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Guido Bellenghi

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 <https://orcid.org/0000-0002-1260-611X>

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# THE EUROPEAN PARLIAMENT'S PROPOSAL FOR AN EU STATE OF EMERGENCY CLAUSE: A COMPARATIVE AND CONSTITUTIONAL ANALYSIS

Guido Bellenghi\*

*Abstract: Following the Conference on the Future of Europe, the European Parliament presented a proposal to reform the Treaties, aiming to expand the competences of the EU in emergency contexts and enhance parliamentary participation in the adoption of emergency measures. Notably, the Parliament suggests introducing a new state of emergency clause, modelled on similar provisions included in national emergency laws. This proposal reveals several issues associated with the attempt of transposing the conceptual categories and legal schemes of national emergency law into EU law. Drawing from examples of EU Member States' emergency laws, this article analyses these issues from a comparative perspective, focusing on the equilibrium between the recognition of extraordinary powers and the construction of appropriate constitutional safeguards. Furthermore, it critically assesses the proposal's potential implications for EU constitutional law, discussing in particular the trajectory of EU integration, the role of the adjudicature, and the constitutional design of EU competence.*

*Keywords: emergency, state of emergency, Treaty reform, competence, Conference on the Future of Europe.*

## 1 Introduction

On 22 November 2023, after the Conference on the Future of Europe, the European Parliament (hereinafter: the Parliament) adopted a Resolution for the amendment of the Treaties.<sup>1</sup> Amongst the 245 amendments proposed, four concern the action of the European Union (hereinafter: EU) within emergency contexts. First, the Parliament proposes to elevate protection against cross-border health threats and civil protection

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\* PhD researcher at Maastricht University, Maastricht Centre for European Law (MCEL); email: [guido.bellenghi@maastrichtuniversity.nl](mailto:guido.bellenghi@maastrichtuniversity.nl); ORCID: 0000-0002-1260-611X. I am grateful to Merijn Chamon and Phedon Nicolaides for their useful feedback on earlier versions of this article and to the two anonymous peer reviewers for their comments. This article was presented as a draft paper at the XXI Dubrovnik Jean Monnet Seminar on Advanced Issues of EU Law. I would like to thank all participants for their valuable feedback. The usual disclaimer applies. DOI: 10.3935/cyelp.20.2024.586.

<sup>1</sup> European Parliament, 'Report on Proposals of the European Parliament for the Amendment of the Treaties' (2023) 2022/2051(INL). The resolution is based on a report drafted by the Committee on Constitutional Affairs (AFCO), in particular by the five rapporteurs Guy Verhofstadt, Sven Simon, Gabriele Bischoff, Daniel Freund, Helmut Scholz, and was published in the Official Journal on 24 July 2024 (C/2024/4216).

from supporting competences<sup>2</sup> to areas of shared competence.<sup>3</sup> Second, with its proposal, the Parliament calls for the establishment of a Defence Union including military units under the operational command of the EU, to be deployed, with the consent of the Parliament itself, if a Member State is a victim of aggression.<sup>4</sup> Third, the proposed reform includes an amendment of the procedure enshrined in Article 78(3) TFEU, which is the legal basis allowing the Council to act in the event of 'an emergency situation characterised by a sudden inflow of nationals of third countries'.<sup>5</sup> Whilst the Parliament currently holds only a right to be consulted, the amended provision would also assign to the Parliament the right of initiative to be shared with the European Commission (hereinafter: the Commission).<sup>6</sup> Fourth and finally, the Parliament proposes to delete Article 122 TFEU,<sup>7</sup> which includes two special emergency mechanisms<sup>8</sup> allowing the Council to take extraordinary measures in emergency contexts<sup>9</sup> with very limited parliamentary involvement.<sup>10</sup> In the Parliament's proposal, the deleted Article 122 TFEU would be replaced by a new Article 222(1) TFEU, enshrining a state of emergency clause resembling those typically contained in national constitutions. Indeed, the new provision would allow the Parliament and the Council to grant, for a predetermined period of time, 'extraordinary powers' to the Commission in the case of emergency.<sup>11</sup>

The changes proposed by the Parliament follow two main threads. First, they tend to expand the emergency competence of the EU, designating the protection against cross-border health threats and civil protection as areas of shared competence, establishing a Defence Union with new civilian and military capacities, and allowing the Commission

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<sup>2</sup> Article 6(a) and (f) TFEU. For the respective legal bases, see Articles 168(5) and 196(2) TFEU.

<sup>3</sup> European Parliament (n 1) 70 and 74.

<sup>4</sup> *ibid* 52, 53 and 55.

<sup>5</sup> See, for instance, 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 L248/80.

<sup>6</sup> European Parliament (n 1) 100.

<sup>7</sup> *ibid* 119–120.

<sup>8</sup> Case C-848/19 P *Germany v Poland* ECLI:EU:C:2021:598, para 62.

<sup>9</sup> For a contrasting view, see Merijn Chamon, 'The Use of Article 122 TFEU: Institutional Implications and Impact on Democratic Accountability' (European Parliament 2023) Study Requested by the AFCE Committee PE 753.307, 19–21, where the author considers Article 122(1) TFEU as 'an exceptional but not an emergency clause'.

<sup>10</sup> The Parliament is excluded from the procedure envisaged by Article 122(1) TFEU, whereas it merely has a right to be informed of the decision taken by the Council under Article 122(2) TFEU.

<sup>11</sup> European Parliament (n 1) 186.

to exercise general emergency powers not limited to specific policy areas. Second, the amendments pursue the democratisation of emergency powers by enhancing the Parliament's role in the adoption of emergency measures. This proposal therefore addresses critical concerns raised by various commentators, relating to both the limited emergency competences of the EU<sup>12</sup> and the marginalisation of the Parliament in the procedures for the adoption of emergency measures.<sup>13</sup>

Crucially, by including a state of emergency clause, the proposal provides an institutional dimension to the growing scholarly debate concerning the potential constitutionalisation of a general emergency competence assigned to the EU.<sup>14</sup> It seeks to answer, from the perspective of the EU legal order, the longstanding question concerning the optimal balance between extraordinary powers and constitutional safeguards. This requires navigating the tension between the nature of emergencies and the constitutional design of EU competence. On the one hand, emergencies are typically unpredictable and transboundary,<sup>15</sup> in that they consist of sudden shocks rapidly escalating and producing cross-sectoral cascading effects. On the other hand, under the principle of conferral,<sup>16</sup> the competence of the EU is based on powers that are attributed in advance to the Union by its Member States, and these powers are typically organised in the Treaties along policy-specific lines, whereby different titles and chapters contain specific legal bases for each policy area.

This contribution analyses the Parliament's proposal for a state of emergency clause from both a comparative and EU constitutional perspective. In doing so, it tests the extent to which it is possible to engage

<sup>12</sup> The Group of Twelve, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century' (2023) Report of the Franco-German Working Group on EU Institutional Reform 32; Salvatore F 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) 79; and Julia Fernández Arribas, 'Regulating European Emergency Powers: Towards a State of Emergency of the European Union' (Jacques Delors Institute 2024) Policy Paper 295 14.

<sup>13</sup> Jonathan White, 'Constitutionalizing the EU in an Age of Emergencies' (2023) 61 *Journal of Common Market Studies* 781, 788–789; Vivien A Schmidt, 'European Emergency Politics and the Question of Legitimacy' (2022) 29 *Journal of European Public Policy* 979, 981; and Andreas Maurer, 'Improving Urgency Procedures and Crisis Preparedness within the European Parliament and EU Institutions: Rationales for Democratic, Efficient and Effective Governance under Emergency Rule' (European Parliament 2022) Study Requested by the AFCO Committee PE 730.838 55.

<sup>14</sup> White (n 13); Stefan Auer and Nicole Scicluna, 'The Impossibility of Constitutionalizing Emergency Europe' (2021) 59 *Journal of Common Market Studies* 20; and Christian Kreuder-Sonnen, 'Does Europe Need an Emergency Constitution?' (2023) 71 *Political Studies* 125.

<sup>15</sup> Arjen Boin, 'The Transboundary Crisis: Why We Are Unprepared and the Road Ahead' (2019) 27 *Journal of Contingencies and Crisis Management* 94.

<sup>16</sup> Article 5(2) TEU.

with the emergency discourse under EU law by means of conceptual categories and legal schemes traditionally belonging to the sphere of national emergency law. In order to achieve its objectives, the article first provides an overview of the relevant comparative theoretical framework, focusing on some essential conceptual tools that are necessary to engage with the emergency legal discourse. These conceptual tools serve to analyse the proposed Article 222(1) TFEU by testing its key constituent elements against the yardstick offered by Member States' emergency laws (Section 2). Such an analysis then allows us to assess, from an EU constitutional perspective, crucial issues arising from the minimalistic character of the proposed clause, focusing specifically on aspects of systematicity, judicial review, and competence (Section 3).

## **2 Comparative analysis of the proposed state of emergency clause**

### **2.1 Conceptual framework**

The EU Treaties incorporate a number of provisions that can be triggered in the event of an emergency.<sup>17</sup> It is possible, in particular, to distinguish at least three different types of emergency clauses:<sup>18</sup> first, emergency legal bases that empower EU institutions to take extraordinary measures in emergency circumstances;<sup>19</sup> second, emergency derogation clauses that allow the Member States to depart from EU law in the event of an emergency;<sup>20</sup> and third, emergency cooperation clauses that prescribe cooperation between the Member States or between the Member States and the Union in the case of emergency.<sup>21</sup> These three types of clauses can be compared to three different models to be found outside the EU legal order. First, emergency legal bases entrust public authorities with emergency powers and thus recall the emergency clauses typically found in national constitutions. Second, emergency derogation clauses allow derogation from Treaty standards, resembling emergency clauses typically foreseen by human rights instruments.<sup>22</sup> Third and finally, emergency cooperation clauses establish mutual obligations similar to those contained in the provisions of some international treaties.<sup>23</sup>

<sup>17</sup> These include Article 42(7) TEU and Articles 66, 78(3), 122(1) and (2), 107(2)(b) and 3(b), 143, 144, 213, 222, and 347 TFEU.

<sup>18</sup> This distinction is proposed by Bruno De Witte, 'EU Emergency Law and Its Impact on the EU Legal Order' (2022) 59 *Common Market Law Review* 3, 5.

<sup>19</sup> See, for instance, Articles 78(3) and 122 TFEU.

<sup>20</sup> See, for instance, Articles 144 and 347 TFEU.

<sup>21</sup> See, for instance, Article 222 TFEU.

<sup>22</sup> Article 15 European Convention on Human Rights; Article 4 International Covenant on Civil and Political Rights; and Article 27 American Convention on Human Rights.

<sup>23</sup> See, for instance, Article 5 of the North Atlantic Treaty.

The proposed Article 222(1) TFEU reads:

In the event of an emergency affecting the European Union or one or more Member States, the European Parliament and the Council may grant the Commission extraordinary powers, including those to enable it to mobilise all necessary instruments. In order for an emergency to be declared, the European Parliament shall act by a majority of its component members and the Council shall act by a qualified majority, on a proposal from the European Parliament or the Commission.

That decision, by which an emergency is declared and extraordinary powers are granted to the Commission, shall define the scope of the powers, the detailed governance arrangements and the period during which they apply.

The European Parliament or the Council, acting by a simple majority, may revoke the decision at any time.

The Council and the Parliament may, in accordance with the procedure set out in the first subparagraph, review or renew the decision at any time.

The proposed provision empowers EU institutions to act within an emergency. It therefore must, from an EU law standpoint, constitute an emergency legal basis. Following the parallel drawn above, the benchmark for the assessment of each of its components must thus be found in national laws. In particular, attention should be paid to national ‘formal emergency law’, understood as those provisions of national law that define the substantive and procedural limits governing the adoption of each ad hoc emergency measure.<sup>24</sup> Whereas a comparison with all existing national laws on a global scale goes beyond the scope of this article, the focus is here placed on examples drawn from the formal emergency laws of EU Member States.<sup>25</sup> In this respect, the constitutions of most

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<sup>24</sup> Andrej Zwitter, ‘The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy’ (2012) 98 Archives for Philosophy of Law and Social Philosophy 95, 100. Ad hoc emergency measures adopted in specific emergency contexts constitute instead ‘material emergency law’.

<sup>25</sup> For methodological transparency, it must be preliminarily noted that, to ensure the feasibility of the research, the analysis contained in this contribution is primarily based on the literal interpretation of national emergency laws. This approach may not provide an exhaustive account of how specific provisions of national emergency law have evolved in the institutional practice or case law of a given Member State. For instance, in the case law of the Romanian Constitutional Court, the threats posed by economic shocks are explicitly considered to pertain to the sphere of national security, as explained by Bogdan Iancu, ‘Romania: The Vagaries of International Grafts on Unsettled Constitutions’ in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (TMC Asser Press 2019) 1074. Therefore, this article acknowledges the need for further research also encompassing the practical application and interpretation of national emergency laws.



EU countries include provisions dealing with emergencies ('constitutional accommodation').<sup>26</sup> Such provisions can take the form of either state of emergency clauses,<sup>27</sup> which allow a temporary emergency regime to be established during which extraordinary powers are conferred upon the executive and where certain constitutional safeguards are suspended,<sup>28</sup> or clauses exceptionally empowering the executive with law-making powers to adopt ad hoc acts addressing urgent situations.<sup>29</sup> In some countries, formal emergency law is partially or entirely contained in legislation ('legislative accommodation')<sup>30</sup> that may be adopted by the legislator on the basis of a specific clause enshrined in the constitution<sup>31</sup> or even in the absence of an ad hoc constitutional mandate.<sup>32</sup>

To the extent that framing within national constitutional traditions acts as the 'motor'<sup>33</sup> to develop principles of EU law, understood as 'a *ius commune* built with the bricks of the comparative law method',<sup>34</sup> it can be affirmed that, with its new Article 222(1) TFEU, the Parliament proposes the constitutional accommodation of emergencies by means of a state of emergency clause. A comparative analysis of the emergency regime proposed by the Parliament can thus be based on the indicators offered by legal literature for the analysis of national emergency clauses,<sup>35</sup> focusing

<sup>26</sup> Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 35.

<sup>27</sup> For instance, Article 16 French Constitution; Article 48 Greek Constitution; Article 50 Hungarian Constitution; Article 19 Portuguese Constitution; and Article 116 Spanish Constitution.

<sup>28</sup> Nicos Alivizatos and others, 'Respect for Democracy Human Rights and Rule of Law during States of Emergency: Reflections' (Venice Commission 2020) CDL-PI(2020)005rev-e para 5; and Zoltán Szente, 'How to Assess Rule-of-Law Violations in a State of Emergency? Towards a General Analytical Framework' (2024) Hague Journal on the Rule of Law.

<sup>29</sup> Article 23 Danish Constitution; Article 101(2) Croatian Constitution; Article 44(1) Greek Constitution; Article 77(2) Italian Constitution; and Article 115(1) Romanian Constitution.

<sup>30</sup> Gross and Ní Aoláin (n 26) 66. See also John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210, 216–217.

<sup>31</sup> For instance, Article 116(1) of the Spanish Constitution was the legal ground for the adoption of the *Ley Orgánica 4/1981, de 1 de junio, de los estados de alarma, excepción y sitio*.

<sup>32</sup> See, for instance, the French *Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence*.

<sup>33</sup> Joana Mendes, 'EU Law Through the State Lens' (*Verfassungsblog*, 20 March 2024) <<https://verfassungsblog.de/eu-law-through-the-state-lens/>> accessed 26 November 2024.

<sup>34</sup> Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 The International and Comparative Law Quarterly 873, 906.

<sup>35</sup> See the various indicators identified by Nicole Questiaux, 'Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency' (United Nations – Economic and Social Council – Commission on Human Rights – Sub-Commission on Prevention of Discrimination and Protection of Minorities 1982) E/CN.4/Sub.2/1982/15 <<https://digitallibrary.un.org/record/36782>> accessed 26 November 2024; Valentina Faggiani, 'Los Estados de Excepción. Perspectivas Desde El Derecho Constitucional Europeo' (2012) 9 Revista de Derecho Constitucional Europeo 181,

in particular on state of emergency clauses and considering the best practices recommended by the Venice Commission.<sup>36</sup> These indicators essentially concern how the notion of emergency is defined ('ontology of emergency' or '*jus ad tumultum*') and how an emergency is handled by the legal order once it manifests itself ('phenomenology of emergency' or '*jus in tumultu*').<sup>37</sup> Largely applying the model developed by Bjørnskov and Voigt,<sup>38</sup> the analysis carried out in this article focuses on six fundamental components of state of emergency clauses. These are (i) the grounds to invoke the emergency, the power to (ii) declare and (iii) end the emergency, (iv) the exercise of emergency powers, (v) their content and function, and (vi) control mechanisms.

## 2.2 The grounds to invoke a state of emergency

Identifying the grounds that may trigger a state of emergency means defining what a certain legal order understands as 'emergency'. Across EU Member States, the emergency definitional framework varies widely. The vast majority of formal emergency laws refer at least to security threats of external and internal origin. These are typically war<sup>39</sup> and internal upheavals.<sup>40</sup> Many Member States also explicitly include calamities and natural disasters within the notion of emergency.<sup>41</sup> Some national emergency laws, moreover, refer to threats to fundamental values such as democracy, the rule of law, and human rights,<sup>42</sup> or threats to

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198–223; and Christian Bjørnskov and Stefan Voigt, 'The Architecture of Emergency Constitutions' (2018) 16 *International Journal of Constitutional Law* 101.

<sup>36</sup> Alivizatos and others (n 28).

<sup>37</sup> Guillaume Tusseau, 'The Concept of Constitutional Emergency Power: A Theoretical and Comparative Approach' (2011) 97 *Archives for Philosophy of Law and Social Philosophy* 498, 503 and 512; and Evan J Criddle and Evan Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law' (2012) 34 *Human Rights Quarterly* 39, 49.

<sup>38</sup> Bjørnskov and Voigt (n 35).

<sup>39</sup> Article 117 Croatian Constitution; Article 36 French Constitution in conjunction with Article L 2121-1 of the French Defence Code; Article 115(a) German Basic Law; Article 48(1) Greek Constitution; Article 48(1)(a) Hungarian Constitution; Article 78 Italian Constitution; Article 62 Latvian Constitution; Article 229 Polish Constitution; Article 32(1) *Ley Orgánica 4/1981* (Spain); and Chapter 15 Swedish Instrument of Government.

<sup>40</sup> Article 36 French Constitution in conjunction with Article L 2121-1 of the French Defence Code; Article 48(1)(b) Hungarian Constitution; Article 28(3)(3) Irish Constitution; Article 62 Latvian Constitution; Article 230(1) Polish Constitution; and Article 13(1) *Ley Orgánica 4/1981* (Spain).

<sup>41</sup> Article 5(1) Constitutional Act of 22 April 1998 No 110/1998 (Czech Republic); Article 117 Croatian Constitution; Article 35 German Basic Law; Article 53 Hungarian Constitution; Article 3 Government Emergency Ordinance 1/1999, as approved and amended by Law No 453/2004 (Romania); and Article 4(1) *Ley Orgánica 4/1981* (Spain).

<sup>42</sup> Article 91(1) German Basic Law; Article 11(1) *Par ārkārtējo situāciju un izņēmuma stāvokli* (Latvia); Article 144 Lithuanian Constitution; Article 8(1) *Lei Orgânica nº 1/2012* (Portugal); and Article 13(1) *Ley Orgánica 4/1981* (Spain).



public health,<sup>43</sup> whereas less common are references to threats to the environment,<sup>44</sup> the economy,<sup>45</sup> and property.<sup>46</sup> Alternatively, rather than focusing on the event from which a threat stems or the interest which is threatened, some national emergency laws adopt functional-structural definitions considering the inherent characteristics of the threat, such as its exceptionality, seriousness, suddenness, and urgency.<sup>47</sup> Finally, some Member States' laws attach legal relevance to the territorial extent of an emergency. For instance, the German Basic Law provides for two different states of internal emergency depending on whether one or more *Länder* are affected.<sup>48</sup>

Whilst in all Member States formal emergency laws envisaging a state of emergency provide (at least minimal) definitional elements qualifying the notion of emergency, this is not the case for the proposed Article 222(1) TFEU. In light of this provision's formulation, two observations concerning the grounds to invoke Article 222(1) TFEU can be drawn. First, following a literal interpretation, Article 222(1) TFEU could be triggered regardless of whether the emergency affects one or more Member States. This is line with most of the Member States' formal emergency laws which foresee that an emergency may threaten just part of their territory and affect the whole or part of their population.<sup>49</sup> Second, fol-

<sup>43</sup> Article 5(1) Constitutional Act of 22 April 1998 No 110/1998 (Czech Republic); Article 2(1) 2017 Emergency Act (Estonia); Article 3 *Valmiuslaki/beredskapslagen*, Act No 1552/2011 (Finland); Article 4(2) *Par ārkārtējo situāciju un izņēmuma stāvokli* (Latvia); Article 48 Lithuanian Constitution; Article 5(1) Constitutional Act No 227/2002 Coll (Slovakia); and Article 4 *Ley Orgánica 4/1981* (Spain). In that respect, 17 Member States have a constitutional emergency clause flexible enough to cover pandemics, as highlighted by Maria Diaz Crego and Silvia Kotanidis, 'States of Emergency in Response to the Coronavirus Crisis: Normative Response and Parliamentary Oversight in EU Member States during the First Wave of the Pandemic' (European Parliament Research Service 2020) Study PE 659.385 1.

<sup>44</sup> Article 4(2) Constitutional Act No 227/2002 Coll (Slovakia).

<sup>45</sup> Article 3(3) *Valmiuslaki/beredskapslagen*, Act No 1552/2011 (Finland). See however Anna Jonsson Cornell and Janne Salminen, 'Emergency Laws in Comparative Constitutional Law: The Case of Sweden and Finland' (2018) 19 *German Law Journal* 219, 246, noting that 'purely economic crises do not qualify as emergencies' under Finnish constitutional law.

<sup>46</sup> Article 5(1) Constitutional Act of 22 April 1998 No 110/1998 (Czech Republic); Article 48(1)(b) Hungarian Constitution; and Article 5(1) Constitutional Act No 227/2002 Coll (Slovakia).

<sup>47</sup> Such functional-structural definitions seem to be provided more often in clauses empowering the executive with ad hoc emergency law-making powers rather than in state of emergency clauses. See Article 18(3) Austrian Constitution; Article 44(1) Greek Constitution; Article 77(2) Italian Constitution; and Article 86 Spanish Constitution.

<sup>48</sup> Article 35(2) and (3) German Basic Law.

<sup>49</sup> Article 84(12) Bulgarian Constitution; Article 230(1) Polish Constitution; Article 19(2) Portuguese Constitution; Article 93(1) Romanian Constitution; and Article 4 *Ley Orgánica 4/1981* (Spain). Evidently, this does not apply to the state of war: see, for instance, Article 2(2) of the Constitutional Act No 110/1998 Coll (Czech Republic), establishing that '[w]hile

lowing a *lex specialis* reasoning, Article 222(1) TFEU, like national state of emergency clauses, would only act as an *ultima ratio* provision and would not be applicable if the emergency at stake is covered by a more specific emergency clause.

### 2.3 The power to declare an emergency

Across EU Member States, the power to declare an emergency is assigned either to the parliament,<sup>50</sup> the government,<sup>51</sup> or the head of state.<sup>52</sup> Where the power to declare is assigned to governments or heads of state, parliaments retain nonetheless important prerogatives, typically in the form of *ex ante* authorisation<sup>53</sup> or *ex post* ratification<sup>54</sup> of the declaration.

In this respect, the proposed Article 222(1) TFEU can be said to reflect Member States' legal traditions. It allows the EU's co-legislators, that is to say, the Parliament and the Council, to declare the existence of an emergency by means of a non-legislative procedure. The right of initiative is assigned alternatively to the Parliament and the Commission. Overall, Article 222(1) TFEU would thus create a significant concentration of powers in the hands of the Parliament.<sup>55</sup> Whilst this carries the typical risks associated with subjecting emergency declarations to democratic deliberation, namely long delays in emergency management and 'potentially fatal false negatives',<sup>56</sup> it is arguably consistent with the general approach followed by Member States' formal emergency laws. Importantly, moreover, entrusting the legislator with the power to declare

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the state of emergency and the state of national threat can be declared for the entire territory of the state or any part thereof, belligerency is always declared for the entire territory of the state only'.

<sup>50</sup> Article 7(1) Constitutional Act No 110/1998 Coll (Czech Republic); Articles 51(1) and 51/A(1) Hungarian Constitution; Article 28(3)(3) Irish Constitution; and Article 116(4) Spanish Constitution.

<sup>51</sup> Article 183(1) Cypriot Constitution; Article 5(1) Constitutional Act No 110/1998 Coll (Czech Republic); Article 6(1) *Valmiuslaki/beredskapslagen*, Act No 1552/2011 (Finland); Article 36(1) French Constitution; Articles 52(1) and 53(1) Hungarian Constitution; Article 62 Latvian Constitution; Article 232 Polish Constitution; Article 5(1) Constitutional Act No 227/2002 Coll (Slovakia); and Article 116(2) Spanish Constitution.

<sup>52</sup> Article 167(1) Belgian Constitution; Article 16(1) French Constitution; Article 87(9) Italian Constitution; Article 103(1) Dutch Constitution; Article 229 and 230(1) Polish Constitution; Article 134(e) Portuguese Constitution; Article 93(1) Romanian Constitution; and Articles 3(1) and 4(1) Constitutional Act No 227/2002 Coll (Slovakia).

<sup>53</sup> Article 138(1) Portuguese Constitution.

<sup>54</sup> Article 93(1) Romanian Constitution; and Article 231 Polish Constitution.

<sup>55</sup> In contrast, see Article 116(4) of the Spanish Constitution, which allows the parliament to act only exclusively at the proposal of the government.

<sup>56</sup> Kreuder-Sonnen (n 14) 133.

the emergency is in line with the best practices recommended by the Venice Commission.<sup>57</sup>

#### **2.4 The power to declare the end of an emergency**

Rather than assigning the power to declare the end of an emergency to a specific institution, the formal emergency laws of most Member States provide that states of emergency automatically expire after a certain period of time. For this purpose, they require the inclusion of a 'sunset clause' in the declaration of emergency. In addition, formal emergency laws often set duration limits that cannot be exceeded by sunset clauses.<sup>58</sup> Some formal emergency laws, moreover, envisage a maximum period of validity not only for the state of emergency but also for the specific emergency measures that may be adopted during the state of emergency itself.<sup>59</sup> Importantly, the maximum duration of emergency regimes tends to be longer where parliaments have had a decisive role in the declaration of emergency, and vice versa.<sup>60</sup> Finally, once expired, states of emergency can normally be prolonged, subject to certain safeguards such as parliamentary authorisations<sup>61</sup> and overall time limits for prolongation.<sup>62</sup> In this regard, unlike the constitutions of some non-EU countries,<sup>63</sup> the national emergency laws of EU Member States do not incorporate mechanisms such as Ackermann's 'supermajoritarian escalator'. The latter would be a clause providing for increasingly high voting thresholds for successive renewals of states of emergency.<sup>64</sup>

The proposed EU state of emergency clause allows the Parliament and the Council to revoke the state of emergency by a simple majority at

<sup>57</sup> Alivizatos and others (n 28) paras 36 and 80–84.

<sup>58</sup> For instance, the state of siege and state of urgency in France last a maximum of 12 days (Article 2(3) *Loi n° 55-385*), whereas a state of alarm in Spain lasts a maximum of 15 days (Article 116(2) Spanish Constitution).

<sup>59</sup> Article 115k(2) and (3) German Basic Law; Article 48(1) Greek Constitution; Article 50(5) Hungarian Constitution; and Article 48(3) Luxembourgish Constitution.

<sup>60</sup> In Spain, the state of alarm, which is declared by the government, lasts only 15 days, whereas a state of exception, which requires the parliament's authorisation, may last up to 30 days, and a state of siege, which is declared by the parliament, does not have a constitutionally determined time limit; in Poland, a state of emergency, which is declared by the president but can be annulled by the parliament, may last up to 90 days, whilst a state of natural disaster, which is declared by the Council of Ministers, has a maximum duration of 30 days.

<sup>61</sup> Article 183(6) Cypriot Constitution; Article 36(2) French Constitution; Article 48(3) Greek Constitution; Article 53(3) Hungarian Constitution; Article 47(3)(c) Maltese Constitution; Article 232 Polish Constitution; and Article 116(2) Spanish Constitution.

<sup>62</sup> Article 48(3) Luxembourgish Constitution; and Article 230 Polish Constitution.

<sup>63</sup> See, for instance, Article 37(2)(b) of the South African Constitution.

<sup>64</sup> Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *The Yale Law Journal* 1029.

any time.<sup>65</sup> From a comparative perspective, the proposed Article 222(1) TFEU requires the Parliament and the Council to set a time limit for a state of emergency but, unlike most Member States' emergency laws, does not specify a maximum duration for states of emergencies or for the ad hoc emergency measures adopted by the Commission. As is the case with a minority of Member States' emergency laws,<sup>66</sup> their duration would therefore be left to the discretion of the institutions. This solution complies with the best practices recommended by the Venice Commission, which only require that a specific time limit be included in the declaration of emergency but do not prescribe the establishment of maximum time limits at constitutional level.<sup>67</sup> Finally, disregarding scholars' recommendations<sup>68</sup> but following the example of Member States' laws, the proposed Article 222(1) TFEU does not include a supermajoritarian escalator, allowing instead the renewal of the EU state of emergency through a procedure subject to the same voting thresholds required for the declaration of emergency in the first place.

## 2.5 Who exercises emergency powers

In EU Member States, for reasons of efficiency,<sup>69</sup> the exercise of emergency powers is typically a prerogative of the executive. The role of the executive is however not always identical, since EU countries' formal emergency laws rely on different schemes of 'Madisonian checks and balances'.<sup>70</sup> This means that the exercise of emergency powers is subject, to various degrees, to institutional interaction between the executive and the legislator. Such a dialectic might be characterised by a strong concentration of powers in the hands of the executive, following the 'presidential' model envisaged by Article 16 of the French Constitution. Alternatively, one can speak of a 'parliamentary' model for countries, such as Germany, where emergency law assigns a particularly active role to the national parliament.<sup>71</sup>

<sup>65</sup> Somewhat similar clauses can be found in the German Basic Law, which, in states of internal emergency and states of tension, assigns the right to rescind at any time any emergency measure to the *Bundesrat* and the *Bundestag*, respectively (see Articles 35(3) and 80a(2)).

<sup>66</sup> For similar mechanisms in Member States' emergency laws, see Article 16 French Constitution; Article 103(3) Dutch Constitution; and Article 116(4) Spanish Constitution.

<sup>67</sup> Alivizatos and others (n 28) para 78.

<sup>68</sup> Kreuder-Sonnen (n 14) 134 and Fernández Arribas (n 12) 15.

<sup>69</sup> Zwitter (n 24) 100.

<sup>70</sup> Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2021) 19 *International Journal of Constitutional Law* 1498, 1502.

<sup>71</sup> Faggiani (n 35) 198.

The state of emergency designed in the proposed Article 222(1) TFEU would arguably reflect an intermediate approach. On the one hand, it would allow the legislator to set certain limits to the granting of emergency powers to the Commission, requiring the Parliament and the Council to determine the scope of the powers, the arrangements governing their use, and their period of application. On the other hand, from a comparative perspective, it would envisage less strict substantive and procedural conditions than those required by some national laws: as for the substantive conditions, one can think of the obligation for the legislator to define the territorial extension of a state of emergency, foreseen by Article 116(4) of the Spanish Constitution but not by the proposed Article 222(1) TFEU; with regard to the procedural conditions, some Member States' formal emergency laws, like the Croatian Constitution,<sup>72</sup> provide for higher voting requirements than the proposed Article 222(1) TFEU. In addition, from an internal perspective, the limits to the granting of powers provided for in Article 222(1) TFEU would be less stringent than those set by the main paradigm of delegation under EU law, namely Article 290 TFEU, which requires legislative acts to define the objectives, content, scope, and duration of the delegation of powers.<sup>73</sup>

## **2.6 Content and function of emergency powers**

### **2.6.1 Content**

Emergency powers have two main types of content. First, they may restrict fundamental rights and freedoms. Across EU Member States, formal emergency laws list either the rights and freedom that may be restricted (positive list approach)<sup>74</sup> or those that may not be restricted (negative list approach).<sup>75</sup> Since all EU Member States are parties to the European Convention on Human Rights (hereinafter: ECHR), fundamental rights limitations during emergencies are in principle also subject to Article 15 ECHR, save for reservations made at the ratification.<sup>76</sup> Second, emergency powers impact the internal division of powers amongst

<sup>72</sup> Article 17(1) Croatian Constitution.

<sup>73</sup> Merijn Chamon, 'The EU's Dormant Economic Policy Competence: Reliance on Article 122 TFEU and Parliament's Misguided Proposal for Treaty Revision' (2024) 49 *European Law Review* 166, 184.

<sup>74</sup> Article 183(2) Cypriot Constitution; Article 48(1) Greek Constitution; Article 145 Lithuanian Constitution; Article 103(2) Dutch Constitution; Article 233(3) Polish Constitution; and Article 55 Spanish Constitution.

<sup>75</sup> Article 57(3) Bulgarian Constitution; Article 17(3) Croatian Constitution; Article 130 Estonian Constitution; Article 54(1) Hungarian Constitution; Article 233(1) Polish Constitution; Article 19(6) Portuguese Constitution; and Article 16(2) Slovenian Constitution. See Gross and Ni Aoláin (n 26) 58 and Questiaux (n 35) para 83.

<sup>76</sup> On this point, see Faggiani (n 35) 223–225.

institutions. From a horizontal perspective, formal emergency laws may exceptionally confer power to adopt acts with the force of law to the executive. When the scope of these acts is not pre-determined by the legislator,<sup>77</sup> it is typically subject to ex post parliamentary ratification.<sup>78</sup> In this respect, some formal emergency laws lay down a taxonomy of emergency measures that may be adopted,<sup>79</sup> whereas others follow a *pleins pouvoirs* approach, setting as the only limit to emergency measures the general principles governing emergency law, including necessity and proportionality.<sup>80</sup> From a vertical perspective, federalism and decentralisation are often (temporary) ‘victims’<sup>81</sup> of emergency law, in that the normal division of competences between the central authorities and local entities may be altered,<sup>82</sup> typically in favour of the former.<sup>83</sup>

The formulation of the proposed Article 222(1) TFEU is, as will be extensively discussed below,<sup>84</sup> quite minimalistic. In particular, once adopted, this provision would allow the Commission to exercise ‘extraordinary powers, including those to enable it to mobilise all necessary instruments’. Two observations can be drawn in this regard. First, whereas the reference to ‘all necessary instruments’ recalls a traditional *pleins pouvoirs* approach, the new clause would arguably be, compared to Member States’ emergency laws, unprecedented in its broadness. Indeed, it appears from the choice of the word ‘including’ that such necessary instruments would not exhaust the toolkit at the disposal of the Commission.<sup>85</sup> In other words, a literal reading suggests that the Commission’s emergency powers would not be limited to those strictly necessary to overcome the emergency. Second, it is not clear to what extent the extraordinary powers assigned to the Commission could derogate from EU primary law. With respect to fundamental rights, in the absence of either

<sup>77</sup> Article 105 Belgian Constitution; Article 50(3) Hungarian Constitution; and Article 116(4) Spanish Constitution.

<sup>78</sup> Article 48(5) Greek Constitution; Article 234(1) Polish Constitution; and Article 108(3) Slovenian Constitution.

<sup>79</sup> Article 11 *Ley Orgánica 4/1981* (Spain).

<sup>80</sup> Article 16 French Constitution; Article 78 Italian Constitution; and Article 28(3)(3) Irish Constitution.

<sup>81</sup> Gross and Ni Aoláin (n 26) 60.

<sup>82</sup> Article 103(2) Dutch Constitution. For a different approach, see Article 19(7) of the Portuguese Constitution.

<sup>83</sup> Articles 91(2) and 115c(1) German Basic Law.

<sup>84</sup> See Section 3.

<sup>85</sup> Whilst this wording may recall the current Article 222(1) TFEU ([t]he Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States), the latter is evidently narrower in that it refers to the instruments *at the disposal* of the EU, that is, those made available to the EU by the ordinary Treaty framework.



a list of (non-)derogable rights<sup>86</sup> in Article 222(1) TFEU or any emergency derogation clause in the EU Charter of Fundamental Rights, it remains obscure whether and to what extent the Commission's extraordinary measures would be exceptionally allowed to interfere with collective and individual rights.<sup>87</sup> In the same vein, it is not clear whether such measures could derogate from the EU's own constitutional identity.<sup>88</sup> Moreover, the formulation of Article 222(1) TFEU raises the question of how triggering this clause could alter the horizontal and vertical division of powers. This question will be specifically addressed below.<sup>89</sup>

### 2.6.2 Function

Emergency powers can legitimately be exercised only for the purpose of overcoming an emergency and restoring normalcy. This conception of emergency powers dates back to the Roman dictatorship, where the consuls could hand emergency powers over to the dictator only *rei gerendae causa*, that is, to temporarily deal with the emergency with a view to restoring the *status quo ante*.<sup>90</sup> Following the firm rejection of Carl Schmitt's sovereign dictatorship, which instead envisaged emergency powers as an expression of *pouvoir constituant*,<sup>91</sup> such a conservative function of emergency powers is nowadays broadly accepted<sup>92</sup> and made explicit in several constitutions.<sup>93</sup> It brings three corollaries, that are amply reflected in Member States' formal emergency laws. First, emergency powers

<sup>86</sup> A negative list approach is recommended by Kreuder-Sonnen (n 14) 135 and Fernández Arribas (n 12) 17.

<sup>87</sup> Chamon (n 73) 184.

<sup>88</sup> On the EU's constitutional identity, see Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para 127, and the comment by Matteo Bonelli, 'Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation' (2022) 7 *European Papers* 507, 518–519.

<sup>89</sup> See Section 3.3.

<sup>90</sup> Ferejohn and Pasquino (n 30) 212. It is precisely on the basis of the Roman dictatorship that Machiavelli also shaped its (conservative) emergency model: see Niccolò Machiavelli, *Discourses on Livy* (Harvey C Mansfield and Nathan Tarcov trs, The University of Chicago Press 1996) 74.

<sup>91</sup> On this point, see Giorgio Agamben, *Stato Di Eccezione* (Bollati Boringhieri 2003) 45–46.

<sup>92</sup> See, *ex multis*, Giuseppe Marazzita, *L'emergenza Costituzionale: Definizioni e Modelli* (Giuffrè 2003) 251; Ferejohn and Pasquino (n 30) 210; Gross and Ni Aoláin (n 26) 21 and 174; Victor Vridar Ramraj, 'The Constitutional Politics of Emergency Powers' in Mark V Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023) 164; and Pavel Ond ejek and Filip Horák, 'Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures' (2024) 20 *European Constitutional Law Review* 27, 31. This is also referred to as the 'principle of purpose limitation' by Szenté (n 28).

<sup>93</sup> Article 48(5) Greek Constitution; Article 228(5) Polish Constitution; and Article 19(4) Portuguese Constitution.

must always be temporary.<sup>94</sup> Second, their exercise must be subject to the principles of necessity and proportionality.<sup>95</sup> Third, the constitutional and institutional framework cannot be permanently changed by means of emergency powers. The latter principle, which has been called ‘institutional continuity’,<sup>96</sup> typically materialises through clauses that prohibit, during emergencies, the modification of the constitution,<sup>97</sup> the dissolution of the parliament,<sup>98</sup> and the amendment of formal emergency law.<sup>99</sup>

Compared to national emergency laws, the conservative function of the proposed EU state of emergency clause is less prominent. First, whilst the emergency powers granted to the Commission would always be temporary, their length would be left to the unlimited discretion of the Parliament and the Council, since the new Treaty clause would envisage no maximum duration. Second, although every action of EU institutions must always respect the principle of proportionality,<sup>100</sup> as explained above,<sup>101</sup> the regrettable formulation of the proposed clause seems to suggest that the EU could adopt measures that go beyond what is strictly necessary to overcome the emergency.<sup>102</sup> Third, in the new Article 222(1) TFEU there would be no provisions recalling those constitutional clauses that aim at safeguarding institutional continuity. For instance, one could have thought of a clause expressly prohibiting the use of emergency powers outside a factual emergency or enshrining an obligation for EU

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<sup>94</sup> See above Section 2.4.

<sup>95</sup> Article 17(2) Croatian Constitution; Article 4(1) *Valmiuslaki/beredskapslagen*, Act No 1552/2011 (Finland); Article 48(2) Luxembourgish Constitution; Article 228(5) Polish Constitution; Article 19(4) and (8) Portuguese Constitution; Article 5(2) Constitutional Act No 227/2002 Coll (Slovakia); Article 16(1) Slovenian Constitution; and Chapter 15, Article 5(1) Swedish Instrument of Government.

<sup>96</sup> Faggiani (n 35) 207.

<sup>97</sup> Article 115e(2) German Basic Law; Article 147(2) Lithuanian Constitution; Article 228(6) Polish Constitution; Article 289 Portuguese Constitution; Article 152(3) Romanian Constitution; and Article 169 Spanish Constitution.

<sup>98</sup> Article 64(2) Bulgarian Constitution; Article 131(1) Estonian Constitution; Article 16(5) French Constitution; Article 115h(3) German Basic Law; Article 48(7) Hungarian Constitution; Article 48(5) Luxembourgish Constitution; Article 228(7) Polish Constitution; Article 172(1) Portuguese Constitution; Article 89(3) Romanian Constitution; and Article 116(5) Spanish Constitution.

<sup>99</sup> Article 228(6) Polish Constitution.

<sup>100</sup> Article 5(4) TEU.

<sup>101</sup> See above Section 2.6.1.

<sup>102</sup> On this point, see instead the more convincing proposal for an EU state of emergency clause put forward by Fernández Arribas (n 12) 20. Not only does that author observe that the clause should exclusively allow the adoption of ‘appropriate measures to the extent strictly required by the exigencies of the situation’, but she also purposefully chooses the verb ‘react’ instead of ‘act’ in relation to EU emergency action ‘to emphasise the preservative character of the State of Emergency, in line with the principles of the constitutional [accommodation] model’.

institutions to declare the end of the state of emergency once the factual emergency is over.<sup>103</sup> In the same vein, the new clause would not explicitly prohibit the establishment of permanent mechanisms, bodies, or agencies by means of emergency powers. This is remarkable when considering the judgment in *Pringle*, where the Court of Justice of the European Union (hereinafter: the Court) held that the emergency clause of Article 122(2) TFEU could not serve as a legal basis for the establishment of a permanent mechanism like the European Stability Mechanism.<sup>104</sup>

## 2.7 Control mechanisms

Typical control mechanisms over the exercise of emergency powers are parliamentary oversight and judicial review. As apparent from the above,<sup>105</sup> across EU Member States, parliaments often play a key role in deciding upon the declaration and duration of emergency regimes, as well as limiting the exercise of emergency powers.

Article 222(1) TFEU would reflect this approach, allowing the Parliament and the Council to review their declaration at any time.<sup>106</sup> Moreover, nothing would prevent the EU co-legislators from including a 'review clause' in the declaration of emergency. Such a clause could, for instance, oblige the Commission to submit a report to the Parliament in order to allow the latter to scrutinise the exercise of emergency powers.<sup>107</sup> Furthermore, under Article 226 TFEU, and according to the best practices recommended in the literature,<sup>108</sup> the Parliament could always create a temporary committee of inquiry to investigate the potential misuse of emergency powers.

<sup>103</sup> For a similar clause, see Article 54(3) of the Hungarian Constitution.

<sup>104</sup> Case C-370/12 *Pringle* ECLI:EU:C:2012:756, para 65. In the literature, the Court's judgment is often criticised for it seems to ignore that the object of Article 122(2) TFEU is financial assistance. Therefore, the latter must be temporary in the sense that it must cease once the emergency situation is overcome, whereas the permanent nature of the mechanism that is activated to provide assistance in emergency cases is irrelevant. See Vestert Borger, 'EU Financial Assistance' in Fabian Amtenbrink, Christoph Herrmann and René Repasi (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 976; Chris Koedooder, 'The *Pringle* Judgment: Economic and/or Monetary Union?' 37 *Fordham International Law Journal* 111, 141. In fact, a permanent mechanism has the advantage of ensuring that resources and technical decision-making rules are already in place once the emergency occurs, improving the EU's preparedness and the effectiveness of its emergency response.

<sup>105</sup> See above Sections 2.3 and 2.4.

<sup>106</sup> Similarly, see Article 162(b) of the Portuguese Constitution.

<sup>107</sup> On review clauses, see Sean Molloy, Maria Mousmouti and Franklin De Vrieze, 'Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality' (Westminster Foundation for Democracy 2022) 6.

<sup>108</sup> Mihail Chiru, 'Parliamentary Oversight of Governments' Response to the COVID-19 Pandemic: Literature Review' (European Parliament Research Service 2023) Study PE 740.217 50.

Regarding judicial review, Member States' emergency laws explicitly reaffirm and protect the role of courts within emergency contexts. For instance, some constitutions provide that the activity of constitutional courts cannot be suspended during emergencies.<sup>109</sup> In the same vein, in accordance with the best practices recommended by the Venice Commission,<sup>110</sup> some constitutions explicitly<sup>111</sup> provide for centralised constitutionality review of the declaration of emergency. Concerning the damage suffered by individuals due to emergency measures, several formal emergency laws assign the related individual claims to the ordinary jurisdictional regime.<sup>112</sup> Finally, most constitutions do not allow for the establishment of extraordinary courts.<sup>113</sup>

The proposed Article 222(1) TFEU would not include any reference to the adjudicating role of the Court.<sup>114</sup> This entails that emergency measures adopted by the Commission would be subject to the ordinary judicial guarantees enshrined in the Treaties. Yet, given the absence of a definition of emergency and the broadness of the notion of 'extraordinary powers', it remains difficult to guess against which yardstick the CJEU could test the substantive legality of emergency declarations and emergency measures respectively. This will be further discussed below.<sup>115</sup>

### **3 The minimalistic choice of the Parliament and its potential implications for EU constitutional law**

With the proposed Article 222(1) TFEU, the Parliament would opt to have the EU's formal emergency law regulated at Treaty level. Due to the rigid character of constitutions, the choice to have an emergency

<sup>109</sup> Article 115g German Basic Law and Article 52(2) Hungarian Constitution.

<sup>110</sup> Alivizatos and others (n 28) para 88.

<sup>111</sup> Article 129(6) Slovakian Constitution. In some Member States, this is considered as implicitly foreseen by the Constitutional framework. See, for Italy, Marazzita (n 92) 305–306 and, for Spain, Faggiani (n 35) 217–218.

<sup>112</sup> See, for instance, Article 20(1) *Par ārkārtējo situāciju un izņēmuma stāvokli* (Latvia); Articles 6 and 22 *Lei Orgânica nº 1/2012* (Portugal); and Article 3(1) *Ley Orgánica 4/1981* (Spain).

<sup>113</sup> Article 146 Belgian Constitution; Article 119(3) Bulgarian Constitution; Article 61 Danish Constitution; Article 148 Estonian Constitution; Article 102(2) Italian Constitution; Article 126(4) Romanian Constitution; Article 126(2) Slovenian Constitution; and Article 117(6) Spanish Constitution. Some exceptions are instead Article 48(1) of the Greek Constitution and Article 111(3) of the Lithuanian Constitution. Finally, some constitutions foresee military jurisdiction in time of war. See Article 84 Austrian Constitution; Article 157 Belgian Constitution; Article 38(4)(1) Irish Constitution; Article 103(3) Italian Constitution; and Article 82 Latvian Constitution.

<sup>114</sup> Such a reference is instead recommended by Kreuder-Sonnen (n 14) 136.

<sup>115</sup> See Section 3.2.

clause at constitutional level helps shield the rule of law<sup>116</sup> and legal certainty<sup>117</sup> from the risks associated with 'legislative myopia', that is, the short-sighted choices often accompanying the rush to legislate which is typical of emergency scenarios.<sup>118</sup> In the Parliament's proposal, the price paid for this choice is the concentration of (too) many legally relevant features in one, relatively brief, clause.

Alternatively, the Parliament's proposal could have provided for a legal basis allowing the co-legislators to determine, within constitutional limits to be set in Article 222(1) TFEU itself, detailed institutional arrangements concerning the new emergency regime. This would have been in line with the best practices recommended by the Venice Commission<sup>119</sup> and the formal emergency laws of various Member States.<sup>120</sup> Moreover, the Parliament could have looked to the model offered by Article 291(3) TFEU which establishes a legal basis allowing the Parliament and the Council to determine the arrangements for the functioning of comitology in an 'organic law' ranking above 'normal' legislation.<sup>121</sup> To be clear, this is not to say that formal emergency law cannot be exhaustively regulated at constitutional level. In fact, several Member States do so, devoting either specific chapters of their constitutions<sup>122</sup> or entire constitutional acts<sup>123</sup> to emergency law. Yet, at EU level, such constitutional acts could be compared, in terms of form and content, to the Protocols attached to the Treaties,<sup>124</sup> but certainly not to one brief and generic clause such as the one contained in the Parliament's proposal. The Parliament's attempt to squeeze the EU's state of emergency clause into such a provision seems thus excessively minimalistic. From a constitutional

<sup>116</sup> Ernst-Wolfgang Böckenförde, 'The Repressed State of Emergency' in Mirjam Künkler and Tine Stein (eds), Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings* (Oxford University Press 2017).

<sup>117</sup> Alivizatos and others (n 28) para 15; and Pablo Martín Rodríguez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) 12 *European Constitutional Law Review* 265.

<sup>118</sup> Gross and Ní Aoláin (n 26) 68. On this issue in the EU legal order, see Auer and Scicluna (n 14) 27–28.

<sup>119</sup> Alivizatos and others (n 28) para 15.

<sup>120</sup> See, for instance, the Spanish *Ley Orgánica 4/1981* and the Portuguese *Lei Orgânica nº 1/2012*.

<sup>121</sup> Merijn Chamon, *The European Parliament and Delegated Legislation: An Institutional Balance Perspective* (Hart 2022) 154–157.

<sup>122</sup> Articles 48–54 ('Special Legal Orders') Hungarian Constitution; Chapter XI of the Polish Constitution; and Chapter 15 of the Swedish Instrument of Government. Instead, for a 'diffuse' approach, envisaging various emergency provisions spread across the Constitution, see Articles 35, 80a, 91, and 115a–115i of the German Basic Law.

<sup>123</sup> Constitutional Act of 22 April 1998 No 110/1998 (Czech Republic) and Constitutional Act No 227/2002 Coll (Slovakia).

<sup>124</sup> Protocols are part of EU primary law.

perspective, this causes crucial uncertainties concerning the Treaties' systematicity, judicial review, and the division of competences.

### **3.1 The systematicity of emergency clauses as a key constitutional issue**

For purposes of systematicity, the adoption of the proposed Article 222(1) TFEU would require framing this provision within the existing landscape of emergency clauses. Chamon has already observed that the amendment of Article 222 TFEU would result in an 'odd constellation' where paragraph (1) would act as *lex generalis* vis-à-vis the emergency clauses included in the other paragraphs.<sup>125</sup> In the same vein, it seems reasonable to assume that this provision would act as *lex generalis* also with regard to other emergency legal bases, such as Article 78(3) TFEU.<sup>126</sup> When considering the distinction drawn above between emergency legal bases and emergency derogation clauses,<sup>127</sup> however, one notes that the proposed text does not clarify what the relationship would be between Article 222(1) TFEU and derogation clauses, and in particular Article 347 TFEU, which allows the Member States to derogate from EU law 'in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war'.<sup>128</sup> Defining this systematic relationship is of great importance to understand the legal limits to the operationalisation of Article 222(1) TFEU and the latter's implications for the trajectory of EU integration.

#### **3.1.1 The operationalisation of Article 222(1) TFEU vis-à-vis emergency derogation clauses**

States of emergency are by definition *ultima ratio* solutions, in that they presuppose the exceptionality of the threat, understood as the impossibility to overcome it by means of the other available legal tools.<sup>129</sup>

<sup>125</sup> Chamon (n 73) 184. This author also discusses the potential implications deriving from the choice to incorporate this emergency clause within Article 222 TFEU, which belongs to Part Five of the TFEU and is devoted to the EU's external action.

<sup>126</sup> See above Section 2.2.

<sup>127</sup> See Section 2.1.

<sup>128</sup> On Article 347 TFEU, see Panos Koutrakos, 'Is Article 297 EC a "Reserve of Sovereignty"?' (2000) 37 Common Market Law Review 1339; and 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).

<sup>129</sup> Alivizatos and others (n 28) para 17; Bogdan Aurescu and others, 'Report on the Democratic Control of the Armed Force' (Venice Commission 2008) Study no 389 / 2006 CDL-AD(2008)004 para 247; Ergun Özbudun and Mehmet Turhan, 'Emergency Powers' (Venice Commission 1995) CDL-STD(1995) 012 30; and Pieter van Dijk, Finola Flanagan



Like every state of emergency clause, Article 222(1) TFEU would act as an exceptional provision to be activated when all the other Treaty tools do not suffice and, therefore, as *lex generalis* vis-à-vis the other emergency clauses. At the same time, the Court has already acknowledged the 'wholly exceptional'<sup>130</sup> nature of Article 347 TFEU, in that (also) the latter is an *ultima ratio* provision meant to be triggered in those exceptionally serious circumstances where no other Treaty provision allows a threat to public order and security in a Member State to be managed.<sup>131</sup> This has even led one author to consider Article 347 TFEU as the actual EU state of emergency clause.<sup>132</sup>

Not clarifying the relationship between the proposed state of emergency clause and derogation clauses means leaving unanswered the question as to what provision would act as the ultimate safety valve in the system designed by the Treaties. In practice, this corresponds to the question whether a Member State could deviate, under a derogation clause and in particular Article 347 TFEU, from the Commission's emergency measures adopted on the basis of the new Article 222(1) TFEU. Over the past decades, various AGs<sup>133</sup> and commentators<sup>134</sup> have insisted that Article 347 TFEU would allow for derogation from *all* Treaty rules and *all* measures adopted on their basis. Yet, in *Kadi*, the Court made clear that Article 347 TFEU cannot be used to derogate from EU fundamental values,<sup>135</sup> now enshrined in Article 2 TEU. The proposed Article 222(1) TFEU would replace Article 122 TFEU, which is informed, at least in its first paragraph, by the notion of solidarity between the Member States; and it would, at the same time, 'broaden the solidarity clause'<sup>136</sup> already enshrined in the current Article 222 TFEU. The new state of emergency clause could thus itself be seen as an expression of solidarity

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and Jeffrey L Jowell, 'Opinion on the Protection of Human Rights in Emergency Situations' (Venice Commission 2006) CDL-AD(2006)015-e para 10; and Martín Rodríguez (n 117) 270.

<sup>130</sup> Case 222/84 *Johnston* ECLI:EU:C:1986:206, para 27.

<sup>131</sup> Case 222/84 *Johnston* ECLI:EU:C:1986:44, Opinion of AG Darmon (not published), para 5; Case C-128/22 *NORDIC INFO* ECLI:EU:C:2023:645, Opinion of AG Emiliou, para 53.

<sup>132</sup> Ulrich Everling, 'The EU as a Federal Association' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Revised second edition, Hart; CH Beck; Nomos 2009) 731.

<sup>133</sup> Case C-72/22 PPU *Valstybės sienos apsaugos tarnyba and Others* ECLI:EU:C:2022:431, Opinion of AG Emiliou, para 112; Case C-120/94 *Commission v Greece* ECLI:EU:C:1995:109, Opinion of AG Jacobs, para 47; *Johnston*, Opinion of AG Darmon (n 131) para 5.

<sup>134</sup> Koutrakos (n 128) 1340.

<sup>135</sup> Case C-402/05 P *Kadi* ECLI:EU:C:2008:461, para 303. More generally, in Case C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029, para 214, the Court observed that the system of derogation clauses constituted by Articles 36, 45, 52, 65, 72, 346, and 347 TFEU cannot be interpreted as 'an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law'.

<sup>136</sup> Chamon (n 73) 184.

both between the Member States and between the Member States and the Union. Therefore, building on the relationship, already stressed by the Court,<sup>137</sup> between solidarity and Article 2 TEU, one could argue that no derogation from emergency measures would be allowed under Article 347 TFEU. A similar argumentation was put forward, *mutatis mutandis*, by AG Emiliou, who argued that, in light of the principle of sincere cooperation enshrined in Article 4(3) TEU, the derogation clause of Article 72 TFEU would not allow any departure from measures adopted pursuant to the emergency legal basis included in Article 78(3) TFEU.<sup>138</sup>

### 3.1.2 *From national to intergovernmental in the name of solidarity; or, towards a supranational emergency law?*

Not only does the question of systematicity impact the concrete aspect of the operationalisation of Article 222(1) TFEU, but it also has broader conceptual and constitutional implications concerning integration. Together, the emergency clauses contained in the Treaties have been referred to as ‘EU emergency law’<sup>139</sup> or the ‘*sui generis* EU emergency constitution’.<sup>140</sup> Yet, scholars’ recourse to these notions should not give the misleading impression that the EU Treaties incorporate a terminologically and conceptually coherent body of law governing the emergency action of the Union and its Member States. In fact, the current emergency clauses result from the rather disorganised stratification of multiple Treaty layers, where emergency action was first considered as mostly a Member States’ prerogative<sup>141</sup> and then gradually evolved as an intergovernmental competence,<sup>142</sup> to be exercised, since Lisbon, in the name of solidarity.<sup>143</sup> This evolution was characterised by the progressive extension of the notion of emergency beyond security concerns, the consequent expansion of the EU emergency competences in fields such as economic policy and migration, and the gradual lowering of voting thresholds.<sup>144</sup>

Against this background, the Parliament proposes to make emergency responses mostly a supranational matter, whereby the Commission and the Parliament itself would arguably be entrusted with most

<sup>137</sup> See Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, para 147.

<sup>138</sup> *Valstybės sienos apsaugos tarnyba and Others*, Opinion of AG Emiliou (n 133) para 112.

<sup>139</sup> De Witte (n 18) 4.

<sup>140</sup> Nicolosi (n 12) 62.

<sup>141</sup> See, for instance, Articles 36, 48, 56, 135, and 224 EEC.

<sup>142</sup> See, for instance, Articles 73f, 100c, and 103a EC (Maastricht numbering).

<sup>143</sup> The references to solidarity in emergency action were introduced by the Lisbon Treaty. See Article 78(3) TFEU read in light of Article 80 TFEU, and Articles 122(1) and 222 TFEU.

<sup>144</sup> See, for instance, the historical evolution of Article 122 TFEU as represented by Chamon (n 9) 15–16.

of the powers envisaged by the new Article 222(1) TFEU. If no national derogation from emergency measures could ever be allowed, the reform might be seen as the natural culmination of the historical trajectory just described, and a crucial moment for European constitutionalism. Indeed, without going as far as defining 'he who decides on the exception' as 'sovereign',<sup>145</sup> it cannot be denied that emergency governance has considerably shaped key phases of European integration.

A key and intergovernmental role in this respect has been increasingly, and perhaps unduly,<sup>146</sup> played by the European Council.<sup>147</sup> The latter does not exercise legislative functions,<sup>148</sup> but this has not prevented it from exercising, especially within emergency contexts, a role akin to a legislative initiator.<sup>149</sup> Rather than challenging this invasive action in Court,<sup>150</sup> the Parliament seeks to carve out space for itself by means of an 'inelegant'<sup>151</sup> Treaty reform that ignores the role played by this intergovernmental institution. Yet, looking at the past fifteen years of emergency governance, this is arguably a missed opportunity. Where completely renouncing the political impetus provided by the European Council to overcome emergencies seems neither feasible nor desirable,<sup>152</sup> the Parliament could have instead proposed a clause clarifying once and for all the role of the European Council and its limits, in the interest of the rule

<sup>145</sup> This is the famous definition given in Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press 1985). Observing that '[e]mergency rule should be decoupled from its associations with the sovereign figure, reversing the Schmittian move', see Jonathan White, *Politics of Last Resort: Governing by Emergency in the European Union* (Oxford University Press 2019) 18.

<sup>146</sup> Alberto Alemanno and Merijn Chamon, 'To Save the Rule of Law You Must Apparently Break It' (*Verfassungsblog*, 11 December 2020) <<https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/>> accessed 26 November 2024.

<sup>147</sup> Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *The Modern Law Review* 817, 830; Luuk van Middelaar, *Alarums & Excursions: Improvising Politics on the European Stage* (Agenda Publishing 2019) 178–183; Paul Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022) 118; and Bruno De Witte, 'Legal Methods for the Study of EU Institutional Practice' (2022) 18 *European Constitutional Law Review* 637, 642–645.

<sup>148</sup> Article 15(1) TEU.

<sup>149</sup> Dawson and de Witte (n 147) 830.

<sup>150</sup> Note that in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631, para 145, later confirmed by Case C-5/16 *Poland v Parliament and Council* ECLI:EU:C:2018:483, para 85, the Court made clear that the conclusions of the European Council cannot constitute a ground for review of the legality of secondary legislation, including emergency measures.

<sup>151</sup> Chamon (n 73) 185.

<sup>152</sup> Bruno De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 *European Constitutional Law Review* 434, 450.

of law and legal certainty.<sup>153</sup> This way, the Parliament would have added another, more credible stone to the gradual evolution of EU emergency competences without neglecting the reality of emergency politics.

### 3.2 Judicial review of emergency declarations

Under the established case law of the Court, when adopting a given measure, EU institutions' choice of legal basis must be based on objective factors amenable to judicial review, such as the aim and content of the measure.<sup>154</sup> This entails that, to declare an emergency under the proposed Article 222(1) TFEU, EU institutions would need to be able to demonstrate that the declaration's aim and content meet the need to address a genuine emergency. However, in the absence of a definition of emergency under Article 222(1) TFEU, the question arises as to whether and how the Court could test the substantive legality of a declaration under Article 222(1) TFEU. At least two options are conceivable.

First, the definition of what constitutes an emergency could be left to the discretion of EU institutions, embracing, to draw a parallel with US constitutional law, a 'political question doctrine'<sup>155</sup> that aligns with the view of various scholars on the matter of emergency law and judicial review.<sup>156</sup> In this respect, the Venice Commission accepted that, when no derogations from human rights are at stake, '[j]udicial control of the declaration of state of emergency may be limited to the control of the procedural aspects of the declaration'.<sup>157</sup> Nevertheless, even if one leaves aside that, as a matter of fact, derogations from fundamental rights are

<sup>153</sup> Exemplifying how this could be done, see the proposal put forward by Fernández Arribas (n 12) 20.

<sup>154</sup> Case C-300/89 *Commission v Council* ECLI:EU:C:1991:244, para 10.

<sup>155</sup> Graham Butler, 'In Search of the Political Question Doctrine in EU Law' (2018) 45 *Legal Issues of Economic Integration* 329. Recently, discussing the existence of a political question doctrine in EU law, see Joined Cases C-29/22 P and C-44/22 P *KS and KD* ECLI:EU:C:2023:901, Opinion of AG Čapeta, para 113.

<sup>156</sup> See, to various extents, Eric A Posner and Adrian Vermeule, 'Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008' (2009) 76 *University of Chicago Law Review* 1613, 1614; Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003) 305–306 and 316–317; Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 *The Yale Law Journal* 1011, 1034; Mark V Tushnet, 'Defending *Korematsu*? Reflections on Civil Liberties in Wartime' (2003) *Wisconsin Law Review* 273, 108; David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 *Michigan Law Review* 2565, 2594; and Kim Lane Scheppele, 'The New Judicial Deference' (2012) 92 *Boston University Law Review* 89, 169–170.

<sup>157</sup> Alivizatos and others (n 28) para 86. On this point, see also Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018) 62.

often attached to emergency measures,<sup>158</sup> the Venice Commission itself also held that '[t]he emergency situations capable of giving rise to the declaration of states of emergency should clearly be defined and delimited by the constitution'.<sup>159</sup> The absence of a clear and reviewable definition of emergency, indeed, would open the gates to a 'permanent state of emergency',<sup>160</sup> in that it would potentially allow the declaration of a legal emergency in the absence of a factual emergency scenario, arguably endangering the rule of law and democracy.<sup>161</sup>

To prevent this from happening,<sup>162</sup> an alternative option for the Court would be to rely on existing Treaty emergency clauses to develop a definition of emergency. This would entail assessing whether and to what extent, across their emergency clauses, the Treaties are informed by one coherent understanding of the notion of emergency, possibly also based on Member States' common constitutional traditions. The Court would thus have to test whether it is possible to reach either a material definition, qualifying emergencies as, for instance, war, internal insurrections, and natural disasters, or a functional-structural one, focusing on features of emergencies such as seriousness, suddenness, exceptionality, and urgency. A material definition of emergency could well match the current structure of the Treaties, in the sense that the latter are already organised along policy-specific lines. Therefore, for instance, the Court

<sup>158</sup> On the impact of emergency law on fundamental rights within the EU, see Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 *Oxford Journal of Legal Studies* 325 and Anastasia Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?' (2017) 54 *Common Market Law Review* 991.

<sup>159</sup> Özbudun and Turhan (n 129) 30. In this respect, see the argumentation of the Italian Constitutional Court in its recent Judgment No 146/2024 ECLI:IT:COST:2024:146, where the judges highlight the importance, for Italian parliamentary democracy, of respecting the precise conditions allowing the government to exercise extraordinary powers under Article 77 of the Constitution (although the latter is not a state of emergency clause but rather an emergency clause endowing the executive with the power to adopt acts with the force of law in extraordinary situations of urgency and necessity).

<sup>160</sup> On the importance of reaching a degree of terminological consistency at EU level, see also Science Advice for Policy by European Academies, 'Strategic Crisis Management in the European Union' (2022) Evidence Review Report 11 23; European Commission, Directorate-General for Research and Innovation, *Strategic Crisis Management in the EU: Improving EU Crisis Prevention, Preparedness, Response and Resilience* (Publications Office of the European Union 2022) 54; and Valentina Faggiani, 'Los Estados de Excepción Ante Los Nuevos Desafíos: Hacia Una Sistemización En Perspectiva Multinivel' (2020) *Federalismi.it* 19, 27–28.

<sup>161</sup> Auer and Scicluna (n 14) 27 and White (n 13) 788. On permanent states of emergency, see Greene (n 157); Agamben (n 91) 11; and Stéphanie Hennette Vauchez, *La Démocratie en État d'Urgence: Quand l'Exception Devient Permanente* (Seuil 2022) 95.

<sup>162</sup> And to shield itself from accusations of excessive judicial deference within emergency contexts. For an example of the latter, see Anna Wallerman Ghavanini, 'The CJEU's Give-and-Give Relationship with Executive Actors in Times of Crisis' (2023) 2 *European Law Open* 284.

could develop a taxonomy of events that may occur within each field of EU competence. An example could be the ‘sudden inflow of third-country nationals’ envisaged as a typical migration emergency by Article 78(3) TFEU. However, a functional-structural approach would arguably be preferable in that, with its flexibility, it would allow the difficulties associated with the unpredictability and transboundary nature of emergencies to be overcome.<sup>163</sup> Indeed, a threat would be qualified as an emergency based on its inherent characteristics, regardless of the event from which the threat stems or the sectoral interest that is threatened.

### **3.3 A (temporary) competence revolution**

Within the current Treaty framework, the conceptual challenges associated with the nature of emergencies as typically unpredictable and transboundary threats are not confined to definitional issues. There is, in fact, an inherent tension between these features of emergencies and the current constitutional design of EU competence. Before turning to the ways in which the Parliament’s proposal addresses this issue, it is necessary to analyse the reasons why this tension arises and how legal commentators have thus far proposed to solve it.

First, since emergency scenarios cannot be foreseen, it is in principle impossible to predict which measures will be necessary to overcome them. This is why states of emergency are primarily characterised by an increase in the executive’s discretionary power.<sup>164</sup> In an international organisation with limited powers like the EU, such discretion is inherently limited. For, under the principle of conferral,<sup>165</sup> the range of emergency measures that can be adopted crucially depends on which powers were, in the first place, conferred upon the EU by the Treaty drafters. Second, an additional layer of complexity lies in the typically transboundary nature of emergencies<sup>166</sup> and their cascading effects.<sup>167</sup> Indeed, emergencies initially affecting a certain interest of society may easily escalate and involve one or more other interests belonging to different sectors or areas. The COVID-19 pandemic, for instance, well exemplifies how quickly a health emergency can evolve into a broader socio-economic emergency. This cross-sectoral tendency of emergencies can hardly be accommodat-

<sup>163</sup> Böckenförde (n 116) 119; Zwitter (n 24) 97–99; and Science Advice for Policy by European Academies (n 160) 22.

<sup>164</sup> Christian Joerges, ‘Integration through Law and the Crisis of Law in Europe’s Emergency’ in Christian Joerges, Damian Chalmers and Markus Jachtenfuchs (eds), *The End of the Eurocrats’ Dream: Adjusting to European Diversity* (Cambridge University Press 2016) 311.

<sup>165</sup> Article 5(2) TEU.

<sup>166</sup> Boin (n 15).

<sup>167</sup> Science Advice for Policy by European Academies (n 160) 242.



ed by the EU Treaties,<sup>168</sup> which instead contain policy-specific legal bases<sup>169</sup> that determine the atomisation of the EU's emergency responses.<sup>170</sup> There is a mismatch, in essence, between the cross-sectoral challenges posed by emergency scenarios and the compartmentalised emergency legal toolbox of the EU. Such a mismatch drags both political institutions and the Court between a rock and a hard place. On the one hand, 'creative legal engineering'<sup>171</sup> and generous interpretations of emergency legal bases<sup>172</sup> are an easy target for allegations of 'competence creep'<sup>173</sup> and undue judicial deference.<sup>174</sup> On the other, strict adherence to a narrow understanding of the principle of conferral may undermine the output legitimacy of emergency responses,<sup>175</sup> in that effective but somewhat unorthodox regulatory strategies may not be considered as legally viable.<sup>176</sup>

In the aftermath of COVID-19, legal literature has hinted at various options to address this issue. For instance, the Court could expand its traditional choice of legal basis test for it to include, next to the aim and content of the measure, also the emergency context in which the measure was adopted.<sup>177</sup> In a similar vein, it has been suggested that the Court could read the principle of conferral in light of Article 7 TFEU,<sup>178</sup> which requires the EU to ensure consistency between its policies and activities, and thus afford, at the judicial level, recognition of emergency policy packages when assessing the legality of individual measures.<sup>179</sup>

<sup>168</sup> Paul Dermine, 'The Planning Method: An Inquiry into the Constitutional Ramifications of a New EU Governance Technique' (2024) 61 Common Market Law Review 959, 979.

<sup>169</sup> De Witte (n 18) 16.

<sup>170</sup> Michael Dougan, 'EU Competences in an Age of Complexity and Crisis: Challenges and Tensions in the System of Attributed Powers' (2024) 61 Common Market Law Review 93, 118.

<sup>171</sup> Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 Common Market Law Review 635, 638.

<sup>172</sup> See, for instance, *Slovakia and Hungary v Council* (n 150) para 180.

<sup>173</sup> Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1; and Sacha Garben, 'Competence Creep Revisited' (2019) 57 Journal of Common Market Studies 205.

<sup>174</sup> Christian Joerges, 'Pereat Iustitia, Fiat Mundus: What Is Left of the European Economic Constitution after the *Gauweiler* Litigation?' (2016) 23 Maastricht Journal of European and Comparative Law 99, 106; Martín Rodríguez (n 117) 276; Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 433, 464; White (n 13) 787; Kreuder-Sonnen (n 14) 129; and Wallerman Ghavanini (n 162) 286.

<sup>175</sup> Schmidt (n 13) 981–984.

<sup>176</sup> Dougan (n 170) 119–124.

<sup>177</sup> Chamon (n 9) 22–23.

<sup>178</sup> See *Hungary v Parliament and Council* (n 88) para 128.

<sup>179</sup> Dougan (n 170) 109 and 129.

Against this background, turning now to the Parliament's proposal, the blunt reference to 'extraordinary powers'<sup>180</sup> in Article 222(1) TFEU must be read in the sense that these are powers that the Commission cannot *normally* exercise. Thus, there are two ways to interpret this clause. A first, less ambitious, reading would be that, in a state of emergency, the Commission could be granted powers that are normally assigned to other EU institutions. For instance, departing from the Court's long-established doctrine of nondelegation that shapes EU executive rulemaking, the Commission could be allowed to adopt emergency measures determining the 'essential elements' of a policy normally falling within the competence of the Parliament and the Council.<sup>181</sup> Taking a step further in this direction, one may wonder whether under Article 222(1) TFEU the Commission could be granted by the Parliament and the Council powers that do not fall within the competence of any of these institutions. An extreme example could be a case in which, to counter an emergency, the Commission was to adopt emergency measures belonging to the area of monetary policy, where the latter falls within the exclusive competence of the European Central Bank.<sup>182</sup> This interpretation of Article 222(1) TFEU would trigger the temporary nihilification of Article 13(2) TEU,<sup>183</sup> in that it would allow EU institutions to disregard the horizontal boundaries imposed by the Treaties in times of normalcy. However, this would not per se entail an alteration of the vertical division of competences set by Article 5 TEU. In other words, the emergency action of the Commission, as authorised by the Parliament and the Council, would invade the regulatory space of other EU institutions but not encroach on Member States' prerogatives.

The second reading of the proposed Article 222(1) TFEU would instead envisage an alteration of the vertical division of competences.<sup>184</sup> Following this reading, the possibility to derogate from the principle of conferral would turn this emergency clause into a sort of 'hypercompetence',<sup>185</sup>

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<sup>180</sup> Emphasis added.

<sup>181</sup> Under the nondelegation doctrine, executive rulemaking is instead confined to non-essential elements. See Case 25/70 *Köster* ECLI:EU:C:1970:115, para 6; Case C-240/90 *Germany v Commission* ECLI:EU:C:1992:408, para 37; Case C-355/10 *Parliament v Council* ECLI:EU:C:2012:516, para 76; and Case C-124/13 *Parliament v Council* ECLI:EU:C:2015:790, para 59. In the literature, see Dominique Ritleng, 'The Reserved Domain of the Legislature: The Notion of "Essential Elements of an Area"' in Carl Fredrik Bergström and Dominique Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016).

<sup>182</sup> See *Pringle* (n 104) para 53; Case C-62/14 *Gauweiler* ECLI:EU:C:2015:400, para 46; and Case C-493/17 *Weiss* ECLI:EU:C:2018:1000, para 53.

<sup>183</sup> Article 13(2) TEU provides that '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.

<sup>184</sup> This could be either alternative or cumulative vis-à-vis the alteration of the horizontal division of powers.

<sup>185</sup> Chamón (n 73).

freed from the fundamental constraints governing Union action in times of normalcy. Thus, the (already blurred)<sup>186</sup> conservative aim of this state of emergency clause would be pursued by revolutionising the core principle underpinning the EU's multilevel governance system – in essence, for everything to stay the same, everything would have to change.<sup>187</sup>

Besides the likelihood of intense constitutional contestation,<sup>188</sup> such a radical choice arguably demolishes any chance of political feasibility for the Treaty amendment at stake.<sup>189</sup> Even practically, it remains difficult to see how, once an emergency occurs, the Commission could suddenly and effectively develop the expertise and, most of all, establish the institutional structures that are necessary to regulate fields that it has never regulated before.

A good example of the problematic issues associated with such a (temporary) competence revolution would be the coexistence of Article 4(2) TEU and the proposed Article 222(1) TFEU. Whilst a typical case encompassed by the notion of emergency is threats to national security, under Article 4(2) TEU 'national security remains the sole responsibility of each Member State'. This is reflected in the current Article 222 TFEU, read in light of its strongly intergovernmental implementing framework, which mandates Member States' cooperation and assigns only a coordinating and supporting role to the EU.<sup>190</sup> It is true that Article 4(2) TEU should not be read as enshrining any domain of Member States' exclusive competence<sup>191</sup> and that the EU has been recently developing its own security discourse,<sup>192</sup> within which security seems now understood as 'a

<sup>186</sup> See above Section 2.6.1.

<sup>187</sup> This echoes the words ('*se vogliamo che tutto rimanga come è, bisogna che tutto cambi*') of Giuseppe Tomasi di Lampedusa in *Il Gattopardo* (Feltrinelli 1958).

<sup>188</sup> It is difficult, if not impossible, to see how such a constitutional arrangement could be favoured by the German Constitutional Court, in light of its *Maastricht* (BVerfG, Judgment of the Second Senate of 12 October 1993 – 2 BvR 2134/92, 2 BvR 2159/92) and *Lisbon* (BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08) decisions. This also raises the question, which cannot be addressed in this article, of the role national parliaments could and should play in a potential EU state of emergency.

<sup>189</sup> Dougan (n 170) 131.

<sup>190</sup> See Declaration (No 37) on Article 222 of the Treaty on the Functioning of the European Union and the preamble of Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, OJ L 192.

<sup>191</sup> Bruno De Witte, 'Exclusive Member State Competences: Is There Such a Thing?' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States Reflections on the Past, the Present and the Future* (Hart Publishing 2017) 70–71. For a contrasting view, see Enrico Peuker, 'Unionsrechtliche Regelungskompetenzen Im Bereich Der Nationalen Sicherheit. Zur Auslegung von Art. 4 Abs 2 S 3 EUV Unter Kritischer Würdigung Der EuGH-Rechtsprechung' (2023) 58 *Europarecht* 535, 544 ff.

<sup>192</sup> Ursula von der Leyen, 'Europe's Choice: Political Guidelines for the Next European Commission 2024-2029' 12–15. In the literature, see Editorial, 'The Passion for Security in European Societies' (2024) 61 *Common Market Law Review* 283, 287–288; and Holly

shared responsibility'.<sup>193</sup> However, the current Treaty design reflects the EU's lack of independent enforcement capacities, whereas entrusted with coercive powers, in the Weberian sense of the monopoly of violence,<sup>194</sup> are only national authorities, namely the police and, ultimately, the army.<sup>195</sup>

The example of national security serves thus to demonstrate that a radical shift within the system of emergency competences is only conceivable to the extent that it occurs within the context of a broader shift in the overall Treaty framework. To be sure, the vocabulary of national emergency law can certainly inspire the birth and evolution of a system of 'EU emergency law'. Yet, one should be careful in bluntly transposing the conceptual categories and legal schemes that apply within the nation State to the context of an international organisation like the (current) EU. In fact, overall, the Treaties do not seem flexible enough to accommodate an emergency clause that would, albeit only temporarily, set aside the principle of conferral. In the current system of conferred powers, a future EU emergency constitution may envisage a certain, higher than normal, degree of flexibility in endowing the EU executive with extraordinary powers. Yet, the principle of conferral would still require drawing some lines, defining at least the policy areas that would belong to the competence of the Member States in times of emergency.<sup>196</sup> Instead, going beyond conferral would require rethinking the EU's constitutional structure in much greater depth than what the Parliament does with its minimalistic proposal.

#### 4 Conclusions

Emergency powers have long represented one of the most fascinating topics of constitutional law. However, the EU scholarly debate has only recently approached the issue of emergency law. The COVID-19 pandemic, the war in Ukraine, and the associated challenges have created a perfect storm, hitting Europeans with unprecedented force and prompting renewed focus on this critical area. In this context, the Parliament's proposal to amend the Treaties attempts to address two major concerns regarding emergency governance, namely the limited competences conferred upon the EU and the lack of democratic legitimacy of emergency measures.

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Faulkner, W John Hopkins and Silke Clausning, 'To the RescEU? Disaster Risk Management as a Driver for European Integration' (2024) 30 *European Public Law* 1, 19–20.

<sup>193</sup> European Commission, 'Communication from the Commission on the EU Security Union Strategy' (2020) COM(2020) 605 final 26.

<sup>194</sup> Max Weber, 'Politics as a Vocation' (Lecture to the Free Students Union, Munich, 1919) <<http://fs2.american.edu/dfagel/www/class%20readings/weber/politicsasavocation.pdf>> accessed 26 November 2024.

<sup>195</sup> Christian Kreuder-Sonnen and Jonathan White, 'Europe and the Transnational Politics of Emergency' (2022) 29 *Journal of European Public Policy* 953, 955.

<sup>196</sup> Kreuder-Sonnen (n 14) 136.

Any constitutional emergency powers regime aims at empowering and constraining the government in emergency scenarios. As Ramraj puts it, '[i]t creates the legal means of responding to exceptional threats, while limiting the scope for abuse'.<sup>197</sup> Each constitution, in essence, has to strike a delicate balance between the broadening of executive powers and the strengthening of democratic guarantees. If benchmarked against national emergency laws, the state of emergency clause proposed by the Parliament largely follows EU Member States' common constitutional traditions with regard to the powers to declare and end an emergency and the Madisonian checks and balances, in particular in terms of parliamentary oversight, surrounding the exercise of emergency powers by the executive. Yet, the proposed EU state of emergency clause seems less careful than national emergency laws with respect to the constitutional safeguards aimed at ensuring that the exercise of emergency powers remains confined to serving a conservative function rather than becoming an expression of *pouvoir constituant*. In this respect, the Parliament's proposal does not adequately address concerns about the potential establishment of an EU permanent state of emergency or, in other words, a situation where abuse of emergency powers transforms them into the ordinary mode of governance.<sup>198</sup>

From the perspective of EU constitutional law, the Parliament's attempt raises more questions than it answers. It shows that the traditional emergency law discourse, inextricably linked with the conceptual categories of the nation State, can only suit EU law to a limited extent. In fact, due to the EU's current constitutional design, emergency law in the EU context requires deep and detailed reflection on, *inter alia*, the trajectory of integration, the role of the judiciary, and the architecture of competences.



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<sup>197</sup> Ramraj (n 92) 167.

<sup>198</sup> See Auer and Scicluna (n 14) 22–25; Stella Ladi and Sarah Wolff, 'The EU Institutional Architecture in the Covid-19 Response: Coordinative Europeanization in Times of Permanent Emergency' (2021) 59 *Journal of Common Market Studies* 32, 36; Kreuder-Sonnen and White (n 195) 960–961; and Leino-Sandberg and Ruffert (n 174) 448.