

GUEST EDITORIAL

EU emergency law and its impact on the EU legal order

European crises and EU emergency law

There is a widespread view in the European studies literature that the European Union has faced a series of important crises in recent years; one even finds the view that the Union is facing one overall multidimensional crisis.¹ Crises have frequently happened in the course of the earlier history of European integration as well, and one could almost retrace the entire history of the integration process based on the occurrence of crises.² The canonical listing of those remote and recent crises contains a mixture of endogenous institutional crises (such as the famous “empty chair” crisis of the 1960s³ or the various failures of Member States to ratify an EU Treaty revision⁴) and exogenous developments (such as the banking crisis of 2008, the migration crisis of 2015, the current pandemic crisis, or the climate change crisis). The examples cited above show that there is no neat distinction between the two categories as, arguably, the institutional features (and decision-making failures) of the European Union can contribute to exacerbate a crisis that is of external origin, as the development of the banking crisis into a euro crisis may illustrate. What the examples have in common, though, is that they refer to “events or developments widely perceived by members of relevant communities to constitute urgent threats to core community values and structures.”⁵ That definition emphasizes the importance of perceptions and of framing: in politics generally and in European politics specifically, the

1. For the latter view, see Dinan, Nugent and Paterson, “A multi-dimensional crisis”, in Dinan, Nugent and Paterson (Eds.), *The European Union in Crisis* (Palgrave, 2017), pp. 1–15.

2. See e.g. Dinan, “Crises in EU history”, in Dinan, Nugent and Paterson, op. cit. *supra* note 1, pp. 16–32.

3. Palayret, Wallace and Winand (Eds.), *Visions, Votes and Vetoos: The Empty Chair Crisis and the Luxembourg Compromise Forty Years On* (P.I.E. Peter Lang, 2006).

4. See Closa, *The Politics of Ratification of EU Treaties* (Routledge, 2013), pp. 111–165, and Hodson and Maher, *The Transformation of EU Treaty Making* (Cambridge University Press, 2018), pp. 221–245.

5. This is the definition of crisis proposed by Boin, ‘t Hart and McConnell, “Crisis exploitation: Political and policy impacts of framing contests”, 16 *Journal of European Public Policy* (2008), 81–106, 83.

existence of an urgent threat to core values or structures of the community is itself contested; what may seem like a crisis to some actors may appear like normal events or developments to others. A further complication is that some crises are fast-burning whereas others are slow-burning:⁶ the urgency of the threat may appear suddenly and abruptly (as with a terrorist attack, a natural disaster, or the spread of a pandemic) or it may appear more gradually, step-by-step (as is the case, arguably, with the EU's rule of law crisis emerging from Hungary and Poland). Again, this is not a neat distinction, since a slow-burning crisis can have fast-burning phases, as was aptly illustrated by the euro crisis which lasted for several years but required some very rapid emergency measures at some key moments in time.

That being said, this guest editorial does not aim to propose new definitions or typologies of crises in the European integration process.⁷ The aim is, rather, to offer some reflections on the *legal* dimension of these crisis phenomena. In the following pages, we will first evoke the main elements composing this EU crisis law and then briefly reflect on whether the EU's actual legal responses to the multiple crises of the past decade have eroded the integrity of the EU legal order.

However, we will focus, in what follows, on the narrower concept of *EU emergency law* rather than that of *EU crisis law*. The latter concept is more difficult to handle for two complementary reasons: because – as argued above – the existence of a crisis is largely a matter of perception and framing by institutional actors, and because some crises are slow-burning and can therefore be handled with the normal resources of EU law (as is the case of climate change: there is undoubtedly a crisis situation there, but climate change policies do not require the adoption of “special laws”). *EU emergency law* is a narrower concept: it refers to the rules of primary and secondary EU law that serve to address *sudden* threats to the core values and structures of the Union and its Member States.⁸

Many States throughout the world have “emergency constitutional law”, whereby the normal constitutional rules are put aside for the time of the emergency and then come back into operation once the emergency has ended.⁹

6. See Seabrooke and Tsingou, “Europe’s fast and slow-burning crises”, 26 *Journal of European Public Policy* (2018), 468–481.

7. Major collective contributions on this subject in the English language include the book edited by Dinan, Nugent and Paterson, op. cit. *supra* note 1; and Riddervold, Trondal and Newsome (Eds.), *The Palgrave Handbook of EU Crises* (Palgrave, 2021).

8. It is, of course, very well possible to discuss the existence and contours of the broader notion of EU crisis law, but this requires a more wide-ranging study. One example in the legal literature is Blumann and Picod (Eds.), *L’Union européenne et les crises* (Bruylants, 2010).

9. For a comparative typology of emergency clauses in national constitutions, see Bjørnsvik and Voigt, “The architecture of emergency constitutions”, 16 *ICON* (2018),

When constitutions provide for the establishment of a state of emergency, they acknowledge that a crisis may necessitate “urgent exceptional and consequently temporary actions by the State not permissible when ordinary conditions exist.”¹⁰ Often, this means a temporary increase of the powers of the executive branch, which is considered to be better able to deal with emergency situations, although many constitutional systems provide for checks-and-balances limiting executive rule even in times of emergency.¹¹ The constitutional law of the European Union does *not* make available such a general emergency regime. Instead, the EU Treaty rules must be used in good and bad times, in normal times and in crisis times. The EU Charter of Fundamental Rights similarly does not have a general derogation clause that could limit its application in times of emergency, in contrast with many national constitutions and with the European Convention on Human Rights (cf. Art. 15 ECHR). However, the European Union does have its own body of law that can be described as emergency law. This is not a coherent body of law found in one place of the legal system, but rather a complex and disparate set of rules found in many different parts of primary and secondary law, supplemented by institutional practice and judicial interpretations.

In describing those rules, we will privilege those that organize action by the *European Union* itself, while leaving aside the rules of EU law that essentially aim at allowing the *Member States* to act in an emergency, such as the national escape clauses allowing Member States to disregard their EU law obligations in exceptional circumstances. These escape clauses were rather ubiquitous in the original text of the EEC Treaty, but were gradually deleted from the Treaty text in the course of time, although some of them are still there, such as Articles 346 and 347 TFEU.¹² We will, similarly, leave aside the Treaty rules that require the Member States to support each other in situations of emergency, such as Article 42(7) TEU (the foreign policy solidarity clause) and Article 222 TFEU (the general solidarity clause), even though the latter also provides for the possibility of EU-level coordination.¹³

101–127. The authors claim that “some 90 percent of all constitutions worldwide contain explicit provisions for how to deal with states of emergency” (with reference to Elkins, Ginsburg and Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009)).

10. Greene, *Emergency Powers in a Time of Pandemic* (Bristol University Press, 2020), p. 12.

11. Ginsburg and Versteeg, “The bound executive: Emergency powers during the pandemic”, 19 ICON (2021), 1–38.

12. For discussion of these two Treaty provisions, see Koutrakos, “Public security exceptions and EU free movement law”, in Koutrakos, Nic Shuibhne and Syrpis (Eds.), *Exceptions from EU Free Movement Law* (Hart, 2016), pp. 190–217, at 208–215.

13. The supporting role of the EU under the solidarity clause of Art. 222 TFEU takes the form of the Integrated Political Crisis Response (IPCR), which is a coordination mechanism led

Emergency competences of the Union

The first element of EU emergency law consists of a number of specific *emergency competences*, that is, legal basis articles in the Treaties allowing the EU to take action to address emergencies or, more generally, unforeseen situations. They are “ordinary” EU constitutional law in the sense that the normal legal basis conditions apply: the EU can only act for the purpose defined in the legal basis, and following the decision-making procedure defined therein. But they are also distinctive from other EU competences, in that their legal basis requires things to be out of the ordinary. For that reason, one would not include among those emergency competences the famous Article 352 TFEU, allowing for the adoption of measures “if action of the Union should prove necessary . . . to attain one of the objectives set out in the treaties” and no other legal basis is available. Recourse to this legal basis does not require the existence of a crisis. The conviction that EU action is necessary can arise in ordinary times, and can arise gradually without the need for a crisis to provoke it.

Among the emergency competences contained in the Treaties, three deserve special mention here, since they played an important role during the recent crises faced by the EU:¹⁴ Article 78(3) TFEU dealing with migration policy, inserted by the Treaty of Amsterdam; Article 107(3) TFEU on State aid, which was already included in the original text of the EEC Treaty; and Article 122 TFEU on economic policy, inserted by the Maastricht Treaty. These three competences deal with separate policy fields and were incorporated in the Treaties at different times. Therefore, they do not denote an overall approach to crisis preparedness of the Union, but rather the wish to prepare for specific emergencies envisaged by the authors of the Treaties because of the particular characteristics of the given policy domain.

Article 78(3) TFEU states that the Council may adopt provisional measures “in the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries”. This legal basis served, most prominently, for the adoption of the two controversial relocation decisions of 2015, whereby the heavy and sudden pressure on the reception capacity of Greece and Italy, caused by the arrival of

by the Presidency of the Council; see, for the organization and role of the mechanism, Council Decision 2014/415 of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, O.J. 2014, L 192/53, and Council Implementing Decision 2018/1993 of 11 Dec. 2018 on the EU Integrated Political Crisis Response arrangements, O.J. 2018, L 320/28.

14. In addition to those three, see also Art. 66 TFEU stating that the Council may adopt safeguard measures to limit the movements of capital to and from third countries where these “in exceptional circumstances . . . cause, or threaten to cause, serious difficulties for the operation of economic and monetary union.”

a large number of asylum seekers and other migrants, was to be temporarily relieved by transferring a number of those asylum seekers to other EU countries where their applications would be examined.¹⁵ The decisions were adopted by qualified majority in the Council and unsuccessfully challenged by Slovakia and Hungary who had been outvoted in the Council.¹⁶ The Commission furthermore used Article 78(3) as the basis for a proposed Council regulation “addressing situations of crisis and *force majeure* in the field of migration and asylum”,¹⁷ and, most recently, for proposing a Council decision that would allow Poland, Latvia and Lithuania to derogate from a number of EU legislative instruments so as to help them in “managing the emergency situation caused by the actions of Belarus”,¹⁸ as part of a broader EU policy response to the “State-sponsored instrumentalization” of migrants by Belarus.¹⁹ The emergency competence of Article 78(3) has thus been used to allow or request Member States to derogate temporarily from existing EU legislation in the field of migration and asylum, and it displays a shift to executive power which is typical for emergency situations: whereas migration and asylum legislation must be adopted through the ordinary legislative procedure, with the European Parliament acting as co-legislator, the measures adopted by the Council under Article 78(3) require the mere consultation of the Parliament.

Article 107(3)(b) TFEU provides that the Commission may consider State aid to be compatible with the internal market when the aid serves “to remedy a serious disturbance in the economy of a Member State.” This broadly defined emergency competence was used by the Commission to adopt a temporary, more lenient, framework for State aid to banks and financial

15. Council Decision 2015/1523 of 14 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, O.J. 2015, L 239/146, and Council Decision 2015/1601 of 22 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, O.J. 2015, L 248/80.

16. See De Witte and Tsourdi, “Confrontation on relocation – The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: *Slovak Republic and Hungary v. Council*”, 55 CML Rev. (2018), 1457–1494.

17. COM(2020)613 of 23 Sept. 2020. The Regulation has not been adopted by the Council at the time of writing.

18. Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM(2021)752 of 1 Dec. 2021. The cited words are included in Art. 1 of the proposal.

19. For this broader response, see Joint Communication of the Commission and the High Representative of the Union for Foreign Affairs and Security Policy, “Responding to State-sponsored instrumentalization of migrants at the EU external border”, JOIN(2021) 32 of 23 Nov. 2021.

institutions during the financial crisis,²⁰ and again to adopt a temporary, more lenient, framework for all sorts of State aid justified by the need to counteract the negative economic effects of the COVID-19 crisis in specific economic sectors and for specific companies.²¹ This emergency competence stands out from others in that the decision to exercise it is entirely in the hands of the Commission, without the need to obtain the agreement or the opinion of the other EU institutions. However, this does not mean that powers are being *shifted* to the executive power when facing an emergency, since the Commission is in almost full control of its State aid policy also in normal times.

Article 122 TFEU, the third of the emergency competences mentioned above, contains two legal bases for EU action in economic crisis situations, a very generic one and a more specific one. Its paragraph 1 (the generic legal basis) states that the Council “may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.” It was used for emergency measures in the energy sector, which is what this provision was written for in the first place,²² but was then used, in 2016, as the legal basis for a broader and permanent EU programme for emergency support when a State is hit by natural or man-made disasters.²³ That Regulation of 2016 was amended in 2020, still with the same legal basis, in order to allow for financial support to pandemic-related health measures taken by the Member States.²⁴ Article 122(1) was also used, most recently, by the Commission for one of the measures leading to a European Health Union, namely the proposal for a Council Regulation on a framework

20. Communication from the European Commission of 22 Jan. 2009, “Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis”, O.J. 2009, C 16/1.

21. Communication from the Commission of 19 March 2020, “Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak”, O.J. 2020, C 091 I/1 (amended several times since then).

22. Council Directive 2009/119 of 14 Sept. 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, O.J. 2009, L 265/9 (as this Directive was adopted before the entry into force of the Lisbon Treaty, its legal basis was Art.100 EC, which is now renumbered as Art.122 TFEU).

23. Council Regulation 2016/369 of 15 March 2016 on the provision of emergency support within the Union, O.J. 2016, L 70/1.

24. Council Regulation 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369 and amending its provisions taking into account the COVID-19 outbreak, O.J. 2020, L 117/3. See its Annex, “Eligible actions”.

for ensuring medical countermeasures in the event of a public health emergency.²⁵

As for Article 122(2) TFEU (the more specific legal basis), it provides that the Council may decide, by qualified majority, to grant financial assistance to a Member State “where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”. This provision entered primary law through the Maastricht Treaty, as part of the fairly detailed rules on the Economic and Monetary Union that were then included in primary EU law and, possibly, as a counterweight or complement to the no-bailout clause then introduced and now laid down in Article 125 TFEU.²⁶ Whereas the no-bailout clause prohibits the EU and the Member States from becoming co-responsible for each other’s debts, Article 122(2) allows for financial solidarity between EU countries under certain conditions. Prior to the COVID-19 crisis, Article 122(2) had been used in the early stages of the sovereign debt crisis as the legal basis for the European Financial Stabilization Mechanism, the modest EU-law-based complement of the much larger, non EU-law-based, European Stability Mechanism.²⁷

In the context of the pandemic crisis, Article 122 TFEU was proposed by the Commission, and accepted by the Council, as the legal basis of the SURE instrument, offering 100 billion euro worth of temporary financial support to the national employment support programmes.²⁸ Later on in 2020, Article 122 TFEU served as the legal basis for the EURI Regulation, the linchpin of the NGEU programme.²⁹ Remarkably, the NGEU programme was not conceived as a mere crisis instrument. Rather, it aims at both the “recovery” and “resilience” of the national economies,³⁰ whereby the latter term refers to a myriad of long-term policy objectives, such as green transition and digital

25. Proposal for a Council Regulation on a framework of measures ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, COM(2021)577 of 16 Sept. 2021. At the time of writing, the Council had reached political agreement on this text.

26. Louis, “Guest Editorial: The no-bail-out clause and rescue packages”, 47 CML Rev. (2010) 971, at 983.

27. Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism, O.J. 2010, L 118/1.

28. Council Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, O.J. 2020, L 159/1. The crisis-related nature of the instrument is underscored by its limited duration, namely until 31 Dec. 2022.

29. Council Regulation 2020/2094 of 14 Dec. 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J. 2020, L 433 I/23.

30. As is acknowledged by the name of the NGEU’s main spending programme, the Recovery and Resilience Facility.

transition, which transcend the immediate pandemic crisis context. The emergency competence of Article 122 is thus stretched to allow for action that deals, at the same time, with crisis response and long-term economic resilience.³¹ Politically speaking, recourse to Article 122 serves to support the view of the “frugal” States (and Germany) that the NGEU, despite its broad substantive scope and huge financial means, is a one-off operation triggered by the exceptional occurrences mentioned in Article 122. The question whether the NGEU programme could have been based on a non-emergency competence,³² thereby creating a permanent instrument in the Union’s fiscal toolbox, could thus be avoided.

The European Parliament is not involved in the decision-making procedure under either Article 122(1) or (2). This may have made sense for the drafters of the Treaties, who may have envisaged that this emergency competence would be used only in rare cases and for action with a limited scope. The response to the pandemic modified this picture, as it has allowed this Treaty article to serve for a number of executive-led crisis responses with a very broad scope and involving massive expenditure. The executive drift was mitigated by the fact that the European Union Recovery Instrument was part of a broader NGEU legislative package which included elements that required the use of the ordinary legislative procedure, in particular for the adoption of the Recovery and Resilience Facility, which was based on Article 175(3) TFEU;³³ the European Parliament was thus indirectly called to approve also the EURI Regulation.

The common element of the three Treaty articles examined so far is that they show an awareness among the drafters of the Treaties that unforeseen events can happen and that the EU’s institutional system should have tools to deal with them. Those emergency competences can be exercised by decisions either of the Commission (in the case of State aid) or of the Council acting by qualified majority. In fact, it would make little sense to have an emergency clause requiring unanimity in the Council. An exception to this rule can be found in Article 7 TEU, providing that a “serious and persistent breach of the EU’s foundational values” in a Member State (i.e., a serious crisis) can only be addressed by the Council acting unanimously minus the vote of the State

31. The use of Art. 122 as the legal basis for SURE and EURI is discussed in De Witte, “The European Union’s COVID-19 recovery plan: The legal engineering of an economic policy shift”, 58 *CML Rev.* (2021) 635–682, 653–655. Its use as the legal basis for EURI is criticized by some authors for it being a “false crisis measure”; see Nettesheim, “Next Generation EU: Die Transformation der EU-Finanzverfassung”, 145 *AÖR* (2020), 381–437, 409–411.

32. Such as Art. 175(3) TFEU, whose use in the pandemic crisis is mentioned in the next section.

33. Regulation 2021/241 of the European Parliament and of the Council of 12 Feb. 2021 establishing the Recovery and Resilience Facility, O.J. 2021, L 57/17.

concerned. However, Article 7 is not really an emergency competence; in fact, the reference to the persistent character of the breach seems to range this among the “slow-burning” crises rather than the “fast-burning” ones; however, to the extent that the rigid decision-making rule prevents effective action from the side of the EU institutions, the slow-burning crisis may gradually escalate into a true emergency situation, which the EU is not well equipped to deal with.

Emergency legislation with “normal” legal bases

In addition to the existence and use of emergency competences, the Union institutions also adopt emergency measures based on the general (non-emergency) legal bases in the Treaties. One can distinguish, among these, between *emergency prevention* and *emergency management* measures. The former are general legal measures setting in place a governance framework that can be triggered when a sudden crisis occurs later on. Very often, these frameworks create forms of shared administration whereby EU and national institutions are called to work together to deal with a future crisis. A well-known example is the regime of escape clauses in the Schengen Code, which allows the Schengen States to reintroduce internal border controls for a variety of emergency reasons, and subject to a variety of European-level coordination mechanisms. They were repeatedly used (and possibly abused by some States) during the migration crisis years of 2015 and 2016 and, again, during the COVID-19 crisis in 2020 and 2021.³⁴

The other category is that of *emergency management*. These measures are adopted to deal with a sudden crisis as and when it occurs, either by implementing one of the preventive frameworks mentioned above, or by adopting self-standing measures. A recent example of the latter is the Regulation, adopted in 2021, setting the framework for the issuance of EU Digital COVID Certificates.³⁵ It aims at facilitating the exercise of the right to free movement within the EU, which was hampered by the adoption of

34. Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), O.J. 2016, L 77/1, Arts. 25 to 35. On the use of those escape clauses during the COVID-19 crisis, see Schade, “Crisis-proof Schengen and freedom of movement: Lessons from the Covid-19 pandemic”, *Hertie School Jacques Delors Centre Policy Paper*, 25 May 2021.

35. Regulation 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, O.J. 2021, L 211/1. See “Editorial comments –

country-specific travel restrictions. Its legal basis is the general competence, conferred in Article 21(2) TFEU, to facilitate the exercise of free movement; its crisis law nature is highlighted by the fact that its application is limited to one year, from 1 July 2021 to 30 June 2022.

The distinction between emergency prevention and emergency management measures is a fluid one. In particular, a general policy instrument can, if necessary, be adapted *ad hoc* in order to deal better with an unforeseen ongoing emergency. For example, Article 175(3) TFEU, a generic legal basis allowing for action that is necessary to strengthen the economic and social cohesion of the Union outside the structural funds, served in 2002 for the creation of the *European Solidarity Fund* (EUSF).³⁶ The EUSF was intended to offer rapid financial support to Member States facing major natural disasters such as floods or earthquakes, but it was amended in 2020, by means of a very quickly conducted decision procedure, to include major public health emergencies within its scope of application,³⁷ and some relatively small sums were allocated to a number of Member States to deal with the health emergency caused by the COVID-19 pandemic.³⁸ The same Article 175(3) TFEU served also as the legal basis for the Recovery and Resilience Facility, the flagship programme of the EU's economic response to the pandemic.³⁹ In this case, the legal basis (which is *not* an emergency competence) was used to deal with both the urgent economic fall-out of the pandemic and with the long-term resilience (and cohesion) of the European economy.

Joint action outside the EU legal order

A final component of EU emergency law is the escape-from-EU-law option. If the Union does not possess the necessary legal tools to deal adequately with a crisis, it is possible, under certain conditions, for the Member States to act

Charting deeper and wider dimensions of (free) movement in EU law”, 58 CML Rev. (2021) 969–986, and Goldner-Lang, “EU COVID-19 certificates: a critical analysis”, 12 EJRR (2021), 298–307.

36. Council Regulation 2012/2002 of 11 Nov. 2002 establishing the European Solidarity Fund, O.J. 2002, L 311/3, later amended by Regulation 661/2014 of the European Parliament and of the Council of 15 May 2014, O.J. 2014, L 189/143.

37. Regulation 2020/461 of the European Parliament and of the Council of 30 March 2020, O.J. 2020, L 99/9.

38. This was just one of many measures taken in response to the pandemic that were adopted on the basis of the EU's cohesion policy competences, both within and outside the framework of the structural funds. For a detailed survey, see Böhme and Lüer, *Cohesion policy measures in response to the COVID-19 pandemic* (European Parliament, Policy Department for Structural and Cohesion Policies, 2020).

39. Regulation 2021/241, cited *supra* note 33.

together collectively under international law. Collective action outside the EU is not always legally admissible; it cannot happen in the domain of exclusive EU competence nor may such measures conflict with existing EU law norms. But, to the extent that such collective action is admissible, it may appear useful in an emergency situation as the measures concerned do not require a legal basis in the Treaties, and therefore do not need to follow the decision-making trajectory imposed by that legal basis. Instead, the main constraint is that the crisis measures should be compatible with existing rules of EU law, and of course also with the constitutional law of each of the participating States. This is an escape from some of the constraints of EU law, in particular from the judicial review exercised by the Court of Justice,⁴⁰ but not an escape from law as such, since the conclusion, ratification and application of those agreements are subject to the rules of international law. Recourse to such “side agreements” happened several times, and for a variety of reasons, during and after the euro crisis,⁴¹ but it was not used as a tool to deal with the pandemic crisis in 2020 and 2021. During that crisis, the Member States agreed that the European Union could itself provide the kind of massive financial assistance, based on EU borrowing on financial markets, which had instead been seen to require the creation of a separate international organization (the European Stability Mechanism) at the time of the euro crisis. Because of the close connection of those side agreements with the functioning of the European Union, they can be considered a, somewhat eccentric, part of EU emergency law.

Legal erosion and shifts in the institutional balance?

The legality of particular EU crisis measures has been questioned in the scholarly literature and also challenged before the national and European courts, most prominent among the latter being the *Pringle* case challenging the compatibility of the ESM Treaty with EU law, the *Gauweiler* and *Weiss* cases contesting the emergency policies of the ECB, and the challenge brought against the migrant relocation decision by Hungary and Slovakia. There is also a diffuse sense that emergency policies will lead, almost invariably, to transgression of existing legal rules. That view is articulated

40. Spaventa, “Constitutional creativity or constitutional deception? Acts of the Member States acting collectively and jurisdiction of the Court of Justice”, 58 CML Rev. (2021) 1697–1730.

41. See the discussion of the reasons for the conclusion of those euro-crisis response agreements by De Witte and Martinelli, “Treaties between Member States as quasi-instruments of EU law”, in Cremona and Kilpatrick (Eds.), *EU Legal Acts – Challenges and Transformations* (OUP, 2018), pp. 157–188, 170–181.

most explicitly in a recent article by Kreuder-Sonnen and White,⁴² in which the authors summarize the views they had elaborated in two separate monographs.⁴³ They argue that emergency politics entails “a willingness to overstep legal and political constraints” and leads the EU institutions to “bend the law, or work creatively around it.” In this manner, they argue, “European-level exceptionalism affects the foundations of the EU’s legal order, and with it the polity’s self-understanding as a community of law.”⁴⁴ These are grave accusations, particularly at a time when the Union’s institutions are taking action to prevent or sanction rule-of-law deficits in the Member States. The examples of legal transgressions given by Kreuder-Sonnen and White are mainly drawn from the euro crisis response and include: the creation *ex nihilo* of the Troika as an intrusive emergency governor; the ECB’s reinterpretation of its Treaty-based mandate; the creation of new authority structures outside the EU legal framework (such as the EFSF and ESM); the empowerment of Frontex and the EU-Turkey deal aimed at stemming the entry of irregular migrants at the external borders; and the acceptance by the EU of the indefinite reintroduction of border controls at the internal borders.

It is true that, in the response to the euro crisis, economic law-making and monetary policy competences were interpreted extensively; that the differentiation between the euro area and the rest of the EU was extended; and that international side agreements have been used more actively than in most previous periods of European integration. Yet, on a closer look, those institutional innovations did not contradict the text of the EU Treaties, the unwritten constitutional principles, or the overall institutional structure of the EU legal order.⁴⁵ Infringements of EU legality may occasionally have happened, most obviously perhaps in the way that EU-imposed austerity measures breached the fundamental social rights of persons in the financial assistance countries such as Greece.⁴⁶ But such occasional infringements of

42. Kreuder-Sonnen and White, “Europe and the transnational politics of emergency”, *Journal of European Public Policy* (advance publication online, 29 April 2021).

43. Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (OUP, 2019), in particular Ch. 5 dealing with the euro crisis; White, *Politics of Last Resort: Governing by Emergency in the European Union* (OUP, 2019).

44. Kreuder-Sonnen and White, op. cit., *supra* note 42. The citations are from pages 3 and 4 of the advance publication.

45. I have elaborated this view in De Witte, “A gentle criticism of the metamorphosis thesis”, in Hofmann, Pantazatou and Zaccaroni (Eds.), *The Metamorphosis of the European Economic Constitution* (Edward Elgar, 2019), pp. 106–124.

46. For the argument that EU-led austerity policies caused violations of human rights, see Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* (Nomos, 2014); Poulou, “Financial assistance conditionality and human rights protection: What is the role of the EU Charter of Fundamental

EU legality do not seem inherently linked to the emergency nature of EU policies: they can happen both in “normal” and in crisis times.

A separate issue is whether, independently of the existence of violations of primary law, EU emergency politics have given rise to institutional practices that have shifted the institutional balance embedded in the Treaties. Many political scientists have been adamant that the euro crisis, in particular, led to major changes in the EU’s institutional regime although there is some disagreement between those who argued that the crisis resulted in the affirmation of the intergovernmental institutions of the EU⁴⁷ or, rather, of some of its supranational institutions such as the Commission and the ECB (but definitely not the European Parliament).⁴⁸ Part of that disagreement may be connected to the moment in time when the assessment is made; the intergovernmental institutions take the lead in formulating the overall political response to the emergency, but the actual policy responses are often taken by supranational institutions such as the Commission or the ECB. We saw in the euro crisis, the Brexit crisis, the migration crisis, and the pandemic crisis, that the political lead in formulating the crisis response was taken by the European Council.⁴⁹ That response was sometimes effective (as with the pandemic) and sometimes much less so (as with migration). The European Council sometimes offered rather detailed guidance (as when dealing with Brexit, based on the text of Article 50 TEU, which requires the European Council to provide guidance for the exit negotiations)⁵⁰ and sometimes entered into very detailed guidance largely preempting the solutions to be formally decided by the EU legislature (as happened at the July 2020 meeting of the European Council dealing with the pandemic). Subsequently, when the crisis response is turned into practice, the European Council takes a backseat and other institutions take a more prominent role, especially the European Commission,

Rights?”, 54 CML Rev. (2017) 991–1025. The EU Courts did not, however, admit the existence of such violations. The Court of First Instance found that the EU institutions had restricted the fundamental social rights of Greek citizens, but it found the limitations to be justified by the greater good of ensuring the financial stability of the euro area: Case T-531/14, *Sotiropoulou and Others v. Council*, EU:T:2017:297.

47. Fabbrini and Puetter, “Integration without supranationalisation: Studying the lead roles of the European Council and the Council in post-Lisbon EU Politics”, 38 *Journal of European Integration* (2016), 481–495.

48. Bauer and Becker, “The unexpected winner of the crisis: The European Commission’s strengthened role in economic governance”, 36 *Journal of European Integration* (2014), 213–229.

49. See, in particular, Van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Agenda Publishing, 2019), pp. 176–191.

50. The European Council’s Brexit negotiation guidelines were ten pages long: European Council, “Guidelines following the United Kingdom’s notification under Article 50 TEU”, EUCO XT 20004/17 of 29 April 2017.

the institution that possesses the manpower and expertise for the day-to-day coordination of an emergency policy.⁵¹

Conclusion

There is a vast political science literature dealing with EU crisis policies in a comparative manner, that is: trying to find commonalities and differences between the various crises that have recently affected the European integration project.⁵² In contrast, the legal literature has mostly focused on single crisis policies. This is logically related to the fact that the legal tools available to address a crisis are themselves policy-specific, as the competences provided in the Treaties to deal with crises are different from one policy domain to another. The few comparative EU crisis-law publications tend to be very critical, finding that the crisis policies lead to transgressions of existing legal norms, or reveal structural flaws of the EU legal order.⁵³ In this guest editorial, we have presented the view that EU crisis law is too fragmented along policy-specific and crisis-specific lines to allow for easy cross-crisis comparisons but, to the extent that an overall view is possible, we are not convinced that the repeated crises have affected the foundations of the EU legal order. On the contrary, the EU institutions (or, rather, their legal services) have constantly sought to argue and show that their emergency measures were legally permissible, even though they occasionally involved unprecedented and somewhat creative interpretations of existing competences and recourse to legal solutions situated outside the EU legal order. On a closer look, we agree that in almost every instance of EU crisis response in the past decade, the legal constraints imposed by EU primary law were respected by the EU institutions, even when the measures adopted may often have been politically sub-optimal. What we do see, in times of emergency, is changing practice under constant rules.⁵⁴ This is linked to the fact that EU constitutional law is both rigid and flexible. It is (too) rigid, in that it constrains the action of the EU institutions by the need to find a specific legal basis for every measure, by the continued existence of cases of unanimous decision-making in the Council,

51. See, on this point, Rhinard, “The crisisification of policy-making in the European Union”, 57 *JCMS* (2019), 616–633, 627.

52. See the collective volumes mentioned *supra* note 7.

53. Kreuder-Sonnen and White, op. cit., *supra* note 42; Dani, Chiti, Mendes, Menéndez, Schepel and Wilkinson, “It’s the political economy...! A moment of truth for the eurozone and the EU”, 19 *ICON* (2021), 309–327.

54. See Schmidt, “Reinterpreting the rules ‘by stealth’ in times of crisis: A discursive institutionalist analysis of the European Central Bank and the European Commission”, 39 *West European Politics* (2016) 1032–1052.

and, more broadly, by the excessive rigidity of Treaty revision. But, at the same time, EU constitutional law is flexible enough to allow for creative interpretations, especially of those Treaty provisions that allow for purposive action by the Union, i.e. action that is defined by a common interest to be achieved rather than by the identification of a precise policy domain. For this reason, we agree that “the EU’s crisis response mechanisms do not represent a radical break with its constitutional system as much as they throw into high relief the profound functionalist reflex already built into it.”⁵⁵

Bruno De Witte*

55. Isiksel, “Constitutionalism as limitation and license – Crisis governance in the European Union”, in Ginsburg, Rosen and Vanberg (Eds.), *Constitutions in Times of Financial Crisis* (Cambridge University Press, 2019), pp. 187–203, at 200.

* Professor of European Law, Maastricht University, and part-time Professor of European Law, European University Institute, Florence, Italy. This Guest Editorial builds on the author’s intervention at the Leiden-London conference of 18 June 2022, and benefited from the very valuable comments and criticism of the members of the Editorial Board of CML Rev.