WE'RE ALL IN THIS TOGETHER: IDENTIFYING COMMON LEGAL CHALLENGES IN THE EARLY PANDEMIC TIMES

by *Sara Cocchi*

Mid-April 2020. Italy was approximately one month into the very first full lockdown declared by any Western country as an extreme measure to tackle the escalating Covid-19 pandemic. With very few notable exceptions, one after the other, almost all countries across the world were applying restrictions to everyday activities, in the desperate attempt to slow down the spread of Sars-CoV2. With social distancing, curfews and remote working as the cornerstones of our lockdown routines, the work environment as well as social interactions became even more reliant on video calls and instant messaging applications than they had been until just a few weeks before. Especially in Western countries, the sense of awe in experiencing such extraordinary times was omnipresent in any conversation with a friend from another part of the world.

Through this endless stream of calls with colleagues from outside of Italy, we realised that we were not only expressing solidarity to one another: we were also sharing our perspectives on how we were faring through those brand-new pandemic times. While similarities were self-evident, striking differences emerged as soon as we plunged beneath the surface of the most common limitations. Reasons ranged from a country's size to its socio-economic connotations, demographics, constitutional order and territorial organisation.

From the point of view of legal scientists – and legal comparativists in particular – such a composite picture needed to be further explored. We could provide a certain degree of systematisation to those one-to-one conversations, without losing that informal tone which is key to a fruitful scientific cooperation and exchange of ideas. The University of Florence Department of Legal Sciences doctoral programme was the natural context in which to focus the efforts of a considerable number of junior and senior academic researchers and legal professionals, who joined online to discuss the legal measures adopted at that early stage to tackle the Covid-19 pandemic in approximately a dozen countries from three different continents.

Easy enough to imagine, the political, economic, social and legal specificities of each country did not allow for a predetermined pattern of analysis. However, we recommended the experts cover at least a set of key aspects that could facilitate comparison and guide the following discussion.

The constitutional framework was deemed crucial to explore the power of governmental authorities to restrain civil rights and liberties by means of general provisions with the underlying justification of the ongoing pandemic. In particular, the existence of a constitutionally regulated "state of emergency" – or its absence – could lead to the adoption of comparable substantive solutions, but entailed a completely different set of problems in terms of sources of law (prescribed by the constitution v. selected by the government), subjection to (constitutional or administrative) judicial review, enforcement and justiciability of the measures adopted (detection of violations and application of the relevant sanctions). As a consequence, contributors were either asked to examine the powers granted to public authorities (governments in particular) by a constitutionally regulated state of emergency (when present), its contents and time limits, as well as the existing control mechanisms and procedural constraints; or to discuss the other constitutional or legal foundations justifying an emergency regulatory activity in times of public health crisis.

As we all could see, it only took a few weeks for the Covid-19 contagion to turn into a global pandemic, but it is certainly hard to predict how and when it will end. Against an uncertain backdrop governed by fluctuations in the number of active cases and virus transmission rate, it became relevant to inquire how to reconcile the necessarily temporary nature of stringent limitations to fundamental rights with a potentially undetermined deadline set by the development of the pandemic itself. Interestingly enough, solving this conundrum was only apparently easier when the state of emergency is regulated by the constitution, as its rigidly predetermined duration and contents might still leave room for potential abuse or – in turn – not prove flexible enough to face the consequences of a constantly evolving emergency such as a global pandemic.

Without an in-depth analysis of the relevant enforcement and sanctioning mechanisms, a mere description of containment measures and key restrictions to personal liberties would not suffice to provide a comprehensive overview of the measures implemented in the selected countries. Therefore, we recommended our colleagues to include a focus on the *law in action* alongside a detailed account of a rapidly evolving (and sometimes incomplete) *law in the books*, in order to offer the audience a practice-oriented perspective. Only complementarity between the two standpoints can shed light both on the effectiveness of the measures adopted and on the actual implementation policies

adopted by law enforcement bodies in their everyday practice. As we will see, the reasons for discrepancies may range from the specificities of the socio-economic context, which entails additional difficulties in detecting and sanctioning possible violations, to public authorities' substantive lack of interest in implementing what would turn out to be merely formal restrictions.

The same context and policy-related diversity, as well as the practical impossibility of sanctioning any behaviour that might take place in citizens' private sphere, has oftentimes led governments to adopt a blend of "hard" and "soft" measures. The latter are often formulated as recommendations and widely disseminated as good practices that should have a persuasive force rather than be perceived as mandatory orders, and hopefully be absorbed as such into everyday life. References to this mixed approach – and to its successful or unproductive outcome – provide an added value to our colleagues' contributions and offer useful hints to further explore the potential of best practices in managing complex crises.

Since the early stages of the lockdown, Italy has offered a tangible example of how difficult it can be to implement emergency restrictive measures in a decentralised (in our case, regional) form of State. In federal, regional, or anyway decentralised forms of State, the all-encompassing implications of a contagion containment strategy on individual rights and freedoms, but also on collective (e.g., labour-related) and social rights (e.g., the right to education or to health care), allow legal researchers and professionals to test all the intricacies of the constitutional distribution of legislative powers between the different territorial levels and the relevant political authorities (State/Federal Government, States/Regions, municipalities) and highlight potential and actual overlapping of, or even conflicts between, the respective regulatory sources. On the other hand, in centralised forms of State, the lack of flexibility was often questioned as ineffective and discriminatory. Whenever relevant, contributions in this volume analyse the measures adopted in each country with an eye to the different forms (or lack) of geographical distribution of power and the main issues connected to it.

The webinar «Freedom v. Risk? Social Control and the Idea of Law Face to Covid-19 Emergencies» took place on 29 and 30 June 2020. When preparing it, we realised that the topics described above were just a few of the many key points that we might have suggested our colleagues to analyse. We are grateful to them for taking on the challenge and offering us in return countless suggestions for further reflection.

This volume collects and expands the presentations delivered during the two-day online event. We are perfectly aware that so much has happened since those early months that it would be impossible to summarise it here in a

few lines. With this collection of papers (all updated to 31 January 2021), we wish to share a picture of the initial stage of the pandemic from the point of view of legal researchers and professionals from different countries and areas of the world. Those were the times when the urgent need to address unprecedented global problems with viable local solutions and adequate guarantees started to reveal the complexity of the challenges that lay ahead.

FEATURES AND CULTURAL BACKGROUND OF A RESEARCH

by Alessandro Simoni

As already explained by Sara Cocchi in the first introductory section, the essays collected in this volume are the final product of a workshop organized in the early phase of the Covid-19 pandemic, when the whole world had yet a long way to go before getting more or less out of the health emergency. Although most of the contributions were written several months after the workshop, or were updated by the authors during the editing process, the general backdrop against which the arguments were developed was still one where sweeping restrictions of the individual freedom of movement were considered as the cornerstone of the fight against the pandemic. The English term "lockdown" suddenly became a loanword that in many European languages was used as an "umbrella term" to refer to the national policies aimed at minimizing all movements of persons outside of their homes.

The (online, it should go without saying …) workshop and the research that ensued was indeed designed and implemented mostly by persons whose contacts with the outside world – at least those beyond the immediate neighbourhood – took place solely through the screens of PCs, TVs, or smartphones.

Of course, we were not the only academics that were forced to stop their ordinary "mobile" activities, and equally not the only ones who decided to devote intellectual energies to understand the impact of the pandemics on the legal systems. "Law & Covid" has indeed rapidly evolved into a flourishing field of research, and the amount of scholarly writings and the variety of perspectives is impressing everywhere.

The exercise that we launched was quite simple in structure. We gathered young scholars (typically PhD candidates or post-doctoral researchers) who had both the interest and the competences required to shed light on some among the endless legal tensions created by the policies for the control of Covid 19. The directions taken by the research exploit as much as possible the potential – in terms of accumulated knowledge and level of internationalization – developed over the years by the Department of legal sciences (*Dipartimento di*

Scienze Giuridiche - DSG) of the University of Florence, that publishes the series "Dimensione giuridica – Legal dimension", primarily aimed at presenting researches developed by PhD candidates. We perceived indeed that, to add something useful to the flood of "Law & Covid" writings, the most effective approach was simply to stick to our established cultural profile, recently strengthened with the implementation of the five years development plan for 2018-2022 launched after the selection as a "Department of Excellence" by the Italian national agency for the evaluation of universities.

To start, this explains the attention given to the intricate legal issues arising from the use of specific technologies using data to contain the pandemic, as in the case of the three essays by respectively Carlo Botrugno, Enza Cirone and Valentina Pagnanelli. The DSG is now a definitely established hub of research on law and technology, particularly when it comes to data protection, and several PhD projects deal with related topics.

A further intellectual line followed by the volume relates to another cornerstone of legal research in Florence, i.e. the attention to the unequal impact that legal rules and institutions have on the lives of the weakest members of our society, such as migrants. Two essays, by Elisa Gonnelli and Olga Cardini, very well explore such dimensions. The intellectual milieu of the DSG easily explains as well the value of the analysis made by Jacopo Mazzuri and Matteo Romagnoli, that write from the angle of constitutional law and EU law respectively, where the strength of the scholarly tradition of Florence is widely known.

But Florence is as well a stronghold of comparative law, and the reader will accordingly find a variety of essays, of different length and style, devoted to legal systems different from Italy as Denmark (by Alice Giannini), Hungary (by Martina Coli), United Kingdom (by Andrea Butelli), Kosovo (by Bardhyl Hasanpapaj), together with several countries of Latin America as Brazil (with two essays by respectively Luciene Dal Ri together with Jeison Giovanni Heiler, and Rafael Köche together with Luíza Richter), Guatemala (by Irma Yolanda Borrayo), Peru (by Luís Álamo), and Japan (by Alessandro Caprotti). Thanks to these authors, it is thus possible to find an interesting analysis of systems that would otherwise remain relatively unknown when it comes to the legal framework introduced to fight the pandemic.

Here, too, the contribution that this collective work brings to the mass of comparative material on "Covid law" was made possible by what the DSG has built in the past. The possibility to get a comprehensive and qualified view on Latin America is e.g. the result of the extensive network of academic cooperation that the DSG has in the area, that allows a cross-fertilization of legal cultures, where the advances of Italian legal scholarship (that keeps a strong prestige in the Spanish and Portuguese speaking world) are shared globally and

our researchers have the opportunity to appreciate what is discussed e.g. in Brazil with regard to the impact on law of poverty and marginality, and much else. The strength of this cross-fertilization is, by the way, also easily proven by the increasing number of Brazilian candidates that are admitted to our PhD to obtain joint degrees.

While most of the sections touching aspects related to the systems of sanctions introduced to ensure compliance with the "lockdown" deal with foreign countries, there is an exception – that of Federica Helferich's essay on the use of criminal law in Italy. This work also is in line with the research priorities currently followed by the DSG, where both young and established scholars keep a vigilant eye on the risks implicit in the constant expansion of social control through criminal law ("panpenalism"), often with populistic overtones.

Last but not least, also the involvement of Alessandro Cocchi, a international cooperation expert, lies at the end of a journey of constant attention of the DSG for the role of law in development contexts, which beyond research projects is also reflected in the growing number of those that after a PhD in legal sciences choose a career in the legal segments of development work.

Every reader will verify what can be of interest for him/her among the materials offered. Now that the health emergency has no longer the monopoly of the headlines, some essays can probably be useful for a retrospective critique of the oversimplification often recurring in the past year in the media, but also in some scholarly works, where the countries that adopted restrictive measures labelled as "lockdowns" are considered as part of a homogenous family, assuming that the only relevant differences were the timing of the introduction of the restrictions and of their removal. Within legal scholarship, this oversimplification was partly endorsed by a focus on the constitutional basis for the introduction of the "lockdowns". A perfectly understandable choice given the situation, that sometimes – however – diverted the attention from the legal "nuts and bolts" of lockdowns, i.e. the provisions that on a daily level allowed limiting freedom of movement and the unwritten rules that governed their use in practice. Upon a closer look, the differences also within Europe at the level of actual restrictions of liberties appears as significant, with differences that are at first sight not in line with the alleged success or failure of national "covid strategies". One of the case studies presented here, that of Denmark, is an interesting example. As everyone knows, in Italy and elsewhere there has been a sweeping critique against the choice made by Sweden, that openly refused to adopt the "lockdown" line pioneered by Italy. One of the core arguments in this critique – sometimes very harsh – against the "Swedish exception" was the death toll of Denmark during the pandemic, that was much lower than that of its neighbour. But once again looking under

the surface brings more doubts than certainties in terms of causal connections. As it appears quite clearly from the legal machinery described in the essay by Alice Giannini, the "success story" in terms of number of victims of Denmark was e.g. not accompanied by a compression of individual freedom of movement even remotely comparable to what took place in Italy,[1] something that of course does not exclude *per se* that the Italian choice could have been, however, rational on some ground.

On this and other aspects, the contributions here made available by the PhD candidates that accepted to take part in this enterprise – and by the other colleagues that joined – will maybe serve retrospectively as small but useful pieces for a "global history" of how freedom was traded off against risk control during the Covid-19 crisis.

[1] On this point see my remarks in A. SIMONI (2020), *Limiting Freedom During the Covid-19 Emergency in Italy: Short Notes on the New "Populist Rule of Law"*, in *Global Jurist*, 2, pp. 11 ff.

EUROPEAN SOCIETIES
AND THE COVID-19 EMERGENCY.
LAW AND INSTITUTIONS
IN THE EARLY STAGES OF THE PANDEMIC

THE ADOPTION OF COVID-RELATED EU LEGISLATION: WHAT ROLE FOR NATIONAL PARLIAMENTS UNDER EU LAW?

by *Matteo Romagnoli*

SUMMARY: 1. The EU's response to the Covid-19 emergency: The key role of the EU legislator. – 2. The European Union's ordinary legislative procedure and the role of national parliaments. – 3. The Covid emergency and the EU legislative response. – 4. The use (and misuse) of the exception to the eight-week period and the obligation to state reasons for urgency. – 5. The exercise of control by national parliaments over EU acts during the pandemic. – 6. Final remarks.

1. *The EU's response to the Covid-19 emergency: The key role of the EU legislator*

The European Council's conclusions of February 20, 2020 show that the Member States' heads of State and Government had initially underestimated the Coronavirus emergency and its potential consequences. Nonetheless, things changed after the worsening of the health crisis in Lombardy and also due to some skirmishes between the Member States over the supply of medical equipment. The European Council held a videoconference on Covid on March 10 in which heads of State and Government highlighted the need to work together and identified the main priorities for the European Institutions' future actions. Unfortunately, public debate about the Union and the Covid emergency – especially in the media – usually focuses solely on financial issues, whereas no one ever mentions the key role played by the European legislator.

The aim of this paper is therefore to analyse the procedure for the adoption of Covid-related EU legislation. There have been sixty-three EU acts proposed since March 2020 to combat the virus and its effects on the economy and society. These acts – due to the Union's competence in many areas affected by the health crisis – have proved essential in supporting the Member

States' efforts to respond to the emergency. The guiding principle of all regulatory actions has been the need to act as quickly as possible, overcoming the procedural *impasse*. This is mainly due to the collective public health emergency faced by the Union, an unprecedented scenario in recent history which "has produced an extreme economic shock that requires an ambitious, coordinated and urgent reaction on all policy fronts to support businesses and workers at risk".[1]

This paper is structured as follows. Section two illustrates the main features of the ordinary legislative procedure and the role of national parliaments in monitoring compliance with the principle of subsidiarity. Participation of national parliaments in the EU legislative process is critical because it is becoming an increasingly important aspect of the Union's constitutional legitimacy.[2] Section three explains how the EU Institutions rearranged the ordinary legislative procedure during the emergency. In section four, the focus then shifts to the eight-week exception, and the justifications provided by the EU Legislator. As a rule, in the context of the EU ordinary legislative procedure, national parliaments are granted a period of eight weeks in order to assess proposed legislation; in the context of the Covid-crisis, this procedure has been accelerated. Lastly, section five discusses how national parliaments are assessing EU acts during the pandemic.

2. *The European Union's ordinary legislative procedure and the role of national parliaments*

The Covid emergency has compelled the EU institutions involved in the law-making process to deliver faster under the ordinary legislative procedure (OLP).[3] To understand how the EU legislator has managed to do so, it is important to stress that European Treaties do not mention emergency legislative powers. However, EU law is very flexible when it comes to deadlines for legislative procedures. At the beginning of the procedure, the Commission submits its

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[1] Decision (EU) 2020/440 of the European Central Bank of 24.3.2020 (ECB/2020/17), recital no. 4.

[2] See M. OLIVETTI, *Art. 12 TUE [The Role of National Parliaments]*, in H.J. BLANKE, S. MANGIAMELI (eds), *The Treaty on European Union (TEU)*, New York-Vienna, 2013, pp. 467-526.

[3] About the ordinary legislative procedure see C. ROEDERER-RYNNING, *Passage to Bicameralism: Lisbon's Ordinary Legislative Procedure at Ten*, in *Comparative European Politics*, Vol. 17 (6), 2019, pp. 957-973.

proposal to the European Parliament (EP) and the Council, and then sends it to national parliaments. The first step is for the EP to adopt its position at first reading and forward it to the Council. If the Council approves the Parliament's position, the act is then adopted in the exact wording of the position. Otherwise, if the Council disagrees, it adopts a position at first reading and forwards it to the EP, thus initiating the second stage ("second reading") of the procedure. The EP then has three months to state its position and, depending on its assessment of the Council's first reading position, three different scenarios arise. Under the first two, the procedure comes to an end: in case of approval, the act is definitively adopted, whereas, in case of rejection, it is definitively not adopted. As a third option, the Parliament can propose amendments to the Council's position by a majority of votes, and the Commission is required to give its opinion on them. The Council can then approve all the parliamentary amendments by a qualified majority and consequently formally adopts the amended act. Otherwise, in agreement with the EP, the Council has to convene – within six weeks – a Conciliation Committee composed of the Commission, the members of the Council (or their representatives – usually members of COREPER[4]) and as many members of Parliament. The task of the Conciliation Committee is to reach, based on the positions expressed by the Parliament and the Council at second reading, an agreement on a "joint text" within six weeks, which may result in the adoption of the act by the Council and the Parliament[5] over the course of an additional six weeks. If no agreement is reached within the Conciliation Committee, the act in question will not be adopted.

To sum up, the two co-legislators adopt the legislation jointly, having equal rights and obligations – neither of them can adopt any legislation without the other's consent, and both co-legislators have to approve an identical text. Therefore, concerted actions of both institutions are indispensable for the OLP's success. On the one hand, this is a great step forward for EU democracy; on the other, it has also a significant impact on the length of the procedure. The

[4] See D. BOSTOCK, *Coreper Revisited*, in *Journal of Common Market Studies*, Vol. 40 (2), 2002, pp. 215-234.

[5] As the Court of Justice itself has observed, the Conciliation Committee is granted significant freedom in seeking agreement on a joint project. CJEU, judgment of 10.1.2006, C-344/04, *IATA e ELFAA*, ECLI:EU:C:2006:10, paragraph 58: "*In adopting such a method for resolving disagreements, their very aim was that the points of view of the Parliament and the Council should be reconciled on the basis of examination of all the aspects of the disagreement, and with the active participation in the Conciliation Committee's proceedings of the Commission of the European Communities, which has the task of taking 'all the necessary initiatives with a view to reconciling the positions of the … Parliament and the Council'*". See R. SCHÜTZE, *European Constitutional Law*, Cambridge, 2015, p. 273 ff.

framework allows for the OLP to be terminated, without further steps, as soon as an agreement or a radical disagreement between the two institutions arises.

An early first-reading search for an agreement between the two co-legislators may help speed up the decision-making process. This is why the EP, the Council and the Commission have concluded an Inter-institutional Agreement aimed at facilitating the OLP in terms of timing. The Joint Declaration on the practical arrangements for the new co-decision procedure of June 13, 2007[6] provides for frequent contacts between the three institutions within the so-called trilogues,[7] which take place throughout the whole OLP and in particular from the first reading. The Declaration also requires the EU Institutions to synchronise their respective work schedules. The content of the Declaration was echoed in the Interinstitutional Agreement on "Better Law-Making" of April 13, 2016.[8] The current successful conclusion at first reading of 80% of OLPs proves the effectiveness of the agreed solutions. Thanks to the increasing use of Trilogues at the very early stages of the OLP, inter-institutional compromise is now often brokered at first reading and prior to second reading.[9] Nowadays, "trilogues have become the *modus operandi* of EU decision-making".[10]

Nonetheless, trilogues and the related early agreements pose two potential risks for the EP as an organ of parliamentary representation and for EU democracy: firstly, they depoliticise conflict by delegating decision-making to technical experts;[11] secondly, they reduce the accountability and transparency

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[6] Joint declaration on practical arrangements for the codecision procedure (article 251 of the EC Treaty) 2007/C 145/02, 30.6.2007, pp. 5-9.

[7] Trilogues are informal meetings between the Council Presidency, the Commission, and the chairs or rapporteurs of the relevant EP Committees. These accompany the whole procedure by preparing the formal meetings of the institutions involved and the Conciliation Committee. See S.L. BIANCO, *Informal Decision-Making in the EU: Assessing Trialogues in the Light of Deliberative Democracy*, in J. DE ZWAAN, M. LAK, A. MAKINWA, P. WILLEMS (eds), *Governance and Security Issues of the European Union*, The Hague, 2016, pp. 75-92.

[8] Interinstitutional Agreement Between the European Parliament, the Council of The European Union and the European Commission on Better Law-Making of 13.4.2016, OJ L 123, 12.5.2016, pp. 1-14; see R. BRAY, *Better Legislation and the Ordinary Legislative Procedure, with Particular Regard to First-Reading Agreements*, in *The Theory and Practice of Legislation*, Vol. 2 (3), London, 2014, pp. 283-291.

[9] See P. CRAIG, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford, 2013, p. 39.

[10] J. GREENWOOD, C. ROEDERER-RYNNING, *Taming Trilogues: The EU's Law-Making Process in a Comparative Perspective*, in O. COSTA (eds), *The European Parliament in Times of EU Crisis. European Administrative Governance*, Bordeaux, 2019, pp. 121-141, p. 137.

[11] Actually, "the EP has historically been the motor of trilogue reform and institutionalization". C. ROEDERER-RYNNING, *Passage to Bicameralism: Lisbon's Ordinary Legislative Procedure at Ten*, cit., p. 966.

of the decision-making process.[12] The Treaties do not specify a time limit for first readings.[13] Therefore hypothetically, in absence of an urgent legislative procedure, if EP, Council and Commission agreed immediately, they could pass a legislative proposal within the time needed to organise votes. However, this cannot actually occur because the rules of national parliaments' participation impose a minimum period of time that must elapse before passing an EU legislative act.

The purpose of involving national parliaments in the European integration process is to bring politics and policies closer together, thus filling a gap that has caused so many problems to the modern EU.[14] Limitations on sovereignty, the attribution of legislative powers to the Union, the principles of primacy and direct effect decrease the strength and the political representativeness of the Member States' national parliaments. This has led some scholars to highlight the "executives' dominance" when defining the government of the Union.[15] The transfer of competence to the EU enhances the power of the executive at the expense of national parliaments. As a result, "democratic disconnection" between supranational and national levels can be observed within the European integration process.[16] More precisely, there is a wide divergence between a large part of public policies that have now become "Europeanised" and a political debate that has remained predominantly national.[17]

Article 12 TEU and protocols 1 and 2 annexed to the Treaties have now established specific "European powers"[18] for the Member States' parliaments.

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[12] The General Court ruled on the lack of transparency of the Trilogues in the De Capitani judgment. CJEU, judgment of 22.3.2018, T-540/15, *Emilio De Capitani v. European Parliament*, EU:T:2018:167, See M. COSTA, S. PEERS, *Beware of Courts Bearing Gifts: Transparency and the Court of Justice of the European Union*, in *European Public Law*, Vol. 23 (3), 2019, pp. 403-420. About accountability see J. GREENWOOD, C. ROEDERER-RYNNING, *Taming Trilogues: The EU's Law-Making Process in a Comparative Perspective*, cit., p. 122.

[13] R. BRAY, *Better Legislation and the Ordinary Legislative Procedure, with Particular Regard to First-Reading Agreements*, cit., p. 287.

[14] N. LUPO, *National parliaments in the European integration process: re-aligning politics and policies*, in M. CARTABIA, N. LUPO, A. SIMONCINI (eds), *Democracy and subsidiarity in the EU. National parliaments, regions and civil society in the decision-making process*, Bologna, 2013, pp. 107-132, p. 108.

[15] K. AUEL, B. RITTBERGER, *Fluctuant nec Merguntur. The European Parliament, National Parliaments and European Integration*, in J.J. RICHARDSON (eds), *European Union: Power and Policy Making*, London, New York, 2006, p. 152 ff.

[16] See P.L. LINDSETH, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, 2010, p. 12 ff.

[17] See V.A. SCHMIDT, *Democracy in Europe: The EU and National Polities*, Oxford, 2006.

[18] *Ibid.*, p. 114.

The first protocol provides for the transmission of documents drawn up by the Commission, as well as of annual legislative programmes, policy strategy documents and draft legislative acts.[19] The second one concerns the procedure under which national parliaments exercise *ex-ante* control in compliance with the principle of subsidiarity (Early Warning System).[20] Another tool created to help national parliaments interact with the European Commission without intermediation is the so-called "political dialogue".[21] Under the Early Warning System (EWS), each national parliament casts two votes. Where a parliament is composed of two different chambers, each chamber may present its reasoned opinion which corresponds to one vote. According to Protocol No. 2, when the reasoned opinions amount to one-third of the total votes that can be expressed, the author of the draft legislation must review it. The purpose is to decide whether to maintain it, modify it or withdraw it (the so-called "yellow card"). In addition, if the Commission decides to keep the proposal, even though the reasoned opinions expressed by national parliaments correspond to a simple majority of the total votes, the Council or the EP can definitively block the proposal, as stated in Article 7, par. 3, of the Protocol (the so-called "orange card").

Besides this, the Commission has established a new procedure to encourage national parliaments to follow a positive logic of cooperation, rather than a negative one of mere obstruction. At first, it was called the "Barroso procedure" and then it was renamed "political dialogue".[22] With a letter from President Barroso in May 2006, the Commission formally committed to taking into consideration all contributions sent by national parliaments, responding to each of them. In addition, this procedure has several complementary qualities to the EWS: firstly, these opinions are political, and may therefore not concern issues regarding compliance with the principle of subsidiarity; secondly, they may be evaluated by the Commission even after the eight weeks allowed for the EWS; thirdly, they are independent by nature and from the subject of the concerned EU acts, so they may also refer to

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[19] C. FASONE, N. LUPO, P.G. CASALENA, *Comment on Protocol No. 1, on the role of national parliaments in the European Union annexed to the Treaty of Lisbon*, in H.-J. BLANKE, S. MANGIAMELI (eds), *The Treaty on European Union (TEU)*, Vienna-New York, 2013, pp. 1529-1634.

[20] See K. GRANAT, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, London, 2018.

[21] See D. JANČIĆ, *The Game of Cards: National Parliament in the EU and the Future of the Early warning Mechanism and Political Dialogue*, in *Common Market Law Review*, Vol. 52 (4), 2015, pp. 939-975, p. 948.

[22] See D. JANČIĆ, *The Barroso Initiative: Window Dressing or Democracy Boost?*, in *Utrecht Law Review*, Vol. 8 (1), 2012, pp. 78-91.

non-legislative measures and exclusive competences. On the one hand, these procedures – notably, the EWS – have produced limited results in terms of actual impact on the decision-making process. On the other hand, they have accentuated the process of Europeanisation of national parliaments, contributing to political – and not just technical – dialogue on European choices.[23] Furthermore, as was observed, "the impact of these measures depends in part on the willingness of national parliaments to devote the requisite time and energy to the matter".[24]

Finally, there is also a standstill period, which is the basic precondition that enables national parliaments to carry out all functions granted to them by the Treaties and the Protocols.[25] According to Article 4 of Protocol No. 1, "an eight-week period shall elapse between a draft legislative act being made available to national Parliaments (…) and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure".[26] An additional deadline is provided for in the last sentence of Article 4: ten days should elapse between the inclusion of the proposal in the draft legislative agenda of the Council and the adoption of a position by this institution. As opposed to the first deadline, this one is set for the Council to carefully consider the content of the parliamentary opinions and other contributions received.[27] However, the same article contains an exception in case of urgency, whereby the approved act, or the Council's position on the act, has to include the grounds on which the exception was applied. The Council's Rules of Procedure implement this provision by stating that the Council may derogate from the eight weeks in accordance with the voting procedure applicable for the adoption of the act or position at issue. This exception could be identified as the only reference to an "EU urgent legislative procedure".[28] As pointed out by Fasone, "Article 4 of the Protocol introduces another element of uncertainty regarding the effectiveness of nation-

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[23] See B. GUASTAFERRO, *Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, in *Maastricht Journal of European and Comparative Law*, Vol. 21 (2), 2014, pp. 320-340.

[24] P. CRAIG, G. DE BÙRCA, *EU Law: Text, Cases and Materials*, Oxford, 2020, p. 98.

[25] C. FASONE, *Comment on article 4*, in C. FASONE, N. LUPO, P.G. CASALENA, *Comment on Protocol No. 1, on the role of national parliaments in the European Union annexed to the Treaty of Lisbon*, cit., pp. 1566-1573, p. 1566.

[26] Article 4, Protocol No. 1 On the Role of National Parliaments in the European Union.

[27] See C. FASONE, *Comment on article 4*, cit., p. 1569.

[28] See A. LEVADE, *Commentaire au protocole sur le role des parlements nationaux*, in L. BURGORGUE-LARSEN, A. LEVADE, F. PICOD (eds), *Traité établissant une Constitution pour l'Europe. Commentaire article par article*, Bruxelles, 2007, pp. 869-894, p. 887.

al Parliaments' participation, which nonetheless seems coherent with the need not to make the legislative process too rigid *vis-à-vis* unexpected situations that can occur in political life".[29] The protocol's article specifies that "save in urgent cases for which due reasons have been given, no agreement may be reached on a draft legislative act during those eight weeks".[30] Therefore, eight weeks and ten days is the minimum period within which an EU legislative act cannot be passed, unless the exception is triggered.

3. *The Covid emergency and the EU legislative response*

During the Covid emergency, the Union legislator has used all the available space for discretion under the existing procedures to deliver in a timely manner. Exceptional measures became necessary to overcome logistical difficulties, since the Institutions' intense activity had become problematic after the introduction of social containment measures. As a result of the restrictions on travel and access to the workplace, the meetings of the EU Institutions took place via remote video conferences. The EP adopted a new remote voting system for its Members (MEPs).[31] The Council also provided for a temporary derogation from the Rules of Procedure, allowing the convening of online meetings, thus overcoming any travel-related difficulties faced by its members.[32] These measures have ensured continuity in the regulatory work of the European Parliament and the Council. However, while these solutions are exceptional and limited in time, such procedures should be appropriately regulated to be used again in the future.

Furthermore, other exceptions had to be applied to ensure the effectiveness of the measures in the Commission's proposals. The Institutions decided that the Covid-related legislative acts would enter into force right after their publication in the Official Journal, to ensure the immediate effectiveness of the new legislation. Besides, the retroactive application of certain new regulations was arranged where necessary to ensure their *effet utile*.[33]

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[29] C. FASONE, *Comment on Article 4*, cit., p. 1571.

[30] Article 4, Protocol No. 1, cit.

[31] Decision of the Bureau of the European Parliament of 20 March 2020 supplementing its decision of 3.5.2004 on voting arrangements, available at https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS_ATA (2020)649348_EN.pdf.

[32] For instance, Council Decision (EU) 2020/702, OJ L 165, 27.5.2020, pp. 38-39.

[33] For instance, See recital no. 22 of Regulation (EU) 2020/698, OJ L 165, 27.5.2020, pp. 10-24.

Finally, since the introduction of the first regulations on March 30, 2020 the Council has consistently used the eight-week period exception in all legislation passed to address – or at least handle – the current emergency. The first measures adopted under the OLP were amendments to three regulations concerning emergency procedures on common rules for the allocation of slots at airports, on the Coronavirus Response Investment Initiative, and on the reformation to the European Solidarity Fund.[34] The latter was identified by the European Council as a measure symbolising solidarity between the Member States. The Council and the EP agreed to vote at first-reading the Commission's proposals, so that such provisions could enter into force by March 31, 2020. Therefore, on March 27, 2020 the Council, besides approving at first reading all the proposed acts, voted unanimously to derogate from the eight-week period. This exception was applied to all subsequent Commission proposals, at least until June. The systematic application of the exception suffered a setback when the EP and the Council examined proposals for the first acts related to the Multiannual Financial Framework (MFF), Recovery Fund and Next Generation EU. The final adoption and publication in the Official Journal of all the legislative acts adopted between March and May 2020 in response to the health emergency took, on average, one month.

4. *The use (and misuse) of the exception to the eight-week period and the obligation to state reasons for urgency*

Focusing on the exception to the eight weeks, there was no reference to justifications in the position of the Council. By contrast, in the regulations which were finally adopted, there is a recurring recital stating that the exception is justified "in view of the Covid-19 outbreak and the urgency to address the associated public health crisis".[35] How should this "standardised" justification be evaluated?

Protocol No. 1 does not provide indications on the meaning of the expression "due reasons". One may consider that "reference can be made to the existence of a compelling interest, to be clearly identified by the Council, whose protection is directly related to the adoption of that legislative measure, and that could be severely jeopardised without shortening or cancelling the dead-

[34] Regulation (EU) 2020/459, OJ L 99, 31.3.2020, pp. 1-4; Regulation (EU) 2020/460, OJ L 99, 31.3.2020, pp. 5-8 and Regulation (EU) 2020/461, OJ L 99, 31.3.2020, pp. 9-12.

[35] E.g. Regulation (EU) 2020/459, OJ L 99, 31.3.2020, pp. 1-4, recital no. 11.

lines fixed by Protocol No. 1".[36] Moreover, "according to the principle of proportionality, the Council should also prove that the same result could have not been achieved by using other tools or other means less restrictive of the right of participation of national parliaments".[37]

Some commentators have already drawn attention to how the European Legislator fulfils its duty to state reasons as required by the Treaties.[38] In the subsidiarity test, for example, the reasons provided by the Commission are often too laconic and merely state that the EU action is justified. As it has already been highlighted, "as a matter of fact, European Institutions do not always draw up an accurate analysis to explain why Union action is deemed to be more efficient than action by the Member States".[39] It has been noted that because of the laziness of the Commission's reasoning, "several national chambers challenge the justification rather than the merit of subsidiarity compliance".[40] Furthermore, this cannot be justified by the fact that "the Court of Justice of the European Union notoriously has deemed the subsidiarity principle as a political rather than a legal concept, showing a strong deference towards the discretionary power of European institutions in assessing the compliance of Union acts with the principle of subsidiarity".[41] The CJEU has distinguished between *ex ante* control, exercised at the political level by national parliaments under the procedures laid down in the Protocols, and *ex post* control, whereby the Court must verify compliances with both the substantive conditions set out in Article 5(3) TEU and the procedural guarantees laid down in the Protocol.[42]

However, it becomes quite evident that the assessment of the Institutions' compliance with the conditions imposed by the principle of subsidiarity requires more political and economic evaluations rather than legal ones. When the Court started exercising its judicial control over EU acts in light of the principle of subsidiarity, it limited itself to assessing their formal appropriate-

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[36] C. FASONE, *Comment on article 4*, cit., p. 1572.

[37] *Ibid.*

[38] B. GUASTAFERRO, *Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, cit., p. 324.

[39] *Ibid.*

[40] *Annual Report 2009 on relations between the European Commission and national parliaments*, COM (2010) 291 final, p. 4.

[41] B. GUASTAFERRO, *Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, cit., p. 323.

[42] CJEU, judgment of 4.5.2016, C-358/14, *Poland v Parliament and Council*, ECLI:EU:C:2016:323, paras. 112 ff.

ness.[43] Judicial review on the initiative of national parliaments is made even more complicated by the procedure of the exception contained in Article 4 of Protocol No. 1. The Council actually delayed its justification (*ex post*), since it came after the pre-legislative stage, when national parliaments could have instead intervened. More precisely, the Council must include the reasons in its position or in the adopted act, after the legislative process has begun, but before its conclusion. This poses several problems. First of all, the activation of the exception does not allow a formal *ex ante* control. In this case, it becomes hard to reach the *quorum* required by the EWS. Secondly, there are no solutions available to national parliaments in case of abuse of the urgency procedure. In case of incomplete or insufficient justification, their position is even weaker, as they cannot directly challenge the validity of an adopted legislative act. Parliaments could only claim the legislative acts under Article 263 TFEU about compliance with the principle of subsidiarity.[44] Therefore, any Member State, through its Government, acting directly on behalf of its Parliament, could arguably claim a violation of an essential procedural requirement, such as the lack of consultation of national parliaments during the pre-legislative phase. The approach of the CJEU regarding subsidiarity does not bode well for the outcome of such legal actions. In addition, some questions about the political expediency of the involvement of national governments might arise given their participation in Council decisions.

Recently, a reflection on the revision of the Protocols was undertaken at the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union's (COSAC) annual meeting in Zagreb.[45] An amendment was considered to extend the time given to national parliaments to better carry out their scrutiny. However, it seems that no discussion was held on the rules on suspension for reasons of urgency, which is probably due to the use of the eight-week suspension in a limited number of cases until now. The main features of these cases deserve attention. EU Legislators used this exception mainly for draft acts intended to make changes to the transposition dates of directives or the application of regulations. The purpose of these acts was to avoid overly heavy burdens on the Member States and to allow adequate time for economic operators to prepare for the new measures. Some features

[43] CJEU, judgment of 13.5.1997, C-233/94, *Germany v Parliament and Council*, ECLI:EU:C:1997:231, paragraph 28.

[44] Article 8, Protocol No. 2 On the Application of the Principle of Subsidiarity and Proportionality.

[45] *Meeting of the Chairpersons of the Committees for Union Affairs (COSAC)*, 19-20.1.2020, Zagreb.

can be highlighted by observing these examples and their reasons. If the exception was activated to postpone a deadline, the argument of the extension includes the description of the required urgency. For example, this can be seen in recitals no. 6 and 7 of Regulation (EU) 2016/2340, which state: "given the very short period of time left before the application of the provisions laid down in Regulation (EU) No 1286/2014, this Regulation should enter into force without delay (…), it is also justified to apply in this case the exception for urgent cases provided for in Article 4 of Protocol (No 1)".[46] Other cases in which this provision was adopted involved acts relating to trade measures ordered under the EU Neighbourhood Policy. Regulation (EU) No. 1150/2014 contained provisions anticipating customs duties in relations with Ukraine because of the political, social and economic crisis of 2014.[47] Instead, Regulation (EU) 2016/580 was a measure designed to quickly handle the economic fallout that occurred after the 2015 terrorist attacks in Tunisia.[48] The Council felt that the EU should grant exceptional and temporary measures to support the Tunisian economy. In these specific cases, explaining the urgency was the same as describing how the act should address a particular event. Thus recital 10 of Regulation (EU) 2016/580 stated: "in view of the severe damage done to Tunisia's economy (…) by the terrorist attack near Sousse on 26 June 2015, and the need to take emergency autonomous trade measures to alleviate Tunisia's economic situation in the short term, it was considered to be appropriate to provide for an exception to the eight-week period".[49] Finally, the applications of the exception include the acts adopted in view of the UK's withdrawal from the EU.[50] These Brexit-related acts seem to share a pattern with the current situation. There was a tendency to identify an emergency in the event (Brexit) without taking into account the object of the adopted act. The exception was then applied to these acts "in view of the urgency entailed by the withdrawal of the United Kingdom from the Union".[51]

Compared with the cases just mentioned, the urgency of intervention resulting from the health emergency outlined a more complicated scenario. In providing for recourse to the exception, the recitals of the legislative acts refer to the urgent need for immediate intervention, based on the assumption that a

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[46] Regulation (EU) 2016/2340, OJ L 354, 23.12.2016, pp. 35-36, see recital no. 6 and 7.

[47] Regulation (EU) 2014/1150, OJ L 313, 31.10.2014, pp. 1-9.

[48] Regulation (EU) 2016/580, OJ L 102, 18.4.2016, pp. 1-4.

[49] *Ibid*. Recital no. 10.

[50] For instance, see Regulation (EU) 2019/503, OJ L 85I, 27.3.2019, pp. 60-65.

[51] *Ibid*. Recital no. 10.

health emergency calls for a quick response. Therefore, it is difficult to understand why all this is never made explicit. Arguably, the argument that the exception is justified "in view of the outbreak of Covid-19 and the urgency of addressing the public health crisis associated with it" is too brief and generic and it is based on circular reasoning. These concerns must be taken seriously because the exception at issue has become the rule for legislative procedures falling under the priority called "The EU's response to the Covid-19 pandemic". It is thus even more evident that these reasons are too generic. Until now, the EU Institutions have applied the exception to the eight-week period to the adoption of 20 legal acts, and they have proposed it in four other cases. These acts cover very different areas: health, medical devices and drugs, agriculture and fisheries, competition, financial tools, consumers, customs, digital single market, employment and social policy, companies, external relations and macroeconomic assistance to EU neighbour countries, foreign trade, food safety, internal market, regional policy, transport and use of structural and investment funds.[52] This exception has even been triggered in relation to the EU Regulation establishing the Recovery and Resilience Facility. In other words, they tackle very different legal and economic problems caused by the pandemic. Despite the exceptional situation, the heterogeneity of the adopted acts would require the justification of the urgency to include a reference to the specific characteristics of each one of them. Therefore, the subsequent assessment of compliance with the obligation to give reasons, whether political or jurisdictional, must be able to cover articulated and complete grounds relating to the specific act adopted. Moreover, not even one attempt to justify the proportionality and necessity of the exceptions can be found in the documents.

These findings are supported by some isolated cases in which the legislator, even in this emergency, was not hasty in justifying the eight-week exception. For example, Regulation (EU) 2020/561 explains clearly and precisely that it was approved quickly by activating the eight-week exception, in order to avoid the entry into force of some provisions concerning medical devices.[53] Another noteworthy example is Regulation (EU) 2020/1042, which establishes temporary measures regarding the deadlines for the collection, verification and examination phases of the European Citizens' Initiative during the Covid emergency. Initially, the Commission's proposal contained a detailed, struc-

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[52] For an exhaustive list of the acts involved see on the Legislative Observatory of the EP the legislative priority "The EU's response to the Covid-19 pandemic", available at https://oeil.secure.europarl.europa.eu/oeil/popups/thematicnote.do?id=2065000&l=en.

[53] Regulation (EU) 2020/561, OJ L 130, 24.4.2020, pp. 18-22, recital no. 11.

tured and very specific justification of the subject matter of the act. According to the Commission, it is appropriate to provide for an exception to the eight-week rule because "this Regulation should be adopted as a matter of urgency, so that situations of legal uncertainty affecting citizens, organisers, national administrations and the Union institutions, in particular where the relevant time periods for the collection of statements of support, verification and examination in respect of a number of initiatives have already ended or are about to end, remain as short as possible".[54] By contrast, the act which was finally adopted only contains a formal reference to Covid,[55] and the reasons behind this change cannot be found. In addition, there are some critical remarks made by the European Ombudsman with respect to transparency of the legislative activity of the Council during the first months of Covid. On March 24, 2021, the Ombudsman demanded that the Council of the European Union adopt measures to achieve better transparency in its decision-making process after examining the procedures utilized during the Covid-19 crisis and finding them insufficient.[56] While noting the great efforts made by the Council to carry out its work under difficult circumstances, the Ombudsman's investigation verified that, for the first four months of the Covid-19 crisis, meetings of relevant ministers did not meet normal standards of transparency. These criticisms of the European Ombudsman also implicitly address the transparency of the activation of the exception to the eight-week period. At least as far as the first period of the anti-Covid rules is concerned.

To sum up, the Protocol requires inclusion of the urgency justifying the exception in the final act or in the Council's position. As much as aspects like national parliament's participation may appear as procedural deadlocks to be overcome, providing a complete justification for the activation of an exception established by primary law is a corollary of the principles of legality and of legal certainty,[57] as it enables an *ex-post* evaluation of the EU legislator's work. The inclusion of references to the reasons for urgency within the act would not seem to be an excessive burden for the EU legislator. Some adaptations to the justifications would be necessary.

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[54] Proposal for a Regulation of The European Parliament and of The Council, COM (2020) 221 final, recital no. 16.

[55] Regulation (EU) 2020/1042 OJ L 231, 17.7.2020, pp. 7-11, recital no. 19.

[56] Decision in strategic inquiry OI/4/2020/TE on the transparency of decision making by the Council of the EU during the Covid-19 crisis of European Ombudsman, 24.3.2021, available at https://www.ombudsman.europa.eu/it/decision/en/139715.

[57] CJEU, judgment of 21.9.1983, C-205/82, *Deutsche Milchkontor GmbH*, ECLI:EU:C:1983:233.

5. *The exercise of control by national parliaments over EU acts during the pandemic*

It is important to stress that the possibility to rely on an exception to the eight-week rule does not take away national parliaments' control over the EU act concerned. Clearly, the shorter time available during the Covid crisis makes it very difficult to reach the required majorities in the EWS. However, many national parliaments have managed to provide their opinion anyway. One reason could be the growing emphasis on political dialogue. A further reason may be that the control established by the subsidiarity Protocol has become a structural element of parliamentary activity in some Member States. Databases such as "the InterParliamentary EU information eXchange" (IPEX)[58] provide an overview on how various national parliaments have responded to the decisions taken by the EU institutions. IPEX is a system for the exchange of information and documents on all European-related activities of national parliaments and the European Parliament.[59] Notably, it allows sharing, thanks to smart and standardised formats in English and French, of an early and essential picture of the orientations and decisions of the various parliaments on specific measures or other EU issues, as well as the European Commission's responses to each one of them within the political dialogue.

An empirical analysis of the work of national parliaments shows that some of them have systematically analysed the Commission's proposals. In March 2020, for example, the Belgian House of Representatives considered the possible application of the eight-week exception by analysing together the proposed acts under the legislative priority of response to Covid.[60] Others, on the other hand, only select those which they consider relevant. In Italy, for instance, the *Camera dei Deputati* (the lower chamber) has prioritised and carried out its subsidiarity control only in respect of Decision (EU) 2020/701 concerning macro-financial assistance to EU neighbouring countries.[61]

[58] IPEX, *the InterParliamentary EU information eXchange*, https://ipexl.secure.europarl.europa.eu/IPEXL-WEB/home/home.do.

[59] See V. KNUTELSKÀ, *Cooperating among National Parliaments: An Effective Contribution to EU Legitimation?*, in B.J.J. CRUM, E. FOSSUM (eds), *Practices of Inter-Parliamentary Coordination in International Politics. The European Union and Beyond*, Colchester, 2013, p. 35 ff., p. 41 ff.

[60] Belgian House of Representatives, 16.4.2020, *Cellule d'analyse européenne. Le deuxième paquet Corona (CRII +) COM(2020)138 à 144 et COM(2020) 170 à 175.*

[61] *Camera dei Deputati*, *Doc. XVIII N. 17 III Commissione (affari esteri e comunitari) documento finale*, 12.5.2020.

Furthermore, national parliaments do not limit their scrutiny only to EU legislative acts (i.e., acts adopted under the OLP). For instance, the EU Regulation that established SURE (Support to mitigate Unemployment Risks in an Emergency),[62] was approved via a non-legislative procedure. Among the most important and innovative initiatives, the Council has taken some decisions based on Article 122 TFEU, adopting coordination measures "in a spirit of solidarity". Yet, two national parliaments issued reasoned opinions – the first ones related to measures acted in response to the Covid-crises.[63] As for the proposal of this Regulation, the case of Finland deserves close attention. The internal discussion within the Finnish Parliament did not go as far as producing a reasoned opinion. This Member State has established a national decision-making procedure on EU matters that provides the national parliament with extensive rights of participation and information. Issues concerning European monetary policy and other related topics have especially been often discussed in the parliament,[64] including the Committee on Constitutional Law – the most important constitutional body in Finland, in the absence of a Constitutional Court.[65] The Committee "found that various elements in the proposals were problematic in light of the Finnish Constitution and gave the government clear and in practice binding guidance".[66] In relation to the governance of SURE, the Committee highlighted that, whilst "the approach might be feasible, from a strictly legal-technical viewpoint, (…) it is not convincing from the viewpoint of a correct, democratic and accountable process".[67]

National parliaments have also devoted special attention to a series of acts proposed and closely related to the Union's long-term budget, to the Recovery Fund and to Next Generation EU.[68] The eight-week exception was initially

[62] Council Regulation (EU) 2020/672 of 19.5.2020, OJ L 159, 20.5.2020, pp. 1-7.

[63] Austrian Federal Council, STELLUNGNAHME, gemäß Art. 23e B-VG des EU-Ausschusses des Bundesrates vom, 6.5.2020; Assembleia da Repùblica, Written opinion on: COM (2020) 139 (PT), 24.4.2020.

[64] See P. LEINO, J. SALMINIEM, *The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?*, in *European Constitutional Law Review*, Vol. 9 (3), 2013, pp. 451-479.

[65] P. LEINO, *Solidarity and Constitutional Constraints in Times of Crisis*, in *VerfassungsBlog*, 2020, available at https://verfassungsblog.de/solidarity-and-constitutional-constraints-in-times-of-crisis/.

[66] *Ibid*.

[67] *Ibid*.

[68] See F. COSTAMAGNA. M. GOLDMANN, *Constitutional Innovation, Democratic Stagnation?: The EU Recovery Plan*, in *VerfassungsBlog*, 2020, available at https://verfassungsblog.de/constitutional-innovation-democratic-stagnation/; D. UTRILLA, *The European deal for post-pandemic economic recovery: content and meaning*, in *EU Law Live*, 2020, available at https://eulawlive.com/the-european-deal-for-post-pandemic-economic-recovery-content-and-meaning/.

planned for these ones too.[69] However, the protraction of the negotiations on these issues over time ended up delaying the approval of these acts. Whilst these acts have not been passed yet, the eight-week standstill period has long since expired. Therefore, the number of opinions delivered by national parliaments was significant in the political dialogue and not in the EWS. Leaving aside instances where substantial clarifications on the Commission's proposal were required,[70] the attitude of the Portuguese Assembly and of the Spanish General Courts should be analysed in detail.[71] These parliaments have indeed tried to support their governments' commitment by stating that action at the EU level was needed to overcome the economic crisis linked to the pandemic.[72] Since the media constantly discuss economic-related matters, national parliaments may have intentionally focused on acts concerning economic policies to draw their citizens' attention. However, it is important to remember that the EWS and political dialogue are the only ways for national parliaments to control or support the action of their member state's governments in increasingly large areas of economic policy. As mentioned above, institutions that have lost their traditional legislative functions have been assigned a supervisory role according to a checks and balances mechanism, following what has been called a "compensatory logic".[73] This is confirmed by the practice concerning parliamentary scrutiny under the Subsidiarity Protocol in "ordinary times". Barbara Guastaferro's studies have already shown that "most of the parliaments will not make use of this mechanism to block the European decision-making, but to have a say on the substance of European institutions' legal and political choices".[74] Indeed, national parliaments rather than being bodies of procedural control, as they were conceptualized in the EWS, are po-

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[69] See, for instance, Proposal for a Regulation of The European Parliament and of The Council COM (2020) 408.

[70] Bundesrat, *Decision of the Bundesrat – COM 2020 451*, 03.6.2020 and the Senate of the Parliament of the Czech Republic, *Resolution of the Senate on the Recovery and Resilience Facility and the Technical Support Instrument (COM 2020 408 and COM 2020 409)*, 22.6.2020.

[71] E. g. Assembleia da República, *Written opinion on: COM (2020) 408*, 29.6.2020; Cortes General, *Report 5/2020 of 30/06/2020 on COM (2020) 408 final*, 1. 6.2020; Cortes General, *Report 7/2020 of 30/06/2020 on COM (2020) 223 final*, 1.6.2020.

[72] Gobierno de España, *Pedro Sánchez y otros ocho líderes europeos defienden una respuesta coordinada frente al coronavirus*, 25.3.2020, https://www.lamoncloa.gob.es/presidente/actividades/Documents/2020/250320-Ingles.pdf.

[73] M. CARTABIA, *Prospects for National Parliaments in EU Affairs*, in G. AMATO, H. BRIBOSIA. B. DE WITTE (eds), *Genesis and Destiny of the European Constitution*, Bruxelles, 2007, p. 1093.

[74] B. GUASTAFERRO, *Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, cit., p. 338.

litical bodies that need to affect in some way the substantive outcome of decision-making processes. Nowadays, Covid-related cases confirm that the national parliaments' need to engage in direct dialogue with the EU institutions appears to have become a structural element of their European powers.

6. *Final remarks*

The EU legislator has shown the ability to finalise the legislative measures related to the Covid emergency more quickly than usual. However, this has required the activation of a clause in Article 4 of Protocol No. 1, which makes it much more difficult for national parliaments to monitor proposals for legislative acts. Yet, the arguments used to justify these exceptions are too generic and not tailored to the specifics of the heterogeneous areas of law that the acts at issue concern. Regrettably, this does not increase the accountability of the institutions involved in such a critical time. The role of national parliaments is important precisely with regard to the accountability of the EU.[75] The main channels for their contribution are the EWS and the informal "political dialogue". Sacrificing the time granted to national parliaments to evaluate EU legislative proposals for reasons of urgency implies the need for a more thorough elaboration of the justifications.

Yet, even though the exception to the eight week-period has become the rule for legislative acts adopted in response to the pandemic, national parliaments have not renounced their European powers. The reported data on the activities and reasoned opinions produced during this period clearly show the national parliaments' determination to play an autonomous role in the institutional framework of the European Union. National parliaments have been very constructive about EU legislative action during this time, showing their willingness to provide a political contribution to the legislative (and non-legislative) activity at the EU level.

In conclusion, whether exceptional legislative processes have become the norm in this time of urgency is something that the Union shares with many national constitutional systems.[76] The pandemic has put almost as much pressure

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[75] K. AUEL, *Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs*, in *European Law Journal*, Vol. 13 (4), 2007, pp. 487-504.

[76] See M.P. MADURO, P.W. KAHN (eds), *Democracy in Time of Pandemic: Different Future Imagined,* Cambridge, 2020; see also T. GINSBURG, M. VERSTEEG, *The Bound Executive: Emergency Powers During the Pandemic*, in *Virginia Public Law and Legal Theory Research Paper No.*

on various decision-making processes as it has on national health systems. One may wonder whether the inclusion of a formal urgency legislative procedure in the Treaties would lead to a better balance between an effective legislative response and a high degree of transparency and accountability. This could be discussed in the context of the Conference on the Future of Europe, which was delayed (also) due to the pandemic crisis.[77] The European Parliament believes "that the Covid-19 crisis has made the need to reform the European Union even more apparent, while demonstrating the urgent need for an effective and efficient Union; is therefore of the opinion that the Conference process should take into account the EU's existing recovery instruments and the solidarity that has already been established, while ensuring ecological sustainability, economic development, social progress, security and democracy".[78] It is essential to take advantage of what has happened over this period of time to discuss the need to provide adequate tools to empower the Union's decision-making process during emergencies.[79] It will then be possible to consider a Union act on emergencies in general, supported by a specific precautionary and urgent competence in the decision-making process.[80] A crucial issue will be the identification of guarantees, counterbalances and modalities of democratic control over these acts, including by national parliaments.

2020-52, U of Chicago, Public Law Working Paper No. 747, Chicago, 2020, available at SSRN: https://ssrn.com/abstract=3608974.

[77] Communication from the Commission to the European Parliament and the Council shaping the conference on the future of Europe, 22.1.2020 COM (2020) 27 final, https://ec.europa.eu/info/sites/info/files/communication-conference-future-of-europe-january-2020_en.pdf; European Parliament resolution of 18.6.2020 on the European Parliament's position on the Conference on the Future of Europe (2020/2657(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0153_EN.pdf; see F. FABBRINI, *Reforming the EU Outside the EU? The Conference on the Future of Europe and Its Options*, in *European Papers – A Journal on Law and Integration*, Vol. 5 (2), 2020, pp. 963-982.

[78] European Parliament resolution of 18.6.2020 on the European Parliament's position on the Conference on the Future of Europe (2020/2657(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0153_EN.pdf, paragraph 6.

[79] See A. ALEMANNO, *Taming COVID-19 by Regulation: An Opportunity for Self-Reflection*, in *European Journal of Risk Regulation*, Vol. 11, Special issue 2, 2020, pp. 187-194.

[80] G. TESAURO, *Senza l'Europa nessun paese andrà lontano*, in *Dibattito "Coronavirus e diritto dell'Unione"*, no. 3, aisdue.eu, 2020, pp. 10-17, p. 16, available at https://www.aisdue.eu/giuseppe-tesauro-senza-europa-nessun-paese-andra-lontano/.