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# Regulating European emergency powers: towards a state of emergency of the European Union

LAW AND INSTITUTIONS

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#emergencypowers
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**Julia Fernández Arribas**
Winner of the 2023 Jacques Delors Prize for the best thesis on a subject relating to European integration.

## Abstract

The aim of this policy paper is threefold. First, it seeks to demonstrate that the lack of a comprehensive European emergency framework has incentivised the surge of 'creative institutional practices'. To avoid the inherent perils of these practices, it suggests regulating the emergency powers of the European Union. Secondly, this paper aims to examine the available models for designing emergency frameworks and concludes that the 'constitutional model' is both legally feasible and more constitutionally desirable than the 'legislative model'. Finally, this paper seeks to propose a suitable architecture for an EU State of Emergency. To do so, it builds on the structure and principles of the constitutional model and identifies four limbs: the conditions to declare an emergency, the allocation of powers, checks and balances, and fundamental rights derogations. It explores the available options for design under each limb and puts forward a humble proposal for an EU State of Emergency.

## I • Introduction: EU law in the face of crises

*« Liberal ideas may sometimes require extraordinary actions in their defence ».*
Bruce Ackerman

Emergencies arguably pose the most critical challenge to liberal democracies. They require to suspend, and sometimes to abandon, the ordinary function and principles of the State to face a threat to the legal and constitutional order. The magnitude of emergencies has historically led thinkers to argue that the law cannot provide

for them[1]. This was the view infamously taken by Carl Schmitt, who defended that the actual threat to the State when facing an emergency is the standing constitutional order[2]. According to him, the unforeseeable nature of emergencies not only prevents the law from providing solutions, but even turns the law into a hurdle for effectively dealing with the threat. On the basis of this premise, a long line of scholars has argued that responses to emergencies can only be developed outside of the legal order.

This dilemma has haunted the European Union for over a decade. According to the principle of conferral, the EU may only exercise the competences that have been explicitly conferred upon it by the Treaties to attain the objectives set out therein. But, in the face of emergencies, these competences have proven to be insufficient, as we will see below. Most national constitutions across the world have addressed this dilemma by codifying an extraordinary legal order within the law. This is, by creating a framework that provides for a temporary increase of executive power in times of crisis, in order to adopt extraordinary measures, and which is subject to checks and balances to prevent any kind of abuse. The EU Treaties, however, do not foresee such a framework. There are some emergency provisions that allow for Union action in extraordinary times. But these provisions are not comprehensively laid out in the Treaties. Instead, they are 'a complex and disparate set of rules found in many different parts of primary and secondary law, supplemented by institutional practice and judicial interpretations (…) [which] do not denote an overall approach to crisis preparedness of the EU'[3].

As I will argue in the next section, the absence of a comprehensive framework for emergency management has led the Union and its Member States to resort to creative institutional practices. These practices do not necessarily fall outside the law as such, but they do circumvent EU law in different ways. And, by doing so, they result in a number of implications that are detrimental from a constitutional point of view. I believe, like other scholars, that this can be prevented by regulating an EU emergency framework, building on the example set by the national constitutions that have already addressed the liberalism-exception dilemma. The main purpose of this policy paper is, therefore, to explore the different available options to do so, and to ultimately put forward a proposal for codifying an EU emergency framework.

## II . The current state of EU emergency law

### I OVERVIEW OF THE EMERGENCY COMPETENCES

The current *corpus* of EU emergency law is formed by four provisions, the so-called "emergency competences"[4]. They are different from other Treaty provisions in that they cannot be used under ordinary circumstances, even if they foresee an ordinary procedure[5], because they require the existence of an emergency to be activated.

1 John Locke. Two Treatises of Government (Hamilton: McMaster University Archive of the History of Economic Thought, 1999).
2 Carl Schmitt. *Political Theology: Four Chapters on the Concept of Sovereignty*. (Chicago, IL: The University of Chicago Press, 2005).
3 B. De Witte, "Guest Editorial: EU emergency law and its impact on the EU legal order", *Common Market Law Review* 59, Issue 1 (2022), pp. 3-18.
4 This categorisation was done by Bruno de Witte, *supra* note 3. It is the only account to this date of the 'galaxy' of EU emergency law.
5 By ordinary procedure I refer to the fact that they prescribe Union action following a specific decision-making procedure and for the purpose defined in the legal basis, like any other provision enshrined in the Treaties.

The aim of these provisions is to organise EU action to 'address the *sudden* and *urgent* threats to the core values and structures of the EU and its Member States'[6]. Therefore, we do not include under this category the provisions allowing Member States to act – whether in a coordinated manner or not – or to support each other in an emergency, nor the provisions aiming to address crises that may develop gradually rather than appear abruptly. We refer exclusively to the provisions that enable Union action in the face of sudden and urgent threats and that require the existence of an emergency to be activated.

The first emergency competence is Article 66 TFEU, which allows the Council to take, in exceptional circumstances, safeguard measures to limit the inflow or outflow of capital to or from third countries where these "cause, or threaten to cause, serious difficulties for the operation of economic and monetary union"[7]. The second emergency competence is Article 78(3) TFEU, which empowers the Council, in an emergency situation caused by a sudden inflow of nationals from third countries, to adopt provisional measures for the benefit of the Member State(s) concerned. The third emergency competence is Article 107(3)(b) TFEU, which allows the European Commission to consider aid to remedy a serious disturbance in the economy of a Member State as compatible with the internal market. The fourth and final emergency competence is Article 122 TFEU. It provides a legal basis that allows the EU to grant financial assistance to Member States in exceptional circumstances, only if they are threatened with severe difficulties. Article 122(1) TFEU, in particular, links Union assistance to the existence of "severe difficulties (…) in the supply of certain products, notably in the area of energy". Article 122(2) TFEU, on the other hand, allows the Union to grant financial assistance to a Member State imminently threatened by or currently suffering severe difficulties 'caused by natural disasters or exceptional occurrences beyond its control'. In *Anagnostakis*[8], the Court of Justice clarified that this provision may only be used as a legal basis for instruments of a temporary nature, or which address temporary challenges faced by Member States[9]. Therefore, it cannot be used to introduce mechanisms of a "general and permanent nature"[10]

6 Bruno de Witte, *supra* note 3.
7 Kellerbauer, Manuel, Marcus Klamert, and Jonathan Tomkin, eds. *The EU Treaties and the Charter of Fundamental Rights : A Commentary*. Firsted. (Oxford, United Kingdom: Oxford University Press, 2019).
8 Case C-589/15 P, *Anagnostakis*, EU:C:2017:663, para 75.
9 Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, supra note 7, p. 1.460
10 *Anagnostakis*, supra note 8, para 75.

**TABLE 1**. The use of the emergency competences as legal basis for crisis-related instruments.

| Treaty provision | Policy area | Used as a legal basis |
|---|---|---|
| Article 66 TFEU | **Movement of capital** | It has never been invoked |
| Article 78(3) TFEU | **Migration** | • Two Council Decisions adopted in 2015 establishing a crisis relocation mechanism (2015/1523 and 2015/1601)<br>• Proposal for a Council Decision to face the migration pressure exercised by Belarus (COM(2021)752) |
| Article 107(3)(b) TFEU | **State aid** | • Temporary Framework for State aid to support banks and financial institutions (C 16/1)<br>• COVID-19 Temporary Framework (CI 91/1)<br>• Temporary Crisis Framework (C 101/3) |
| Article 122 TFEU | **Financial assistance** | • Council Regulation establishing the EFSM (407/2010)<br>• Council Regulation to reduce consumption of primary sources of energy (2015/632)<br>• Council Regulation on emergency support in humanitarian disasters (2016/369)<br>• Council Regulation to finance the response to the pandemic (2020/521)<br>• Council Regulation establishing the SURE (2020/672)<br>• Council Regulation establishing the EURI (2020/2094)<br>• Council Regulation to reduce gas demand (2022/1369)<br>• Council Regulation on medical supply amidst a public health emergency (2022/2372)<br>• Council Regulation to coordinate gas purchases across the EU (2022/2576)<br>• Council Regulation to accelerate the deployment of renewable energy (2022/2577)<br>• Council Regulation to address the high energy prices (2022/2578) |

These four emergency provisions constitute the core of EU emergency law. The Treaties provide, then, sector-specific provisions enabling Union action in the face of crises concerning the movement of capitals, migration, State aid, and financial assistance. But, beyond these provisions, there is no general regime for EU emergency management. According to some scholars, the EU manages emergencies 'in a partial legal void'[11], where emergency powers are largely unregulated. As a consequence, an important part of the EU's response to crises has been developed through creative institutional practices. This has led to a number of adverse constitutional implications that I will examine in the following section.

11 G. Gentile, "Too Unpredictable to be Tamed? The Management of Emergencies and Crises in the EU", LSE Law Policy Briefing Series, retrieved 11 April 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4081427

## I CREATIVE INSTITUTIONAL PRACTICES[12]

The EU and its Member States have engaged in two different types of 'creative' institutional practices in the wake of crises: parallel integration and creative legal engineering[13].

### – Parallel integration

Member States have sometimes concluded intergovernmental agreements to address emergencies. For example, during the financial crisis some Member States concluded the ESM Treaty and the Fiscal Compact, international treaties that do not form part of the EU legal order, but which are closely linked to it.

This kind of agreements leads to a number of constitutional deficiencies: first, they constitute a circumvention of the legal requirements to amend the Treaties[14]. When finding a compromise with a minority of Member States which opposes a Treaty amendment poses a challenge, a majority of Member States recurs to intergovernmental cooperation to achieve the desired objective. As opposed to Treaty amendments, the conclusion of intergovernmental agreements does not require a unanimous consent. The consequence is that if a Member State does not ratify an intergovernmental agreement – which may only reflect the majority's position – it will face isolation[15]. Secondly, parallel integration entails the marginalisation of the European Parliament and national parliaments. In the best case, the European Parliament plays a consulting role; in the worst one, it is a mere observer. To name a few examples, in the Fiscal Compact 'parliamentary actors are relegated to discussing and consulting on decisions that have already been taken'[16], and the architecture of the ESM provides for almost no parliamentary oversight either at European or national level. Thirdly, smaller or less rich Member States tend to be side-lined within the parallel institutions and decision-making structures. For example, the financial strength of Member States determines their voting power under the ESM. This means that, in intergovernmental decision-making, 'entire national democracies are disempowered'[17]. For instance, during the financial crisis creditor governments imposed conditionalities on debtor governments through 'extremely asymmetric bargaining' rather than 'consensus-oriented voting in the Council'[18].

The lack of parliamentary oversight and the side-lining of smaller Member States combined amount to a fundamental democratic concern. In the words of Moravcsik, 'international cooperation redistributes domestic power in favour of [a small group

12 Other practices such as 'agencification' and the self-empowerment of the ECB have also taken place in times of crisis. However, I believe that they are different from parallel integration and creative legal engineering. The logic of the last two is to find ways to adopt measures for which the Treaties do not or questionably provide a legal basis. Instead, the former are consequences of the progressive technocratisation of EU governance. This is also a worrying trend, but it is not derived from the absence of an EU emergency framework. For that reason, I will not discuss them here.

13 B. De Witte, "The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift", *Common Market Law Review* 58, Issue 3 (2021), pp. 635-682.

14 Lenaerts, Koen, and José A Gutiérrez-Fons, "A Constitutional Perspective", in Professor Robert Schütze, and Professor Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order*, Volume I (Oxford, United Kingdom: Oxford University Press, 2018).

15 Dawson, Mark, and Floris de Witte, "Constitutional Balance in the EU after the Euro–Crisis", *The Modern Law Review* 76, no. 5 (2013), p. 817–44.

16 *Ibid.*

17 Garben, Sacha, "The European Union and its Three Constitutional Problems", in Matej Avbelj (ed), *The Future of EU Constitutionalism*, (Oxford, United Kingdom: Hart Publishing, 2023), p. 87–104.

18 F. W. Scharpf, "After the Crash: A Perspective on Multilevel European Democracy", *European Law Journal* Volume 21, Issue 3 (2015), p. 384-405.

of] national executives, by permitting them to loosen domestic constraints imposed by legislatures, interest groups, and other societal actors'[19]. Within the EU legal framework, executive dominance, parliamentary exclusion, and the disempowerment of smaller Member States are limited through checks and balances and voting arrangements that do not exist in intergovernmental cooperation.

– Creative legal engineering

The second creative institutional practice consists of the expansive interpretation of EU Treaty provisions to stretch their scope without formally amending the Treaties. It is known as 'creative legal engineering', and the best example is NGEU[20], which has led to an expansive institutional interpretation of Articles 122 and 175(3) TFEU.

First, instruments developed on the basis of Article 122 TFEU must be temporary[21]. In a strict sense, NGEU is meant to be temporary, since its funds will be fully disbursed within four years. But paying back NGEU will take nearly 40 years according to the present ORD, which 'will make common debt a nearly permanent structure of the EU'[22]. Moreover, certain EU institutions and Member States saw NGEU as 'the beginning of a more permanent solution'[23]. Secondly, the CJEU held in *Pringle* that financial assistance provided under Article 122 TFEU must be compatible with Article 125 TFEU and thus be subject to 'strict conditions' which 'prompt Member States to implement a sound budgetary policy'[24]. During the financial crisis, financial support provided to the Member States was subject to strict conditionality to ensure debt sustainability. In contrast, the aim of the financial assistance provided through NGEU was not to ensure a sound budgetary policy, but to reduce economic disparities between Member States in the face of the COVID-19 pandemic – effectively derogating from Article 125 TFEU.

Article 175(3) TFEU, on the other hand, allows the European Parliament and the Council to adopt financial measures outside the Structural Funds if they prove to be necessary. These Funds may be used to reduce the development disparities between regions and to support less favoured regions. However, the measures financed by NGEU through the RRF cover almost any public policy field, far from being limited to the objectives of cohesion policy. Moreover, the distribution of the funding is not necessarily linked to the COVID-19 pandemic; it is focused on promoting sustainability and digitalisation.

The creative legal interpretation inherent to NGEU follows a certain logic: since Treaty change is unforeseeable, and the current structure for economic, monetary, and fiscal governance of the EU is outdated[25], the expansive institutional interpretation of the existing Treaty provisions is the only way forward. But there is a good

19 A. Moravcsik, "Why the European Union Strengthens the State: Domestic Politics and International Cooperation", *Center for European Studies Harvard University*, Working Paper no. 52, (1994).
20 The best assessment of the expansive interpretation of EU competences through NGEU has been made, in my opinion, in Leino-Sandberg, Päivi, and Matthias Ruffert, "Next Generation EU and its constitutional ramifications: a critical assessment", *Common Market Law Review*, vol. 59, no. 2 (2022), p. 433–472. In the following paragraphs, I will focus on discussing their views on this matter.
21 Case C-589/15 P, *Anagnostakis*, EU:C:2017:663, para 75.
22 Leino Sandberg and Ruffert, *supra* note 20.
23 *Ibid.*
24 Case C-370/12, *Pringle*, EU:C:2012:756, paras 135-137.
25 Rubio, Eulalia, Lucas Guttenberg, "The future of the Eurozone: cross-perspective from France and Germany", *Institut Jacques Delors*, retrieved 25 July 2018, https://institutdelors.eu/wp-content/uploads/2020/08/RencontresdEvian-EMU-GuttenbergRubio-Sept2018-3.pdf

reason behind the difficulty of engaging in Treaty reform: the procedure laid down in Article 48 TEU ensures that reforms will be subject to a democratic debate at European and national level. This democratic safeguard is not upheld if the decision to reinterpret the Treaties is made by Member States under the time constraints characteristic of an emergency and outside the scope of any parliamentary oversight. This practice is not only questionable in terms of democratic legitimacy; it also goes against the principle of conferral and the exclusivity of Article 48 TEU. In the first case, as pointed out by the GCC 'if the institutions are permitted to re-define expansively, fill lacunae or actually extend competences, they risk (…) acting beyond the powers granted to them'[26]. In the second case, as AG Szpunar noted in his Opinion in *McCarthy*, 'an act or a practice of the institutions or of the Member States cannot lead to a revision of the Treaties outside the procedures prescribed for that purpose'[27].

## III • Regulating emergency powers

In *Discourses*, Niccolò Machiavelli stated that 'when a dictatorship[28] is lacking in a republic, it is necessary either that it be ruined by observing the orders or that it break them so as to not be ruined'[29]. This is exactly what we have observed in the previous section. Facing the financial crisis, the pandemic, and Russia's aggression against Ukraine, the EU has been forced to 'break the orders' to be able to manage the crises. It has done so by recurring to parallel integration and creative legal engineering. So even if the EU Treaties were foreseen to be applicable both at ordinary and extraordinary times, ultimately EU institutions and Member States have sought alternative ways to be capable of effectively dealing with crises. If they had not done so, as Machiavelli alerts, the EU would have been 'ruined by observing the orders'.

My aim here is not to justify the creative institutional practices developed by the EU and its Member States, but to point out that they have taken place precisely because of the lack of a comprehensive emergency framework at the EU level. The only way to avoid the resort to unregulated extraordinary means is to regulate emergency powers. This may seem paradoxical, as the activation of emergency powers entails relaxing, in some way, the legal and even constitutional structure in place. But it is precisely that temporary relaxation which enables facing the crisis and restoring the original legal and constitutional structure. It is important to remember that emergency powers are not activated in a vacuum; they constitute the legal response to crises. And what are crises if not a threat to the constitutional order? An inappropriate response to such a threat is more damaging to the constitutional order in the long term than a temporary suspension thereof to put the threat to an end. Because if crises are not properly addressed, the ultimate risk is that the legal and constitutional order will crumble in its entirety.

We see, therefore, that sticking to the ordinary rules may not be sufficient at all times – especially in times of crisis, where there is a need for quick and decisive responses that 'cannot wait for the deliberate pace of ordinary constitutional rule'[30]. For this reason, many national constitutions around the world foresee emergency

26 BVerfG, judgment of the Second Senate of 30 June 2009, 2BvE2/08, p. 238.
27 Opinion of AG Szpunar in Case C-202/13, *McCarthy*, EU:C:2014:345, para 82, quoted in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, *supra* note 7, p. 482.
28 A Roman dictatorship would be understood in current terms as a comprehensive array of emergency powers.
29 Niccolò Machiavelli. *Discourses on Livy* (Chicago, IL: University of Chicago Press, 1996).
30 J. Ferejohn and P. Pasquino, "The law of the exception: A typology of emergency powers", *International Journal of Constitutional Law*, Volume 2, Issue 2 (2004), p. 210–239.

regimes. Their aim, as highlighted above, is to put an end to crises so as to restore the legal and constitutional order to its previous state. And, as we will see below, these regimes not only confer emergency powers, but also foresee checks and balances that prevent their abuse and avoid permanent legal and constitutional changes.

Having responded affirmatively to the question of whether regulating emergency powers is necessary, it is now time to examine how it can be done.

## I THE CONSTITUTIONAL MODEL

The constitutional model is also known as the neo-Roman model due to its strong inspiration from the Roman dictatorship. The proponents of this model argue that since ordinary law may be insufficient to deal with certain scenarios, especially if they require an urgent response, it is necessary to design a constitutional emergency framework in advance. This is, to explicitly specify the powers that may be exercised during emergencies under the constitution.

This model replicates three key elements of the Roman dictatorship: it is a functional, temporary, and preservative model. It is functional because, in the same way that the Roman dictator was only appointed to put an end to the imminent threat to the Republic and expected to abdicate as soon as he had fulfilled his purpose, the executive under the constitutional model is entrusted with emergency powers only to remove the threat to the constitutional order. It is temporary because the emergency powers can only be used for a limited time, in the same way that the Roman dictator's rule could not exceed six months, the consuls' mandate, or the end of the crisis. And it is preservative because its aim, like the one of the Roman dictatorship, is to restore the previous standing legal order.

Therefore, under this model, the existence of a threat to the community may justify vesting emergency powers in the executive for a limited amount of time, whose function will be to 're-establish the regular government'[31]. However, in the same way that it provides for the necessary emergency arrangements to deal with crises, the constitutional model 'insulates and protects the constitution'[32]. To do so, it relies on *ex ante* procedural checks on emergency powers. For example, it is frequently provided that the executive is forbidden to amend the constitution or to modify 'the nature of the regime and its core constitutional norms' during the emergency[33]. Similarly, under this model, the executive can only issue temporary decrees, but it cannot make law, and the legislature may not be dissolved during an emergency.

The inherent risk of this model is that it may lead to the same problem that it purports to avoid. In the words of Carl Schmitt, 'any effort to restrict emergency powers may deprive the government of the very tools it needs to counter the threat to its survival'[34]. The constitutional model argues that an extraordinary regime is needed in times of crisis because there are circumstances for which the ordinary law can by no means provide for. However, the pre-regulated emergency powers, even if constitutionalised, may also limit the efforts of the executive in the face of crises, since they are regulated *in advance* and therefore 'cannot possibly anticipate all

31 Karin Loevy. *Emergencies in Public Law : The Legal Politics of Containment* (Cambridge, UK: Cambridge University Press, 2015).

32 Lafrance, Sébastien, Shruti Bedi, and Hannah de Gregorio Leao, "Constitutional theories of emergency powers and their limits: perspectives from Vietnam, India and Canada", *Vietnamese Journal of Legal Sciences*, Vol. 04, No. 01 (2021), p. 01-33.

33 Oren Gross and Fionnuala Ní Aoláin. *Law in Times of Crisis : Emergency Powers in Theory and Practice*. (Cambridge, United Kingdom: Cambridge University Press, 2006).

34 Carl Schmitt, *supra* note 2.

future exigencies, nor can they provide detailed and explicit arrangements for all such occasions'[35].

This limitation could be solved by identifying a broad range of scenarios that would justify the declaration of an emergency, and by providing a negative list of powers that could not be exercised by the executive during crises, instead of a positive list of enumerated powers. But these solutions would entail their own risks: the executive could abuse the broad definition of 'emergency' to declare an emergency even when the circumstances would not require it, and it could make use of an almost unlimited array of emergency powers whenever an emergency would be declared. To avoid these abuses, the model relies on the procedural checks and balances and mostly on the oversight by the legislature[36].

### THE LEGISLATIVE MODEL

The proponents of the legislative model argue that, since not every future emergency is foreseeable, it is better to modify the ordinary laws or to adopt special emergency legislation once the emergency has erupted so as to adapt the legal response to the crisis in place. This model accepts that the existing legal order cannot fully address the threat posed by the crisis, but it believes that the answer to such a threat can be found within the existing system, without the need to completely overhaul it. So, under this model, emergencies are dealt with through ordinary legislation, by 'enacting ordinary statutes that delegate special and temporary powers to the executives'[37].

The delegation of emergency powers through the legislative model may be done in two ways: by modifying ordinary laws or by adopting special emergency legislation. In the first case, the emergency provisions are simply introduced into existing ordinary legislation to enable an adequate response to the needs emanating from the crisis. In the second case, instead of modifying the existing norms, new emergency provisions are created that address a particular crisis or potential future crises[38]. These new provisions are known as 'emergency legislation', usually take the form of statutes or framework statutes, and are passed following the ordinary legislative procedure. An example of this model can be found in Canada, where its emergency regime is regulated through a framework statute, the Emergencies Act, instead of through explicit constitutional provisions[39].

Under this model, since the ordinary legislative process is the key to emergency management, and thus it remains in place during the emergency, the legislature can monitor the use of emergency powers and prevent any kind of abuse by the executive. In addition to this, it is frequently conferred upon the legislature the powers to prolong or suspend the emergency, according to the circumstances. Moreover, under this model the legislature is the key to declaring the emergency and to delegating the emergency powers on the executive. Therefore, it may serve as a check on the executive since the latter will not be able to declare the emergency on its own or arrogate itself emergency powers.

The legislative model also has its flaws. We can identify three kinds of problems regarding the efficiency of this model, the supervisory role of the legislature, and the impact of emergency legislation in the legal system. As for the efficiency of

35 Oren Gross and Fionnuala Ní Aoláin, *supra* note 33.
36 J. Ferejohn and P. Pasquino, *supra* note 30.
37 J. Ferejohn and P. Pasquino, *supra* note 30.
38 Oren Gross and Fionnuala Ní Aoláin, *supra* note 33.
39 B. Ackerman, "The Emergency Constitution", *The Yale Law Journal* 113, no. 5 (2004).

this model, two concerns arise: first, relying on the legislature for declaring the emergency and conferring the emergency powers to the executive may lead to governmental paralysis, if the former is 'unready or unwilling to act in a timely fashion'[40]; secondly, 'the unpredictability of crises and (...) the need for rapid counter response'[41] may turn the emergency laws adopted insufficient to deal with the crisis. As for the supervisory role of the legislature, two other concerns arise: first, legislative checks on the executive tend to be problematic because legislatures often abdicate responsibility in times of crisis[42]. Secondly, the very power to enact emergency legislation will implicate the legislature in emergency ruling and thus annul its role as a monitor of the executive. As for the impact of the emergency legislation in the legal system, two final concerns arise: first, emergencies require an imminent reaction, which will lead emergency legislation to be adopted in a rush, without meaningful debates over it taking place. These provisions will then be incorporated 'into the ordinary legal system without invoking further debate and discussion'[43]. Secondly, once emergency legislation is embedded in the ordinary legal system, it will enact permanent changes in the latter. This legislation may have an eroding effect on civil liberties 'which may not be rapidly restored, if they are restored at all'[44].

## IV • Legal pathways to apply the models in the EU

The main difference between the constitutional model and the legislative model lies on whether the emergency framework is embedded constitutionally or whether it is created through emergency legislation following an ordinary legislative procedure.

Following the constitutional model, an EU State of Emergency would be regulated through a chapter in the EU Treaties; an 'emergency constitution'[45]. The regulation of an EU State of Emergency would therefore require an amendment of the EU Treaties pursuant to Article 48 TEU. The appropriate procedure to do so would be the ordinary revision procedure, since it does not impose any 'substantive limits to the scope and content of Treaty change' and so it enables enhancing 'Union powers by conferring more competences on the EU'[46].

The design of an EU State of Emergency is therefore procedurally feasible. The main challenge to this model lies in its ratification: as the second paragraph of Article 48(4) TEU indicates, such an amendment would only enter into force 'after being ratified by all the Member States in accordance with their respective constitutional requirements'. One could question whether a proposal for an EU State of Emergency would survive the ratification by national parliaments or popular referenda.

On the other hand, following the legislative model, an EU Emergencies Act could be adopted in the form of a piece of EU legislation. The legal basis to establish it

40 J. Ferejohn and P. Pasquino, *supra* note 30.
41 Oren Gross and Fionnuala Ní Aoláin, *supra* note 33.
42 *Ibid.* Emergencies have a consensus-generating effect: opposition or not, everyone 'rallies around the flag' to support the emergency measures enforced by the executive. Moreover, legislators may want to 'appear patriotic to voters' and thus vest without delay 'broad and expansive authorisations and powers' in the executive. And, when facing acute emergencies, the opposition will most likely mute its criticism of the executive. All of these result in a likely legislative complacency of the executive's actions, and in its willingness to vest it with whatever powers the executive alleges to require.
43 *Ibid.*
44 J. Ferejohn and P. Pasquino, *supra* note 30.
45 Bruce Ackerman, *supra* note 39.
46 Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, *supra* note 7, p. 486.

could be Article 352 TFEU, the flexibility clause[47]. This provision empowers the EU to adopt 'measures that prove necessary to attain its objectives where the Treaties do not provide for a specific legal basis'[48]. Union action relying on Article 352 TFEU must prove necessary to attain the objectives set out in the Treaties, but with the exclusion of the CFSP objectives. Therefore, legislative acts adopted pursuant to this provision may not be adopted in the area of CFSP[49]. This poses an obvious limitation to the adoption of an EU Emergencies Act on the basis of Article 352 TFEU, which may not be suitable in the case of a war or aggression against the EU. Nonetheless, it seems that this limitation could be circumvented as long as the immediate object of the Act is linked to the operation of the internal market[50]. Besides this, the EU institutions have considerable discretion to decide whether an action based on this provision proves necessary to attain the objectives set out in the Treaties. Therefore, this condition should not pose too much of a hurdle for the adoption of the EU Emergencies Act.

A second condition to adopt measures pursuant to Article 352 TFEU is that they do not have the effect, in substance, of amending the Treaties[51]. Moreover, Declaration 42 of the Treaty of Lisbon clarified that Article 352 TFEU 'cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those defining the tasks and the activities of the Union'. These two are the real limitations, in my opinion, to the development of an EU Emergencies Act pursuant to Article 352 TFEU. On the one hand, it could be argued that an EU Emergencies Act would have fundamental institutional and constitutional implications for the EU, therefore *de facto* amending the Treaties[52]. On this point, it is worth noting that the Court has consistently held that the Treaties cannot be modified through the adoption of secondary law. So even if the legal basis of the Act was different, it would be unsustainable due to the constitutional implications it has on the EU[53]. On the other hand, such an Act would undoubtedly widen the scope of Union powers, since it would confer unprecedented emergency powers on the EU. For the aforementioned reasons, I believe that an EU Emergencies Act based on Article 352 TFEU would not stand in the Union Courts.

Besides being more legally sound, the State of Emergency is arguably more desirable than the EU Emergencies Act. The main reason being that the legislative model runs the risk of permanently altering the legal order. On the one hand because, since the measures adopted to tackle the emergency are 'ordinary', they are not necessarily temporary, and therefore may remain in the system long after the emergency that justified their adoption has elapsed. And, on the other hand, because constitutional amendments are permitted under the ordinary system. These two risks are contained under the constitutional model. First, because the measures adopted therein are considered to be 'emergency measures', and thus required to have a temporary nature. And, secondly, because constitutional amendments are forbidden under this model.

47 This was first proposed by Martin Selmayr, former European Commission Secretary General.
48 Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, *supra* note 7, p. 2.250.
49 Declaration 41 of the Treaty of Lisbon on Article 352 TFEU.
50 In *Kadi*, the Court did not repeal a regulation based on Article 352 TFEU which pursued the objective to maintain international peace and security on the basis of this reasoning. See Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat*, EU:C:2008:461, paras 221–36, as quoted in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, supra note 7, p. 2.252.
51 Opinion 2/94, *Accession to ECHR (ECHR I)*, EU:C:1996:140, p. 29-30.
52 This was precisely what led the Court to conclude in Opinion 2/94 that the flexibility clause was not an appropriate legal basis for the EU's accession to the ECHR.
53 See, in this regard, Case 43/75, *Defrenne*, EU:C:1976:56, paras 56–8, or Case 59/75, *Manghera*, EU:C:1976:14, paras 19–21.

## V . Proposal for an EU State of Emergency

To this day, the only comprehensive proposal for a State of Emergency of the EU has been put forward by Christian Kreuder-Sonnen[54]. In his contribution, he lays out four basic principles that should be followed when designing such a mechanism: (1) conferring the power to declare an emergency and the power to exercise emergency powers on different organs; (2) conditioning the prolongation of the emergency to subsequent parliamentary approvals and requiring increasing majority thresholds over time; (3) defining a list of non-derogable rights and areas of exclusive competence to subsidiary levels of governance, and (4) subjecting all emergency measures to judicial review. On the basis of those principles, which reflect very well the main lessons drawn from the constitutional theories on emergency management, I propose to go a step further and design the architecture of an EU State of Emergency. To do so, I will discuss the alternatives available to regulate the procedure to declare the emergency, the exercise of the emergency powers, the procedure to re-establish normality, and the means to monitor the use of emergency powers. I will then suggest my preferred options in each case, and present a – very humble – proposal of the Treaty provision that could lay out the EU State of Emergency.

### 1. CONDITIONS TO DECLARE AN EMERGENCY

Declaring the EU State of Emergency should only be possible in the face of a serious and immediate threat to 'the core values and structures of the EU and its Member States'[55]. This threat could take many forms: a war or aggression against the EU, an internal security threat, a national disaster, an economic emergency, a threat to the constitutional system, or even a terrorist attack. Emergency constitutions generally avoid providing an enumeration of the threats, and rather recur to broad formulas such as threats to 'the constitutional order', 'the public order', or 'territorial integrity and independence'[56]. The reason being that emergencies are by nature unforeseeable, and a closed enumeration would be unwisely constraining.

Nonetheless, it is prudent to limit the declaration of the State of Emergency for particularly exceptional threats. The conditions to declare an emergency should be broad enough to prevent a constraint on Union action in the face of an unforeseen emergency, but not as broad as to allow the EU executive to declare an emergency under any circumstances. For this reason, the ECHR and the ICCPR recommend declaring a State of Emergency only in response to emergencies that pose a real, current, or at least imminent[57] threat. Therefore, not every crisis would justify triggering this mechanism: only those which pose 'serious and immediate' threats could do so. Moreover, if the ordinary EU legal framework were sufficient to meet the danger caused by the emergency, the State of Emergency should not be declared[58]. A final condition to declare an emergency, particular to the case of the EU, should be to observe the principle of subsidiarity. Only if the objectives of the proposed action to address the threat could not be sufficiently achieved by the Member States, and could be better attained at Union level, would the declaration of a EU State of Emergency be justified.

54 C. Kreuder-Sonnen, "Does Europe Need an Emergency Constitution?", *Political Studies* Vol. 71(1), (2023), p. 125–144.

55 Bruno de Witte, *supra* note 3.

56 A. Khakee, "Securing Democracy? A Comparative Analysis of Emergency Powers in Europe", *Geneva Centre for the Democratic Control of Armed Forces (DCAF)*, Policy Paper No. 30 (2009), p. 12.

57 There is a debate on whether an emergency could be declared before the actual emergency has broken out. Some authors warn that mere dangers are disputable realities which can be manipulated by power-grabbing politicians, as opposed to actual emergencies.

58 This builds on the ECtHR case-law on Article 15 ECHR: in *Lawless v. Ireland*, p. 36, the ECtHR established that if ordinary laws are sufficient to meet a danger caused by the public emergency, recourse to Article 15 is not justified.

## 2. ALLOCATION OF POWERS

### – Power to declare an emergency

If the conditions to declare an emergency are present, the power to do so must be vested in one or more EU institutions. Emergency constitutions at national level include different types of arrangements: the power to declare an emergency may be conferred to the parliament, upon request or proposal by the government; to the executive, requiring a subsequent ratification by the parliament; or to the head of the executive, requiring an approval by or consultation of the government. The principle guiding the choice of the relevant model is the separation of powers, following the example of the Roman dictatorship. This constitutes an important check in emergency constitutions. Advancing that the exercise of the emergency powers will be vested in the EU executive[59], the power to declare an emergency should be held by another actor. I propose that this power is conferred to the European Parliament, acting upon request or proposal by the European Council. If the European Parliament could not convene or act in time, the European Council would be allowed to declare the emergency, and such a declaration would be subject to a subsequent ratification by the European Parliament.

The required majority in the parliament to declare the State of Emergency or ratify an executive declaration is often provided for by emergency constitutions. Sometimes only a simple majority is required, while other times qualified majorities, or even absolute majorities, are needed. Ackerman proposes the 'supermajoritarian escalator'[60], a model which reinforces the majority needed to declare or ratify the declaration with every extension of the State of Emergency[61]. If the majorities required are expected to progressively increase, it is appropriate to only require a simple majority at the outset. Therefore, the European Parliament could declare the State of Emergency, or ratify the European Council's declaration, acting by simple majority. Emergency constitutions also tend to determine 'the duration for which the initial declaration of emergency may be in force'[62], after which the State of Emergency would automatically come to an end, unless it was prolonged. This period is 'relatively short and clearly limited'[63]. The tradition common in most European emergency constitutions is to set the limit between 15 and 30 days[64]. In our case, we could establish that the initial declaration could last for 15 days, after which the State of Emergency would terminate, unless it was prolonged.

A final question is whether the Court of Justice should play any role regarding the declaration of the emergency. The judiciary usually intervenes *ex post* since judicial review requires an amount of time incompatible with the need to provide an urgent response to an imminent threat. However, the French Constitution provides that the President, who can unilaterally declare an emergency, is required to consult the *Conseil Constitutionnel*, which has to publicly deliver an advisory opinion on whether declaring an emergency is appropriate. The *Conseil*'s advice is not binding, but its public nature may prevent an abuse by the President of his power, since a negative advisory opinion could turn the public opinion against him. In my opinion, this safeguard would not be necessary in the EU State of Emergency unless the power to declare the emergency were vested in the European Council, instead of the European Parliament.

59 See section concerning the power to exercise emergency powers.
60 Bruce Ackerman, supra note 39.
61 See section concerning the power to prolong the emergency.
62 Oren Gross and Fionnuala Ní Aoláin, *supra* note 33.
63 *Ibid.*
64 Anna Khakee, *supra* note 106, p. 56.

– Power to exercise the emergency powers

Most of the time, emergency powers are granted to the head of the executive. However, certain constitutions confer these powers to the head of the military or to technocrats as well. In our case, I propose that the European Council is entrusted with emergency powers, which could be delegated to the Council, the Commission, or the ECB. After all, the European Council has become a 'sovereign by default' in times of crisis[65], albeit informally. This would just formalise a role it had already assumed long ago.

Another question is what the scope of the emergency powers should be. Emergency constitutions generally vest in the executive the power to suspend certain basic rights, and normally specify some non-derogable rights[66]. Beyond this, the roads diverge: some constitutions grant an almost *carte blanche* to the executive, to avoid hampering its margin of manoeuvre, while others provide a very detailed enumeration of powers. I believe that, while it is convenient to regulate emergency powers constitutionally, as argued above, it is imprudent to provide a positive enumeration of those powers. This is not to say that the European Council should be granted a *carte blanche*, because its powers could be limited through a negative enumeration. So, instead of detailing which powers could the European Council use, we could specify which powers fall outside of the scope of its mandate.

This is a common practice in emergency constitutions. Normally, the executive is barred from: (1) amending the constitution or the laws governing elections or the State of Emergency, and (2) dissolving the parliament during the emergency. It is frequently prescribed that parliaments and courts should continue functioning during the emergency, and oversee the measures undertaken by the executive. Moreover, emergency constitutions usually foresee a compulsory convening of the parliament right after the declaration, and a postponement of the elections until the emergency has elapsed. In relation to this, the Venice Commission of the Council of Europe recalls that only specific circumstances justify a postponement of the elections, which should be scrutinised by the judiciary, and that electoral rights should only be allowed 'where a strict proportionality test is met'[67]. Finally, emergency constitutions usually prevent the executive from adopting any measures contrary to the international obligations acquired by the State, or which go beyond what is strictly necessary to address the emergency.

Therefore, under our model, the European Council – or the Council, Commission, or ECB, upon delegation – would be able to undertake 'any appropriate measures' except from amending the EU Treaties or the Charter and dissolving the European Parliament, those measures would have to comply with the international obligations acquired by the EU and its Member States, and they would have to observe the principles of necessity, proportionality, and temporariness[68].

65 Deirdre Curtin. *Executive Power of the European Union. Law, Practices and the Living Constitution* (Oxford, United Kingdom: Oxford University Press, 2009).

66 See the section on Fundamental rights derogation below for a broader discussion on this topic.

67 M. Diaz Crego, S. 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 Parliamentary Research Service*, retrieved 1 December 2020, https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)659385

68 Alivizatos, Nicos, Veronika BÍlková, *et al*, "Report. Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections", *European Commission for Democracy through Law (Venice Commission)*, Study n° 987/2020 (2020).

– Power to end or prolong an emergency

In some emergency constitutions, the power to end an emergency is vested in the parliament or in the head of the executive, on a proposal of the government. Instead, other constitutions foresee an automatic expiration of the State of Emergency after a certain time. Where constitutions set a time limit for emergency rule, a question arises: what if the emergency has not yet come to an end when the State of emergency is supposed to expire?

As I briefly advanced when discussing the power to declare an emergency, some constitutions allow the parliament to extend the duration of the emergency for a certain amount of time if the circumstances demand it. The majority often required to do so is the same that was needed to declare the state of emergency in the first place. Some scholars believe that this could lead to an endless State of Emergency, or a 'permanent autocracy'[69], especially if the executive holds a parliamentary majority.

That is why Ackerman put forward a proposal for a 'supermajoritarian escalator'. This mechanism subjects every extension of the emergency to a more inclusive parliamentary majority, or an 'escalating cascade of supermajorities'[70]. So, for example, if a simple majority was needed to declare an emergency in the first place, its extension would require a majority of sixty percent of the parliament, seventy for the next extension, and eighty thereafter. This would effectively give minority parties veto power over possible abuses by a majority-holding executive. There is no such thing as a majority-holding executive in the EU, because the executives represented in the European Council represent, at the same time, different political parties, and majorities hardly exist in the European Parliament anyway. But this is nevertheless a useful mechanism to avoid 'normalising' emergencies and ensure that they are not prolonged indefinitely. For this reason, I believe that it would be convenient to set an automatic expiry of the State of Emergency after 15 days, and to establish a supermajoritarian escalator for subsequent extensions.

## 3. CHECKS AND BALANCES

The control of emergency measures can be done through two main procedures: parliamentary oversight (the 'separation-of-powers mechanism'[71]) and judicial review. Before diving into each of them, it is important to recall that, for this very reason, both the parliament and the judiciary must continue to function normally during the emergency, so as to be able to monitor the executive.

On the one hand, the separation-of-powers mechanism rests on the premise that parliaments stand in the way of executive unilateralism and an excessive intrusion on civil and political rights. For that reason, emergency constitutions generally confer a broad monitoring power to parliaments. First, as we already saw, parliaments often control the declaration, prolongation, and termination of the emergency. Only very rarely the executive is allowed to declare an emergency unilaterally, or to prolong it without parliamentary consent. Secondly, parliaments are usually entrusted with the oversight of emergency measures adopted by the executive. If the executive disregards any of the limitations established in the previous section – it amends the constitution, dissolves the parliament, breaches the international obligations

69 Bjørnskov, Christian and Stefan Voigt, "The architecture of emergency constitutions", *International Journal of Constitutional Law*, Vol. 16 No. 1 (2018), p. 101–127.
70 Bruce Ackerman, *supra* note 39.
71 M. V. Tushnet, "Controlling Executive Power in the War on Terrorism", *Harvard Law Review* 118, (2005), p. 2673-2682.

acquired by the State, or breaches the principles of necessity, proportionality, and temporariness –, the parliament is entitled to repeal the emergency measures in question. This control can also be carried out *a posteriori*: many constitutions allow parliaments to hold hearings or carry out investigations on the use of the emergency powers by the executive once the emergency has concluded. In our case, I propose that, besides having the control over the declaration, extension, and termination of the emergency, the European Parliament should be able to repeal unlawful emergency measures and hold accountable the executive after the emergency has come to an end.

On the other hand, the judicial review mechanism relies on the judiciary to oversee the executive in times of crisis. One of the main functions of the judiciary in this regard is to review the legality of the emergency measures adopted by the executive. Courts are expected to ensure that the emergency measures do not 'exceed the boundaries of legality'[72], and do not infringe non-derogable rights. Moreover, the Venice Commission stresses that the right to an effective remedy should be ensured in respect to emergency measures, especially if they derogate from human rights[73]. The judicial review of emergency measures normally falls into the hands of the Constitutional Court or the Supreme Court. In our case, I believe that the Court of Justice should have the final authority to review the legality of the emergency measures and that the procedural requirements of the State of Emergency are observed.

In addition to these two mechanisms, the European Ombudsman could be a complementary check on the exercise of emergency powers by the EU executive. It could identify fundamental rights breaches in times of crisis and assist the EU citizens affected by the emergency measures.

## 4. FUNDAMENTAL RIGHTS DEROGATIONS

Emergency measures often lead to suspensions of civil and political liberties, including fundamental rights. During World War II, States that were parties to international conventions could 'arbitrarily derogate from their obligations in respect of human rights'[74] because of the absence of provisions drawing the limit between permissible and forbidden derogations. For this reason, the drafters of the ECHR and the ICCPR decided to allow for certain suspensions of human rights during emergencies in Articles 15(1) ECHR and 4(1) ICCPR, respectively, albeit subject to strict conditions[75]. Both provisions include substantive limitations to the derogations. First, States can only derogate 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'[76]. Secondly, States cannot suspend non-derogable rights, including the right to life, the prohibition of torture, and the prohibition of slavery, among others[77].

72 Alivizatos, Nicos, Veronika Bílková, *et al*, *supra* note 68.
73 *Ibid.*
74 Simpson, A. W. Brian. *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, England: Oxford University Press, 2001).
75 Hafner-Burton, Emilie M., Laurence R. Helfer, and Christopher J. Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties", *International Organization* 65, no. 4 (2011), p. 673– 707.
76 See Articles 15(1) ECHR and 4(1) ICCPR.
77 See Articles 15(2) ECHR and 4(2) ICCPR.

The EU Treaties or the Charter do not include any 'escape clause' of the sort. The closest example may be found in Article 52(1) of the Charter, which allows for limitations 'on the exercise of the rights and freedoms' recognised in the Charter under certain circumstances. However, limitations are not the same as derogations. The Venice Commission distinguishes between three types of restrictions: exceptions, limitations, and derogations of human rights[78]. While limitations imply a restriction of non-absolute human rights, subject to 'a triple test of legality, legitimacy and necessity'[79], derogations entail temporary suspensions of human rights where a 'public emergency (…) threatens the life of the nation'[80]. Therefore, there is currently no provision in the EU regulating the suspension of 'absolute' fundamental rights amidst a crisis.

To design such a provision, two approaches could be followed: a positive list approach, whereby the rights and freedoms that may be suspended during an emergency are enumerated; or a negative list approach, whereby the non-derogable rights and freedoms are listed. I propose to follow the example of the ECHR and the ICCPR and elaborate a list of non-derogable 'absolute' rights. These could be: Article 2 (right to life), Article 4 (prohibition of torture), Article 5(1) (prohibition of slavery), and Article 49(1) (prohibition of retroactive application of criminal laws)[81]. Therefore, upon declaration of a State of Emergency, the EU could derogate from the Charter as long as those derogations were proportionate, consistent with the Union's and Member States' international obligations, and did not affect any of the non-derogable rights.

78 Alivizatos, Nicos, Veronika Bílková, *et al*, *supra* note 68.
79 *Ibid.*
80 Article 4 ICCPR.
81 This is the same list as the one provided by the ECHR.

**TABLE 2**. Available options to regulate emergency powers and preferred options for the EU.

| Limbs | Items | Sub-items | Available options | Preferred option for the EU State of Emergency |
|---|---|---|---|---|
| Conditions to declare an emergency | | **Enumerating the threats** | • **Closed list** of threats;<br>• **Broad formulas** (threats to 'the constitutional order', 'the public order', or 'territorial integrity and independence'). | Declaring the EU State of Emergency should only be possible in the face of a **serious and immediate threat** to 'the core values and structures of the EU and its Member States'. |
| | | Delimiting the **seriousness of the threat** | • **Seriousness** of the threat<br>• **Imminence** of the threat | |
| | | Choosing the appropriate **legal framework** | • **Ordinary** legal framework<br>• **Extraordinary** legal framework (State of Emergency)<br>• (+ **Subsidiarity principle**) | If the **ordinary EU legal framework** were sufficient to meet the danger caused by the emergency, the State of Emergency should not be declared. Moreover, only if the objectives of the proposed action to address the threat could **not be sufficiently achieved by the Member States**, and could be better attained at Union level, would the declaration of a EU State of Emergency be justified. |
| Allocation of powers | *Power to declare an emergency* | Vesting the **power to declare** an emergency | • Power conferred to the **parliament**, upon request or proposal by the government;<br>• Power vested in the **executive**, requiring a subsequent ratification by the parliament;<br>• Power conferred to the **head of the executive**, requiring an approval by or consultation of the government. | Power conferred to the **European Parliament** (EP), acting upon request or proposal by the European Council (EUCO). If the EP could not convene or act in time, the **EUCO** would be allowed to declare the emergency, and such a declaration would be subject to a subsequent EP ratification. |
| | | **Required majority** to declare an emergency | • **Simple** majority<br>• **Qualified** majority<br>• **Absolute** majority<br>• **Supermajoritarian** escalator | The EP could declare the State of Emergency, or ratify the EUCO's declaration, acting by **simple majority**. Subsequent extensions would require **reinforced majorities**. |
| | | **Duration** for which the emergency may be in force | The tradition common in most European emergency constitutions is to set the limit **between 15 and 30 days**. | The initial declaration could last for **15 days**, after which the State of Emergency would terminate, unless it was prolonged. |

82 This section refers to the options adopted by emergency constitutions across the world.

| | | | | |
|---|---|---|---|---|
| | *Power to exercise the emergency powers* | Vesting the **power to exercise** the emergency powers | • Head of the **executive**<br>• Head of the **military**<br>• **Technocrats** | The **EUCO** would be entrusted with emergency powers, which could be delegated to the Council, the Commission, or the ECB. |
| | | **Scope** of the emergency powers | • Power to suspend certain basic rights, specification of **non-derogable rights**<br>• ***Carte blanche*** | The EUCO – or the Council, Commission, or ECB, upon delegation – would be able to undertake '**any appropriate measures**' **except** from amending the EU Treaties or the Charter and dissolving the EP, those measures would have to comply with the international obligations acquired by the EU and its Member States, and they would have to observe the principles of necessity, proportionality, and temporariness. |
| | *Power to end or prolong an emergency* | Vesting the **power to end or prolong** an emergency | • **Parliament**<br>• Head of the **executive**, on a proposal of the government<br>• **Automatic expiration** of the State of Emergency | Automatic expiry of the EU State of Emergency after 15 days, and **supermajoritarian escalator** for subsequent extensions. |
| **Checks and balances** | | **Parliamentary oversight** | • **Monitoring power**: parliament controls the declaration, prolongation, and termination of the emergency;<br>• **Oversight of emergency measures** adopted by the executive. | Besides having the control over the declaration, extension, and termination of the emergency, the EP should be able to **repeal unlawful emergency measures** and hold accountable the EUCO after the emergency has come to an end. |
| | | **Judicial review** | • Oversight of the executive by **reviewing the legality** of the adopted emergency measures;<br>• Often a responsibility of the **Constitutional Court or the Supreme Court**. | The **Court of Justice** should have the final authority to review the legality of the emergency measures and that the procedural requirements of the State of Emergency are observed. |
| **Fundamental Rights derogations** | | | • **Positive list approach**, whereby the rights and freedoms that may be suspended during an emergency are enumerated;<br>• **Negative list approach**, whereby the non-derogable rights and freedoms are listed. | Upon declaration of a State of Emergency, the EU could derogate from the Charter as long as those derogations were **proportionate**, consistent with the Union's and Member States' **international obligations**, and did not affect any of the **non-derogable rights**. |

## VI . Proposal

In light of the foregoing, I humbly propose to include the following provision in the Treaties to 'constitutionalise' the EU State of Emergency:

1. *In the event of a serious and immediate threat to the core values and structures of the EU and its Member States*[83]*, which cannot be sufficiently addressed by the Member States, but can rather, by reasons of the scale or effects of the threat, be better addressed at Union level*[84]*, and where the Treaties have not provided the necessary powers to react*[85]*, the European Parliament, acting by a simple majority on a proposal of the European Council, shall declare a State of Emergency. The State of Emergency shall automatically expire after 15 days, unless it is subsequently prolonged by the European Parliament, acting by increasing majority thresholds over time*[86]*.*

2. *Upon the declaration of a State of Emergency, the European Council, or the Council, the Commission, or the European Central Bank, upon delegation, shall adopt any appropriate measures to the extent strictly required by the exigencies of the situation, provided that such measures are consistent with the obligations under international law87 of the Union and its Member States. The European Council may not, however, make use of the powers provided for in this Article to:*
   *a) amend the Treaties or the Charter of Fundamental Rights;*
   *b) dissolve the European Parliament;*
   *or (c) derogate from Articles 2, 4, 5(1) or 49(1) of the Charter of Fundamental Rights.*

3. *The European Parliament and the Court of Justice shall continue to function normally upon the declaration of emergency. In addition to their ordinary functions, they shall oversee the exercise of emergency powers. Any emergency measures which exceed the boundaries laid down in the preceding paragraph shall be repealed by the European Parliament. The Court of Justice shall review the procedure to declare, prolong or terminate the emergency, as well as the legality of the emergency measures.*

## . Conclusions

Constitutionalising an EU State of Emergency would give rise to a paradigm shift in EU emergency management. The EU institutions and Member States would no longer be constrained by the four emergency competences and their respective limits when facing an emergency. Instead, following the procedure outlined in the previous sections, they could adopt 'any appropriate measures', provided that the applicable conditions were met. This also means that EU emergency management would no longer be constrained by the principle of conferral. Since the EU State of Emergency would be a provision enshrined in the Treaties, vesting in the EU institutions the power to adopt 'any appropriate measures', no competence would fall outside the scope of EU action for the duration of an EU State of Emergency. As long, of course, as the conditions outlined in the second paragraph of the proposed provision were met. So it would not be a carte blanche – the essential democratic

83 Borrowed from Bruno de Witte's definition of 'emergency'. See Bruno de Witte, *supra* note 3.
84 Adapted from Article 5(3) TFEU.
85 Adapted from Article 352 TFEU. The choice of 'react' instead of 'act' is purposeful, to emphasise the preservative character of the State of Emergency, in line with the principles of the constitutional model.
86 Wording borrowed from one of the basic principles of Christian Kreuder-Sonnen. See C. Kreuder-Sonnen *supra* note 54.
87 Borrowed from Article 15 ECHR and Article 4 ICCPR.

guarantees would prevail, and EU action would only be justified if Member States could not sufficiently address the threat –, but the scope of EU emergency powers would be much broader.

The implications of such a provision are, therefore, far-reaching: if, for instance, the EU and its Member States faced a new health emergency in the future, which could not be sufficiently addressed at national level, and for which the Treaties had not provided the necessary powers to react, the EU could acquire exceptional health powers for the duration of the emergency. It would be capable of adopting virtually any measure in the field of health, as long as such a measure were strictly required by the exigencies of the situation, and consistent with the obligations under international law of the EU and its Member States. Similarly, the EU could acquire exceptional powers in the area of CFSP facing a security crisis, or exceptional financial powers amidst a financial crisis.

All of this means that the EU State of Emergency would be helpful to prevent some of the creative institutional practices discussed in this paper. For instance, EU institutions would no longer have the need to expansively interpret Treaty provisions, since the EU State of Emergency would grant them the necessary powers to act in the face of any emergency. As for parallel integration, the case would be somehow different. On certain occasions Member States have opted for parallel integration because the Treaties did not grant them the power to set up those structures within the EU. If, in a potential future crisis, the issue was purely of competence, then the EU State of Emergency would allow for such parallel structures to be built within the EU. However, there is a situation where Member States would have to recur nevertheless to parallel integration: if the structures that they aim to create are of a permanent nature. Emergency measures must last as long as the emergency that justifies them; in other words, they must be temporary. That is the underlying idea behind emergency law. Allowing for the adoption of permanent measures through the EU State of Emergency would deprive the latter of its justification and make its democratic legitimacy questionable. If Member States wanted to set up a permanent structure in response to a crisis, for which the Treaties did not provide a legal basis, they should not recur to emergency measures or parallel integration, but enshrine in the Treaties the *ordinary* competence to do so. And that should happen before the next crisis knocks on our door.

Of course, constitutionalising an EU State of Emergency is very ambitious. As we saw above, it would require reforming the Treaties and achieving a ratification in every Member State. Considering the implications of this mechanism for national sovereignty, it is more than likely that a number of national parliaments and peoples would oppose it, at least for now. The second-best option would be to design further sector-specific emergency competences[88]. This is, to expand the current four emergency competences to new fields like health or security. Although this would be a pragmatic solution for certain crises, it would still not be as comprehensive as an EU State of Emergency. As we saw above, emergencies are by nature unforeseeable and sector-specific provisions tend to be unduly constraining. Even if a provision was designed for every imaginable policy field, its specific wording could prevent the EU institutions from using it as a legal basis in certain scenarios – as already happens with the current emergency competences.

88 This was recently proposed in Costa, Olivier, Daniela Schwarzer, "Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century", *Franco-German Working Group on EU Institutional Reform*, retrieved 18 September 2023, https://www.politico.eu/wp-content/uploads/2023/09/19/Paper-EU-reform.pdf

Overall, the EU State of Emergency seems to be the best available mechanism to enhance EU emergency management and avoid creative institutional practices and their perilous consequences. It may seem unthinkable now, but the EU itself, and many of its achievements, were unthinkable once. What made them possible was the need for further integration in the face of crises. And that is precisely the *raison d'être* of this proposal.

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**Institut Jacques Delors**
Penser l'Europe • Thinking Europe • Europa Denken
18 rue de Londres 75009 Paris, France • www.delorsinstitute.eu
T +33 (0)1 44 58 97 97 • info@delorsinstitute.eu

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