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TABLE OF CONTENTS

ARTICLES

HUMAN RIGHTS AND JUDICIAL REVIEW IN TIMES OF EMERGENCY OR CRISIS

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The article analyses the role of courts in upholding fundamental rights during emergencies and other crises. It identifies grounds for special judicial restraint in emergencies or crises: the stakes are extraordinarily high, and the need for action is urgent; the Government (with the legislature) has primary responsibility for protecting the nation and its citizens and will also typically be best placed to decide what is useful and necessary to address the emergency or crisis. Therefore, courts should generally exercise more restraint as regards assessing the situation or threat, than reviewing the measures taken; exercise more restraint on factual aspects where courts are generally not in a good position to second-guess the assessment of the executive (situation, necessity of measures) than on normative aspects which are judicial in nature (rationality, arbitrariness, discrimination, proportionality); and exercise more restraint on substance than on procedure (due process). Examples from, notably, Strasbourg case law, but also certain national jurisdictions, indicate that courts act more or less accordingly.

1 INTRODUCTION

'Sovereign is he who decides on the state of exception'.[1] With this famous statement the German constitutional theorist Carl Schmitt introduces his work Politische Theologie (1922).

In a constitutional democracy no single state organ can claim to be the sovereign in so far as constitutional democracy is based on the separation of powers, where Parliament has the legislative power, the Government the executive power, and the judiciary has judicial power and is entrusted with upholding the rule of law, including fundamental rights. As is well known, this separation of powers creates checks and balances as a bulwark against abuse of power, including ensuring that the judiciary will keep the political organs within the limits of the law. At least this is so in normal times. Perhaps this ordinary state of affairs is somehow suspended during a public emergency or other serious crisis giving way to a concentration of power in the hands of the executive power, in particular. This is what Carl Schmitt's famous quote implies: the state of exception reveals the real essence of state authority.

Clearly, the existence of an emergency or other acute crisis creates a need for swift and decisive action, which affects the ordinary relationship between the political organs, notably the executive, and the judiciary. If, however, the executive power could freely decide that an emergency or other crisis existed (and for how long) and was free to take the measures deemed necessary to cope with it, without being constrained by the Courts, then the executive would be truly sovereign in the sense of Carl Schmitt. History tells us that such kind of power concentration is dangerous.

The aim of this article is to provide a general analysis of the role of courts in upholding

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[1] Translation from original German text: 'Souverän ist, wer über den Ausnahmezustand entscheidet'.

fundamental rights during emergencies or other crises: to what extent and on what issues should courts exercise judicial restraint during public emergencies or other crises when they review the conformity of political measures with fundamental rights?

The article deals in principle with any type of emergency or crisis, including war, internal unrest or coup attempts, terrorism, immigration, pandemics, natural disasters etc.

The analysis is, above all, normative in the sense that the arguments are based on general considerations relating to the role and competence of courts in a constitutional democracy based on the rule of law. However, the analysis is supported by and illustrated with examples from European case law, notably from the European Court of Human rights (ECtHR or the Strasbourg Court) but also, to a lesser extent, from the European Court of Justice and from national jurisdictions – Great Britain, Norway and Denmark.

As a precursor to the analysis a few remarks are offered pertaining to the notion of judicial restraint (Section 2). The starting point of my analysis is the principle of constitutional democracy that courts have the power to review acts of the executive and the legislature (Section 3). A deviation from this normal state of affairs needs justification, and so we must look for those characteristics of an emergency or crisis which provide special grounds for judicial restraint or deference vis a vis the political organs, notably the executive (Section 4). Having identified those grounds, the analysis is divided into issues of judicial review relating to the situation (Section 5), the measures taken (Section 6), and conformity with due process guarantees (Section 7). Finally, a conclusion is offered along with some final remarks on the relevance of declaring a 'public emergency' (Section 8).

2 THE NOTION OF JUDICIAL RESTRAINT

Judicial restraint[2] is generally described as an approach by which courts, based on constitutional considerations concerning the function and competence of the different state organs, allow the political branches a 'margin of appreciation', or a 'scope of discretion' so that the courts will not necessarily enforce their own understanding of the best interpretation of fundamental rights. It thus concerns the strictness of the courts' scrutiny, the extent to which they will review the assessments made by the political organs, including both normative assessments and factual assumptions and forecasts about future events.

Accordingly, judicial restraint or deference is not only a matter of how much; it is also a matter of what kind. Notably, judicial restraint may be exercised with regard to both legal questions based on fact (such as evidence, threat, or necessity) and legal questions based on norms (such as interpretation or proportionality). Furthermore, judicial restraint may relate to both procedural and substantive legal issues or rights.

In principle, one should distinguish between the material human rights norm (based on interpretation) and the standard of judicial review (based on considerations of relative constitutional competence). In practice, however, this distinction may not always be

[2] The doctrine of 'judicial self-restraint' as such originates from American constitutional law, where it was originally conceived in the context of judicial review of legislation, cf. James B Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7(3) Harvard Law Review 129, 129 et seq (135), arguing that courts should respect that the legislature has *'a wide margin of consideration'*. The doctrine first gained traction in the US Supreme Court in 1936, when Justice Stone stated concurred, stating that *'the only check upon our own exercise of power is our own sense of self-restraint'*, United States v Butler, 297 U.S. 1, 78 (1936).

clear-cut. For instance, the Strasbourg Court has sometimes recognised a lower human standard than would normally apply, with reference to the crisis at hand.

Thus, when in *Khlaifia and Others*[3] the Grand Chamber of the Strasbourg Court was called upon to assess whether in 2011 Italy had deprived asylum seekers of their liberty under conditions contravening Article 3 ECHR (prohibiting torture and other inhuman or degrading treatment), the Court took into account the fact that, at the time, Italy was experiencing an exceptional influx of asylum seekers. The Court recognised that the massive influx had placed the Italian authorities in an extremely difficult situation. Accordingly, while reaffirming that Article 3 ECHR is absolute and allows for no exception or derogation, the Court nevertheless took the exceptional situation into account:

> While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time.[4]

Against this background, the Grand Chamber (unlike the chamber previously) concluded that despite problems with overcrowding, bad hygiene and other conditions which were, in the words of the Court 'far from ideal',[5] the applicants had not suffered inhuman and degrading treatment during their detention at Lampedusa. The case of *M.A. v. Denmark*[6] provides a somewhat similar example. The Strasbourg Court had to decide whether the so called 'waiting periods' for family reunification (suspending the right to apply for family reunification for three years) established in Denmark by law in response to a massive influx of asylum seekers from Syria in 2015 was in conformity with Article 8 ECHR (the right to respect for i.e. family life). Previous case law suggested a right to family reunification, if refugees and others seeking protection have no other option of upholding family life. However, the Strasbourg Court held that the exceptional crisis made a difference and could justify a temporary suspension of the right to family reunification (although not for three years):

> [D]uring periods of mass influx of asylum seekers and substantial resource restraints, receiving States should be entitled to consider that it falls within their margin of appreciation to prioritise the provision of Article 3 protection to a greater number of such persons over the Article 8 interest in family reunification of some.[7]

[3] *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 15 December 2016).
[4] ibid para 185.
[5] ibid para 188.
[6] *M.A. v Denmark* App no 6697/18 (ECtHR, 9 July 2021).
[7] ibid para 145.

3 THE ROLE OF JUDICIAL REVIEW IN A CONSTITUTIONAL DEMOCRACY

In any democratic constitution based on the rule of law, courts are entrusted with interpreting and enforcing the law. This judicial function of courts extends to the protection of constitutional rights and liberties (as well as international human rights). While political branches have a democratic mandate and are thus in general pre-eminently responsible for balancing security and liberty (as they are with regard to balancing other basic societal interests), this does not hold true whenever the balancing encroaches upon constitutional and international human rights.[8] Behind the basic constitutional principles of human rights, the rule of law and the separation of powers lies the suspicion – based on historical experience – that unlimited and unchecked powers of government may lead to abuse and unwarranted encroachments on individual rights. This holds especially true in times of a public emergency or other crisis, when far-reaching restrictions of rights are often employed. In the final analysis, there can be no rule of law and no protection of fundamental rights, unless the power of the political organs is limited, and even no democracy unless the power of the executive is limited, even in times of emergency or crisis. Those limits only exist to the extent they are enforced by the judiciary.

Therefore, the legal starting point for any discussion of judicial deference is the presumed competence of courts to review acts of the political branches for their conformity with constitutional and international rights. Any judicial deference must be justified on constitutional and institutional grounds. This also holds true whenever the executive or legislature encroaches upon individual rights and liberties during emergencies or other crises. Even in those very serious situations, the burden of justification is on those demanding judicial restraint, not on those favouring unrestricted judicial review.

4 WHAT GROUNDS FOR SPECIAL JUDICIAL RESTRAINT DURING EMERGENCIES AND CRISES?

It is well established that some judicial restraint may be called for even in normal times, based on considerations relating to the constitutional distribution of responsibility and competence between the political organs and the judiciary. Of interest here, however, is whether the existence of an emergency or crisis might justify *special* judicial restraint, having regard to the respective constitutional responsibilities and competences of the political branches and the courts – what has been labelled 'relative institutional competence'.[9]

There are at least four basic arguments for exercising special judicial restraint during an emergency or crisis, notably vis-à-vis the executive:

1) The stakes are high: In an emergency or serious crisis the stakes are extraordinarily

[8] This point was strongly emphasised by Lord Bingham on behalf of the House of Lords in *A and Others v Secretary of State* [2004] UKHL 56 at para. 42.

[9] See David Dyzenhaus, 'Deference, Security and Human Rights' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007) 125–139; see also *A and Others v Secretary of State* (n 8) at para 29 (*per* Lord Bingham).

high, so that the cost of failure may be serious, perhaps even disastrous.[10] This is a general argument for judicial restraint the strength of which will vary with the level and urgency of the crisis, regardless of whether an emergency has been declared or could be said to exist.[11]

2) *There is urgent need for action:* In normal situations, governments and politicians will have plenty of time to consider different options and means to achieve political objectives, based on thorough surveys. Not so during an emergency or other crisis. Time is of the essence; there is an urgent need for action (also because the stakes are high), and sometimes on the basis of limited knowledge.[12] So the executive will often have to act without knowing the exact scope of the emergency or crisis and the best means to counter it.

3) Government's first responsibility: The executive (with the legislature) has primary responsibility for national security and protecting the life of the nation. Although the political branches have many primary responsibilities in political matters, protecting the state and the security of its people is arguably the very first responsibility of government, and an original *raison d'etre* of state power and legitimacy. Thus, this argument seems especially relevant in the face of serious threats to national security and other emergencies.[13] By its nature, it is a general argument for judicial deference and restraint.

4) Government's expertise: It is a classic argument that the executive with its expertise is better equipped than courts to assess serious risks and threats to society and decide on what steps are necessary to counter it.[14] No doubt, this claim is credible. It is primarily an argument for some judicial restraint when it comes to reviewing substantial legal requirements based on fact (including predictions), rather than normative assessments.

In sum, what characterises an emergency or crisis is the seriousness of the situation and the urgent need for action. The obvious actor is the executive which not only has preeminent responsibility for the life and safety of the nation but is also better equipped than other state organs (especially the courts) to make informed decisions in this regard. All of these characteristics may provide, in different ways, grounds for special judicial restraint.

We can now turn to the question of how these grounds should affect the judicial review of emergency/crisis measures restricting fundamental rights: to what extent should and will courts review the assessment of the political branches, notably the executive, as to whether the requirements for restriction of fundamental rights have been fulfilled? First, we look at

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[10] See Eric A Posner and Adrian Vermeule, *Terror in the Balance. Security, Liberty and the Courts* (Oxford University Press 2007) 119; see also *Secretary of State v Rehman* [2001] UKHL 47 para 62 (*per* Lord Hoffmann); *A and Others v Secretary of State* (n 8) paras 29 (*per* Lord Bingham), 79–80 (*per* Lord Nicholls), 112 and 116 (*per* Lord Hope), 154 (*per* Lord Scott), and 226 (*per* Baroness Hale).

[11] See *Brogan and Others v United Kingdom* App no 11209/84 (ECtHR, 29 November 1988) para 48; *A and Others v United Kingdom* App no 3455/05 (ECtHR, 19 February 2009) para 216.

[12] See e.g. *Communauté genevoise d'action syndicale v Switzerland* App no 21881/20 (ECtHR, 15 March 2022) para 84 (the ECtHR Grand Chamber subsequently on 'appeal' rejected the case as inadmissible due to non-exhaustion of domestic remedies, Judgment of 27 November 2023).

[13] See *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para 207.

[14] See, for example, the House of Lords in *Secretary of State v Rehman* (n 10) paras 26 (*per* Lord Slynn), 57, and 62 (*per* Lord Hoffmann).

judicial review of the situation as one justifying special measures – i.e. determining that an 'emergency', 'threat', 'danger', etc. exists (Section 5). Second, we look at how courts review the measures taken to confront it – i.e. determining the (lawfulness), rationality, necessity, and proportionality of the specific measures taken to counter it (Section 6). Third, we look at judicial review of the process by which those measures are implemented, including the existence of safeguards against abuse (Section 7).

5 JUDICIAL REVIEW OF THE SITUATION (EXISTENCE OF AN EMERGENCY, THREAT, DANGER ETC.)

In order to justify extraordinary restrictions on fundamental rights an extraordinary situation must exist. Notably, the existence of a 'public emergency threatening the life of the nation' can justify derogation from ordinary human rights obligations, cf. Article 15 ECHR. However, also in less extreme circumstances, the restriction of rights may depend on the existence of, as it were, a 'threat to public safety', a 'danger to national security', a 'serious risk to public health' etc. The characterisation of the situation depends on factual information and assumptions, including forecasts about the future. While such a determination is subject to judicial review, the abovementioned grounds suggest the need for some judicial restraint. Accordingly, although courts consider themselves competent to review such legal categorisation, it seems they will generally defer to the assessment of the authorities, unless on the facts their categorisation appears arbitrary or indefensible.

5.1 'PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION' (ARTICLE 15 ECHR)

Article 15 ECHR allows states to derogate from most Convention rights[15] in time of war or other public emergency, to the extent strictly required by the situation:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

According to the wording of Article 15 the emergency at hand must be 'threatening the life of the nation'. This indicates a high threshold. The Strasbourg Court in *Lawless* – the first and leading case on derogations – confirmed that there must exist an exceptional and very serious situation affecting the whole population:

> In the general context of Article 15 of the Convention, the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; they refer to an exceptional situation of crisis or emergency which

[15] Article 15(2) precludes derogation from the right to life (with the exception of lawful acts of war), and the prohibitions on torture and others inhuman or degrading treatment, slavery and retroactive punishment, cf. Articles 2, 3, 4(1) and 7. In addition, no derogation can be made to the prohibition on the death penalty, cf. Additional Protocol No. 6, Article 3, and Additional Protocol 13, Article 2.

> affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.[16]

In concrete cases, however, the Strasbourg court has been more flexible, at times accepting national declarations of a 'public emergency' even if it was at least questionable whether the circumstances met the high threshold. This is due to the wide margin of appreciation which according to the Strasbourg Court must be left to the States in this respect. In *Ireland v United Kingdom,* the Strasbourg Court stated – and has often since repeated – that the national authorities enjoy a wide margin of appreciation as regards the existence of a public emergency within the meaning of Article 15:

> The limit on the Court's powers of review are particularly apparent where Article 15 is concerned. It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether the life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.[17]

Thus, many have questioned whether such a public emergency existed in Ireland in the late 1950'es due to sporadic IRA operations from Ireland into Northern Ireland. According to the critics, the IRA operations clearly damaged relations between Ireland and Great Britain but could hardly be said to threaten Irish state institutions.[18] Nevertheless, the Strasbourg Court unanimously accepted Ireland's declaration of an emergency in the *Lawless* case.[19]

The same could perhaps be said about the terrorist threat against the United Kingdom emanating from Al Qaeda following the events of 11 September 2001. As a response to this threat, the UK government declared a public emergency and detained foreigners suspected of terrorist activities indefinitely, until such time as they could be expelled to their countries of origin. The terrorist threat was real, but could it be said to threaten the life of the nation, also considering that the UK was the only European country to rely on Article 15? In *A and Others*[20] the Strasbourg Court answered this question in the affirmative referring to the wide margin of appreciation left to national authorities by the Convention:

> As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al-Qaeda,

[16] *Lawless v Ireland* App no 332/57 (ECtHR, 1 July 1961) para 28; *A and Others v United Kingdom* (n 11) para 176; *Dareskizb LTD v Armenia* App no 61737/08 (ECtHR, 21 September 2021) para 59.
[17] *Ireland v United Kingdom* (n 13) para 207.
[18] Among others Aly Mokhtar, 'Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights' (2004) 8(1) International Journal of Human Rights 65, 69.
[19] *Lawless v Ireland* (n 16).
[20] *A and Others v United Kingdom* (n 11).

> although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency.[21]

Even more interesting in this case is the previous decision in the United Kingdom by the House of Lords[22] (now Supreme Court) containing deep reflections regarding the extent to which national courts can review a declaration of an emergency by the executive. Leading the majority, Lord Bingham stated that great weight must be attached to the government's assessment that an emergency exists, as it is 'a pre-eminently political judgment', where predictions of future events are uncertain. He also recognized that the Government should enjoy the benefit of doubt, a right 'to err […] on the side of safety'.

> I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour and human beings […] is necessarily problematic. Reasonable minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety.[23]

Accordingly, although several Law Lords were sceptical about the government's assessment, they allowed the government 'the benefit of the doubt'.[24] Only Lord Hoffmann rejected outright that there was a national emergency qualifying for derogation under Article 15.[25]

Baroness Hale in the case defined the outer limit of judicial deference as to the existence of an emergency as the situation where there is a manifest abuse of the emergency declaration:

> Protecting the life of the nation is one of the first tasks of a Government in a world of nation states. That does not mean that the courts could never intervene. Unwarranted declarations of emergency are a familiar tool of tyranny. If

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[21] *A and Others v United Kingdom* (n 11) para 180.
[22] *A and Others v Secretary of State* (n 8).
[23] ibid para 29 (*per* Lord Bingham). See also paras 79–80 (*per* Lord Nicholls), 112, 116 (*per* Lord Hope), 154 (*per* Lord Scott), 166 (*per* Lord Rodger), and 226 (*per* Lord Hale).
[24] ibid paras 26 (*per* Lord Bingham) 'the appellants have shown no ground strong enough to warrant displacing the Secretary of State's decision'; 154 (*per* Lord Scott): 'I would […] allow the Secretary of State the benefit of the doubt on this point'; 165-66 (*per* Lord Rodger).
[25] ibid para 96: 'I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda […]. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community'.

> a Government were to declare a public emergency where patently there was no such thing, it would be the duty of the court to say so.[26]

So far there is only one example in Strasbourg case law where the ECtHR rejected a Government's reliance on Article 15 to derogate from the Convention: *Dareskizb*.[27] This was a case of manifest abuse of Article 15. The Government wanted to silence the opposition by declaring a public emergency after anti-government demonstrations had resulted in violence. The violence emanated from a small group of demonstrators and was, above all a result of the heavy-handed response by the police to peaceful demonstrations; the demonstrators had not planned for any violent uprising, which might have justified declaring a public emergency.

5.2 OTHER CATEGORISATIONS: 'THREAT', 'DANGER', 'RISK' ETC.

The Strasbourg Court has held that in cases concerning national security, the executive's assessment of what constitutes a threat to national security 'will naturally be of significant weight'.[28] However, they do not enjoy a free discretion. National courts must be competent to review whether that characterisation has a 'reasonable basis in the facts' and is not 'arbitrary'.[29] Accordingly, the Court in *Al-Nashif*[30] found a violation of Articles 5(4), 8 and 13 ECHR, because a foreigner had been detained and subsequently expelled for posing a threat to national security, but without being able to challenge that assessment before the national courts, since the authorities kept the intelligence on which it was based secret.

National courts have taken the same approach. The U.K. House of Lords held in *Rehman*[31] that while considerable deference is owed to the expertise of the executive, the notion of national security remains a legal construction subject to review. The Norwegian Supreme Court, in a 2007 expulsion case, held that courts should show restraint when considering the question of whether the evidence merits the conclusion that a person poses a threat to national security; nevertheless, courts must still review whether evidence supports that view.[32] The Danish Supreme Court in 2008[33] examined on its own whether a person planning to kill the "Muhammed cartoonist" could rightly be considered a 'danger to national security'; the Court upheld the authorities' assessment, finding that trying to kill a man because he had made a controversial cartoon could be considered an attempt to scare and intimidate the public and thereby undermine freedom of speech and public debate.

6 JUDICIAL REVIEW OF THE MEASURES (RATIONALITY, NECESSITY, PROPORTIONALITY)

If an extraordinary situation or threat exists, the next question is whether the measures taken

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[26] *A and Others v Secretary of State* (n 8) para 226 (*per* Lord Hale).
[27] *Dareskizb LTD v Armenia* (n 16) paras 60-62.
[28] *Al-Nashif v Bulgaria* App no 50963/99 (ECtHR, 20 June 2002) para 124. *Piskin v Turkey* App no 33399/18 (ECtHR, 15 December 2020) para 225.
[29] ibid.
[30] *Al-Nashif v Bulgaria* (n 28).
[31] *Secretary of State v Rehman* (n 10) paras 29 (*per* Lord Slynn), 50, 53, and 56 (*per* Lord Hoffmann).
[32] Norwegian Supreme Court, judgment of 8 November 2007, Norsk Retstidende 2007, p. 1573, paras 51–58.
[33] Danish Supreme Court, judgment of 2 July 2008, Ugeskrift for Retsvæsen 2008, afdeling B, p. 2394.

to counter it can be justified. Even during a public emergency, measures taken in derogation of human rights must be 'strictly required' under Article 15 ECHR. Essentially, this requirement is no different from the ordinary requirement that (most) rights restrictions must not only be rational and non-discriminatory but must also be necessary and proportionate to the aim pursued (we here talk about relative rights only, i.e. those which are subject to restriction, not absolute rights). These requirements have factual as well as normal aspects and so, while all subject to judicial review, may not all be subject to the same level of scrutiny by the courts.

6.1 'MEASURES […] STRICTLY REQUIRED BY THE EXIGENCIES OF THE SITUATION' (ARTICLE 15 ECHR)

As already mentioned during a public emergency as defined in Article 15 ECHR states may derogate from (most) human rights obligations, but only 'to the extent strictly required by the exigencies of the situation', cf. Article 15(1) ECHR. On its face, this is a strict requirement of necessity (and proportionality) of any measure derogating from Convention rights.

However, as mentioned earlier, the Strasbourg Court stated in *Ireland v United Kingdom* – and has repeated since – that the Convention leaves a broad margin of appreciation to the national authorities also as regards what measures are necessary, to address the emergency:

> The limit on the Court's powers of review are particularly apparent where Article 15 is concerned. It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether the life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.[34]

Despite this stated broad margin, the Strasbourg Court has found on numerous occasions, that national measures taken during an emergency could not be considered to be 'strictly required' by the emergency and were thus not covered by Article 15.[35] One explanation for this may be that the Strasbourg Court seems increasingly to focus on a broad and normative assessment of proportionality rather than a more narrow and factual assessment of the necessity of measures taken.[36]

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[34] *Ireland v United Kingdom* (n 13) para 207. See also *Brannigan and McBride v United Kingdom* Apps nos 14553/89 and 14554/89 (ECtHR, 25 May 1993) para 43; *Aksoy v Turkey* App no 21987/93 (ECtHR, 26 November 1996) para 68; *A and Others v United Kingdom* (n 11) para 184; *Sahin Alpay v Turkey* App no 16538/17 (ECtHR, 20 March 2018) para 75.

[35] See among others *Aksoy v Turkey* (n 34) (incommunicado detention for 14 days); *Nuray Sen v. Turkey*, ECtHR judgment of 17 June 2003, Appl. no. 41478/98 (detention for 11 days). *A and Others v United Kingdom* (n 11) (indefinite detention of foreign terrorist suspects); *Sahin Alpay v Turkey* (n 34) (journalist detained on remand without reasonable suspicion of being member of a terrorist organisation); *Piskin v Turkey* (n 28) (dismissal from public service without access to a fair trial).

[36] See in this context the debate in *Brannigan and McBride v United Kingdom* (n 34), with dissenting opinions.

All in all, the review of emergency measures by the Strasbourg Court can thus be characterised as real, while not strict or intensive, especially not as regards the question of whether the State could have chosen less intrusive means. It may thus also be concluded that while the Strasbourg Court clearly exercises judicial restraint in the face of a national declaration of an emergency, it is less pronounced as regards reviewing the measures when compared to the restraint exercised in reviewing the existence of the emergency.

6.2 NON-ARBITRARINESS (RATIONALITY AND NON-DISCRIMINATION)

As a minimum, restrictive measures chosen by the authorities to counter emergencies or crises must not be arbitrary; they must be rational[37] and non-discriminatory. These basic requirements are normative and there is no reason why courts should not strictly enforce them, even during emergencies or other serious crises. And case law suggests they will.

In *A and Others* ('the Belmarsh Case'), the British Parliament had enacted legislation allowing indefinite detention of alien terrorist suspects, but not of British citizens posing a similar threat. The House of Lords [now the Supreme Court] held this detention to be discriminatory on grounds of national origin, as there was no justification for the difference in treatment between aliens and citizens. This sufficed to strike down the indefinite detention scheme as incompatible with Articles 5 and 14 of the ECHR. By excluding British terrorist suspects who posed just as much of a threat, the measure was not rationally tailored to its purpose of preventing terrorism. Accordingly, the discrimination against alien suspects was unnecessary, a conclusion that Lord Bingham found to be 'irresistible'.[38] The ECtHR subsequently agreed.[39] An even clearer example of an arbitrary measure during an emergency was dealt with by the Strasbourg Court in *Sahin Alpay*: following the attempted military coup in Turkey, the authorities had detained a journalist on remand for alleged membership of a terrorist organization. There was, however, no reasonable suspicion of that membership, which made the detention utterly arbitrary. The Strasbourg Court sided with the Turkish Constitutional Court in turning against it:

> Turning to the derogation by Turkey, the Court observes that the Constitutional Court expressed its position on the applicability of Article 15 of the Turkish Constitution, holding that the guarantees of the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence […].[40]

6.3 NECESSITY

Whether a non-arbitrary measure is also necessary to achieve its aim depends on factual assessments of the emergency or threat and of the effectiveness of less intrusive alternatives. Considering the primary responsibility and expertise of the executive, as well as the urgent need for action in a high stakes situation, courts should be cautious not to second-guess the

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[37] See e.g. *A and Others v Secretary of State* (n 8) para 30 (*per* Lord Bingham).
[38] ibid paras 35, 43, and 68 (*per* Lord Bingham), 76–77 (*per* Lord Nicholls), 97 (*per* Lord Hoffmann), 129–32 (*per* Lord Hope), 155–56 (*per* Lord Scott), 188–89 (*per* Lord Rodger), 228, and 231 (*per* Lord Hale).
[39] *A and Others v United Kingdom* (n 11) para 186.
[40] *Sahin Alpay v Turkey* (n 34) para 119.

executive on the necessity of measures taken, unless there is a solid basis for doing so.

Accordingly, case law would seem to suggest that, generally, courts considerably defer to the executive in this regard. They allow the executive the benefit of the doubt, unless there appears prima facie to be less intrusive alternatives. In *Rehman* concerning national security, Lord Slynn of the British House of Lords justified this cautious approach, remarking that the government

> is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed […] is primarily for him.[41]

In the same vein, the House of Lords in *A and Others* concerning anti-terrorism measures during an emergency indicated that, faced with an urgent and complex crisis, the Government is allowed to act out a principle of caution, Lord Bingham stating that for the Government 'it would be irresponsible not to err, if at all, on the side of safety'.[42] Similarly, the Strasbourg Court in *Communauté genevoise* concerning the margin of appreciation left to the Swiss Government in the early days of the Covid-19 pandemic, stated as follows:

> [The Court] acknowledges the very serious threat to public health from COVID-19, and that information about the characteristics and dangerousness of the virus was very limited at the beginning of the pandemic; accordingly, States had to react swiftly during the period under consideration in the present case. […][43]

Similarly, the Norwegian Supreme Court has held that the courts must generally leave the necessity of expulsion to the final decision of the executive in national security cases, intervening only in case of an outright abuse of authority.[44]

Occasionally, when there appears prima facie to be less intrusive alternatives to a government's chosen measures, the necessity requirement has been more strictly enforced. In such cases, a court would require the executive to prove that less intrusive measures would be insufficient to meet the security threat. The House of Lords did this, for example, in *A and Others* ('the Belmarsh Case') concerning detention of foreign terrorist suspects.[45] Lord Scott was among the several judges underlining the burden of the government in this case:

> [The Secretary of State] should at least, in my opinion, have to show that monitoring arrangements or movement restrictions less severe than incarceration in prison would not suffice.[46]

The same held true in *Communauté genevoise d'action syndicale*,[47] concerning restrictions on freedom of assembly in Switzerland in the early days of the Covid-19 pandemic – including

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[41] *Secretary of State v Rehman* (n 10) para 26 (*per* Lord Slynn).
[42] *A and Others v Secretary of State* (n 8) para 29 (per Lord Bingham).
[43] *Communauté genevoise d'action syndicale v Switzerland* (n 12) para 84.
[44] Norwegian Supreme Court, judgment of 8 November 2007, Norsk Rettstidende 2007, p. 1573, paras 56–58.
[45] *A and Others v Secretary of State* (n 8) paras 35, 44 (*per* Lord Bingham), 76–77 (*per* Lord Nicholls), 121, 126 (*per* Lord Hope), 155 (*per* Lord Scott) 167 (*per* Lord Rodger), and 228 (*per* Lord Hale).
[46] ibid para 115 (*per* Lord Scott). See also paras 44 (*per* Lord Bingham), 167 (*per* Lord Rodger).
[47] *Communauté genevoise d'action syndicale v Switzerland* (n 12).

a prohibition on demonstrations, which precluded the applicant trade union from arranging 1 May meetings. While acknowledging the very serious threat to public health facing the authorities and the complexity of the situation, the Court majority (4-3), nevertheless, found a violation of Article 11 ECHR (freedom of assembly), noting that it was difficult to accept that an outright prohibition of political demonstrations was the least intrusive measure, when the authorities continued to allow people to go to work indoors in factories and offices, provided necessary precautions were taken to prevent dissemination of the virus.[48]

6.4 PROPORTIONALITY

Proportionality is about weighing interests – i.e. whether a measure restricting fundamental rights is proportionate to the legitimate aim pursued. This is a normative exercise, and so there is no strong reason for courts to defer to the political branches to a wider extent than they would normally do. That being said, during a crisis the weighing of interests may be more complex than in normal situations. Accordingly, the Strasbourg Court in *Communauté genevoise d'action syndicale* recognised the serious threat to public health facing the authorities (the Government had not declared an emergency, cf Article 15 ECHR), and the very complex circumstances where competing interests and rights had to be considered:

> [T]he Court takes note of the competing interests at stake in the very complex circumstances of the pandemic, especially with regard to the positive obligations on the States Parties to the Convention to protect the lives and health of the persons within their jurisdiction, notably under Articles 2 and 8 of the Convention [para. 84].

Accordingly, courts review emergency and crisis measures restricting individual rights as to their proportionality. Presumably, however, a court will rarely strike down on proportionality grounds a measure which it accepts as a rational and necessary response to a serious threat. However, this is due to the weight of the societal interest during an emergency or serious crisis, rather than an exercise of judicial restraint. In an emergency or crisis, while the normative weight of rights remains constant, the weight of the colliding societal interest increases with the seriousness and urgency of the threat or risk. It follows from the proportionality principle that the weightier the national security interest, the more likely it will outweigh the individual rights in question. This analytical exercise has nothing to do with judicial restraint.

In any case, courts generally deem themselves competent to review proportionality even in emergencies and crises. The Strasbourg Court in *A and Others* agreed with the House of Lords that 'the question of proportionality is ultimately a judicial decision'.[49]

There were indications in *A and Others* ('the Belmarsh Case') that even confronted with a public emergency due to serious terrorist threats against the UK, the House of Lords would not have accepted the scheme of indefinite detention of terrorist suspects without trial, even if it had been applied to all without discrimination.

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[48] *Communauté genevoise d'action syndicale v Switzerland* (n 12) para 87.
[49] *A and Others v United Kingdom* (n 11) para 184.

In the same vein, while not employed during an emergency within the meaning of Article 15 ECHR but during a violent clash between the authorities and the opposition, the Strasbourg Court in *Dareskizb* (2021) took a strong stand against censorship of the press. Finding a violation af Article 10 ECHR in the specific case, the Court implied that censorship will not be easily justifiable even during an emergency:

> [D]emocracy thrives on freedom of expression […]. In this context, the existence of a 'public emergency threatening the life of the nation' must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society. In the Court's view, even in a state of emergency the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness […].[50]

7 JUDICIAL REVIEW OF DUE PROCESS GUARANTEES

Regardless of the restraint exercised on the substantial issues, courts – in accordance with international human rights law – uphold basic procedural safeguards against arbitrariness even in times of an emergency or other crisis. As the Strasbourg Court stated in *Piskin* where during the emergency in Turkey following a failed coup attempt the applicant had been dismissed from his public position without access to a fair trial:

> [I]n the Court's view, even in the framework of a state of emergency, the fundamental principle of the rule of law must prevail. It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for an effective judicial review – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons […].[51]

Similarly, the Strasbourg Court has confirmed on numerous occasions that basic due process guarantees must be available, even where national security is at stake, with the necessary adjustments to protect the secrecy of classified information.[52] In *Al-Nashif*[53] – concerning a foreigner who had been detained and subsequently expelled for posing a threat to national security, without, however, having any way to defend himself, since the relevant intelligence was classified and unavailable to him or his lawyer – the Strasbourg Court found a violation of Article 5(4), Article 8 and Article 13, stating among others:

> 123. Even where national security is at stake, the concepts of lawfulness and the rule

[50] *Dareskizb LTD v Armenia* (n 16) para 77.
[51] *Piskin v Turkey* (n 28) para 153.
[52] See, for example, *Chahal v United Kingdom* App no 22414/93 (ECtHR, 15 November 1996) para 131; *Al-Nashif v Bulgaria* (n 28) paras 136–37; *A and Others v United Kingdom* (n 11) para 205.
[53] *Al-Nashif v Bulgaria* (n 28).

> of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information […].
> 124. The individual must be able to challenge the executive's assertion that national security is at stake. […] Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.[54]

In the same vein, the European Court of Justice (ECJ) in *Kadi*[55] held that the principle of effective judicial protection also applies in the field of counter-terrorism (with restrictions necessary to ensure the efficiency of the measures and the secrecy of intelligence sources). The case concerned the freezing of assets belonging to suspected terrorist individuals and organisations, without those affected being informed of the reasons for the suspicion. The Court held that the rights of defence, in particular the right to be heard, had not been respected.[56]

The Danish Supreme Court has also upheld the European Convention requirements of due process in terrorism cases, despite post-9/11 legislative attempts by the Danish government to limit judicial review. The Danish parliament enacted legislation in 2002 empowering the executive to detain and deport aliens whom the intelligence service considered a danger to national security, without providing the alien or the courts access to the factual basis for this danger assessment (secret intelligence). This was an apparent violation of Articles 5(4) and 13 of the ECHR. Therefore, the Danish Supreme Court has decided that the authorities are required to provide some substantiation (to a standard of reasonable probability) that there is a factual basis for characterising an alien as a danger to national security. The authorities were required to present the evidence necessary for such substantiation in an adversarial process, so as to preclude arbitrary detention.[57] Similarly, the Norwegian Supreme Court, in a case concerning the expulsion of an alien considered to be a terrorist threat, held that it was also competent to review the factual evidence on which the decision to expel was based. It could also determine whether the executive's assessment of the facts had been defensible. The fact that national security was involved justified only some limited judicial restraint in this respect.[58]

8 CONCLUSIONS – AND SOME FINAL REMARKS

In constitutions based on the rule of law, the courts are called upon to review the acts of the political branches to ensure their compatibility with constitutional and international human rights norms. This power of judicial review also encompasses measures during an emergency or other crisis. Accordingly, even during emergencies and crises, it is not judicial review, but judicial restraint that needs justification. Too much judicial restraint might

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[54] *Al-Nashif v Bulgaria* (n 28) paras 123-124. See also *Piskin v Turkey* (n 28) paras. 223 and 227.
[55] Joined cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission* EU:C:2008:461.
[56] ibid at paras 335–53.
[57] Danish Supreme Court, judgment of 2 July 2008, in *Ugeskrift for Retsvæsen* 2008, pp. 2394 et seq.
[58] Norwegian Supreme Court, judgment of 8 November 2007, in *Norsk Retstidende* 2007, p. 1573, at para 49. See also *Secretary of State v Rehman* (n 10) para 54 (*per* Lord Hoffmann).

be as dangerous as too little, because it might reduce the constitutional function of courts into rubber-stamping political action, thereby providing the latter with a legal legitimacy it may not deserve.[59]

In addition to general constitutional considerations concerning the function and relative competence of the political organs and the judiciary, there are grounds for special judicial restraint in emergencies and crises: the stakes are extraordinarily high, and the need for action is urgent. The Government (with the legislature) has primary responsibility for protecting the nation and its citizens and will also typically be best placed to decide what is useful and necessary to address the emergency or crisis.

From this starting point the above analysis suggests a differentiated approach by courts when they review respect for fundamental rights during emergencies or other crises. In very general terms courts should exercise more restraint as regards assessing the *situation or threat*, than reviewing the *measures* taken; exercise more restraint on *factual* aspects where courts are generally not in a good position to second-guess the assessment of the executive (situation, necessity of measures) than on *normative* aspects which are judicial in nature (rationality, arbitrariness, discrimination, proportionality); and exercise more restraint on *substance* than on *procedure* (due process) – the latter being the providence and raison d'etre of courts.

The examples from case law in this article indicate that courts act more or less accordingly. They clearly exercise restraint when reviewing factual questions relating to the existence of an emergency, threat orrisk etc. and the necessity of the measures taken to counter it (benefit of the doubt). However, they will ensure that restrictions are non-arbitrary (rational and non-discriminatory) and also uphold real proportionality review even in times of emergency, to avert government excesses. Finally, they uphold basic due process guarantees regardless of the situation (including access to independent review and adversarial proceedings), if necessary, adjusted to take into account a need for secrecy.

So, who decides on the 'state of exception'? The Government above all (with Parliament) but fenced in by the judiciary which upholds the rule of law and essential human rights protection even in times of an emergency or other crisis. Judge Krenc of the Strasbourg Court summed it up nicely in his opinion in *Communauté genevoise*:

> In times of (public-health or other) crisis, when successive rounds of far-reaching restrictions to freedoms may be enacted under the banner of urgency, access to independent and effective judicial review is a fundamental safeguard against the risk of excess and abuse, a possibility that can never be overlooked. The courts are not there to take the place of the competent authorities – they can make no such claim and do not have the necessary legitimacy for that purpose – but to verify the lawfulness and proportionality of those restrictions […].[60]

This begs a final question: In terms of judicial review of fundamental rights does it make any real difference whether, during a crisis, the Government declares a 'state of exception' (meaning here a public emergency, cf. Article 15 ECHR) or not? It does make a difference, of course, if one contemplates restrictions that cannot be justified during normal

[59] See also *A and Others v Secretary of State* (n 8) para 41 (*per* Lord Bingham).
[60] *Communauté genevoise d'action syndicale v Switzerland* (n 12), Concurring opinion of Judge Krenc joined by Judge Pavli para 18.

times, such as administrative detention without usual guarantees of judicial review, indefinite detention without trial or censorship of the media. More frequent during a crisis, however, is a need to restrict rights, which themselves allow necessary and proportionate restrictions, in a more far-reaching manner than during normal times. In that case, recourse to Article 15 ECHR with a declaration of a public emergency is not necessary and it is not even obvious that it would make any material difference.

First, even during a public emergency, measures restricting human rights must be necessary and proportionate (even 'strictly' so!). Second, the existence of a crisis (even below the threshold of a public emergency) will in any event impact the proportionality assessment, i.e. more restrictive measures may be justified than in normal times. In that sense, emergency and crisis is rather a sliding scale than concepts with strict limits – the worse the situation, the more restrictive measures can be justified. In the proportionality assessment during an emergency or crisis, the societal interest behind restricting individual rights will carry considerably more weight and can thus justify more far-reaching restrictions than during normal times, in order to protect 'national security', 'public safety/order', 'public health' etc. This is likely one explanation the vast majority of European states did not invoke Article 15 ECHR to derogate from the Convention during the Covid-19 pandemic and that only the United Kingdom relied on Article 15 after 9 September 2001.

In *Communauté genevoise*, the Strasbourg Court (majority), before concluding that the Swiss prohibition on demonstrations during Covid-19 was not proportionate and therefore in violation of Article 11 ECHR, noted that Switzerland had not declared a public emergency under Article 15 ECHR which would have allowed it to derogate from the right to freedom of assembly to the extent strictly necessary in the situation.[61] In light of the above remarks, however, one might ask, whether that would have changed anything. Would it not still have been regarded as disproportionate to prohibit political meetings outdoors, while at the same time allowing people to meet by the hundreds in workplaces all over the country? The only possible difference would be if declaring an emergency (in good faith) is such a serious statement from a government that it might trigger some additional restraint from the courts.

[61] *Communauté genevoise d'action syndicale v Switzerland* (n 12) para 90.

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

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

1 INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[18] Editorial, 'COVID in the Case Law of the CJEU: Affirming EU Law Orthodoxy Even under Extraordinary Circumstances' (2024) 61(3) Common Market Law Review 581, 591. Likewise Emanuele Rebasti, Anne Funch Jensen, and Alice Jaume, 'Institutional Report' in Krzysztof Pacula (ed), *EU Emergency Law*, vol 1 (XXXI FIDE Congress Katowice 2025, Wydawnictwo Uniwersytetu Śląskiego 2025) 205.
[19] Carolyn Moser and Berthold Rittberger, 'The CJEU and EU (de-)Constitutionalization: Unpacking Jurisprudential Responses' (2022) 20(3) International Journal of Constitutional Law 1038, 1070.
[20] Cf. Case C-465/20 P *Commission v Ireland* EU:C:2024:724 para 370 and case-law cited; Case C-181/23 *Commission v Malta* EU:C:2025:283 para 81 and case-law cited.
[21] Cf., e.g., *Brannigan and McBride v United Kingdom* App nos 14553/89 and 14554/89 (ECtHR, 25 May 1993) para 43; *Dareskizb Ltd v Armenia* App no 61737/08 (ECtHR, 21 September 2021) para 57.
[22] Article 15 ECHR, titled 'Derogation in time of emergency', provides that '[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.
[23] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.
[24] Cf. the *travaux préparatoires* and in particular Niall Coghlan and Marc Steiert (eds), *The Charter of Fundamental Rights of the European Union: The Travaux Préparatoires and Selected Documents* (European University Institute 2021) 2888. See also Claudia Cinnirella, '"Emergency Powers" of the European Union: An Inquiry on the Supranational Model' (2025) 10 European Papers 525, 547.

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

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

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

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[25] The Statute of the Court and its Rules of Procedure envisage expedited procedures and an urgent procedure for preliminary rulings in the Area of Freedom, Security and Justice. These procedural rules allow to quickly reach a verdict but do not necessarily concern emergency measures.
[26] Article 347 TFEU allows a Member State to derogate from EU law in the event of an emergency threatening that Member State's external or internal security.
[27] Case C-120/94 *Commission v Greece* EU:C:1996:116.
[28] Opinion of AG Cruz Villalón in Case C-62/14 *Gauweiler* EU:C:2015:7 paras 7 and 3.
[29] Hjalte Lokdam, '"We Serve the People of Europe": Reimagining the ECB's Political Master in the Wake of Its Emergency Politics' (2020) 58(4) Journal of Common Market Studies 978, 984.
[30] Case C-62/14 *Gauweiler* EU:C:2015:400. Noting that, in the judgment, the Court 'avoids any emergency feeling', Pablo Martín Rodríguez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) 12(2) European Constitutional Law Review 265, 276.
[31] See , Opinion of AG Sharpston in Case C-646/16 *Jafari* EU:C:2017:443, paras 231-243. Cf. text to note 67.
[32] See Opinion of AG Pitruzzella in Case C-209/21 P *Ryanair v Commission (Swedish License)* EU:C:2023:223, paras 91 and 93. Cf. text to note 129.
[33] Editorial (n 18) 586. Likewise Michael Dougan, 'EU Competences in an Age of Complexity and Crisis: Challenges and Tensions in the System of Attributed Powers' (2024) 61(1) Common Market Law Review 93, 114–115.
[34] See Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97 and Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98, concerning Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1.

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

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

3 EMERGENCY AS AN AUTONOMOUS GROUND FOR DEROGATION

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

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

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

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

[36] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ 2015 L248/80.

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

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

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

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

3.1 DEROGATIONS BEYOND THOSE ALREADY ALLOWED BY EU LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[55] ibid paras 221-224.
[56] Case C-72/22 PPU *M.A.* EU:C:2022:505 para 74, referring to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60.
[57] Case C-368/20 *NW v Landespolizeidirektion Steiermark* EU:C:2022:298 paras 85-90, referring to Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L77/1.
[58] According to the Legislative Priority Rule, 'exhaustive EU *legislation* will become the Court's sole norm of reference against which to assess the impugned national measure, to the exclusion of [Treaty] Articles' (emphasis added), as explained, in the field of free movement of goods, by Eadaoin Ní Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods: A Constitutional Approach* (Oxford University Press 2022) 2–3.
[59] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland and Others* EU:C:2020:257 paras 148-153.
[60] Case C-139/79 *Maizena v Council* EU:C:1980:250.
[61] Council Regulation (EEC) No 1293/79 of 25 June 1979 amending Regulation (EEC) No 1111/77 laying down common provisions for isoglucose [1979] OJ L162/10, adopted under Article 43(2) EEC.
[62] *Maizena* (n 60) paras 8 and 36.
[63] ibid para 37.

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

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

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

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

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

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

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

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

[68] Case C-646/16 *Jafari* EU:C:2017:586 paras 93-97, referring to Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31. Cf. Opinion of AG Sharpston in *Jafari* (n 31) paras 231-243.

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

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

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

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

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

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

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

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

4.1 BROAD INTERPRETATION OF POWER-CONFERRING NORMS

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

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

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

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

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

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

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[81] Case C-212/09 *Commission v Portugal* EU:C:2011:717 para 82. Likewise, Case C-244/11 *Commission v Greece* EU:C:2012:694 para 67 and case-law cited.
[82] Regulation (EU) 2016/399 (n 57).
[83] *NW v Landespolizeidirektion Steiermark* (n 57) para 64.
[84] This would have later been changed by Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders [2024] OJ L2024/1717.
[85] Case C-128/22 *NORDIC INFO* EU:C:2023:951 paras 118 and 126-127.
[86] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/1.
[87] Opinion of AG Jääskinen in Case C-270/12 *United Kingdom v Parliament and Council* EU:C:2013:562 paras 50-53, referring to Case C-217/04 *United Kingdom v Parliament and Council* EU:C:2006:279 para 45.
[88] Case C-270/12 *United Kingdom v Parliament and Council* EU:C:2014:18 para 108.
[89] Defining this interpretation as a 'stretch', Viktor Szép and Ramses Wessel, 'Balancing Restrictive Measures and Media Freedom: *RT France v. Council*' (2023) 60(5) Common Market Law Review 1384, 1393.
[90] Case T-125/22 *RT France v Council* EU:T:2022:483 para 55.

4.2 NARROW INTERPRETATION OF POWER-RESTRAINING NORMS

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

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

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

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

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

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

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

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

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

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

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

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

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[108] *Ryanair v Commission (Finnair I)* (n 107) para 78; *Ryanair v Commission (Finnair II)* (n 106) paras 115-116.
[109] Accordingly, in EU legislation, risk scenarios are typically qualified as 'emergency' situations. See, for instance, Articles 53-54 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1; Articles 12-13 of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy [2013] OJ L354/22.
[110] Pavel Ondřejek and Filip Horák, 'Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures' (2024) 20(1) European Constitutional Law Review 27, 44.
[111] ibid.
[112] Vincent N Delhomme, 'The Legality of Covid-19 Travel Restrictions in an "Area without Internal Frontiers": Court of Justice (Grand Chamber) 5 December 2023, Case C-128/22, *Nordic Info*' (2024) 20(2) European Constitutional Law Review 307, 324.
[113] Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan* EU:T:2002:283 para 184. See also Communication from the Commission on the precautionary principle, COM(2000) 1 final. *Contra*, arguing that the precautionary principle would not be a general principle of EU law, Joanne Scott, 'Legal Aspects of the Precautionary Principle' (The British Academy 2018) Brexit Briefing.
[114] Kristel de Smedt and Ellen Vos, 'The Application of the Precautionary Principle in the EU' in Harald A Mieg (ed), *The Responsibility of Science* (Springer 2022) 172.

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

5.1 APPLICATION OF THE PRECAUTIONARY PRINCIPLE

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

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

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

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

[116] Ondřejek and Horák (n 110).

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

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

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

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

[121] ibid para 122.

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

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

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

5.2[a] Broadening of Executive Discretion

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

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

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

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

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

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

5.2[b] Flexibilisation of Procedural Duties

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

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

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

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

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

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

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

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

136 ibid para 87.

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

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

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

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

6 CONCLUSIONS

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

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

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

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

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

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

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

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

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THE 'ANTECHAMBER' OF EMERGENCIES: INSIGHTS FROM THE JUDICIAL APPLICATION OF THE PRECAUTIONARY PRINCIPLE AT THE UNION LEVEL

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Emergencies have gradually found a more stable place in the law of the European Union. Nevertheless, the concept of emergency at the Union level presents some ambiguities that generate legal implications. That is coupled with various issues concerning the precautionary principle. Even if precaution has become a general principle of the law of the European Union, some of its structural aspects are still unclear. However, the precautionary principle seems to have the potential to be a decisive tool in the hands of policy and decision-makers when it comes to managing events that are related to emergencies. This article analyses and untangles the relevant case-law of the Court of Justice to detect common trends. This study envisages possible legal implications with respect to the management of emergencies (understood in a broad sense) through the precautionary principle in a multilevel context. In particular, the analysis demonstrates that, based on the Court's case-law, this principle could be key to taking actions in the preliminary phases of the emergency management cycle, especially when serious risks (are believed to) exist and are addressed in the absence of full scientific certainty.

1 INTRODUCTION

The precautionary principle has progressively gained momentum in the legal order of the European Community (EC) and the European Union (EU), thereby becoming key to justify the taking of impactful measures by both supranational and domestic policy and decision-makers. That is particularly true as far as initiatives aimed at managing emergencies are considered. The practice emerging from the COVID-19 pandemic is emblematic,[1] and new legislative approaches targeting future pandemics or similar events are flourishing in the Member States.[2] Nevertheless, when discussing the potential of the precautionary principle in the context of emergencies, two issues further affect an already complex scenario from a legal point of view at the Union level.

First, the concept of emergency is still not well circumscribed in the EU legal order. Focusing on the so-called 'EU emergency law', the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) contain various provisions that have been associated with 'emergency clauses' or 'emergency competences':

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[1] Goldner Lang, '"Laws of Fear" in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19' (2021) 14(1) European Journal of Risk Regulation 141. It was affirmed that '(t)he precautionary principle has become the cardinal principle of the pandemic because it provides clear rules of conduct when administrations are faced with risk scenarios in which the outcomes are unknown or difficult to estimate': Francesco De Leonardis, 'The Precautionary Principle in the Administrative Management of Epidemiological Emergencies: From *ad hoc* Response Measures to Advance Planning Policies' (2021) 13(1) Italian Journal of Public Law 1, 11.

[2] Reza Khabook, 'Application of the Precautionary Principle in Dealing with Future Pandemic Diseases: The Dilemma of Legality and Legitimacy Under the Rule of Law' (2024) 20(3) Utrecht Law Review 10.

among these are Art. 42(7) TEU and Arts. 66, 78(3), 107(2)(b), 107(3)(b), 122(1) and (2), 143, 144, 213, and 222 TFEU.[3] However, the Treaties fail to provide a flagship concept of 'emergency', nor do they lay the ground for a uniform legislative action in an emergency.[4] Moreover, some of these provisions do not appear to reflect a high degree of exceptionality, seriousness, suddenness and urgency.[5]

In addition, EU emergency measures also find space in a complex and variegated set of secondary law acts. Some of these acts are not even rooted in the legal bases mentioned above: this is the case of certain measures adopted in the realms of human health, food safety and environmental protection. This means that there could be emergency scenarios or emergency initiatives that are covered by EU Law even if they fall outside the scope of more traditional EU emergency law categories.

It is therefore no coincidence that 'various sectoral policy strategies in the EU use different concepts and terms (e.g. crisis, resilience, adaptability, disaster risk management/reduction, emergency response) for similar issues – which may lead to fragmentation or limitation of knowledge, evidence and expertise that inform the overall EU crisis strategy, as well as to fragmented crisis management mechanisms and operations'.[6] Accordingly, when considering events that have had serious consequences at EU level or in certain regions of the Union (such as epidemics or pandemics, natural and man-made disasters, serious situations related to migration flows, public security or the economy), it is noticeable that, in literature, they may be described as emergencies (at times, serious or complex emergencies), but also as threats, crises, or disasters.[7] This is a matter of fact, even if there are some conceptual differences between these terms.

In support of what has just been stated, it was recently held that concepts like emergencies and crises are not synonyms, but are still affected by 'definitional challenges that

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[3] See e.g., Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35(2) Oxford Journal of Legal Studies 325; Bruno de Witte, 'EU Emergency Law and its Impact on the EU Legal Order' (2022) 59(1) Common Market Law Review 3.

[4] Salvatore Fabio Nicolosi, 'Emergency Legislation in European Union Law', in Ton van den Brink and Virginia Passalacqua (eds), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing 2024) 61.

[5] Guido Bellenghi, 'Neither Normalcy nor Crisis: The Quest for a Definition of Emergency under EU Constitutional Law' (2025) European Journal of Risk Regulation 1.

[6] European Commission, 'Strategic crisis management in the EU Improving EU crisis prevention, preparedness, response and resilience' (Scoping paper, 2021), 3 <https://research-and-innovation.ec.europa.eu/system/files/2021-07/scoping-paper_crisis-management-in-the-eu_june_2021.pdf> accessed 30 November 2025.

[7] Marco Gestri, 'EU Disaster Response Law', in Andera De Guttry, Marco Gestri, and Federico Casolari (eds), *International Disaster Response Law* (Springer 2012) 120; Arjen Boin, Magnus Ekengren, and Mark Rhinard, *The European Union as Crisis Manager. Patterns and Prospects* (Cambridge University Press 2013) 52; Mark L Flear and Anniek De Ruijter, 'Guest Editorial to the Symposium on European Union Governance of Health Crisis and Disaster Management: Key Norms and Values, Concepts and Techniques' (2022) 10(4) European Journal of Risk Regulation 605; Merijn Chamon, 'The use of Article 122 TFEU. Institutional Implications and Impact on Democratic Accountability' (European Parliament – Study Requested by the AFCO committee 2022) <https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU(2023)753307_EN.pdf> accessed 30 November 2025; Salvatore Fabio Nicolosi, 'Health Emergency and Asylum Law in the European Union' (2022) 34(3-4) International Journal of Refugee Law 398; Federico Casolari, 'The EU Approach Towards Disaster Management. A Critical Appraisal in the Light of the Action Put in Place to Face the COVID-19 Pandemic' (2023) 6 Yearbook of International Disaster Law Online 51; Steve Peers 'The New EU Asylum Laws: Taking Rights Half-Seriously' (2024) 43 Yearbook of European Law 113.

make any legal distinction inherently complex and sensitive to framing'.[8] Other examples could be made, which relate to the possible links between emergencies and disasters. Some authoritative opinions consider natural disasters as a major type of crisis and inquire how should a legal order deal with 'such emergencies':[9] this implies a juxtaposition between emergencies and disasters. According to a different standpoint provided by other renowned scholars, an emergency should be seen as 'an umbrella term which is used to refer to sudden events causing the death of a large number of people, their internal displacement and even exodus'.[10] However, this definition seems to fall within the scope of the most widely accepted notion of 'disaster' at the Union level, which is contained in Art. 4(1) of Decision 1313/2013/EC[11] (here, disaster 'means any situation which has or may have a severe impact on people, the environment, or property, including cultural heritage').

Now, given that EU literature and regulatory practice rightly refer to the existence of a disaster management cycle comprising several *ex ante* and *ex post* phases, and it is therefore possible to legally address a disaster before it has occurred,[12] the same approach should be allowed when looking at emergencies from the perspective of EU Law. Consequently, in this article, the expression 'emergency management' alludes to a multiple-phase cycle within which supranational or national competent bodies can take action to eliminate or reduce the seriousness of situation considered to be an actual or a potential emergency. In such a context, the multilevel legal discourse on emergencies is likely to cover a wider array of issues than one might think at first glance. Besides that, the regulatory landscape becomes even more varied when the laws of individual Member States are taken into account.[13]

The second point to make is that the conceptualisation and the operationalisation of the precautionary principle have been proving challenging also at the EU level.[14] In a nutshell, the law of the EU is still experiencing uncertainty in terms of the nature, definition, scope, application and justiciability of this principle. Some scholars understandably claimed that there was a need for a thorough academic analysis of the way the principle of precaution was used and should be used.[15] Therefore, the action of the Court of Justice of the European Union (Court, Court of Justice, or CJEU) is of particular importance to shed light on this principle. Some authors convincingly argued that references

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[8] Claudia Cinnirella, '"Emergency Powers" of the European Union: An Inquiry on the Supranational Model' (2025) 10(3) European Papers 525, 527 (footnote 4).

[9] Antonis Antoniadis, Robert Schütze, and Eleanor Spaventa, 'Introduction: The European Union and Global Emergencies' in Antonis Antoniadis, Robert Schütze, and Eleanor Spaventa (eds), *The European Union and Global Emergencies : a Law and Policy Analysis* (Hart Publishing 2011) 1.

[10] Inge Govaere and Sara Poli, 'Introduction to EU Governance of (Global) Emergencies, Threats and Crises' in Inge Govaere and Sara Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Nijhoff 2014) 1.

[11] Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism [2013] OJ L347/924 (see the consolidated version of 18 December 2023).

[12] See e.g., ibid. See also Andrea de Guttry, Micaela Frulli, Federico Casolari, and Ludovica Poli (eds), *International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events. Towards an All-Hazards Approach* (Brill Nijhoff 2022).

[13] See Daniel Sarmiento, 'General Report: Topic I – EU Emergency Law' (2025), 21 <https://www.fide-europe.org/xms/files/Katowice2025/REPORTS/Topic_I._EU_Emergency_Law._General_Report_by_D._Sarmiento_-provisional_version-.pdf> accessed 30 November 2025.

[14] Ex multis, Nicolas de Sadeleer, 'The Precautionary Principle in EU Law' (2010) 5 Aansprakelijkheid Verzekering En Schade 173.

[15] Ragnar Lofsted, 'The Precautionary Principle in the EU: Why a Formal Review is Long Overdue' (2014) 16(2) Risk Management 137.

to the principle of precaution in the case-law of the Court of Justice (including the General Court) were considerably more detailed than in legal acts.[16] As will be seen in the next Sections, this seems to be even more true in the face of acts qualified as 'emergency measures' by the competent authorities, adopted in the context of selected policy areas, and leading to (heavy) restrictions on competing interests.

Against this backdrop, and based on the relevant case-law of the Court of Justice, the present article contributes to this Special Issue by assessing and untangling the main legal issues associated with the application of the precautionary principle. It explores its potential with respect to the management of emergencies (understood in the broad sense) with a view to envisaging significant legal implications within the EU legal order. In particular, it is posited that the precautionary principle may facilitate the adoption or maintenance of measures expected to help competent authorities to define the emergency nature – whether sectoral or general – of certain situations which, *prima facie*, do not fall within the scope of the emergency clauses mentioned at the beginning of this Section.

The article is structured as follows. The next Section provides a brief overview of the genesis of the precautionary principle in International and EC/EU Law, in order to clarify since the very beginning some delicate issues characterizing this principle from both the theoretical and practical points of view. In Section 3, the main findings of some landmark judgments through which the Court 'anticipated' the precautionary principle are pointed out and streamlined (Section 3.1); subsequently, the very first judicial test for the operability of the precautionary principle is discussed (Section 3.2). Section 4 highlights common features of the case-law on the application of the precautionary principle with respect to EU and national measures aimed at preventing health emergencies, focusing on influential judgments of the General Court (Section 4.1) and discussing subsequent trends fuelled by the Court of Justice (Section 4.2). Finally, and through the analysis of three case studies, Section 5 looks at further issues and possible new areas of investigations concerning the goals (Section 5.1), impact (Section 5.2) and misuse (Section 5.3) of the precautionary principle. Some concluding remarks on the main outcomes of the CJEU's approach follow in Section 6.

2 SETTING THE SCENE: THE GENESIS OF THE PRECAUTIONARY PRINCIPLE AT THE INTERNATIONAL AND EU LEVEL

Even though precautionary approaches were first 'spotted' in the law and practice of some European States (in particular, Germany),[17] the principle of precaution was mainly framed and developed under International Environmental Law. To sum up, the 1972 United Nations Conference on the Human Environment, held in Stockholm, brought environmental protection to the heart of the international community's agenda.[18] Then, the 1987

[16] Kristel De Smedt and Ellen Vos, 'The Application of the Precautionary Principle in the EU' in Harald A Mieg (ed), *The Responsibility of Science* (Springer 2022) 176.

[17] See e.g., Meinhard Schröder, 'Precautionary Approach/Principle' (2014) Max Planck Encyclopedias of International Law <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1603> accessed 30 November 2025.

[18] Among the outcomes of this Conference were a Declaration and an Action Plan containing a series of principles and recommendations for sound management of the environment a series of principles for sound management of the environment.

'Our Common Future' Report (also known as 'Brundtland' Report),[19] prepared by the World Commission on Environment and Development, introduced the concept of sustainable development and guiding principles to achieve that new overarching goal for humankind. Interestingly, the Annex enshrining the proposed legal principles for environmental protection and sustainable development also included a 'strict liability' obligation based on which States were to take 'all reasonable precautionary measures to limit the risk when carrying out or permitting certain dangerous but beneficial activities'.

These novelties paved the way for the 1992 Rio de Janeiro Conference on Environment and Development, renamed 'the Earth Summit', because of its symbolic importance. The Rio Conference proceedings included a Declaration of Universal Principles,[20] Agenda 21,[21] and other international instruments.[22] Here, the precautionary principle formally saw the light. The main reference is Principle 15 of the 1992 Rio Declaration on Environment and Development, which runs as follows:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Subsequently, further definitions or conceptualisations of the precautionary principle were elaborated, taking the cue from Principle 15 of the Rio Declaration. For instance, Art. 5.7 of the 1994 World Trade Organisation (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) does not explicitly refer to this principle, but it allows the contracting parties to take action even in cases where relevant scientific information is simply 'insufficient'. It also adds that the measures adopted must be provisional and that States shall seek to obtain the additional information necessary for a more objective assessment of risk and review the measure accordingly within a reasonable period of time. Other important insights stem from the 1998 'Wingspread Statement on the Precautionary Principle'; in this case, the principle was the subject matter of an initiative that aimed to add human health to the category of protected goods (next to the environment) and to downgrade the risk threshold to generic 'threats of harm'.[23]

The European Community tried to keep pace with the legal advancements in the realm of International Environmental Law.[24] In 1986, the Single European Act introduced a

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[19] The text of the Report is available here <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 30 November 2025.

[20] Rio Declaration on Environment and Development (A/CONF.151/26).

[21] The text of the Agenda 21 is available here: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> accessed 30 November 2025.

[22] In particular, the Convention on Biological Diversity (Biodiversity Convention or CBD) entered into force on 29 December 1993, and the United Nations Framework Convention on Climate Change (UNFCCC), entered into force on 21 March 1994. Another outcome was the Statement of Principles for the Sustainable Management of Forests (A/CONF.151/26, Annex III).

[23] The text of the Statement is available here: <https://www.gdrc.org/u-gov/precaution-3.html> accessed 30 November 2025. See more in detail Charles Vlek, 'A Precautionary-Principled Approach Towards Uncertain Risks: Review and Decision-Theoretic Elaboration' (2009) 2(2) Erasmus Law Review 129, 137.

[24] Some EC measures predating the Maastricht Treaty expressed the precautionary approach, albeit in a sectoral manner: see *amplius* Joakim Zander, *The Application of the Precautionary Principle in Practice. Comparative Dimensions* (Cambridge University Press 2010) 80.

provision, Art. 130r, concerning Community action on the environment. This provision also included the principle of environmental integration, which soon ceased to be a sectoral principle. With the adoption of the Maastricht Treaty, in 1992, this action was turned into a policy of the newly formed European Union, and Art. 130r was partly amended. Among other things, the precautionary principle was added to the text of this Article (it was the same year of the Rio Conference on Environment and Development). The structure and core contents of this provision, including the precautionary principle, have been reproduced time after time until the adoption of the Lisbon Treaty; they can now be found in Art. 191 TFEU.[25]

Notwithstanding the influence of International Law on EU Law, and despite the developments outlined above, the precautionary principle quickly proved difficult to conceptualise and apply at the EU level. It was thus not surprising to come across divergent implementation schemes at the international level, even outside the scope of application of environmental protection. As for the Community, the risk of double standards for what was permissible internally and in international relations was highlighted.[26] A famous testing ground was the 'hormone beef' dispute, which took place within the WTO following complaints submitted by the United States and Canada to challenge an EC ban on the importation of meat and meat products from cattle treated with specific hormones for growth promotion purposes. In that case, the WTO Panels and the Appellate Body ruled in favour of the applicants and stated that the contested EC measures were not in line with the SPS Agreement.[27] This dispute brought to the surface the uncertainty surrounding this principle,[28] with the Appellate Body trying to shed some light on the matter.[29]

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[25] The precautionary principle remains a founding principle of the EU's environmental policy, alongside principles that emphasize the need for preventive action, the priority of rectifying environmental damage at its source, and the principle that the polluter should pay. Instead, the principle of environmental integration acquired a more general nature and is enshrined in Art. 11 TFEU and Art. 37 of the Charter of Fundamental Rights. See more in detail Patrick Thieffry, *Manuel de droit de l'environnement de l'Union européenne* (Bruylant 2014) 65; David Langlet and Said Mahmoudi, *EU Environmental Law and Policy* (Oxford University Press 2016) 40; Geert Van Calster and Leonie Reins, *EU Environmental Law* (Edward Elgar Publishing 2017) 17; Gyula Bándi, 'Principles of EU Environmental Law Including (the Objective of) Sustainable Development' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) 36; Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (2nd edn, Oxford University Press 2020), especially Part I; Ludwig Krämer with Christopher Badger, *Kramer's EU Environmental Law* (9th edn, Hart Publishing 2024) 14.

[26] Giandomenico Majone, 'What Price Safety? The Precautionary Principle and its Policy Implications' (2002) 40(1) Journal of Common Market Studies 89.

[27] WTO Panel, Report of 18 August 1997 (WT/DS26/R/USA); WTO Panel, Report of 18 August 1997 (WT/DS48/R/CAN); WTO Appellate Body, Report of 16 January 1998 (WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4).

[28] For example, regarding its definition, its nature under International Law, and its position in the SPS Agreement. More to the point, the applicants claimed that the precautionary principle was inherent in risk assessment and should not have been linked to risk management (as argued by the EC): Anna Szajkowska, 'The Impact of the Definition of the Precautionary Principle in EU Food Law' (2010) 47(1) Common Market Law Review 173, 178.

[29] See further Wybe Th Douma and M Jacobs, 'The Beef Hormones Dispute and the Use of National Standards under WTO Law (1999) 8(5) European Energy and Environmental Law Review 137; Christophe Charlier and Michel Rainelli, 'Hormones, Risk Management, Precaution and Protectionism: An Analysis of the Dispute on Hormone-Treated Beef between the European Union and the United States' (2002) 14(2) European Journal of Law and Economics 83; Ilona Cheyne, 'Gateways to the Precautionary Principle in WTO Law' (2007) 19(2) Journal of Environmental Law 155, 158; Jacqueline Peel, 'Of Apples and Oranges (and Hormones in Beef): Science and the Standard of Review In WTO Disputes Under The SPS Agreement' (2012) 61(2) International & Comparative Law Quarterly 427.

The final decision of the Appellate Body pushed the European Commission to draft a Communication on the precautionary principle, which was published in 2000.[30] The Communication definitely brought some elements of interest. For example, the Commission illustrated that the principle's scope is wider than what could be inferred from the EU's founding Treaties, as it covers priorities and policy areas like health and the internal market. The critical threshold was represented by the existence of 'reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community'.[31] The background against which the principle could be activated should be characterised by insufficient, inconclusive, or uncertain scientific information that make it impossible to determine the risk with sufficient certainty. Finally, any measure adopted by decision-makers under the umbrella of the precautionary principle has to be proportionate, non-discriminatory, consistent with similar initiatives, resulting from a cost and benefits analysis, subject to review in the light of new scientific data, and capable of assigning responsibility for producing the scientific evidence.

The fact is that the 2000 Communication was literally designed as a point of departure for broader studies, meaning that the Commission itself expected substantive evolutions in the future. However, as anticipated in the previous Section, the EU institutions and bodies failed to improve the state-of-the-art on the legal debate about the precautionary principle.[32]

In the absence of thorough legal guidance in the EU's founding treaties and secondary law, the role of the CJEU became (and continues to be) inevitably preponderant and suitable to lead to innovative outcomes.[33] So, the purpose of the next Sections is to highlight the alleged added value of the CJEU's case-law for the concretisation of the precautionary principle, and to contextualize the main findings with respect to the management of emergencies (keeping in mind the potential broadness of this concept).

3 THE EARLY STAGES OF THE PRECAUTIONARY PRINCIPLE

The attention is now directed to the activity of the EU judicial bodies in order to discuss some evolutionary stages of the principle of precaution. Next Sections consider the role played by the Court of Justice to make the precautionary principle 'fit' for the supranational legal order.

3.1 THE BASELINE

To start with, it is worth emphasising the influence of the Court of Justice's case-law even before the precautionary principle was officially spelt out. The Court acted as a 'forerunner'

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[30] Commission, 'Communication from the Commission on the precautionary principle', COM(2000) 1 final.
[31] ibid, 2.
[32] Kenisha Garnett and David J Parsons, 'Multi-Case Review of the Application of the Precautionary Principle in European Union Law and Case Law' (2017) 37(3) Risk Analysis 502.
[33] Alberto Alemanno, 'The Shaping of the Precautionary Principle by European Courts: From Scientific Uncertainty to Legal Certainty' in Lorenzo Cuocolo and Luca Lupária (eds), *Valori costituzionali e nuove politiche del diritto. Scritti raccolti in occasione del decennale della rivista 'Cahiers Européens'* (Halley 2007) 11; Eloise Scotford 'Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights' in Sanja Bogojević and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 133, 146.

in this respect because it laid the groundwork for a legal narrative on precaution-related powers and duties.

A set of judgments evidently favoured the emergence of a "precautionary approach" in sectors that were regulated to a small extent by the European Economic Community (EEC or Community) many years ago. These judgments often related to a branch under the course of development in the law of the Community, namely food security. However, the very aim of the approach constituting the *fil rouge* of these judgments was safeguarding human health and consumer protection in a single market-driven context where potentially negative consequences were difficult to estimate. Essentially, the main findings of the then Court of Justice of the European Community (CJEC) mirrored the mandatory requirements of the doctrine elaborated since the seminal *Cassis de Dijon* judgment.[34] Basically, the Court enabled the Member States to err on the side of caution with the result that competent national authorities often enjoyed much leeway in determining the threshold where a balance between rules (primarily related to free movement of goods) and exceptions had to be struck. Some examples may help clarify this point.

In the *Kaasfabriek Eyssen* case,[35] the Court had to consider whether a Dutch prohibition on the use of a specific antibiotic to preserve cheese was justified on health protection grounds, even though, at that time, the state of scientific research did not offer any clear result about the existence of a health risk. The CJEC nonetheless ensured a wide margin of manoeuvre to the Member State concerned and confirmed the validity of the domestic prohibitions. To reach this conclusion, the Court noted that some United Nations agencies, such as the Food and Agriculture Organisation and World Health Organisation, had decided to undertake scientific studies on the risk of ingestion, not only from cheese but also from all other sources.

Similarly, with the *Sandoz* judgment,[36] related to national authorisation schemes for vitamins intake in food and beverages, the Court of Justice provided a broad interpretation of the findings of another ruling, *Frans-Nederlandse Maatschappij*,[37] on plant protection products. The Court held that in case of scientific uncertainty on the harmfulness of a certain additive, and in the absence of full harmonisation, the Member States can establish the degree of protection of the health and life of humans that they intend to assure, having regard of the specific eating habits of their own population. In *Heijn*[38] and *Mirepoix*,[39] concerning the harmfulness of pesticide residues for human health, the Court, again, confirmed that domestic restrictions could be justified even in the face of scientific uncertainty on the minimum level of danger for human organisms.

The *Melkunie* judgment[40] had a particular impact, as it expressed a 'zero tolerance approach' for threats to human health. The case referred to non-pathogenic micro-organisms

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[34] Case 120/78 *Rewe-Zentral AG contro Bundesmonopolverwaltung für Branntwein* EU:C:1979:42. According to some scholars, it is right in the post-*Cassis de Dijon* internal market rationale that the precautionary logic fits: Kai Purnhagen, 'The EU's Precautionary Principle in Food Law is an Information Tool!' (2015) 26(6) European Business Law Review 903.

[35] Case C-53/80 *Officier van Justitie/Kaasfabriek Eyssen BV* EU:C:1981:35.

[36] Case 174/82 *Criminal proceedings against Sandoz BV* EU:C:1983:213.

[37] Case 272/80 *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV* EU:C:1981:312.

[38] Case 94/83 *Criminal proceedings against Albert Heijn BV* EU:C:1984:285.

[39] Case 54/85 *Ministère public against Xavier Mirepoix* EU:C:1986:123.

[40] Case C-97/83 *Criminal proceedings against CMC Melkunie BV* EU:C:1984:161.

in pasteurised milk products and was dealt with in the framework of the exceptions to the free movement of goods at the Community level. The CJEC affirmed that the data available did not make it possible to determine with certainty the minimum threshold of non-pathogenic micro-organisms in pasteurised milk products at which an acceptable level turns into a source of danger to human health. In the absence of harmonisation in this field, the Court ruled that

> it is for the Member States to determine, with due regard to the requirements of the free movement of goods, the level at which they wish to ensure that human life and health are protected. In those circumstances, national legislation seeking to ensure that at the time of consumption the milk product in question does not contain micro-organisms in a quantity which may constitute a risk merely to the health of some, particularly sensitive consumers, must be considered compatible with the requirements of [the treaty-based derogations to the free movement of goods].[41]

Considered as a whole, these judgments suggest that the Court was inclined to confirm the significance of precaution as a regulatory tool. The CJEU appeared to have laid the foundations for a generally deferential approach towards competent authorities seeking to invoke precaution in order to prevent situations that could have led to (or constituted) health emergencies. It does not even seem that the conditions to be met to validly invoke precaution included the burden of proving the cross-border nature of the scenario to be averted. This circumstance becomes even more important if one considers the effects that the Court tolerated when it agreed to uphold the arguments of the authorities that had adopted measures expressing the precautionary approach. At a time when the single market represented the main goal of the European integration process (pursuant to Art. 2 of the Rome Treaty establishing the EEC),[42] the precautionary approach was indeed turning into one of the main drivers to limit market freedoms by means of domestic measures.

3.2 THE INITIAL 'STRESS TEST': THE *BSE* JUDGMENT

The first real implementation of the precautionary principle in the case-law of the Court of Justice took place in 1998, in the case *United Kingdom and Northern Ireland v European Commission*.[43] The case arose at the time of a continental alarm for the potential effects of Bovine Spongiform Encephalopathy (BSE), commonly known as 'Mad Cow disease', first detected in 1986 in the United Kingdom (UK). In March 1996, a specific variant of BSE epidemic in cattle was found to be present in humans in the UK; the event was allegedly linked to the consumption of meat and other food products from contaminated cattle. Just one week later, the European Commission adopted Decision 96/239/EC on 'emergency measures' to protect against bovine spongiform encephalopathy.[44] This Decision temporarily banned the UK's exports of bovine animals, as well as meat and derivative products. The

[41] *CMC Melkunie BV* (n 40) para 18.
[42] It is well-known that the formulation of Art. 3 TEU is very different, and the concept of the internal market is now way broader.
[43] Case C-180/96 *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities (BSE)* EU:C:1998:192.
[44] Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy [1996] OJ L78/47.

ban was passed, although available scientific information was not sufficient to take a definitive stance on the transmissibility of BSE to humans. Apparently, the risk of transmission could not be excluded, and that immediately raised serious concern among consumers. The emergency measures provided for by Commission's Decision had as their legal foundations legislative acts adopted in the framework of the Common Agricultural Policy.[45]

The CJEU was confronted with an action for annulment brought against this Decision. The Court's ruling – which has gone down in history as the '*BSE* judgment' – confirmed the legality of the challenged measure. The Judges stressed the importance of competent authorities' relevant publications about new scientific information that had established a probable link between a disease typically affecting cattle and a fatal disease affecting humans for which no known cure existed at that time. The core of the judgment is in a statement: 'Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent' (para 99).[46] The Court added that such an approach could be inferred by the Treaty-based provisions shaping the environmental policy. Furthermore, after applying the proportionality test, the Court concluded that the ban on the export of live bovine animals could not be regarded as a manifestly inappropriate measure in view of the seriousness of the risk and the urgency of the situation.[47] As one can see, the CJEU did not expressly mention the precautionary principle. Nevertheless, it was convincingly argued that the Court's reasoning implicitly included this principle in the legitimation of the protective measure in the face of scientific uncertainty.[48] Not by chance, the management of the BSE crisis at the Community level was immediately labelled as a case study on the precautionary principle.[49] This aspect constitutes a remarkable evolution with respect to the background of the cases illustrated in the previous Section.

In addition, the application of the precautionary principle in the *BSE* judgment had two very important legal effects. First, the legal act in question was clearly designed to extend the scope of application of the precautionary principle outside the environmental dimension, particularly to trace it back to health protection. Second, in the *BSE* case, the precautionary principle was crucial in attributing the characteristics of a health emergency to the specific situation that the European Commission sought to avert. The fact that the Court upheld the Commission's Decision means that the judgment confirmed the emergency nature of that act, i.e. a particularly urgent measure, adopted during an epidemic, and with a view to introducing heavy restrictions on intra-Community trade. The context that emerges from a joint reading of the contested act and the judgment appears to be one of possible and

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[45] Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra- Community trade in certain live animals and products with a view to the completion of the internal market [1990] OJ L224/29, and Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market [1989] OJ L395/13.
[46] The Court took the same stand in a judgment closely related to *BSE* and completed the same day: see Case C-157/96 *The Queen v Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others* EU:C:1998:191 para 63.
[47] *BSE* (n 43) para 110.
[48] Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 696.
[49] Jane Holder and Sue Elworthy, 'The BSE Crisis: A Study Of The Precautionary Principle and The Politics Of Science in Law' in Helen Reece (ed), *Law and Science: Current Legal Issues 1998* (Oxford University Press 1998) 129.

imminent emergency, notwithstanding scientific uncertainty regarding the existence of serious large-scale risks to human health, and even though the disease at issue was known for years.

4 CONSOLIDATING THE PRINCIPLE

The *BSE* judgment proved to be a driving factor for the EU legislation. In particular, it had a profound impact on the preparation of the 2002 General Food Law Regulation, whose Art. 7 is notable for being one of the most striking precautionary clauses in EU secondary law. The legal framework of other sectors was also underpinned by the precautionary principle: the 2006 Regulation on chemicals[50] and the 2009 Regulation on plant protection products,[51] are good examples in this respect. Additionally, all these Regulations contain provisions openly referring to emergency situations, procedures or measures. However, *BSE* became a reference point in the case-law on the precautionary principle, bearing in mind the difficulties the Union faced in managing scientific uncertainty, due to varying national standards affecting administrative discretion at the EU level.[52] The following sections illustrate the main outcomes of the post-*BSE* case-law on the precautionary principle.

4.1 THE BASELINE: THE EARLY 2000s JURISPRUDENCE OF THE COURT OF FIRST INSTANCE (AND THE EFTA COURT)

Since the early 2000s, the case-law of the CJEU on the precautionary principle has intensified. In particular, the *BSE* decision was soon followed by some judgments issued between 2002 and 2003 by the former Court of First Instance (CFI, now General Court), which still constitute milestones in this regard. Among these decisions are *Pfizer,*[53] *Alpharma,*[54] *Artegodan,*[55] and *Solvay Pharmaceutical*,[56] concerning cases that are about Community measures establishing the withdrawal of the authorisation of certain antibiotics, medicinal products, or additives in feedingstuffs. For the purposes of the present analysis, the findings on the issue of scientific evidence are particularly noteworthy, as the CFI went beyond the conclusions reached by the CJEU in the *BSE* judgment and the guidelines published in 2000 by the European Commission.

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[50] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1.
[51] Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L309/1.
[52] Karl-Heinz Ladeur, 'The Introduction of the Precautionary Principle into EU Law: A Pyrrhic Victory for Environmental and Public Health Law? Decision-Making under Conditions of Complexity in Multi-Level Political Systems' (2003) 40(6) Common Market Law Review 1455, 1475.
[53] Case T-13/99 *Pfizer Animal Health SA v Council of the European Union* EU:C:1999:572.
[54] Case T-70/99 *Alpharma Inc. v Council of the European Union* EU:T:2002:210.
[55] Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan GmbH and Others v Commission of the European Communities* EU:T:2002:283.
[56] Case T-392/02 *Solvay Pharmaceuticals BV v Council of the European Union* EU:T:2003:277.

In these judgments, the CFI addressed risks to human health[57] and stated that a preventive measure cannot be based on a purely hypothetical approach to target risks:[58] a conjecture that has not been scientifically verified is not sufficient to activate the precautionary principle validly. Against this background, the *Pfizer* judgment clarified that a risk assessment must be carried out to verify the degree of scientific (un)certainty before taking a restrictive measure. The CFI acknowledged that arbitrary measures could not in any circumstances be rendered legitimate by the precautionary principle and that even preventive measures must be based on 'as thorough a scientific risk assessment as possible', account being taken of the particular circumstances of the case at issue, as well as the best available scientific data and the most recent results of international research.[59] This may also be the reason why the CFI, in *Pfizer*, got into the very technical substance of the case, thereby paving the way for the application of a proactive approach in cases where scientific knowledge is needed.[60]

However, the initial emphasis on risk assessment may be misleading, as the judges also added that:

> when the precautionary principle is applied, the fact that there is scientific uncertainty and that it is impossible to carry out a full risk assessment in the time available does not prevent the competent public authority from taking preventive protective measures if such measures appear essential, regard being had to the level of risk to human health which the public authority has decided is the critical threshold above which it is necessary to take preventive measures.[61]

Therefore, it does not come as a surprise that in cases like *Alpharma* and *Solvay Pharmaceutical*, the CFI applied the principle of precaution even though the defendant institution had not carried out a risk assessment prior to the taking of the measures challenged by the applicants.[62] Moreover, it appears that the explicit evidence of the risk was not deemed to be necessary in order to trigger the precautionary principle.[63] This is why the literature rightly points out that the determination of the exact level of uncertainty implies very challenging evaluations, to the point that the requirement of conducting a solid risk assessment is unlikely to be fulfilled in practice.[64] The CFI, if anything, constructed

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[57] Indeed, after *BSE*, the Luxembourg judges ended up dealing with the precautionary principle mostly in the areas of health and food safety, rather than environmental protection. See more extensively Nicolas de Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law' (2006) 12(2) European Law Journal 139.

[58] See e.g., *Pfizer* (n 53) para 143, *Alpharma* (n 54) para 156.

[59] *Pfizer* (n 53) para 162.

[60] This choice was criticised by some scholars who claimed that in *Pfizer*, the CFI took its epistemic role seriously and acted as a kind of 'super-expert'. That resulted in the CFI going 'further than performing a role as informational catalyst would permit'. See Luca Knuth and Ellen Vos, 'When EU Courts Meet Science: Judicial Review of Science-Based Measures Post-Pfizer' in Mark Dawson, Bruno de Witte, and Elise Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar Publishing 2024) 191, 199.

[61] *Pfizer* (n 53) para 382.

[62] See also Anne-May Janssen and Nele F Rosenstock, 'Handling Uncertain Risks: An Inconsistent Application of Standards?: The Precautionary Principle in Court Revisited' (2016) 7(1) European Journal of Risk Regulation 144, 150.

[63] De Smedt and Vos (n 16) 177.

[64] Marjolein B A van Asselt and Ellen Vos, 'The Precautionary Principle and the Uncertainty Paradox' (2006) 9(4) Journal of Risk Research 313.

uncertainty as the absence of full safety, which ultimately leads to a very limited room for any judicial review of the precautionary principle.[65] Most notably, given the likelihood of diverging scientific opinions on uncertainty in many situations, these CFI's judgments suggest that the precautionary principle has the potential to always be applied.[66]

For the sake of completeness, it should be stressed that CFI was partly influenced by the case-law of the Court of the European Free Trade Association (EFTA Court).[67] A major example is the *Kellogg's* judgment,[68] concerning a ban on import and marketing imposed by Norway on cornflakes fortified with iron and vitamins.[69] *Kellogg's* boosted a sort of circular approach when it comes to the relationship between the CJEU and the EFTA Court; on the one hand, it contributed to developing the law of the European Economic Area (EEA) in an integration-friendly way, while on the other, the CJEU cited *Kellogg's* in various judgments on the precautionary principle.[70]

Now, if one puts the main takeaways of these rulings in the context of emergency management, it seems fair to conclude that the CFI opened the way to a framework in which policy and decision-makers enjoy a significant margin of manoeuvre since the first phases of the cycle. That is particularly true when it comes to assessing the lawfulness of measures already adopted. This argument is strengthened by the fact that, in those years, the CFI elevated the precautionary principle to the rank of the general principles of Community law, requiring that 'competent authorities' take appropriate measures.[71] Moreover, the category of 'competent authorities' was interpreted as encompassing both EU institutions involved in

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[65] Anne-May Janssen and Marjolein van Asselt, 'The Precautionary Principle in Court. An analysis of post-Pfizer Case Law' in Marjolein van Asselt, Esther Versluis, and Ellen Vos (eds), *Balancing between Trade and Risk: Integrating Legal and Social Science Perspectives* (Routledge 2013) 197, 213. However, it was also argued that this line of judgments showed the CFI's propensity to require the demonstration of solid evidence of harm to justify precautionary measures: Elen Stokes, 'The EC Courts' Contribution to Refining the Parameters of Precaution' (2008) 11(4) Journal of Risk Research 491, 497.

[66] Sara De Vido, 'Science, Precautionary Principle and the Law in Two Recent Judgments of the Court of Justice of the European Union on Glyphosate and Hunting Management' (2020) 43(2) DPCE Online 1319, 1332.

[67] This Court is a peculiar judicial body, as it is an independent International Law Organisation with a limited jurisdiction. See Halvard Haukeland Fredriksen, 'The EFTA Court', in Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein and Michelle Q Zang (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge University Press 2018) 138. The EFTA Court was not found to play the same para-constitutional role of the CJEU, and it should be recalled that the latter underscored the different aims of the EFTA Convention and the Treaty establishing the European Economic Community, notwithstanding the identical formulation of certain provisions (Case 270/80 *Polydor and Others v Harlequin and Others* EU:C:1982:43). However, it was opined that the case-law of the EFTA Court at times influenced that one of the CJEU: Carl Baudenbacher, 'The EFTA Court's Contribution to the Realisation of a Single Market' (2018) 29(5) European Business Law Review 671.

[68] Case E-3/00 *EFTA Surveillance Authority v The Kingdom of Norway* [2000-2001] EFTA Ct. Rep. 73 points 25-29.

[69] In *Kellogg's*, the EFTA Court ruled that the ban ran counter to the prohibition of quantitative restrictions on imports and all measures having equivalent effect between the Contracting Parties. However, it also laid down some important insights on the application of the precautionary principle. Above all, the *Kellogg's* ruling clarified that, in the absence of harmonisation, and when there is uncertainty as to the current state of scientific research, States can decide what degree of protection of human health they intend to assure, thereby enjoying discretion to make risk management decisions, including establishing the level of risk they consider appropriate. The EFTA Court added that restrictive measures can be justified under the precautionary principle 'when the insufficiency, or the inconclusiveness, or the imprecise nature of the conclusions to be drawn from those considerations make it impossible to determine with certainty the risk or hazard, but the likelihood of considerable harm still persists were the negative eventuality to occur'. See ibid, paras 25-31.

[70] Halvard Haukeland Fredriksen, 'The EFTA Court 15 Years On' (2010) 59(3) The International and Comparative Law Quarterly 731, 747.

[71] *Artegodan* (n 55) para 184.

preparing and applying secondary legislation, as well as Member States when acting within the scope of EU Law.[72] That being stated, a common trait of the judicial decisions considered so far is the consolidation of the precautionary principle's high potential to justify measures aimed at tackling risks leading to possible health emergencies. Even when the aim is to lower the intensity of these risks, the approach at hand is likely to anticipate the emergency threshold, and this applies regardless of whether the emergency envisaged by the competent authorities is sectoral or general in nature.

4.2 FURTHER EVOLUTIONS: OF DISCRETION AND PROPORTIONALITY

The judgments referred to in the previous Sections opened the way to an extensive use of the precautionary principle in cases relating to the nexus between environment and human health. Chiefly, the precautionary principle was operationalised to determine whether restrictions on certain products, as decided by the EU or national institutions, were compliant with supranational rules. Most of the times, a large latitude was warranted to competent bodies.[73]

Predictably, the Court drew some red lines to anchor the uncertainty condition to scientific knowledge. A good example is the *Monsanto* judgment (2003), concerning genetically modified organisms (GMOs), where the Court indicated that the risk assessment to be conducted (by domestic bodies) is in line with the precautionary principle if it provides 'specific evidence which, without precluding scientific uncertainty, makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available and the most recent results of international research that the implementation of those measures is necessary' in order to avoid potential (thus, not necessarily actual) risks to human health.[74]

At the outset, it can easily be observed that, in many judgments, the CJEU relied on the principle of precaution to warrant restrictive measures adopted – in whole or in part – to protect human health. That happened either in cases where supranational norms had been challenged[75] or in cases involving alleged non-compliance with EU Law.[76] More generally (and more importantly), these rulings bring to the surface the issue of the leeway afforded by the precautionary principle to policy and decision-makers when a serious risk to human

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[72] Didier Bourguignon, 'The Precautionary Principle: Definitions, Application and Governance' (in-depth analysis - European Parliamentary Research Service 2015), 6 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/573876/EPRS_IDA(2015)573876_EN.pdf> accessed 30 November 2025.

[73] It was claimed that this effect could in turn reinforce the dominance of administrations over citizens: Veerle Heyvaert, 'Facing the Consequences of the Precautionary Principle in European Community Law' (2006) 31(2) European Law Review 185, 187.

[74] See in particular Case C-236/01 *Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri and Others* EU:C:2003:431 para 113.

[75] To give just a few examples, see: Case C-154/04 *Alliance for Natural Health judgment* EU:C:2005:449; Case C-558/07, *The Queen, on the application of S.P.C.M. SA, C.H. Erbslöh KG, Lake Chemicals and Minerals Ltd and Hercules Inc. v Secretary of State for the Environment, Food and Rural Affairs* EU:C:2009:430; Case C-343/09 *Afton Chemical Limited v Secretary of State for Transport* EU:C:2010:419; Case C-616/17 *Criminal proceedings against Mathieu Blaise and Others* EU:C:2019:800.

[76] For instance, see Case C-192/01 *Commission of the European Communities v Kingdom of Denmark* EU:C:2003:492 (the same approach was followed one year later in Case C-41/02 *Commission of the European Communities v Kingdom of the Netherlands* EU:C:2004:762, even though the national measure was found in breach of EU Law, especially due to the absence of scientific data affecting the assessment carried out by Dutch competent authorities); Case C-95/01 *Criminal proceedings against John Greenham and Léonard Abel* EU:C:2004:71.

health is supposed to exist notwithstanding scientific uncertainty. Furthermore, if the likelihood of real harm to health (or actual damage to environment) persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.

So, the Court reaffirmed the wide discretionary powers enjoyed by EU institutions as regards the definition of the objectives pursued and the choice of appropriate means of action. Accordingly, the scope of judicial review ends up being limited to checking whether a manifest error of assessment vitiates the institutions' exercise of their powers, whether there has been a misuse of powers, or whether the institutions have manifestly exceeded the limits of their discretion.[77] In this respect, further useful insights can also be found in judicial decisions where the Court acknowledged that the principle of precaution is instrumental to the achievement of health priorities even regardless of a connection with other policy areas characterised by high-intensity powers and competences of the EU (e.g. environmental protection, agriculture, internal market). In other words, the Court gradually accepted the connection of the precautionary principle to Art. 168 TFEU, which embodies a supporting competence of the EU and prescribes the inclusion in all the policies and actions of the Union of the requirements relating to the protection of human health.[78]

Quite similar prerogatives were guaranteed to the Member States acting in sectors that were not harmonised by supranational legislation, although in some of the judgments concerned the Court failed to reproduce the same considerations on the limits to judicial review.[79] Paradoxically, this seems to be confirmed by rulings in which the Court took a restrictive stand on the possibility of invoking the precautionary principle. A case in point is *Fidenato* (2017),[80] a sort of 'follow-up' judgment with regard to the '*Monsanto* saga'.[81] Here, the Court indirectly denied the lawfulness of a restriction established by national competent authorities against the cultivation of genetically modified maize. Still, in that case, precise and exhaustive EU-based criteria contributed to clarifying the specific extent to which the precautionary principle could be applied. In fact, the placement in the internal market was originally authorised at the EU level. Additionally, the provision to interpret was Art. 34 of the 2003 Food and Feed Regulation,[82] concerning the so-called 'emergency measures' that Member States may take under the 'Emergencies' Section of the 2002 General Food

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[77] E.g., Case T-204/11 *Kingdom of Spain v European Commission* EU:T:2015:91 paras 30-34; Case T-584/13 *BASF Agro and Others v Commission* EU:T:2018:279 paras 92-96; Case T-317/19 *AMVAC Netherlands BV v European Commission* EU:T:2022:62 paras 203-206 and 230; Case C-499/18 P *Bayer CropScience AG and Bayer AG v European Commission* EU:C:2021:367 paras 170-172.

[78] See in particular the *Gowan Comércio* judgment, where the Court confirmed the validity of a Commission's measure adopted to include fenarimol as 'active substance' pursuant to the Community's legal framework on the placing of plant protection products on the market: Case C-77/09 *Gowan Comércio Internacional e Serviços Lda v Ministero della Salute* EU:C:2010:803 para 70.

[79] *Ex multis*, Case C-24/00 *Commission of the European Communities v French Republic* EU:C:2004:70 para 50 (basically, the Court recalled previous judgments related to the precautionary approach and issued before the precautionary principle was officially established, like *Sandoz*); Case C-333/08 *European Commission v French Republic* EU:C:2010:44 para 86; Case C-663/18 *Criminal proceedings against B S and C A* EU:C:2020:938 para 90.

[80] Case C-111/16 *Criminal proceedings against Giorgio Fidenato and Others* EU:C:2017:676.

[81] See also Joined cases C-58/10 and C-68/10 *Monsanto SAS et al. v Ministre de l'Agriculture et de la Pêche* EU:C:2011:553. On the case-law concerning the application of the precautionary principle in response to the introduction of GMOs in the Member States, see Alessandra Guida, 'The Precautionary Principle and Genetically Modified Organisms: A Bone of Contention between European Institutions and Member States' (2021) 8(1) Journal of Law and the Biosciences 1.

[82] Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed [2003] OJ L268/1.

Regulation; and this provision is formulated in a very precise way, as it allows the adoption of said domestic measures exclusively when it is evident that a product authorised by or in accordance with that Regulation is likely to constitute a serious risk to human health, animal health or the environment. So, the Court's conclusions in *Fidenato* depend on the peculiar nature of the applicable secondary law provision, to be seen as a *lex specialis* (vis à vis the discipline on the precautionary principle contained in the 2002 General Food Regulation) authorising only in exceptional circumstances the implementation of Member States' subsidiary powers in the face of the risk assessment conducted by the European Union.[83]

In addition to all this, a large part of the judgments integrating the trend discussed in this Section adds a further layer of analysis. These rulings stand out for the development of a close connection between the principles of precaution and proportionality. This circumstance is not wholly innovative, compared with judgments issued shortly after the publication of the 2000 Commission's Communication on the precautionary principle. The point is that the power/duty of the Member States' authorities and the EU institutions to act with precaution when they are aware of risks to health or the environment associated with certain activities or products is likely to cause disproportionate restrictions. To avoid the so-called 'panic struck approach', the EU Courts paid much attention to the respect of the proportionality principle in cases concerning measures adopted under the principle of precaution.[84] This trend has evolved over time. As confirmed by comprehensive analyses, judgments like *Pfizer* and *Alpharma* 'drew a clear distinction between review of the scientific substantiation of risk management measures and review of risk management measures, manifest errors of assessment, and proportionality'. As a matter of fact, the Court subsequently proved more inclined to conduct joint assessments on both principles. That resulted in the scrutiny on precaution becoming ancillary to (or even being absorbed within) proportionality review.[85] For instance, in the case *BASF Argo BV*, the judges pointed out that the obligation to carry out an impact assessment under the precautionary principle 'is ultimately no more than a specific expression of the principle of proportionality'.[86]

So, the precautionary principle can likely raise the discretion threshold of competent authorities within the application of the principle of proportionality,[87] particularly in the final balancing sub-test. In other words, precaution could turn into a key tool to identify

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[83] Furthermore, the *Fidenato* case was decided when a new Directive on GMOs had already been adopted, but was still not applicable *ratione temporis* (Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory [2015] OJ L68/1). This Directive marked a turning point in the sense that it allows Member States to restrict or prohibit the cultivation of GMOs in their territory (see the amendments that this directive produced to Art. 26 of the 2001 Directive on GMOs). See also Elena Corcione, 'Emergency Measures Against GMOs. Between Harmonizing and De-harmonizing Trends: The Case *Fidenato et al.*' (2018) 3(1) European Papers 345.

[84] Koen Lenaerts, '"In the Union We Trust": Trust-Enhancing Principles of Community Law' (2004) 41(2) Common Market Law Review 317, 335.

[85] Giulia Claudia Leonelli, 'Acknowledging the Centrality of the Precautionary Principle in Judicial Review of EU Risk Regulation: Why It Matters' (2020) 57(6) Common Market Law Review 1773, 1791.

[86] *BASF Agro BV* (n 77) para 170.

[87] Xavier Groussot and Katharina Girbinger, 'The Precautionary and Proportionality Principles in Emergency Situations: an Analysis of the Concept of Discretion in the Context of the Covid-19 Pandemic and EU/EEA Law' (November 2024) <https://www.researchgate.net/publication/385423324_The_precautionary_and_proportionality_principles_in_emergency_situations_an_analysis_of_the_concept_of_discretion_in_the_context_of_the_Covid-19_pandemic_and_EUEEA_law> accessed 30 November 2025.

the potentially negative health consequences of certain activities. Accordingly, when conducting the proportionality test, competent authorities could enjoy much latitude in determining at least the imminence of a potential emergency as well as its possible impact (until it is possible to reach opposite conclusions thanks to new scientific evidence).

With all this in mind, it can be assumed that the precautionary principle may be implemented quite easily as a tool to justify the adoption of anticipatory measures in the management cycle of events perceived as possible emergencies, especially where such perception can be inferred from the supranational sectoral legislation to be applied in the case concerned. The judgments considered so far contribute to confirming that one of the effects of the precautionary principle could be facilitating the use of the language of the emergency by competent authorities, to the point that certain measures adopted on the basis of this principle could be conceived as emergency ones even though the emergency in the strict sense is not yet truly imminent. These measures would thus be adopted in times of no emergency, although in the name of emergency and outside the scope of the 'emergency clauses' expressed by the TEU and the TFEU.[88] The CJEU's case-law on the management of health-related issues suggests that the precautionary principle can easily pop up like a 'jack in the box' and be used to establish if an event is an emergency (or part thereof) or to take action at an earlier stage than response. Drawing on the terminology typically used in EU disaster law, it can be said that the precautionary principle, as operationalised by the Court, can prove to be an important factor in the management of emergency scenarios understood in a broad sense, acting in particular in the preparedness phase or in a 'buffer zone' between preparedness and prevention.[89] Furthermore, the case-law of the CJEU on the precautionary principle appears to confirm that precaution could be invoked to justify restrictive measures during the response to an event that in turn constitutes a risk or a threat capable of leading to a subsequent emergency.

5 ADDITIONAL ISSUES AND NEW TESTING GROUNDS

Although the precautionary principle finds its original background in environmental law, and despite the numerous links between this principle and the health of animals and plants, human health was the real target in the case-law discussed so far. What is more, these judgments often focused on actual or potential prejudices for the free movement of certain goods and were invoked to justify exceptions to EU Law rules (primarily, market freedoms). However, it can be assumed that the importance of the precautionary principle as a guiding principle in emergency contexts is also witnessed by some CJEU's judgments that are not exclusively limited to these dynamics. Three case studies are thus discussed in this Section:

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[88] See above, Section 1.

[89] According to Art. 4(3) of Decision 1313/2013/EU (n 11), preparedness 'means a state of readiness and capability of human and material means, structures, communities and organisations enabling them to ensure an effective rapid response to a disaster, obtained as a result of action taken in advance'. Instead, Art. 4(4) defines prevention as 'any action aimed at reducing risks or mitigating adverse consequences of a disaster for people, the environment and property, including cultural heritage'. For more information on preparedness in International and EU Law with respect to emergencies, see Andrea de Guttry, 'Rules of General Scope in Order to Be Prepared to Deal with CBRN Emergency Situations' in Andrea de Guttry, Micaela Frulli, Federico Casolari, and Ludovica Poli (eds), *International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events. Towards an All-Hazards Approach* (Brill Nijhoff 2022) 49, 51.

Pesce and others (2016),[90] *Nordic Info* (2023)[91] and *PAN Europe ASBL* (2023).[92]

5.1 *PESCE AND OTHERS* AND CONCEPTUAL DILEMMAS: A CONTROVERSIAL CONTEXTUALISATION OF THE PRECAUTIONARY PRINCIPLE'S FIELD OF OPERATION?

Whereas the precautionary principle can be invoked to counter threats to the environment as well as human, animal, or plant health,[93] *Pesce and others* is a prime example of the shifting boundaries that may characterise the reference context when health protection requirements are at stake. Chiefly, the concepts of 'emergency' and 'health' deserve specific attention.

The case concerned Xylella fastidiosa (Xylella), a bacterium that affects a large number of plants and can cause their death by desiccation. Xylella was first detected in olive trees in some areas of the Apulia region (Italy). The outcomes of scientific analyses indicated that Xylella could rapidly spread through certain insects. Notably, in a scientific opinion published at the beginning of 2015, the European Food Safety Authority (EFSA) highlighted that the exact role of Xylella as regards the syndrome of those olive trees remained to be understood. However, EFSA explained that this bacterium presented a major risk because it had the potential to cause disease to olive trees in the target area once it established.[94] More precisely, it was specified that the risk identified by EFSA affected the whole EU territory, given the likelihood of transboundary consequences.

Based on Directive 2000/29/EC,[95] the European Commission adopted several implementing Decisions aimed at preventing the spread of Xylella within the EU.[96] Importantly, these acts were qualified as 'emergency measures' by the EFSA in its 2015 scientific opinion, which proved crucial in enabling Commission to adopt strict prohibitions in the case concerned.[97] It should also be noted that a core EFSA's task in this case was to carry out an evaluation of the EU phytosanitary requirements against Xylella and its insect vectors, as laid down in Directive 2000/29/EC 'and in possible future EU emergency legislation'.[98] Evidently, the implementing Decisions adopted by the Commission were aimed to go beyond the national 'emergency measures' (once more, this is the terminology chosen to qualify the acts at stake)[99] put in place since 2013 to prevent and eradicate the specified organism in accordance with Art. 16(1) of Directive 2000/29/EC. All these elements, taken together, contribute to determining partial overlaps between risk and emergency

[90] Joined cases C-78/16 and C-79/16 *Giovanni Pesce and Others v Presidenza del Consiglio dei Ministri - Dipartimento della Protezione Civile and Others* EU:C:2016:428.
[91] Case C-128/22 *Nordic Info* EU:C:2023:951.
[92] Case C-162/21 *Pesticide Action Network Europe ASBL, Nature et Progrès Belgique ASBL, TN v État belge,* EU:C:2023:30
[93] For considerations on the possibility of applying, at least, the precautionary approach beyond these areas, see Guido Bellenghi.
[94] The document is available here <https://efsa.onlinelibrary.wiley.com/doi/pdfdirect/10.2903/j.efsa.2015.3989> accessed 30 November 2025.
[95] Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community [2000] OJ L169/1.
[96] These Decisions were adopted pursuant to Art. 16(3) of Council Directive 2000/29/EC.
[97] See supra (n 94).
[98] ibid 13.
[99] *Pesce and others* (n 90) para 16.

management scenarios.[100]

Among other things, the Commission ordered Italy to carry out eradication activities, consisting in the immediate removal not only of the infected plants (in particular olive trees), but also of all host plants – even in the absence of any symptoms of infection – situated within a radius of 100 metres of those infected, both in the infected area and in the adjacent zone (referred to as the 'buffer zone').[101] An Italian Administrative Court submitted a preliminary ruling for validity to the CJEU to challenge this measure.

In its ruling, the Court confirmed the validity of the Commission's Decision and highlighted that the precautionary principle allows the adoption of restrictive measures even where it is impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness, or imprecision of the results of studies conducted.[102] Next to this, the Court pointed out that the principle of precaution had to be applied having regard to the proportionality principle. By virtue of the EFTA's scientific opinion and the wide margin of appreciation typically recognised to the Commission, the Court – in the analysis of both principles – stated that the contested Decision was adequate to attain the objectives sought.[103] Overall, the CJEU struck a balance between competing interests, which led in particular to (major) restrictions on the right to property of the owners of olive trees in the area concerned, and environmental protection in that Region.[104]

It is worth recalling that the CJEU focused on health protection to explore the perspectives of application of the precautionary principle in the case concerned. However, the baseline question is: what kind of health? The reason behind this question is in the core background condition that Court indicated for the principle's application. The judgment points out that the validity of the provision under dispute (in the implementing act) must be checked against Art. 16(3) of Directive 2000/29/EC. Well, in the Court's words,

> the EU legislature must take account of the precautionary principle, according to which, where there is uncertainty as to the existence or extent of risks to *human* health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent.[105]

Nonetheless, in the legal reasoning of the judgment, references to human health suddenly disappear, nor did the Court cite *BSE*. On the contrary, the ruling simply stresses the key function of plant health in the framework of the Commission's Decision. Although the judgment does contain some references to public health, they are quite generic. It must also be observed that Art. 16(3) of Directive 2000/29/EC does not mention human health;

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[100] ibid, para 48 (the CJEU qualified the Commission's Decision at hand as a risk management measure).
[101] Commission Implementing Decision (EU) 2015/789 of 18 May 2015, as regards measures to prevent the introduction into and the spread within the Union of Xylella fastidiosa [2015] OJ L125/36; see also Commission Implementing Decision (EU) 2016/764 of 12 May 2016 amending Implementing Decision (EU) 2015/789 as regards measures to prevent the introduction into and the spread within the Union of Xylella fastidiosa [2016] OJ L126/77.
[102] *Pesce and others* (n 90), especially para 47.
[103] ibid, especially para 64.
[104] ibid para 81.
[105] ibid para 47, emphasis added.

the same applies to the baseline EFSA analysis.[106] Similarly, the Court refrained from centring its reasoning on the protection of the health of humans also in the judgment concluding an infringement procedure that the European Commission had activated for Italy's failure to comply with the Xylella Decisions.[107]

These circumstances allow to figure out the potential fluidity of the precautionary principle in the case-law of the Court of Justice. *Pesce and others* remains a good illustration of the moving boundaries of the precautionary principle's scope of application as regards, on the one hand, the characterisation of the operational context and the nature of the precautionary measures, and, on the other, the (re)definition of the interest to protect by means of this principle.

5.2 *NORDIC INFO*: THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE AGAINST THE FREE MOVEMENT OF UNION CITIZENS

The *Nordic Info* case, instead, was about travel bans and testing and quarantine obligations established by Belgium after the outbreak of the COVID-19 pandemic. Those restrictions were initially applied also to non-essential travel from Sweden, as this Member State was temporarily classified as a 'red zone' by the Belgian authorities. Nordic Info, an agency organising travel in Scandinavia, cancelled all scheduled trips between Belgium and Sweden and brought proceedings against the Belgian State to seek compensation for the damage. The Belgian court submitted a preliminary ruling to the CJEU, which was thus asked to interpret provisions establishing exceptions to the free movement rules enshrined in Directive 2004/38/EC (Citizens' Rights Directive – CRD)[108] and the Regulation (EU) 2016/399 (Schengen Border Code – SBC).[109]

The Court resorted to the precautionary principle to grant the defendant's arguments, even if further guidelines were provided to assist the referring court in striking a fair balance. The judgment stresses the measure of discretion enjoyed by the Member States in the area of public health on account of the precautionary principle.[110] Nonetheless, the judgment adds that, in these circumstances, the referring court's scrutiny must be confined

> to ascertaining whether it is evident that, in the light, in particular, of the available information on the COVID-19 virus at the time of the facts in the main proceedings, measures such as the obligation to maintain social distancing and/or wear a mask and the obligation for any person to regularly carry out screening tests

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[106] At most, it indicated a connection between this goal and possible large-scale insecticide treatments. The crux of the matter was that EFSA had not proved the existence of a definite causal link between the bacterium Xylella and the rapid olive tree desiccation in the Puglia Region (however, the existence of a significant correlation between the bacterium and the occurrence of such a pathology was proved).
[107] Case C-443/18 *European Commission v Italian Republic* EU:C:2019:676.
[108] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.
[109] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.
[110] *Nordic Info* (n 91) para 90.

would have sufficed to give the same result as the restrictive measures [at stake].[111]

Even if the focus on human (indeed, public) health in *Nordic Info* is self-evident, unlike *Pesce and others*, the most peculiar feature of this judgment is that, for the first time, the precautionary principle was applied to limit the free movement of persons. That happened notwithstanding the centrality of Union citizens' rights, bearing in mind that Union citizenship is a fundamental *status* of the EU legal order[112] and considering the traditional restrictive interpretative approach provided by the Court when interpreting exceptions to free movement rights recognised and guaranteed in the CRD and the SBC. Indeed, even in the presence of a totally uncommon factual background that could justify a less stringent scrutiny from a precautionary principle perspective, it appears that the Court, in *Nordic Info*, breathed life into health protection grounds via the principle of precaution.[113]

It is interesting to note that the Court never expressly mentioned the word 'emergency' in the judgment. This confirms that the field of action selected in the present work to assess the potential of the precautionary principle remains controversial. However, the *Nordic Info* ruling provided an opportunity for the Court to further strengthen the joint analysis of the precautionary and proportionality principles in a public health emergency of international concern.[114] What is more, in this judgment, the CJEU applied the classic three-step proportionality test, as opposed to the two-step proportionality test applied in previous public health cases.[115] This time, the penetration of precaution in the proportionality scrutiny was visible yet in the necessity sub-test; that probably lowered the threshold of the evidentiary requirement and shifted the assessment of uncertainty from the existence of a risk to the effectiveness of mitigating measures.[116] Overall, although the Judges confirmed the much-vaunted (highly) deferential approach in favour of the competent national authority, the judicial review concerning the assessment of the national measures proved to be particularly intense, to the point that some authors claimed that 'the CJEU acted as if it were a public health authority explaining their proportionality and not a reviewing judicial authority'.[117]

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[111] *Nordic Info* (n 91).
[112] Case C-181/23 *Commission v Malta* EU:C:2025:283 para 92.
[113] The core of the CJEU's reasoning in *Nordic Info* was followed by the EFTA Court in a judgment issued after a few months: see Case E-5/23 *Criminal Proceedings against LDL*.
[114] See e.g., the website of the European Medicines Agency <https://www.ema.europa.eu/en/human-regulatory-overview/public-health-threats/coronavirus-disease-covid-19/covid-19-public-health-emergency-international-concern-2020-23> accessed 30 November 2025.
[115] Danaja Fabčič Povše, 'So Long and See You in the Next Pandemic? The Court's One-And-Done Approach on Permissible Reasons to Restrict Freedom of Movement for Public Health Reasons in the Nordic Info Case (C-128/22) of 5 December 2023' (*European Law Blog*, 19 December 2023) <https://www.europeanlawblog.eu/pub/so-long-and-see-you-in-the-next-pandemic-the-courts-one-and-done-approach-on-permissible-reasons-to-restrict-freedom-of-movement-for-public-health-reasons-in-the-nordic-info-case-c-128-22/release/1> accessed 30 November 2025.
[116] Vincent N Delhomme, 'The Legality of Covid-19 Travel Restrictions in an 'Area without Internal Frontiers' Court of Justice (Grand Chamber) 5 December 2023, Case C-128/22, Nordic Info' (2024) 20(2) European Constitutional Law Review 307, 324.
[117] Patrycja Dąbrowska-Kłosińska, 'The EU Court of Justice on Travel Bans and Border Controls Deference, Securitisation and a Precautionary Approach to Fundamental Rights Limitations' (2025) 50(1) European Law Review 107, 113.

5.3 *PAN EUROPE*: THE DOUBLE DIMENSION OF THE PRECAUTIONARY PRINCIPLE IN THE EU PESTICIDES FRAMEWORK

Finally, it is worth adding some considerations on case law concerning the precautionary principle in EU pesticide law, which constitutes the background of the *PAN Europe ASBL* judgment. Specifically, the case revolved around plant protection products containing active substances that had been prohibited or restricted by the Commission through implementing acts.

The request for a preliminary ruling concerned Regulation (EU) 1107/2009 on the placing of plant protection products on the market.[118] This piece of legislation is a balancing act with three legal bases and a twofold aim: ensuring a high level of protection of human and animal health as well as the environment, and safeguarding the competitiveness of the EU's agriculture. Indeed, pesticides serve the second purpose, while representing a potential risk for the first one. Hence, the backbone of the Regulation is a complex system of authorisations for products containing active substances. In brief, the rule provided for by the Regulation is that such products can be authorised within a Member State if there has been a previous authorisation at the EU level.

Within this framework, Art. 53(1) of the Regulation allows Member States to introduce derogatory measures in case of 'emergency situations in plant protection'. More to the point, it stipulates that 'in special circumstances a Member State may authorise, for a period not exceeding 120 days, the placing on the market of plant protection products, for limited and controlled use, where such a measure appears necessary because of a danger which cannot be contained by any other reasonable means'. For the avoidance of doubt, this clause does not aim to restrict the placing on the market of products with already approved substances.[119] Despite presenting some ambiguities, it was formulated in rather strict terms so that national competent authorities could invoke it in clearly exceptional situations.

Nevertheless, it was shown that Art. 53 of Regulation (EC) 1107/2009 had become a kind of catch-all clause, as some Member States resorted to it to authorise the same products time after time or even to allow the placing on the market of products that had neither been approved nor banned by the EU. As a result, the ordinary authorisation procedures established by the Regulation were replaced by extraordinary measures that, step by step, had become routine.[120] The Court of Justice was pushed to address this practice, particularly the aforementioned case *PAN Europe ASBL*.[121] The final ruling unequivocally confirms that

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[118] See *supra* (n 51).

[119] These situations are covered by Chapter IX of Regulation (EU) 1107/2009, where Art. 69 permits derogations only when it is clear that what was approved at the EU level is now likely to constitute a serious risk to human or animal health or the environment, and that such risk cannot be contained satisfactorily by means of measures taken by the Member State(s) concerned.

[120] Pietro Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations: The Role of the EU Principles of Good Administration and the Precautionary Principle in Shaping Better National Administrative Practices' (2025) 8(1) Nordic Journal of European Law 70.

[121] Further preliminary rulings were activated in cases where PAN Europe was involved and the precautionary principle in the framework of Regulation (EU) 1107/2009 was at stake (although the Court did not interpret Art. 53): see e.g., Case C-308/22 *Pesticide Action Network Europe (PAN Europe) v College voor de toelating van gewasbeschermingsmiddelen en biociden* EU:C:2024:350; Joined Cases C-309/22 and C-310/22 *Pesticide Action Network Europe (PAN Europe) v College voor de toelating van gewasbeschermingsmiddelen en biociden* EU:C:2024:356. See also Pietro Mattioli, 'How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant

Art. 53(1) of the Regulation does not allow a Member State to authorise the placing on the market of plant protection products if the Commission had expressly prohibited the substances concerned.

For the purpose of the present analysis, the most important aspect is the way the precautionary principle was operationalised. The Court refrained from applying it as a justification for the 'normalisation' of pro-State emergency clause, but used it to foster the scope of the Regulation.[122] In other words, the CJEU confirmed that the precautionary principle is an inherent element of the Regulation.[123] Due to this circumstance, which can be inferred by recital 8 and Art. 1(4), precaution here stands out not as a legal basis for justifying an emergency-related exception to the rule, but as a reinforcement of a rule that could have been neutralised by extensive (potentially abusive) use of the exception.

6 CONCLUDING REMARKS

Given the absence of a uniform definition of 'emergency' at EU level and considering that various secondary law acts introduced or corresponded to emergency measures in the context of certain Union policies (in particular, environmental protection, food safety and, above all, human health), the analysis conducted in the preceding pages is based on a fairly flexible conceptualisation of the term 'emergencies'. In this regard, it was considered legally acceptable to apply the cornerstones of the disaster management cycle, including the *ex ante* phases, to emergencies as well. On the basis of these premises, the article demonstrated how the precautionary principle can influence this management cycle, especially with regard to the phases that constitute the prelude to (or the 'antechamber' of) an emergency.

The case-law analysed in the previous Sections shows that the EU institutions and national authorities can validly apply the precautionary principle in many situations falling within the emergency management cycle. That is likely to occur even outside the domain of environmental protection. The Court of Justice (and the General Court) progressively set forth some strict requirements, but many judgments contribute to substantiating a deferential approach in favour of competent authorities, especially for the evaluation of precautionary measures already adopted. This remains true despite the significant restrictions that these measures may produce on interests of utmost importance to the Union (e.g., the market freedoms) and even if the Court's scrutiny tends to be more intensive where domestic measures are at stake. Moreover, applying the precautionary principle within the proportionality test (particularly in the final stages of the latter) could further expand the margin of manoeuvre for adopting measures that, despite scientific uncertainty, allow for

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Protection Products at Member State Level? Some Clarifications from the Court of Justice' (2025) 16(2) European Journal of Risk Regulation 824.

[122] Paradoxically, in a previous case the referring Court submitted questions concerning the compatibility of Regulation (EU) 1107/2009 with the precautionary principle; the Court did not find any ground to declare the act contrary to this principle. Case C-616/17 *Procureur de la République v Blaise and Others* EU:C:2019:800. See Sabrina Röttger-Wirtz, 'The Precautionary Principle and its Role in Judicial Review: Glyphosate and the Regulatory Framework for Pesticides' (2020) 22(4) Maastricht Journal of European and Comparative Law 529.

[123] However, it seems that this aspect does not exclude the existence of controversial issues, especially as far as discretionary powers of the European Commission are concerned: Nicolas de Sadeleer, 'Renewal of an Active Substance Found in an insecticide: How to Articulate Risk Assessment and Risk Management?' (2024) 26(4) Environmental Law Review 304.

prolonged restrictions on specific interests in order to pursue others.

In particular, many of the CJEU's rulings lead to the conclusion that competent authorities can enjoy a certain leeway when it comes to using the language of the emergency in order to justify the taking of certain measures in a given sector and before the immediacy of a sudden event with far-reaching negative consequences. In order to bring these initiatives more into line with EU law, it is believed that the case law analysed in this article can help trace many of these initiatives back to the scope of the preparedness phase in the face of a likely upcoming scenario perceived as an emergency.

As regards future prospects, and thus going beyond the main outcomes of the analysis conducted in this work, the CJEU could still play a decisive role in mitigating certain additional issues. First, the Court should strive to draw a line between the principles of precaution and preventive action, and take a clearer stance on challenging aspects such as the identification of the objective(s) to pursue, the degree of protection to achieve, the time frame before which the risk is likely to materialize, the choice of the most appropriate means, the intensity and length of the provisional measures. In this way, the typically deferential approach followed by the Court could be partly reoriented if need be, at least when there is strong evidence that the challenged measure is wrong.[124] Second, the Court's action could also be noteworthy in resolving conflicts that may occur between different priorities covered by the precautionary principle, thereby – hopefully – restoring any balances that may have been unlawfully or even abusively altered; for example, when the conditions behind the adoption of precautionary measures have been established clearly and precisely in secondary law acts. Finally, attention should be paid to the evolution of the relationship between the precautionary and proportionality principles before or during emergencies in order to see if the Court is more inclined to assess both principles separately or if the former is destined to be a component of the latter. While adjusting proportionality to precaution may result in more flexible and knowledge-based assessments,[125] ensuring more autonomy to the proportionality principle could foster procedural safeguards against excessive discretion.[126] To this end, the role of the Court will be crucial to balance not only competing priorities but also these two principles.

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[124] In this respect, see Ladislav Vyhnánek, Anna Blechová, Michael Bátrla, Jakub Míšek, Tereza Novotná, Amnon Reichman, and Jakub Harašta, 'The Dynamics of Proportionality: Constitutional Courts and the Review of COVID-19 Regulations' (2024) 25(3) German Law Journal 386, 393.

[125] Pavel Ondrejek and Filip Horák, 'Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures (2024) 20(1) European Constitutional Law Review 27, 50.

[126] Groussot and Girbinger (n 87).

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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 Pacula (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 Pacula (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

[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

[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

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,

[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

[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

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[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

[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

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[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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JUDGING EMERGENCIES IN THE AFTERMATH – COMMISSIONS AS A TOOL FOR SYSTEMIC CHANGE

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Responsibility. Accountability. These two concepts seem to take centre stage in the aftermath of emergencies. This article uses these words in a specific context: how Sweden uses commissions to review how authorities at different levels and the government have handled their responsibilities and tasks during an emergency. Over the years, numerous commissions have reviewed and analysed emergencies and other events that have put pressure on the Swedish administrative system. The argument here is that commissions focus on what should happen after an emergency has been handled, i.e. the aftermath. They review decision-making processes, systems, and legislation to improve them. Despite often being initiated during an emergency, they review decisions taken and laws implemented to determine how emergencies could be better regulated or handled in the future. The commissions' reviews are based on government decisions outlining specific tasks or questions for each commission. It is argued here that these commissions are an essential part of how Sweden addresses accountability after an emergency, with the focus on systemic learning and change rather than the personal accountability of decision-makers.

1 INTRODUCTION

States organise their legal systems for peace and war in different ways. Sweden opted for a regulatory structure that creates two distinctly separate legal systems for peacetime emergencies and war. They differ both in structure and regulatory framework. The two systems were also developed separately. Although its origins can be traced back further, the former whole-of-government approach (total defence system) was built up from around 1940 to the end of the 20th Century. During that period, Sweden built a total defence system encompassing all of society to handle situations of war and danger of war.[1] The idea was that by planning and preparing for the absolute worst imaginable emergency – war – society would also be able to handle other types of emergencies – floods, forest fires, or major accidents.

From the beginning of the new century, focus shifted to peacetime emergencies. The total defence system was abandoned based on a belief that there was no immediate risk of war anymore. Society's preparedness, focusing on peacetime emergencies, was built up from the municipal level. Preparedness was built to manage a wide range of societal threats from natural disasters and pandemics to terrorist attacks. The emergency management system that was created as a result was continuously developed further over the coming decade. The system and its rules gradually evolved based on evaluations and lessons learned

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[1] For the meaning of the terms 'war' and 'danger of war': Prop. 2009/10:80, 'En reformerad grundlag', 204; SOU 2023:75, 'Stärkt konstitutionell beredskap', 83 ff; Prop. 1987/88:6, 'om de offentliga organens verksamhet vid krig och krigsfara', 20, and Hans Blix, 'Om definition av krig' in Arne Gadd et al, *SOU 1972:15, Ny regeringsform Ny riksdagsordning* (Göteborgs Offset Tryckeri AB 1972) 349f.

from emergencies, for instance, the tsunami in 2004, the storm Gudrun in 2005, and a large forest fire in 2014.[2]

As the general security situation deteriorated again, and especially after the Russian invasion of Ukrainian Crimea in 2014, the government in 2015 decided to start planning for war, and the danger of war throughout society again.[3] The regulatory preparedness for total defence was still in place, even though many of the exceptional laws had not been updated for many years. The massive Cold War total defence, with stockpiles and preparedness work on all levels of society, was, however, dismantled and gone. Since 2015, emergency management and total defence have both been in place and under development. Authorities on different levels have had to learn to manoeuvre two systems. Systems with completely different legal structures. Emergency management focuses on handling emergencies that occur during peacetime. Total defence consists of all measures taken to prepare Sweden for war and is thereby a planning tool until the Government decides on high readiness.[4]

Total defence is regulated from the top down and includes regulatory preparedness measures at all levels of society.[5] The Instrument of Government regulates war and the danger of war[6] and contains far-reaching provisions for delegating decision-making and implementing exceptional laws in those situations. Preparedness rules in regular laws and ordinances further strengthen the regulatory preparedness and create a network of laws from the constitution down to regulations by authorities. Today, the systems are more entwined than ever since threats are multifaceted and difficult to label as war, danger of war, or peacetime emergencies.[7]

Peacetime emergency management, in contrast to total defence, is mainly regulated and handled by the normal legal framework and administrative system. Special laws exist, but only in certain sectors of society and not as generally applicable rules at the constitutional level. In the constitution, some rules also include peacetime emergencies. There is a rule on taxes and other state fees in war, danger of war, and severe financial crisis.[8] Rules are limiting the rights to free assembly and free demonstration due to national security and in order to combat an epidemic.[9] Parliament sessions can also be held outside of Stockholm in case of threats to the safety and liberty of the Parliament.[10]

1.1 REVIEW AND ANALYSIS AS A TOOL FOR CHANGING LAW AND POLICY

Analysis and review are vital parts of Swedish administration. There is a long tradition of

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[2] For a description of the emergency management system during the years 2002-2022 see chapter 2 in: Viktoria Asp et al, *Förutsättningar för krisberedskap och totalförsvar i Sverige* (Försvarshögskolan 2025).
[3] Proposition 2014/15:109, Försvarspolitisk inriktning – Sveriges försvar 2016–2020.
[4] 1 § lagen (1992:1403) om totalförsvar och höjd beredskap & Proposition 2014/15:109, 117.
[5] See for instance: lagen (1993:1403) om totalförsvar och höjd beredskap, förordningen (2015:1053) om totalförsvar och höjd beredskap och lagen (1988:97) om förfarandet hos kommunerna, förvaltningsmyndigheterna och domstolarna i händelse av krig eller krigsfara m.m.
[6] Chapter 15 Instrument of Government (IG). On the meaning of the terms see for instance: Prop. 2009/10:80, 204 & SOU 2023:75, 83 ff.
[7] SOU 2021:25, Struktur för ökad motståndskraft – Slutbetänkande av utredningen om civilt försvar, Elanders Stockholm 2021.
[8] See 2:10 IG. This rule is only for use in peacetime emergencies that are severe financial crises.
[9] See 2:24 para 1 IG. But also in those instances, the measures are not necessarily linked to emergencies and emergency management.
[10] See 4:1 IG.

including analysis and review in the government's steering of authorities in Sweden. Analysis and review are also important parts of the process to create new laws and change policy and administrative structures.[11]

There are authorities specialised in analysis and review who are tasked with investigating the work of other authorities within a specific sector of society or related to a particular area of work.[12] One example with a bearing for total defence is the Swedish Agency for Defence Analysis.[13] In its instruction, the authority is tasked to follow up, analyse, and evaluate activities within total defence from a system perspective, focusing on the overarching functionality of total defence.[14] There is also the National Audit Office, an authority under Parliament, tasked with auditing how well governmental agencies and political reforms function.[15] Two other authorities with tasks to evaluate and review will be merged in 2026: the Swedish Agency for Public Management and the Swedish National Financial Management Authority.[16]

There are more examples of authorities with review and evaluation as main tasks. Here, a different type of structure is in focus; the reviews conducted by a type of temporary authority, like the ones described above for changing laws or policy. These committees are, in a sense, a temporary authority set up for a specific time frame with a specific task.[17] There is an ordinance on committees regulating their work.[18] Setting up a committee is a decision by the government, and it will receive a task description, framing its work.[19] The constitution refers to an obligation for the government to incorporate needed information and opinions from authorities, municipalities, associations, and the general public.[20] Committees and the follow-up remit for receiving input on the committee's results are one way to live up to that obligation.[21] Setting up a committee to prepare a policy change, systemic change, or a new law is an important tool for governments, but it is not unproblematic.[22] But, the Government has the final responsibility for preparing the proposals before presenting them to Parliament. It will therefore also be the Government that decides how to prepare

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[11] Johan Hirschfeldt, 'Kommissioner och andra undersökande utredningar – en utflykt i gränsmarkerna mellan politik och juridik' in Lena Marcusson (ed), *Festskrift till Fredrik Sterzel* (Iustus förlag 1999); Johan Hirschfeldt, 'Undersökningskommissioner – extraordinära inslag i "the Audit Society"' in Thomas Bull, Olle Lundin, and Elisabeth Rynning (eds), *Festskrift till Lena Marcusson* (Iustus förlag 2013).

[12] See for interesting examples and a review of the system with review authorities for instance: SOU 2018:79, Analyser och utvärderingar för effektiv styrning, Stockholm 2018.

[13] Myndigheten för totalförsvarsanalys, information about the authority in English: <https://www.mtfa.se/en> accessed 20 December 2025.

[14] 1 § förordningen (2022:1768) med instruktion för Myndigheten för totalförsvarsanalys.

[15] Lagen (2002:1023) med instruktion för Riksrevisionen. Information about the authority in English: <https://www.riksrevisionen.se/en/about-us/our-remit.html#h-Lawsthatgovernouractivities> accessed 20 December 2025.

[16] The new authority will be named Statskontoret and the new instruction enters into force 1 January 2026: Förordningen (2025:681) med instruktion för Statskontoret.

[17] Hirschfeldt, 'Undersökningskommissioner' (n 11) 156.

[18] Kommittéförordningen (1998:1474).

[19] 1 § kommittéförordningen (1998:1474).

[20] 7:2 IG. The principle is rather wage in formulation, a more in depth discussion around what it entails can be found in: Anna Jonsson Cornell, 'Sverige och Rättsstaten' in Anna Jonsson Cornell and Richard Sannerholm (eds), *Rättsstatens principer – Juridik och politik i världen, Europa och Sverige* (Iustus förlag 2023) 161f.

[21] On the use of remits see for instance: Erik Nymansson, 'Remissfasen och lagrådets roll' (2020) 1 Svensk Juristtidning 34, 34ff.

[22] See for instance Svensk Jurist Tidning (SvJT) who has come back to scrutinizing the use of committees on several occasions. SvJT 2011 häfte 8 och SvJT 2020 häfte 1.

those proposals.[23] The outcome or result of the work of committees is normally a report. That report, together with the proposition from the Government, are the *travaux preparatoires*.[24]

A specific type of commission is the one that conducts a review or evaluation of an event or emergency.[25] The commissions in focus for this article are all examples of that type. They evaluate emergencies based on decisions taken, implementation of laws, and systemic challenges caused by the emergency. This type of commission can be used to review and evaluate both peacetime emergencies and war. Since Sweden has so far never operationalised the laws and structures for war and danger of war, the only available examples are, however, from peacetime emergencies. For total defence purposes, several inquiries have been of a different kind, investigating the planning structures and laws for total defence. Changes have also been implemented based on proposals from those inquiries.[26]

1.2 OUTLINE

This article will focus on three, or more accurately five, commissions enacted to evaluate and review the handling of three different emergencies – foreign submarine incursions into Swedish territorial waters in the 1980s and 1990s, the tsunami in 2004, and the COVID-19 pandemic.[27]

The article began with a description of how Sweden uses commissions and how they have been implemented and regulated in Swedish laws. Now focus turns to the terms responsibility and accountability. The following part of the article then focuses on the commissions that will be examined in more detail: the Submarine Commission of the 1980s, the Catastrophe Commission from 2005, and the Corona Commission from 2022. The Submarine Commission is a rather special case since two follow-up commissions reviewed the original commission's work.[28] The article includes all three submarine commissions.

The article will address two questions. Firstly, did the respective commission lead to changes in the system or law? Secondly, were any other forms of judicial accountability mechanisms triggered or developed by the work of the respective commissions?

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[23] Prop. 1973:90, Kungl. Maj:ts proposition med förslag till ny regeringsform och ny riksdagsordning m.m., 288, see also Anders Eka, 'Att ändra grundlag med hjälp av parlamentariska kommittéer' Anna Jonsson Cornell, Mikael Ruotsi, Caroline Taube, and Olof Wilske (eds), *De lege, Regeringsformen 50 år 1974-2024* (Iustus förlag 2024) 67.

[24] Bertil Bengtsson, 'SOU som rättskälla' (2011) 8 Svensk Juristtidning 777.

[25] See for more on this type of commission for example: Hirschfeldt, 'Undersökningskommissioner' (n 11).

[26] Some examples: SOU 2021:25; SOU 2025:6, Plikten kallar! Elanders, Stockholm 2025 & SOU 2024:65 Kommuners och regioners grundläggande beredskap inför kris och krig, Elanders, Stockholm 2024.

[27] For summaries in English of the respective commission's reports see: SOU 1983:13, Att möta ubåtshotet - ubåtskränkningarna och svensk säkerhetspolitik, Ubåtsskyddskommissionen, 1983. 79-82; SOU 1995:135, Ubåtsfrågan 1981-1994, Fritzes 1995, 325-340; SOU 2001:85, Perspektiv på ubåtsfrågan, Fritzes, 2001, 353-370; SOU 2005:104, Sverige och tsunamin - granskning och förslag, Lind & Co, 2005, 509 – 536 & SOU 2022:10, <https://www.regeringen.se/globalassets/regeringen/block/fakta-och-genvagsblock/socialdepartementet/sjukvard/coronakommissionen/summary.pdf> accessed 10 November 2025.

[28] SOU 1995:135 & SOU 2001:85.

2 RESPONSIBILITY AND ACCOUNTABILITY

In this article, the term responsibility is used in a forward-looking sense. It establishes tasks that a certain authority is responsible for or oversees.[29] For national authorities, their mandated tasks are listed in their respective government ordinance with instructions.[30] For certain authorities, there are also other laws or ordinances outlining specific tasks or mandates that are to be implemented by that authority. Some authorities also have tasks in addition to their regular tasks in the event of a peacetime emergency. Responsibility is often viewed against the backdrop of a more general sense of what responsibility a certain task requires. A review of tasks and responsibilities is, therefore, in that sense, a precondition for moving over to processes for accountability.

Accountability, on the other hand, is used in a more hindsight sense. A review in the aftermath of an emergency lays the foundation for establishing what was done, how the authority or the government interpreted and operationalised their tasks, and whether or not the decisions taken and actions implemented lived up to their mandated tasks and responsibilities.[31]

2.1 EMERGENCY MANAGEMENT – SOME LEGAL AND SYSTEMIC FEATURES

In order to start analysing commissions focused on peacetime emergencies, there is a need to first present some of the legal and systemic features of Swedish emergency management. A peacetime emergency can be defined as a situation that:

- deviates from normal;
- affects many people, big parts of the society or threatens basic values;
- implies a serious interference or imminent risk of serious interference with important societal functions;
- demands coordinated and prompt measures from several actors.[32]

This definition has changed several times since the beginning of the 2000s, but the essence of it has remained in place over time.[33] There are, however, many different terms relating to peacetime emergencies to be found in different parts of the system and in different legal instruments.[34]

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[29] A similar definition of the term can be found in: SOU 2005:104, annex 5, 490.
[30] See for example: Förordningen (2024:1333) med instruktion för Försvarsmakten, Förordningen (2008:1002) med instruktion för Myndigheten för Samhällsskydd och beredskap.
[31] SOU 2005:104, annex 5, p. 490f.
[32] Authors translation, 6 § förordningen (2022:524) om statliga myndigheters beredskap. A similar description of peace-time emergencies on the local level is given in 1:4 law (2006:544) on municipalities and regions measures before and during extraordinary situations in peacetime and during high readiness (lagen (2006:544) om kommuners och regioners åtgärder inför och vid extraordinära händelser i fredstid och höjd beredskap).
[33] See: Proposition 2007/08:92, Stärkt krisberedskap - för säkerhets skull, 97.
[34] For a few examples see note 38; peace-time emergencies and extraordinary event (extraordinär händelse) in 1:4 lagen (2006:544) om kommuners och regioners åtgärder före och under extraordinära händelser i fredstid och höjd beredskap, Societal disturbance (samhällsstörning) is a term used by MSB and defined in their guidance: MSB 2024, *Centrala koncept – En grund för aktörsgemensamt arbete med ledning, samverkan och övrig styrning*, publ nr MSB2383.

The emergency management system builds on the notion that emergencies will always impact the local level. The system takes a clear bottom-up perspective. That is a clear difference to the activation of the system for handling war and danger of war, which is a decision of the government and parliament, a top-down perspective. Municipalities thereby have substantial decision-making power to declare a situation as a peacetime emergency or extraordinary situation.[35] In contrast to the national level, the local level has access to exceptional rules for peacetime emergencies by activating the emergency management committee (*krisledningsnämnd*). It can take over tasks and decision-making from other departments in the municipality and speed up decision-making processes and administration during a peacetime emergency. It is the chairperson of the committee who decides that an extraordinary situation is occurring and activates the committee.[36] This means, that on the local level, where municipalities have a clear responsibility within a geographical area, there are exceptional rules in place for peacetime emergencies.

It also means that for peacetime emergencies, the situation is distinctly different from war. There are no specific rules in the Instrument of Government relating to the handling of peacetime emergencies.[37] Instead, the general legal and constitutional framework applies to these situations.[38] Sweden has also not built a comprehensive regulatory preparedness for peacetime emergencies. That is rather oxymoronic considering that one of the first articles in the Instrument of Government reads: *'Public power is exercised under the law'*.[39] Another principle has been formulated by several inquiries reviewing the constitution: constitutional necessity (extra-legal powers) is not accepted as a basis for acts and decisions during an emergency. In practice, without constitutional rules on peacetime emergencies, the constitutional necessity, however, will become the last resort for decision-makers. It has been accepted by the Constitutional Committee for decisions taken by the government in individual cases during the 1970s. Still, it is viewed as an undesirable deviation from the principle that public power is exercised under the law.[40] There are instead some flexibilities built into the Instrument of Government which have proven useful in times of emergency. The legislative process can, for instance, be faster than normal. There are numerous examples of that from several emergencies, especially from the pandemic in 2020 and the tsunami in 2004.[41]

The system for handling peacetime emergencies is further built on the geographical

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[35] See supra note 10.
[36] Asp et al (n 2) 157.
[37] Inquiries have suggested to include rules, or a chapter on peace-time crisis several times, SOU 1963:16, Författningsutredningen: VI, Sveriges statsskick, del I. Lagförslag Justitiedepartementet, 1963, 43. An interesting analysis and discussion around rules or no rules for 'civilian crisis' in the Instrument of Government can also be found in: SOU 2008:61, Krisberedskapen i grundlagen - översyn och internationell utblick (Expertgruppsrapport), Grundlagsutredningen, chapter 7.3. The latest inquiry on the topic provides a suggestion for adding a chapter on serious peacetime crisis situations in IG, SOU 2023:75, chapter 11.
[38]. Asp et al (n 2) Attachment 2.
[39] 1:3 IG
[40] For more information see: Ericson and Wilske (n 23) 1088, and SOU 2022:10, vol II, 268.
[41] Lagen (2020:148) om tillfällig stängning av verksamheter på skolområdet vid extraordinära händelser i fredstid, also see Utbildningsutskottets betänkande 2019/20:UbU25, Lag om tillfällig stängning av verksamheter på skolområdet vid extraordinära händelser i fredstid & the changes to: lagen (2002:297) om biobanker i hälso- och sjukvården m.m. decided upon after the tsunami in 2004. The processes and the criticism against them have for instance been described in Johan Hirschfeldt, 'Svensk Krishantering i fredstid' (2020) 105 Svensk Juristtidning 1148, 1159.

area responsibility on the local, regional, and national levels. It is paired with the responsibility of national societies to provide their expertise on, for instance, public health, transport, energy, or telecommunications. The expert authorities have a strong standing in emergency management, as seen in, for instance, the Corona Commission. Their responsibilities cut across the geographically defined area of responsibility of local and regional authorities, as well as the national geographical responsibility vested in the government.

The principles of emergency management are not legal principles; they are not written into any law on emergency management. The principles of responsibility, similarity, and proximity have been part of both total defence and emergency management, but have not always been defined in the same way in both systems.[42] The *principle of similarity,* means that an organization's structure and localization, to the extent possible, should remain the same during peace, emergency, and war. Changes should not be larger than necessary. The *principle of proximity* means that emergencies should be handled at the lowest possible level in society close to those directly affected.[43] We will return to the *principle of responsibility* below.[44]

2.2 RESPONSIBILITY AND ACCOUNTABILITY IN EMERGENCY MANAGEMENT

As already mentioned, one of the most important principles for emergency management is the *principle of responsibility*. It was originally defined as a responsibility held in normal conditions, is also held in peacetime emergencies and situations of war.[45] It was somewhat refined over time and is now defined as the one responsible for an activity in normal times, also having that responsibility in an emergency.[46] The principle of responsibility also entails taking measures to create robustness and increase the ability to handle emergencies. Further, it has been described as containing a responsibility for actors to cooperate.[47] The principle of responsibility is often referred to as a cornerstone in Swedish emergency management.

But what does responsibility, more in general, mean? How is the term normally used within the state administrative system? Sannerholm starts by concluding that a responsibility is linked to something that is to be done. It can also be linked to an omission if someone neglected their responsibility.[48] Responsibility then becomes a virtue based on a normative starting point where organizations take responsibility by behaving in a certain way.[49]

Accountability, on the other hand, is a mechanism where somebody or something is held accountable for what they have or have not done based on the responsibility they have. Sannerholm takes a broader perspective on accountability. His perspective is valuable to implement here since it can be related to how emergency commissions work. In essence, even though traditional legal accountability is a possibility after emergencies, the commissions in focus here use more semi-legal administrative processes. The outcome becomes more of a political, professional, or even social form of accountability.

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[42] Hirschfeldt, 'Svensk Krishantering i fredstid' (n 41) 1159f.
[43] The original principles are described in: Proposition 2005/06:133, 51f & SOU 2022:10, vol II, section 9.4.
[44] See Section 3.1
[45] Prop. 2001/02:158, Samhällets säkerhet och beredskap, 22.
[46] SOU 2022:10, vol II, 291ff.
[47] Regeringen skrivelse 2009/10:124, Samhällets krisberedskap - stärkt samverkan för ökad säkerhet, 5, 79.
[48] Richard Sannerholm, *Ansvar och ansvarsutkrävande – Institutioner, regler, processer* (Studentlitteratur 2024) 24.
[49] ibid 24.

For an individual, responsibility can be a positive notion, providing meaning to a profession and giving a rationale for an increased salary or better terms of employment. But when facing accountability for a responsibility not taken, the individual will connect it to negative consequences.[50] The terms, therefore, mirror one another. The legal and administrative responsibility focused on here is linked to norms at different levels. Those norms ideally clarify what act, or what behaviour, is required to live up to the responsibility. For authorities, one could argue that this boils down to how the principle of responsibility is implemented in practice. For accountability purposes, it becomes relevant to analyse how the authorities have interpreted their tasks and responsibilities, but also how the responsibility was formulated in the respective norms. Accountability will then stem from an analysis of whether or not those tasks and responsibilities were completed.

For purposes of responsibility and accountability, the division of tasks between decision-makers and authorities should be further elaborated. The administrative system in Sweden rests on certain pillars. The government works under a collective decision-making structure.[51] Swedish ministries are comparably small, and the national authorities are larger than in other countries.[52] The relationship between authorities and the government is also signified by a large degree of independence for authorities in handling and deciding on individual cases and implementing laws.[53]

Responsibility and accountability can only function effectively if authorities are well aware of their tasks and the responsibilities they entail. The principle of responsibility reinforces that as it connects the authorities' responsibility in emergencies to their tasks in normal times.[54]

Where are the tasks and responsibilities of individual authorities found? Well, to start with, each national authority has an ordinance with instructions, containing provisions stating the tasks and responsibilities of the authority.[55] The tasks and responsibilities stated there will further provide a basis for evaluating authorities' responsibility and accountability in the aftermath of an emergency.

If responsibility is defined by the tasks authorities are responsible for, there is also a need to state who is accountable for not fulfilling those tasks. If the state fails in protecting its citizens or the state's handling of an emergency is experienced as a failure, the social order may also be at risk.[56] It is argued here that the quest for accountability in the aftermath of an emergency can serve several purposes. There are aspects of upholding a democratic

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[50] SOU 2005:104, annex 5, 493.
[51] 7:3 IG.
[52] This is partly linked to the fact that Swedish authorities are not incorporated in the ministries. For a description of the Swedish administrative model and the relationship between the government and public authorities see for instance: Statskontoret, 'Förvaltningsmodellen under coronapandemin' (2020) 17, available here with a summary in English: <https://www.statskontoret.se/siteassets/rapporter-pdf/2020/oos41.pdf> accessed 10 November 2025.
[53] 12:2 IG. The provision reads: 'No public authority, including the Riksdag, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law'.
[54] This is also one of the descriptions of responsibility in the Catastrophe Commission: SOU 2005:104, annex 5, 490.
[55] See for instance: Förordning (2024:1333) med instruktion för Försvarsmakten, Förordning (2008:1002) med instruktion för Myndigheten för samhällsskydd och beredskap & Förordning (2017:868) med instruktion för Länsstyrelserna.
[56] SOU 2005:104, efterord (afterword).

system based on the rule of law. Decision-makers and holders of power must know that their decisions and acts will be under review. That can contribute to reinforcing their sense of commitment to work in accordance with the law, but also to work efficiently and in a way that will uphold the trust of the citizens.[57] Being under constant scrutiny and review can, however, also lead to a feeling of uneasiness. A fear of doing something wrong may hamper an organisation during an emergency so that necessary decisions are not taken. The difference between different authorities in preparedness and structure for decision making, and how it impacted the management of the pandemic, was raised by the Corona commission as a lesson learned for future emergencies.[58]

Review is also not the same as accountability, and it is the latter that is sometimes criticised as a weak point in the Swedish system.[59] As was raised in the introduction to this article, there are several public authorities with tasks described as including review and/or control functions. But accountability is not within their task and mandate. Sannerholm argues that the amount of review within the public administration has increased over time, especially within elderly care, schools, and health care. The review is designed to contribute to the continuous improvement of the activities or to increase the legitimacy, before something happens.[60] Sannerholm, however, lists three aspects of importance for processes of accountability: good decision-making, a sense of justice, and learning for the future.[61] Accountability could arguably be based on a review or evaluation of how a certain emergency was handled. And in Sweden, that is the case to a certain extent. In many cases, accountability by review will instead focus on learning. The aim is to improve the organization and its decision-makers so that the next emergency is handled in a better way.

The laws on emergency management do not prescribe clear rules on accountability, for instance, in the ordinance (2022:524) on state authorities' preparedness. That ordinance also contains wording that arguably will make accountability difficult. When and how does an authority live up to taking the necessary measures to handle the emergency and its consequences?[62] What measures have to be taken to ensure that information systems are up to security standards so that their activities can be conducted in 'a satisfactory manner'?[63] Formulations like these arguably make accountability processes more challenging, as they lack of clearly formulated standard for officials and authorities to live up to, paired with a lack of predictability.

The government governs all state authorities that are not specifically governed by

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[57] Sannerholm (n 48) 27.
[58] SOU 2022:10, vol II, 628ff.
[59] Sannerholm (n 48) 27.
[60] See the reasoning in Sannerholm (n 48) 28f.
[61] ibid 31-35.
[62] 9 § förordningen (2022:524) om statliga myndigheters beredskap – 'Varje myndighet vars ansvarsområde berörs av en fredstida krissituation ska vidta de åtgärder som behövs för att hantera den uppkomna situationen och konsekvensen av den. Myndigheterna ska samverka och stödja varandra'. ('An authority with an area of responsibility affected by an emergency is to take necessary measures to handle the situation and its consequences. Authorities are to cooperate and support each other'). Author's own translation.
[63] 13 § förordningen (2022:524) om statliga myndigheters beredskap – 'Varje myndighet ansvarar för att egna informationshanteringssystem uppfyller sådana grundläggande och särskilda säkerhetskrav att myndighetens verksamhet kan utföras på ett tillfredsställande sätt. […]'. ('Every authority is responsible for making sure its information management fulfils basic and special security requirements in order for the activities of the authority to be conducted in a functionable way'). Author's own translation.

Parliament.[64] Governing is, for instance, done through the ordinances with instructions outlining responsibilities and tasks, budgeting, and also through appropriation directions (*regleringsbrev*) that are updated yearly. The government follows up on tasks, responsibilities, and budgets. Reviews are conducted regularly. Sannerholm concludes that reviews of the public sector have increased. It is also an *ex ante* review, meaning it is done before something has gone wrong and aims at continuous improvement of activities.[65] As general director or head of an authority, your term is time-limited, but the government can decide to prolong it. The government may also decide to move a general director to a different role or authority, for instance, if he or she is not living up to the responsibilities and tasks handed to the authority. In certain cases, an employment contract can also be cancelled.[66] This right of a government to remove a general director or head of authority is used, with several examples only from later years from for instance County Administrative Board of Stockholm in 2024, the Swedish mapping, cadastral and land registration authority in 2024, and the Swedish Social Insurance Authority (Försäkringskassan) in 2018.[67] In most cases, former heads of authority are moved into a special department in the Governmental offices, in public often referred to as the Cemetery of elephants. They are there for the remainder of their term as general director, retaining their salary, and can receive other tasks. In several cases, they have taken the lead on state inquiries.[68] The referral of former high-ranking public officials to the Cemetery of elephants has continuously been criticised, and several governments have stated that the system will be changed, but so far it still remains in place.

Accountability today forms a rather unclear structure. Officials used to be held accountable by their managers, managers answered to the head of authority, the head of authority answered to the politicians, and politicians were held accountable by their voters. Today, the structure is not as clear-cut.[69] There are also other forms of accountability in the modern public sector. A head of authority may be questioned and reviewed by the media, causing a loss of trust at the political level, leading to a removal or the official leaving office voluntarily. It may also be difficult to assess where the actual responsibility lies, making accountability difficult to attain.

From a legal point of view, all public employees are subject to criminal law regulations on dereliction of duty (*tjänstefel*). Public authorities are encompassed in tort law if they act with negligence or omission in their exercise of authority. That is however an institutional responsibility, and only in a very limited sense connected to a personal accountability for an individual public employee.[70] A majority of public officials also fall under regulations on

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[64] 12:1 IG.
[65] Sannerholm (n 48) 28f.
[66] Art. 33 lagen (1994:260) om offentlig anställning (law on public employment).
[67] <https://www.regeringen.se/pressmeddelanden/2024/09/anna-kinberg-batra-lamnar-sin-anstallning-som-landshovding-i-stockholms-lan/> accessed 14 November 2025; <https://www.lantmateriet.se/sv/om-lantmateriet/press/nyheter/susanne-as-sivborg-lamnar-sin-anstallning-som-generaldirektor-for-lantmateriet/> accessed 15 November 2025, and <https://www.svt.se/nyheter/inrikes/uppgift-begler-far-lamna-forsakringskassan> accessed 18 November 2025.
[68] One recent example of this is the head of the Financial Inspection who was removed from his position in 2025 and will be in charge of an inquiry about the functioning of the bond market. <https://www.affarsvarlden.se/artikel/fi-chefen-far-ga-hamnar-pa-elefantkyrkogarden> accessed 18 November 2025.
[69] Sannerholm (n 48) 36.
[70] The different forms of legal accountability are for instance described here: SOU 2005:104, 63.

disciplinary measures in the employment law.[71] Disciplinary measures are reviewed by the Government Disciplinary Board for Higher Officials (Statens Ansvarsnämnd) and can consist of a warning or a reduction of salary.[72] There are also specific regulations to prevent a double punishment of public officials. If an official has been charged with dereliction of duty, the employer cannot start or continue a process for disciplinary measures relating to the same act or behaviour.[73]

3 JUDGING EMERGENCIES IN THE AFTERMATH – SWEDISH CRISIS COMMISSIONS

As already stated, there are ample examples of how commissions have been enacted for different types of reviews, investigations, and inquiries in Sweden over time. Their tasks and mandates have shifted. They have been enacted both by the parliament, the government, and at the municipality level.[74] Commissions are, in part, at least one aspect of accountability processes, although research clearly indicates that the accountability aspects of commissions are rarely clearly stated or mandated.[75]

In focus here are three emergencies that have been the subject of five commissions or inquiries. Each commission will be viewed focusing on:

- What tasks and mandate did the respective commission have, and were questions around responsibility and accountability included?
- What conclusions did the commission present, and were any proposals made about systemic or regulatory changes?
- What was the outcome in terms of accountability, systemic, and/or regulatory changes after the commission finished its work?

3.1 FOREIGN SUBMARINES IN THE SWEDISH ARCHIPELAGO

In 1981, a Soviet submarine went aground in the southern Swedish archipelago outside Karlskrona. That event has remained the only one where an actual submarine was visibly present on Swedish territory. Reports on submarine observations and the Armed Forces reports on traces of submarines on the seabed surged in the years after 1981. The public debate on foreign submarines along the Swedish coast, the event in Karlskrona archipelago in 1981, and whether or not the Soviet Union violated Swedish territorial waters continued during the 1980s and 1990s.[76]

In 1982, a major anti-submarine operation was initiated with a focus on Hårsfjärden in the Stockholm Archipelago. No submarine was intercepted during the operation. Already,

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[71] Art 14 Law on public employment (Lagen (1994:260)om offentlig anställning (LOA)).
[72] Art 15 LOA.
[73] Art 18 LOA.
[74] Hirschfeldt, 'Undersökningskommissioner' (n 11).
[75] See for instance: Sannerholm (n 48) 46.
[76] See for different perspectives for instance: Fredrik Bynander, *The Rise and Fall of the Submarine Threat: Threat Politics and Submarine Intrusions in Sweden 1980-2002* (Doktorsavhandling, Uppsala Universitet 2003); Wilhelm Agrell, 'Soviet Baltic Strategy and the Swedish Submarine Crisis' (1983) 18(4) Cooperation and Conflict 269; Anders Hasselbohm, *Ubåtshotet – En kritisk granskning av Hårsfjärden-incidenten och ubåtsskyddskommissionens rapport* (Prisma, Stockholm 1984).

while the operation was ongoing, the first Submarine Commission was initiated. It was followed by two other commissions in 1995 and in 2001. An interesting aspect of these commissions is that the later ones reviewed the findings and conclusions from the earlier commissions. As late as 2001, the 'mother of all submarine commissions' presented their final report. That report provides an overall assessment of the handling of alleged submarine threats from the 1980s onwards. It reviews and evaluates how different governments and authorities have handled and responded to the alleged violations of Swedish territory. This flora of investigations and commissions makes submarines a relevant case to start with when analysing how Sweden uses commissions for review and/or accountability.

3.1[a] The Submarine protection commission 1983 (Ubåtsskyddskommissionen SOU 1983:13)

The government decided to create this commission in October 1982 and gave it until April 1983 to investigate several questions related to allegations of foreign submarines violating Swedish territorial waters. The commission was initiated while the Swedish navy was still conducting the operation in and around Hårsfjärden. The incident in Hårsfjärden, but also the earlier Whisky-class Soviet submarine that ran aground in the Karlskrona archipelago in 1981, was viewed as especially serious examples of Soviet incursions into Swedish territory.[77] The commission consisted of five members, all of them worked in the political sphere. A group of experts from the Armed Forces and the Ministry of Defence was tasked to support the commission. The secretary of the commission came from the Government office.[78]

Tasks and mandate

The tasks given for the commission included, among other things:

- Disclose and review the development around foreign submarines unlawfully entering Swedish territory and discuss possible motives for these violations;
- Map and review the Swedish ability in peacetime and when neutral in war to discover, identify, and repel foreign vessels;
- Evaluate the operative, tactical, and technical experiences, especially from the operation in Hårsfjärden;
- Take a position on whether or not current regulations that are in use, as well as regulations that have been decided on but are still not in force, are suitable and enough for serving their intended purpose.

The task formulations show that this commission was focused on learning from the Hårsfjärden operation. It is clear that the commission was to focus on what was done, but also review and propose changes to equipment, tactics, and regulations for submarine operations.

Conclusions

[77] SOU 1983:13, 7.
[78] ibid 6f.

The report concluded that the incident was not a singular event, but that violations of Swedish territory by foreign submarines were a recurring phenomenon.[79] The report includes a detailed report on how the operation in October 1982 was carried out by the Swedish navy. It also details what types of foreign submarines were present, as well as maps and documentation of tracks on the seabed. The commission further states details around the number of submarines, and where they were observed during 1981 and 1982. To be noted is also the conclusion on the nationality of the submarines that were violating Swedish territorial waters during 1981 and 1982. They were, according to the commission, mainly from the Warsaw Pact, meaning Soviet submarines. There was no evidence suggesting NATO submarines had violated Swedish territorial waters.[80] That determination of nationality rests on observations and not on specific evidence obtained during the submarine operations.[81] The latter commission comes to a different conclusion.

The commission suggests alterations to the future Ordinance Concerning Intervention by Swedish Defence Forces in the Event of Violations of Swedish Territory in Peacetime and in Neutrality etc. (IKFN-Ordinance).[82] The report includes a legal analysis of the basis for interventions against other states' unlawful entries into Swedish territory and suggests further, sharper measures to be included in the ordinance. The ordinance was not in force during the submarine operation in 1982; it entered into force in 1983. Measures taken by the Swedish navy during the operation were, however, based on what would become the IKFN-Ordinance, which at the time was viewed as a customary practice. The commission, linked to the IKFN-Ordinance, also reviewed the use of depth charges (dive-bombs). It concluded that the new IKFN-ordinance, based on experiences from Hårsfjärden, needed to include rules on their active use despite the risk of sinking the intruding submarines.[83]

The commission's report further refers to the decision of the Commander-in-Chief on the 7th October 1982 to use mine barriers as a weapon to prevent submarines from leaving the area of operation.[84] Mine barriers were at the time used to detect marine vessels invading Sweden. The barriers were, however, during the Hårsfjärden operation deemed to be useful as submarine weapons. It was the first time the Swedish navy used mines as a weapon in a peacetime submarine operation.[85] All operations and the increased use of sink bombs had the aim of forcing submarines to the surface but also came with an increased risk of sinking the submarines targeted.[86] The government was informed about the decision to use mines, and the commission describes it as the government being aware of the increased risk of sinking submarines.[87] To keep the risk at an acceptable level, the mines were not automatically fired, but were used with a delayed firing function to nuance the use of the weapon.[88] The commission does not question that decision by the Commander-in-Chief but concludes that the use of mine barriers in this way is a balancing act between security

[79] SOU 1983:13, 9, 23, 40.
[80] ibid 10.
[81] ibid.
[82] Förordningen (1982:756) om Försvarsmaktens ingripanden vid kränkningar av Sveriges territorium under fred och neutralitet m.m. (IKFN-förordningen).
[83] SOU 1983:13 47.
[84] ibid 48.
[85] ibid 41.
[86] ibid 42.
[87] ibid 48.
[88] SOU 1983:13 48.

policy considerations and the risk of sinking foreign submarines in peacetime.[89]

The commission also concludes that there were deviations from adherence to the general command structures of the Armed Forces in October 1982. Deviations where higher command intervened and took decisions bypassing lower command levels occurred on several occasions.[90] It was also difficult to align a command structure and decision-making designed and trained for use in war, with the use of weapons similar to a war situation, in a situation that was actually a peacetime emergency.[91] Higher command made use of the new IKFN-Ordinance, although it was still not formally implemented, without having detailed instructions for lower command levels in place. Higher command wanted to control the measures used to avoid too aggressive use of force at the operational level.[92] But the bypassing of commanders at lower levels created insecurity among staff, and situations occurred where conflicting views arose on the actual content of orders.[93]

This commission can be said to follow a general tradition of reviewing major events with a clear starting point to improve the system ahead. There are limited references to individuals' or the government's decision-making. There is also a limited analysis of the tasks and responsibilities that the Armed Forces had in the event of submarine incursions into Swedish territory. The report seems to view it as self-evident that the task is to remove the submarine unlawfully entering Swedish territory. The commission never discusses what that task entails in question of responsibility on different levels and what kind of use of force is connected to that task. This commission is also special since it provides a clear formulation of how the rules in the IKFN-Ordinance should be developed. It is rather unusual for a commission to be that specific.

The commission report includes a discussion around how the government and the military leadership handled their tasks and responsibilities. The commission discusses orders given by the Commander-in-Chief and how the chain of command was bypassed. There are certain criticisms, but the report does not consist of a clear review of tasks and responsibilities. There is also, as stated above, no mention of accountability. The report focuses on challenges posed by structural problems on different levels, the lack of regulatory frameworks, and the lack of appropriate weapons and equipment for submarine operations. The report takes a clear systemic development approach by proposing purchases and regulatory changes. It does not focus on accountability for decision-making during the operation. The lack of focus on accountability could be linked to the fact that the report does not outline any clear wrongdoings. Conclusions are rather technical and focused on what capabilities and resources need to be added or developed within the Armed Forces for the future.

Outcome

When it comes to clear outcomes from the commission in 1982, at least two developments can be seen.

[89] ibid.
[90] ibid 49.
[91] ibid.
[92] ibid 50.
[93] ibid 50f.

The legal framework for operations to protect the Swedish territorial integrity in peacetime was developed further in line with what the commission had proposed. The IKFN-ordinance had already been decided upon, but was not in force when the operations in 1982 were carried out. Before entering into force on 1 July 1983, the IKFN-ordinance was amended based on the commission's findings.[94] The ordinance is still the main regulation for the Armed Forces' use of force when responding to other states violating Swedish territory.

Another outcome was that the Swedish Government handed over a sharply formulated protest to the Soviet Union. The note protested against the violations of Swedish territorial integrity and also specifically raised conclusions from the commission about the nationality of the violating submarines. The note is referenced in the later submarine commission's report from 1995.[95]

3.1[b] The Submarine commission (Ubåtskommissionen SOU 1995:135)

During the 1990's the questions on foreign submarines in Swedish territorial waters were revisited. In February 1995, the Submarine commission was initiated. It presented a report entitled 'The submarine question 1981-1994' in December the same year.

The background to this commission was the recurring criticism and attention caused by the questions around foreign submarines in Swedish waters. Specifically, and as a clear deviation from the earlier Submarine Protection Commission, this commission consisted of a group not linked to politics, and not working for authorities with tasks or responsibilities for submarine operations. The five members were professors, one assistant professor working as head of the Space Authority, and the head of the Union for public officials. The secretary of the commission was originally an army officer who had recently finished his term as general director of the National Defence Radio Establishment (Försvarets Radioanstalt (FRA)).[96]

Tasks and mandate

The tasks included, among others:

- To review and present a comprehensive view of what had occurred between 1981 and 1994.
- To test the validity of conclusions drawn concerning the character and extent of violations
- To evaluate the efficiency of Swedish operations and discuss both the results of the measures taken as well as the conditions under which operations took place and their implications on the results.[97]

It should be noted that the government specifically conditioned the commission's work in two respects. It should consider territorial incursions by foreign submarines and

[94] SOU 1995:135 23.
[95] ibid 57f.
[96] ibid 1.
[97] SOU 1995:135 24f.

the Swedish anti-submarine operations against the backdrop of Swedish history, as well as its security and defence policy. However, the commission should not review Swedish security policy during the period. It was also not to give concrete suggestions for future measures within the Armed Forces.[98]

Conclusions

As a general starting point, it is clear that this commission lacked the military expertise of the former commission. Henceforth, this commission focused on including information, analysis, and interviews with the Armed Forces and the Defence Research Agency (Försvarets Forskningsanstalt (FOA)) in their report material. It is further clear that the technological developments between 1982 and 1995 provided this commission with improved material, methods, and instruments to analyse what actually happened in 1981 and 1982. This may be one reason for the Submarine commissions' questioning of both signal surveillance material and hydrophone evidence that the commission from 1983 relied on in their conclusions on the foreign submarines' whereabouts and nationality.[99] The Commission details the different reports from the Commander-in-Chief on submarines violating Swedish territory during the years under review. The total number in the statistics is over 6000 incursions, where the main part consists of observations reported to the Armed Forces by the general public.[100] The commission further analyses the media reporting during this period and presents several books that have been discussed heavily. The books are critical of the view on the threat from foreign submarines presented by Swedish authorities and the government. They are questioning whether it really was Soviet submarines or also NATO submarines that were present in the Swedish archipelago in the 1980s.[101]

The commission details other criticisms that argue that the government and the Armed Forces have been too weak and hesitant in their handling of submarines violating Swedish territorial waters during the given time period.[102] It provides a thorough run-through of debates around this topic, especially from the 1990s.[103] More critical voices also went public after the Commander-in-Chief in 1994 informed the public that sounds from the years before, originally designated as clear submarine sounds by the Armed Forces, in some cases had proven to emanate from swimming minks.[104]

In line with earlier investigations, this commission also came to the conclusion that the submarine running around outside Karlskrona in 1981 had made an intentional violation of Swedish territory. The commission further confirmed the earlier analysis that the submarine was armed with nuclear weapons.[105] The commission confirmed reports on violations of Swedish territorial waters and sabotage acts directed towards military equipment on the seabed.[106] Regarding recorded sounds earlier defined as emanating from submarines, and signal surveillance as a basis for concluding foreign submarine activities on Swedish

[98] ibid 25.
[99] SOU 1983:13 39f, and SOU 1995:135 chapters 6 and 9.
[100] SOU 1995:135 chapter 3.
[101] ibid.
[102] See especially: ibid, chapter 3.3.
[103] ibid 45ff.
[104] ibid 52.
[105] SOU 1995:135 266.
[106] ibid 267.

territory, the commission dismissed earlier findings.[107] This commission had a clear task to re-evaluate earlier findings, and based mainly on technical knowledge and systems, the commission stated that it was not possible to determine which nationality the intruding submarines had. In essence, none of the available methods used at the time, for instance, optical observations, sound recordings from sonars, and signal surveillance, were accepted as solid evidence.[108] This commission presented far more material and analysis than the former commission did, and they were equally certain as the former commission that their conclusions were right.

Nothing in the report indicates that decision-making or decision-makers acted wrongfully. However, it would also seem that the commission's tasks did not include any kind of accountability aspect. The tasks were focused on establishing what had happened and what measures to take to improve future handling of submarine incursions. There is little reference to specific tasks and responsibilities, and no clear discussion on accountability, even though the commission ended up questioning earlier conclusions.

To be noted is also the difference in approach between this commission and the one from 1983, which at least in part may emanate from the very different skill-set present in the commissions. Politicians versus researchers and public officials. It was a conscious choice by the government to have a more freestanding group look at this topic without a clear political or military connection or experience. Both commissions, however, used experts with a professional background in the Armed Forces.

Another aspect to be noted, according to this author, is the difference in the security policy landscape visible in the respective reports of the commissions. In 1983, the Cold War was still cold, and total defence planning was an integral part of society on all levels, meaning the threat from the Soviet Union was self-evident for most of society. In 1995, the situation had altered drastically with the end of the Cold War and the dissolution of the Soviet Union. Sweden had become part of the EU, and the view on total defence was gradually shifting towards planning for other emergencies than war. It is not evident in the report from 1995 that this difference is also apparent to the members of the commission. The report can be perceived as not noticing that just as it was self-evident to the commission in 1983 to see the Soviet Union as a threat, and maybe jumping to conclusions about the submarines' nationality, maybe the commission in 1995 is doing the same thing.

Outcome

The outcome of this commission was rather bleak. It suggested two new inquiries, both of a technical nature.[109] The last inquiry refers back to this commission by presenting statements from both former Prime Minister Carl Bildt and the then Prime Minister Ingvar Carlsson. Carlsson views it as problematic that the commission report was not followed up with clear military and political conclusions. It disappeared in the sand.[110] Bildt on the other hand argued that the commission had actually confirmed the continuous violations of Swedish territory, but that the question of the nationality of the submarines had gotten entangled in

[107] ibid 269.
[108] ibid chapter 9.5.
[109] ibid 10-12, 211-234.
[110] Swedish original quote: 'Det rann ut i sanden', SOU 2001:85 256.

a situation where 'everybody knows what we know, but does not dare or want to state it openly'.[111]

3.1[c] The Submarine investigation (Ubåtsutredningen SOU 2001:85)

The different opinions and alleged facts surrounding discussions about foreign submarines in the Swedish archipelago still surged after 1995. As a consequence, in 2001, for the third time, a commission, this time an inquiry, was formed to perform another final evaluation of everything that had happened between 1980 and 2001.

Tasks and mandate

The tasks of the Submarine inquiry were, among other things:

- Assess political and military actions concerning the submarine question from 1980 until the present time;
- Present and evaluate how the government, the Armed Forces, and other concerned authorities since the beginning of the 1980s handled submarine incursions and indications for such violations of Swedish territory;
- Analyse decisions taken and the basis for them in forming political actions and positions;
- Illustrate how earlier commissions and inquiries affected political and military positions on this matter;[112]
- Analyse the efficiency of Swedish operations and present what affected the ability to achieve intended results;
- What other information should be presented to achieve a complete picture?[113]

As in the earlier commission, the government delimited the task. The question of whether or not foreign submarines had been violating Swedish territory had been analysed and did not need further attention. The investigator should instead focus on reviewing measures taken, how decisions on measures were taken, and on what basis decisions were taken, as well as how the decisions were implemented. Finally, the inquiry should examine how politicians and military commanders had been affected by the public debate.[114]

The mandate for the Submarine inquiry was given in October 2000. This inquiry was assigned to a single investigator, an ambassador, along with two secretaries, who came from the government offices. A group of experts was also connected to the inquiry for support with military expertise, security policy perspectives, historical perspectives, peace research expertise, and for archival research.[115]

Conclusions

[111] Swedish original quote: 'Och i nationalitetsfrågan har man trasslat in sig i en situation där alla vet vad det är vi vet och bedömer, men där man inte vågar eller inte vill säga detta öppet'. SOU 2001:85 257.
[112] SOU 2001:85 26.
[113] ibid 27.
[114] ibid.
[115] SOU 2001:85 1.

One difference between the commission from 1995 and the one from 2001 was that the evaluation of political handling of the submarine question was not included in the first, but specifically included in the 2001 inquiry.[116] This inquiry referred to vast amounts of new data and new information, which affected the picture of how the Armed Forces, especially the Commander-in-Chief and the Navy, and several former governments had handled their tasks.

The tasks seem to include different actors' responsibilities as well as accountability questions.[117] Another valuable clarification initially in the inquiry is that it includes an evaluating review (*värderande granskning*) of the earlier Commissions' reports, which is relevant, especially since they come to opposite conclusions, for instance, on the nationality of submarines.[118]

The learning perspective was again very present in the Submarine inquiry. The inquiry presented an ambition to gather and archive as much information as possible from open sources on the submarine question. The material could then be used for continued studies by researchers, journalists, and others with an interest in the topic.[119]

The most relevant part here is however, the very last chapter 11, Perspectives on the submarine question.[120] Initially, focus is put on security policy and how the analysis was made, especially in the 1980s. The inquiry states that earlier reports were not based on the full picture or understanding of Sweden's position in relation to the Cold War powers. In 2001, the picture was that Sweden was not a primary target for the Soviet Union, but more of a secondary target for reaching certain limited objectives.[121]

The inquiry moves over to analysing the division of tasks and roles between the military leadership and the government. The inquiry describes a working method, which is also stipulated in the Instrument of Government, where the operational handling of alleged violations is left mainly to the Armed Forces.[122] According to the inquiry, this addresses accountability. The blame for wrongdoings or bad decisions is almost exclusively put on military authorities.[123] The inquiry concludes that governments, regardless of political affiliation, when consulted, almost without exception, support the Commander-in-Chief. The question is whether it implies that the government is too eager to hand over responsibility to the Commander-in-Chief, also in politically sensitive questions. The inquiry shows examples from Hårsfjärden and Gåsefjärden where it is the military authorities that take action and initiative, and politicians then, in a more reactive way, start creating policy based on those actions and in the end lose control over the political fallout.[124] The Swedish tradition of strong authorities with clearly defined tasks and responsibilities, and ministers not interfering in the handling of individual cases, is described as a challenge by the inquiry.[125] In foreign policy, authorities' responsibilities are trumped by the government's responsibility

[116] ibid 28.
[117] ibid.
[118] ibid 29.
[119] ibid note 1, 27.
[120] ibid 321-344.
[121] ibid 325ff.
[122] 12:2 IG.
[123] SOU 2001:85 328.
[124] ibid.
[125] SOU 2001:85 329.

for the relationship with other states.[126] That risks making a hands-off approach by the government problematic. Authorities were in the 1980s, and still are, under an obligation to report to the government anything in their activities that could have implications for Sweden's relationship to other states.[127] In cases involving the Armed Forces and possible use of force against state vessels from other states, this perspective is, of course, inherently vital to understand. The inquiry concludes that several governments gave the military authorities too much of a free rein, which led to political considerations being invisible and political decision-making being reactive. The inquiry also clarifies that this is not to be interpreted as a criticism of the Commander-in-Chief's handling of the submarine question, but an underlining of the responsibility of the political level to live up to the responsibility they have.[128] The inquiry further concludes that governments from 1982 onwards bit by bit took a tighter grip on the political dimensions of the submarine questions.[129]

Of interest is also that the inquiry criticises the government for allowing the Submarine Protection Commission from 1983, to go to work without a 'strong hand' from the government. According to the inquiry, this contributed to an analysis and evaluation strongly dominated by the Armed Forces' perspectives, based on weak evidence that locked perspectives on submarine incursions as preparations for future violent attacks on Sweden and the Soviet Union as the only possible actor behind it.[130]

One further note here is that the inquiry distinguishes between different governments and their different ways of handling the submarine question. However, the Commander-in-Chief is never referred to as acting differently depending on who actually held the command responsibility.[131] Again, it gives a clear impression that focus is not on accountability for specific holders of decision-making power, but more on the institution of Commander-in-Chief or Prime Minister, and what can be learned for the future on an organizational level.

On a final note, the Inquiry takes up certain strands of challenges, which, read together with the later commissions' findings from the tsunami and the pandemic, ring a clear bell of recognition.[132] The authority with the main responsibility, in the submarine case the Armed Forces, generally handled their tasks with a great sense of responsibility and a high degree of professionalism. There were structural and organizational issues that hampered their ability to perform their tasks. Their analysis was based on a belief that was not challenged or altered over time – that the Soviet Union was the state violating Swedish territory. One specific group of experts was given a central role with a monopoly on analysing events, which led to information from other parts of the Armed Forces never being included in the analysis. There were challenges with cooperation between authorities, in this case, the Armed Forces and FOA. The handling of information and registering, and archiving documents, and especially sound recordings, was poor, leading to vital information missing when reviewing or analysing situations afterwards. Media handling at the beginning of the 1980s was very

[126] ibid 331.
[127] 10:13 IG.
[128] SOU 2001:85 332.
[129] ibid 330-333.
[130] ibid 330f.
[131] From 1980 to 2001 Sweden had four different Commanders-in-chief. See: <https://www.forsvarsmakten.se/sv/information-och-fakta/var-historia/artiklar/alla-vara-overbefalhavare/> accessed 18 August 2025.
[132] See below in 3.2 and 3.3.

open, and communication was handled in a way that was highly unusual for this type of situation from an international perspective. By the end of the 1980's the Armed Forces changed their approach, and submarine operations became more low profile and handled more discreetly.[133]

The inquiry then finishes off with a rather scathing criticism of the former foreign and defence minister from 1983, who, early on, 'lacking complete and sustainable evidence, on the basis of a political judgement' designated the Soviet Union as the violating power.[134] According to the inquiry, he was assisted by the Commander-in-Chief, who contributed with poorly based information emanating from signal surveillance. The government as a whole was partly to blame, as they enacted a Commission with politicians, which in essence meant that they abdicated from their responsibility as a government. They failed their constitutional responsibilities in the Hårsfjärden incident.[135] The inquiry states that later governments altered the power balance between the Armed Forces and the government by, for instance, evaluating reports and materials handed over by the armed forces through creating their own expert groups. They also required the Armed Forces to more consistently cooperate with and report back to the government, and started a political-level action by initiating political talks with Russia at the beginning of the 1990s.[136]

Outcome

As is clear from above, this is an inquiry that does place blame, not necessarily on persons, but on roles.[137] The government, specific ministers, and the Commander-in-Chief are all pointed out in the report for certain wrongdoings. They are, however, more of omissions than active decisions – at least in the case of politicians. There is also no clear analysis or any suggestions for how to proceed with accountability questions. Instead, the inquiry finishes by clarifying that the Commander-in-Chief took measures that could have had far-reaching consequences for Sweden's relationships to other states, but again does not relate that statement to any questions on accountability.[138]

3.2 THE CATASTROPHE COMMISSION

In late December 2004, when the tsunami hit Southeast Asia, it caused enormous suffering for many people around the world. It was maybe also the first time Sweden as a society saw the implications of internationalisation. Swedes were present in the affected areas, both as tourists, as employees, or as inhabitants. Thereby, the tsunami also raised questions around the responsibility of individuals travelling abroad as well as the state's responsibility for citizens abroad. The emergency management system was also a new construction and had not yet been put to the test in an actual emergency when the tsunami happened.

Already early on, the public criticised the government and authorities for acting too

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133 SOU 2001:85, 340.
134 "…även i avsaknad på fullständig och hållbar bevisning, på basis av en politisk bedömning utpeka Sovjetunionen som kränkande makt." Ibid, 340.
135 Ibid, 341.
136 Ibid, 342f.
137 The whole of chapter 11 is noteworthy in this respect, but especially the inquirer's concluding observations are worth reading, SOU 2001:85, section 11.4.
138 Ibid, 343f.

slowly. Media reports of the foreign minister prioritising a visit to the theatre and being on holiday rather than taking an active role in the initial emergency management in the governmental offices caused outrage in the days and weeks following the tsunami.[139]

Tasks and mandate

Already on 13 January 2005, the Government decided, after consulting the parties in parliament, to initiate an independent Commission tasked with evaluating society's ability to handle the tsunami and clarify how those experiences could be used in the future.

The tasks included, among other things:

- To evaluate how parliament, government, central authorities, including the Governmental offices and embassies abroad, acted in relation to the tsunami;
- To focus especially on the initial response to the tsunami and how the work was later organised and conducted;
- To evaluate organisation, cooperation, and information exchange between actors involved;
- To evaluate tasks and the division of responsibility between different actors;
- To evaluate whether or not preparatory works and earlier experiences from emergencies had been taken into account in the work conducted during the tsunami.

The President of the Svea Court of Appeal was named head of the Commission, which further consisted of a professor of political science, a former Head of Swedish Red Cross who was at the time National Coordinator for Psychiatry, the chairperson for Swedish Mailservice (Posten), and a colonel 1st degree from the Swedish Armed Forces. Several secretaries, mainly lawyers with a background from the court system and the Government office, were included in the commission.[140]

It is already from the start clear that the focus is on learning for the future and drawing conclusions by evaluating the events. This particular commission, however, starts off with a thorough presentation of workways and methods that provide valuable insights into how the task was approached at the time.[141] The first chapter of the report contains headings like: What is a commission? There are sub-chapters focusing on key terms for the task, problems, and evaluation methods.

The directive stating tasks for the commission uses the term 'citizens commission'.[142] The commission connects that term to the directives' formulations on working in an open way and taking a clear citizen-perspective. This is interpreted as meaning that the commission, among other things, is to actively include information about experiences and views from individuals affected by the disaster.[143] To include individuals' perspectives and accounts is an unusual feature in reports like this. It is something that, for instance, the

[139] <https://www.aftonbladet.se/nyheter/a/Xwbv8B/hon-gick-pa-teater> accessed 20 August 2025.
[140] SOU 2005:104.
[141] ibid, especially chapter 1.1 and 1.5.
[142] The term used is: 'medborgarkommission'. See: Direktiv 2005:3, Kommissionen för utvärdering av nationell krishanteringsförmåga med anledning av naturkatastrofen i Asien, 13 januari 2005, in SOU 2005:104 473.
[143] SOU 2005:104 38.

later Corona Commission did not do.

Further, the commission was to conduct its work independently. This was interpreted as working in line with the tasks and limits of the directive, but completely independently for parts like organization, analysis, and all other activities of the commission.[144] The commission report clarifies that it also interprets independently as in relation to experts. The commission only cooperates with experts who were not responsible for any authority functions during the disaster. The commission will also independently view the expert's analysis and conclusions.[145]

Conclusions

It is already clear, viewing the table of contents, that this commission focused on questions regarding responsibility and accountability. Chapter five is named 'Concluding diagnosis and distribution of responsibility'. In the introduction to that chapter, the commission clarifies that the discussion is limited to so-called institutional and strategic deficiencies. This further means that individual handling errors of an operative nature will not be handled in the report.[146] Again, focus is on learning from mistakes made and suggesting changes to systems, laws, and authorities rather than establishing who should be held accountable for decisions taken during the emergency. However, it is also clear reading chapter five of the Catastrophe Commission report that the commission has included aspects of accountability for each aspect of emergency management that they evaluate.

The commission details failures on many levels within the Swedish state during the tsunami. The governmental offices lacked a crisis organization.[147] This is deemed to be a clear reason for many of the shortcomings at the level of ministries and the governmental offices as a whole. It led to a late situational awareness, difficulties in gathering information, difficulties with coordinating analysis, and identifying relevant actions both within the governmental offices and in the relationship between ministries and authorities.[148] It also caused problems with efficiently operationalizing decisions taken. The Government did not initially gather and did not take decisions to support the management of the emergency.[149] It was believed that the regular structures and decision-making within the normal regulatory framework would be enough on the ministerial level. The division of tasks and responsibility between the ministries was unclear during the emergency. The Ministry of Foreign Affairs took the lead since the disaster happened abroad and initial information came through that ministry's channels. However, questions around authority between ministries showed themselves early on, where, for instance, officials from the ministry were not allowed to have direct contact with authorities under other ministries. These issues had a clear impact and delayed the operative response from the Rescue Services Agency to Thailand.[150] The commission further describes that, lacking a clear structure for emergency management, a lot of responsibility ended up on the shoulders of individual officials within the ministries.

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144 ibid 39.
145 ibid.
146 ibid 265.
147 ibid 265ff.
148 ibid.
149 ibid 266.
150 SOU 2005:104 266.

Without clear instructions and with the normal institutional order as the norm for action, this led to a delay in understanding that the regular consular regime was not enough and had to be replaced with something else. An example of this concerns the costs for supporting individuals in Thailand. It took time before informal signals were sent out to staff that the costs would not be an issue. However, no formal decision was taken by the government, clarifying that costs would be met. The general conclusion is that it is simply not good enough to work during an emergency of this magnitude without a formal structure and organization for emergency management with clear mandates to lead and take necessary decisions.[151] The commission also clarifies that the responsibility for the shortcomings at the level of government and the Governmental offices falls on the Prime Minister.[152]

On the level of ministries, the commission outlines several challenges. To mention some, there was unclear leadership for handling emergencies and unclear routines and structures for sharing information between ministries. Within the Ministry for Foreign Affairs several of the central managers did not initially break off their holiday; instead, it took more than 24 hours for several within the leadership to physically come into work. The responsibility for actions and omissions is placed on the level of central leadership within the ministry. The commission also addresses accountability aspects for the Foreign Minister and the state secretary level, just below the minister.[153]

The healthcare system and responsibility for disaster medicine also came into focus after the tsunami. The commission concludes that a Swedish operation focused on disaster medicine would have been needed early on. It would have contributed to supporting the Thai health-care system, which was under heavy pressure, but also to planning and efficiently conducting the evacuation of injured people from Thailand.[154] The authority in charge was the National Board of Health and Welfare. According to the commission, they reacted late. The department in charge of emergency management was understaffed during the first week after the tsunami. The Board itself stated that it did not have an operational responsibility and also no task to contribute to operations outside of Sweden.[155] Instead, responsibility, according to the Board, rested with the regions. In addition, via a delegation in the law on health care, the government had the right to issue rules on national perspectives on disaster medicine. The Commission accepted that the emergency management structures and the rules for disaster medicine were not appropriate for handling a situation like the tsunami. It also, however, clarified that despite that, it could reasonably be expected of both the Ministry for Social Welfare and the Board on Health and Welfare that they take a more active role in this situation.[156]

The commission also reviewed the consular system in relation to emergencies. Even though the commission is clear on that planning for something as exceptional as the tsunami is not reasonable to expect, it also concludes that the system and preparedness did not live up to even more modest expectations.[157] The data registration contained many faults, and

[151] ibid 267.
[152] ibid 268.
[153] ibid 272f.
[154] ibid 273f.
[155] ibid 274.
[156] ibid 276.
[157] SOU 2005:104 276.

the methods used created risks for further faults; mobilization of staff was difficult and also not prepared.[158] The ambassador acted initially according to applicable rules and the emergency plan, but information flow between the embassy and the Ministry for Foreign Affairs was not smooth.[159] Many victims and their next of kin expressed to the Commission that they felt a severe lack of empathy emanating from the Ministry for Foreign Affairs, both locally and in Sweden.[160] The regulatory framework for consular support was also upheld initially despite the extraordinary situation that was handled.[161] A new law from 2003 on consular economic support, which was rather strictly formulated, also formed the behaviour of officials during the initial phase of the response to the tsunami.[162] The commission raised the question of accountability and placed it with the responsible functions in the Ministry. Better training, better planning, and a focus on empathy and the task to support people in need were suggested as ways forward.[163]

Of the commissions analysed here the Catastrophe commission has the most clear and structured approach to questions on responsibility and accountability. The commission in chapter five of the report goes through responsibility and accountability and places them even on the individual level.[164] When it comes to accountability, the commission is equally clear that their task is to draw conclusions and suggest improvements that will improve the handling of the next emergency. The report itself, therefore, does not handle individual accountability questions, other than voicing criticism against certain acts and decisions taken. It is a conscious choice to work with the concept of modified personal responsibility. That means a focus on personal responsibility, but modified through taking into consideration the special conditions applicable in organisations reviewed.[165] This approach is traceable when reading the report's conclusions on responsibility. The commission works with a combination of responsibility put on individuals, together with clear descriptions of systemic failures and proposals on how to improve both decision-making and the system for the future.

Outcome

In many ways, the commission's suggestions for changes in the system, the role for authorities in times of emergency, and legal changes had a defining impact on the new emergency management systems over the coming years. There were four major weaknesses according to the commission: the lack of a central emergency management function, ill-functioning information sharing also within ministries, the far-reaching sector-division, and unclear boundaries between the Government offices and authorities.[166] These four features led to a lack of clear leadership, a lack of an overall view and management of the emergency due to compartmentalising functions, responsibilities, and tasks to different sectors without creating clear cooperation between them. Further, the commission criticises strict

158 ibid 223ff.
159 ibid 276f.
160 ibid 223f.
161 ibid 226.
162 Lagen (2003:491) om konsulärt ekonomiskt bistånd.
163 SOU 2005:104 254f.
164 See for instance: SOU 2005:104 267f, 272, and 278.
165 ibid annex 5, 503f.
166 SOU 2005:104 282f.

hierarchies, rivalries between and within different ministries and authorities at different levels, believing they could not take action without a clear directive from the government office. This all led to delays in operations and handling of the emergency. The role of a government and the governmental offices during emergencies in relation to the role of national authorities was in need of clarification.[167]

Finally, the main suggestion from the Commission was the creation of a central emergency management function established directly under the Prime Minister's office.[168] This is also the main outcome from a system point of view. The function was initially created as a warning and alarm function. Over the years since the tsunami, the functioning, tasks, and also the place in the Government office have changed several times. At the time of writing, the function has been closely integrated with the new function of the National Security Advisor, created in 2022, and is placed in the Prime Minister's office.[169] The commission further suggested that the constitutional law on peacetime emergencies should be reviewed together with the laws on rescue services operations and emergency management.[170]

Another effect of the commission's work was a change in the authority structure. The Swedish Civil Contingency Agency (Myndigheten för Samhällsskydd och Beredskap) was formed in 2009 through a merger of the Emergency Management Agency (Krisberedskapsmyndigheten), the Rescue Services Agency (Räddningsverket), and parts of the Board for psychological defence (Styrelsen för Psykologiskt Försvar). The idea was to improve the integration of international and national aspects into the operational emergency management work and improve coordination and cooperation between authorities.

In 2008, a constitutional inquiry, including a review of the rules on war and danger of war, also included a proposal for including rules in the constitution on peacetime emergencies.[171] The proposal did not result in a law proposal. After criticism from several authorities, the government decided to let that proposal rest. In 2021, when the pandemic again caused discussions around the possible need for rules in the constitution for peacetime emergencies a new parliamentary commission was initiated.[172]

3.3 THE CORONA COMMISSION

The Covid-19 pandemic hit Sweden, as it did the rest of the world, and in just a few weeks, life as we knew it ground to a stop. The home office became the new normal for those of us who can work remotely. For all people working in schools, pre-schools, health care, public transport, and who conduct work tasks that simply cannot be done remotely, everyday life

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[167] ibid 283ff.
[168] ibid 308.
[169] It had been moved to the Ministry of Justice for a few years before coming back to the Prime Minister's Office in 2022. The move had for instance been criticised by the Corona Commission in 2022 as a factor hampering the Governments possibility to take an active lead in the Corona handling. See: SOU 2022:10, vol II, 645.
[170] SOU 2005:104 309.
[171] See for more background: SOU 2008:61.
[172] The Commission presented its report in 2023: SOU 2023:75. At the time of writing the law proposal has been presented and is now pending parliamentary decision. New rules can enter into force earliest in 2027. See: Proposition 2024/25:155.

became a balancing act between taking responsibility for the common good and keeping society running.

Tasks and mandates

The start of the Corona Commission came after a governmental decision on 30 June 2020, so only a few months into the ongoing pandemic. The decision was preceded by deliberations with all parties in the Parliament. The tasks included for instance:

- To evaluate measures taken by the government, authorities, regions, and municipalities to limit the spread of the virus causing COVID-19 and the effects of the spread of the virus;[173]
- To evaluate how the crisis organisation within the governmental offices, concerned authorities, regions, and municipalities functioned during the emergency;
- To evaluate how the principle of responsibility and the geographical area responsibility functioned during the emergency.[174]

The head of the commission was a former Justice of the Supreme Court and President of the Supreme Administrative Court. The commission consisted of professors in political science, in leadership, and medicine, as well as representatives from the Swedish Association of Local Authorities and Regions[175] and the Swedish Church. On the whole, 10 secretaries assisted with the work and the commission presented three reports between 2020 and 2022. The first report focused on the care for the elderly during the pandemic.[176] The second report was focused on the virus as such, the spreading of the disease, and the healthcare system during the pandemic.[177] The third report focused on economic aspects of the pandemic and in the second volume of the third report, presented conclusions from the complete work of the Corona-commission with conditions and paths to choose from. It is the third report and especially volume two that is in focus here, as it contains the more overarching aspects and an evaluation of the pandemic response.

Conclusions

The Corona Commission's final report outlines the choices Sweden made and analyses how those choices impacted or may have impacted the outcome of the pandemic in Sweden. The pandemic response was heavily questioned from the outset, and there are aspects where Sweden chose a different path from neighbouring countries or even most countries in the world. Sweden did not completely close down, but kept especially schools for younger children open. However, elderly care facilities were closed down, and in the aftermath of the pandemic, that is a choice that has been questioned by experts, and also by the Corona-

[173] SOU 2022:10 (vol I), Coronakommissionen, Sverige under pandemin: Volym 1, Samhällets, företagens och enskildas ekonomi.
[174] Full directive can be found here: SOU 2022:10, vol II, 687ff.
[175] Sveriges kommuner och regioner (SKR).
[176] SOU 2020:80, Coronakommissionen, Delbetänkande – Äldreomsorgen under pandemin.
[177] SOU 2021:89, vol 1, Coronakommissionen, Delbetänkande – Sverige under pandemin: Volym 1, Smittspridning och smittskydd; SOU 2021:89, vol 2, Coronakommissionen, Delbetänkande - Sverige under pandemin: Volym 2, Sjukvård och folkhälsa.

commission in their first report from 2020.

The report also focuses on the legal framework for handling peace-time crises and details how the emergency management system is structured and the deficiencies of the system that have been evaluated and also reported on several times since the system came into place at the beginning of the 2000s.[178] The commission, just like the Catastrophe commission, focuses on the responsibility of the government, the division of labour between ministries and authorities, and how different authorities, the municipalities and regions, worked and handled their tasks and responsibilities during the pandemic.[179]

It is clear in the report that certain conditions shaped the Swedish response during the pandemic, but also the specific choices that were made. One of the aspects shaping the response is the decision-making of the expert authority that became the leader of society's response to the pandemic, the Public Health Agency.[180] Another focus area is the communication to the general public, as this particular emergency quickly became a battle for the information space. Who knows best what response is the right one, and how do authorities communicate with the public – by rules or by recommendations?[181] The last two chapters of the report then focus on concluding observations, questions on responsibility, and lessons learned.

The Corona-commission concludes in their report that taken over the whole time period from 2020 to 2022 Sweden managed well in comparison to many other states, with regard to the number of deaths and the effects on society as a whole. The first wave in 2020 however, hit Sweden hard, and during that time Sweden stood out as a country that trusted their citizens to take responsibility for the situation rather than using very restrictive measures.[182]

The report clearly addresses the inequality and the human rights implications of both how the virus affected society and the measures taken to prevent its spread.[183] Gender imbalances, socio-economic imbalances, geographical differences, and many other factors affected the spread and the efficiency of measures taken, but also contributed to different impacts on people. Measures taken have many times fitted 'the well-educated middle class with good possibilities to protect themselves against the virus, navigate the care system and work from home'.[184] The Corona Commission, as did the Catastrophe Commission, also addresses the trust in institutions and society and how vital it is to uphold people's trust in order for society to keep functioning and maintain social order.[185]

The Corona Commission further brings up the recurring deficiencies in emergency management. These are clearly recognizable from other evaluation reports and especially from the earlier Tsunami Commission:

- Lacking cooperation before the emergency;
- Questionable usability of risk and vulnerability analysis;

[178] SOU 2022:10, vol II 298, 364ff.
[179] ibid chapter 11.
[180] ibid 364ff.
[181] ibid chapter 13.
[182] SOU 2022:10, vol II 237.
[183] SOU 2022:10, vol II, especially chapter 8.
[184] Own translation, ibid 636.
[185] SOU 2022:10, vol II 549.

- Too few exercises and a lack of preparedness planning;
- Deficiencies in how lessons learned are taken care of after emergencies.[186]

In the report, the commission repeats the demand for the government to take a larger responsibility for the overarching perspectives in emergency management and give a clear direction for emergency management as a whole in society, as well as to clarify what different actors have to manage.[187] A better balance between the government's responsibility to govern and the free-standing authority structure should have been found. The government was in this respect, too dependent on the analysis made by the Board for Public Health. The Board for Public Health, despite its broad responsibility for analysis of its measures and recommendations, kept most tasks internal instead of cooperating and taking in expertise from other authorities or academia to support them during the pandemic.[188] A broader input for decision-making would have been needed.[189] The commission concludes that the focus on advice and recommendations meant that Sweden, to a higher degree than many other countries, upheld personal freedom. The advice and the recommendations could however have been communicated in a clearer way as rules for behaviour.

The Corona Commission, in their conclusions, also focuses again on the legal structure for emergency management and criticises that the government waited so long to initiate the constitutional inquiry on peacetime emergencies, even after two different evaluations of emergencies had stated the need for a review.[190] The pandemic showed again how legal regulations are managed in times of emergency. During 2020 and 2021 several new laws entered into force to address different aspects of the pandemic. Some were more general in nature. One example is the law that delegated a possibility for government through ordinances to restrict the number of people in restaurants or other public places. Other ordinances provided rules for closing down schools.[191] The Corona Commission suggested a complete review of the legal preparedness as well as a full review of the principles of responsibility, proximity and similarity.[192]

Outcome

The last and most comprehensive report was presented to the government on the 25th February 2022. Needless to say, all attention, and rightly so, was on the Russian invasion of Ukraine. From a Swedish emergency management perspective, this was, however, detrimental, as a highly needed debate and discussion around the findings of the Corona Commission, to an extent, got lost. On the homepage, where the report can be found, there are no follow-up measures listed.[193] There have been no remits and no law proposals that are directly linked to the suggestions from the Corona Commission's final report so far. It is important to stress that this does not mean that nothing has come out of the work done.

[186] SOU 2022:10, vol II 10.3.1-10.3.4
[187] ibid 326, 639.
[188] ibid 651.
[189] ibid 639.
[190] ibid 653, 661.
[191] For more examples on laws and ordinances from 2020 see for instance: Ericson and Wilske (n 23).
[192] SOU 2022:10, vol II 665, 668, 675f.
[193] <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2022/02/sou-202210/> accessed 25 August 2025.

There is, as an example at the time of writing, a law proposal awaiting decision by parliament that could create a new chapter in the Instrument of Government dedicated to peacetime emergencies.[194]

When it comes to responsibility and accountability questions the Corona commission is also pointing out who, in this case authority or the government, or a region, is responsible for things that have not gone according to plan or functioned in a good way.[195] The Corona Commission handles questions on responsibility and accountability in a similar way as the Catastrophe Commission.

4 CONCLUSIONS

The Swedish emergency management system has developed rather organically since it was first created at the beginning of the 2000s. It is argued here that governments are consistently using commissions in the aftermath of emergencies as a tool to evaluate, draw conclusions, and suggest changes to the emergency management system. It is also common that the commission is initiated while the emergency is still ongoing, although its focus is on what should happen after the emergency. The initial Submarine Commission from 1982, the Catastrophe Commission and the Corona Commission all started their work while active management of the emergency was still ongoing. Why is that so? Well, there are probably many reasons, and some have already been mentioned earlier. One main argument may be to move questions from the political debate sphere while showing a sincere will to learn from mistakes and take responsibility for necessary changes without pointing the finger at specific decision-makers. A certain appeasement to criticism from the public and from political opponents may also be visible. That appeasement may also be a reason for acting fast, while the emergency is still underway.

For authorities, the rationale may be different. There is, arguably, a strength in a system that is always willing to be reviewed and to draw lessons learned. Hopefully, it leads to decision-makers who are feeling safe and thereby are more willing to take certain risks by focusing on the handling of an emergency for the common good, not only on following rules and regulations. Based on conclusions from all commissions analysed here, the common good perspective is, however, not always serving as a guiding light. Rules and regulations are often perceived as absolute, rather than containing room for interpretation.

However, looking at these different commissions that have worked over a time period from 1982 to 2022, it is striking how many of their conclusions are the same, or at least consistently linked to the same aspects of the system and structures for emergency management. The lack of efficient cooperation between authorities keeps coming back despite being a constant feature in applied system changes. The government's role and responsibility for the national level of emergency management, and the relationship between the government and authorities, were raised by all commissions focused on here. Another example is the question of taking active decisions and measures in emergency management instead of waiting for more information, and the suggestion of adding a principle of action and precaution to the other principles for emergency management. These aspects keep

[194] Proposition 2024/25:155.
[195] SOU 2022:10, vol II 653ff.

coming back and can be found in all reports analysed here.

When it comes to the questions on responsibility and accountability, it is also argued here that responsibility is in focus for all commissions. Tasks are formulated, reported on, and also suggested when perceived as missing. The reports are based on ordinances with instructions, and commissions seem unafraid to evaluate tasks given as well as tasks implied for different authorities and for the government.

Accountability is referred to. In the reports on the submarines and the tsunami, roles, but also named decision-makers and politicians, are held accountable for certain shortcomings or deficiencies in the handling of the respective emergencies. That does not, however, lead to starting processes for formal accountability. Instead, accountability often seems to become a process based on the media demanding answers, the Constitutional Committee organizing hearings with ministers, their state secretaries, and heads of authorities. This may lead to ministers leaving the government or heads of authority being transferred to the 'Cemetery of elephants' as described earlier. But, formal processes for misconduct or formal dismissals are unusual.

For many public officials who belong to the first generation in the 'new' emergency management system in Sweden, the tsunami occurring in Asia in 2004 became a defining moment in many ways.[196] It happened far away, but the effect on Swedish citizens and Sweden as a state was immediate and far-reaching. For those of us working in emergency management, certain parts of the system failed in both anticipated and unforeseen ways. The Catastrophe Commission was, as has been described, also labelled a Citizens' commission. It shines through in the report that the commission performed a balancing act. Due to the heavy criticism that the media and the public had voiced, the commission had to address mistakes that were made and systemic as well as leadership failures that occurred. Still, the main task was not accountability, but to learn for the future and to suggest improvements to the newly established emergency management system. Questions on accountability were also raised in the Constitutional Committee (Konstitutionsutskottet) where both ministers and state secretaries were questioned and held responsible in a very public way for decisions taken and not taken.[197]

Sweden, despite not being at war for centuries, has seen its fair share of emergencies. To just mention a few, the ferry Estonia sinking in the Baltic Sea in 1994 is often referred to as a defining emergency in Sweden. Prime Minister Olof Palme was murdered in 1986, and the Minister for Foreign Affairs Anna Lindh in 2003. Just after the tsunami happened, in January 2005, the storm Gudrun ravaged parts of Sweden, and in 2014 and 2018, major forest fires occurred. The COVID-19 pandemic hit Sweden just as it hit the rest of the world. But, for many Swedes, the magnitude of the tsunami and the number of people affected by it stand out also in a historical context.

When societies face an emergency of a certain magnitude, humans' best but also worst

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[196] The authority started its work in 2002 and was among other things tasked with supporting the build up of the new emergency management system. At the same time the Agency for civil Emergency Planning was closed down. The author started working in the Swedish Emergency Management Agency in the beginning of 2004. The tsunami was the first major emergency that the authority ended up in the middle of, despite not having a mandate to handle anything operational related to the emergency.

[197] Konstitutionsutskottets betänkande 2005/06:KU8, Regeringens krisberedskap och krishantering i samband med flodvågskatastrofen 2004.

sides tend to exhibit themselves. Looting and extortion serve as examples of the latter, but self-organization, a tremendous drive to assist others are example of the former. A transparent handling of an emergency, openly communicating to the public, can also increase trust between the public and decision-makers. Not communicating or hiding risks can cause the opposite and thereby also hamper the efficient handling of an emergency.[198] In the afterword to the Catastrophe Commission, this is very well formulated, and with examples of how people affected by the tsunami have described the best sides of other people, but also failings in the Swedish handling of it. In the commission's report, a specific part is dedicated to testimonies from affected people. There, it is visible how the human factor, both among victims and public officials handling the emergency, affects trust between individuals and the public authorities and the government.[199] The Catastrophe Commission concludes that emergency management at its core will be about upholding social order.[200] Similar aspects are often brought to the fore as reasons for reviewing and learning from emergencies that occur. It is important to keep social order intact during the next emergency, and a way to uphold people's trust in public authorities and the society's ability to handle emergencies next time they occur.

A striking feature of the different commissions handling the questions on submarines between 1982 and 2001 is how commissions can review other commissions' conclusions and also review their review material and data. When the last, so far, commission presented its report in 2001, that report was written in a completely different mindset, methods for data gathering and analysis than the initial one in 1982. The security policy situation was different, the authority structure altered, and the regulatory framework altered. The reasoning behind initiating these latter commissions seems to be that public debate kept going and differences in opinions were causing friction between political parties, authorities, and the general public. But when is it time to let an emergency rest? When is it time to close down analysis and accept that all answers will never be found? In the submarine case, that seems to be a question that has never been answered. Accountability questions also tend to be more relevant in the aftermath of an emergency, rather than 20 years after the possible deficiencies or wrongdoings occurred. The perspective of later submarine commissions thereby automatically becomes less focused on accountability questions.

Commissions can also mutually reinforce each other. The last submarine commission hailed the description of the factual events and analysis made by the commission from 1995 and used it as a starting point. The Corona Commission referred to conclusions and analysis by the Catastrophe Commission on regulatory frameworks, principles for emergency management, and the need for improved constitutional preparedness for peacetime emergencies. Commissions may thereby legitimise each other's work and reports, and the writings become established as absolute truths for good and bad. In a sense, this contributes to not forgetting the results of commissions and hopefully leads to lessons learned being taken further.

Finally, the Catastrophe Commission has contributed with a highly relevant analysis of what a commission really is and its status under law. It is an authority under the government,

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[198] See for instance: Misse Wester, 'Fight, Flight or Freeze: Assumed Reactions of the Public During a Crisis' (2011) 19(4) Journal of Contingencies and Crisis Management 207.
[199] See especially around the expectations from victims on the Swedish government, SOU 2005:104 376ff.
[200] SOU 2005:104 349.

without a specific rule on how to run its activities. Administrative law does not apply to commissions' work other than how administrative cases are handled, and regarding public access to documents.[201] It is therefore up to the commission itself, based on the directive given by the government, to decide how the task of investigating the emergency is to be conducted and interpreted.[202] This is important to remember when analysing commissions' reports and their analysis of emergencies. Formulations on the method of inquiry and data gathering have become more prominent in reports in recent years. Of the reports analysed here, the Catastrophe Commission and the Corona Commission stand out in this respect by writing both about their methods and their interpretation of terms, tasks, and questions. That transparency is vital for future commissions to uphold trust in commission reports in the future.

Commissions reviewing emergencies have been and will most likely also for the future be an important part of presenting lessons learned and developing the emergency management system further. At the same time, the government has also expressed willingness to review and develop what is referred to as systems for personal accountability further.[203] What this will mean for commissions ahead is still unclear. Will future commission reports become material for accountability processes against individual decision-makers? Will the more political or informal accountability processes stay intact? Is it in our system's best interest to formalise accountability after emergencies to a greater extent than is the case today? Many questions can be asked, but here and now they will regrettably remain unanswered.

[201] SOU 2005:104, 38f.
[202] ibid 39.
[203] See for instance: Justitiedepartementet, *Direktiv 2024:14, Kommittédirektiv: Straffrättsliga åtgärder mot korruption och tjänstefel* (2024)

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Lantmäteriet, press release, https://www.lantmateriet.se/sv/om-lantmateriet/press/nyheter/susanne-as-sivborg-lamnar-sin-anstallning-som-generaldirektor-for-lantmateriet/ (accessed 15 November 2025).

THE CONCEPT OF EMERGENCY IN FINNISH EMERGENCY LEGISLATION: AN ANALYSIS OF AMENDMENTS TO THE EMERGENCY POWERS ACT

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In this article, I analyse the expansion of concept of emergency in the Finnish legal system by means of amending the Emergency Powers Act (1552/2011). The Act is the one of the main vehicles for regulating the use of emergency powers. The Act lists six distinct exceptional circumstances that authorise a state of emergency. Amendments to the Act have served to expand the definition of emergencies in the Constitution (Section 23) and the concept of emergency in general. By analysing the travaux préparatoires of relevant amendments, the focus is on the principles in expanding the concept. I argue that one of the main principles in developing the concept through legislation is preciseness. Emergencies should have to be defined by means of legislation as precisely as possible. In analysing the main principles in expanding the concept of emergency, this article seeks to also emphasise the tensions between these principles. As I will point out, sometimes preciseness is outweighed by the need to ensure that the Act accommodates all emergencies exhaustively.

1 INTRODUCTION

In Finland, the practice has been that emergencies are determined in advance by legislation exhaustively and as precisely as possible. The Finnish legal system emphasises parliamentary sovereignty, meaning that the capacity of courts in controlling legislation is rather restricted[1] – a practice that is prevalent in Nordic countries.[2] Therefore, it has been up to the legislator to develop the concept of emergency. Section 23 of the Constitution, 'Basic rights and liberties in situations of emergency', which is the section that regulates emergencies, states that 'the grounds for provisional exceptions shall be laid down by an Act'.[3] The Emergency Powers Act[4] is meant to be this act. It establishes six different exceptional circumstances as a ground for declaring a state of emergency. It provides for powers during armed conflicts, economic crises, major disasters, pandemics and hybrid threats. This list of exceptional circumstances has been the result of more than 30 years' work – the first document of the long list of *travaux préparatoires* is from 1979.[5] The Act was passed

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[1] Kaarlo Tuori, 'Judicial Constitutional Review as a Last Resort' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) 381, 387.

[2] Jaakko Husa, 'Nordic Constitutionalism and European Human Rights – Mixing Oil and Water?' (2011) 55 Scandinavian Studies in Law 101.

[3] Unofficial translation by the Ministry of Justice, Finland. Other translations are the author's unless otherwise stated.

[4] Valmiuslaki/Beredskapslag (1552/2011).

[5] Parlamentaarinen valmiuslainsäädäntökomitea, *Parlamentaarisen valmiuslainsäädäntökomitean mietintö* (Valtioneuvosto 1979).

in 1991 and the most resent major amendment dates back to 2022. Amending the Act's list of exceptional circumstances has expanded the concept of emergency within and beyond the constitutional order. For this reason, the Ministry of Justice is facilitating a comprehensive reform of the Act.[6]

In this contribution, I analyse how the Emergency Powers Act has expanded the concept of emergency. The focus is on the principles in expanding the concept to emergencies other than war in the strict sense.[7] The Act provides for domestic and peace-time crises, which originally expanded the concept substantially.[8] My research question is: what are the principles in amending the Emergency Powers Act's list of exceptional circumstances? Through an analysis of relevant *travaux préparatoires*, I argue that a central principle is that the definition of emergencies is as precise as possible.

However, as I will point out, this principle of preciseness is sometimes in tension with the other principles in amending the Act, namely the principle that the legal system should anticipate emergencies and legislate emergency powers in advance. Anticipating emergencies legislatively ensures that there is no room for extra-legal measures or need for hastily (and therefore poorly) drafted legislation during emergencies. In following this principle, the practice has therefore been that new exceptional circumstances are included in the Act to ensure that the Act accommodates emergencies exhaustively. While legislatively anticipating emergencies is partly justified by the fact that in doing so ensures the proportionality and the preciseness of emergency provisions, ensuring that the Act regulates all emergency situations effectively has sometimes enjoyed precedence over preciseness.

The article's contribution to the discussion of emergency law is in analysing the principles of legislatively expanding the concept of emergency. While many have sought to understand and theorise the principles underlying legislatively defining emergencies,[9] my point is to analyse and illuminate the principles in expanding such a definition. I will begin by a theoretical discussion of conceptualising emergencies (Section 2), then move on to an overview of emergency laws in the Finnish legal system and their history (Section 3). In Section 4, I will analyse the development of the Emergency Powers Act and the *travaux préparatoires* relevant to the concept of emergency.

Three important studies have assessed the concept of emergency in Finnish legal system. Anna Jonsson Cornell and Janne Salminen, in their comparative work on Swedish and Finnish emergency law, have analysed the Emergency Powers Act's significance for

[6] Ministry of Justice, Finland, 'Valmiuslain Kokonaisuudistus (OM015:00/2022)' <https://oikeusministerio.fi/en/project?tunnus=OM015:00/2022> accessed 15 October 2025.
[7] The Act on the State of Defence (1083/1991) regulates war-time powers. However, the amendments to this Act have not developed the concept of emergency in Finnish legislation significantly.
[8] Antti Aine et al, *Moderni Kriisilainsäädäntö* (WSOY 2011) 28, 138. A similar development seems to have taken place in the Roman Republic. Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (Oxford University Press 2016) 71–74.
[9] John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2(2) International Journal of Constitutional Law 210; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006); Sascha Mueller, 'Turning Emergency Powers inside out: Are Extraordinary Powers Creeping into Orginary Legislation' (2016) 18(2) Flinders Law Journal 295.

the Finnish Constitution.[10] Johannes Heikkonen et al. have written a thorough assessment of the Act's constitutionality.[11] Lastly, Antti Aine et al have summarised the history of the Act in the broader context of Finnish crisis legislation.[12] While they all provide a good overview of the Act, its development and issues, they do not focus on the principles in expanding the concept of emergency as such. Furthermore, the Act has gone through a significant amendment after their publication: the addition of hybrid threats as an exceptional circumstance category in 2022.[13]

2 CONCEPTUALIZING EMERGENCIES

There are different approaches to analysing the concept of emergency. Guillaume Tusseau distinguishes between ontological realism, the notion that in legal systems, the term 'emergency' refers to objectively knowable uniform circumstances independent of law, and functionalism, the notion that, while the term 'emergency' might not refer to anything real beyond the legal system, it is still a unified object of knowledge as it has a specific function in law, such as conferring emergency powers.[14] However, these positions are difficult to reconcile with the fact that it is neither possible to establish a correspondence between the legal definition of emergencies and real-world events or situations, nor easy to develop a unified notion within the legal system.[15] Emergencies denote plethora of different events and situations, such as economic, political, and natural events,[16] and the nature of actual emergencies seems to change and develop beyond the intention of the legislator, meaning that new court rulings and/or legislation is needed to further develop the legal definition. Even a working conception of emergencies that is not too general for allowing any event whatsoever to be an emergency and not too specific to hinder an effective emergency response is difficult to formulate.[17] In addition, scholars have convincingly argued that emergencies are becoming more complex and therefore they are less likely to accord with strict spatio-temporal limits.[18]

However, as Tusseau puts it, while the term might not denote anything precise, 'this does not prevent it being used in legal discourses'.[19] Analyses of emergency law should begin with positive law and practice rather than a unified definition.[20] Emergency law may be seen as power-conferring rules in exceptional situations, regardless of the fact whether exceptional

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[10] Anna Jonsson Cornell and Janne Salminen, 'Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland' (2018) 19(2) German Law Journal 219.
[11] Johannes Heikkonen et al, *Valmiuslaki Ja Perusoikeudet Poikkeusoloissa: Valtiosääntöoikeudellinen Kokonaisarvio Valmiuslain Ja Perustuslain 23 §:N Suhteesta* (Valtioneuvoston kanslia 2018).
[12] Aine et al (n 8).
[13] Laki valmiuslain muuttamisesta / Lag om ändring av beredskapslagen (706/2022).
[14] Guillaume Tusseau, 'The Concept of Constitutional Emergency Power: A Theoretical and Comparative Approach' (2011) 97(4) Archiv für Rechts- und Sozialphilosophie 498, 513, 517.
[15] Michel Troper, *Le droit et la nécessité* (Presses Universitaires de France 2011) 101, 108.
[16] Tusseau (n 14) 520.
[17] Gross and Ní Aoláin (n 9) 5-6
[18] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112(5) Yale Law Journal 1011, 1022; Ferejohn and Pasquino (n 9) 228; Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018) 45–48.
[19] Tusseau (n 14) 530.
[20] Mario Kresic, 'Emergency Situations and Conceptions of Law' in Vadim Mantrov, *Revisiting the Limits of Freedom While Living Under Threat. II* (University of Latvia Press 2024) 76.

situations is a unified set of events or not.[21] An analysis of the concept of emergency can therefore begin with laws and practices that confer extraordinary competences to make exceptions to fundamental rights and the constitution.

For example, the European Convention of Human Rights and Fundamental Freedoms defines an emergency justifying derogations as 'war or other public emergency threatening the life of the nation'.[22] The relevant characteristics of such an emergency were fleshed out in the ECtHR's caselaw. In the so-called Greek-case, the ECtHR established that an emergency must be actual or imminent, affecting the whole nation, threatening the continuation of 'the organised life of the community,' and it has to be exceptional in so far that ordinary powers are insufficient in responding to it.[23] In addition, the International Covenant on Civil and Political Rights determines a public emergency as a threat to the life of the nation.[24] It has been specified similarly by the so-called Siracusa-principles, which also state that internal conflict and unrest or economic difficulties per se do not constitute an emergency.[25] Indeed, in the international context, there is in general a call to establish clear boundaries for emergencies.[26]

While analysing expanding the concept of emergency, I refer to a process in which emergency law accommodates to new exceptional situations and events. Scholars often emphasise the differences between constitutional, legislative, and judicial accommodation of emergencies.[27] Oren Gross and Fionnuala Ní Aoláin distinguish between constitutional accommodation, in which the constitution includes a state of emergency clause, legislative accommodation, in which ordinary legislation or special emergency legislation is used, and 'interpretative accommodation', in which existing laws are interpreted so that they accommodate emergencies. [28] The infamous Article 48 of the Weimar Republic is an example of constitutional accommodation.[29] An example of legislative accommodation would be the French Law No. 2020-290, which developed a new regime of state of health emergency (*état d'urgence sanitaire*) during the pandemic.[30]

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[21] Gross and Ní Aoláin (n 9) 38; Tusseau (n 14) 527–528; on power-conferring norms, see François Tanguay-Renaud, 'The Intelligibility of Extralegal State Action: A General Lesson for Debates on Public Emergencies and Legality' (2010) 16(3) Legal Theory 161, 167.

[22] ECHR, Art 15.

[23] 'Report of the European Commission of Human Rights on the "Greek Case"' s 153; see also *Lawless v Ireland (No 3)* App n Application no 332/57 (ECtHR, 1 July 1961); for the development of the concept under ECHR law, see Guido Bellenghi, 'Neither Normalcy nor Crisis: The Quest for a Definition of Emergency under EU Constitutional Law' [2025] European Journal of Risk Regulation 1, 11.

[24] ICCPR article 4.

[25] American Association for the International Commission of Jurists, *Siracuse Principles: On the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (International Commission of Jurists 1985) 7.

[26] For example, the Venice Commission states emergency powers should not 'be applied in case of threats that, however unfortunate and dramatic, are endemic to modern societies and can never be fully eradicated (common crime, sporadic terrorist attacks etc.)'. Venice Commission, *Respect for Democracy, Human Rights and the Rule of Law during States of Emergency - Reflections* (Council of Europe 2020) 6.

[27] Anna-Bettina Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck 2020) 197–198.

[28] Gross and Ní Aoláin (n 9) 36, 66–67, 72–73; see also Gross (n 18) 1059–1061, 1065–1066.

[29] Kim Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6 University of Pennsylvania Journal of Constitutional Law 1001.

[30] Sylvia Brunet, 'The Hyper-Executive State of Emergency in France' in Matthias C Kettemann and Konrad Lachmayer (eds), *Pandemocracy in Europe: power, parliaments and people in times of COVID-19* (Hart 2022) 208.

Interpretative accommodation is a practice developed most prominently by courts.[31] At the European level, for example, the Court Justice of the European Union (CJEU) confirmed that COVID-19 justifies restricting freedom of movement.[32] According to Vincent N. Delhomme, this was not a simple matter of applying the pre-existing law, as the Schengen Border Code and relevant EU law, but applying it to a situation unanticipated by its drafters and interpret it 'far beyond the wording of both texts, almost at risk of judicial rewriting'.[33] Furthermore, according to Alan Greene, the approach of the European Court of Human Rights has weakened the threshold for declaring an emergency,[34] meaning that the concept of emergency has become significantly more accommodating of various events.

In the context of constitutional and legislative accommodation, scholars juxtapose strict limits and flexibility.[35] In the context of constitutional accommodation, the worry is that a state of emergency clause might determine emergencies too vaguely or broadly.[36] For example, the Weimar Republic's Article 48 lacked any clear limits, which allowed an uncontrolled expansion of emergency measures.[37] In contrast, some argue that legislative accommodation can be too strict and therefore in constant need of revision.[38] However, the Finnish legal system is interesting as it includes both constitutional and legislative accommodation. The development special emergency legislation, namely the Emergency Powers Act, has also affected the constitutional definition of emergency. Therefore, rather than focusing on legislative accommodation in isolation, my analysis illuminates how these two forms of accommodation are also interconnected. Furthermore, in focusing on the principles in expanding the concept of emergency, I draw attention to the fact that flexibility and preciseness can take place within legislative accommodation.

3 THE FINNISH LEGAL SYSTEM AND EMERGENCIES

3.1 OVERVIEW OF FINNISH EMERGENCY LAW

The main principle in Finnish emergency law is that emergency measures are provided by law legislated in advance to ensure that such laws are ready at hand and proportional.[39] There is no principle of constitutional necessity, namely that the state would act in dire

[31] Sara Poli, 'Emergencies, 'Crises and Threats in the EU: What Role for the Court of Justice of the European Union?' in Inge Govaere and Sara Poli (eds), *EU Management of Global Emergencies* (Brill | Nijhoff 2014) 199.
[32] Case C-128/22 *Nordic Info* EU:C:2023:951.
[33] Vincent N Delhomme, 'The Legality of Covid-19 Travel Restrictions in an "Area without Internal Frontiers": Court of Justice (Grand Chamber) 5 December 2023, Case C-128/22, Nordic Info' (2024) 20(2) European Constitutional Law Review 307, 316, 327.
[34] Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12(10) German Law Journal 1764, 1781–1782.
[35] Eric A Posner and Adrian Vermeule, 'Accommodating Emergencies' (2003) 56 Stanford Law Review 605, 606–608; Gross (n 18) 1068.
[36] Pierre-Clément Frier, 'Les Législations d'exception' (1979) 10 Pouvoirs 21, 33.
[37] Ludwig Richter, 'Die Vorgeschichte Des Art. 48 Der Weimarer Reichsverfassung' (1998) 37 Der Staat 1, 26.
[38] Mueller (n 9) 306; Gross and Ní Aoláin (n 9) 68–69.
[39] HE 248/1989, 1, 4; HE 63/2022, 7; Parlamentaarinen valmiuslainsäädäntökomitea (n 5) 112; Valmiuslainsäädäntötyöryhmä, *Ehdotus Laiksi Yhteiskunnan Toimintojen Turvaamisesta Poikkeusoloissa: Työryhmän Mietintö* (Oikeusministeriö 1987) 6; Aine et al (n 8) 9.

circumstances extra-legally.[40] Rather, such measures should always be provided by law.[41] This has been the main principle in developing the Emergency Powers Act. In addition, ensuring that derogations to fundamental rights are precise is a central principle in legislative emergency preparation.[42] As the Section 23 of the Constitution establishes, an authorisation for provisional exceptions to basic rights and liberties may be provided by an Act, given that it is 'subject to a precisely circumscribed scope of application'.[43] In the context of the Emergency Powers Act, the motivation for defining exceptional circumstances that constitute an emergency has been to limit emergency powers provided by the Act to specific emergencies.[44]

There are some general characteristics of the concept of emergency in Finnish legal system that can be identified. These characteristics often mirror the international ones explicitly.[45] First of all, the concept is characterised by a 'principle of normality', which requires that ordinary powers granted by the legal system during normalcy are to be used whenever possible,[46] meaning that genuine emergencies are those that cannot be governed by ordinary powers.[47] In addition, emergencies are grave crises that affect the nation as a whole, or a major part of it, and affect the functioning of the whole society.[48] Therefore, the term 'emergency' denotes only the most serious and exceptional events and situations.

Emergencies are covered by Section 23 ('*Basic rights and liberties in situations of emergency*') of the Constitution. It defines an emergency as an armed attack or other emergency that poses a serious threat to the nation. This definition is meant to be in line with the international definition discussed above;[49] indeed, the first part states that an act may provide 'provisional exceptions to basic rights and liberties that are compatible with Finland's international human rights obligations'. This definition is an amended version of the one established in 1995 by the fundamental rights reform[50] of the Constitution Act[51]In the 1995 version, the definition was an armed attack or emergencies, which are equivalent in severity to an armed attack.[52] In contrast, the amended version of Section 23[53] established that exceptions to basic rights and liberties may be made in 'the case of an armed attack against Finland or in the event of other situations of emergency', which is now closer to the definition established by ECHR.[54] Such emergencies therefore do not have be as serious as

[40] Kaarlo Tuori, 'Hätätilaoikeus teoriassa ja käytännössä' in Kaarlo Tuori and Martin Scheinin (eds), *Lukeeko hätä lakia?* (Helsingin Yliopisto 1988) 44.
[41] HE 200/2002, 6; HE 3/2008, 5; HE 63/2022, 7; PeVL 29/2022, 2.
[42] HE 248/1989, 7; PeVM 25/1994, 2.
[43] Unofficial translation by the Ministry of Justice.
[44] HE 248/1989, 17.
[45] HE 3/2008, 21
[46] PeVL 10/1990, 3; HE 200/2002, 6; HE 3/2008, 5; PeVM 2/2020, 4
[47] HE 248/1989, 4.
[48] HE 3/2008, 1; PeVM 2/2020, 2; PeVM 7/2020, 2.
[49] Heikkonen et al (n 11) 9.
[50] Laki Suomen Hallitusmuodon muuttamisesta / Lag om ändring av Regeringsformen för Finland (969/1995).
[51] Suomen hallitusmuoto 94/1919.
[52] Section 16 in the original Finnish Constitution Act (94/1919) from 1919 recognised only war and rebellion. This section was then later amended (969/1995) to 'an armed attack on Finland as well as under exceptional circumstances threatening the life of the nation and lawfully comparable in gravity to an armed attack' to reflect the definition in international human rights treaties (HE 309/1993 vp, 75-76).
[53] Laki Suomen perustuslain muuttamisesta / Lag om ändring av Finlands grundlag (1112/2011), entry into force in 1.3.2012.
[54] Jonsson Cornell and Salminen (n 10) 239; Heikkonen et al (n 11) 9.

an armed attack, but they still do need to be so extraordinary that they threaten the life of the nation.

The first part of the Section 23 of the constitution establishes that 'the grounds for provisional exceptions shall be laid down by an Act'. The Emergency Powers Actis meant to be this act,[55] which lays down the specific capacities and regulations concerning the state of emergency. The first part of the Act establishes general provisions, namely the purpose, scope of application and general principles of the Act (chapter 1), the protocol for using emergency powers (chapter 2), and obligations for preparation (chapter 3). The second part then establishes the exceptional competences that the Government may exercise in the form of decrees.

Most notably, the first Chapter Section 3 defines six distinct emergencies or exceptional circumstances that authorise the declaration of a state of emergency: (1) an armed attack or another attack of comparable severity against Finland and the immediate aftermath of such an attack; (2) a considerable threat of an armed attack or another attack of comparable severity against Finland; (3) a particularly serious incident or threat against the livelihood of the population or the foundations of national economy; (4) a particularly serious major accident and its immediate aftermath; (5) a very widespread outbreak of a hazardous communicable disease; and (6) a threat or activity, whose combined effects to vital functions[56] of society are substantial (so-called hybrid threats).[57]

These six types of emergencies are the culmination of a long and multifaceted development from the original one from the 1991,[58] which did not include the pandemic and hybrid threats as emergencies but included an emergency category for (3) war or the threat of war between foreign countries or an event of comparable seriousness that threatens the life and welfare of the nation. In addition, the emergency category concerning economic crises was originally restricted to threats 'brought about by hampered or interrupted import of indispensable fuels and other energy, raw materials and goods or by a comparable serious disruption of international trade'.[59] This was later in 2011 enlarged to concern any serious threat or incident in the context of the economy. It is especially due to economic crises that

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[55] Janne Salminen, 'Finsk Krishantering i Fredstid — Beredskapslagen Tillämpas För Första Gången' [2020] Svensk Juristtidning 1116, 1121.

[56] 'Vital functions' (*elintärkeät toiminnot*) is a central notion in emergency preparation. The Security Strategy for Society enumerates leadership, international and EU activities, defence capability, internal security, economy, infrastructure and security of supply, functional capacity of the population and services, and psychological resilience - Security Committee, *The Security Strategy for Society* (The Security Committee 2017) 14. These include critical services, such as energy and food supply, industry and service production, communication and information systems, traffic and transportation, social and health services, but also the mental well-being, trust in institutions and mutual solidarity of the population. Valtioneuvosto, 'Valtioneuvoston Turvallisuus- Ja Puolustuspoliittinen Selonteko 2004' (Valtioneuvoston kanslia 2004) 116–122; Ministry for Foreign Affairs of Finland, *Government Report on Changes in the Security Environment* (Finnish Government 2022) 37. The latter, psychological resilience, is reflected in how security strategies and documents emphasise that societal security also requires that the rule of law, democracy, legal certainty, and bolstering fundamental rights. Security Committee, *The Security Strategy for Society* (The Security Committee 2017) 10, 19, 28; Ministry of the Interior, *Government Report on Internal Security* (Finnish Government 2022) 8, 38. Measures to protect psychological resilience are especially needed against hybrid threats, as they often aim 'to drive a wedge between different interest groups, create a poisonous atmosphere within the population and weaken the people's trust in public institutions'. Ministry of the Interior, *National Risk Assessment 2018* (Ministry of the Interior 2019).

[57] Paraphrasing of the translation by the Ministry of Justice, Finland.

[58] Valmiuslaki / Beredskapslag (1080/1991).

[59] Unofficial translation by the Ministry of Justice, Finland.

the Act has remained an exceptive act – an act that has been passed as an exception to the constitution – as it deviates from international criteria for emergencies.[60] One of the main impetuses in amending the Act has been to make it accord with the Constitution.[61]

The exceptive act procedure is a peculiar aspect of the Finnish legal system. Amendments to the Emergency Powers Act have been implemented under this procedure. It allows the parliament to pass an act in the order prescribed for constitutional legislation that deviates materially from the constitution.[62] This is done by leaving it in abeyance until after the following parliamentary election, which is then passed with two thirds majority (or, if it is deemed urgent by 5/6 majority, it can be passed with two thirds majority immediately without leaving it in abeyance). The current Constitution regulates this procedure under Section 73 ('*Procedure for constitutional enactment*'). The underlying idea is that exceptions to fundamental rights should not be made via ordinary law but via a constitutional enactment.[63] It was deemed necessary to include it in the new constitution[64] to uphold the normativity of constitutional law. Without this procedure, the concern was that either exceptions would have to be included in constitutional laws or made vague enough to allow for discretion.[65] With the new constitution, the practice of passing such acts is informed by the principle of avoiding them whenever possible and by the doctrine of 'limited exceptions', which demands that exceptive acts are limited in scope and do not invalidate fundamental rights in their entirety.[66] However, it remains a contentious aspect of the Finnish legal system.

3.2 HISTORY OF EMERGENCY LAW IN FINLAND

The amendments to the Emergency Powers Act reflect a long-term trend in Finnish development of emergency law. Since independence, the legal problem regarding emergencies has been emergencies other than armed conflict, as the legal system was based on a dichotomy between war and peace.[67] In the 1930s, during major societal unrest and extra-parliamentary opposition,[68] the need to develop peace-time emergency powers became an urgent task.[69] Emergency legislation, in the form of an exceptive act, was passed to deal with the situation. Most notably, a temporary act, the Republic's Protection Act[70] was passed

[60] HE 3/2008, 21; HE 60/2010, 23. Jonsson Cornell and Salminen (n 10) 240.
[61] PeVL 1/2000, 4; Valmiuslakitoimikunta, *Valmiuslainsäädännön Tarkastelua Perustuslain Näkökulmasta: Valmiuslakitoimikunnan Välimietintö* (Oikeusministeriö 2004) 33, 37; HE 3/2008, 5, 20; PeVL 6/2009, 16. Liisa Vanhala, 'Valmiuslaki – Mitä Ja Miksi?' [2020] Lakimies 502, 503.
[62] Janne Salminen (n 55) 1121.
[63] Veli-Pekka Viljanen, *Perusoikeuksien Rajoitusedellytykset* (WSLT 2001) 13, 16–18.
[64] Suomen perustuslaki / Finlands grundlag (731/1999), entry into force 1.3.2000.
[65] HE 1/1998 vp.: 35, 39.
[66] HE 1/1998 vp.: 6, 28–29, 125.
[67] Aine et al (n 8) 21; Jonsson Cornell and Salminen (n 10) 238; Heikkonen et al (n 11) 15–16.
[68] Johanna Rainio-Niemi, 'Managing Fragile Democracy: Constitutionalist Ethos and Constrained Democracy in Finland' (2019) 17(4) Journal of Modern European History 519, 528–529; Aura Kostiainen, 'Oikeusvaltiokamppailua Laillisuuden Tuuliajolla – Suojelulaista Vuonna 1930 Käydyn Eduskuntakeskustelun Oikeudellis-Poliittista Tarkastelua' (2018) 47 Oikeus 215, 222–226.
[69] Aine et al (n 8) 23. This was mostly due to the right-wing radicalism and the pressure put on the Government to restrict communist (and socialist) political activity. Jenni Karimäki, 'Finnish Liberals and Anti-Fascism, 1922–1932' in Kasper Braskén, Nigel Copsey, and Johan A Lundin (eds), *Anti-fascism in the Nordic Countries: New Perspectives, Comparisons and Transnational Connections* (Routledge 2019) 47–48; Ville Okkonen and Ville Laamanen, 'Kansalaisuus, Politiikka Ja Laillisuus Mäntsälän Kapinan Jälkeen' (2018) 116(1) Historiallinen Aikakauskirja 15, 16–17.
[70] Tasavallan suojelulaki (336/1930).

to grant the executive temporary powers to restore order and deal with domestic disturbances.[71]

Developing legislation concerning peace-time emergencies took a decisive step in the 1960s and 70s when the focus of policy was on Finnish society's preparedness for economic crises. Before that, an exceptive act, the Act on the Regulation of the Economy in Exceptional Circumstances,[72] originally enacted during the second world war, and which was renewed every year from 1941 to 1955 – a feat which became increasingly difficult to accomplish as years passed – was the main instrument for regulating economic emergency measures.[73] In the 1960s, the problem was therefore once again the 'legal gap' between war and normalcy.[74] To anticipate an economic crisis beginning with an armed conflict or political tension between foreign countries that would affect the Finnish economic situation, the Parliament passed the Act on safeguarding the livelihood of the population and the economy of the country in exceptional circumstances.[75] It was used during the oil-crisis of the 1970s. According to Aarninsalo and Rainio-Niemi, while this Act still only recognised armed conflict as the sole basis of emergency governance – albeit in this case it was not necessary for Finland to be involved in it – the oil crisis served as the main catalyst for reforming Finnish emergency laws and to develop a legal concept of peace-time emergencies.[76] The culmination of this development was the Emergency Powers Act of 1991, the preliminary work of which began in the late 1970s.[77]

4 THE EMERGENCY POWERS ACT

In this Section, I will analyse how the original Emergency Powers Act and its subsequent amendments have developed the concept of emergency. The Emergency Powers Act is an exceptive act; it is in contradiction with the constitution as it delegates broad legislative powers to the executive, includes emergencies that are not in line with the constitution's definition,[78] and does not accord with Finland's international obligations. Nevertheless, it has a crucial role in developing the Finnish concept of emergency, as it has even served as a basis

[71] HE 54/1930 vp., 1. The lawyer, public law scholar and the first President of the Republic (3 February 1914 – 3 April 1917), Kaarlo Juho Ståhlberg (28 January 1865 - 22 September 1952), noted in 1930, functioning then as a Member of the Parliament for the liberal party, that right-wing lawless and criminal activity against the communist threat had brought about a situation in which the law's authority was severely weakened. To amend this situation and restore the law's authority, he supported passing the Republic Protection Act (336/1930) to develop a legal solution for the situation and clarify the law's position on the matter. Kaarlo Juho Ståhlberg, 'Vuoden 1930 Toisten Valtiopäiväin Tehtävät', *Puheita : 1927-1946* (Otava 1946) 98–99. Indeed, as Tuori puts it, the motivation for the legislation was to create a positive legal basis for the actions against communists. Tuori, 'Hätätilaoikeus teoriassa ja käytännössä' (n 40) 52.

[72] Laki talouselämän säännöstelemisestä poikkeuksellisissa oloissa (303/1941).

[73] Lyydia Aarninsalo and Johanna Rainio-Niemi, '1970-luvun öljykriisi : Kokoaan vaikuttavampi kriisi?' in Jari Eloranta and Roope Uusitalo (eds), *Ankarat ajat: suomalaisten talouskriisien pitkä historia* (Gaudeamus 2024) 160-161.

[74] Tuori, 'Hätätilaoikeus teoriassa ja käytännössä' (n 40), Aarninsalo and Rainio-Niemi (n 73) 171; Heikkonen et al (n 11) 16.

[75] Laki väestön toimeentulon ja maan talouselämän turvaamisesta poikkeuksellisissa oloissa (407/1970).

[76] Aarninsalo and Rainio-Niemi (n 73) 169.

[77] Aine et al (n 8) 24.

[78] Heikkonen et al (n 11). This was also the case with the original (1080/1991), which was deemed to be in conflict with the Constitution Act's (PeVL 10/1990, 1-2).

for also amending the definition of emergency in the new Constitution.[79] Therefore, amendments to the Emergency Powers Act have also developed the constitutional notion of emergency and, in addition, the concept of emergency in Finnish legal system in general. As mentioned, these amendments have expanded the concept to accommodate new exceptional circumstances.

My focus is on how the principles in expanding the concept of emergency have developed in the amendment process of the Emergency Powers Act. As I established above, two central principles established by the constitution are that emergency provisions legislated in advance and that they are as precise as possible. Apart from these two, constitutionality and the principle of normality are also central principles in amending the Act. As I will point out, while preciseness and constitutionality are often prevalent in the *travaux préparatoires* of the amendments, they are often weighed against the principle that legislation should anticipate emergencies exhaustively so that no need for extra-legal measures arises. Namely, as the Finnish political, security and societal situation changes, there is a pressing need to ensure that all grave situations that require emergency powers are accounted for by the Act. While legislatively anticipating emergencies is a good practice, and doing so will also ensure that constitutionality and preciseness are taken into consideration, it has also been emphasised at the expense of these two principles in the amendment process of the Act.

In addition to the Government Proposals, documents developed by the Constitutional Law Committee and the official accounts, reports, and forecasts on the Finnish security situation are of particular relevance for expanding the concept of emergency. The former functions as a form of ex ante constitutional control of legislation. The Committee is formed of parliamentary members and it hears experts on constitutional law (such as constitutional law professors). Apart from the review of legislative proposals, the Committee's reports and assessments develop principles, concepts, guidelines and recommendations for future proposals and amendments. The Committee's accounts and reports are meant to function as one of the primary sources of constitutionality control of legislation.[80]

The latter, the official accounts, reports and forecasts on Finnish security situation, are documents commissioned by various ministries and the State Council of Finland. They focus on recent developments of the security landscape, potential threats, and policy recommendations for preparedness. The most relevant are the annual Government report on Finnish foreign and security policy and the various accounts and recommendations by the Security Committee, an intergovernmental body that operates under the Ministry of Defence. In addition to these two sources, various temporary committees established by the State Council have written reports on how to amend the Emergency Powers Act and the Constitution that are also important for understanding the development of the concept of emergency as they serve as the main basis for the Government Proposals.

The documents by the Constitutional Law Committee and the Finnish security reports

[79] In the context of the Constitution Act (94/1919), the Government Proposal amending it mentions, among others, the Emergency Powers Act's notion of the temporary aspect of emergencies as a basis for amending the Constitution Act's respective notion (HE 309/1993, 76).

[80] In the Government Proposal for the new Constitution, the Constitutional Law Committee is named as the central and leading authority on constitutional control (HE 1/1998, 125-126; see Jaakko Husa, *The Constitution of Finland: A Contextual Analysis* (Hart 2011) 161-162.

are important sources for amendments to the Emergency Powers Act. These sources demand, (1) legislative preciseness and restricting discretion, and (2) enhancing Finnish preparedness and adapting to new crises, that have worked in tandem to develop the concept of emergency in the Finnish legal system. On the one hand, the Constitutional Law Committee's main role in the context of the concept of emergency has been to emphasise that the grounds for declaring a state of emergency, the exceptional circumstances, need to be defined as precisely as possible and interpreted restrictively. On the other hand, official documents concerning the Finnish security situation and its forecasts have served as a basis for justifying the expanding of the concept of emergency by, explicitly or implicitly, recommending that the Emergency Power Act is amended to improve Finnish preparedness for future crises.

The first time the constitutionality of applying the Emergency Powers Act came into question was during the COVID-19 pandemic. In cooperation with the President of the Republic, the State Council declared a state of emergency in 16th March 2020.[81] The declaration itself does not grant any extraordinary powers. Rather, only an application decree for extraordinary competences, established in the second part of the Act, does so. The Emergency Powers Act's extraordinary competences were applied twice, between 16 March 2020 and 16 June 2020, and between 01 March 2021 and 27 April 2021.[82]

The parliament has no power for reviewing the declaration but it controls the application decree by deciding whether it remains in force and to what extent, and for how long. Therefore, the Constitutional Law Committee could not directly review the declaration. Instead, it assessed the application decrees and whether they are necessary and proportional.[83] The Constitutional Law Committee emphasised the principle of normality, namely that the extraordinary competences may be used if ordinary legislation is not enough.[84] The position of the Committee was that the new Section 23 covers the pandemic, and that the current situation, a global pandemic whose full impact had not yet been felt in Finland, accorded with the legislative intent.[85] The situation in the beginning especially required concentrating some of the healthcare and restrictive measures, which meant that ordinary legislation, namely the Communicable Diseases Act,[86] was deemed insufficient.[87] However, the Committee also emphasised that governing with the Emergency Powers Act has to be temporary, it should not be used 'just in case,' and using the

[81] 'Valtioneuvoston Päätös VNK/2020/31: Poikkeusolojen Toteaminen' (*Valtioneuvosto*, 16 March 2020) <https://valtioneuvosto.fi/paatokset/paatos?decisionId=0900908f8068ec10&gsid=4fc4a561-cddb-46ab-8fc6-7dc857849f2a> accessed 19 November 2025.
[82] Mehrnoosh Farzamfar, Janne Salminen, and Janna Tuominen, 'Governmental Policies to Fight Pandemics: Defining the Boundaries of Legitimate Limitations on Fundamental Freedoms: National Report on Finland' in Arianna Vedaschi (ed), *Governmental Policies to Fight Pandemic* (Brill | Nijhoff 2024) 180.
[83] See, e.g., PeVM 9/2020, 4. For an analysis of the Constitutional Law Committee during the pandemic, see Mikko Värttö, 'Parliamentary Oversight of Emergency Measures and Policies: A Safeguard of Democracy during a Crisis?' (2023) 10(1) European Policy Analysis 84; Tuukka Brunila, Janne Salminen, and Mikko 'Oikeuden Resilienssi Poikkeuksellisissa Oloissa – Perustuslakivaliokunnan Rooli Oikeuden Ylläpitämisessä Covid-19-Pandemian Aikana' [2023] Lakimies 1011.
[84] PeVM 2/2020, 4; PeVM 8/2020, 2; PeVM 9/2020, 3.
[85] PeVM 2/2020 2-3; PeVM 7/2020, 2; PeVM 8/2020, 1. However, some of the experts consulted noted that the definition is not very explicit. See, e.g., EDK-2020-AK-291030.
[86] Tartuntatautilaki / Lag om smittsamma sjukdomar (1227/2016).
[87] PeVM 2/2020, 3-5.

Communicable Diseases Act should be preferred.[88]

4.1 THE ORIGINAL ACT

As mentioned, the preparatory work for the Emergency Powers Act began in the 1970s.[89] Two reports from 1979 and 1987 developed the basic principles of the Act, such as that exceptional circumstances should be defined as restrictively and precisely as possible.[90] The main motivation for developing emergency legislation was to account for peace-time and internal crises less serious than war.[91] The reports describe these as 'intermediate' emergencies between war and normalcy (*välitila*).[92] In addition, one of the purposes of the Act was to be applicable in situations when the threat of war might require raising preparedness level in a way that does not yet necessitate triggering the Act on the State of Defence.[93] The reports provide a list of exceptional circumstances, developed by the presidential Committee of Defence, which is basically the same as the one that was adopted by the original version of the Act.[94] Here, the principle of legislatively anticipating emergencies begins to develop. However, the original 1979 committee recommended also explicitly including terrorism to the major disasters exceptional circumstance category, as it might pose a threat of comparable seriousness.[95] In contrast, the 1987 report states that in preparedness for terrorism attacks, ordinary competences and legislation are sufficient, and, as its effects can in extreme cases be identified as an armed attack or a major disaster, the list of exceptional circumstances was deemed sufficient without it.[96]

The Government Proposal for the Act established five distinct exceptional circumstances: (1) an armed attack, war and its aftermath on Finnish territory, (2) a violation of Finnish territorial integrity and the threat of war, (3) war or the threat of war between foreign countries or an event of comparable seriousness that threatens the life and welfare of the nation, (4) 'a serious threat to the livelihood of the population or the foundations of the national economy brought about by hampered or interrupted import of indispensable fuels and other energy, raw materials and goods or by a comparable serious disruption of international trade',[97] and (5) a major disaster.[98] The Government Proposal stated that the Act would concern emergencies less serious than war, which is regulated by the State of Defence Act,[99] partly because the current definition of emergencies was too narrow to be

[88] PeVM 9/2020, 3-5; see also PeVM 8/2020, 5.
[89] The Cold War and Finland's relationship with the Soviet Union had a decisive role in developing the Act. The first report on the Act from 1979 notes that having proportional and legally established emergency powers will ensure that 'misinterpretations outside the country' will not rise and trigger actions by foreign nations (most notably by the Soviet Union). Parlamentaarinen valmiuslainsäädäntökomitea (n 5) 112; see Aarninsalo and Rainio-Niemi (n 73) 170.
[90] Parlamentaarinen valmiuslainsäädäntökomitea (n 5) 117; Valmiuslainsäädäntötyöryhmä (n 39) 7, 22.
[91] Parlamentaarinen valmiuslainsäädäntökomitea (n 5) 15, 105, 109, 129; Aine et al (n 8) 24, 28.
[92] Parlamentaarinen valmiuslainsäädäntökomitea (n 5) 110, 132, 137; Valmiuslainsäädäntötyöryhmä (n 39) 13–14.
[93] Parlamentaarinen valmiuslainsäädäntökomitea (n 5) 110; Aine et al (n 8) 132.
[94] Parlamentaarinen valmiuslainsäädäntökomitea (n 5) 106–110; Valmiuslainsäädäntötyöryhmä (n 39) 9.
[95] Parlamentaarinen valmiuslainsäädäntökomitea (n 5) 109, 110, 140.
[96] Valmiuslainsäädäntötyöryhmä (n 39) 26.
[97] Unofficial translation by the Ministry of Justice, Finland.
[98] HE 248/1989, 12-14.
[99] HE 248/1989, 4, 12-13.

applicable.[100]

The Constitutional Law Committee stated that this expansion established in Section 2, in addition to the Act delegating very broad legislative powers, meant that the Act would have to be enacted as an exceptive act as it expanded the concept of emergencies.[101] Indeed, as the Constitution Act's Section 16 recognised only war and rebellion as grounds for necessary decrees that derogate from fundamental rights, the Emergency Powers Act expanded the concept of emergency to the aftermath of war, conflicts that do not involve Finland directly, and to threats to indispensable materials and major disasters. The Constitutional Committee also noted that, while the proposal was meant to be in line with Finland's international obligations, the list of exceptional circumstances made the concept of emergency more expansive than the one in international treaties.[102] This was especially the case with the economic exceptional circumstance. The need to anticipate emergencies by means of legislation therefore outweighed constitutionality as the concept was expanded beyond the constitution.

However, the Act's development did not mean expansion without qualifications. Indeed, the aim was to define exceptional circumstances as precisely as possible. Emergencies should have to be interpreted restrictively and exhaustively, meaning that it could not be expanded by analogical interpretation so that events caused by mass unemployment, labour disputes or other such events do not constitute an emergency.[103] The Government also decided not to add terrorism to the list of exceptional circumstances, as it deemed in line with the report form 1987 that, on the one hand, counter-terror measures could be provided by ordinary legislation during a state of normalcy, and, on the other hand, it could be possible to interpret a large scale act of terrorism as an armed attack or as a major disaster if its effects constituted one.[104]

When it came to major disasters, according to the proposal, they were to be considered an exceptional circumstance only if ordinary competences were insufficient for managing one.[105] The Constitutional Law Committee proposed that this criterion, which in the proposal was only limited to major disasters, would apply to all exceptional circumstances, developing further the principle of normality mentioned above – thus further entrenching the principle of normality as a principle in emergency law.

4.2 CONSTITUTIONAL AMENDMENTS

The next steps regarding the concept of emergency took place at a constitutional level. First, there was to the fundamental rights reform of the Constitution Act. Section 16 was amended to 16 a, which stated that an Act of Parliament may derogate from fundamental rights during 'an armed attack on Finland as well as under exceptional circumstances threatening the life of the nation and lawfully comparable in gravity to an armed attack'. While it expanded

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[100] HE 248/1989, 12.
[101] PeVL 10/1990, 1-2. The reports from 1979 and 1987 had already predicted this. Parlamentaarinen valmiuslainsäädäntökomitea (n 5) 131; Valmiuslainsäädäntötyöryhmä (n 39) 82.
[102] HE 248/1989, 9.
[103] HE 248/1989, 12.
[104] HE 248/1989, 14. One can only wonder, though, if interpreting a terror attack along these lines would mean an analogical interpretation that the proposal sought to preclude. See HE 248/1989, 12.
[105] HE 248/1989, 6, 13-14.

the earlier definition, which only mentioned war and rebellion, the amendment was meant to align the Finnish concept of emergency with the one in international human rights treaties (most notably ECHR, Article 15 and ICCPR, Article 4).[106] The intention was also to make emergencies and emergency powers more precise, specific, and temporally limited.[107]

Second, the new Constitution kept the Section providing for emergencies (now Section 23) intact: fundamental rights could be derogated from in situations of an armed attack or other emergencies comparable in seriousness.[108] While this new constitutional definition of emergencies, to be sure, was not as narrow as the original one from 1919, it did not alleviate the issue concerning the Emergency Powers Act, whose list of exceptional circumstances did expand the concept to crises that were less serious (and therefore not comparable) to war.[109] For this reason, the Constitutional Law Committee stated that the Emergency Powers Act would have to be reviewed after the new Constitution would come into force.[110] In the future, making the Act constitutional would be a central principle in drafting amendments to the Act.

Before the Act's constitutionality would be reviewed more thoroughly in late 2000s, two amendments to the Emergency Powers Act were made in 2000[111] and in 2003[112]. From the point of view of the concept of emergency, they were somewhat minor adjustments. According to the Government, the motivation for the 2000 amendment were the changes in the Finnish political system, such as joining the European Union, the fundamental rights reform in 1995 and the new Constitution.[113] These changes required that the definition of emergencies would be made more precise. In addition, the proposals for the 2000 and 2003 amendments emphasised the need to develop emergency powers to better account for future threats.[114]

Preciseness and the need to anticipate emergencies were therefore both present in these first amendments that expanded the concept of emergency and emergency powers. In the 2000 proposal, the Government stated that existing competences did not include securing availability of indispensable building materials and that serious international political tensions were missing from the list of exceptional circumstances.[115] The latter meant, namely, those situations, in which international tensions threaten to escalate into war, which would require securing supply chains and increase material and military preparedness.[116] This required amending Section 2's list of exceptional circumstances so that Section 2 Paragraph 3 (war or threat of war between foreign countries) would include an international tension requiring necessary preparatory action.[117] In contrast, the 2003 amendment did not explicitly develop the list of exceptional circumstances, but it added competences to regulate financial and insurance markets, which were needed due to the development of international trade

[106] HE 309/1993, 75.
[107] HE 309/1993, 76; PeVM 25/1994, 2, 11.
[108] HE 1/1998, 81.
[109] PeVL 31/1998, 5; 2000 1/2000, 2.
[110] PeVM 10/1998, 13.
[111] Laki valmiuslain muuttamisesta / Lag om ändring av beredskapslagen (198/2000).
[112] Laki valmiuslain muuttamisesta / Lag om ändring av beredskapslagen (696/2003).
[113] HE 186/1999, 4.
[114] HE 186/1999, 4; HE 200/2002, 1, 5, 9.
[115] HE 186/1999, 5, 7.
[116] HE 186/1999, 7, 10.
[117] HE 186/1999, 15.

and markets (most notably Finland becoming a part of the Eurozone) and financial technology (monetary transactions).[118]

While these amendments were minor, at least in comparison to the later amendments, they illuminate what the requirement regarding legislative precision meant. While international tension and, perhaps, building materials could already be interpreted to be implicitly included in the definition of 'threat of war' and 'indispensable materials', the principle has been to make them explicit by legislation rather than by interpretative accommodation.[119] In addition, while the attempt was to make the Emergency Powers Act accord with the Fundamental Rights Reform of 1995 and the new Constitution, the Constitutional Law Committee stated that, as the Emergency Powers Act's list of exceptional circumstances is more expansive than Section 23 of the Constitution, the 2000 amendment had to be enacted as an exceptive act.[120] This was the case also with the 2003 amendment due to its manner of delegating extensive legislative powers.[121] Indeed, all subsequent amendments to the Act would have to follow suit. Here, the principle of legislatively anticipating emergencies was connected to making the Act as precise as possible, both of which enjoyed precedence over constitutionality.

4.3 THE NEW ACT

An overhaul of the Emergency Powers Act was accomplished in 2011. In addition to shifting the balance of power between the president and the parliamentary government in favour of the latter – which was in line with the new constitution's shift towards parliamentarianism – the new Act, which replaced the old one from 1991, made major changes to the list of exceptional circumstances. The motivation was once again to make the Act constitutional and to better anticipate future threats.[122]

Drafting began with the Emergency Powers Act Committee appointed by the ministry of justice in 2003. In its report, the Committee noted that the Act's scope of application was broader than the constitutional notion of emergency, as it only accommodated the exceptional circumstances under Section 3 Paragraphs 1–3 (the military ones).[123] The committee also suggested that, instead narrowing the Act's the scope of application, it should be made more precise.[124] In the second report, which also presented a proposal, the committee recommended a revision that would update the Act and its list of exceptional circumstances while keeping its form and structure intact.[125]

The proposal defines exceptional circumstances as those 'grave crises that affect

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[118] HE 200/2002, 5-6, 36.
[119] Similarly, as the Emergency Powers Act lacked financial and insurance regulatory powers, new competences needed to be developed. HE 200/2002, 9, 23, 25.
[120] PeVL 1/2000, 2-3; see PeVL 57/2002, 2.
[121] PeVL 57/2002, 3.
[122] Valmiuslakitoimikunta, *Ehdotus Uudeksi Valmiuslaiksi: Valmiuslakitoimikunnan Mietintö* (Oikeusministeriö 2005) 33; Aine et al (n 8) 142–144.
[123] Valmiuslakitoimikunta (n 61) 13, 29, 31.
[124] ibid 36. The Committee also considered whether the Act could be narrowed to accord with Section 23 of the Constitution. This would have required ensuring that the problems of extraordinary governance were not simply ordinary legislation (n 122) 39.
[125] Valmiuslakitoimikunta (n 122) 3.

the nation as a whole, or a major part of it, and affect the functioning of the whole society'.[126] The number of exceptional circumstances remained the same. However, a widely spread contagious disease was added as a new exceptional circumstances category (Section 3 Paragraph 5), the economic exceptional circumstance was broadened, and the violation of territorial integrity into the first circumstance was subsumed.

Like the 2000 amendment, the proposal motivated the overhaul because the present Act predated the fundamental rights reform of 1995 and the new constitution, and because of the need to review the definition of exceptional circumstances and competences in the shifting security situation.[127] The former meant that the new Act was supposed to be drafted so that it would no longer be an exceptive act, which would also require assessing the fact that its definition of emergency was broader than the one in Section 23 of the Constitution.[128] According to relevant security documents, the latter meant that recent development in the Finnish security situation required that the Act would have to be reviewed thoroughly,[129] a development which was caused by globalisation and growing dependency on international information and trade networks in particular.[130] The main threats identified by the State Council's security strategy document were, among others, terrorism, economic and information network disruptions, dangerous communicable diseases, illegal entry into the country, the use of military force, and a major disaster.[131] The proposal considered some of these, namely large-scale illegal border crossing, terrorism and disasters concerning animal and plant health or foodstuff hygiene crises, but stated that ordinary competences and legislation were sufficient to deal with them.[132]

Some categories on the list of exceptional circumstances did become more constitutional, such as the first one, which was amended to mention armed conflict, and not war, to be in line with Section 23 of the Constitution.[133] However, the proposal was conscious that economic crises, major disasters and pandemics were broader than the definition of emergency in the constitution, EU treaties (notably, Article 347,[134] TFEU) and international human right treaties.[135] Indeed, a major expansion took place in the context of economic crises. In the original Emergency Powers Act an economic crisis meant situations such as war or trade war beyond the Finnish territory, causing depletion of or spikes in prices of indispensable goods or sudden in prices, or disruption of trade routes, that seriously undermine the import of indispensable fuels, energy, raw-material and other such goods, which would require measures such as regulating or rationing private property and export and import of goods.[136] In contrast, the new amended version broadened the category to 'any particularly serious incident or threat against the livelihood of the population or the

[126] HE 3/2008, 1.
[127] HE 3/2008, 5, 22, 30.
[128] HE 3/2008, 20-21.
[129] The Proposal refers to Valtioneuvosto (n 56); Valtioneuvosto, *Yhteiskunnan Elintärkeiden Toimintojen Turvaamisen Strategia: Valtioneuvoston Periaatepäätös 23.11.2006* (Puolustusministeriö 2006).
[130] HE 3/2008, 22; see Valtioneuvosto (n 56) 10, 111; Valtioneuvosto (n 129) 25.
[131] Valtioneuvosto (n 129) 26.
[132] HE 3/2008, 23. However, in case of terrorism, the proposal points out that the effects of an attack could be interpreted as a major disaster or an armed attack.
[133] HE 3/2008, 32-33.
[134] Ex Article 297 TEC.
[135] HE 3/2008, 20-21, 26.
[136] HE 248/1989, 13, 18, 22.

foundations of the national economy'.[137] The idea was that now other disturbances, such as ones to information systems, might constitute a serious economic threat in general rather than only to indispensable materials.[138] However, as Finland was now part of the Eurozone, resorting to the Emergency Powers Act in the economic context required that the Government first tries to solve the issue with the EU and the ECB.[139] This means that, if the EU and the ECB cooperation take precedence over the use of the Act, the threshold for an economic crisis serving as a ground for a state of emergency should be quite high.

In the context of broadening the definition of economic crises, the tension between the principle of legislatively anticipating emergencies and other principles becomes evident. The need to prepare for economic crises outweighs the principle that its definition should be precise. Instead, it is broad for the sake of flexibility. In doing so, the legislator has sought, at the expense of constitutionality and preciseness, to ensure that the definition is exhaustive and that the act accommodates grave economic crises.

Apart from amending the economic exceptional circumstance, the new Act expanded the concept of emergency considerably, as it added a contagious disease to the list of exceptional circumstances. The proposal is quite brief about a pandemic as it is only mentioned that it is caused by a widely contagious disease, the effects of which are comparable in seriousness to a major disaster,[140] such as a nuclear or a radiation disaster or a major dam accident.[141] As the proposal establishes that an emergency is something that affects the whole or a major part of the nation or the functioning of the society as a whole, a pandemic could become serious enough to reach this threshold.[142] In addition, ordinary legislation (e.g. the Communicable Diseases Act[143]) was not seen as enough because extraordinary readiness to deal with a pandemic might be needed even before a global pandemic has reached Finland,[144] and, during such an emergency, ordinary competences would be insufficient in situations that, for example, would require establishing temporary health care facilities.[145]

Preciseness was also a relevant aspect of adding pandemic to the list of exceptional circumstances. In the original proposal, pandemics were meant to be part of the major disaster category, such that Section 3 Paragraph 4 of the Act would read as follows: 'an

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137 Unofficial translation by the Ministry of Justice.
138 HE 3/2008, 33.
139 Act HE 3/2008, 22, 28. The proposal for the amendment 696/2003 seems to have also established a criterion for declaring an economic emergency being that the mechanisms and measures taken with the European Union and the European Central Bank are insufficient (in so far as cooperation with EU and ECB would precede using the Emergency Powers Act). HE 200/2002, 19, 24. The new Act included Section 27, which stated that 'A decree on the use of emergency powers laid down in Section 15 or 17, Section 19, subsection 1, Paragraph 3 or Section 20 or 21 that concerns tasks of the European System of Central Banks under the Treaty establishing the European Community or the Statute of the European System of Central Banks and of the European Central Bank may only be issued if the European Central Bank and the Bank of Finland, when carrying out tasks of the European System of Central Banks as part of the European System of Central Banks, are not able to function in emergency conditions'. (Unofficial translation by the Ministry of Justice).
140 HE 3/2008, 26, 34; The Constitutional Law Committee voiced this critique in its opinion. PeVL 6/2009, 4.
141 HE 3/2008, 34.
142 PuVM 3/2010, 5.
143 Tartuntatautilaki / Lag om smittsamma sjukdomar (1227/2016).
144 HE 3/2008, 23; StVL 3/2008, 2.
145 PuVM 3/2010, 5.

extraordinary serious major disaster, its immediate aftermath, and a very widely spread dangerous contagious disease comparable to an extraordinary serious major disaster in its effects'. However, the parliamentary Defence Committee recommended that these two should be divided into their own categories, so that the application extraordinary competences would remain more restricted and precise.[146]

Ultimately, the Constitutional Law Committee opined that the Constitution covers only the first two of the exceptional circumstances.[147] The others broadened the concept of emergency beyond emergencies comparable in seriousness to an armed attack. The Committee once again noted that, while the economic exceptional circumstance was broad for a good reason to allow for flexibility in dire situations (such as in serious disruptions to information and communication infrastructure), it should be interpreted restrictively to ensure that ordinary economic events (such as economic recession or labour disputes) are not seen as a ground for declaring a state of emergency.[148] In addition, the Committee stated that some of the other exceptional circumstances should also be interpreted more restrictively by limiting the extraordinary competences that can be enacted during them. For example, the Committee recommended that weakening social security as a measure[149] should be limited to the first three exceptional circumstances.[150]

Nevertheless, despite the fact that the new Act would broaden the concept of emergency beyond the Constitution, the Committee noted that there were grave and weighty reasons for the Act, as the extraordinary competences are necessary for dealing with contemporary crises.[151] Therefore, the Committee stated that the Act maybe passed as an exceptive act. However, as the Act was both necessary and would also have to be passed as an exceptive act, a situation which in the long run was not a preferable or a sustainable solution, the Committee suggested that perhaps the constitutional definition of emergencies should be modernized.[152]

The next step was indeed to broaden the definition of emergencies in the Constitution.[153] The constitutional amendment,[154] a larger constitutional revision project, was done with the Emergency Powers Act in mind.[155] As the Committee for constitutional revision (appointed by the Ministry of Justice) noted, the 'limits set by the constitution have proved to be too narrow especially in the case of emergency law'.[156] The task, therefore, was to modernise (i.e. expand) the constitutional definition of emergencies so that it would be broader and more accommodating.[157] The Government Proposal agreed with the Committee's assessment and stated that the limits set by Section 23 were too narrow, and

146 PuVM 3/2010, 5; see also StVL 4/2008, 2.
147 PeVL 6/2009, 3.
148 PeVL 6/2009, 4.
149 Current Sections 56 and 57 of the Act.
150 Section 3 Paragraphs 1–3. PeVL 6/2009, 9.
151 PeVL 6/2009, 4, 16.
152 PeVL 6/2009, 16.
153 Interestingly, the Emergency Powers Act Committee opined against this solution as it would break Finnish international human rights obligations. Valmiuslakitoimikunta (n 61) 37.
154 Laki Suomen perustuslain muuttamisesta / Lag om ändring av Finlands grundlag (1112/2011).
155 HE 60/2010, 22.
156 Perustuslain tarkastamiskomitea, *Perustuslain tarkistamiskomitean mietintö* (Oikeusministeriö : Edita Publishing 2010) 60.
157 ibid 60–62.

that it should be amended, in accordance with international human rights treaties, to help make the Emergency Powers Act constitutional.[158]

The new Section 23 now states that provisional exceptions to basic rights and liberties may be provided by an Act 'in the case of an armed attack against Finland or in the event of other situations of emergency, as provided by an Act, which pose a serious threat to the nation'.[159] While the original version required that other emergencies are comparable in seriousness to armed conflict, the new amended definition allowed for other, less serious emergencies to be accommodated. Even though the new definition would be broader, as the Constitutional Law Committee pointed out, it was still meant to be restrictive and accord with strict criteria established by human rights treaties.[160] However, the Proposal noted that economic crises will not fulfil the international criteria for emergency,[161] a fact also stated by the Constitutional Law Committee's report,[162] and therefore the problem regarding the Emergency Powers Act's unconstitutionality would not be immediately solved.

4.4 HYBRID THREATS

After applying the Emergency Powers Act for the first time during the COVID-19 pandemic in 2020, the next amendment (in 2022)[163] was right around the corner. However, this amendment neither revised pandemic powers nor the economic exceptional circumstance category, but, instead, developed an altogether new exceptional circumstance category: hybrid threats.[164]

The motivation for the amendment was prompted by the Russian invasion of Ukraine and its effects on the Finnish security situation.[165] Security documents and reports had drawn attention to the fact that the use of hybrid and covert tactics to influence societal stability require developing more preparatory mechanisms.[166] Hybrid threats are defined as action that seeks to destabilise society and 'in which the aim of the instigator is to achieve its aims by using a multitude of complementary methods and exploiting the weaknesses of the targeted community'.[167] Such methods include attacks on cyber security, spreading disinformation on social media, acquiring properties in strategic locations, and financing, trade and investment

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158 HE 60/2010, 22-23. See Jonsson Cornell and Salminen (n 10) 245–246
159 Unofficial translation by the Ministry of Justice.
160 PeVM 9/2010, 9.
161 HE 60/2010, 23.
162 PeVM 9/2010, 10.
163 Laki valmiuslain muuttamisesta / Lag om ändring av beredskapslagen (706/2022).
164 The law itself does not mention the word hybrid threats. Also, sometimes multi-domain influencing (*laaja-alainen vaikuttaminen*) is used as a more precise term (HE 63/2022, 5). However, as the Government Proposal, relevant security documents, research literature and public discussion use this expression, I will also use hybrid threats for the sake of simplicity. See also EU-level security documents European Commission, *Joint Framework on Countering Hybrid Threats: A European Union Response* (European Commission 2016); European External Action Service, *A Europe That Protects: Countering Hybrid Threats* (The Diplomatic Service of the European Union 2018).
165 HE 63/2022, 6, 32.
166 Already in 2004, the Government report on Finnish security and foreign policy had stressed that multi-domain influencing and unsymmetric use of military tactics was a central security issue for Finnish societal stability Valtioneuvosto (n 56) 81–83. In addition, Russian aggression on neighboring countries was already in issue before 2022. Ministry for Foreign Affairs of Finland, *Government Report on Finnish Foreign and Security Policy* (Finnish Government 2020) 21.
167 Ministry of the Interior, *National Risk Assessment 2018* (n 56) 16.

to create influence and dependence.[168] Indeed, technological development, complexity and acceleration of societal processes, and global interdependency has increased the amount of (relatively inexpensive) methods that aggressors can use to destabilise societies.[169] Apart from the various hybrid methods and tactics, the documents singled out serious and extensive disturbances caused by major accidents, terrorism, activities targeting critical infrastructure, and large-scale movement of people or migration.[170]

The development of Finnish security landscape therefore entailed, once again, a need to adapt relevant legislation. According to the parliamentary Defence Committee, this development meant both that the Emergency Powers Act's definition of exceptional circumstances is not up to date *and* that ordinary legislation is needed, as most of hybrid influencing will take place below the threshold of Emergency Powers Act.[171] In the Act's case, hybrid threats pose a problem because, to quote the 'National risk assessment 2018', they take place 'in the grey zone between the legal and illegal, thereby often remaining beyond the reach of ordinary security measures of the authorities'.[172] This makes hybrid threats a boundary defying and breaking phenomenon, as responding to them entails that cooperation is intergovernmental, takes place between military and non-military authorities, and that internal and external security measures are intertwined.[173] It also means that specifying extraordinary powers according to precise exceptional circumstances would make cross-sectoral governance more difficult.[174]

Hybrid threats as an exceptional circumstance category therefore required an altogether new approach to legally defining exceptional circumstances. Two reports on amending the Emergency Powers Act emphasised that a phenomenon-based approach should be taken, namely that events and situations are approached as part of a larger,

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[168] Ministry for Foreign Affairs of Finland, *Government Report on Finnish Foreign and Security Policy* (n 167) 14; Security Committee, *The Security Strategy for Society* (n 56) 96; Ministry of the Interior, *National Risk Assessment 2018* (n 56) 16.

[169] Minna Branders, 'Valmiuslain Uudistamisen Ilmiöpohjaiset Lähtökohdat' (Maanpuolustuskorkeakoulu 2021) 1, 5–8; Security Committee, 'Valmiuslain Uudistamistarpeita Kartoittava Ilmiöpohjainen Skenaarioselvitys' (2021) 3, 17; Ministry for Foreign Affairs of Finland, *Government Report on Finnish Foreign and Security Policy* (n 167) 15; Parliamentary Committee on Crisis Management, *Effective Crisis Management: Recommendations of the Parliamentary Committee on Crisis Management on Developing Finland's Crisis Management* (Finnish Government 2021) 12; Ministry of the Interior, *Government Report on Internal Security* (n 56) 30.

[170] Ministry of the Interior, *Government Report on Internal Security* (n 56) 34. Especially extensive migration – which can either be caused by natural reasons (such as global warming) or it is a tactic used in hybrid influencing (so-called 'instrumentalised migration') – has been noted as a possible scenario that escalates so that the situation can no longer be governed by ordinary procedures and arrangements. Security Committee, 'Valmiuslain Uudistamistarpeita Kartoittava Ilmiöpohjainen Skenaarioselvitys' (n 170) 5–6; Ministry of the Interior, *Government Report on Internal Security* (n 56) 35; Ministry for Foreign Affairs of Finland, *Government Report on Changes in the Security Environment* (n 56) 32.

[171] PuVM 4/2021, 9-10.

[172] Ministry of the Interior, *National Risk Assessment 2018* (n 56) 16; see also European External Action Service, *Food-for-Thought Paper 'Countering Hybrid Threats'* (Council of the European Union 2015) 2.

[173] HaVL 30/2021, 2; Security Committee, 'Valmiuslain Uudistamistarpeita Kartoittava Ilmiöpohjainen Skenaarioselvitys' (n 170) 3, 8. In this context the National risk assessment 2018 emphasises that 'external and internal security are strongly intertwined in hybrid threats, and it is impossible to draw a clear distinction between the two'. Ministry of the Interior, *National Risk Assessment 2018* (n 56) 17. The parliamentary Administration Committee also noted that the current Emergency Powers Act does not take into account internal security threats. HaVL 30/2021, 6.

[174] Security Committee, 'Valmiuslain Uudistamistarpeita Kartoittava Ilmiöpohjainen Skenaarioselvitys' (n 170) 17; Branders (n 170) 10.

cross-sectoral context.[175] On the one hand, single disturbances could trigger a serious emergency, and, on the other hand, multiple minor disturbances could develop into a serious one.[176] In addition, as hybrid tactics are by design meant to be difficult to attribute to a specific actor – upholding deniability is a central aspect of such tactics[177] – defining them as an emergency requires focusing on their cumulative effects rather than on their underlying causes and motives.[178] The problem in doing so, according to the Security Committee's report on amending the Act, was how to make the definition of exceptional circumstances broad enough to remain flexible for the various threats to be included, and yet to ensure that it is clear enough for political decision-makers to have the 'legal mandate for declaring an emergency to be at hand in a situation that the criteria of the definition are met'.[179] This was a challenge as, due to ever increasing complexity of societal and international contexts, emergencies are becoming less and less precise and therefore more difficult to define.[180] Therefore, the aforementioned tension between anticipating emergencies and preciseness was once again present.

The Government Proposal emphasised that, while individual acts and tactics utilised in hybrid influencing might meet the criteria of emergencies, cumulative effects might pose a serious threat to the vital functions of society.[181] As the Emergency Powers Act was outdated, the Proposal claimed, the definition of exceptional circumstances needed to be complemented.[182] The Proposal stated that a sixth exceptional circumstance category would be added so that threats, actions, events, or their cumulative effects endangering decision-making capacities of public authorities, functioning of critical infrastructure, border security or public order and security would be covered by it.[183] Namely, what was lacking was threats, actions or events that neither were armed conflicts nor threatened economic circumstances.[184] For example, whereas in previous amendments to the Emergency Powers Act mass migration was deemed to be a disturbance governable by ordinary competences, the new Proposal established that so-called instrumentalised migration cases, that is, the redirection of migration flows to overwhelm border officials resembling the 2021 Poland-Belarus border crisis,[185] were a novel issue not taken into account by previous amendments.[186]

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[175] Branders (n 170) 2–3, 5–6; Security Committee, 'Valmiuslain Uudistamistarpeita Kartoittava Ilmiöpohjainen Skenaarioselvitys' (n 170) 3.
[176] Security Committee, 'Valmiuslain Uudistamistarpeita Kartoittava Ilmiöpohjainen Skenaarioselvitys' (n 170) 6–7, 18.
[177] Branders (n 170) 5.
[178] Security Committee, 'Valmiuslain Uudistamistarpeita Kartoittava Ilmiöpohjainen Skenaarioselvitys' (n 170) 11, 19.
[179] Security Committee, 'Valmiuslain Uudistamistarpeita Kartoittava Ilmiöpohjainen Skenaarioselvitys' (n 170) 18.
[180] Branders (n 170) 24; ibid 25.
[181] HE 63/2022, 5.
[182] HE 63/2022, 6, 32. Here, the argument is picked up from the above-mentioned reports: the main issue is that the current definition is based on singular and clearly determined events or threats, which in themselves are serious enough to trigger a state of emergency.
[183] HE 63/2022, 40, 42-43, 60.
[184] HE 63/2022, 58. The Proposal also states that adding hybrid threats as an exceptional circumstance will help ensuring that these types of emergencies will not develop into more serious armed conflicts or comparable ones needing military action. HE 63/2022, 60.
[185] See, e.g. Ondřej Filipec, 'Multilevel Analysis of the 2021 Poland-Belarus Border Crisis in the Context of Hybrid Threats' (2022) 8(1) Central European Journal of Politics.
[186] HE 63/2022, 59.

Once again, the definition was meant to be as precise as possible and to accommodate new types of emergencies that pose a serious threat to national security.[187] The threshold for applying it, the Proposal stated, would have to accord with the requirements of Section 23 of the Constitution.[188] Indeed, the Proposal mentions the principle that the concept of emergency cannot by broadened by interpretation.[189]

Apart from this substantial broadening of the concept of emergency, the amendment would develop the concept by adding cumulative effects, or the seriousness of the overall situation, as a grounds for a state of emergency.[190] This would require that the effects can be estimated as serious enough to accord with Section 23's definition; mere minor disturbances would not do so.[191] While one of the defining features of an emergency was that they are so grave that they affect the nation as a whole, or a major part of it, and affect the functioning of the whole society,[192] the Proposal states that with hybrid threats (e.g. cyber-attacks) the former, affecting the nation as a whole or in part, might not be easy to determine as it is difficult to pinpoint them spatially or numerically.[193]

In focusing on (cumulative) effects rather than causes was meant to solve the issue regarding the covert nature of hybrid threats. Whether an emergency was at hand would not require determining the cause or the originator the disturbance. What was crucial was the seriousness of the effects on national security, vital functions of society and the population's living conditions. This means that an emergency could also be the outcome of unintentional actions.[194]

While the Constitutional Law Committee agreed that there were grave reasons for amending the Act due to the shifts in the security landscape,[195] it also drew attention to the fact that it significantly broadened the definition of exceptional circumstances and extended its scope of application.[196] The Committee noted that while there was some overlap between the new exceptional circumstance and the armed conflict, threat of armed conflict and economic crises),[197] expanding the extension of exceptional circumstances through interpretation is against the principles of legislating emergency powers.[198] However, the broadness of the definition was still an issue. In the Proposal, it is stated that an exceptional circumstance includes 'other threats, activity, an event, or a cumulative effect of these on the capacity of public decision-making, the functioning of society's critical infrastructure, border security, or public order and security, and which endangers very seriously and substantially

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[187] In defining threats to national security, the Proposal refers to the Government Proposal (198/2017) on amending Section 10 of the Constitution, *The right to privacy*. In this document, national security is elaborated as 'the collective security of the people within the state's jurisdiction against direct or indirect external violent threats'. Threats against national security are those that 'threatens the life or health of a large and unpredictable, randomly determined number of people' directly, or by targeting society's vital functions, state organs, and democratic decision-making institutions. HE 198/2017, 35-36.
[188] HE 63/2022, 62.
[189] HE 63/2022, 58, 62.
[190] HE 63/2022, 60.
[191] HE 63/2022, 41, 60.
[192] HE 3/2008, 1; PeVM 2/2020, 2; PeVM 7/2020, 2.
[193] HE 63/2022, 43.
[194] HE 63/2022, 43-44, 62.
[195] PeVL 29/2022, 2-3, 10.
[196] PeVL 29/2022, 6.
[197] Section 3 Paragraphs 1–3.
[198] PevL 29/2022, 4.

national security, society's functioning or the population's living conditions'.[199] The Committee noted that the new criteria lacked a clear definition similar to the other categories (such as 'a contagious disease' in Section 3 Paragraph 5.[200] In addition, the term 'critical infrastructure' was very broad and lacked legal content.[201] Because of this, it was difficult to assess the scope of application in advance and, therefore, whether such exceptional circumstances would be serious enough to accord with Section 23's criteria.[202]

Because of the difficulty in predicting the scope of application, which also made the extraordinary competences too general and broad, the Committee deemed that the amendment would have to be passed as an exceptive act.[203] However, the Committee noted that in legislating emergency powers, some flexibility is always a necessity, and because of this, attempts to make the amendment accord with the Constitution would prove to be counterintuitive.[204] Despite this, the Committee recommended that the definition should be made more precise to better accord with Section 23's requirements.[205]

The passed version was significantly more precise than the proposal. The parliamentary Defence Committee took the task of developing the proposal to better account for the Constitutional Law Committee's comments. The Defence Committee emphasised that hybrid threats cannot be given a singular definition similar to the other exceptional circumstances.[206] It suggested making the Section 3 Paragraph 6 into a list. The passed amendment,[207] which reflected the Committee's proposal, states that an exceptional circumstance is:

> such a threat, activity or incident or the combined effect of these targeting
>
> a) the decision-making capacity of the public authorities;
> b) the maintenance of border security or public order and security;
> c) the availability of essential healthcare, social welfare or rescue services;
> d) the availability of energy, water, food supplies, pharmaceuticals or other essential commodities;
> e) the availability of essential payment and securities services;
> f) the functioning of transport systems critical to society; or
> g) the functioning of ICT services or information systems that maintain the functions listed in Paragraphs a–f.
>
> as a result of which the functions vital to society are prevented or paralysed substantially and on a large scale, or which in some other manner of comparable severity endangers the functioning of society or the living conditions of the population particularly seriously and substantially.[208]

Parts (c) to (g) were meant to replace the notion of critical infrastructure with more

[199] HE 63/2022, 73.
[200] PeVL 29/2022, 5.
[201] PeVL 29/2022, 5, 10.
[202] PeVL 29/2022, 5.
[203] PeVL 29/2022, 5-6.
[204] PeVL 29/2022, 9-10.
[205] PeVL 29/2022, 10; PuVM 2/2022, 21.
[206] PuVM 2/2022, 21.
[207] Laki valmiuslain muuttamisesta / Lag om ändring av beredskapslagen (706/2022).
[208] Unofficial translation by the Ministry of Justice.

precise terms, and the final part is meant to establish the criteria for application and emphasise that only very serious cases would fall within its scope of application.[209] This way, the exceptional circumstance category is more precise but it also expands into many social domains, such as information systems, social welfare, border security, and so on.

As noted above, the Act's development process is far from over. At the end of its statement, the Constitutional Law Committee noted that the overall situation, namely that the Emergency Powers Act being an exceptive act, was not preferable, and a process should be initiated for an extensive review of the Act's current status.[210]

5 CONCLUSIONS

In this contribution, I have analysed how the Emergency Powers Act has expanded the concept of emergency in Finnish legal system. Most notably, the Act has expanded the concept of emergency by adding peace-time emergencies to the situations and events authorising the application of emergency powers. These so-called intermediate emergencies between war and normalcy have broadened the concept of emergency to internal and non-military circumstances. The Act has also affected the constitutional definition of emergencies. As I pointed out, the Constitution's definition has been amended with the Act's requirements in mind. In addition, while amendments have sought to ensure that Finland's international treaties are respected, the Act has also expanded the concept of emergency beyond the international definition. Namely, this applies to the economic exceptional circumstance, which deviates from the Constitution's, ECHR's and ICCPR's definitions.[211]

My argument has been that preciseness is a central principle in expanding the concept of emergency. Often the legislation's definition has been more precise than the proposal's version. This is the case, for example, in the adding of hybrid threats to the list of exceptional circumstances. Preciseness can be seen as an aspect of why emergency powers are legislated in advance. Namely, in doing so the proportionality of such legislation can be ensured.[212] However, I pointed out that sometimes, especially in the context of economic crises, the principle of legislatively anticipating emergencies is in tension with the principle of preciseness. In these cases, exhaustiveness of the list of exceptional circumstances and flexibility have outweighed preciseness.

Indeed, preciseness is not the only principle in developing the list of exceptional circumstances. The principle of normality has served to limit the expansion of the concept of emergency in some cases (e.g. terrorism). In addition, the constitutionality, while not followed to the letter, has been a principle present in the *travaux préparatoires*. Lastly, the principle of legislatively anticipating emergencies has been central in amending the Act. Following this principle has sometimes meant favouring flexibility over preciseness.[213] For example, economic crises as an exceptional circumstance category has been developed to become more accommodating for the sake of flexibility. However, preciseness should not be seen as mere narrowness. Instead, the aim to make exceptional circumstance categories

[209] PuVM 2/2022, 22.
[210] PeVL 29/2022, 12.
[211] Aine et al (n 8) 144; Heikkonen et al (n 11) 33; Vanhala (n 61) 507.
[212] Valmiuslakitoimikunta (n 122) 3.
[213] PeVL 6/2009, 4; PeVL 29/2022, 9-10.

as precise as possible can be seen to accord with the need for flexibility in dire situations. Nevertheless, there is a moment where 'as precise as possible' no longer holds and, instead, flexibility simply means broadening the definition.

To emphasise, this article analysed one characteristic of the concept of emergency in the Finnish legal system, namely, the principles in the legislative process of expanding the concept. This process has expanded the concept and adapted it to new circumstances by accommodating less serious emergencies. Greene argues that such accommodation weakens the protective nature of the state of emergency procedure as emergency measures are expanded to non-exceptive circumstances.[214] However, this point is more relevant in legal systems in which emergency powers are the same in all emergencies. Indeed, especially when the judicial branch has a stronger role in determining the legality of emergency measures,[215] this serves to expand the state of emergency to less exceptional cases. However, because the powers provided by the Emergency Powers Act are specific to the exceptional circumstances, the state of emergency is not identical in various emergencies. This is in line with the Venice Commission's statement that 'while the idea behind the declaration of a state of emergency is a dichotomy between normalcy and the exception, in practice there can be a spectrum between the powers used in the ordinary situation and those used in an emergency'.[216] Indeed, the concept of emergency in the Finnish legal system seems to form a spectrum of states of emergencies from more serious to less serious ones.

Apart from expanding the concept, there are also some general aspects of the concept of emergency that have developed as a result of the amendments to the Emergency Powers Act. Most notably, the idea that cumulative effects can serve as a ground for applying the Act is indeed a novel one. However, the notion that only the effects matter and that the reason or the intention behind the situation or event is irrelevant, while emphasised in the most recent amendment, is nothing new.[217] In fact, part of the reason why terrorism was left out of the original Act was because its effects could be interpreted as an armed attack or a major disaster, points to the fact that the origin of such events, whether intentional or not, is not significant. The principle of normality is also something that has been developed mainly by means of amending the Act. In addition, the fact that Finland's membership of the EU and Eurozone has to be taken into account in assessing the necessity of extraordinary measures, namely whether the ECB's measures are sufficient in an economic crisis, is also a novel feature.

The capacity to predict and anticipate future emergencies by means of legislation is a difficult task. As the security situation can alter rather rapidly, the need for amendments to adapt to these changes never ends.[218] Indeed, one of the main drivers for developing

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[214] Greene (n 34) 1748.

[215] According to Fabbrini, courts tend to defer to the executive especially during the initial phase of an emergency. Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice' (2009) 28(1) Yearbook of European Law 664, 674.

[216] Venice Commission (n 26) 6.

[217] Aine et al (n 8) 133.

[218] According to Aine et al, part of the reason why ordinary legislation has been developed to address crises is partly because amending the Emergency Powers Act is such an extensive and slow process. Antti Aine and others, *Moderni Kriisilainsäädäntö* (WSOY 2011) 11.

the Emergency Powers Act has been changes in Finnish security landscape.[219] In order to avoid gaps and analogical interpretation, the list of exceptional circumstances has been amended regularly. Developing the Act's capacity to legislatively accommodate future emergencies has served to expand its list of exceptional circumstances and make it more comprehensive. Because of this, the concept of emergency and, as a by-product, the Constitution has been 'modernised' through amendments to the Act..

Perhaps in the future new exceptional circumstances will be added to the list. Terrorism as an emergency has always 'haunted' the proposals. This would happen if extraordinary competences strictly needed for addressing terrorism are deemed necessary to be included in the second part of the act. So far, it has been deemed unnecessary. Recent security documents have also emphasised space as a new frontier of warfare, technological development and security policy.[220] The new Security Strategy for Society has considered ensuring availability of space services as a domain of security policy.[221] Perhaps this will lead to amending the list of exceptional circumstances (most probably Section 3 Paragraphs 1-3 and 6), or simply adding new extraordinary competences to the second part of the Act (which will also serve to expand the concept of emergency). It remains to be seen. However, one thing is certain: the concept of emergency will develop with future changes in the security situation.

[219] Indeed, already the 1987 report notes that the growing global interdependency requires amending the Finnish emergency law. Valmiuslainsäädäntötyöryhmä (n 39) 5.
[220] Ministry for Foreign Affairs of Finland, *Government Report on Finnish Foreign and Security Policy* (Finnish Government 2024) 19; Security Committee, *Security Strategy for Society: Government Resolution* (Finnish Government 2025) 24.
[221] Security Committee, Security Strategy for Society (n 225) 132.

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JUDICIAL RESTRAINT OR ACTIVISM? THE FEDERAL CONSTITUTIONAL COURT'S ROLE IN RECENT 'EMERGENCIES'

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This article examines the role of the German Federal Constitutional Court (Bundesverfassungsgericht) in situations commonly labelled as 'emergencies', using recent decisions on climate change and the federal pandemic emergency brake as case studies. Although the Basic Law does not provide for a general state of emergency permitting the suspension of constitutional norms, crises such as the COVID-19 pandemic and climate change nevertheless require flexibility within the ordinary constitutional framework. The article shows that the Court's jurisprudence in these contexts contains both activist and restrained elements. The climate change decision, while outwardly activist due to its creative concepts and international resonance, proves more restrained upon closer inspection, particularly in its refusal to derive new fundamental rights and its deference to legislative discretion. Conversely, the pandemic emergency brake decisions, though initially characterised by judicial restraint, include significant doctrinal developments such as the recognition of a fundamental right to school education.

1 INTRODUCTION

In the following article, I would like to offer a German perspective on the role of courts in emergencies. Specifically, I would like to highlight three recent decisions of the Federal Constitutional Court in particular and show that they contain elements of both judicial restraint[1] and judicial activism.

I will proceed in three steps: I will begin with some introductory remarks on the (constitutional) legal requirements governing 'emergencies' and what these imply for the Federal Constitutional Court's role. In a second step, I will examine the climate change order[2] and the orders on the federal pandemic emergency brake[3] with regard to their restraining and activist elements. In a third step, I will conclude with considerations on how the Federal Constitutional Court secures political leeway.

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[1] For a perspective on the Federal Constitutional Court as a conservative court, see Andreas Kulick and Johann Justus Vasel, *Das konservative Gericht. Ein Essay zum 70. Jubiläum des Bundesverfassungsgerichts* (Mohr Siebeck 2021).

[2] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 (Klimaschutz (Climate Change)).

[3] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223 (Bundesnotbremse I (Federal pandemic emergency brake I)); BVerfG, order of 19 November 2021 - 1 BvR 971/21 - 1 BvR 1069/21 - BVerfGE 159, 355 (Bundesnotbremse II (Federal pandemic emergency brake II)).

2 LEGAL STANDARDS FOR JUDGING 'EMERGENCIES'

2.1 HANDLING EMERGENCIES UNDER THE NORMAL CONSTITUTIONAL SITUATION

From the perspective of German constitutional law, the term 'emergency' is somewhat misleading insofar as the German constitutional order (Basic Law – *Grundgesetz* [GG]) contains several provisions designed for special crisis situations, namely the case of defence (Art. 115a GG), the case of tension (Art. 80a GG), the internal emergency (Art. 91 GG) and the case of disaster (Art. 87a para. 4 GG). However, a general state of emergency that suspends constitutional regulations in the event of a crisis is alien to it. The normative handling of crises such as the climate crisis and the Covid-19 pandemic does not take place by declaring a state of emergency (such as Art. 15 ECHR), but within and with the means of the normative 'normal situation': the legal obligation is not suspended and restrictions are imposed on the basis of the regular laws rather than exceptional legislation.[4]

Nevertheless, the term 'emergency' also appears in Germany, particularly in the context of the Covid-19 pandemic and climate change: at the beginning of the Covid-19 pandemic, the federal legislator inserted a kind of 'emergency clause' into the Protection Against Infection Act (§ 5 *Infektionsschutzgesetz* [IfSG])[5]. This enables the German Bundestag to declare an 'epidemic situation of national significance'. The consequence of the declaration of such a situation is that the Federal Ministry of Health is granted more specific powers (§ 5 para. 2 IfSG). In particular, the Federal Ministry of Health is authorized to take measures to ensure the provision of healthcare by means of orders and ordinances. However, the constitutional requirements for dealing with such an epidemic situation of national significance remain unchanged.[6]

Similarly, there has been discussion of declaring a 'state of emergency' in connection with climate change. Since 2019, many municipalities have declared a 'climate emergency'.[7] This is intended to recognize an urgent political and practical need for action and to assign the highest priority to climate protection measures that cannot be postponed. The depth and level of detail of the requirements that a local council associates with this vary. Of course,

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[4] In the context of the Covid-19 pandemic: BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223 <principle 1>; Jens Kersten and Stephan Rixen, *Der Verfassungsstaat in der Corona-Krise* (3rd edn, C.H.Beck 2022) 65 ff.; in contrast Uwe Volkmann assumes a 'perceived state of emergency' – Uwe Volkmann, 'Der Ausnahmezustand' (*Verfassungsblog*, 20 March 2020) <https://verfassungsblog.de/der-ausnahmezustand/> accessed 27 November 2025; this leads to the problem of a possible mixture of normal situation and state of emergency, see: Tristan Barczak, *Der nervöse Staat* (2nd edn, Mohr Siebeck 2021).

[5] Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen of 20.07.2000 (BGBl. I p. 1045), most recently amended by the Act of 12.12.2023 (BGBl. I No. 359).

[6] A certain shift in powers in favor of the federal government and the executive has certainly taken place during the pandemic. However, it was not a state of emergency, see Jens Kersten, 'Covid-19 – Kein Ausnahmezustand!' [2020] ZRP 65, and Kersten and Rixen (n 4).

[7] See the list of German municipalities that have already declared a "climate emergency": 'Liste deutscher Orte und Gemeinden, die den Klimanotstand ausgerufen haben' (*Wikipedia*, 15 September 2025) <https://de.wikipedia.org/wiki/Liste_deutscher_Orte_und_Gemeinden,_die_den_Klimanotstand_ausgerufen_haben> accessed 27 November 2025; on the municipalities' guarantee of self-government in this context see Christiane Juny, 'Ausrufung des Klimanotstands durch Gemeinden im Kontext der verfassungsrechtlich verbürgten Selbstverwaltungsgarantie nach Art. 28 Abs. 2 Satz 1 GG' [2021] NWVBl 313.

the following also applies here: declaring such a state of emergency does not change the constitutional requirements. Therefore, the management of crises such as the Covid-19 pandemic and climate change is also subject to the regular constitutional requirements.

2.2 A NEED FOR FLEXIBILITY

From this initial finding, the question of interest here regarding the Federal Constitutional Court's role is that there is a need for flexibility. After all, it is self-evident that a raging pandemic is legally distinct from merely the regular winter cold wave, whether there are normal temperature fluctuations or extreme weather events. Because such situations, which this workshop explores under the theme of 'emergencies', place different demands on the law than the normal situation, certain flexibility of the law of the normal situation are required.

As a 'living constitution', the Basic Law can adapt to crises despite its textual rigidity and to meet changing challenges through the – sometimes dynamic – interpretation of its provisions.[8] Such a dynamic interpretation and further development of the law can come into conflict with the legislator's political leeway. At the same time, it is important not to subject the Basic Law to the constraints of the *zeitgeist*, but to understand it as a resilient constitution.

Under the Basic Law, fundamental rights also apply in times of crises such as the Covid-19 pandemic; they are neither suspended nor fundamentally subject to other provisos.[9] Therefore, certain flexibilities are required elsewhere so that the state can react appropriately. The principle of proportionality has proven to be a central instrument of flexibility during the Covid-19 pandemic. However, its breadth raises concerns about whether judicial review remains effective: The associated broad scope raises the question of the extent to which state decisions can be reviewed and whether the principle of proportionality is still able to effectively limit encroachments on fundamental rights in times of crisis.[10]

The necessary flexibility means that the Federal Constitutional Court in particular has certain leeway, which it can exercise more cautiously or more consciously when interpreting and developing the law. In the following, I would like to show that the case law of the Federal Constitutional Court can be read in both directions – cautiously and consciously – using the climate change order and the orders on the federal pandemic emergency brake.

3 THE FEDERAL CONSTITUTIONAL COURT'S ORDERS ON CLIMATE CHANGE AND ON THE FEDERAL PANDEMIC EMERGENCY BRAKE

The First Senate of the Federal Constitutional Court ruled that the provisions of the Climate

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[8] On judicial interpretation as a reserve of flexibility in the legal system, see: Judith Froese, 'Die Grenze des Rechts als Herausforderung der Auslegung, oder: Interpretation als Flexibilitätsreserve der Rechtsordnung' [2015] 46 Rechtstheorie 481.

[9] In the context of the Covid-19-pandemic: Stephan Rixen, 'Die epidemische Lage von nationaler Tragweite – einfachrechtliche Regelungen und verfassungsrechtliche Problematik' in Sebastian Kluckert (ed), *Das neue Infektionsschutzrecht* (2nd edn, Nomos 2021) § 4 para 4 f.

[10] See Judith Froese, 'Das Verhältnismäßigkeitsprinzip in der Krise' [2022] 10 DÖV 389.

Protection Act (*Klimaschutzgesetz*) on the national climate protection targets and the annual emission quantities permitted up to 2030 are incompatible with fundamental rights insofar as they lack sufficient requirements for further emission reductions from 2031. In all other respects, the constitutional complaints were rejected.[11]

At first glance, the climate change order appears activist: The Federal Constitutional Court ruled on several constitutional complaints that had been filed strategically, the proceedings received a lot of public attention and the court had the decision translated into English and French, thereby also contributing to the international discourse.

The First Senate used the dazzling concepts of 'intertemporal guarantee of freedom'[12] (*intertemporale Freiheitssicherung*), 'interference-like effect'[13] (*eingriffsähnliche Vorwirkung*) and 'respecting future freedom' to call for the safeguarding of fundamental over time and for a proportionate distribution of opportunities for freedom over time and across generations.

Reactions in Germany were divided. With regard to the question of interest here, it should be mentioned in particular that the Federal Constitutional Court was sometimes accused of activism and concerns were expressed about a 'jurisdictional state'.[14] In a matter in which there were many uncertainties, it was up to politicians, not the courts, to decide which path to take.[15]

In contrast, the Federal Constitutional Court's orders on the federal pandemic emergency brake[16] might appear to be (too) cautious: In the first of those orders *(Bundesnotbremse I)*, the Federal Constitutional Court rejected several constitutional complaints against the curfews and contact restrictions that had been in place in the spring of 2021.[17] Although the measures significantly interfered with various fundamental rights, they were compatible with the Basic Law given the extreme dangerous situation posed by the pandemic. The Federal Constitutional Court also rejected the constitutional complaints against the school closures during the pandemic in a second ruling on the federal pandemic emergency brake *(Bundesnotbremse II)*.[18]

Many had hoped that the Federal Constitutional Court would take a stronger stance

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[11] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <110 ff.>.

[12] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <headnote 4; 102, 131>.

[13] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <130 f., 133>.

[14] See Dietrich Murswiek, 'Karlsruhe als Klimaaktivist' *FAZ-Einspruch* (19.7.2021); similarly Claus Pegatzky, 'Von Richterkönigen, Volksvertretern und Generationengerechtigkeit' *FAZ-Einspruch* (15.5.2021); former President of the Bundestag, Norbert Lammert, criticized the decision in Der Spiegel as 'an inadmissible interference in the legislative branch', see Gerald Traufetter, 'Politiker in Roben' *Der Spiegel* (No. 28/2021, 10.7.2021) 30 f.; according to constitutional law expert Peter Bußjäger, the political role of the courts becomes greater the more strongly the duty to protect is enforced, which would further promote the 'judicial state', see Daniel Bischof, 'Klimaschutz durch Richters Hand' *Wiener Zeitung* (18.7.2021).

[15] This raises the old question of who is the 'guardian of the constitution' (*Hüter der Verfassung*); to the fundamental controversy: Carl Schmitt, *Der Hüter der Verfassung* (Duncker & Humblot 1931) and Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (Mohr Siebeck 1931).

[16] The relevant provisions were inserted into the Protection Against Infection Act (Infektionsschutzgesetz – IfSG) by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance (Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite) (22 April 2021) BGBl I 802.

[17] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223.

[18] BVerfG, order of 19 November 2021 - 1 BvR 971/21 - 1 BvR 1069/21 - BVerfGE 159, 355.

here; the decision was received with corresponding criticism in the literature. The way in which the Federal Constitutional Court handled the principle of proportionality and left the legislator a wide margin of manoeuvre was criticized, as this meant that even massive encroachments on fundamental rights were no longer effectively limited.[19]

However, this black and white picture does not do justice to any of the decisions. On the contrary, a differentiated view shows that the climate change order is much more restrained than it might appear at first glance. The same is true for the way the Federal Constitutional Court exercised its supervisory function with regard to the pandemic. In particular, the second order on the federal pandemic emergency brake contains elements of further development of the law.

3.1 CLIMATE CHANGE (BVERFGE 157, 30)

3.1[a] No Derivation of a new Fundamental Right

The Court proceeds cautiously by refraining from deriving a new, autonomous ecological fundamental right. The complainants in the climate proceedings before the Federal Constitutional Court had argued that the German state had not made sufficient regulations to reduce greenhouse gases and that this violated, among other things, a fundamental right 'to a future consistent with human dignity' and a fundamental right to an 'ecological minimum standard of living'. They believed they could derive these rights from Art. 2 para. 1 in conjunction with Art. 20a GG and from Art. 2 para. 1 in conjunction with Art. 1 para. 2 sentence 1 GG. The Federal Constitutional Court, however, left open whether such rights exist. In the literature those were partly derived from Art. 1 para. 1 in conjunction with Art. 20a GG.[20] Other fundamental rights already oblige the state to uphold minimum ecological standards that are essential to fundamental rights and, in this respect, to protect against environmental damage of catastrophic or even apocalyptic proportions. In particular, the state has a duty to protect physical and mental well-being under Art. 2 para. 2 sentence 1 GG, in addition to the duty to protect under Art. 14 para. 1 GG (guarantee of property).

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[19] Oliver Lepsius, 'Einstweiliger Grundrechtsschutz nach Maßgabe des Gesetzes' [2021] 60 Der Staat 609; John Philipp Thorn, 'Grenzenlose Vorverlagerung' (*Verfassungsblog*, 3 December 2021) <https://verfassungsblog.de/grenzenlose-vorverlagerung/> accessed 27 November 2025; Klaus Ritgen, 'Die Entscheidung des BVerfG zur "Bundesnotbremse" und ihre Bedeutung für die künftige Pandemiegesetzgebung des Bundes' [2022] Zeitschrift für Gesetzgebung 102; Martin H W Möllers and Robert Chr. van Ooyen, 'Bundesnotbremse – das Bundesverfassungsgericht bleibt "etatistisch": Neue Grundrechte, weniger Freiheit und eine „Kontrollinszenierung"?' [2022] 58 Recht und Politik 68; Oliver Lepsius, 'Zerstörerisches Potential für den Verfassungsstaat' (*Legal Tribunal Online*, 3 December 2021) <https://www.lto.de/persistent/a_id/46831> accessed 27 November 2025.

[20] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <95 ff. para 113 ff.>; Hans Heinrich Rupp, 'Die verfassungsrechtliche Seite des Umweltschutzes' [1971] 13 JZ 401, 402 derived a "fundamental right to a clean environment" ("Grundrecht auf unschädliche Umwelt") early on; for a fundamental right to an ecological subsistence minimum (Grundrecht auf ein ökologisches Existenzminimum), see only: Christian Calliess, *Rechtsstaat und Umweltstaat* (Mohr Siebeck 2001) 300; Klaus Ferdinand Gärditz in Robert von Landmann and Gustav Rohmer (eds), *Umweltrecht* (68. Supplementary delivery February 2013) Art 20a GG para 78; Wolfgang Kahl, '§ 19 Natürliche Lebensgrundlagen und Ressourcenverbrauch' in Uwe Kischel and Hanno Kube (eds), *Handbuch des Staatsrechts, Band I: Grundlagen, Wandel und Herausforderungen* (C.F. Müller 2023) para 51 ff.

3.1[b] No Violation of the Duty to Protect

The court's handling of the state's duty to protect is equally cautious: State obligations to protect arise from fundamental rights and therefore also have a subjective legal character. In terms of objective law, the state is also obliged to protect the natural foundations of life under the state objective provision of Article 20a GG. The central issue lies in the broad discretion the Court grants the state, especially the legislature, and the associated review of legislative action, which is essentially designed as a mere review of evidence.[21] As is well known, the Federal Constitutional Court only finds a breach of the duty to protect if the legislator has remained completely inactive or if the protective measures it has taken are clearly unsuitable or inadequate.[22] The Federal Constitutional Court thus rightly respects the legislator's scope for action. Because the legislator has not remained inactive and its protection concept is not completely inadequate, the very strict climate protection obligations (the Federal Constitutional Court formulates very specific requirements in the scale section) have not been violated.[23]

The Federal Constitutional Court has thereby continued its established case law with regard to the duty to protect. At the same time, however, there are further developments and significant extensions of the duty to protect: The Federal Republic of Germany should not only have a duty to protect people currently living in Germany, but also – with graduated intensity – for people living abroad and – under objective law – for future generations.[24]

3.1[c] Obligations of the Legislator

The terms the Federal Constitutional Court used ('intertemporal guarantee of freedom' etc.) indicate that the court is acting in a highly creative manner. But what is behind this? Without denying the creative approach, here, too, the court can draw on established dogma, namely the broad conception of freedom articulated in the well-known *Elfes*-decision.[25] In this decision, the Federal Constitutional Court ruled that Art. 2 para. 1 of the Basic Law is not limited to protecting a minimum level of freedom of action without which the individual

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[21] The prohibition of inferiority referred to in the second judgment on abortion (BVerfG, judgement of 27 October 1998 - 1 BvR 2306/96 - 1 BvR 2314/96 - 1 BvR 1108/97 - 1 BvR 1109/97 - 1 BvR 1110/97 - BVerfGE 88, 203 <254> is sometimes understood as a stricter standard of review, see Rudolf Steinberg, *Der ökologische Verfassungsstaat* (Suhrkamp 1998) 325 ff.; criticism of the mere evidence control in the climate change decision in Christian Calliess, 'Das "Klimaurteil" des Bundesverfassungsgerichts: "Versubjektivierung" des Art. 20a GG?' [2021] 6 ZUR 355, 357; in more detail on the potential of a further development of the duty to protect dimension: Calliess, *Rechtsstaat und Umweltstaat* (n 20) 437 ff. and 566 ff.; Gabriele Britz, 'Grundrechtliche Schutzpflichten in bald 50 Jahren Rechtsprechung des BVerfG' [2023] NVwZ 1449, 1454 interprets the recent case law of the Federal Constitutional Court as a "merging of standards"; for a further development of the doctrine of the duty to protect to meet the challenges of the climate crisis: Wolfgang Kahl, '§ 19 Natürliche Lebensgrundlagen und Ressourcenverbrauch' in Uwe Kischel and Hanno Kube (eds), *Handbuch des Staatsrechts, Band I: Grundlagen, Wandel und Herausforderungen* (C.F. Müller 2023) para 59.

[22] BVerfG, order of 27 October 1998 - 1 BvR 2306/96 - 1 BvR 2314/96 - 1 BvR 1108/97 - 1 BvR 1109/97 - 1 BvR 1110/97 - BVerfGE 88, 203 <254>.

[23] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <113 ff. para 151 ff.>.

[24] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <headnote 2 c) and para 199 ff.: international dimension; headnote 1 and para 146 ff.>.

[25] BVerfG, judgement of 16 January 1957 - 1 BvR 253/56 - BVerfGE 6, 32.

cannot develop as an intellectual-moral being. Rather, the notion of the free development of one's personality includes freedom of action in the broadest sense.[26] What the court stresses referring to the 'intertemporal guarantee of freedom' is basically the idea of freedom in the broadest sense.

It is also worth taking a look at the obligation of the legislator, which the Federal Constitutional Court has specifically stated. First of all, the legislator is only obliged to plan its climate protection targets more extensively. Karl-Heinz Ladeur spoke boldly of a 'right to freedom planning by the state' (*Recht auf staatliche Freiheitsplanung*).[27] The Federal Constitutional Court considers the protection concept of the legislature to be appropriate: The German legislator has taken precautionary measures that are not manifestly unsuitable. The legislator has made efforts towards limiting climate change, not least by introducing the provisions of the Federal Climate Change Act. The adopted provisions are not manifestly unsuitable for safeguarding the interests protected under Art. 2 para. 2 first sentence GG.[28] The Federal Constitutional Court merely requires the legislature to continue its climate protection targets for the period from 2031 onwards, but not to present a completely different or more intensive protection concept.

3.1[d] Restrictive Application of the 'Intertemporal Guarantee of Freedom'

Eventually, in two chamber decisions following the climate change order, the Federal Constitutional Court clarified that the concept of 'intertemporal guarantee of freedom' applies only when a constitutional complaint is 'directed against the entirety of the permitted emissions, because regularly only these, but not selective actions or omissions by the state, could disproportionately shift the overall reduction burden to the future'.[29] This is neither the case for the climate protection laws of the federal states, because a state-specific reduction target does not exist and the challenged regulations therefore do not have a prior effect similar to interference,[30] nor does the failure to set a speed limit for the transport sector interfere with future freedom.[31]

3.2 FEDERAL PANDEMIC EMERGENCY BRAKE I (CURFEWS AND CONTACT RESTRICTIONS, BVERFGE 159, 223) AND FEDERAL PANDEMIC EMERGENCY BRAKE II (SCHOOL CLOSURES, BVERFGE 159, 355)

In contrast, the decisions on the federal pandemic emergency brake[32] are characterized by great restraint on the part of the Federal Constitutional Court. Before I elaborate on this, I

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[26] BVerfG, judgement of 16 January 1957 - 1 BvR 253/56 - BVerfGE 6, 32 <36 ff.>.
[27] Karl-Heinz Ladeur, 'Freiheit als Anspruch auf staatliche Lenkung?' *FAZ* (6 May 2021) 7.
[28] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <114 f.>.
[29] BVerfG, order of 15 December 2022 - 1 BvR 2146/22 <headnote 5>.
[30] BVerfG, order of 18 January 2022 - 1 BvR 1565/21 - 1 BvR 1566/21 - 1 BvR 1669/21 - 1 BvR 1936/21 - 1 BvR 2574/21 - 1 BvR 2575/21 - 1 BvR 2054/21 - 1 BvR 2055/21 - 1 BvR 2056/21 - 1 BvR 2057/21 - 1 BvR 2058/21 <headnote 13 ff.>.
[31] BVerfG, order of 15 December 2022 - 1 BvR 2146/22.
[32] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223; BVerfG, order of 19 November 2021 - 1 BvR 971/21 - 1 BvR 1069/21 - BVerfGE 159, 355.

would first like to make a few comments on the background to the decisions. The subject of the decisions were provisions of the Infection Protection Act that allowed massive infringements of fundamental rights during the COVID-19 pandemic (in the period from April to June 2021). These included, in particular, curfews and school closures. Several individuals filed constitutional complaints against the provisions of the Infection Protection Act, arguing that their fundamental rights had been violated.

The curfew and school closures served — like the other infection control measures — to protect life and health (under Art. 2 para. 2 sentence 1 GG). Under the Basic Law, life is accorded 'supreme value'.[33] However, this fundamental right, which also obliges the state to protect life, does not take precedence over other fundamental rights (such as the right to personal freedom or the right to school education). Measures to protect life must, in particular, be proportionate. However, within the proportionality framework, a structural difficulty arises: given the high value of protecting life, almost all measures appear appropriate. Therefore, doubts have been raised in the literature as to whether this limitation, which is inherent in the proportionality test in German constitutional law doctrine, is effective.[34]

In the first decision on the Federal Emergency Brake the Federal Constitutional Court limited its proportionality review to an assessment of the reasonableness of legislative evidence:

> Where scientific knowledge is tentative and the legislator's possibilities to draw sufficiently reliable conclusions are therefore limited, it is enough for the legislator to proceed on the basis of a context-appropriate and tenable assessment of the available information and evidence […]. This leeway stems from the fact that the Basic Law makes it incumbent upon the legislator, with its strong level of democratic legitimation, to resolve conflicts between high-ranking and highest-ranking interests despite uncertainties.[35]

The Federal Constitutional Court considered the measures to be proportionate when applying this standard.

In the second order on the federal pandemic emergency brake regarding school closures, however, the Federal Constitutional Court also broke new ground by deriving a new fundamental right from the Basic Law: the right to school education from Art. 2 para. 1 in conjunction with Art. 7 GG.[36] For the first time, the Federal Constitutional Court acknowledged that children and young people have a right to school education vis-à-vis the state. The school closures that have taken place in Germany since the beginning of the pandemic have interfered with this right in a serious way. As a result of the dynamic

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[33] BVerfG, judgement of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 - BVerfGE 39, 1 <42>; BVerfG, judgement of 16 October 1977 - 1 BvQ 5/77 - BVerfGE 46, 160 <164>; BVerfG, order of 6 December 2005 - 1 BvR 347/98 – BVerfGE 115, 25 <45>; BVerfG, judgement of 26 February 2020 - 2 BvR 2347/15 - 2 BvR 651/16 - 2 BvR 1261/16 - 2 BvR 1593/16 - 2 BvR 2354/16 - 2 BvR 2527/16 - BVerfGE 153, 182 <para 232: "Höchstwert">.

[34] In detail: Froese, 'Das Verhältnismäßigkeitsprinzip in der Krise' (n 10) with further evidence.

[35] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223 <para 171>.

[36] BVerfG, order of 19 November 2021 - 1 BvR 971/21 - 1 BvR 1069/21 - BVerfGE 159, 355 <headnote 1; para 44 ff.>.

infection rate at the time of the adoption of the 'federal pandemic emergency brake' at the end of April 2021, when the vaccination campaign had only just begun, this intervention was countered by overriding public welfare interests in the form of averting dangers to life and health and to the functioning of the healthcare system, which, according to the legislator's reasonable assessment at the time, could also be countered by school closures.

Finally, it should be emphasized that the court stresses here that interventions in fundamental rights to combat a pandemic must satisfy the general constitutional standards applicable to restrictions of fundamental rights in every respect.[37]

It should also be mentioned that the Federal Constitutional Court applies strict standards for the existence of emergency situations in a different context, namely public debt. In its landmark ruling pronounced in November 2023, the Federal Constitutional Court set strict standards to exceeding of credit limits. The legislator argued that there was a new emergency situation and transferred the € 60 billion credit authorization earmarked for the coronavirus pandemic, which no longer was not needed, to the Climate and Transformation Fund. The Federal Government's argument that there was an extraordinary emergency situation was rejected by the Court. The Second Senate declared the Second Supplementary Budget Act 2021 null and void and set strict standards: there must be an objective causal link between the natural disaster or the extraordinary emergency situation and the exceeding of the credit ceilings. The Second Senate did not agree with the Federal Government's argument[38] that the loan-financed measures contribute to reducing the financial burden on future generations and that the requirements for the causal link should therefore be lowered. Rather, with the standards it has established, it expresses the fact that the challenges of the time are fundamentally to be financed in the present.[39] Future generations, who are not in a position to decide on current borrowing, should not be financially burdened with the expenditure of the present. Politicians can continue to make the necessary expenditures with regard to climate change, but they must either change their priorities or relax the constitutional requirements of the so-called debt brake.

4 CONCLUSION: SAFEGUARDING FUTURE POLITICAL OPTIONS FOR THE LEGISLATURE THROUGH THE JUDICIARY

Ultimately, the Federal Constitutional Court interprets the Basic Law dynamically in crisis situations or 'emergencies', as it does elsewhere.[40] This is not unproblematic in view of the counter-majoritarian difficulty,[41] but the conflict cannot be completely resolved either. Finally, I would like to take a look at a central justification that the Federal Constitutional

[37] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223 <headnote 1>.
[38] BVerfG, judgement of 15 November 2023 - 2 BvF 1/22 - BVerfGE 167, 86 <para 66>.
[39] See Gregor Kirchhof, 'Die Schuldenbremse – eine Haushaltskrise als Chance in der Zeitenwende' [2023] NJW 3757, 3761.
[40] Cf. Daniel Wolff, 'Strategische Verfassungsprozessführung, das Bundesverfassungsgericht und der Klimaschutz' [2024] DVBl 1402, 1406.
[41] Alexander M Bickel, *The Least Dangerous Branch* (Bobbs-Merrill 1962).

Court uses in its climate decision, but also in its case law on European integration:[42] the court does not refer to a state of emergency, which – as we have seen – is fundamentally alien to the Basic Law. Rather, it argues that political scope for decision-making must be secured for the future. In this respect, the judiciary positions itself as both a counterweight to the present legislature and an ally of the legislature of the future.

[42] The Federal Constitutional Court derives a 'right to democracy' from Art. 38 para. 1 in conjunction with Art. 20 para. 1, para. 2 and Art. 79 para. 3 GG. According to case law, this requires the preservation of democratic scope for shaping and decision-making, also for the future. This could result in limitations for the current legislator, but these could be legitimate with a view to keeping the future open, cf. BVerfG, judgement 12 September 2012 - 2 BvR 1390/12 - 2 BvR 1421/12 - 2 BvR 1438/12 - 2 BvR 1439/12 - 2 BvR 1440/12 - 2 BvE 6/12 - BVerfGE 132, 195 <para 120 ff.>.

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CONSTITUTIONAL COURTS IN STATES OF EMERGENCY: EXPERIENCES FROM THE VISEGRÁD COUNTRIES

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This article examines the operation of constitutional courts in Hungary, Poland, the Czech Republic, and Slovakia – the Visegrád countries – during states of emergency, with a special focus on the COVID-19 pandemic. It investigates how these courts interpreted their constitutional roles under 'special legal orders' and whether their competencies and jurisprudential standards changed under exceptional circumstances. Although the constitutions of all four states maintain the continuous operation of constitutional review during emergencies, the courts' performance and impact varied considerably. The analysis shows that the strength and independence of constitutional adjudication under normal conditions determine its capacity to function as a guardian of constitutionality in emergencies. The article concludes that constitutional courts that do not effectively protect constitutionalism in ordinary times are unlikely to do so during crises, emphasizing the continuing importance of institutional integrity, judicial independence, and rule-of-law standards in exceptional legal orders.

1 INTRODUCTION

What happens to constitutional courts and constitutional adjudication when an emergency occurs? The global crises that have erupted since the turn of the millennium, such as the international financial and debt crisis,[1] terrorism,[2] the often so-called migration crisis,[3] and other country-specific or regional problems, such as the Russo-Ukrainian war and the Hamas-Israel conflict,[4] as well as the extraordinary new rules introduced on the basis of constitutions or normal legislation, have raised and continue to raise numerous questions about the function and nature of constitutional review in these exceptional circumstances. Furthermore, what is the role of the constitutional courts as autonomous state institutions

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[1] Xenophon Contiades and Alkmene Fotiaou, 'How Constitutions Reacted to the Financial Crisis' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis. A Comparative Analysis* (Ashgate 2013); Pablo Iglesias-Rodríguez, Anna Triandafyllidou, and Ruby Gropas (eds), *After the Financial Crisis – Shifting Legal, Economic and Political Paradigms* (Palgrave MacMillan 2016); Fred L Morrison (ed), *Fiscal Rules – Limits on Governmental Deficits and Debt* (Springer 2016).

[2] Christian Kaunert and Sarah Léonard (eds), *European Security, Terrorism and Intelligence Tackling New Security Challenges in Europe* (Palgrave MacMillan 2013); Anthony Richards, *Conceptualizing Terrorism* (Oxford University Press 2015).

[3] Ali Bilgic, *Rethinking Security in the Age of Migration: Trust and Emancipation in Europe* (Routledge 2013).

[4] Some researchers have already dubbed the 21st century the 'century of crises'. For example, Norma C Noonan and Vidya Nadkarni, 'Introduction: A Century of Challenges' in Norma C Noonan and Vidya Nadkarni (eds), *Challenge and Change. Global Threats and the State in Twenty-first Century International Politics* (Palgrave Macmillan 2016). These crises are of various kinds, Alan Greene, 'Types and Effects of Emergency' in Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (eds), *Max Planck Encyclopaedia of Comparative Constitutional Law* (Oxford University Press 2019).

in protecting constitutional justice and the rule of law in these situations? In such situations, the constituent power and the legislator determine the constitutional court's function when drafting constitutional legislation prior to the emergency; therefore, constitutional courts are inevitably forced to reconsider their previous case law, developed over decades of constitutional disputes under normal circumstances. However, it is the task and the duty of the constitutional courts to interpret the exceptional rules both in terms of their own competencies and in relation to the new separation of powers.

The above-mentioned problems have a major impact not only on public policy and people's everyday lives, but also on old and established constitutional norms and constructions of judicial interpretation, and may, in many cases, change the function of the constitutional court. In new situations, the courts must address the constitutionality of legal responses to unprecedented social, economic, and political problems. What is more, in the Member States of the European Union, all answers must be in line with EU and international law. Finally, in some cases, constitutional courts may act not only as a counterweight or constraint on public power but also as supporters of the acting state institution in order to identify effective solutions to particular problems in line with the rule of law.

In an edited volume published in 2019, Zoltán Szente and I examined how these challenges have generally affected the case law of the constitutional courts of certain European countries and of the European courts (CJEU, ECtHR).[5] We also examined the states of emergency, specifically in the Visegrád countries, with regard to the protection of fundamental rights[6] and to the general capacity of the emergency constitutional law to meet rule-of-law requirements by evaluating the experiences of the practice of recent years.[7]

The goal of this study is now limited to special situations in which the proclamation of an emergency as a 'special legal order' regulated by the constitution may arise and/or has occurred in recent years. In the study, the role of the Visegrád Constitutional Courts is examined in these special legal situations. The Hungarian, Polish, Czech, and Slovak Constitutional Courts have played an important role in state life since the democratic transitions. All four countries transitioned from state socialism to constitutional democracy through a complex process after 1989 and joined the EU together in 2004. All four jurisdictions have rules in their constitutions about emergency-type 'special legal orders', and they uphold the operation of the Constitutional Courts in these situations.

I examine the functions the constitution assigns to them under a special legal order, the powers and tasks it defines for them, and how the institutions have functioned within that framework. In all four Visegrád countries, this is essentially a constitutional problem linked to the experience of the COVID-19 pandemic of recent years.

We can learn a lot about the specific characteristics of constitutional institutions by testing their stability and viability under strong external pressure. Constitutional courts survive from crisis to crisis.[8] One of the most frequently discussed topics in comparative

[5] Zoltán Szente and Fruzsina Gárdos-Orosz (eds), *New Challenges to Constitutional Adjudication in Europe – A Comparative Perspective* (Routledge 2018).
[6] Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge 2024).
[7] Zoltán Szente and Fruzsina Gárdos-Orosz, 'Constitutional Risk Management in the V4 Countries – Diverging Practices and the Need for Convergence' (2025) 16(2) European Journal of Risk Regulation 460.
[8] Szente and Gárdos-Orosz (eds), *New Challenges* (n 5); Zoltán Szente and Fruzsina Gárdos-Orosz (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge 2021); Fruzsina Gárdos-Orosz,

constitutional law is constitutional adjudication, including its institutional aspects[9] and the methodology of jurisprudence.[10] The starting point of this Article is that constitutional review and relevant, well-functioning constitutional courts are essential elements of a constitutional democracy, no matter what the borders are between normalcy and emergency. The aim of this contribution is to complement existing research with a fresh comparative analysis of contemporary European challenges that have not yet been examined with this methodology in the context of the Visegrád countries.

2 THE VISEGRÁD CONTEXT

The Visegrád Four (V4) – Hungary, Poland, the Czech Republic,[11] and Slovakia – share a common history dating back to well before the establishment of the Habsburg Empire and their experience of becoming part of the Soviet bloc after the Second World War.[12] In 1989, following the political and economic transformation that followed the collapse of the state socialist system, they decided to deepen their cooperation and promote their common interests within the framework of the Visegrád Group, which was established for this purpose in 1991.[13]

Although there are differences between the four constitutional systems,[14] they are fundamentally similar, all four being parliamentary republics. Their place in European integration, historical experience, physical proximity, and similar legal culture[15] nevertheless, make it possible to compare how the respective legal systems respond to identical phenomena and similar problems. One area where this is particularly worthwhile is in the development of regulations for emergency situations, as the constitutional framers were motivated by very similar historical experiences, and the region was similarly affected by

Constitutional Justice under Populism: The Transformation of Constitutional Jurisprudence in Hungary since 2010 (Wolters Kluwer – Akadémiai Kiadó 2024).

[9] Andrew Harding and Peter Leyland (eds), *Constitutional Courts. A Comparative Study* (Wildy, Simmonds & Hill Publishing 2009); Víctor Ferreres Comella, *Constitutional Courts and Democratic Values* (Yale University Press 2009); Allan R Brewer-Carías (ed), *Constitutional Courts as Positive Legislators. A Comparative Law Study* (Cambridge University Press 2011); Patricia Popelier, Werner Vandenbruwaene, and Armen Mazmanyan (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia, 2012); Maartje De Visser, *Constitutional Review in Europe: A Comparative Analysis* (Bloomsbury 2014).

[10] Diana Kapiszewski, Gordon Silverstein, and Robert A Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press 2013); Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart 2014). See the new wave of comparative constitutional law literature; Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of New Constitutionalism* (Harvard University Press 2007); Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar 2014).

[11] The official names of the countries are Hungary, the Slovak Republic, the Republic of Poland, and the Czech Republic/Czechia.

[12] Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer, 'States of emergency and fundamental rights in books and in action: The Visegrad countries and the COVID19 pandemic' in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge 2024).

[13] Michal Kopeček, 'Sovereignty, "'Return to Europe" and Democratic Distrust in the East After 1989 in the Light of Brexit' (2019) 28(1) Contemporary European History 73.

[14] Iván Halász, *Az államszervezet fejlődése a közép-európai államokban 1989 után (Államfő, parlament, kormány). [The development of state organisation after 1989 in Central and Eastern Europe]* (Lucidus 2014).

[15] Zoltán Tóth J, 'Interpretation of Fundamental Rights in Central and Eastern Europe: Methodology and Summary' in Zoltán Tóth J (ed), *Constitutional Reasoning and Constitutional Interpretation: Analysis on Certain Central European Countries* (CEA Publishing 2021).

dangerous situations, such as the COVID-19 pandemic, during the period under review.

The analysis of legal issues arising from the pandemic sheds light on the functioning of special legal regimes and shows that, although the special legal regimes in all four countries were developed along similar principles, they operated differently in exceptional situations.[16] Although the rules differ in their detail, during the COVID-19 pandemic, for example, the constitutions of all the countries provided for the possibility of introducing special legal orders. Since, following the democratic transitions, the Constitutional Courts were also established in a similar manner, following the centralised, so-called Kelsen model, and they have played a similarly important role in interpreting and monitoring the rules of constitutional democracy, it is also possible to compare how this original function has changed over the years and how the special legal orders have affected the former. Have these bodies retained their constitutional protection function under the special legal orders, and if so, based on normative regulations, how do they exercise their powers, what decisions do they take, and in what cases do they declare that they lack jurisdiction?[17]

With the global pandemic, emergency situations became a central constitutional issue worldwide, and constitutional lawyers in the Visegrád countries also began paying increasing attention to the topic. While in other countries the literature had already begun to address the phenomenon of the special legal order in the wake of the 'war on terrorism' or similar events, the tragic COVID-19 pandemic provided researchers of the constitutional systems of the Visegrád countries with an opportunity and empirical research material for an intensive examination.[18] The joint discussion of these four jurisdictions is therefore justified by the constitutional, political, historical, and cultural similarities between the V4 countries, as well as their proximity and planned cooperation.

Despite all the above-mentioned similarities, the history and the presence of the four Visegrád Constitutional Courts are fundamentally divergent. The Polish Constitutional Court has been in a state of crisis since 2015 because it has been unable to perform its original function.[19] The Hungarian Constitutional Court has also suffered from a legitimacy crisis since 2010.[20] The constitutional and legislative powers have shaped the special legal order regulations into an ideal type of constitutional adjudication across all four countries, but when assessing the practice of the Constitutional Courts, one cannot avoid noticing differences. Apart from the specific problems related to COVID-19, there are general difficulties that exist independently of the special legal orders, but also within them.[21]

The four constitutional regulations are similar in that they establish a special legal order at the normative constitutional level within the framework of the constitutional state. They reject the Schmittian approach to the state of exception. Consequently, the constitutional systems of all four countries accept that their Constitutional Courts shall continue to function

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[16] Zoltán Nagy and Attila Horváth (eds), *Emergency Powers in Central and Eastern Europe. From Martial Law to COVID-19* (Central European Academic Publishing 2022).
[17] Joelle Grogan, 'COVID19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis' (2022) 14(2-3) Hague Journal on the Rule of Law 349.
[18] Florczak-Wątor, Gárdos-Orosz, Malíř, and Steuer (eds) (n 6).
[19] Monika Kawczyńska, 'Combating the constitutional crisis in Poland – Can the European Union provide an effective remedy?' (2021) 61(2) Hungarian Journal of Legal Studies 229.
[20] Gárdos-Orosz, *Constitutional Justice under Populism* (n 8).
[21] Tímea Drinóczi and Agnieszka Bień-Kacała, 'COVID19 in Hungary and Poland: Extraordinary Situation and Illiberal Constitutionalism' (2020) 8(1-2) The Theory and Practice of Legislation 171, 187-188.

unchanged and do not lay down separate rules for their functioning. On the other hand, the four Constitutional Courts have different competencies with regard to, e.g. general ex post facto abstract review, constitutional complaint procedures, and constitutional complaints.

In sum, with regard to constitutional emergencies, there has been no change in the fundamental competencies of any of the Constitutional Courts, either in terms of who can bring cases before them or the legal consequences of their decisions. All four constitutional systems structure their emergency rules in a similar way, categorizing them according to specific dangers and exceptional situations, and do not distinguish between different special legal situations with regard to the role of the constitutional court. However, the exercise of competencies is influenced by the fact that emergency situations raise novel constitutional issues, to which constitutional courts may struggle to respond within their original interpretation of the scope of their competencies. The question of jurisdiction over acts related to the promulgation of an emergency is one such problem, and another is the scope of jurisdiction in fundamental rights cases.

In principle, therefore, the Constitutional Courts have the same function in such situations as they do in normal cases (constitutional protection, review of norms, protection of individual rights), but in a special, emergency legal order, the scope of their competencies and the manner in which they are exercised are probably not the same.

Different rules can also be found on the restriction of fundamental rights in constitutions and (in the Czech Republic and Slovakia) in the constitutional acts that form part of the constitutional order.[22] These rules, or the binding legislation based on the authorisations provided therein, define the content of constitutional review, the scope of protected fundamental rights, and the criteria for their restriction. However, depending on their level of abstraction, the rules are more or less helpful in establishing the special legal standards, and thus, the Constitutional Courts of the Visegrád countries also vary in how they approach this task. In addition, the different roles are reflected in the development of their criteria. Overall, the exercise of powers in the field of fundamental rights adjudication varies despite the unchanged institutional function.[23]

The Constitutional Court of each country is therefore the body that ultimately determines the scope of its review over legislation pertaining to the special legal order: it decides how the latter deviates from the normal legal order when adopting a given decision, whether it reviews the legislative reasoning, and what it takes into account, e.g. in order to assess the constitutionality of the restriction of rights.[24] In some cases, the general fundamental rights restriction test applies, in which case the question arises of how judges take into account the special legal circumstances. In these cases, although the fundamental rights restrictions that were introduced were similar in nature everywhere, the four Constitutional Courts assumed different roles in different constitutional regulatory

[22] See Chapter V, especially Article 52-54 of the Fundamental Law of Hungary, Chapter XI in the Polish Constitution, especially Articles 229-234. In the Czech constitutional order, the relevant rules for the non-war situations are in the Act with constitutional force about state security 110/1998. In Slovakia the relevant Constitutional provision is 460/1992 of the Constitution of Slovakia, especially 51(2).

[23] Florczak-Wątor, Gárdos-Orosz, Malíř, and Steuer (eds) (n 6).

[24] Szente and Gárdos-Orosz, 'Constitutional Risk Management in the V4 countries' (n 7); Zoltán Szente, 'Conceptualising State of Emergency, Constitutional Crisis Management and Their Rule-of-Law Requirements' (2025) 16(2) European Journal of Risk Regulation 374.

environments: Of all the courts, the Slovak one was most involved in fundamental constitutional and political controversies, while the Czech court was particularly restrained, rejecting numerous petitions on the grounds of lack of jurisdiction, but nevertheless laying down the basic principles for assessing the constitutionality of fundamental rights restrictions. The Hungarian body did not rule out the possibility of review in some of its decisions, but applied different standards in these decisions and declared the constitutionality of all but one government action. The Polish Constitutional Court, however, was not given a role in developing special legal standards during the COVID-19 pandemic, as no special legal order was declared; only alternative statutory measures were introduced.[25]

The V4 Constitutional Courts responded to various types of constitutional issues during the COVID-19 pandemic such as whether the acts proclaiming the special legal orders were constitutional; how the special legal orders established at the constitutional level and those established at the legislative level relate to each other; what the legal basis for individual emergency measures was; what types of norms can arise in the legal system; and the extent to which fundamental rights can be restricted.[26]

Similar motions were submitted in all four jurisprudences in related matters during the COVID-19 pandemic due to similar emergency measures (shop closures, mask wearing, vaccination, curfews, etc.). However, the level of abstraction and the procedural frameworks through which these issues reached the constitutional or high administrative courts depended on the specific characteristics of the respective states' legal systems. The depth of the Constitutional Courts' examination of the constitutionality of the specific legal norms containing the emergency measures depended on their interpretation, which reflected their understanding of their role. Three out of four Constitutional Courts maintained the characteristics of their functioning prior to the COVID-19 pandemic. The Hungarian Constitutional Court was extremely deferential; the Polish court did not function; and the Slovak court was probably the most involved in politically sensitive constitutional controversies, with its deferential position changing slowly.[27]. Only the Czech Constitutional Court changed its role relative to the normal legal order, as it was notably reserved in its interpretation of its powers during the COVID-19 pandemic.[28]

During the democratic transitions in the Visegrád countries, constitutional adjudication took the institutional form of independent Constitutional Courts, with the constitution granting these bodies broad powers to protect the constitution. This constitutional court function related to the protection of the constitution and fundamental rights was not fully realised in all four countries, particularly in light of the COVID-19 pandemic-related emergency and the special legal orders issued in recent years. What impact

[25] Monika Florczak-Wątor, 'Constitutional Challenges in Emergency Governance: An Analysis of Poland's Reluctance and Regulatory Ambiguities in States of Emergency' (2025) 16(2) European Journal of Risk Regulation 433.
[26] Szente and Gárdos-Orosz, 'Constitutional Risk Management in the V4 countries' (n 7), and Florczak-Wątor, Gárdos-Orosz, Malíř, and Steuer (n 6).
[27] Tomáš Gábriš and Max Steuer, 'The Consequences of COVID-19 Emergency Risk Mismanagement: The Rise of Anti-Evidence Decision Making in Slovakia' (2025) 16(2) European Journal of Risk Regulation 446, 455.
[28] Zdenek Kühn, 'Emergencies under Czech Law' (2025) 16(2) European Journal of Risk Regulation 405; Jan Malíř and Jan Grinc, 'States of emergency and COVID19: Czech Republic' in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge 2024).

have the special legal orders themselves had on the function of these Constitutional Courts? In other words, how do the rules of the special emergency legal orders determine the competencies and functioning of the Constitutional Courts? If the Constitutional Courts are not restricted by the constitution in an emergency, what criteria determine how they function?

3 THE VISEGRÁD CONSTITUTIONAL COURTS AND THEIR POLITICAL ENVIRONMENT

During the democratic transitions, the Hungarian, Polish, Czech, and Slovak Constitutional Courts established Kelsenian-style constitutional adjudication under different historical circumstances. Czechoslovakia had one of Europe's first constitutional courts before World War II, which, although not as famous as its Austrian counterpart, issued several decisions until 1939 that typically did not fall within the scope of constitutional court jurisdiction as we know it today.[29] Even before its peaceful separation, Czechoslovakia re-established the institution of the constitutional court, which was then retained in the legal systems of both the Czech Republic and Slovakia.[30] The Polish Constitutional Court began its work in 1986 at a time when socialism was already demanding reforms, and the first elements of its legal practice remained part of the living law even after the democratic transition.[31] In Hungary, an independent, centralised constitutional body separate from the courts has been in operation since 1 January 1990.[32]

Despite the fact that, in Poland, the Sejm could override the decisions of the Constitutional Court until 1997 some in the Slovak Republic contested the legitimacy of the Constitutional Court's decisions even in the 1990s, overall, constitutional courts with stable and similar powers have been established. With the exception of Poland, constitutional complaints seeking review of ordinary court decisions (the German type of constitutional complaint) emerged slowly in all countries, with the main task of the Constitutional Courts during the COVID-19 pandemic being dominated by constitutional complaint proceedings rather than ex post abstract review of norms, as they often received thousands of submissions. In Poland, 2015 marked a turning point,[33] when a constitutional crisis culminated in the appointment of constitutional judges in an unlawful manner, and the legitimacy of some judges was called into question, disrupting the functioning of the entire body.[34] As a result, the ordinary courts also took a different, more active position on the protection of the constitution and fundamental rights.[35]

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[29] Jiri Priban, 'Judicial Power vs. Democratic Representation: the Culture of Constitutionalism and Human Rights in the Czech Legal System' in Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer 2003).
[30] Max Steuer, 'The Slovak Constitutional Court' in Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2019).
[31] Mirosław Granat and Katarzyna Granat, *The Constitution of Poland: A Contextual Analysis* (Bloomsbury 2021) 105–130.
[32] Fruzsina Gárdos-Orosz and Kinga Zakariás, 'Organisational, functional and procedural changes of the Hungarian Constitutional Court 1990–2020' in Fruzsina Gárdos-Orosz and Kinga Zakariás (eds), *The Main Lines of the Jurisprudence of the Hungarian Constitutional Court: 30 Case Studies from the 30 Years of the Constitutional Court (1990 to 2020)* (Nomos 2022).
[33] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).
[34] ibid.
[35] Michał Ziółkowski, 'States of emergency in Poland: A model under construction' in Monika Florczak-

In Hungary, the formal legality of the Constitutional Court's functioning in the strict sense is hardly disputed, and in this sense, no constitutional crisis similar to that in Poland developed. However, the competence and practice of the Constitutional Court have changed significantly within the so-called populist constitutional environment.[36] Hungary has had a new Fundamental Law since 2011, which has been amended fifteen times by the almost permanent two-thirds parliamentary majority of the Fidesz-KDNP party coalition since 2010, in several cases precisely in order to override or prevent decisions of the Constitutional Court.[37]

The four Constitutional Courts of the Visegrád countries do not operate in the same constitutional environment.[38] The differences are not only due to their partly different historical, jurisdictional and procedural characteristics. As highlighted already, the legitimacy and lawful functioning of the Polish Constitutional Tribunal has been in doubt, while in Hungary the function of the Constitutional Court has fundamentally changed since 2011: instead of deciding on the constitutionality of legislation in the strict sense, it now mostly formulates soft-law type constitutional requirements that serve as guidelines of constitutionality, or decides on the constitutionality of individual court decisions.[39] This phenomenon is explainable by the populist political environment. In contrast, in the Czech Republic and Slovakia, before the COVID-19 pandemic, experiences related to the election and appointment of judges and their respective powers dominated the discourse, while these states faced ongoing constitutional challenges but fundamentally respected the rules of constitutional democracy during the COVID-19 pandemic.[40]

Although it has been suggested in Poland that constitutional review is conceivable in a constitutional democracy even without a constitutional court,[41] great emphasis is still being placed on restoring the legitimate functioning of this institution. Similarly, in Hungary, there are serious professional debates about the need to restore the competence of the Constitutional Court and ensure its professional independence and autonomy.[42] Despite the legitimacy problems, constitutional courts are (potentially) important actors in the functioning of the constitutional system in all four countries, in accordance with the

Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge 2024).

[36] Fruzsina Gárdos-Orosz, 'Constitutional review, Constitutional Courts and the institutional challenges of the 21st century in Europe' in Fruzsina Gárdos-Orosz, *Constitutional Justice under Populism: The Transformation of Constitutional Jurisprudence in Hungary since 2010* (Wolters Kluwer – Akadémiai Kiadó 2024). See also Roger Eatwell and Matthew Goodwin, *National populism: The revolt against liberal democracy* (Penguin UK 2018) xxv, xxviii; Zoltán Szente, 'The myth of populist constitutionalism in Hungary and Poland: Populist or authoritarian constitutionalism?' (2023) 21(1) International Journal of Constitutional Law 127.

[37] Tímea Drinóczi, Fruzsina Gárdos-Orosz, and Zoltán Pozsár-Szentmiklósy, 'Formal and Informal Constitutional Amendment in Hungary' (2019, MTA Law Working Paper 18) <https://jog.tk.elte.hu/mtalwp/formal-and-informal-constitutional-amendment-in-hungary> accessed 20 December 2025.

[38] Max Steuer, 'Models of states of emergency in Slovakia and their political context: "We'll manage … somehow?"' in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge 2024).

[39] Gárdos-Orosz, 'Constitutional review, Constitutional Courts and the institutional challenges of the 21st century in Europe' (n 36).

[40] Steuer, 'The Slovak Constitutional Court' (n 30).

[41] Mirosław Granat, 'Constitutionality of law without a constitutional court in the Polish setting' in Mirosław Granat (ed), *Constitutionality of Law without a Constitutional Court: A View from Europe* (Routledge 2024).

[42] Gárdos-Orosz, 'Constitutional review, Constitutional Courts and the institutional challenges of the 21st century in Europe' (n 36).

relevant regulations.[43]

4 THE NORMATIVE FUNCTION OF THE CONSTITUTIONAL COURTS UNDER THE SPECIAL LEGAL ORDERS OF THE V4 COUNTRIES

The constitutional systems of the four countries established during democratic transitions from state socialism after 1989 are similar in that they define, in their constitutions, special legal regulations for emergencies by specifying qualifying conditions.[44] Based on the classification of foreseeable exceptional situations, the constitutions have thus created special legal situations that define the conditions for the exercise of public power and set out special rules for the protection of fundamental rights.[45]

Although the special legal orders involve sets of provisions in the constitutions that allow for derogations from fundamental rules, the Constitutional Courts in all four states are still entitled to review the constitutionality of normative rules adopted under these orders.[46]

Another similarity is that the legal systems of all four states contain statutory regulations in the form of legislative acts, regulations, and other legal provisions on defence, public safety, health, disaster management, and other security and emergency matters.[47] Similar to constitutional rules and the statutory provisions implementing them, these autonomous legislative acts also allow for deviations from the normal legal order in a number of areas concerning the exercise of public authority and fundamental rights restrictions in order to facilitate the handling of challenging situations. In terms of their legal classification, they are quasi-constitutional emergency rules, but in many cases, the legislator has ordered their application at the statutory level rather than, or in parallel with, the constitutional level. This has created a special, emergency legal regime that thus blurs the two categories of rules and causes several constitutional problems.[48] Regarding the relevance of this fact to the normative function of the Constitutional Courts, it must be emphasized that although the Constitutional Courts operate in the V4 countries regardless of whether the legal order shifts from normalcy to emergency, the competencies remain the same, as explained above. However, the assessment of the rights restrictions and extensions of state power is different.

This situation thus makes the position of the Constitutional Courts unstable when

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[43] Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014); Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000); Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (CEU Press 2002).

[44] See more on this in the form of a comparative analysis in Attila Horváth, 'Emergency Regimes in the European Constitutions – A Comparative Overview' (2025) 16(2) European Journal of Risk Regulation 388.

[45] Dávid Hojnyák and Álmos Ungvári, 'A visegrádi együttműködés országainak koronavírus járványra adott válasza, különös tekintettel a vizsgált államok által bevezetett különleges jogrendi szabályozásra' [The response of the Visegrad countries to the coronavirus pandemic – the regulation] (2021) 17(1) Iustum Aequum Salutare 305.

[46] Lóránt Csink, 'Comparative Constitutionalism in Central Europe: Summary' in Lóránt Csink and László Trócsányi (eds), *Comparative Constitutionalism in Central Europe Analysis on Certain Central and Eastern European Countries* (CEA Publishing 2022).

[47] Florczak-Wątor, Gárdos-Orosz, Malíř, and Steuer, 'States of emergency and fundamental rights in books and in action: The Visegrad countries and the COVID19 pandemic' (n 12).

[48] On Slovak case law, Gábriš and Steuer (n 27). On the Hungarian issues see Fruzsina Gárdos-Orosz and Evelin Burján, 'From Constitutional Risk Management to Constitutional Risk Management (Emergency Law Misuse) in Hungary' (2025) 16(2) European Journal of Risk Regulation 421.

dealing with the same factual matters.[49] Although in theory the state can respond to exceptional situations with effective measures while preserving the characteristic features of constitutional democracy, there are significant differences in the practical implementation of constitutional rules. The law in action creates gaps among the experiences of the four jurisdictions.

In the Czech Republic, parliamentary control plays a key role under the special legal order in the review of constitutionality, which certainly diminishes the role of the Constitutional Court.[50] This may be supplemented by the review solution provided by the Pandemic Act that came into force in 2021,[51] as this transferred the competence of reviewing the applicable legislative acts and regulatory measures in individual cases to the Supreme Administrative Court. Previously, during regional states of emergency declared due to floods, the Supreme Administrative Court was also given a substantive role in exercising control. The Czech Constitutional Court can therefore rule on the constitutionality of legislation under the special legal order, as well as on constitutional complaints or at the initiative of judges, but this has not become widespread practice. Furthermore, the act declaring the special legal order was not considered a normative act subject to review by the Constitutional Court even before the COVID-19 pandemic.[52]

In the normal legal order, the Czech Constitutional Court imposes important limits on the exercise of public power. In contrast, during a special legal order, parliamentary protection of the constitution is strengthened while maintaining the importance of norm control, but Constitutional Court proceedings are limited to a narrow range of cases. The situation makes constitutional court review less effective in remedying urgent constitutional issues, and decisions are more likely to be of particular importance concerning the objective protection of the constitutional order. Therefore, despite the very high number of constitutional complaints under the normal legal order, in an emergency, the Constitutional Court is clearly not the most important institution for reviewing legislation and answering constitutional questions relating to individual rights violations.[53]

Slovakia can be considered the opposite pole in terms of the role of parliament and the Constitutional Court in constitutional review. The Slovak constitutional regulation defines a modest role for parliament in decisions relating to the special legal order, placing greater emphasis on judicial and constitutional review; however, the declaration and prolongation of the emergency are decided first by Parliament.[54] The Slovak Constitution allows the Constitutional Court to review the legality of this proclamation of a special legal order, which is difficult to separate from the examination of its necessity, since the proclamation is lawful if its conditions are met. The key point of the set of conditions is that the situation cannot be addressed in any other way, as the normal legal order is not adequate to ensure the constitutional (i.e. constitutionally restricted) exercise of public power

[49] Malíř and Grinc, 'States of emergency and COVID19: Czech Republic' (n 28); Tomáš Ľalík, Kamil Baraník, and Šimon Drugda, 'Slovakia' in Richard Albert, David Landau, Pietro Faraguna, and Šimon Drugda (eds), *The I·CONnect-Clough Center 2020 Global Review of Constitutional Law* (October 14, 2021) <https://ssrn.com/abstract=3942876> accessed 20 December 2025.
[50] Kühn (n 28); Malíř and Grinc, 'States of emergency and COVID19: Czech Republic' (n 28).
[51] Act 94/2021 on the protection against the pandemic.
[52] Malíř and Grinc, 'States of emergency and COVID19: Czech Republic' (n 28).
[53] Kühn (n 28).
[54] Steuer, 'Models of states of emergency in Slovakia (n 38).

while protecting fundamental rights, enabling the state to return to the normal legal order as soon as possible.

The Slovak Constitution maintains the normal functioning of the Constitutional Court, and this exercise of review power demonstrates that even in the most delicate matters of emergency, the Constitutional Court must review whether the proclamation/prolongation of the state of emergency is constitutional.[55] In this constitutional system, this leads to the Constitutional Court playing a very important role in reviewing the constitutionality of the exercise of public power; the Parliament, in general, does not play as significant a role in this as in the Czech Republic, where the Parliament and the ordinary courts perform more important tasks under special legal orders.[56]

The Polish special legal order is also unique because both the Parliament and the Constitutional Court play prominent roles in controlling government actions in accordance with the provisions of normative constitutional regulations.[57] The Hungarian and Polish constitutions stipulate that the Parliament can review the proclamation of a special legal order, but the constitutional doctrine of both states suggests that the Constitutional Court may also be entitled to do so. It is also true of the constitutional systems of both countries that, while the Constitutional Court has never stated that it has the power to review acts promulgating a special legal order, it has not stated the opposite.

In the Polish and Hungarian special legal orders, government decrees concerning individual measures may be subject to constitutional review on the basis of a relevant motion, but they should also be subject to continuous review by Parliament, and their extension requires parliamentary approval.[58] It is necessary to add that this has remained a doctrinal issue in Poland and Hungary, as Poland did not declare a special legal order during the COVID-19 pandemic, and in Hungary, there was no motion on this constitutional issue.

In sum, the decision concerning the special legal order in the Czech Republic cannot therefore be subject to constitutional review, while in Slovakia it can, and in Hungary and Poland, the text of the constitution does not clarify this. All decrees and other normative regulations issued under the special legal order can be reviewed from a constitutional perspective by the Constitutional Courts in all four countries.[59]

5 THE ROLE OF THE CONSTITUTIONAL COURTS IN ESTABLISHING STANDARDS FOR THE RESTRICTION OF FUNDAMENTAL RIGHTS UNDER A SPECIAL LEGAL ORDER

As regards constitutional standards for the restriction of fundamental rights, the regulations

[55] Gábriš and Steuer (n 27).
[56] With the constitutional amendment of 2020, Parliament was given a more significant role in declaring a pandemic emergency, but this constitutional amendment was highly controversial.
[57] Monika Florczak-Wątor, 'States of Emergency in Poland and Their Impact on the Protection of Human Rights in Times of Covid-19 Pandemic' (2021) 12 Romanian Journal of Comparative Law 287.
[58] Zoltán Szente, 'Emergency as a pretext to restrict political rights: The Hungarian autocratic regime at work' in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge 2024).
[59] Florczak-Wątor, Gárdos-Orosz, Malíř, and Steuer (eds) (n 6).

of the four countries differ in this respect.[60]

In Hungary, the Constitutional Court took charge of defining the constitutional possibility in the Fundamental Law of deviating from the general standard of fundamental rights restrictions,[61] while in Poland, only the scholarly literature dealt with the issue in relation to COVID-19, as no special legal order was declared. In Hungary, while the text of the Fundamental Law allows for the suspension of almost all fundamental rights, with exceptions that differ from the general rule, the Constitutional Court has formulated a number of approaches to the constitutional review of emergency regulation. At one extreme, legislative acts cannot be reviewed at all from the point of view of necessity and proportionality,[62] while at the other extreme, the Constitutional Court may also assess the necessity and proportionality of decrees in the context of its constitutional review.[63] Looking at the arguments on both sides, it is clear that the only thing the court agrees on is that special legal norms are temporary and need to be reviewed regularly.[64]

In Poland, the problem was that the constitutional standard for declaring a special legal order can only be applied in exceptional situations. In this case, pursuant to the provisions of the Constitution, a law specifying the rules of the special legal order in detail defines the fundamental rights that may be restricted in the given special legal situation, while ensuring that their essential content cannot be revoked even in such cases. It posed a constitutional problem for ordinary judicial practice that, during the COVID-19 pandemic, the legislature invoked the state of emergency to restrict fundamental rights differently than under the normal legal order and granted broader powers to administrative authorities.[65]

The Czech constitutional regulation is concise, but the constitutional law on the protection of public security, which supplements the constitution and forms part of the constitutional order, allows for greater restrictions on fundamental rights under a special legal order.[66] It does not provide any guidelines that deviate from the normal legal order for assessing restrictions or for determining the specific rights that may be restricted at the legislative level.[67] The Slovak constitutional regulation is similar: the Constitutional Court has not been provided with any special standards for the special legal order defined in the Constitution, and must instead apply the general test for restricting fundamental rights in such cases.[68]

Since the special legal order is laid down in the Constitution and the general principles of the rule of law also apply to this regulation, the Czech and Slovak Constitutional Court

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[60] See Florczak-Wątor, Gárdos-Orosz, Malíř, and Steuer (eds) (n 6), four studies in Chapter II.
[61] Article 53 of the Fundamental Law.
[62] 3152/2022. (IV. 12.) AB decision. See Szente, 'Emergency as a pretext to restrict political rights' (n 58).
[63] 3537/2021. (XII. 22.) AB decision.
[64] However, this is the only clear constitutional requirement that cannot be enforced.
[65] Monika Florczak-Wątor, 'Human Rights in States of Emergency: Constitutional Principles and Their Application in the Republic of Poland' in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge 2024).
[66] Max Steuer and Radka Vicenova, 'A widening gap? Fundamental rights and states or emergency in Slovakia' in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge 2024).
[67] Jan Malíř and Jan Grinc, 'Fundamental rights limitations in states of emergency' in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge 2024).
[68] Steuer and Vicenova (n 66).

decisions are also based on the doctrine that if there is no rule in the Constitution regarding the deviation, then the necessity and proportionality test must be applied during constitutional review.[69] The practice of these Constitutional Courts differs in the extent to which they undertake to develop the criteria of necessity and proportionality in specific cases. While the Czech jurisprudence emphasizes that the court can assess the reasonableness of the justification provided by the legislature in the context of recognizing the necessity of a greater fundamental right restriction,[70] the Slovak Constitutional Court goes further and, in addition to adequate justification, also takes into account publicly known scientific facts when reviewing necessity.

There is therefore a significant difference in the constitutional regulations of the Visegrád countries in that the standard for restricting fundamental rights is defined differently, and the Constitutional Courts have assigned different functions to their interpretation. In Poland, different fundamental rights may be restricted under specific legal orders, but their restriction is subject to the general test for restricting fundamental rights, taking into account the circumstances, and in the absence of constitutional or statutory provisions to the contrary. As the rules on restrictions are defined in the constitution for the special legal order, it was an even greater problem that this did not apply during the COVID-19 pandemic because a special legal order was not declared.[71]

In the Czech Republic and Slovakia, the restriction of fundamental rights and their review are governed by general rules. The constitutional question before the Constitutional Courts was how the test could be adapted to the circumstances of a special legal order and whether such a legal order entails a different quality of fundamental rights protection.[72] In Hungary, different rules apply under the special legal order, both concerning the scope of fundamental rights that can be restricted and the applicable standard for restricting fundamental rights, which the Constitutional Court has attempted to interpret in several decisions, with contradictory results.[73]

6 CONSTITUTIONAL ISSUES ADJUDICATED BY V4 CONSTITUTIONAL COURTS DURING THE COVID-19 PANDEMIC – A SUMMARY

The closing question is: which cases were finally found admissible by the Constitutional Courts, and when did the court refer to a lack of jurisdiction?

In Poland, due to the constitutional crisis, the Constitutional Court did not perform its function effectively. As a result, the ordinary courts performed constitutional protection tasks in individual cases, which primarily involved assessing the legality and, in some cases, the constitutionality of measures taken by decree or administrative decisions. Accordingly, the ordinary courts did not apply laws which were regarded as unconstitutional and even established the state's liability for damage caused by unconstitutional legislation in some

[69] Pavel Ondřejek and Filip Horák, 'Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures' (2024) 20(1) European Journal of Constitutional Law 27.
[70] Kühn (n 28).
[71] Florczak-Wątor, 'Constitutional Challenges in Emergency Governance' (n 25).
[72] Ondřejek and Horák, 'Proportionality during Times of Crisis' (n 69).
[73] Gárdos-Orosz and Burján (n 48).

cases. This debate took the form of motions from the president and the speaker of the Sejm to the Constitutional Tribunal. The motions concerned one of the most fundamental issues connected to the Polish legal system during the COVID-19 pandemic: the powers of ordinary courts to interpret and enforce the constitution in relation to the Constitutional Court.

In Hungary, it is important to emphasize the original function of the Constitutional Court and compare it with the changes that took place after 2010.[74] In this situation, during the pandemic, the court mainly received motions concerning fundamental rights instead of politically sensitive legislative matters. Despite the continuous operation of the Constitutional Court, special legal order standards were not developed and/or enforced. The decisions taken in connection with the COVID-19 pandemic failed to establish a consistent standard, and as a result, the Constitutional Court ultimately found all but one of the regulations issued by the Government to be constitutional.[75]

In the Czech Republic, the Constitutional Court issued a number of decisions, but in most of them, it emphasized the supervisory powers of parliament and that some of the issues relating to the special legal order were political in nature and therefore could not be reviewed by the Constitutional Court. At the same time, it stated that it would only rule on restrictions on fundamental rights in exceptional cases where the issue of fundamental constitutional importance affected a large number of other legal disputes and caused widespread violations of fundamental rights within the Czech legal system. In the normal course of their work, the courts and the Supreme Administrative Court are responsible for adjudicating individual cases of the infringement of rights and providing guidance on questions of illegality.[76] The Czech Constitutional Court therefore ruled on many of the motions brought before it, but took the position that it plays only a minor role in crisis management. However, it established that the fundamental test for restricting fundamental rights under the Constitution is the necessity and proportionality test, which must be applied by both legislators and law enforcement authorities. It found the special restrictions on fundamental rights and the criteria set out in the pandemic law to be constitutional and did not raise any objections to the establishment of a quasi-statutory special legal order.[77]

The Slovak Constitutional Court issues numerous decisions in which it clarified its jurisdiction in many matters relating to the special legal order. It expressed its position not only in individual decisions aimed at the abstract ex post review of regulation and legislation, but also in the detailed review of other normative measures (provisions of general application) taken by the authorities in response to the COVID-19 pandemic. In addition to emphasizing the requirement for justification, it also placed great emphasis on the enforcement of the principle of equality. However, the Slovak Constitutional Court also approved a significant proportion of the reviewed state decisions and rejected many constitutional complaints on the basis of procedural inadmissibility.[78]

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[74] Gárdos-Orosz and Zakariás (n 32).
[75] Gárdos-Orosz and Burján (n 48).
[76] Kühn (n 28).
[77] Pavel Ondřejek, 'Threshold of Justification of Emergency Regulations: On Coherentism Requirement for the Justification of Measures Adopted in the Czech Republic during the COVID-19 Pandemic' (2021) 27(2) Archiwum Filozofii Prawa i Filozofii Społecznej 41.
[78] Kamil Baraník, 'Disproportionate restrictions on the freedom of movement: The Slovak Republic during the Covid19 pandemic' in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds),

In Hungarian, Polish, Czech and Slovak constitutional practice, the practice of the Constitutional Courts has thus been organised around three fundamental issues. The first issue was the reviewability and review of the proclamation and extension of a special, emergency legal order. The second issue concerned the hierarchy of legal sources, the problem of regulations of different levels promulgated in parallel, and their justification. In connection with this, the third issue concerned the legal basis of state decisions. These were supplemented by classic constitutional jurisprudence on the protection of fundamental rights, i.e. the assessment of the constitutionality of restrictions on fundamental rights.

While in Poland, the most important constitutional issue brought before the Constitutional Tribunal concerned the relationship between the latter and ordinary courts in the enforcement of fundamental rights and the protection of the constitution, in the Czech Republic, the review focused on the legal basis for emergency measures and the possibility of the constitutional review of their promulgation.

In Slovakia, in addition to these and fundamental rights issues, questions of legal sources arose, as a completely new source of law was ultimately recognised by the Constitutional Court in connection with crisis management, a provision of general application which the Constitutional Court recognised as a source of law that it is competent to review within the scope of its powers to review legislation.

In Hungary, the most important issues brought before the Constitutional Court were classic cases of fundamental rights restrictions related to the right of assembly, compulsory vaccination and the protection of data of public interest.

The Constitutional Courts of the Visegrád countries have therefore dealt with (or established their lack of jurisdiction over) various issues of state organisation and sources of law and procedure, in addition to classical cases of fundamental rights restrictions such as shop closures, curfews, restrictions on religious freedom, mask wearing and dilemmas related to immunity certificates.[79] The differing assessments of the motions, the definition of the jurisdiction of the Constitutional Courts, and the review criteria highlight the different roles of the V4 Constitutional Courts.

7 CONCLUSION

In the Visegrád countries, constitutional adjudication has taken the form of independent constitutional courts, which are vested with significant powers by the constitution. However, not all countries have fully realized the original function of these institutions, as they face serious problems in Poland and Hungary. The role of constitutional review and its institutional and procedural arrangements were not specifically adjusted in the constitutional legislation related to emergency or special legal orders and therefore remained the same as in the normal legal order. In some countries with explicit constitutional guarantees, the constitutional courts' acts did not specify any special legal order procedures, and normal functioning was maintained. However, during the COVID-19 pandemic, the constitutional courts exercised their powers differently among the Visegrád countries.

States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries (Routledge 2024).

[79] New perspective of comparative constitutional law. A global database from constitutional case law delivered in the shadow of the pandemic. <https://covid-and-constitutionalism.tk.hu/en> accessed 20 December 2025.

Although the Czech Republic made few, rather restrained decisions, and Slovakia made more detailed ones, both Constitutional Courts provided clear guidance on issues relating to state organisation or fundamental rights standards in emergency situations, based on their interpretations of the constitution. The Polish Constitutional Tribunal did not issue any relevant decisions on the standard of review for normal and special legal orders during the COVID-19 pandemic, whereas in Hungary, the special legal order test enshrined in the Fundamental Law was interpreted in countless ways, and the permanent special legal order was not subject to constitutional review.

This article has provided a broad picture of how the V4 Constitutional Courts operated under the emergency situation related to the COVID-19 pandemic. The results of the inquiry show that, in situations of danger, constitutional courts should act as guardians and institutional guarantors of constitutionality in accordance with the black-letter law. However, in Poland and Hungary the original institutional function of the Constitutional Court had already been seriously undermined under normal conditions.

The special legal order itself, by its very nature, allows for the further strengthening of an already powerful executive, making constitutional review particularly important under this regime. Although the constitutions of all four states consider the institution of constitutional review to be of paramount importance even under a special legal order, they do not reinforce it, nor provide for additional powers, procedural safeguards, rights of initiative, the possibility of ex officio proceedings or other solutions to ensure the effectiveness of review and the exercise of powers. The practice of the Constitutional Courts, therefore, is, in most cases, restrained and hesitant.

The functioning of the Constitutional Courts is (or should be) an important institutional guarantee of the rule of law in all Visegrád constitutional democracies, even in times of a special legal order. This article has highlighted that this well-established constitutional function is nevertheless under threat both in times of normalcy and in emergencies. Constitutional courts that do not operate properly in normalcy do not fulfil their full functions in an emergency either (Poland and Hungary). While constitutional courts may operate according to their constitutional function in normal times, their role might become uncertain in an emergency (Czechia) or the role of executive decision-making might become uncertain (Slovakia).

All in all, the big picture of the V4 Constitutional Courts in emergencies suggests that well-functioning constitutional courts should operate equally well in times of normalcy and in emergencies, in accordance with valid constitutional standards. However, without strong, decisive institutional operations and impact in normal times, they are unlikely to succeed in providing relevant and independent guidance on matters of constitutionality in an emergency. However, in some V4 jurisdictions, constitutional courts took important steps in some decisions to clarify the standards for the future.

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