[96]

However, just as in the case of the IMVM, the decision to activate the IMEM is taken by the Council on a proposal from the Commission by means of an implementing act.[97] In its proposal, the Commission must take into consideration the opinion provided by the Board.[98] The Board, in its turn, shall prepare its opinion in accordance with Article 5(3) IMERA which entails for example substantive information gathering regarding the nature of the crisis, the measures taken by Member States in response to the crisis and efforts to coordinate crisis-relevant exchange of information.

According to the IMERA preamble, it is the 'exceptional nature of and potential far-reaching consequences for the functioning of the internal market during the internal market vigilance mode or during the internal market emergency mode' that create the need for uniform conditions.[99] In the same section of the preamble, it is explained that these implementing acts must include detailed accounts of the reasons for the Commission's proposal and the Council's decision, and Articles 17(2) and 18(4) IMERA set up requirements in that respect. Since nothing is mentioned regarding voting procedure to adopt

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[94] Article 291(2) TFEU.
[95] Case C-440/14P *National Iranian Oil Company v Council of the European Union* EU:C:2016:128 para. 50. According to Rebasti et al (n 8) 312, the Court has shown 'a great deal of deference' to the choices made by the co-legislators when deciding to deviate from the normal case and give the implementing powers to the Council instead of the Commission..
[96] To underline this point, it serves to mention that there is a regulation, often referred to as the 'Comitology regulation', that lays down detailed rules for the adoption and control of Commission implementing acts. The regulation does not apply to Council implementing acts. Regarding Commission implementing acts under the IMERA, Article 45 IMERA establishes a committee within the meaning of the Comitology regulation. Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13.
[97] IMERA (n 1) Article 18(4). In the Commission's original proposal, the IMVM would be activated by the Commission, but this was changed during negotiations. Somssich (n 3) 18.
[98] IMERA (n 1) Article 18(3).
[99] ibid recital 36 in the preamble.

the implementing act, the decision is taken by qualified majority.[100]

3.3[a] Emergency powers during the IMEM

The emergency powers that become available through the Council implementing decision are listed in Articles 20, 21, 23(1), 23(4) and 40 IMERA. This article focuses on Articles 20 and 21 IMERA, which lay down restrictions that apply to Member State actions during an IMEM, as these are the articles that tell us the most about the concept of IME.[101] One could think of them as 'emergency internal market law' as their aim is to further limit the possibility for Member States to derogate from free movement law. The restrictions are modelled on the traditional rules regarding restrictions to the obligation to provide free movement and require non-discrimination, justification and proportionality[102] as well as an extra proportionality-requirement in the form of a duty not to impose 'undue or unnecessary administrative burden' on citizens or economic operators.[103] According to Article 21(a) IMERA, all measures enacted must be limited in time. Regarding the free movement of goods and services, there are special rules that apply to crisis-relevant goods and services and the intra-union export or transit thereof.[104] Regarding people's right to travel across borders within the Union, there are several provisions that prohibit bans on such travel, for family or work reasons.[105]

At a first glance, it would seem that the effect of triggering the IMEM is that Member States are prohibited to take actions they normally would be allowed to take under EU law, in particular in two ways. Firstly, during the IMEM member states are subject to additional restrictions regarding measures taken in response to emergencies compared to the normal exceptions available through the TFEU and relevant case law. Secondly, certain measures that would be in accordance with EU law are no longer available during the IMEM.

However, Article 20 applies 'in response to an internal market emergency' and Article 21 'during the internal market emergency mode and when responding to an internal market emergency'.[106] Article 20 IMERA stipulates:

> […] when adopting and applying national measures in response to an internal

[100] Article 16(3) TEU. For a concurring conclusion see Emanuele Rebasti, 'Shifting the Institutional Balance in Times of Crisis? The Expanding Role of the Council in the Implementation of EU Spending Instruments' (2024, Jean Monnet Working Paper Series No 3/24) <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> accessed 17 November 2025.
[101] IMERA (n 1) Article 23 concerns obligations on Member States to communicate information about 'emergency measures taken in response to the crisis' to the Commission and the other Member States and to the public, and Article 40 IMERA entrusts the obligation on the Member States to inform each other and the Commission about ongoing procurement proceedings of crisis-relevant goods and services.
[102] IMERA (n 1) Article 20(1).
[103] ibid Article 20(3).
[104] The Council may adopt a list of such goods and services 'where applicable' attached to the implementing act that activates the IMEM, IMERA (n 1) Article 18(4).
[105] ibid Article 21.
[106] IMERA (n 1) Article 20 has 'during the internal market emergency mode' in the title, but not in the operative part whereas Article 21 includes both conditions. On a sidenote, once again, the wording is open for interpretation regarding the potential overlap of the criteria for the activation of the internal market emergency mode and the definition of the internal market emergency. I may emphasize that my own reading is that the articles cover both situations, but the fact that both are covered suggest that they are not synonyms, which strengthens my previous call for a clear definition of an internal market emergency.

> market emergency, Member States shall ensure that such measures comply with Union law.

Article 21:

> During an internal market emergency mode and when responding to an internal market emergency, Member States shall refrain from introducing any of the following […].

It follows that only measures taken in response to an internal market emergency are caught by the restrictions. In the quote from Article 21 IMERA above, the 'and' could be read either as making the two conditions cumulative or as making them alternative,[107] but read in the context of Article 20 IMERA and this section of the regulation I would lean towards the former. As to whether or not this is intended, I am not convinced either way. The point is that the competing perspectives of *EU emergency* and *emergency in the EU* once again come to the fore. It is clear that there have always been emergencies on the Member State level, that require and allow national measures that infringe EU law unless they are justified by reference to the accepted derogations – and that this is true also after the entry into force of the IMERA. But, as Articles 20 and 21 IMERA are worded, do they really apply to such national measures?

The obvious answer is: 'Of course they do!'. This is proven by the motivation given in the Commission's proposal and a large number of the recitals in the preamble of the regulation. But, at the same time, the whole point of the regulation is that Member State measures in response to domestic crisis, which of course could be of a kind that affect several Member States in a similar way exactly in the way the pandemic did, are the most likely cause of an internal market emergency which is proven by the very same statements in the proposal and the preamble.[108] Therefore, logically, the same measure cannot cause the internal market emergency and be a measure taken in response to it, can it?

But the wording is still there. And to make matters slightly worse, Article 23 IMERA speaks about 'Member State measures taken in response to the crisis', which could incorporate both options.

3.3[b] Judicial control of the decisions taken in connection to an IMEM

The decisions to activate and terminate the IMEM are taken by the Council through implementing acts. Nothing in the regulation specifies any procedural requirements as regards what type of act, which means that the Commission's proposal will most likely determine that question. As observed by Rebasti et al, it is the Commission that does the preparatory work motivating the activation or deactivation,[109] while as noted by Bellenghi, even though the normal procedural rules would suggest that the Council needs a unanimous vote to alter the proposal of the Commission it is not certain that this applies

[107] Which, again, would make the internal market emergency something that is not intrinsically connected to the internal market emergency mode.
[108] See for example IMERA (n 1) recitals 1-8 of the preamble and Proposal for SMEI (n 2).
[109] Rebasti et al (n 8) 317.

when taking decisions based on legislation.[110]

As regards the possibility to challenge the Council acts, there is nothing to suggest that these implementing acts should be exempt from judicial review under Article 263 TFEU, as there are numerous examples of implementing acts submitted to the CJEU, not only for a validity control in relation to the scope of the act granting the implementing power,[111] but also on the merits of the act itself.[112] So, just as in the case of all other EU emergency powers, the CJEU exerts judicial control over the actions taken. This means that case law may contribute to our understanding of the concept in 'internal market emergency' in the future.

Finally, it remains to be seen how the Commission would respond to a notification by a Member State under Article 114.4 TFEU during an IMEM. There is nothing in the Commission proposal that addresses the obvious conflict between the right of the Member States to derogate from harmonizing legislation and the IMERA's prohibition under Article 21 IMERA.

4 CONCLUDING REFLECTIONS

The aim of this article is to provide analysis that enhances our common understanding of the concept 'internal market emergency'. In conclusion, I wish to address three points:

1) language and terminology;
2) the constitutional effects of deepening the chasm between EU emergency and emergency in the EU;
3) the constitutional effects of harmonizing emergency measures.

The language and terminology used in the regulation should have been sharper. The most obvious flaw is the lack of an explicit definition of 'internal market emergency' but there are other examples of inconsistent terminology and disconnects between the paragraphs. It seems clear that the regulation is a product of long negotiations, as hard-fought compromises often result in a lack of textual precision.[113] Furthermore, the regulation makes no clear distinction between 'crisis' and 'emergency', which may lead to an expansion of the scope of 'emergency' and more frequent use of emergency powers.

In order not to exaggerate the risk of abuse of powers, it should be noted that the decision to activate the IMEM requires a qualified majority in the Council. This means that at least 15 of 27 Member States (representing at least 65% of the EU's total population) must vote in favour of *limiting their own powers*. This is not comparable to the situation in some sovereign states where, for example, the president has the power to declare a state of emergency granting the executive emergency powers that can only be cancelled by a vote in

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[110] Bellenghi, 'Good Health and Bad Memory' (n 12) 5. See also Rebasti (n 100) 17.
[111] Case C-65/13 *European Parliament v European Commission* EU:C:2014:2289. See also Case C-427/12 *Commission* v *Parliament and Council* EU:C:2014:170, concerning the lawfulness of the choice made by the EU legislature when conferring an implementing power on the Commission within the meaning of Article 291(2) TFEU,
[112] Case C-695/20 *Fenix International Limited v Commissioners for Her Majesty's Revenue and Customs* EU:C:2023:127.
[113] Somssich (n 3).

the legislative assembly.[114] Furthermore, the emergency powers under the IMEM are limited to the powers enumerated in the regulation and not as far reaching as emergency powers can be under national constitutions.[115] As a consequence, it should be noted that the effects of a potential expansion of the executive's use of power is perhaps not as significant a threat from the practical perspective, that is considering what the powers actually enables the Council to do,[116] as it might be from a perspective of constitutional law and perhaps also from a perspective of European integration.

As the activation of the IMEM automatically means that the Member States limit their rights to take certain emergency measures, as if the power to use emergency powers had been pre-empted or turned into exclusive competence, the consequences of a blurred distinction between crisis and emergency are potentially severe.

As regards point number two, EU emergency powers are not very different from emergency powers under national law, but it is a mistake to think that they are the same. The main difference is that the IMERA emergency powers are not devised to handle emergencies in the EU Member States but are focussed on emergencies on the EU level. Most emergency powers in primary law are motivated by the fact that EU Member States need exceptions from their obligations under the treaties in times of emergency. There are exceptions, the most notable one is found in Article 122(1) TFEU, but in most cases EU emergency power is there for the sake of handling *emergencies in the EU*.

The IMERA is a, potentially significant, step towards more emergency power for *EU emergencies* as its main goal is to safeguard the internal market – not the Member States. To achieve this goal, the regulation grants the Council and the Commission emergency powers through QMV-decisions in the Council. The emergency powers range from non-intrusive, from the perspective of sovereign Member States, to potentially very restrictive regarding crisis-relevant goods and services.

For this reason, the introduction of *internal market emergency* in secondary law is a highly interesting development of EU Constitutional law. First of all, the distinction between a *crisis/emergency* and an *internal market emergency* is likely to cause difficulties that may lead to the IMERA not fulfilling its potential. The EU legal terms *crisis* and *emergency* have evolved from signifying an event that threatens the sovereign Member State to also include the concept of an 'internal market emergency' which is something that threatens the internal market – not the sovereign state, but which in most plausible scenarios will originate in *emergencies in the EU*. This may create cases where the same facts on the ground will lead to two different legal situations, depending on perspective. One situation where the Member

[114] Emily Berman, 'Trump's Manufactured Emergencies: A Playbook for Expanding Authoritarian Power' (*Verfassungsblog,* 22 August 2025) <https://verfassungsblog.de/trumps-manufactured-emergencies> accessed 17 November 2025.
[115] Blake Emerson, 'Undoing the American Rechtsstaat: What U.S. Law Is (Not) Prepared For' *(Verfassungsblog,* 16 May 2025) <https://verfassungsblog.de/undoing-the-american-rechtsstaat> accessed 17 November 2025; William E Scheuerman, 'Trump 2.0 as 'Dual State?' (*Verfassungsblog,* 6 May 2025) <https://verfassungsblog.de/trump-2-0-as-dual-state> accessed 17 November 2025; Kim Lane Scheppele, 'Trump's Counter-Constitution "He who saves his Country does not violate any Law"' (*Verfassungsblog,* 21 February 2025) <https://verfassungsblog.de/trumps-counter-constitution> accessed 17 November 2025.
[116] Given the focus on 'crisis-relevant goods' in the list of prohibited restrictions, the drafting of implementing acts specifying such goods will most likely prove a difficult task. As we are yet to learn how this procedure will look, there is not much more to say on the matter at present, but it is definitely worth returning to.

State, relying on the exceptions available in the EU Treaties, wants to handle the emergency using its own emergency powers, and another where a sufficient majority in the Council considers that the Commission's proposal to activate the IMEM shall pass, and therefore declares an internal market emergency. This means that there will be two competing legal solutions to the same emergency. In such a situation, EU law takes precedence – even over a potential state of exception in national constitutional law!

There is thus a risk that EU emergency law in the future will bifurcate into different sets of regulation depending on whether the emergency is an *emergency in the EU* or an *EU emergency*, at least as long as the emergencies affect the functioning of the internal market. Consequently, the new concept of 'internal market emergency' heralds a conceptual discussion similar to the discussion about disentangling emergency from crisis.

Finally, the third point. The EU is built on the principles of conferral, which means that the EU institutions may only act within the remit of the competences conferred upon it, and subsidiarity, which means that the EU may only act when the intended goals cannot be sufficiently achieved by the Member States themselves. With the IMERA, we now have secondary law that further strengthens the EU's emergency powers by narrowing the scope of the possibility under primary law to make derogations from EU law obligations in case of emergency. Since all treaty provisions granting rights to derogate from internal market law apply in the absence of common rules, which means that the area has not been harmonized, what consequences will the IMERA have in relation to those derogations and justifications? Does the regulation mean that the derogations in response to emergency have now been harmonized, and therefore apply through the lens of secondary law?[117]

The last sentence of recital 38 of the preamble is illuminating in relation to the question of harmonization:

> In general, national measures restricting free movement which are not harmonized under this Regulation would be in principle no longer justified or proportionate when the internal market emergency mode is deactivated and should therefore be removed.[118]

The consequence could be that derogations motivated by emergency is now a pre-empted shared competence, meaning that Member States can no longer take such measures unless a clear distinction is maintained between internal market emergency and emergency. However, if such a distinction is made, then the Member State would be free to argue that the measures in question were not taken because of an internal market emergency and therefore are not caught by the harmonizing measure. Following this line of argument would, of course, make the IMERA toothless, as Article 21 IMERA would lose its meaning as the language of the article clearly states that it only applies to measures taken in response to an internal market emergency. It is not clear to this author whether this situation has been foreseen by the drafters, but the distinction between internal market emergency and emergency, or EU emergency and emergency in the EU if you will, opens for this line of argument.

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[117] Somssich (n 3) 12 agrees that the IMERA delimits 'the scope of Treaty exceptions' but the does not elaborate on specifics nor consequences in relation to pre-emption.
[118] IMERA (n 1) recital 38 in the preamble (emphasis added).

Granted, this development is perhaps not all that likely. But it does indeed create a problem for future loyal cooperation, a problem whose core lies in the need for a distinction between an EU emergency and an Emergency in the EU, as sketched in this article.

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