**URGENT LEGISLATIVE MEASURES IN THE EUROPEAN UNION**

**RESEARCH PROJECT FUNDED BY FRITZ THYSSEN STIFTUNG**

Outline, methodology and research proposal

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## 1. Introduction

After 60 years of continuous European integration, the European Union has reached a critical turning point characterized by complex and urgent situations. At the same time, it is faced with new challenges that seem to call for pragmatic decisions and immediate legislative reaction. The economic crisis, the sizeable migratory flows and the recent terrorist attacks are only some examples of such exceptional circumstances. All these urgencies lead to a fundamental common question: are there any provisions in the European Treaties that allow for a lawful, fast and flexible legal way to resolve urgent occurrences and to deal with extraordinary circumstances? And, assuming there are none, which are the possible tools one could rely on, in order to trace new legislative (or regulatory) instruments at EU level? Is it possible to bring together institutions, countries and sole researchers and through a common European proposal inspire Europe towards a concrete and feasible legal reform?

Our proposed research project will endeavor to answer these ambitious legal questions. Young scholars and eminent professors from all over Europe will form a multinational team that will try to identify the possible types of legal provisions and instruments to be agreed and implemented at institutional level in the EU. They will all contribute therefore their excellence to an innovative and challenging research.

## 2. Empirical examples

In order to elevate the above crucial questions to a research topic, we are presenting below some facts and preliminary remarks on the legal issues arising from instances of recent (prima facie) exceptional circumstances and the reaction of Member States or European Institutions to them. These instances include the Eurozone crisis, terrorist attacks and the emergencies caused by recent migratory flows.

*2.1/ Financial and public debt crisis*

At the onset of the economic crisis, it was assumed that the path to overcoming it would consist of strict application or reform of the *existing* legal European framework. As a result, the EU proceeded to the reform of the Stability and Growth Pact (SGP) by the Six Pack, a set of European legislative measures aiming at strengthening the procedures to reduce public deficit and address macroeconomic imbalances. Nevertheless, amidst the unprecedented crisis of the Greek economy, which was spiraling downwards since 2009, the EuroGroup announced in May 2010 a loan agreement between Greece, the Eurozone countries and the International Monetary Fund, surveyed by an expert team of the Commission, the European Central Bank (ECB) and the IMF, hereby leading to the *participation of an international organisation in* the consolidation of a European state's economy.

Following the decision on the Greek bailout, the EU was convinced to open a rescue umbrella for all Member States in distress. Based on article 122.2 TFEU, which grants the Council the power to decide upon measures to tackle extraordinary situations, the Council established the European Financial Stabilization Mechanism (EFSM) (Regulation 407/2010), a Special Purpose Vehicle which issues own bonds to support member states in crisis. It was *an interim measure* providing direct support from the EFSM to the Member State.

Multiple voices were nonetheless pointing out the inefficiency of interim measures under such conditions. In order to evade the non-bailout clause (art 125 TFEU), which did not allow a Member State to support financially the economy of another Member State, a new third paragraph was added to article 136 TFEU, allowing Eurozone states to establish a stability mechanism that is to be activated to safeguard the stability of the Euro area as a whole. The permanent European Stability Mechanism (ESM) was thus created by an international treaty, "*as an intergovernmental organization under public international law*". By selecting this modus operandi, the EU opted for a solution combining both international and European legal instruments, and eventually found by the Court of Justice of the EU to be compatible with EU law (CJEU C-370/2012, Pringle case): although Member States may also dispose of other solutions within the EU legal framework, there is nothing to preclude them from concluding an international treaty, as long as they remain bound by their duty of sincere cooperation and by existing primary and secondary law, and respect the basic principles of EU law.

*2.2/ Refugee crisis*

At the outbreak of the refugee crisis, it was also assumed that tackling it would entail the application of the *existing* European legal framework: the Schengen Agreement, that

endowed the EU with the competence to create unified visa, asylum and migration policies; the Common European Asylum System, harmonizing national legislations; the Schengen Information System, that strengthened external border controls; the Schengen Borders Code (SBC, Regulation 562/2006, amended by Regulation 1051/2013), providing for common rules on the temporary reintroduction of border controls at internal borders in exceptional circumstances. Faced with an unparalleled flood of asylum seekers, the Schengen area is today under pressure: Hungary built a 175-km barbwire wall along the Serbian border, Germany, Austria, France, Malta, Norway, Slovenia and Sweden reintroduced border controls restricting the free movement of persons across their territories, FYROM closed its borders with Greece, Austria decided to cap refugee numbers; speculations went as far as a possible exit of Greece from the Schengen area.

All 7 countries that reintroduced temporary controls at internal borders of the Schengen area invoked the derogation clause of article 25 SBC (exceptional circumstances due to the unpredictable migratory flows amounting to a serious threat to public policy and internal security). They all make a consistent reference to public policy and internal security and therefore seem to follow the letter of article 25 SBC, being at the same time justified by the European Commission as giving "an adequate response to the identified threat to the internal security and public policy consisting of the uncontrolled influx of exceptionally large numbers of undocumented/improperly documented persons and the risk related to organized crime and terrorist threats" (EC Opinion of 28.10.2015).

In addition to the question of the legality of national measures, we are faced at the same time with an *à la carte* application of the Dublin III Regulation principle. In particular, while, according to the Dublin III Regulation 604/2013, asylum-seekers' applications have normally to be examined by the country of their first arrival, the CJEU considered that "the Member States may not transfer asylum seekers to the Member State responsible for examining the asylum application, if systemic deficiencies in that Member State amount to real risks of inhuman or degrading treatment" (CJEU C-411/10 and C-493/10, 21.12.2011, N.S. and M.E.). Similarly, the European Court of Human Rights required additional assessment of reception capacities in Italy (ECtHR, 04.11.2014, Tarakhel v. Switzerland).

In this framework, it is more than reasonable to ponder whether all these national measures aiming at stopping the influx of asylum seekers and possible terrorists are in compliance with European and international law. It is moreover necessary to determine

how Europe can strike the perfect balance between quick and effective reaction and respect for the rule of law.

*2.3/ Terrorist attacks*

Similar questions arise as Europe faces unprecedented terrorist attacks, obliging Member States to redefine their Counter-Terrorism Policy. It is indeed noteworthy that in the aftermath of the deadly terrorist attacks in Paris in November 2015, the French government immediately invoked the mutual assistance clause of the Treaty on European Union (art 42.7 TEU) asking for immediate support (also non-military) by other EU Member States in its military operations against ISIS. France opted in fact for an intergovernmental process (opting clearly for a bilaterally exchange with the other EU governments without involving the EU institutions), despite the absence of *armed aggression*, as in the case of the Paris incidents. France excluded, therefore, EU institutions from decision-making and implementation of measures taken, as it decided not to use the European solidarity clause (art 222 TFEU) providing for a more formal and time-consuming procedure.

**3. Preliminary remarks**

As a first preliminary remark, one notices, that the EU chose, at least at the beginning, the *path of legality* in order to tackle emergency situations. It is doubtful however, whether national decisions to reintroduce border control in the Schengen area still follow this rule. Therefore, the first question is whether the existing legal framework is sufficient and efficient enough for the EU to face such emergencies or whether new less time-consuming procedures could be a better solution.

Secondly, one could point out that EU readily chooses to *combine legal tools from European and International law alike*. In order to tackle the economic debt crisis, for instance, member states put forth an *intergovernmental solution*, i.e. *international treaty* for the creation of ESM. Similarly, France opted right after the terrorist attacks for an intergovernmental process, in order to take immediate action in an emergency situation, bypassing at the same time the EU institutions. Therefore, a second question refers to the potential permanence of this legal strategy that could apply also to other exceptional circumstances, and to whether this process is the only and/or an adequate EU response as a whole to unprecedented terrorist attacks.

Furthermore, it remains *doubtful whether the guarantees of transparency* required by EU law *are fully met in all the aforementioned urgent legal reactions*. Concerning specifically the ESM, one should mention that the European Parliament recommended *to avoid the*

*increasing use of intergovernmental agreements,* as this would divide and weaken the EU and the Euro area, and *to make ESM accountable to the European Parliament,* also where decisions to grant financial assistance are concerned (EP Report 2013/2277(INI) on the enquiry on the role and operations of the Troika with regard to the Euro Area Program Countries). Therefore, one should examine whether the notion of emergency itself could justify policies deviating from principles that have emerged as the legal and jurisprudential core of 60 years of European integration.

Finally, it is evident that the EU Counter-Terrorism Policy, for instance, *challenges some of the fundamental principles of EU Law*. How could a proposed use of large-scale monitoring of EU citizens' freedom of circulation be in harmony with the principle of free movement inside the Schengen area? Could the adoption of the European Passenger Name Record be compliant with the European Acquis? Could an amendment to the Schengen Borders Code allow for a broader consultation of the SIS II during the crossing of external borders by individuals enjoying the right to free movement? How could large-scale surveillance and data retention instruments be lawful, proportional and compatible with EU rules?

**4. Scope of research**

All aforementioned remarks articulately demonstrate the difficulties that the EU is faced with when coping with urgent or exceptional situations that call for fast decision making. In all these acute problems, or similar ones that may arise in the future, the EU legal weaponry appears to be inefficacious. It is, therefore, our mere duty to deepen these questions, to look into possible legal answers and to propose effective solutions. Possible answers and solutions are to be identified within the existing legal arsenal, different national legal orders and secondary EU law.

*4.1/ Solutions emerging from the existing legal arsenal*

As an initial step, one must inevitably examine all possibilities that the current post-Lisbon legal framework has to offer, and mainly the category of *delegated acts* intended to regulate non-essential elements of legislative acts by supplementing or amending them. The rationale behind delegated acts is the need for the legislator to delegate to the executive the technical aspects or details of legislation, so as to accelerate the legislative procedure and to make it more flexible and simple. As the same needs for simplified and fast-track decision-making procedures appear in all urgent circumstances, it would be useful to investigate whether delegated acts are fit to regulate the above areas of

interest and subsequently whether a possible expansion of their use could eventually lead to a Treaty reform.

*4.2/ Solutions emerging from the national legal orders*

A further source of inspiration could be examples originating from the national constitutional legal orders of the Member States.

Such an example is that of article 44 of the Greek Constitution, granting the President of the Republic the possibility to issue, upon the proposal of the Cabinet, *acts of legislative content* in case of *extraordinary circumstances of an urgent and unforeseeable need*. The Cabinet shall then submit within forty days the acts to the Parliament for ratification. Should such acts not be submitted to Parliament within the above time limits or should they not be ratified by Parliament within three months of their submission, they henceforth cease to be in force.

In the same direction, article 38 of the French Constitution is granting the Cabinet the possibility to issue *ordonnances* that are normally the preserve of statute law, for a limited period of time, after authorization from the Parliament and consultation with the Conseil d'État. They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the bill ratifying them by the date set by the enabling act. By expiration of that date, they may be amended solely by an act of parliament in those areas governed by statute law.

A comparative analysis of exceptional legislative procedures will allow us to weigh the various arguments in favor of and against them respectively and eventually sketch out the most appropriate solution at European level.

*4.3/ Solutions emerging from secondary EU law*

European secondary legislation could also prove helpful in our quest for possible divergence clauses that provide for legislative derogations in the case of urgent or unforeseeable events.

Among many others, one could refer to Communication COM(2015)454 by the European Commission that contains all existing lawful possibilities in secondary public procurement law to assist Member States in adequately and speedily satisfying the most immediate needs of asylum seekers. Although the conclusion of the Communication was clear ("Union procurement rules provide for adequate rules to satisfy the most immediate needs of asylum seekers in the current exceptional circumstances"), its sole issuance reveals the disconcertment of the Commission before unforeseen needs of

asylum seekers. What is more, despite the Commission's reaction, not all Member States proved capable of rising to the challenges, nor may all situations allow for the observance of the rules set forth in public procurement directives. The case of Greece is indicative: since 2012 many *acts of legislative content* have been issued, ratified then by law and extended in time, providing for the direct award of public contracts dealing with the asylum seekers' needs. However, many circumstances invoked by the Greek authorities to justify extreme urgency are related to contracting authorities, a fact which jeopardizes the legality of the direct award procedure and its compliance with the principle of proportionality.

*4.4/ Situations to avoid*

The creation and evolution of the European Union has been made possible thanks to its competence to issue and impose legal norms. When the regulatory response of the EU is not timely and effective, then two possible scenarios are likely to emerge: in case of shared competences, Member States are free to regulate (since the EU has not exercised its competence within a specific area), potentially resulting in fragmentation and heterogeneity of European legal rules; or, in the case of exclusive competences (i.e. where only the EU is competent to adopt legally binding acts excluding any actions on the part of Member States), the legislative gap remains, possibly leading to serious legal uncertainty. The case of judicial annulment of the Data Protection Directive and the Safe Harbor Framework in two landmark judgments of the CJEU (C-293/12, *Digital Rights Ireland* and C-362/14 *Schrems* respectively) is revealing.

## 5. Conclusion

As multi-faceted constellations like the economic crisis, refugee influx and terrorist threats are only some of the pressing challenges that Europe is actually faced with, the need for effective legal and non-legal instruments to tackle with urgent and unforeseen situations appears to be more than crucial. Our proposed legal project features both adequate methodology and essential legal expertise to ensure the identification of a pragmatic solution that will contribute to the future of the EU and the well-being and prosperity of its citizens.

## 6. Methodology

To achieve the goals set above and truly contribute to both academic research and EU policy–making knowledge, we developed an *academic cooperation network* with representatives of the widest possible range of national legal orders, who would contribute their knowledge and expertise to the research fields described earlier.

We created

a team of eminent professors, who readily accepted our invitation:

1. **Prof. Marc Blanquet** (University of Toulouse I, Chair of Public Law)
2. **Prof. Pedro Cruz Villalon** (University of Madrid, former Advocate General of ECJ)
3. **Prof. Helene Gaudin** (University of Toulouse I, Chair of Public Law)
4. **Prof. Jörn Axel Kämmerer** (Bucerius Law School, Chair of Public Law)
5. **Prof. Egils Levits** (Judge of the ECJ)
6. **Prof. Roberto Mastroianni** (University of Napoli, Chair of EU Law)
7. **Prof. Fabrice Picod** (University of Panthéon-Assas, Chair of Public Law)
8. **Prof. Sinisa Rodin** (Judge of the ECJ)
9. **Prof. Takis Tridimas** (Kings' London College, Chair of EU Law).

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a team of post-doc scholars who worked under the supervision of the above academics:

1. **Ilaria Anro**, Researcher in European Union Law, University of Milan
2. **Dr. Elena Drymiotou**, Adjunct Lecturer, Neapolis University Pafos
3. **Dr. Aurore Garin**, Attorney-at-Law
4. **Dr. Flavia Ronaldo**, Research Fellow, University of Naples
5. **James Rooney**, PhD Candidate, Trinity College Dublin, Government of Ireland Postgraduate Scholar 2019
6. **Dr. Marta Simoncini**, Assistant professor in Administrative law Luiss "Guido Carli", Rome
7. **Dr. Dace Sulmane**, Adviser at the Supreme Court of the Republic of Latvia
8. **Dr. Paulina Starski**, Senior Research Fellow in Max Planck Institute, Visiting Prof at at Humboldt-University Berlin.

under the scientific supervision of

1. **Prof. Vassilios Skouris** (President of CIEEL, former president of CJEU) and

2. **Prof. Vassilios Christianos** (former Director of CIEEL)

and the coordination of **Dr. Elsa Adamantidou**, Senior Researcher at CIEEL.

The project was launched in Thessaloniki (13.01.2017), during an official kick-off event, where all participants had the opportunity to meet, discuss on the main issues and finalize the scope of the research.

The final questionnaire was then dispatched and answered accordingly:

QUESTIONNAIRE

## I. National practices concerning law-making procedures in case of urgent and/or exceptional circumstances

**1/** Does your national legal order identify urgent and/or exceptional cases as the justification for applying special law-making procedures?

Are the concepts of "urgency" and "exceptionality" used cumulatively or alternatively as conditions for the special law-making procedures?

Are there distinct or common law-making procedures applying in urgent and/or exceptional cases?

**2/** Do the eventual special law-making procedures in case of urgent and/or exceptional circumstances derive from de facto practices or are they set out in the Constitution and/or in ordinary legislation?

What are the main principles and the concrete proceedings of law-making in urgent and/or exceptional circumstances in your national legal order?

**3/** What is the respective role of the legislative and the executive power, and eventually of other institutions, in dealing with urgent and/or exceptional circumstances?

Do the Head of the State, the Parliament and the Government retain a particular role?

**4/** On what occasions and how frequently have the urgent and/or exceptional law-making procedures been applied in your national legal order?

Have they been activated in abusive ways and has there been a political criticism against their application?

**5/** Are the urgent and/or exceptional regulatory procedures and measures subject to judicial review in your country?

In particular, is this review the task of a constitutional court?

Is the existence of the "urgent" and/or the "exceptional" situation a factual or a legal issue?

Is there a special duty for the executive to give reasons for the application of an urgent and/or exceptional regulatory procedure? Are these reasons subject to judicial control, and, if so, to what extend?

**6/** Do you think that any general or particular feature of your national special law-making procedures could be used at a European level for the management of urgent and/or exceptional circumstances?

Which criteria could be apt to guide this transposition?

**7/** Do you think that under the current circumstances your national Government would be willing to grant competence for urgent and/or exceptional legislation to the EU?

**II. Potentialities of an urgent and/or exceptional law-making procedure at the European level**

**1/** How could an urgent and/or exceptional law-making procedure be established at the EU level?

In particular, could one use the current EU rules by broadening their scope of the application or is it necessary to introduce new provisions, exclusively destined to address urgent and/or exceptional circumstances?

Is a revision of the Treaties necessary or is it possible to reach a solution by means of secondary law? In the former case, would it be sufficient a simplified procedure according to the article 40 TEU?

**2/** Which cases are to be considered as "urgent" and/or "exceptional" in the EU legal order?

Is it necessary to distinguish between "urgent" and/or "exceptional" cases?

Are there any sensitive domains that should be excluded from the application of urgent and/or exceptional EU law-making procedures?

**3/** Can you suggest a possible model for urgent and/or exceptional EU law-making procedures?

In particular, what would be the different phases of such procedures, the institutions involved and their respective roles as well as the applicable timetable for the issuing of an urgent and/or exceptional EU regulatory measure?

**4/** What kind of control is to be provided for the eventual urgent and/or exceptional EU law-making procedures and measures?

Would you consider a system of judicial review or rather a system of political accountability?

In what terms should either system operate?

**Presentation of national orders and critical thoughts on European Union**

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|---|---|
| **ANRO Ilaria** | Italy + European Union |
| **Dr DRYMIOTOU Elena** | Cyprus |
| **Dr. GARIN Aurore** | France + European Union |
| **Dr ROLANDO Flavia** | Italy +European Union |

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|---|---|
| **ROONEY James** | Ireland + European Union |
| **Dr SIMONCINI Marta** | Italy + United Kingdom + European Union |
| **Dr SULMANE Dace** | Latvia + Lithuania + Estonia + European Union |
| **Dr STARSKI Paulina** | Germany |

**Final note**

We are delighted to publish all these academic contributions, submitted to CIEEL (in 2018) and to Fritz Thyssen Stiftung (2019).