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# States of emergency in response to the coronavirus crisis

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Normative response  
and parliamentary  
oversight in  
EU Member States  
during the first wave  
of the pandemic

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## STUDY

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## Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic

The present study examines the normative response of the 27 European Union Member States (EU-27) during the first phase of the Covid-19 pandemic (March to mid-June 2020). Following an initial description of the theories surrounding the states of emergency and exception (Schmitt, Rossiter, Agamben, Posner and Vermeule), the authors describe the international law framework of states of emergency and of the recommendations of the Venice Commission in this respect. The analysis identifies four main normative responses (constitutional states of emergency; statutory regimes; use of special legislative powers by the executive; and ordinary legislation). The study does not focus on the specific content of the various containment measures, but rather on the normative mechanisms that led to the introduction of such measures, highlighting the main features and trends. The study also devotes particular attention to the role of national parliaments in the adoption of the various normative responses and explores the degree to which national parliaments have been involved and could exercise parliamentary oversight over the normative measures used by the executive to contain the pandemic in the EU-27.

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## Executive summary

This study analyses European Union Member States' normative response to the coronavirus pandemic, focusing mainly on the response to the 'first wave' of the pandemic, a period that goes from its declaration (March 2020) to mid-June 2020, and the parliamentary oversight over the measures adopted. In the EU-27, the majority of Member States (19) enacted either a constitutional state of emergency, or a statutory emergency regime, or both, establishing, or sometimes adapting, emergency mechanisms. A minority of Member States (8) enabled governments to adopt containment measures through either special or ordinary legislation.

Of the 17 Member States with a constitutional emergency clause suitable to respond to a pandemic, only 10 chose to activate it in the first wave of the pandemic (Bulgaria, Czechia, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain), although often in combination with other arrangements. Seven Member States (Croatia, Germany, Lithuania, Malta, the Netherlands, Poland and Slovenia) chose not to declare a state of emergency. States of emergency were initially declared between 11 and 19 March and lifted between 13 May and 24 June 2020. In some cases, these states of emergency were lifted once the first wave of the pandemic was under control, and replaced with lighter mechanisms. The minimal statutory duration of states of emergency ranges from 10 days (Luxembourg) to 90 days (Estonia, Finland, Slovakia), generally renewable. The legislation underpinning the declared states of emergency allowed governments to restrict fundamental rights. Some EU Member States did communicate to the Council of Europe's Treaty Office a derogation to certain fundamental rights under Article 15 of the European Convention on Fundamental Rights and to the Secretary-General of the United Nations derogations to Article 4 of the International Covenant on Civil and Political Rights.

Statutory regimes were implemented in 14 Member States (Bulgaria, Croatia, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovenia, and Slovakia). These statutory health or civil protection regimes aimed at introducing predetermined measures of an exceptional and practical/operational character. Some states decided to declare both a state of emergency and a statutory regime, to serve different purposes. In some cases, the statutory regimes were declared in lieu of a state of emergency because this latter was not suitable to respond to a pandemic, in some other cases because declaring a state of emergency was not desired. Special legislative powers exercised by the executive were used in only a handful of states: Belgium, Greece, Italy, Romania and Spain. In all these Member States, except Spain, special legislation has provided enabling rules for the government to introduce containment measures. The majority of Member States, either relied on an arsenal of enabling laws that existed prior to the current emergency (13 Member States: Cyprus, Czechia, Estonia, Finland, France, Germany, Latvia, Lithuania, the Netherlands, Portugal, Slovakia, Slovenia and Spain), or adapted pre-existing enabling laws (8) to the new emergency (Bulgaria, Croatia, Denmark, Hungary, Luxembourg, Malta, Poland and Romania). In very few cases (Denmark, Ireland, the Netherlands, Sweden), the power to introduce containment or mitigating measures derived exclusively from ordinary legislation that either existed prior to the current crisis, or that was adopted or even adapted to the exigencies of the pandemic.

It should be noted that participation of EU Member States' national parliaments in the management of the first wave of the pandemic has differed widely, depending on the constitutional and legal arrangements used to contain the spread of Covid-19 and the extent to which they provided for some kind of parliamentary participation or oversight over the measures adopted. In all the Member States that declared a constitutional state of emergency, except Estonia and Slovakia, the national parliament participated in the decision to declare or to prolong the emergency. This was either because the parliament had to declare (Bulgaria), or authorise, the declaration of the state of emergency (Finland, Portugal and Romania, as well as Czechia – where the Chamber of Deputies could annul the declaration); or because it had to authorise its extension, usually within a very short time frame after the initial declaration (the above-mentioned Member States plus Hungary,

Luxembourg, Spain). A similar conclusion can be reached in relation to the Member States that have decided to address the pandemic by resorting to the special legislative powers constitutionally granted to the executive for urgent or exceptional circumstances. In the five Member States that resorted to these tools, parliamentary oversight as regards the normative acts adopted by the executive took place either ex-post (Italy, Greece, Romania and Spain) or ex-ante and ex-post (Belgium). Parliamentary oversight was not so widespread, however, in the Member States that decided to resort to special statutory regimes to deal with the health crisis, as parliamentary oversight in relation to the declaration was only required in France, Germany (ex-ante) and Latvia (ex-post).

Apart from these special tools, parliaments have participated in the management of the crisis, in many Member States, by using their normal legislative, budgetary and oversight powers. Among the Member States that addressed the consequences of the health crisis resorting mainly to measures adopted under ordinary legislation, many had to pass brand new legislation or amend existing laws to enable the national authorities to adopt the measures needed to address the crisis (e.g. Austria, Croatia, Denmark, France, Germany, Ireland, Malta, Poland). In some cases, the measures adopted were of a temporary nature (even if adopted through ordinary legislation), providing national parliaments with an extra layer of oversight over governmental decisions (e.g. Austria, Ireland). Amendments to the approved national budget were also passed in several EU Member States (e.g. Belgium, Estonia, France, Ireland) to allow national authorities to address the new needs created by the pandemic. Similarly, national parliaments frequently used ordinary oversight tools to obtain fresh information on the situation and the measures adopted to deal with the crisis and hold the government to account while it exercised special emergency powers.

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# 1. Introduction

With the World Health Organization (WHO) declaring a global pandemic on 11 March 2020, states all over the world have largely resorted to exceptional measures to curb the spread of Covid-19. How states reacted globally and the measures that they put in place has attracted attention and academic interest among political and constitutional experts. Several networks, foundations and institutions<sup>1</sup> have attempted to describe and elaborate on the various responses in a scientific way, keeping in mind that this exercise, although commendable, could be by definition outdated, due to the fast moving reality and the quick obsolescence of the remedies, but may teach us important lessons for dealing with similar emergencies in the future. The different strands of research that the pandemic has involuntarily activated are all the more extraordinary due to the unprecedented reach of the (current) health crisis, which is probably the only occasion in recent times where such a high number of states have been affected at the same time.

Although at the time of writing, the 'second wave' of the pandemic is sadly on the way<sup>2</sup> in many Member States, this study looks back in time and attempts to give a picture of the measures adopted by EU Member States in the first phase of the pandemic, from the WHO declaration to mid-June 2020. Some more recent developments are also considered, although not systematically, as EU Member States' normative responses to the emergency are rapidly evolving and a full picture of those reactions would only be available once the second wave is over.

This exercise has revealed that EU Member States have all adopted a wide range of emergency measures in response to the public health crises generated by the coronavirus pandemic. However, their constitutional and legal frameworks differ widely as regards the procedures and requirements to adopt emergency measures. Some Member States' constitutions contain detailed provisions on states of emergency, whereas others contain no provisions at all (e.g. Denmark), or contain provisions that do not include a health emergency (e.g. Italy). Some Member States decided to declare a constitutional state of emergency to contain the pandemic (e.g. Bulgaria, Estonia, Latvia, Romania, or Spain), whereas others decided not to resort to that possibility, even when their constitution allowed it. Instead, they adopted measures on the basis of, for example, ordinary laws, statutory regimes, or making use of special legislative powers granted to the executive.

Despite this variety of national situations, a common feature of the legal response to tackle the pandemic in the Member States has been the shift in the competences of both the legislative and the executive branches of government. As in other parts of the world,<sup>3</sup> governments in the Member States of the EU have assumed a central role in proposing and adopting the measures needed to tackle the health crisis, in some cases with significant transfers of additional competences from the legislature to the executive branch.<sup>4</sup> This comes as no surprise, as executives have traditionally been considered better suited to deal with crises than legislatures, due to their hierarchical structure, their ability to respond more speedily and flexibly to immediate challenges and their better access to expertise.<sup>5</sup>

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<sup>1</sup> See [Just Security](#), [Constitutionnet](#), the [Venice Commission](#) of the Council of Europe, the European Union Agency for Fundamental Rights (FRA), [Verfassungsblog](#), [Robert Schuman Foundation](#).

<sup>2</sup> See [World Health Organization](#).

<sup>3</sup> T. Ginsburg and M. Versteeg, 'The Bound Executive: Emergency Powers During The Pandemic', *Virginia Public Law and Legal Theory Research Paper*, No 52, 2020, p. 22; J. Grogan, 'States of Emergency', [Verfassungsblog](#), 26 May 2020.

<sup>4</sup> T. Ginsburg and M. Versteeg, op. cit, p. 4; E. Griglio, 'Parliamentary oversight under the COVID-19 emergency: striving against executive dominance', *The Theory and Practice of Legislation*, July 2020.

<sup>5</sup> J. Petrov, 'The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?', *The Theory and Practice of Legislation*, June 2020, p. 5.

Schmittian accounts of the role of governments in crises draw a picture of clear pre-eminence of the executive branch in addressing the situation, with no constraints from the other branches of government.<sup>6</sup> However, such accounts have been contested by academics who have defended the need to find an adequate framework for emergencies that both invest the executive with the additional competences needed to address the crisis while providing for the necessary checks and balances from the judiciary and the legislature.<sup>7</sup> In this logic, several international human rights treaties recognise that states may derogate from some of the obligations they impose during emergencies. At the same time however, such treaties impose formal and substantive safeguards, including that the emergency state is formally declared, that it is motivated by exceptional circumstances, and that the measures adopted are of a necessary, temporary and supervised nature (Article 4 International Covenant on Civil and Political Rights; Article 15 European Convention on Human Rights).<sup>8</sup> The European Parliament also favoured a similar approach during the Covid-19 pandemic, emphasising that all measures adopted must be 'strictly proportionate to the exigencies of the situation, clearly related to the ongoing health crisis, limited in time and subjected to regular scrutiny'.<sup>9</sup> Similarly, the Venice Commission has indicated that the use of emergency powers can be considered justified only if they are necessary to overcome the exceptional situation; if they are proportionate and limited in time; and if there is an effective judicial and parliamentary scrutiny on them.<sup>10</sup>

Therefore, it seems clear that even in the midst of a crisis, the judiciary and the parliament play a decisive role in preventing the excessive use of emergency powers and in ensuring the adequacy and proportionality of the special measures adopted. Judiciary oversight remains crucial to ensuring the legality, necessity and proportionality of the measures adopted, because the ensuing decisions are on the one hand characterised by the independency and impartiality of those called to resolve the dispute (the judges), and on the other by the fact that the decisions possess legal authority.<sup>11</sup> The legislatures' pluralistic compositions and the deliberative and public nature of parliamentary procedures make national parliaments an exceptionally suitable arena to discuss the different ways in which a crisis can be addressed and make the relevant information available to the public, thus adding to the legitimacy of the solutions finally taken.<sup>12</sup>

In this vein, this study focuses on the legal framework within which emergency measures were adopted in the EU Member States and on national parliaments' role in dealing with the pandemic. After a short overview of the debate on emergency powers according to political science theory and a description of the international law framework (Section 2), this study analyses the legal framework within which Member States adopted containment measures (Section 3). In addition to exploring the additional powers granted to the executive during the crisis, this study examines the way and the extent to which national parliaments exercised an effective and timely oversight of

<sup>6</sup> C. Schmitt, *Die Diktatur*, first published in 1922.

<sup>7</sup> For a discussion of those positions, see: T. Ginsburg and M. Versteeg, op. cit, pp. 10-21.

<sup>8</sup> [General comment no 29, states of emergency \(Article 4\)](#), United National Human Rights Committee, CCPR/C/21/Rev. 1/Add. 11, 31 August 2001; [Guide on Article 15 of the European Convention on Human Rights-Derogation in time of emergency](#), European Court of Human Rights, December 2019.

<sup>9</sup> Resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences, European Parliament, [2020/2616\(RSP\)](#), para. 46.

<sup>10</sup> [Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency](#), Venice Commission, CDL-AD(2020)014, 19 June 2020.

<sup>11</sup> J. Petrov, op. cit, p. 10.

<sup>12</sup> J. Murphy, 'Parliaments and Crisis: Challenges and Innovations. Parliamentary Primer No 1', International Institute for Democracy and Electoral Assistance (IDEA), 2020, p. 16.

governmental measures and whether similarities or differences can be drawn from the different Member State's reactions (Section 4).

The analysis is based on research performed by the European Parliament's Research Service, which led to the publication of a series of briefings between May and July 2020, drawing on official information and available academic commentaries on the EU-27 national responses.<sup>13</sup>

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<sup>13</sup> K. Binder, M. D. Crego, G. Eckert, S. Kotanidis, R. Manko and M. Del Monte, [States of emergency in response to the coronavirus crisis: Situation in certain Member States](#), Briefing, EPRS, European Parliament, April 2020; N. Atanassov, H. Dalli, C. Dumbrava, G. Eckert, U. Jurviste, A. Radjenovic, S. Voronova, [States of emergency in response to the coronavirus crisis: Situation in certain Member States II](#), Briefing, EPRS, European Parliament, May 2020; N. Bentzen, A. Boström, M. Del Monte, I. Odink, M. Prpic, M. Tuominen, [States of emergency in response to the coronavirus crisis: Situation in certain Member States III](#), Briefing, EPRS, European Parliament, June 2020; Z. Alexandre, M. Del Monte, G. Eckert, S. Kotanidis, V. Langova and V. Rakovska, [States of emergency in response to the coronavirus crisis: Situation in certain Member States IV](#), Briefing, EPRS, European Parliament, July 2020.

## 2. Emergency powers

### 2.1. Theory and nature of emergency powers

Since ancient times, communities' compelling impulse for self-preservation has led to the design of specific mechanisms to allow the exercise of special powers in extreme situations of danger due to external or internal threats. This part of the constitutional theory of state power has been the object of political theories whose most recent expressions date back to the period before the Second World War.

Carl Schmitt<sup>14</sup> famously explored the nature of emergency powers<sup>15</sup> and identified the sovereign in 'he who has power to decide on the state of emergency'. In Schmitt's theory, the unpredictability of national threats made it impossible to regulate emergency powers as liberal constitutionalism would require, i.e. according to the law or constitution and more particularly the rule of law. Instead, Schmitt makes the claim that the sovereign's emergency powers would be unconstrained and unbound as he may act outside juridical normality. The dictator/sovereign unites the legal and the non-legal by means of a decision 'having the force of law'. In this way, according to Schmitt, the juridical order is preserved, even when the law itself is suspended.<sup>16</sup> In fact, the suspension of law is evidence as to how a sovereign dictatorship is linked with the exercise of constituent powers, i.e. a moment where no law applies but only the power of the sovereign who decides on the content and existence of law. This would also justify the exercise of martial law against extrajudicial violence.

A more nuanced position was advanced by Clinton Rossiter following the Second World War, who preconised the advent of a dictator of a constitutional nature that is limited in time, with the mission to preserve the constitutional order and who remains within constitutional boundaries.<sup>17</sup> More recently, Giorgio Agamben<sup>18</sup> argued a de facto normalisation of emergencies, in the sense that states of emergency have become 'the dominant paradigm of government in the 20th century' where, contrary to Schmitt's vision, the state of emergency is not a state where law continues to be created, although without democratic methods, but a true state of anomie, or a space without law.<sup>19</sup> Posner and Vermeule also revisited the issue of emergency powers,<sup>20</sup> claiming that the exercise of emergency powers by the executive became unbound, especially after the 11 September terrorist attacks in the United States of America. These two academics argued that the executive is the only state organ that has the resources, power and flexibility to tackle an emergency while balancing it with civil liberties. The executive seems therefore to be the best and perhaps the only institutional actor that can manage emergencies of a security character. They therefore advocate for an 'unbound executive' in times of crisis.

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<sup>14</sup> T. Ginsburg, M. Versteeg, op. cit., p. 9.

<sup>15</sup> K. L. Scheppele, '[Law in a Time of Emergency: States of Exception and the Temptations of 9/11](#)', *Public Law and Legal Theory Research Paper Series* Research Paper No 60.

<sup>16</sup> S. Humphreys, '[Legalizing Lawlessness](#): On Giorgio Agamben's State of Exception', *EJIL*, Vol. 17(2006), No 3, pp. 677-687.

<sup>17</sup> C. L. Rossiter, [Constitutional Dictatorship](#): *Crisis government in the modern democracies*, Princeton University Press, 1948.

<sup>18</sup> G. Agamben, *State of exception*, University of Chicago Press, Chicago, 2005.

<sup>19</sup> S. Humphreys, op. cit. p. 680.

<sup>20</sup> T. Ginsburg and M. Versteeg, op. cit., p. 10.

On the other side of the spectrum, the 'Madisonian'<sup>21</sup> approach emerges, which highlights the existence of checks and balances to counteract the executive's prerogatives that unfold with judicial review and legislative oversight.

Modern constitutions however, seem to adhere to this latter model in as much as they not only provide in overwhelming numbers the possibility to declare a state of emergency, but they also do so by equipping the constitutional architecture of the state with certain boundaries and with built-in safeguards. Indeed, a recently conducted research on emergency powers around the world<sup>22</sup> has evidenced that over 90 % of all constitutions currently provide for a state of emergency. Of them, 60 % require the legislature to declare such a state of emergency. Many of them prevent the dissolution of parliamentary assemblies during an emergency state. This prohibition seems to confirm the conservative nature of states of emergency which derives from the Roman archetype,<sup>23</sup> whereby in cases of emergency the senate could entrust the consul to appoint a dictator with the power to enact the necessary actions (suspend rights, engage military action or suppress insurrection). The conservative aspect of emergency powers in the Roman experience was in fact inherent in the nature of the emergency dictator's office, which was limited to six months, after which the dictator was expected to step down and the *status quo ante* to be restored.

Finally, this dualism found in academia is somewhat reflected in the approach taken by international organisations<sup>24</sup> that foster approaches to states of emergency which depart from the notion that states of emergency lie outside the law and are not subject to it (sovereignty approach), adhering to the notion that states of emergency are in themselves a legal institution or a set of arrangements, albeit of an exceptional character, which is however subject to law and which possesses built-in safeguards and guarantees (rule of law approach). This dichotomy, as observed,<sup>25</sup> does not however exclude a different level of detail in the regulation of emergency powers.

## 2.2. International framework

It is acknowledged today that states may resort to special, even invasive exercise of powers when the situation demands. This exercise of special powers most of the time, if not always, involves the exercise of governmental powers and remains at the discretion of states. However, such freedom comes with strings attached, particularly from sources of international law.

States of emergency, or broadly speaking the exercise of emergency powers, impact two main areas: human rights and the exercise of state powers.

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<sup>21</sup> This term derives from US President James Madison, who theorised the characteristics of executive government. In particular, he was one of the authors of the [85 Federalist Papers](#), of which [Paper No 51](#) refers specifically to checks and balances on state government.

<sup>22</sup> T. Ginsburg and M. Versteeg, op. cit., p. 14.

<sup>23</sup> J. Forejohn and P. Pasquino, '[The law of the exception: A typology of emergency powers](#)', *International Journal of Constitutional Law*, Vol. 2(2004), issue 2, pp. 210-239.

<sup>24</sup> [Report](#) on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Venice Commission, CDL-AD(2020)014, 19 June 2020, p. 4.

<sup>25</sup> E. Bulmer, 'Emergency Powers', International IDEA Constitution-building Primer 18, 2018.

At European level, the most prominent source of human rights standards can be found in the European Convention of Human Rights of 1950 (ECHR), and in the Charter of Fundamental Rights of the European Union (2009). In addition, a number of international rights instruments such as the International Covenant on Civil and Political Rights (ICCPR, 1966), become relevant.<sup>26</sup> In addition, the 1984 UN Siracusa Principles<sup>27</sup> provide the protection of public health as a ground for limiting certain rights, provided they are geared towards preventing diseases.<sup>28</sup>

The **Venice Commission**, which is the Council of Europe's advisory body on constitutional matters and particularly a Commission tasked with fostering democracy through law, has substantially contributed, albeit in terms of **soft law**, to the discussion around the limits and requirements of emergency powers in times of pandemic, and has explored the boundaries of human rights standards.

On 7 April 2020, having explored the topic of emergency powers since 1995,<sup>29</sup> and not long after the WHO declaration of the Covid-19 outbreak, the Venice Commission issued a 'toolkit for member states',<sup>30</sup> a condensed guide for governments tailored to specific challenges brought about by a pandemic situation.

Those guidelines were further explained and clarified in a report adopted by the Venice Commission on 19 June 2020.<sup>31</sup> More recently, on 8 October 2020, following an invitation from the President of the European Parliament, the Venice Commission issued an interim report<sup>32</sup> exploring notably how measures to contain Covid-19 were applied in the EU Member States in the light of the Venice Commission's main previously affirmed principles.

## European Convention on Human Rights

### Article 15

#### Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Source: [Council of Europe](#).

<sup>26</sup> See also: the International Convention on the Elimination of all Forms of Racial Discrimination (1965), the International Covenant on Economic, Social and Cultural rights (ICESCR, 1966), the Convention on the Elimination of all Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Convention on the Rights of Child (1989).

<sup>27</sup> See [The Siracusa Principles](#) on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Commission on Human Rights, 28 September 1984, E/CN.4/1985/4.

<sup>28</sup> See [Article 25](#) of the Siracusa Principles.

<sup>29</sup> [Emergency powers](#), Venice Commission, CDL-STD(1995) 012, 1995.

<sup>30</sup> Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis - a toolkit for member states, Venice Commission, Information Documents, 7 April 2020, [SG/INF\(2020\)11](#).

<sup>31</sup> [Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency](#), Venice Commission, CDL-AD(2020)014, 19 June 2020.

<sup>32</sup> Interim report on the measures taken in the EU Member States as a result of the Covid-19 Crisis and their impact on Democracy, the Rule of Law and fundamental Rights, Venice Commission, [CDL-AD\(2020\)018](#), 8-9 October 2020.



The Venice Commission has also instituted an Observatory,<sup>33</sup> gathering information on constitutional and non-constitutional emergency powers, judicial oversight and electoral experiences in times of the current pandemic in states who are members of the Council of Europe.

In its 19 June 2020 report, the Venice Commission explored the many problematic aspects of the exercise of emergency powers and the areas where such powers impact the lives of individuals and the democratic fabric of a community in full and in detail. The Venice Commission characterises the state of emergency as a compelling situation where, due to external or internal threats, the normal exercise of state powers would not suffice to overcome the crisis, and therefore a special enhanced concentration of powers in the hands of the executive is necessary. This modification of state functioning has to be seen however in view of a return to normality.

States of emergency should be subject to the principles of necessity, as their declaration should be a last resort measure; proportionality, as the measures adopted should not go beyond what is necessary; and transience, as they should have a time-bound application and effect. The overarching principle is however, that the respect of the rule of law should be guaranteed during the entire exercise of the emergency powers, through the possibility to exercise meaningful parliamentary oversight and judicial review. The cornerstones of the Venice Commission are on the one hand the principle of legality, which should supersede the definition, declaration and exercise of powers within the perimeter of the emergency, possibly with detailed rules established in advance in 'normal' times. On the other hand, emergency powers should not be used to face endemic issues, but rather truly exceptional crises. The Venice Commission identifies three main issues in the exercise of emergency powers: the respect of human rights, the distribution of powers and the holding of elections.

In terms of impact on **human rights**,<sup>34</sup> the Venice Commission envisages that this might take the form of an exception, limitation or derogation to human rights with respect to the protection contained in the European Convention on Human Rights (ECHR). An exception exists where the protection of human rights is lifted in certain emergency cases.<sup>35</sup> A limitation to human rights entails the compression of certain non-absolute rights (e.g. right of expression or association),<sup>36</sup> subject to the principles of legality, legitimacy and necessity. A derogation under Article 15 ECHR implies the heavier consequence of a temporary suspension, except for some non-derogable rights.<sup>37</sup> In addition, a derogation of human rights protection is however subject to the principle of proportionality. The Venice Commission recognises that states enjoy a margin of discretion in the assessment of whether an emergency threat exists and on the nature and extension of a derogation, which however should not be unlimited. Rights that are likely to be affected in a pandemic are those connected to freedom of movement; rights to education; rights to property and freedom to conduct a business; as well as the right of assembly, expression, protection of personal data or political rights.

<sup>33</sup> See [Observatory](#) of situations of emergency in Venice Commission member states.

<sup>34</sup> See [Report](#) on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Venice Commission, CDL-AD(2020)014, p. 9.

<sup>35</sup> See Article 4(2)(c) of the European [Convention](#) on Human Rights, which excludes from the notion of (forbidden) compulsory labour those services 'exact in case of an emergency or calamity threatening the life or well-being of the community'.

<sup>36</sup> See, for example, Article 5(1)(e) protecting the right to liberty and security, save for the lawful detention of persons for the prevention of the spreading of infectious diseases; or Article 8(2) [ECHR](#) which protects the right to respect for private and family life from interference by public authorities where, in accordance with the law and to the extent necessary in a democratic society, for the purpose of protecting national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>37</sup> See [ECHR](#), the right to life (Article 2), right to be free from torture and other inhumane or degrading treatment or punishment (Article 3), right to be free from slavery (Article 4) and the right not to be subject to the application of retroactive penal law (Article 7).

A delicate balance must be found under the principle of proportionality between the restriction and the enjoyment of such rights.

Emergency powers are also often associated with the alteration of the **distribution of powers** within a state's architecture, with the government gaining more prominence. The Venice Commission suggests that the enhancement of powers (to the executive) should be regulated and detailed, with provisions on its temporal exercise and its phasing out (sunset clauses). In any case, democratic legitimation should not be overlooked and parliaments should always be able to approve or disapprove, without resort to an 'all or nothing' formula. Moreover, Parliaments should be allowed to fully function and not be dissolved in an emergency. Oversight over the acts of government should be guaranteed by parliament, either during crises or ex-post, through inquiries or investigations. It should also be possible to activate judicial review over measures that affect fundamental rights.

The third strand of constitutional ramifications of emergency powers concerns their effects on **elections** and how the exercise of political rights can be preserved in an emergency. The Venice Commission acknowledges that the exercise of electoral rights is strictly connected to the exercise of other rights, such as the right of assembly, freedom of expression, and freedom to create political parties. Eventual limitations to these latter rights should be proportional to the emergency. In line with the Code of Good Practice in Electoral Matters<sup>38</sup> those rights should also be preserved.

Although the postponement of elections in an emergency should be allowed sparingly, as international law suggests,<sup>39</sup> there is no general rule on the duty or possibility to postpone elections. Nevertheless, many European constitutions allow elections to be postponed only in extraordinary situations, or would allow postponement only with guarantees in place, such as an extension of the term of parliament. In any case, the Venice Commission recalls that suspension of electoral rights is only permissible where a strict proportionality test is met, and specific circumstances must justify such a postponement. The topic of elections is also admittedly a very sensitive political issue, as the declaration, prolongation or non-declaration of a state of emergency could be politically motivated or prone to abuse. To avoid this situation, the Venice Commission suggests that an independent judiciary should have the possibility to scrutinise the decision to postpone. The Venice Commission also recommends that politically agreed solutions are reached on the holding of elections, and that any postponement is time-bound. It also suggests that alternative modalities should be found for electoral campaigns and voting (mobile ballot boxes, internet, postal vote). Particular attention should be paid to reducing any impact on the electoral participation of elderly people in particular, who might be less digitally skilled.

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<sup>38</sup> Code of Good Practice in Electoral Matters: [Guidelines](#), Venice Commission, CDL-AD(2002)023-rev2-cor, 19 October 2002.

<sup>39</sup> Article 15 [ECHR](#) and Article 4 [ICCPR](#) provide a derogation from fundamental rights in times of emergency where the life of the nation is under threat.



To monitor the extent to which human rights are respected, the Council of Europe's Treaty Office receives<sup>40</sup> notifications of derogations to the application of the ECHR pursuant to Article 15 ECHR. This latter provision allows any contracting party to derogate from the obligations arising from the ECHR in times of war or other public emergency threatening the life of the nation, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. Currently, Estonia, Latvia and Romania have made such a notification. Likewise, notifications<sup>41</sup> to derogate from the application of the ICCPR pursuant to Article 4, have been submitted to the United Nations by the same states.<sup>42</sup>

### International Covenant on Civil and Political Rights

#### Article 4

1. In times of public emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Source: UN, [International Covenant on Civil and Political Rights](#).

<sup>40</sup> See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms ([ETS No 5](#)), notifications under Article 15 of the Convention in the context of the Covid-19 pandemic.

<sup>41</sup> K. Istrefi and I. Humburg, '[To Notify or Not to Notify: Derogations from Human Rights Treaties](#)', *Opinio Juris*, April 2020.

<sup>42</sup> See notification by [Latvia](#), [Estonia](#) and [Romania](#).

## 3. Member States' normative responses to the coronavirus pandemic

### 3.1. Normative framework of the pandemic containment in the European Union

The means adopted by Member States to contain Covid-19 during the first wave of the pandemic in the EU have been of various types. While in terms of content the measures present many similarities across the EU-27, the constitutional or legal framework in which containment measures were designed and adopted differ. A common trait observed across the 27 Member States is that the executive has had a major role in adopting the concrete measures that introduced the 'classic' containment measures such as restrictions to circulation, closure of shops and enterprises, quarantine obligations, travel bans, testing obligations, etc. Within the executive, then, Ministries of Health have often taken on a special role. Given this recurrent characteristic, this study devotes special attention to the source of the government's power and to the constitutional or statutory arrangement in which such powers were exercised during the first phase of the pandemic.

Our analysis pinpoints four main categories of normative intervention (see Table 1) as the most commonly recurrent among the EU-27 during the first wave of the pandemic:

- i. constitutional states of emergency;
- ii. statutory regimes;
- iii. measures adopted under special legislative powers; and
- iv. measures adopted almost exclusively under ordinary legislation.

In this study, constitutional states of emergency refers to those states of emergency provided by the constitution of a Member State. Statutory regimes refer to those regimes provided by statute, rather than in the constitution, and which regulate the type of emergencies and powers attributed to the authorities concerned in an organic manner. Special legislative powers refer to the constitutional powers granted to the executive to adopt normative acts with the same legal standing as primary laws under urgent/exceptional circumstances and subject to parliamentary oversight.

With the last above category, this study refers to those measures that found a legal basis in ordinary legislation, although legislation could in some cases have been adopted with a certain compelling rapidity based on informal agreements among the actors concerned or on the basis of a fast-track legislative procedure provided for under the national legal/constitutional framework.<sup>43</sup> Such ordinary legislation might also include the legal basis of the statutory regimes and may have pre-existed the current pandemic or have been issued expressly for the current pandemic.

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<sup>43</sup> In identifying which Member States resorted to measures adopted exclusively under ordinary legislation, the preponderance of the use of ordinary legislation has been considered decisive.

Table 1 – Overview of constitutional/statutory framework of the containment measures at the national (not regional) level during the first wave of the pandemic

Country	States of emergency provided in the Constitution effectively declared	Statutory regimes effectively declared	Measures adopted making use of special legislative powers (granted to the executive under urgent/special circumstances)	Measures adopted almost exclusively under ordinary legislation <sup>44</sup>
Austria	- <sup>45</sup>	No	No	Yes ( <a href="#">legislative package of March 2020</a> providing containment measures also of an administrative and economic nature)
Belgium	-	No	Yes (two enabling laws adopted under Article 105 Constitution)	No (although some containment measures were adopted on the basis of the <a href="#">1963 Act concerning Civilian Protection</a> , the 1992 <a href="#">Police Service Act</a> and the <a href="#">2007 Act concerning Civilian Safety</a> )
Bulgaria	Yes (state of emergency)	Yes (emergency epidemiological situation)	No	No (although the State of Emergency Measures and Actions Act was adopted)
Croatia	No	Yes (epidemic of infectious disease)	No	Yes (the Civil Protection System Act and the Infectious Diseases Protection Act were amended)
Cyprus	-	No	No	Yes (measures were adopted on the basis of the Quarantine Law)
Czechia	Yes (state of emergency)	No	No	No (although several ordinary laws have been amended in response to the Covid-19 crisis, for instance the Public Procurement Act (Law No 134/2016 Coll.), and new laws have been adopted, for instance Law No 262/2920 Coll. on the compensation bonus related to the emergency anti-coronavirus measures )

<sup>44</sup> This column indicates with a 'Yes' those Member States that resorted almost exclusively to ordinary laws for the adoption of containment measures or for enabling the executive or other state authorities to adopt such measures. Where Member States adopted containment measures also based on emergency powers awarded by the constitution (e.g. constitutional emergency state), they were assigned a 'No' for the purpose of this table, as the recourse to ordinary laws (i.e. those laws setting the rules of a constitutional state of emergency) belongs to the normal course of the exercise of emergency powers. Conversely, where a Member State has introduced a statutory regime, this Member State is indicated with a 'Yes' in this column.

<sup>45</sup> A blank cell is introduced when the question does not apply to the Member State, either because the national constitution does not provide for a state of emergency at all, or because the state of emergency is not suitable for a health emergency (see Table 2).

Country	States of emergency provided in the Constitution effectively declared	Statutory regimes effectively declared	Measures adopted making use of special legislative powers (granted to the executive under urgent/special circumstances)	Measures adopted almost exclusively under ordinary legislation <sup>44</sup>
Denmark	-	No	No	Yes (Act on Measures against Infectious and Other Communicable Diseases was amended)
Estonia	Yes (emergency situation)	No	No	No (although Parliament approved a supplementary budget; and the Act relating to the implementation of the emergency situation amended 33 other acts)
Finland	Yes (state of emergency)	No	No	No (although some measures were adopted under the Communicable Diseases Act)
France	-	Yes (public health emergency)	No	Yes (Health National Code was amended)
Germany	No	Yes (epidemic situation of national importance)	No	Yes (Infection Protection Act, revised as a part of a massive legislative 'corona crisis package')
Greece	-	No	Yes (several acts of legislative content adopted under Article 44 of the Constitution)	No
Hungary	Yes (state of danger)	Yes (state of epidemic-logical preparedness)	No	No (although the Act on Transitional Rules was adopted in June 2020)
Ireland	-	No	No	Yes (measures adopted under the Health Act and the Emergency Act)
Italy	-	Yes (state of emergency)	Yes (decree- laws under Article 77 of the Constitution)	No (although some measures were adopted under the Civil Protection Code)
Latvia	-	Yes (emergency situation)	No	Yes (measures adopted under the 2013 Law on Emergency Situation and State of Exception and the Epidemiological Safety Law)

Country	States of emergency provided in the Constitution effectively declared	Statutory regimes effectively declared	Measures adopted making use of special legislative powers (granted to the executive under urgent/special circumstances)	Measures adopted almost exclusively under ordinary legislation <sup>44</sup>
Lithuania	No	Yes (state of extreme situation)	No	Yes (measures adopted on the basis of Law on civil protection and Law on the Prevention and Control of Contagious Diseases in Humans)
Luxembourg	Yes (state of crisis)	No	No	No (although some measures were adopted under the Act of 25 March 1885, concerning the measures to be taken to prevent the spread of contagious diseases, and more recently on the basis of two <a href="#">Covid-19 laws</a> )
Malta	No	Yes (public health emergency)	No	Yes (measures adopted under the Public Health Act, that was amended)
Netherlands	No	No	No	Yes (measures adopted under Public Health Act and Safety Regions Act)
Poland	No	Yes (state of epidemic risk, state of epidemic)	No	Yes (measures adopted under Act of 5 December 2008 on the prevention and combat of contagions and contagious diseases in humans. In addition, Act of 2 March 2020 on special solutions connected with preventing, countering and combating Covid-19 was passed)
Portugal	Yes (state of emergency)	Yes (state of calamity/ state of contingency/ state of alert)	No	No (although several measures were adopted under the Civil Protection Act)
Romania	Yes (state of emergency)	Yes (state of alert)	Yes (emergency ordinances adopted under Article 115 of the Romanian Constitution)	No
Slovenia	No	Yes (Covid-19 epidemic)	No	Yes (Communicable Diseases Act was <a href="#">modified</a> , as well as some other ordinary laws through several <a href="#">packages of acts</a> )
Slovakia	Yes (emergency state)	Yes (extra-ordinary situation based on Law 42/1994)	No	No (although the Covid-19 emergency omnibus legislation introduced many different amendments, including for example to the Electronic Communications Act)

Country	States of emergency provided in the Constitution effectively declared	Statutory regimes effectively declared	Measures adopted making use of special legislative powers (granted to the executive under urgent/special circumstances)	Measures adopted almost exclusively under ordinary legislation <sup>44</sup>
		on civil protection)		
Spain	Yes (state of alarm)	No	Yes (decree-laws under Article 86 Constitution)	No
Sweden	-	No	No	Yes (Communicable Diseases Act was amended, other acts e.g. Act (2020: 526) on temporary infection control measures in restaurants, Public Order Act)

Source: EPRS.<sup>46</sup>

As Table 1 shows, all of the EU-27 countries adopted the four type of measures described above, either alone or in a variety of combinations. For example, Portugal availed itself of almost all the available tools from states of emergency provided for in the constitution, to statutory regimes and ordinary legislation. On the other side of the spectrum, Sweden and Ireland relied uniquely on measures adopted under ordinary legislation to contain the pandemic, together with Austria, Cyprus, Denmark and the Netherlands.

Between these two extremes, different combinations of the various normative measures are possible. Examples include the Member States that declared a state of emergency and also implemented a special statutory regime<sup>47</sup>. In other Member States, where a constitutional state of emergency could not be declared, the executive made use of special legislative powers (e.g. Italy). There were also situations where – regardless of the declaration of a state of emergency – measures to contain the pandemic were issued based on enabling laws of an ordinary character that either pre-existed or were created *ad hoc* for the pandemic<sup>48</sup>.

Overall, however, the majority of Member States (19) enacted a form of emergency scheme either in the form of a constitutional state of emergency (10), or in the form of a statutory emergency regime (14), or both (5), that offered a set of often pre-established (sometimes adapted) rules providing for decision-making mechanisms able to function in crisis situations. Such emergency schemes also provided safeguards and allowed governments to react in a fast and efficient way.

A minority of Member States (8) enabled governments to adopt the measures that were deemed necessary from a substantive perspective, through either special or ordinary legislation giving the government the appropriate powers to adopt a certain range of containment measures. In some

<sup>46</sup> See the four EPRS briefings cited in footnote number 13.

<sup>47</sup> See, for example, Bulgaria, Hungary, Portugal, Romania, Slovakia.

<sup>48</sup> See, for example, Germany, the Netherlands, Slovenia.

cases, however, the recourse to a statutory arrangement may not have been the source of the governmental powers that introduced the 'classic' containment measures. This was the case in Italy, for example, where the Government, in particular the President of the Council of Ministers, was empowered by special legislation (decree-law), and not by the statutory arrangement (*stato di emergenza*) declared under the Code of Civil Protection,<sup>49</sup> to adopt containment measures. In the Italian case, the 'classic' containment measures were adopted by Decrees of the President of the Council (DPCM), previously authorised and pre-defined by a decree-law.<sup>50</sup>

Figure 1 also shows that ordinary legislation is a recurrent form of normative measures in the EU-27, as 14 Member States seem to have based the individual and concrete measures adopted to contain the virus mainly on ordinary laws. This can be explained either because provisions that enable governmental powers are contained in statutory regimes provided for/regulated in ordinary laws, or because such empowerment was carried out under either pre-existing ordinary laws, or laws adapted to the new public health emergency. Ten Member States adopted a constitutional state of emergency while fourteen Member States adopted a statutory regime geared to tackle a crisis or other extraordinary circumstance; finally, in five Member States the government resorted to special legislative powers to adopt the measures needed to tackle the crisis.

Finally, although this detail is not captured in Figure 1, the exceptional character of the current emergency created by the coronavirus pandemic is also testified by the fact that, for the majority of the EU-27, the most 'invasive' type of measures indicated in Figure 1 (states of emergency/statutory regimes) were adopted for the first time to contain Covid-19. Only for a few (ten)<sup>51</sup> had the measures already been adopted in previous crises. In Belgium, the 'special powers' provision was used for the 2009 swine flu sanitary emergency. In Hungary, a state of danger was declared for the flooding of the river Tisza in 2001, and the Danube in 2013, while in 2010 in some towns a state of danger was declared to address an ecological catastrophe caused by a reservoir failure. In Slovakia, a short-term emergency was declared in 2011 when negotiations between the government and doctors were unsuccessful. In Greece, the legislative tool of 'acts of a legislative content' that can be adopted under Article 44 of the Constitution<sup>52</sup> was used during the economic crisis. Spain had already declared a state of alarm in 2010, when action by civilian air traffic controllers provoked the closure of Spanish airspace.<sup>53</sup> Italy (and Spain) has often used, if not sometimes abused,<sup>54</sup> the instrument of decree-laws that the Government can adopt under Article 77 of the Constitution, with the same legal standing as primary law, but which need to be converted into law by Parliament.

<sup>49</sup> Legislative Decree No.1 of 2 January 2018, [Code of Civil protection](#).

<sup>50</sup> See for example, [Decree Law](#) No. 6 of 23 February 2020.

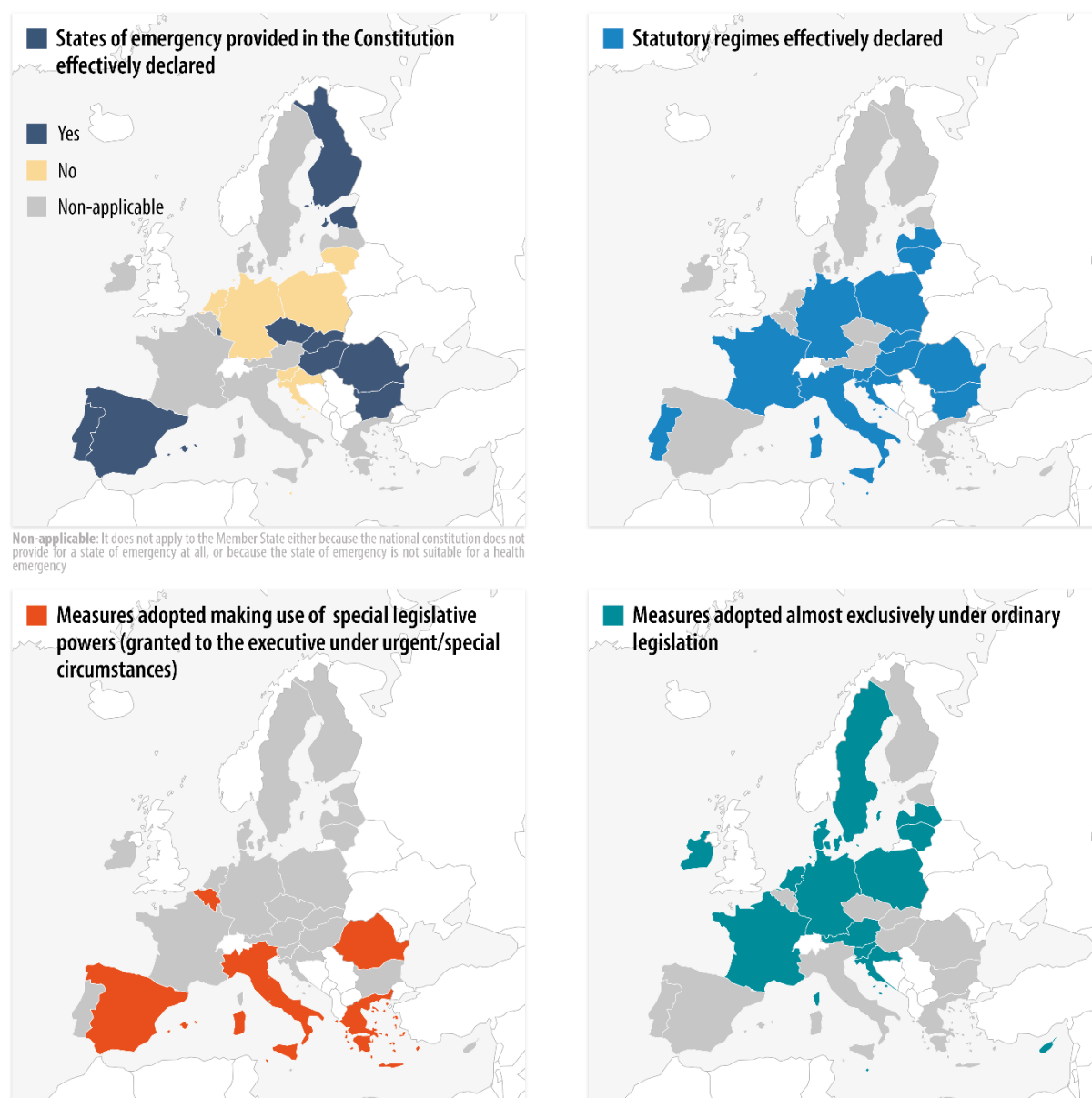
<sup>51</sup> Belgium, Czechia, Greece, Hungary, Italy, Latvia, Luxembourg, Netherlands, Slovakia, Spain. For further information, see EPRS, *States of emergency in response to the coronavirus crisis: Situation in certain Member States, II, III and IV*, op. cit.

<sup>52</sup> For the purposes of this publication, such acts fall under the type 'measures adopted making use of special legislative powers'.

<sup>53</sup> [Real Decreto](#), de 4 de diciembre, por el que se declara el estado de alarma para la normalización del servicio público esencial del transporte aéreo

<sup>54</sup> L. Di Stefano, 'La Decretazione D'urgenza: Profili Delle Prassi Parlamentari Ed Aspetti Problematici Della XVII Legislatura', *Rivista dell'associazione italiana dei costituzionalisti*, n° 1/2017.

Figure 1 – Constitutional/legislative framework of the main measures adopted to contain the coronavirus pandemic at the national level (not regional) during the first wave of the pandemic.



Source: EPRS.<sup>55</sup>

### 3.2. States of emergency provided in the constitution: EU-27 overview

As is well known, the risk that states face unexpected threats and the need to allow the exercise of state functions in accordance with special (non-ordinary) methods is the very essence of why states of emergency exist. With their application, a state is able to protect the country and react to threats of an unexpected nature that may represent a danger or even pose harm to the community, or in a

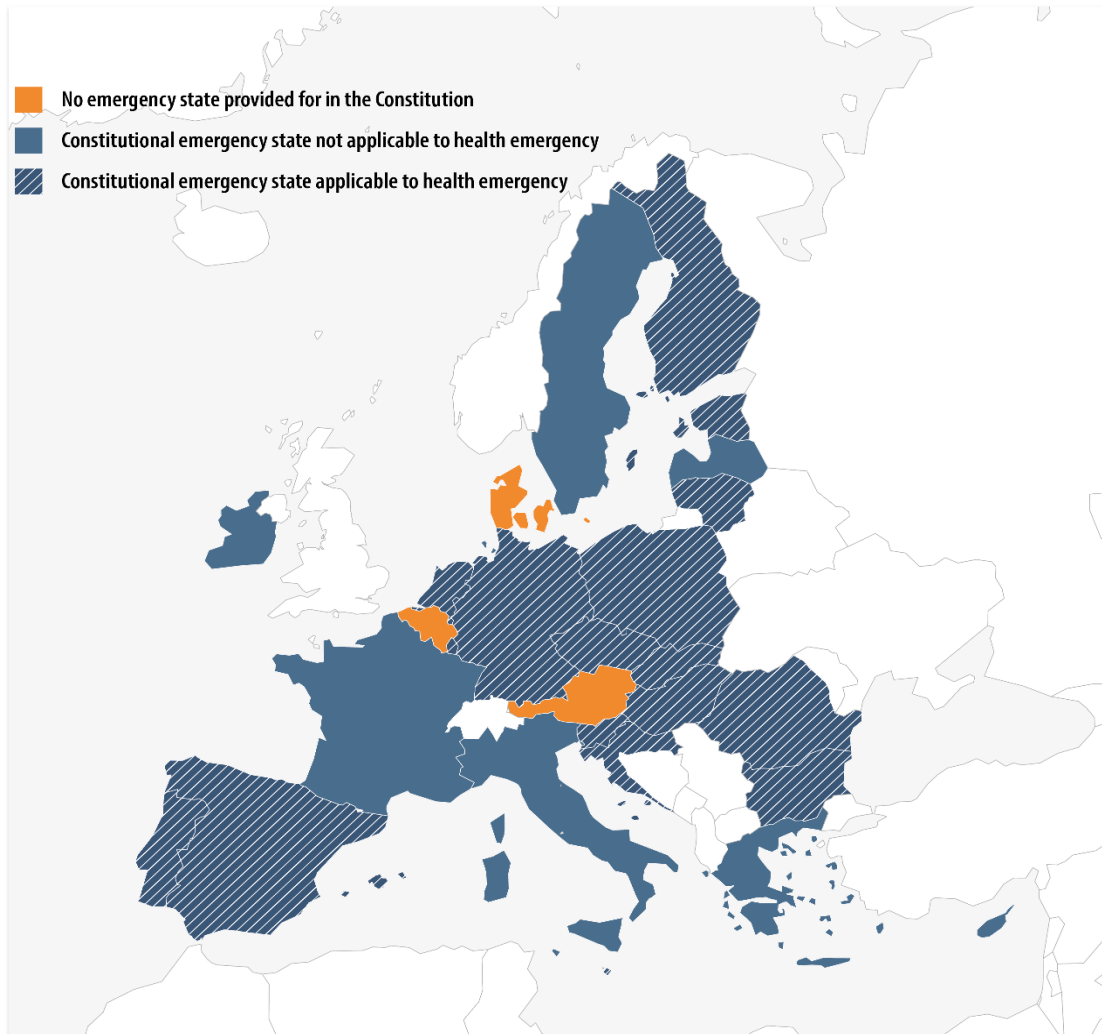
<sup>55</sup> See the four EPRS briefings cited in footnote number 13.



broader sense affect the unity of the state.

This primary need of any state also explains why special arrangements aimed at tackling diverse emergencies are provided in the constitutions of the majority of the 27 EU Member States. Indeed, only a few Member States do not provide for an emergency state clause (see Figure 2), although they provide for alternative ways to react if the national parliament is unable to convene or to function, by allowing exceptional transfer of legislative powers to the monarch i.e. the executive (Belgium<sup>56</sup> and Denmark<sup>57</sup>), or to the Federal President (Austria<sup>58</sup>).

Figure 2 – Member States that have state of emergency clauses in their constitutions



Source: EPRS.<sup>59</sup>

<sup>56</sup> According to Article 105 of the Constitution, the monarch (i.e. the government) may be granted powers other than those formally attributed to the monarch by the Constitution under specific laws passed by virtue of the Constitution itself.

<sup>57</sup> According to Section 23 of the Constitution, in an emergency the monarch (i.e. the government) may, when the Folketing cannot assemble, issue provisional laws, provided that they shall not be at variance with the Constitutional Act, and that they shall always, immediately upon assembling of the Folketing, be submitted to it for approval or rejection.

<sup>58</sup> According to Article 18 of the Constitution, if Parliament is unable to convene in time of distress, the legislative power shall be transferred from the Parliament to the Federal President.

<sup>59</sup> See the four EPRS briefings cited in footnote number 13.

### 3.2.1. Grounds to invoke a constitutional state of emergency in EU Member States

The threats that might justify a recourse to an emergency state may be of a diverse nature: internal, external, and of a human or natural origin. In general, it can be said that the most classical and recurrent threat that justifies the recourse to a state of emergency is the threat of an external attack represented by war, siege or other type of violent hostility. This type of eventuality, which historically has been the primary concern for the survival of any state, is clearly a requirement that recurs very often in a constitutional emergency state. In fact, almost all Member States that provide for an emergency state in their constitution contain this type of threat as a triggering factor for the declaration.

From a systematic perspective, the most frequent constitutional threats that have been observed as a source of a state of emergency in the EU-27 can be grouped into three main categories: i) external threat in the form of war (also often referred to as state of siege); ii) internal threat consisting of situations that endanger the democratic endurance of the state function, insurrection or internal state of tension; and iii) external natural events, such as natural disasters, catastrophes.

In nine EU Member States at least (Croatia, Czechia, Germany, Hungary, Malta, the Netherlands, Poland, Portugal, Spain), all three risks are considered in the constitutional states of emergency. For example, the Polish Constitution provides for three different types of states of emergency that separately address respectively the above three threats: i) martial law for external threats of a military nature; ii) state of exception, for internal upheaval; iii) state of natural disaster, for emergencies of a natural origin. Likewise, Germany provides for a state of defence mandated to tackle military attack or a similar threat, and a state of internal emergency that can be triggered for natural catastrophes or situations of internal threat to the democratic order. Hungary provides for six different types of states of emergency: a state of national crisis, state of emergency, a state of preventive defence, a state of terrorist threat, a state of unexpected attacks and a state of extreme danger. Czechia also provides for a state of war, a state of emergency, and a state of threat to state sovereignty.

Some other Member States however, do not provide for such comprehensive options, either because they rely solely on the menace of war (Cyprus, Greece, Italy); or because they provide only constitutional reactions to war or insurrectional type emergencies leaving not addressed natural disasters by way of their constitution.<sup>60</sup>

### 3.2.2. Suitability of constitutional states of emergency to a health emergency

Table 2 below shows that of the 24 Member States that possess a constitutional state of emergency clause, **only 17 have chosen requirements that could in principle apply in a pandemic situation**. This choice of triggering factors indeed explains why some countries have resorted to alternative legal tools not provided in their constitution to contain a menace of a natural origin, such as a pandemic.

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<sup>60</sup> France, Ireland, Latvia, Lithuania, Slovenia.

Table 2 – Member States with emergency state clauses in their constitutions

Country	Does the constitution provide for the possible declaration of an (or several) emergency states?	Does any of the emergency states in the constitution apply to health emergency?
Austria	No	– <sup>61</sup>
Belgium	No	–
Bulgaria	Yes (state of war or state of emergency)	Yes (state of emergency)
Croatia	Yes (state of war, immediate threat to independence and unity of the state, severe natural disasters)	Yes
Cyprus	Yes (state of emergency in case of war or other event that endangers the life of the Republic)	No
Czechia	Yes (state of war/threat/emergency and danger)	Yes (state of emergency)
Denmark	No	–
Estonia	Yes (state of emergency and emergency situation)	Yes (emergency situation)
Finland	Yes (situation of emergency)	Yes
France	Yes (state of siege and exceptional powers to the President in Article 16 of the Constitution)	No
Germany	Yes (state of tension, state of defence and internal emergency states)	Yes (internal emergency) <sup>62</sup>
Greece	Yes (state of siege)	No
Hungary	Yes (state of national crisis, state of emergency, state of preventive defence, state of terrorist threat, unexpected attacks and state of danger)	Yes (state of extreme danger)
Ireland	Yes (state of emergency in times of war or armed rebellion)	No
Italy	Yes (state of war)	No
Latvia	Yes (state of exception)	No

<sup>61</sup> A blank cell indicates the question does not apply to the Member State because no emergency states are provided for in the national constitution.

<sup>62</sup> Articles 35(2) and 35(3) of the Basic Law of the Federal Republic of Germany could be invoked if the Covid-19 pandemic worsened drastically, according to [academics](#). In the unlikely event that the pandemic became a threat to the free democratic order or the existence of the Federation, Article 91 of the Basic Law could also be invoked, according to some [experts](#).

Country	Does the constitution provide for the possible declaration of an (or several) emergency states?	Does any of the emergency states in the constitution apply to health emergency?
Lithuania	Yes (threat to constitutional system or social peace)	Yes <sup>63</sup>
Luxembourg	Yes (state of crisis)	Yes
Malta	Yes (war, subversion and public emergency,)	Yes (state of public emergency) <sup>64</sup>
Netherlands	Yes (external and/internal security)	Yes
Poland	Yes (martial law, a state of exception and a state of natural disaster)	Yes (state of natural disaster)
Portugal	Yes (state of emergency and state of siege)	Yes (state of emergency)
Romania	Yes (state of siege or a state of emergency)	Yes (state of emergency)
Slovenia	Yes (state of emergency)	Yes <sup>65</sup>
Slovakia	Yes (state of emergency)	Yes
Spain	Yes (states of alarm, emergency, siege)	Yes (state of alarm)
Sweden	Yes (war, danger of war, and exceptional conditions as a result from war or the danger of war)	No

Source: EPRS.<sup>66</sup>

Special consideration may be devoted to Finland, whose Constitution expressly refers to an armed attack and to other emergencies provided by law, reserving to the law the creation of further justifications for emergency states. Luxembourg also refers to an '*état de crise*', a broad enough formula, capable of encompassing an external, internal or natural threat without directly mentioning war, siege or natural emergencies.

<sup>63</sup> Although the assessment of the conditions for the declaration remains with the Lithuanian Parliament, the [Lithuanian Parliament's Legal Service](#) clarified that declaration of a state of emergency is not precluded in principle by a health emergency, but could be declared where, together with the health emergency, there is unrest, violence or crimes.

<sup>64</sup> Although the state of public emergency provided for under Article 47(2)(b) of the Maltese Constitution seems in principle applicable to a pandemic situation, some [authors](#) have affirmed that its application would require a situation 'directed more against territorial or political integrity rather than mere issues of health'.

<sup>65</sup> Article 92 of the Slovenian Constitution would allow declaration of a state of emergency if a serious natural disaster or an epidemic posed such a 'great danger that the existence of the state could be endangered'. [Experts](#) argue that we should understand such a critical situation as being when, given the exceptional number of patients and victims and the consequent inability of the state to function due to a complete quarantine, it would make sense to focus the state's operations on a handful of people. However, [academics](#) understand that the conditions for declaring a state of emergency were not met during the current pandemic.

<sup>66</sup> See the four EPRS briefings cited in footnote number 13.

Table 2 also shows that although only 17 Member States could have activated a constitutional state of emergency in reaction to Covid-19, for some of them (Malta,<sup>67</sup> Slovenia,<sup>68</sup> Germany<sup>69</sup>), the matter would not have been straightforward, as the question would be surrounded by doctrinal doubt. Lithuania has excluded a state of emergency without a higher threat to the life of the state.<sup>70</sup> However, it has been argued that,<sup>71</sup> since a threat to the constitutional system or social peace represents the grounds on which a state of emergency can be declared in Lithuania, the question as to whether a pandemic may fulfil such condition remains open depending on the situation.

Similar reasoning is valid for some Member States for whom a state of emergency can be declared in situations of internal threat of a destabilising nature, but not strictly speaking for those provoked by natural causes. For those Member States, the question could arise if a pandemic or other health emergency, which is in itself not expressly included among the triggering factors of a constitutional emergency state, can still become an indirect trigger where the situation spirals into upheavals or riots and becomes a danger to the democratic and peaceful life of the community.

### 3.2.3. Activation of the constitutional emergency clause to the current health emergency

The mere fact that the constitutions of some EU Member States are in principle equipped to face unexpected crises is not an indication that they will use that constitutional arsenal.

Of the 17 Member States (see Figure 2) that are equipped with some sort of constitutional emergency clause suitable for use in a pandemic, Figure 1 above shows that only **10 chose to activate it during the first peak of the pandemic** in Europe (Bulgaria, Czechia, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain).<sup>72</sup> Seven Member States (Croatia, Germany, Lithuania, Malta, the Netherlands, Poland and Slovenia), who could in principle have declared a state of emergency, chose not to do so. Among the manifold reasons for this, apart from the objective legal uncertainty in some cases as to whether a pandemic would fall under the state of emergency clause (Germany, Lithuania, Malta, Slovenia), historical reasons that made emergency

<sup>67</sup> See comment by V. A. De Gaetano, 'Covid-19 – the Maltese Response: Slow at First but Steady and Effective', *Verfassungsblog*, 4 May 2020.

<sup>68</sup> See Chapter on Slovenia, Coronavirus pandemic in the EU – Fundamental Rights Implications, European Union Agency for Fundamental Rights, 4 May 2020.

<sup>69</sup> In Germany, some authors, (Prof. Dr. U. M. Gassner, available on Legal Tribune Online of 27 February 2020) have argued that mass disease is also a natural disaster under the meaning of Articles 35(2) and 35(3) of the *Grundgesetz*, and therefore that the internal emergency could be invoked. Others (see P. Thielbörger and B. Behelert, *COVID-19 und das Grundgesetz*, available on *Verfassungsblog* of 19 March 2020) argue that these provisions could be invoked in a situation where the collapse of the health system would endanger the existence of the federal government.

<sup>70</sup> See comment by Eglė Dagilytė in Lithuania's Response to COVID-19: Quarantine Through the Prism of Human Rights and the Rule of Law, *Verfassungsblog*, 14 May 2020.

<sup>71</sup> See opinion of the Legal Service of the Lithuanian Parliament quoted in Lithuania's Response to COVID-19: Quarantine Through the Prism of Human Rights and the Rule of Law, op. cit.

<sup>72</sup> At the time of writing, several Member States have decided to re-introduce a constitutional emergency state to address the second peak of the health crisis. For example, Slovakia decided to declare an emergency from 1 October to 14 November 2020 and has decided to prolong it until the end of the year. Czechia declared an emergency from 5 October 2020 by Resolution No [957](#) of 30 September 2020 and extended it first to 20 November by Resolution No [1108](#) of 30 October 2020 and later to 12 December by Resolution No [1195](#) of 20 November. Spain declared a state of alarm by Royal Decree 900/2020 of 9 October 2020, in certain parts of the territory of Spain (Alcobendas, Alcorcón, Fuenlabrada, Getafe, Leganés, Madrid, Móstoles, Parla and Torrejón de Ardoz), and again declared it by Royal Decree [926/2020](#) of 25 October 2020, this time for the entire national territory; and [Royal Decree 956/2020](#) of 3 November 2020 extends the state of alarm until 9 May 2021. Portugal re-introduced a state of emergency from 9 November to 23 November 2020 by Decree of the President of the Republic [51-U/2020](#) of 6 November 2020, authorised by Resolution of the National Assembly [83-A/2020](#) of 6 November 2020. The state of emergency was later prolonged until the 8 December 2020 by Decree of the President of the Republic [59-A/2020](#) of 20 November, authorised by Resolution of the National Assembly [87-A/2020](#) of 20 November.

laws controversial in the past, may have played a certain role (Germany). In Poland, the consideration prevailed that suitable legislation already existed, giving appropriate powers to the executive (although, more practically, the intention to carry out elections otherwise precluded during a state of emergency<sup>73</sup> could have been decisive). In other situations, either the level of infections was not initially sufficiently alarming to require a constitutional activation of emergency powers (Croatia), or the already existing legislation was considered a sufficient guarantee that the appropriate measures could be put in place (the Netherlands).<sup>74</sup>

It can be observed however, that **in almost half of the Member States** that declared a constitutional state of emergency, **this has not been the only arrangement introduced**, as a statutory emergency regime was also activated (see Figure 1). This was the case for Bulgaria, Hungary, Portugal, Romania and Slovakia. The combination of these two regimes did not occur simultaneously, but in most cases, one either preceded or followed the other in an escalating or de-escalating mode.

Finally, states of emergency of a **constitutional nature most often are not self-standing arrangements**, but are complemented by detailed legislation of either a constitutional or ordinary level, in order to regulate the transfer of powers, duration, safeguards and the limits of the state of emergency in detail. This is the case for example in Spain, where the Organic Law 4/1981 regulates the state of alarm, emergency and siege, with the indication of the type of measures that the executive may adopt and the rights that can be curtailed during those arrangements. In Hungary, the main rules on the state of extreme danger are laid down in the Constitution, while implementing rules of that states are contained in two cardinal acts (Disaster Management Act and the Coronavirus Containment Act), i.e. legislative acts with an enhanced method of adoption because they were adopted by a majority of two-thirds in the National Assembly. In Poland, the state of natural disaster provided for in Article 232 of the Polish Constitution is detailed in its legal aspects in the Act of 18 April 2002, which defines the requirements, powers and measures. In Romania, the state of emergency is governed by Organic Law 453/2004 of 1 November 2004 (requiring a majority of votes of members of both chambers of parliament to be approved), which approved the government's Emergency Ordinance (EGO) 1/1999 of 21 January 1999. During the first wave of the pandemic, the Romanian Government modified EGO 1/1999 through EGO 34/2020 of 26 March, but the Romanian Constitutional Court found this emergency ordinance to be unconstitutional, considering that the Government had overstepped its powers in assuming additional legislative competences.<sup>75</sup>

This pre-defined character of the main aspects of a state of emergency in times of peace or of 'non-emergency' complies with one of the key principles highlighted by the Venice Commission, in as much as pre-definition allows the requirements of a state of emergency and all ensuing transfers of powers and limitations of rights to be better known and controllable.

Most often, the legislation of declared states of emergency contain a possibility for the government to compress fundamental rights, although in several cases in the current pandemic, a prohibition on such compression was explicitly provided with respect to a number of rights considered inviolable. This is the case in Bulgaria, where a suspension of civil rights is possible but there are explicit restrictions to the inviolability of persons and premises. Likewise, Portuguese organic law

<sup>73</sup> See [Emergency, but not a state of emergency](#), Polandin, 14 March 2020.

<sup>74</sup> It should be noted, however, that on 13 October 2020, the Dutch Parliament adopted a specific temporary law to address the pandemic: [Tijdelijke bepalingen in verband met maatregelen ter bestrijding van de epidemie van covid-19 voor de langere termijn](#) (Tijdelijke wet maatregelen covid-19).

<sup>75</sup> Romanian Constitutional Court, [Decision 152/2020](#) of 6 May 2020.

No 44/86 explicitly mentions rights that cannot be compressed (right to life, personal integrity, non-retroactivity of criminal law).

### 3.2.4. Duration of states of emergency

In line with the principle that emergency states should be temporary,<sup>76</sup> most EU Member States that have declared a state of emergency provide a maximal statutory or constitutional duration that ranges between 10 days (Luxembourg) and 90 days (Estonia, Finland, Slovakia), generally renewable. In some cases, possible extensions are also subject to time limits provided for either in the constitution or in the statute regulating the emergency states in detail<sup>77</sup>.

Concerning the ten countries that chose to introduce a state of emergency during the first wave of the pandemic, Figure 3 below shows that these constitutional mechanisms were declared between 11 and 19 March 2020 and lifted between 13 May and 24 June 2020. This illustrates the duration of some of the Member State's initial reactions. States of emergency lasted in some cases slightly more than one month<sup>78</sup>; in other cases for longer<sup>79</sup>; and others in a mid-range<sup>80</sup>. Of course, this length depends on many factors, among which can be considered the diffusion of the pandemic in a given country and the available capacity of the national health system.<sup>81</sup>

<sup>76</sup> Venice Commission, [Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency](#), CDL-AD(2020)014, 19 June 2020, p. 5.

<sup>77</sup> e.g. three months in Luxembourg, as indicated under Article 32.4 of the Constitution.

<sup>78</sup> Portugal, 1 month and 12 days; Romania, 1 month and 28 days.

<sup>79</sup> Luxembourg and Spain, 3 months and 6 days; Hungary 3 months and 7 days.

<sup>80</sup> Bulgaria, 2 months; Czechia and Estonia, 2 months and 5 days; and Slovakia, 2 months and 27 days.

<sup>81</sup> As for the length of the constitutional emergency states declared during the second wave of the pandemic, it is still too early to assess the situation. It should be noted, however, that Spain has extended the current state of alarm until 9 May 2021, although the parliamentary authorisation deciding on the extension provides for the possible lifting of the state of alarm after four months, following a proposal by the Conference of Regional Presidents (Article 14 of [Royal Decree 956/2020](#), 3 November 2020).



Figure 3 – Timeline of the states of emergency declared by Member States during the first wave of the pandemic



Source: EPRS.<sup>82</sup>

The length of the constitutionally provided states of emergency as described above is not however an indicator to be interpreted in isolation. In some cases, these states of emergency were lifted after the worst effects of the first wave were somehow mitigated, and replaced with lighter mechanisms. For example, in Portugal the state of emergency was lifted on 3 May 2020, but replaced first with a state of calamity (in force until 31 July),<sup>83</sup> and later with a state of contingency or alert, depending on the epidemic situation in the specific part of the territory where it applied.<sup>84</sup> In Hungary, the state of extreme danger was lifted on 19 June 2020, and replaced by a state of epidemiologic preparedness declared by the government<sup>85</sup> – intended to last for six months, subject to review after three months.

### 3.3. Declaration of statutory regimes

During the first wave of the pandemic, **statutory regimes were declared or implemented by 14 Member States** (Bulgaria, Croatia, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovenia, Slovakia). This study considers statutory regimes as those that

<sup>82</sup> See the four EPRS briefings cited in footnote number 13.

<sup>83</sup> The state of calamity was declared by [Resolution of the Council of Ministers No 33-A/2020](#), in force from 3 May 2020 to 31 July 2020 ([Resolution of the Council of Ministers No 53-A/2020](#), Official Journal No 135/2020, 2, Supplement, Series I, 14 July 2020).

<sup>84</sup> Since 15 July 2020, the declaration of a state of calamity did not apply to the entire national territory, and some areas were under a state of contingency or alert ([Resolution of the Council of Ministers No 51-A/2020](#)). Since 1 August 2020, no part of the national territory was under the state of calamity, but some parts remained under a state of contingency or alert. As of 3 November, a state of calamity was reintroduced by [Resolution of the Council of Ministers No 88-A/2020](#). As of 9 November 2020, Portugal has re-introduced a constitutional state of emergency to address the second wave of the pandemic (Decree of the President of the Republic [51-U/2020](#), 6 November 2020).

<sup>85</sup> See [Coronavirus Update: State of epidemiological preparedness declared for six months](#), About Hungary, 19 June 2020.



are more often legal regimes provided in primary law in the field of health or civil protection and that allow, under certain conditions, adoption of a range of predetermined measures of an exceptional character to contain situations such as health crises, earthquakes, or even technological emergencies.

Most often, these statutory regimes consist of arrangements that allow a fast normative production, derogating from ordinary decision-making procedures and creating the legal basis for entrusting either the executive or a specific authority (e.g. the head of civil protection) with the power to adopt orders or executive measures of a concrete and operational character. As said, statutory regimes may introduce particular decision-making procedures that deviate from usual practice. This is, for example, the case in Croatia, where the Infectious Diseases Protection Act was amended to allow the Ministry of Health to take decisions based on proposals from the Croatian Institute of Public Health. Statutory regimes may also, as is the case in Germany, intervene in the allocation of competences concerning the adoption of containment measures between the regional and federal government. In Bulgaria, the special SEMA regime, which was adopted based on the State of Emergency Measures and Actions Act, allowed a broad range of non-health related measures to be taken (freezing of judicial proceedings, interventions on telecom legislation to allow, under certain circumstances, law enforcement authorities to isolate and track infected persons). In Slovakia, for example, the 'extraordinary situation' in the entire Slovakian territory, declared in resolution 111 of 11 March 2020, also intended to ensure the continuity of protective equipment supplies by limiting its sale abroad. In Italy, the declaration of a state of emergency had the effect of triggering an organic regime that allowed, by means of orders by the Head of the Civil Protection, to adopt measures of a preeminent practical and operational character (creation of structures necessary to the situation, measures to ensure smooth and prompt acquisition of medical equipment, etc.).

The relation between declaration of states of emergency and declaration of statutory regimes has been rather varied during the current pandemic. During the first wave of the pandemic, **some states decided to declare both a state of emergency and a statutory regime.**<sup>86</sup> The continuity of these two arrangements served different purposes. For example, in Slovenia, the declaration of an extraordinary situation on 11 March 2020 was driven by logistical or practical reasons, i.e. to ensure the continuity in supplies of relevant medical equipment, while the emergency declaration of 15 March introduced more invasive measures, such as a travel ban, quarantine obligations, and the closure of shops and retail activities. In Portugal, a state of emergency was first declared on 19 March, lasting until 2 May 2020, while with the subsequent states of calamity, contingency and alert, the seriousness of the measures was de-escalated.<sup>87</sup> In Hungary, phasing out the 'state of danger' meant that a new 'state of epidemiological preparedness' was introduced.

**Some other Member States, who could not declare a state of emergency because that one provided in their constitution could not be applied to a pandemic, decided to activate a statutory emergency regime instead.** Those Member States (France, Italy, Latvia and Lithuania), therefore activated the only comprehensive mechanism at their disposal, in addition to other legislative tools. For example, Italy declared a state of emergency on 31 January 2020,<sup>88</sup> in accordance with the civil protection law, which allowed activation of what, for the purpose of our analysis, has been qualified as a statutory regime. This was not however the only measure adopted

<sup>86</sup> Bulgaria, Hungary, Portugal, Romania and Slovakia.

<sup>87</sup> The state of calamity was declared by [Resolution of the Council of Ministers No 33-A/2020](#) and was in force from 3 May 2020. However, since 15 July 2020, the declaration of the state of calamity was not applicable throughout the whole national territory and some areas were under a state of contingency or alert ([Resolution of the Council of Ministers No 51-A/2020](#)).

<sup>88</sup> [Decision](#) of the Council of Ministers of 31 January 2020, 'Declaration of a state of emergency as a consequence of the health risk connected with the insurgence of pathologies derived from transmissible viruses, Official Journal No 26 of 1 February 2020.

to contain the pandemic, as the Italian state of emergency alone is not able to entrust the government with special powers to limit freedom of movement, introduce lockdowns, or other 'classic' anti-pandemic measures. To do that, special legislation was adopted (decree-laws under Article 77 of the Constitution). In the case of Italy, the statutory regime was therefore complementary to any other measures enabled through special legislation.

A special observation must be reserved for France, since this Member State could not activate a constitutional state of emergency (state of siege) because this presupposed the existence of a violent and armed threat, while presidential powers require the existence of a threat to the independence or the integrity of the state, *quod non*. Notwithstanding this, French primary law provides for a state of emergency (Law No 55-385 of 1955) which, although formulated in ways that could include social unrest or a public calamity, it was argued that it could also apply to a pandemic.<sup>89</sup> In spite of this, France decided not to activate that state of emergency, probably due to the negative connotation it had acquired after the 2015 Bataclan attacks, when it was prolonged four times. France decided instead to introduce a state of public health emergency created *ad hoc* and *ex novo* in response to the Covid-19 pandemic, by Law No 2020-290 of 23 March 2020.<sup>90</sup>

Finally, **some Member States<sup>91</sup> that in principle could have declared a constitutional state of emergency**, because a pandemic could have fallen under that domestic notion,<sup>92</sup> **decided not to do so, instead deciding to declare a statutory regime**. The reasons for this may indeed be various, however we could theorise in the case of Germany that the aversion for emergency laws was possibly due to historical reasons; in Poland, political considerations may have played a certain role; while Croatia did not consider that the situation at the time required the declaration of a state of emergency. For these five countries, it would appear that the statutory regime was intended to contain the pandemic with a set of rules providing for less invasive or lighter containment measures compared to a state of emergency, which could however allow an organic and fast reaction.

### 3.4. Use of special legislative powers by the executive

As Figure 1 above shows, the **exercise of special legislative powers by the executive** (i.e. special refers to a procedure that departs from the ordinary, or to content being justified by the emergency and necessary nature of the circumstances) **occurred only in a handful of states**. Belgium, Greece, Italy, Romania and Spain resorted to this normative tool either alone or in combination with other tools. For Belgium and Greece, this was the predominant type of legislative means used, as ordinary legislation was adopted to a much lesser degree. For Italy and Spain, special legislative powers were used together with respectively a statutory regime and a constitutional state of emergency, whereas ordinary legislation played a lesser role in these two countries. In Romania, special legislative powers were exercised together with a state of emergency and a statutory regime.

In Spain, for example, most containment measures were adopted during the first wave, on the basis of the constitutional state of alarm declared on 14 March and lifted on 20 June 2020, (see Figure 3). The measures adopted to address the socio-economic effects of the crisis, however, have been adopted mainly through decree-laws (*Decretos-Ley*), a legislative act with the same legal standing of an ordinary law, but adopted by the government and subject to ex-post parliamentary oversight. Similarly, in Italy, most containment measures were enabled on the basis of decree-laws (*Decreti-*

<sup>89</sup> E. Mignon, '[l'état d'urgence sanitaire, quand, pourquoi, comment?](#)', 20 March 2020.

<sup>90</sup> [Loi No 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 \(1\)](#).

<sup>91</sup> Croatia, Germany, Malta, Poland and Slovenia.

<sup>92</sup> However, this issue has been problematic in some Member States, see Section 3.2.2.

*Legge*), particularly Decree law No 6 of 23 February 2020, while other more operational measures of an organisational nature were introduced on the basis of a statutory regime called 'state of emergency' (*stato di emergenza*) and declared under Article 24 of the Civil Protection Code.

In almost all of the above five member states, with the exception of Spain, **special legislation fulfilled the function of establishing enabling rules for the executive**. This was not the case in Spain, because, once a state of alarm was declared, enabling rules are to be found in the legal regime applicable to this constitutional emergency state. In the five Member States, special legislation provided an *ad hoc* empowerment for the government to introduce a number of predefined measures. In Belgium, two enabling laws were adopted to allow the King, i.e. the executive, to adopt measures to contain the spread of the virus. These indicated the type of measures to be taken to protect public health, as well as measures of an economic or other administrative nature. In Greece, the adoption by the President of the Republic of an 'Act of a legislative content', of 25 February 2020, as Article 44 of the Constitution provides, empowered the government (individual ministers in particular), with a range of measures to contain the pandemic (mandatory medical checks, pharmaceutical treatment, confinement, etc.). In Italy, Decree-law 6 of 23 February 2020 empowered the Prime Minister to introduce, where necessary, a range of measures including inter alia, the prohibition to exit or enter an affected municipality, suspension of transport of goods and persons, educational activity, etc. A particular aspect of such enabling acts is the pre-determination of the type of measure that the government can adopt, which shows on the one hand their 'enabling', but on the other also their 'circumscribed' nature. In other words, the enabling act did not consist of a blank check for the government.

### 3.5. General use of enabling laws

Enabling legislation played a crucial role in the normative management of the pandemic. As the swift spread of the virus gradually raised serious concerns in the EU-27, Member States' reactions had to be necessarily fast, informed and decisive. This situation saw executives on the frontline of this sometimes confused process, facing the reality of an unknown but dangerous threat. In this framework, the legal systems of Member States created the legal basis for delegated powers to the executive in three main ways. **A few Member States were not immediately equipped with a set of rules that could enable the government to adopt containment measures.** These six Member States<sup>93</sup> therefore adopted legislative acts that laid down a range of measures that the executive could take only once the coronavirus situation required them to do so.

**The majority of Member States, however, either relied on an arsenal of enabling laws pre-existing the current emergency (13 Member States),<sup>94</sup> or adapted pre-existing enabling laws (8 Member States) to the new emergency.<sup>95</sup>** Luxembourg deserves special mention, as Article 32(4) of the Constitution reserves special powers for the Grand Duc to take measures when real threats to vital interests of the population or imminent dangers to the public security materialise, once established that it is impossible for the Chamber of Deputies to perform its function. The Regulation of the Grand Duc<sup>96</sup> that declares the state of crisis (*état de crise*) contains the type of measures that the government may implement. In this case, it is therefore the

<sup>93</sup> Austria, Belgium, Italy, Greece, Ireland and Sweden.

<sup>94</sup> This was the case for Cyprus, Czechia, Estonia, Finland, France, Germany, Latvia, Lithuania, the Netherlands, Portugal, Slovenia, Slovakia and Spain.

<sup>95</sup> Bulgaria, Croatia, Denmark, Hungary, Luxembourg, Malta, Poland and Romania.

<sup>96</sup> See [règlement grand-ducal](#) du 18 mars 2020 portant introduction d'une série de mesures dans le cadre de la lutte contre le Covid-19, journal officiel du Grand Duché de Luxembourg.

Constitution, not a special or ordinary law, which acts as an 'enabling provision' of the special powers.

Finally, as may seem obvious, the five Member States that resorted to special legislative powers of government, did not adopt ordinary legislation in this first phase of the pandemic, or only did so to a low degree.

### 3.6. Ordinary legislation for emergency situations

Overall, **14 Member States resorted to measures enabled mainly through ordinary legislation to adopt the measures necessary to contain the first wave of the pandemic** (see Table 1). In some Member States, containment measures were the result of delegation of powers derived from the circumstance that a piece of ordinary legislation was the legal basis for the declaration of a specific statutory regime.<sup>97</sup>

At other times, the source of the power to introduce containment or mitigating measures derived from ordinary legislation *tout court* – either pre-existing the current crisis, or adopted, or even adapted to the exigencies of the pandemic. This was the case, for example, in Denmark, where although the constitution does not provide for a true state of emergency but rather for the transfer of specific powers to the monarch, no such emergency clause was activated. Instead, the management of the pandemic was carried out through the powers and measures allowed by the Act on Measures against Infectious and Other Communicable Diseases. This act allowed regional Epidemic Commissions, made up of representatives of various public administrations (police, health authorities, local politicians, etc.), to take up the appropriate measures. As a consequence of the Covid-19 pandemic, the act was amended to give more power to the government, particularly to the Minister of Health, in an attempt to streamline the response on the national territory.<sup>98</sup>

The reaction to the pandemic in Ireland, where a state of emergency applicable to a health emergency is not constitutionally possible (see Figure 2), was also almost exclusively through ordinary legislation. However, in mid-March 2020, a comprehensive legislative package was introduced – the Health Act 2020<sup>99</sup> and the Emergency Act 2020.<sup>100</sup> The Health Act 2020 particularly allowed the government to introduce containment measures and to issue guidelines that thereafter became binding law.

In the Netherlands, the Public Health Act<sup>101</sup> and the Act on Security Regions<sup>102</sup> provided the legal basis for the adoption of containment measures. The former act awarded the Health Minister a central role in the control of the pandemic, while the Chairs of the security regions were responsible for the actual implementation and enforcement of anti-coronavirus measures. The Public Health Act empowered the Minister of Health to issue instructions containing national guidelines, addressed to all security region chairs, or guidelines with a regional restriction to one or only a few security

<sup>97</sup> Croatia, France, Germany, Latvia, Lithuania, Poland, Slovenia.

<sup>98</sup> Law [L 133](#) entered into force on 17 March 2020, amending the Law on measures against infectious and other communicable diseases.

<sup>99</sup> [Health \(Preservation and Protection and other emergency measures in the public interest\) Act No 1 2020](#).

<sup>100</sup> [Emergency Measures in the Public Interest \(COVID-19\) Act No 2 2020](#).

<sup>101</sup> [Law](#) of 9 October 2008, on Public Health. It should be noted that on 13 October 2020, the Dutch Parliament amended the Health Public Act to allow national authorities to adopt specific measures aiming to combat the pandemic in the longer term ([Temporary provisions related to measures to combat the covid-19 epidemic for the longer term](#) (Temporary Measures Act Covid-19), 13 October 2020).

<sup>102</sup> [Act](#) on Security Regions of 11 February 2010.

regions. During the current pandemic, specific prohibitions have been enacted through the Public Health Act powers attributed to the Minister of Public Health, Welfare and Sports.

The initial state reaction was through recommendations in Sweden, where an emergency clause cannot be activated for a health crisis (see Figure 2). Thereafter, specifically addressed legislative acts were introduced to impose specific measures, e.g. Act (2020:148)<sup>103</sup> on the Temporary Closure of Activities within the field of education and during extraordinary events in peacetime (19 March 2020). Overall, Sweden relied on the Public Order Act (SFS, 1993:1617)<sup>104</sup> for the introduction of several measures, especially limiting the number of persons allowed to attend public gatherings. However, to allow the government to adopt certain types of measures if needed more swiftly, especially concerning restrictions on businesses, cultural events or other public gatherings, amendments were introduced to the Act on Protection Against Contagious Diseases (SFS 2004:168).<sup>105</sup>

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<sup>103</sup> [Act \(2020:148\)](#) of 19 March 2020 on the temporary closure of school activities in the event of extraordinary peacetime events.

<sup>104</sup> [Public Order Act](#) of 16 December 1993.

<sup>105</sup> [Act](#) on Protection against Contagious Diseases of 7 April 2004.

## 4. Parliamentary oversight over containment measures

Governments of EU Member States were the major institutional actors proposing, adopting and implementing the measures to contain the Covid-19 pandemic during the first wave, a shift in the normal distribution of powers that is common to many crises, as indicated above. However, that 'executive dominance'<sup>106</sup> or executive aggrandisement'<sup>107</sup> was accompanied by different forms of **parliamentary oversight, which is one key element to determine whether the use of emergency powers can be considered legitimate**, as analysed in Section 2.<sup>108</sup> The rationale is clear. If the executive assumes certain powers, which would otherwise be reserved to the legislature during a crisis, then the rule of law, democratic principles and respect for checks and balances between state powers require that the competences assumed by the government are limited in terms of content (principles of necessity and proportionality) and time. Effective judicial and parliamentary oversight of the measures adopted is also necessary.<sup>109</sup>

Although **there are different ways of ensuring effective parliamentary oversight over emergency measures**, as mentioned in Section 2 of this study, the Venice Commission indicates certain elements that characterise an adequate oversight of emergency measures by parliaments. First, parliaments need to be active during the crisis and continue to sit. Second, if a state of emergency is declared, the declaration and its prolongation must be subject to parliamentary oversight. Third, if government is entrusted with the power to adopt legislative acts or acts with the same standing as laws during a crisis, such power must be limited in terms of content and time and subject to a parliamentary oversight. This oversight cannot be limited to rubber-stamping the normative acts adopted by the executive and should involve an adequate discussion of their content.<sup>110</sup>

During the first wave of the coronavirus pandemic, EU national parliaments exercised their oversight powers and participated in the management of the crisis in different ways. However, the extent to which they were able to continue exercising their usual competences and the type of oversight they exercised over governmental activities seems to have been affected by several elements. These include the introduction of innovations or arrangements aiming at ensuring the continuity of parliamentary work during the crisis (while observing the sanitary rules aimed at stopping the spread of the virus and protecting the health of members of parliament), and the national constitutional and/or legal framework and the possibilities it offered for parliamentary oversight.

### 4.1. Ensuring parliamentary work during the crisis

A first challenge faced by Member States' parliaments across the EU during the first peak of the pandemic was to continue its institutional activity. Although the coronavirus pandemic was not a single disastrous event, nor an armed conflict preventing legislatures to carry out their normal institutional work, sanitary rules discouraging or forbidding gatherings and imposing social distancing rules led to the absence of a large number of members, or difficulties in gathering

<sup>106</sup> E. Griglio, 'Parliamentary oversight under the Covid-19 emergency: striving against executive dominance', *The Theory and Practice of Legislation*, July 2020.

<sup>107</sup> J. Petrov, 'The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?', *The Theory and Practice of Legislation*, June 2020.

<sup>108</sup> Among others, see: 'Report on respect for Democracy, Human Rights And The Rule Of Law During States Of Emergency: Reflections', Venice Commission, CDL-AD(2020)014, 19 June 2020, p. 5.

<sup>109</sup> Ibid, pp. 14-16.

<sup>110</sup> Ibidem.



members and staff. This represented a challenge to the normal institutional settings and usual parliamentary working procedures.<sup>111</sup> **All EU Member State parliaments adopted preventive measures to contain and prevent the spread of the virus within their premises.** These included: cancellation or severe restriction of visits and travel, widespread use of teleworking, reinforcement of cleaning and disinfection of premises, provision of specific protective equipment (gloves, masks, etc.). In many cases, parliaments required people entering the premises to sign a specific statement (e.g. indicating that no travel was undertaken in the past number of days, or that there had been no contact with anyone infected with coronavirus), or to undergo a medical examination (e.g. measurement of body temperature).<sup>112</sup>

Apart from these hygienic and sanitary measures, EU Member State parliaments adopted some form of organisational measures aiming at ensuring the continuity of parliamentary activity during the first peak of the pandemic, without endangering the health of their staff and that of members of parliament. At the beginning of the pandemic, some EU national parliaments decided to adjourn their sessions (e.g. Spain, Latvia, Lithuania), resuming parliamentary activities some weeks after the outbreak of the pandemic in the country.<sup>113</sup> The majority of EU national parliaments decided however to maintain parliamentary sessions, even during the worst of the crisis, although the number of sittings were sometimes reduced and, in some cases, parliamentary activities were limited to the essential or to matters linked to the health crisis.<sup>114</sup> Even in those cases, most EU Member States' national parliaments adopted additional organisational measures to ensure the continuity of parliamentary activity. In some cases, parliaments moved their parliamentary sessions (or at least some of them) to larger premises (e.g. Luxembourg), or tried to ensure that members did not meet all together in the same room, for example, by requiring them to vote in turns, keeping a safe distance from each other (e.g. Denmark). In other cases, national parliaments used the room for manoeuvre afforded by existing parliamentary rules to **reduce the number of members of parliament that could be present at sittings** through political agreements, which preserved the original distribution of power among different political families (e.g. France, Ireland, and Sweden).<sup>115</sup>

Finally, some more elaborate solutions were adopted, which required the **national parliament to 'go digital'**. This meant that parliamentary sessions were held entirely (deliberation and vote) or partially (voting or deliberation) remotely. Before the pandemic, only the two chambers of the Spanish national parliament allowed physically absent members to vote in plenary through a remote electronic system, in specific cases.<sup>116</sup> Absent members were permitted to cast their vote in other ways in some other national parliaments (e.g. written vote in Greece). However, the Covid-19 pandemic has substantially increased the number of national parliaments providing members with the possibility to deliberate and vote through remote electronic means (e.g. Belgium, Poland, Romania, Slovenia), although in some cases the possibility only applies to committee sessions and not to the plenary (e.g. Greece, Lithuania).<sup>117</sup>

These measures and arrangements have been essential to maintaining parliamentary activity while respecting minimal preventive measures to contain the pandemic. The solutions found by different

<sup>111</sup> J. Murphy, op. cit., pp. 37-48; M. Diaz Crego and R. Manko, [Parliaments in emergency mode. How Member States' parliaments are continuing with business during the pandemic](#), EPRS, European Parliament, April 2020.

<sup>112</sup> For a detailed analysis of these measures, see: Preventive and sanitary measures in Parliaments, Spotlight on Parliaments in Europe, Directorate for Relations with Parliaments, European Parliament, no 28, March 2020.

<sup>113</sup> [Adjustment of Parliamentary Activity to COVID-19 Outbreak and the prospect of remote sessions and voting](#), Spotlight on Parliaments in Europe, Directorate for Relations with Parliaments, European Parliament, no 27, March 2020.

<sup>114</sup> *Ibid*, accompanying table.

<sup>115</sup> M. Diaz Crego and R. Manko, op. cit. p. 8-9.

<sup>116</sup> M. Diaz Crego and R. Manko, op. cit. p. 6-7.

<sup>117</sup> M. Diaz Crego and R. Manko, op. cit., p. 11.

national Parliaments may not have been ideal in some circumstances,<sup>118</sup> but they have certainly allowed parliaments to continue exercising their legislative, budgetary and oversight powers, even in times of crisis.

## 4.2. Types of parliamentary oversight

If the solutions found by EU national parliaments to ensure the continuity of parliamentary work during the first wave of the pandemic differed widely, parliamentary oversight over the measures taken by EU Member States to contain the pandemic also varied. These measures largely depended on the national constitutional legal framework through which the national authorities dealt with the crisis.

Most EU national parliaments that activated a constitutional state of emergency exercised parliamentary oversight over the emergency powers entrusted to the government, either by authorising the initial declaration or the subsequent extensions of the state of emergency. Parliamentary oversight was also exercised as regards the declaration of statutory regimes to deal with the crisis, although not in all Member States who decided to resort to this tool. Many EU national parliaments also continued to exercise legislative and budgetary powers, by adopting new legislation allowing the government to deal with the crisis or by substantially amending the existing legal framework to cope with the new situation. In other cases, the budget was amended to provide the government with the economic flexibility needed to deal with the crisis. As indicated above, in some Member States, the constitutional framework allowed the government to adopt normative acts with the same standing as laws adopted by parliament. These norms were subject to subsequent oversight by Parliament. Finally, national parliaments used their normal prerogatives to exercise parliamentary oversight over the executive, for example, by requiring information from the government on the situation through parliamentary questions, the weekly question time, or in some cases through *ad hoc* parliamentary committees.

### 4.2.1. Parliamentary oversight in relation to the declaration of a constitutional state of emergency

In all of the ten Member States that declared a constitutional state of emergency during the first wave of the pandemic, the national constitutional and legal framework provides for relevant formal and substantive safeguards that circumscribe the declaration, with the aim of preventing uncontrolled use of the emergency powers and possible 'power grabs' from the executive. **The legal framework of almost all of the EU Member States that declared a state of emergency ensures that Parliament cannot be prevented from sitting during the crisis.** The framework also requires a certain degree of parliamentary oversight, either as regards the declaration of the state of emergency or subsequent extensions, thus clearly characterising parliamentary oversight as an important counterweight to balance the growth in powers of the executive branch during emergencies.

In this vein, the legal framework of the Member States that declared a state of emergency during the Covid-19 pandemic normally prevents dissolution of parliament during the constitutional state of emergency,<sup>119</sup> provides for the possible extension of the parliamentary term if it ends while a state

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<sup>118</sup> See P. Popelier, '[COVID-19 legislation in Belgium at the crossroads of a political and a health crisis](#)', *The Theory and Practice of Legislation*, May 2020, p. 18, in relation to the Belgian case.

<sup>119</sup> See, for example, Article 116 of the Spanish Constitution, Article 32.4 of the Constitution of Luxembourg, Article 172.1 of the Portuguese Constitution, or Article 89.3 of the Romanian Constitution



of emergency is in force,<sup>120</sup> and/or requires parliament to convene immediately if it is not in session when a state of emergency is declared.<sup>121</sup> These provisions are clearly geared towards preventing situations where a national parliament would be unable to perform its constitutional role, by providing guidance and oversight over the executive's actions. The provisions are in line with the recommendations made by the Venice Commission.<sup>122</sup>

As regards the form parliamentary oversight takes of the declaration and extension of a state of emergency, it should be noted that certain of the Member States that resorted to this tool during the first peak of the pandemic, did provide for the same type of parliamentary oversight for all the different states of emergency regulated in the national constitution. This was either because the constitution only provides for one type of state of emergency, or because parliamentary oversight takes a similar form in all of them. Luxembourg seems to belong to the first type of Member States, in as much as the Luxembourg Constitution provides for only one emergency state, which is subject to ex-post parliamentary oversight. In this vein, the parliament has to decide on its possible extension, after the initial period of 10 days; by a law adopted by a qualified majority of two-thirds (Articles 32.4 and 114.2 of the Constitution of Luxembourg). Portugal provides an example of the second model, as the Portuguese Constitution subjects the declaration of both the state of siege and the state of emergency (to be made by the President of the Republic, after consulting the government) to the authorisation of the National Assembly (Articles 134, 138, 161 of the Portuguese Constitution).

Conversely, some other states differentiate the type of parliamentary oversight depending on the type of emergency state to be activated, thus normally using stricter forms of parliamentary oversight for the states of emergency that allow introduction of more severe and invasive measures. In this vein, for example, the Czech Parliament is competent to declare the states of war and of threat to national sovereignty (Articles 39.3 and 43 of the Czech Constitution and Article 7 of the Constitutional Law on the Security of the Czech Republic, No 110/1998 Coll.). However the Czech Government is competent to declare a state of emergency subject to ex-post parliamentary oversight (Article 5 of the Constitutional Law on the Security of the Czech Republic). In Finland, the regime applicable to the state of defence<sup>123</sup> and the state of emergency<sup>124</sup> is different and, for the second, parliamentary oversight can take place either ex-ante or ex-post, depending on the urgency of the circumstances.<sup>125</sup> In Spain too, the government is competent to declare a state of alarm, which can only be extended by authorisation of Congress (lower chamber of the national parliament), whereas Congressional authorisation is needed for declaring a state of exception (Article 116.2 and 3 of the Spanish Constitution). Congress is the competent authority to declare a state of siege, by absolute majority (Article 116.4 of the Spanish Constitution). As a final example, the Estonian Constitution entrusts the *Riigikogu* with the competence to declare states of war and emergency

<sup>120</sup> See, for example, Article 131 of the Estonian Constitution, as regards the state of war or emergency, but not as regards emergency situations, which was the mechanism used by Estonia during the pandemic.

<sup>121</sup> See, for example, Article 116 of the Spanish Constitution, Article 100.5 of the Bulgarian Constitution, and Article 93.2 of the Romanian Constitution.

<sup>122</sup> 'Report on respect for Democracy, Human Rights And The Rule Of Law During States Of Emergency: Reflections', Venice Commission 19 June 2020, CDL-AD(2020)014, p. 16.

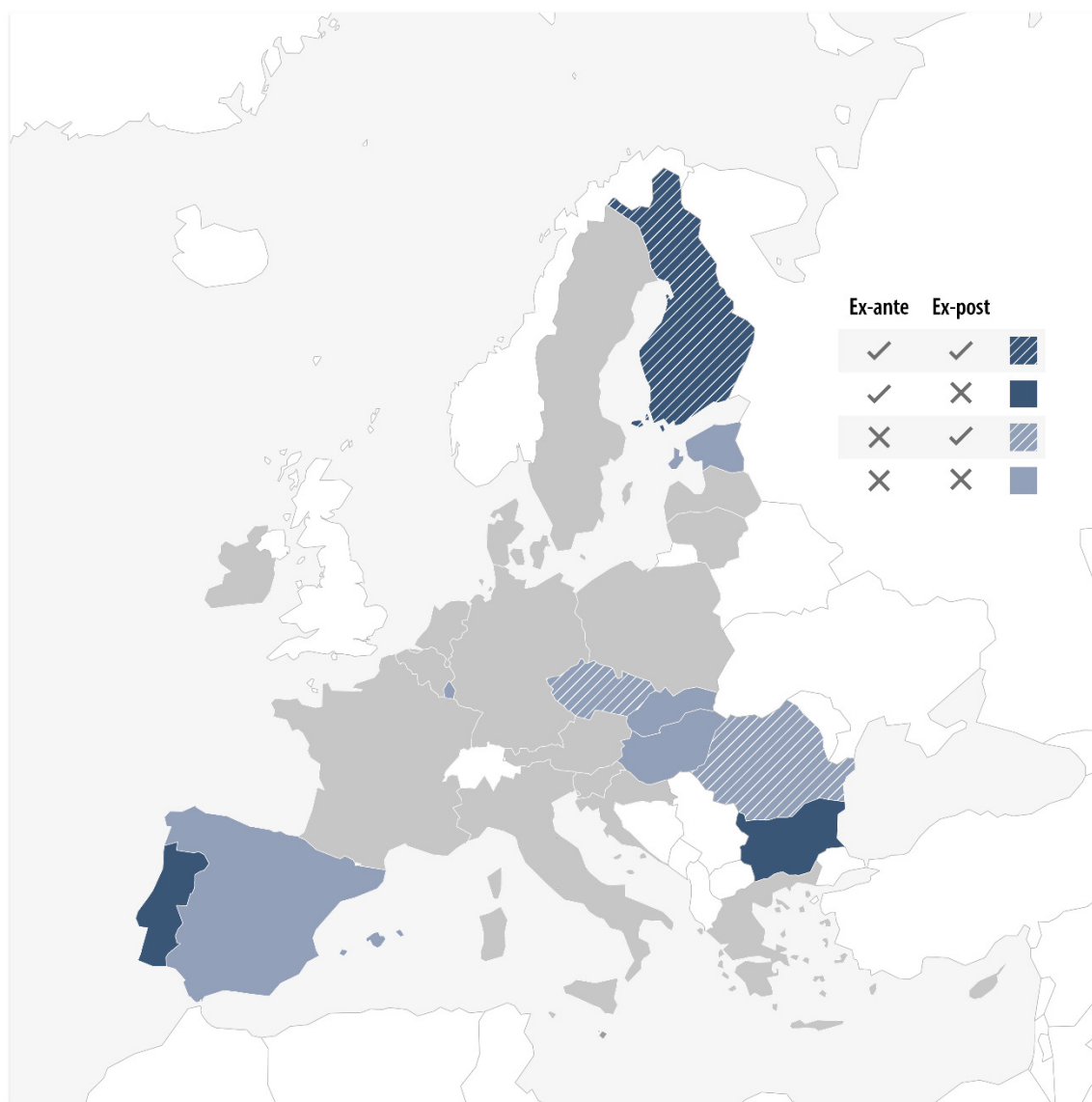
<sup>123</sup> See articles 2-5 [Defence State Act](#).

<sup>124</sup> See articles 6-9 [Emergency Powers Act](#).

<sup>125</sup> In cooperation with the President of the Republic, the government may declare that the country is in a state of emergency. However, the decree indicating the extent of the emergency powers granted to the executive and its territorial scope shall be submitted to Parliament immediately, which shall decide whether it shall remain in force or whether it should be partially or totally repealed. Following Parliament's decision, the government may begin to use the emergency powers (Article 6 [Emergency Powers Act](#)). In specific urgent situations, the decree may enter in force immediately, although Parliament may exercise its powers ex-post (Article 7, [Emergency Powers Act](#)).

(Articles 128-129 of the Estonian Constitution),<sup>126</sup> allowing the national government to declare an emergency situation in a natural disaster or catastrophe, or to prevent the spread of an infectious disease (Article 87 of the Estonian Constitution).

Figure 4 – Parliamentary oversight as regards declaration of a state of emergency during the first wave of the pandemic



Source: EPRS.<sup>127</sup>

As Figure 4 shows, during the first wave of the Covid-19 pandemic, **Bulgaria, Finland and Portugal declared a constitutional state of emergency in which parliamentary oversight was exercised ex-ante**, either because the national parliament was competent to declare the state of emergency (Article 84 Bulgarian Constitution), or because it authorised the declaration before it was effectively

<sup>126</sup> As an exception, the President declares a state of war without awaiting the corresponding *Riigikogu* resolution in cases of aggression (Article 128 of the Estonian Constitution).

<sup>127</sup> See the four EPRS briefings cited in footnote number 13.

applied (Article 138 of the Portuguese Constitution, Article 6 of the Finnish [Emergency Powers Act](#)).<sup>128</sup> In Finland, Article 7 of the Emergency Powers Act provides that the decrees indicating the extent of the emergency powers granted to the executive and its territorial scope may enter in force immediately, being subject to ex-post parliamentary oversight, in specific urgent situations. However, this possibility was not used during the first peak of the pandemic and Parliament decided on the extent of the emergency powers granted to the executive before they were applied.

On the other side of the spectrum, Slovakia and Estonia resorted to constitutional states of emergency that did not provide for specific forms of parliamentary oversight and, therefore, the national parliament resorted to ordinary oversight procedures to exercise its oversight functions.<sup>129</sup> For example, in the case of Estonia, the head of the state of emergency reported on his activity to the parliament and the government, as required by Article 18(5) of the State of Emergency Act. Several members of the national government and the Prime Minister himself appeared in parliament to share information about the situation.<sup>130</sup>

However, **in most of the Member States that effectively declared a constitutional state of emergency during the first peak of the pandemic, parliamentary oversight took place ex-post**, once the constitutional state of emergency was in force. This oversight took the form of an ex-post authorisation (or possible annulment) of the declaration of the state of emergency (Czechia and Romania – see Figure 4), or of an authorisation of the extension of the state of emergency (Hungary, Luxembourg, Spain – see Figure 5). These models seem to be based on the assumption that a speedy declaration of a state of emergency may be needed and may be better ensured if entrusted to the national government, as convening a parliamentary session might not always be possible in very short time frames, especially in crises.

Among the Member States in which parliamentary oversight over the state of emergency took place ex-post, Romania is the only case in which parliament had a very short time frame – five days – to authorise the declaration (Article 93.1 of the Romanian Constitution).<sup>131</sup> In Czechia, a state of emergency can be declared by the government for an initial period of 30 days,<sup>132</sup> but the Chamber of Deputies has the power to annul such declaration, although it did not exercise that power during the first wave of the pandemic. However, authorisation of the lower House is required to extend the initial declaration after the first period of 30 days, which the Chamber gave on 7 and 28 April 2020, for the first state of emergency declared.<sup>133</sup> In Hungary, Luxembourg and Spain, the national parliaments did not play a decisive role in relation to the initial declaration of a state of emergency (although in some cases, it had to be immediately informed, e.g. Spain), but had to authorise subsequent extensions of the emergency state. A specific period was set for issuing such

<sup>128</sup> See footnote number 120.

<sup>129</sup> See, N. Atanassov, H. Dalli, C. Dumbrava, et al, [States of emergency in response to the coronavirus crisis: Situation in certain Member States II](#), EPRS, European Parliament, May 2020, p. 6 and Z. Alexandre, M. Del Monte, G. Eckert, et al, [States of emergency in response to the coronavirus crisis: Situation in certain Member States IV](#), EPRS, European Parliament, July 2020, p. 11.

<sup>130</sup> N. Atanassov, H. Dalli, C. Dumbrava, et al, [States of emergency in response to the coronavirus crisis: Situation in certain Member States II](#), EPRS, European Parliament, May 2020, p. 6.

<sup>131</sup> The state of emergency was declared by [Presidential Decree 195/2020](#), 16 March 2020, which Parliament approved in [Decision 3/2020](#), 19 March 2020.

<sup>132</sup> As provided under Articles 5-6 of the Constitutional Law on the Security of the Czech Republic (No 110/1998 Coll.). In addition, any extension requires the authorisation of the Chamber.

<sup>133</sup> On 7 April 2020, the Chamber of Deputies approved the extension of the state of emergency until 20 April 2020 ([Decision 1012](#)). On 28 April, the Chamber further extended the emergency to 17 May ([Decision 1105](#)). It should be noted, however, that Czechia has again introduced an state of emergency by Resolution of the Government of 30 September 2020, No [957](#) and that this second state of emergency was extended by Resolution of the Government of 30 October 2020, No [1108](#), as authorised by the Chamber of Deputies in its resolution of 30 October 2020, No 1326.

authorisation (10 days for Luxembourg,<sup>134</sup> 15 days for Spain<sup>135</sup> and Hungary<sup>136</sup>). As a result, the type of parliamentary oversight provided for in these five countries was largely comparable. In all cases, parliamentary oversight was required within a more or less short time frame after the initial declaration, either to authorise it ex-post or to extend the initial declaration.

In addition, it should be noted that **extensions of the emergency states had to be authorised by national parliaments either ex-ante or ex-post in nearly all the Member States** that declared a constitutional emergency state, except Slovakia and Estonia (see Figure 5). During the first wave of the pandemic, these authorisations were usually limited in time (e.g. 3 months in Luxembourg;<sup>137</sup> 1 month in Bulgaria<sup>138</sup> and Finland, although with a longer period for the second extension of the emergency state in Finland;<sup>139</sup> 30 days in the case of Romania;<sup>140</sup> 15 days in Portugal<sup>141</sup> and Spain<sup>142</sup>). This accords with the principle that exceptional circumstances should ideally not be used to

<sup>134</sup> The Grand Duke may take regulatory measures that may derogate from existing laws in the specific cases defined by Article 32(4) of the Luxembourg Constitution. However, the extension of that state of crisis for more than 10 days can only be authorised by a law of Parliament and cannot go beyond 3 months.

<sup>135</sup> The state of alarm shall be declared by the Government for a maximum initial period of 15 days and the Congress of Deputies must be immediately informed and convene a session for this purpose. The extension of the declaration shall be authorised by the Congress (Article 116 of the Spanish Constitution).

<sup>136</sup> The government is competent to declare the state of extreme danger and the governmental decrees adopted thereof remain effective for 15 days only, unless Parliament authorises to extend the effects of those decrees (Article 53 of the Hungarian Constitution). Parliaments authorisation needs a two-thirds majority of the members present, as it should be granted through a cardinal act (Articles T and 54 (4) of the Hungarian Constitution).

<sup>137</sup> In Luxembourg, the Grand-Ducal decree of 18 March 2020 introducing a series of measures to combat the Covid-19, was extended once by [Law 7534](#), 21 March 2020, for a period of three months.

<sup>138</sup> On 3 April 2020, the National Assembly extended the initial declaration of a state of emergency (from 13 March 2020 to 13 April 2020) to 13 May 2020. See Venice Commission – Observatory on emergency situations, [Bulgaria](#), question 4.

<sup>139</sup> The Finnish Government initially declared a state of emergency on 16 March 2020 (Government decision [VNK/2020/31](#)). On 31 March 2020, the government extended the use of emergency powers from 14 April to 13 May 2020 (Government Decree [177/2020](#) and [176/2020](#)). On 6 May 2020, the government extended the use of emergency powers for one and a half months, from 14 May to 30 June 2020 (Government Decree [308/2020](#) and Government Decree [309/2020](#)), although the emergency state was finally lifted before then, on [16 June 2020](#).

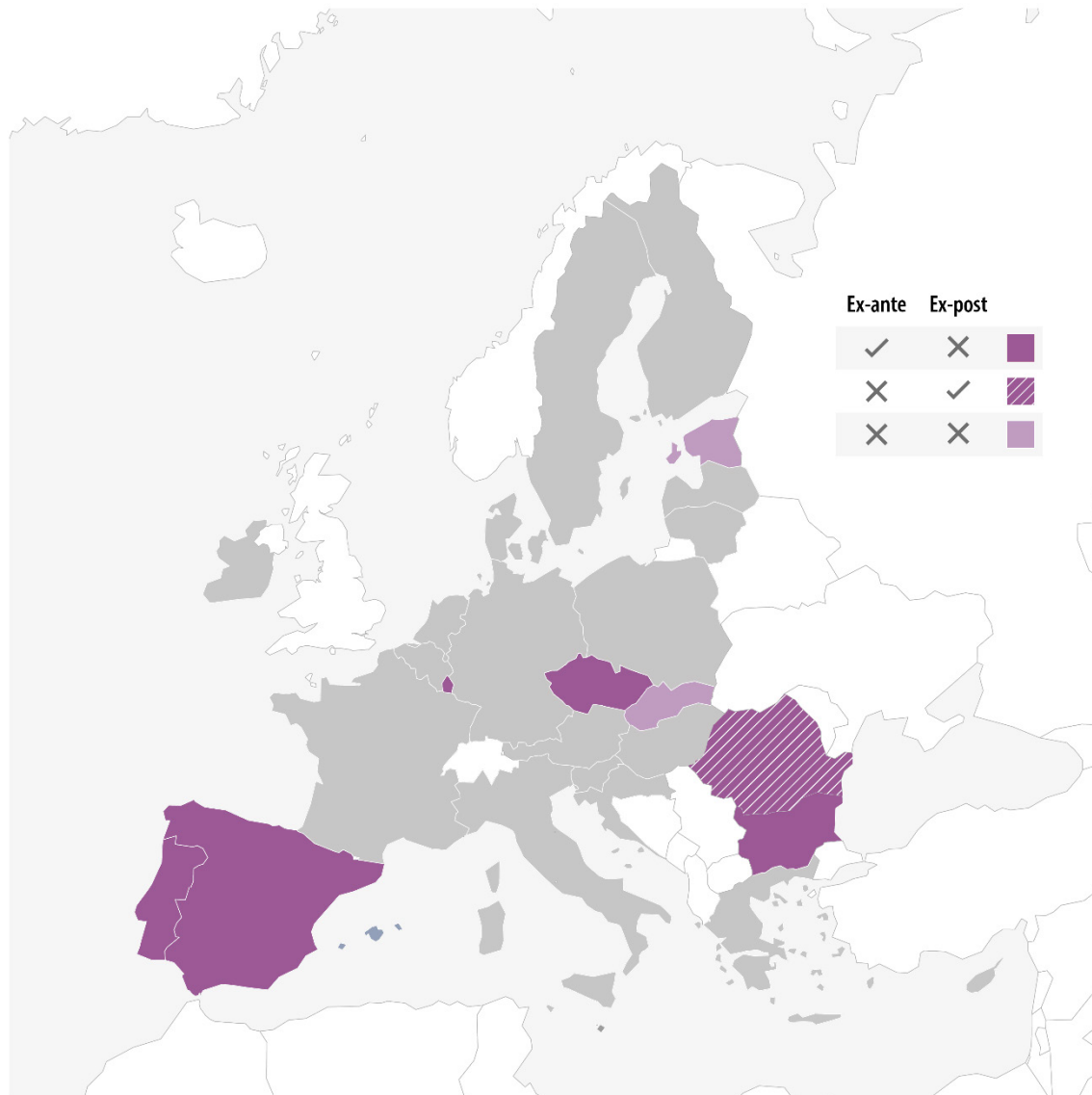
<sup>140</sup> See [Presidential Decree 240/2020](#) of 14 April 2020, extending the initial declaration for 30 more days, as approved by [Parliament's Decision 4/2020](#), 16 April 2020.

<sup>141</sup> The state of emergency declared by Decree of the President of the Republic [14-A/2020](#) of 18 March 2020, authorised by Resolution of the National Assembly [15-A/2020](#) of 18 March 2020, was extended twice by Decree of the President of the Republic [17-A/2020](#) of 2 April 2020, authorised by Resolution of the National Assembly [22-A/2020](#) of 2 April 2020; and Decree of the President of the Republic [20-A/2020](#) of 17 April 2020, authorised by Resolution of the National Assembly [23-A/2020](#) of 17 April 2020, for two periods of 15 days. It should be noted however that Portugal has reintroduced a state of emergency in the second wave of the pandemic (Decree of the President of the Republic [51-U/2020](#) of 6 November 2020, authorised by Resolution of the National Assembly [83-A/2020](#) of 6 November 2020), that was prolonged until the 8 December 2020 (15 days) by Decree of the President of the Republic [59-A/2020](#) of 20 November, authorised by Resolution of the National Assembly [87-A/2020](#) of 20 November 2020.

<sup>142</sup> The state of alarm declared by [Royal Decree 463/2020](#) of 14 March 2020, was extended 6 times for 15 days in each case ([Royal Decree 476/2020](#) of 27 March 2020, authorised by Resolution of Congress adopted on [25 March 2020](#); [Royal Decree 487/2020](#) of 10 April, authorised by Resolution of Congress adopted on [9 April 2020](#); [Royal Decree 492/2020](#) of 24 April 2020, authorised by Resolution of Congress adopted on [22 April 2020](#); [Royal Decree 514/2020](#) of 8 May 2020, authorised by Resolution of Congress adopted on [6 May 2020](#); [Royal Decree 537/2020](#) of 22 May 2020, authorised by Resolution of Congress adopted on [20 May 2020](#); [Royal Decree 555/2020](#) of 5 June 2020, authorised by Resolution of Congress of [3 June 2020](#)). It should be noted, however, that Spain reintroduced a state of alarm in the second wave of the pandemic, through [Royal Decree 900/2020](#) of 9 October 2020 (only applicable to certain territories in Madrid) and [Royal Decree 926/2020](#) of 25 October 2020 (applicable to the whole territory of Spain), and that the latter was extended to 9 May 2021 (six months) by [Royal Decree 956/2020](#) of 3 November 2020, authorised by Resolution of Congress adopted on [29 October 2020](#).

introduce long-standing, but only temporary measures aimed at addressing the crisis situation.<sup>143</sup> However, this was not the case in Hungary, where Act XII of 2020 on the containment of coronavirus, adopted on 30 March 2020, initially authorised the extension of the state of danger without any specific deadline. Even in that very specific case, in which the temporary nature of the emergency state was arguable,<sup>144</sup> the national parliament was able to end to the state of emergency declared in the first phase of the pandemic by repealing the act authorising the extension on 16 June 2020, with the adoption of Act LVII of 2020.

Figure 5 – Parliamentary oversight as regards the extension of the state of emergency during the first wave of the pandemic



Source: EPRS.<sup>145</sup>

Moreover, the time limits for the extensions authorised by parliaments were generally short, ranging around a maximum extension period of one month. During the first wave of the pandemic, and

<sup>143</sup> Among others, see B. Ackerman, 'The Emergency Constitution', *Yale Law Journal*, vol. 113, 2004, p. 1030.

<sup>144</sup> T. Drinóczi, '[COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism](#)', *The Theory and Practice of Legislation*, June 2020, para. 3.1.2.

<sup>145</sup> See the four EPRS briefings cited in footnote number 13.



setting aside the specific case of Hungary, only Luxembourg departed clearly from that general rule, as the national parliament authorised the extension of the state of crisis for a period of three months, as indicated in the paragraph above.<sup>146</sup> Limiting extensions of the emergency states to short periods allowed national parliaments to exercise their oversight powers on several occasions and at different times, thus granting them a powerful tool to better assess the content and extent of the emergency powers granted to the government and to adapt them to the evolution of the pandemic.

Finally, although the legal framework of the Member States that declared a constitutional state of emergency rarely give national parliaments the power to authorise each of the individual measures adopted by the executive branch on the basis of the emergency powers granted,<sup>147</sup> the parliamentary authorisations to declare or extend the emergency states allowed them to modify the extent of the declaration of the state of emergency and of the emergency powers granted to the national government. This gave the legislatures a meaningful way to modify the initial measures adopted to deal with the health crisis. In this vein, for example, in Finland, the declaration of the state of emergency state was made by the government, jointly with the President of the Republic, on 16 March 2020, and the national parliament debated the extension of the emergency powers in a record time of two days (17–18 March), amending some provisions that Parliament considered excessive.<sup>148</sup> Similarly, in Romania, the parliament imposed safeguards when authorising the extension of the state of emergency declared through Presidential Decree 240/2020, including that any restriction of fundamental rights had to be motivated; must respect Article 53 of the Constitution; be regulated by a normative act with the same standing as a law; and adopted only to prevent the spread of Covid-19.<sup>149</sup> In Spain as well, Congress imposed an obligation on the government to report to Congress weekly on the measures adopted to contain the pandemic when the first extension of the state of alarm was authorised during the first wave of the pandemic.<sup>150</sup>

#### 4.2.2. Parliamentary oversight in relation to the declaration of statutory regimes

As opposed to the situation for constitutional states of emergencies, the legal framework of most of the Member States that resorted to statutory regimes to deal with the first wave of the health crisis did not attribute any specific role to the national parliament as regards the declaration or the

<sup>146</sup> See Law 7534, 21 March 2020, extending the state of emergency in Luxembourg for a period of three months. It should be noted that, during the second wave, the Spanish Congress has decided to authorise the extension of the state of alarm until 9 May 2020 (Resolution of Congress adopted on [29 October 2020](#)), although there are doubts concerning whether the extensions can be granted for a period that is longer to the initial declaration of 15 days (see, J. Garcia Roca, 'El Control Parlamentario y otros contrapesos del Gobierno en el Estado de Alarma: La Experiencia Del Coronavirus', in D. Barcelo Rojas et al (coordinators), *Covid-19 y parlamentarismo. Los Parlamentos en cuarenta*, Instituto de Investigaciones Jurídicas, UNAM, 2020, p. 25; A. Torres Gutierrez, 'The Spanish Parliament in the context of the Coronavirus pandemic', Robert Schuman Foundation, 2020, pp. 4-6). The parliamentary authorisation extending the state of alarm to 9 May 2020 however provides other forms of parliamentary oversight of the use of the emergency powers, as the Prime Minister and the Health Minister are required to inform the Congress about the implementation of the state of alarm every two and one months, respectively (see Section 4, Resolution of Congress adopted on [29 October 2020](#)).

<sup>147</sup> As an exception, the Finnish model requires that government decrees and decisions issued on the basis of the emergency powers granted shall be submitted to Parliament immediately and shall be repealed if the Parliament so decides (Article 10, Emergency Powers Act).

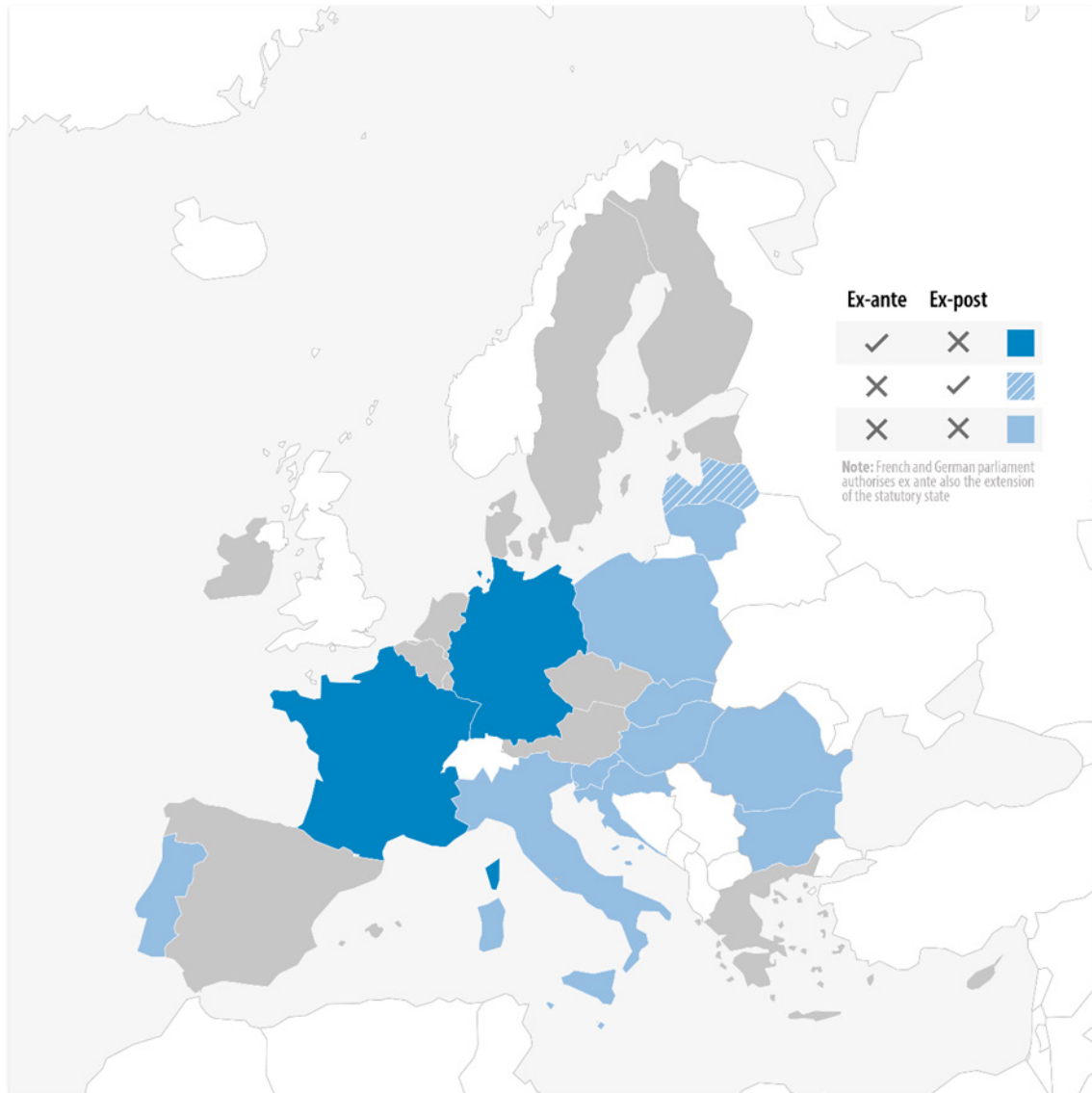
<sup>148</sup> See, J. Murphy, op. cit., p. 33-34.

<sup>149</sup> Decision No 4/2020, published in the Official Gazette No 320 on 16 April 2020. On Parliament's intervention see: E.-S. Tănăsescu and B. Dima, 'The Role of the Romanian Parliament during the COVID-19 Sanitary Crisis. A diminishment of the executive decision-making power', Fondation Robert Schuman, 2020, pp. 3-4.

<sup>150</sup> See Section 3, Resolution of Congress adopted on [25 March 2020](#).

possible extension of that regime. Germany, France (ex-ante oversight) and Latvia (ex-post oversight) are an exception to this trend (see Figure 6).

Figure 6 – Parliamentary oversight in Member States that declared statutory regimes during the first wave of the pandemic



Source: EPRS.<sup>151</sup>

Parliamentary oversight over the declaration and extension of statutory regimes was intense in Germany and France. In Germany, the *Bundestag* was the competent body to declare an epidemic situation of national importance (§5(1) Infection Protection Act) and used this competence on 25 March 2020.<sup>152</sup> Since then, the *Bundestag* has decided to maintain the declaration at different moments.<sup>153</sup> In France, Law No 2020-290 of 23 March, declared a public health emergency, initially

<sup>151</sup> See the four EPRS briefings cited in footnote number 13.

<sup>152</sup> Following the outbreak of the pandemic, the Bundestag [declared](#) the epidemic situation of national importance and adopted amendments to the Infection Protection Act, both on 25 March 2020.

<sup>153</sup> The second amendment to the Infection Protection Act, adopted on 19 Mai 2020, [reflects](#) that Parliament saw no reason to repeal its decision regarding the declaration of an epidemic situation of national importance. Later, the Bundestag [rejected](#) a proposal to repeal the decision declaring an epidemic situation of national importance on

for two months (Article 4), and Law No 2020-546, of 11 May, extended the declaration to 10 July 2020.<sup>154</sup> The case of Romania is also worth mentioning, as the country resorted first to a constitutional state of emergency<sup>155</sup> and later to a statutory state of alert.<sup>156</sup> The national parliament originally played a similar role as regards the declaration and possible extensions of the state of alert, as it does in relation to the declaration and extensions of the constitutional state of emergency. However, this form of parliamentary oversight was modified as a consequence of Decision No 457/2020 of 25 June 2020, of the Romanian Constitutional Court.<sup>157</sup> The Constitutional Court decision struck down the provisions of Law No 55/2020, of 15 May 2020, which required Parliament to approve the declaration of the state of alert adopted by the government within five days, with the possibility to introduce modifications in the original declaration. As a result, parliamentary oversight over the declaration and possible extensions of the state of alert was no longer necessary.<sup>158</sup>

Apart for the exceptions given above, **parliamentary oversight over the declaration and extensions of statutory regimes was not required in most Member States**, leading to an initial conclusion that parliamentary oversight of these regimes was weaker compared to that exercised over constitutional states of emergency. This conclusion must be nuanced however, as in most Member States those statutory regimes were provided for in statutes adopted by the national parliaments, in some cases for the specific purpose of addressing the Covid-19 pandemic (see Section 4.2.4.), which points to a different form of parliamentary participation in the management of the crisis.

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17 September 2020. More recently, on 18 November 2020, a third package of amendments to the Infection Protection Act was [adopted](#) by the Bundestag and Bundesrat, and the Bundestag [reaffirmed](#) the decision to maintain the declaration.

<sup>154</sup> See also Article 2 of Law No [2020-856](#) of 9 July 2020, extending the declaration of the public health emergency to Guyane and Mayotte until 30 October 2020. It should be noted that, during the second wave of the pandemic, parliamentary oversight in relation to the declaration of a public health emergency seems to have been weakened in France, as highlighted, among others, by the National Commission on Human Rights (Commission Nationale Consultative Des Droits de l'homme, *Avis Etat d'urgence sanitaire et Etat de droit*, 28 April 2020, [CDHX2011093V](#)). Current [Article L3131-13 of the Health National Code](#) provides for the declaration of a public health emergency by a Decree adopted in the *Conseil des Ministres* on a report presented by the Health Minister. A public health emergency was therefore again declared in France as of 17 October 2020, without any formal involvement of the national Parliament (Decree No [2020-1257](#) of 14 October 2020, declaring a public health emergency). According to [Article L3131-13 of the French Health National Code](#), the French Parliament is only required to become involved if the public health emergency is prolonged after an initial period of one month, as any extension of the declaration is to be authorised by a law.

<sup>155</sup> The state of emergency was declared through [Presidential Decree 195/2020](#) of 16 March 2020, which Parliament approved by [Decision 3/2020](#) of 19 March 2020.

<sup>156</sup> The state of alert was initially declared as from 15 May 2020, by Decision [24/2020](#), of the National Committee for Emergency Situations of 14 May 2020. As a result of the adoption of Law No 55/2020 of 15 May 2020, a new declaration was adopted by the government through Decision No [394/2020](#) of 18 May 2020.

<sup>157</sup> For a detailed analysis of these decisions and the national legal framework, see: E.-S. Tănăsescu and B. Dima, op. cit., pp. 5-6.

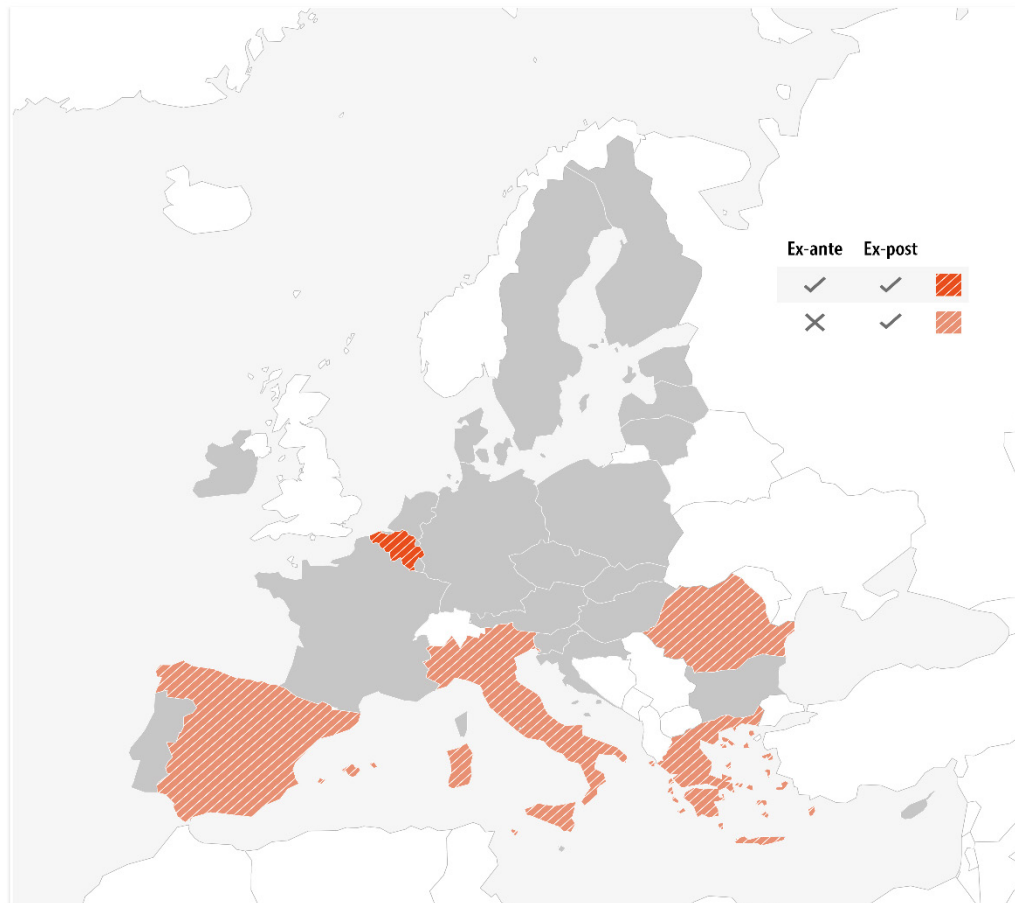
<sup>158</sup> The original provisions were, however, applied until the adoption of Decision of the Constitutional Court No 457/2020 of 25 June 2020. As a result, the governmental Decision No [394/2020](#) of 18 May 2020, declaring the state of alert at national level for 30 days, was first approved by Parliament through Decision No 5/2020, adopted two days later. The subsequent extensions of the state of alert were adopted under the new regime, without requiring any parliamentary approval.



### 4.2.3. Parliamentary oversight in relation to the exercise of special legislative powers by the executive

As indicated above, only a handful of EU national governments resorted to special legislative powers to face the first wave of the coronavirus pandemic. That is to say, they made use of the constitutional powers granted to the executive to adopt normative acts with the same legal standing as laws under urgent/exceptional circumstances and subject to some kind of parliamentary oversight (see Figure 7).

Figure 7 – Parliamentary oversight of special executive legislative powers during the first wave of the pandemic



Source: EPRS.<sup>159</sup>

**Spain, Italy, Greece and Romania** have a similar model of parliamentary oversight of those normative acts, as they **allow the executive branch to adopt such norms in urgent situations and provide for an ex-post parliamentary oversight** that needs to take place within a determined period. However, the way in which they exercise parliamentary oversight differs. The constitutions of these four Member States ensure that these normative acts are submitted to the national parliaments swiftly following their adoption by the executive. Article 77 of the Italian Constitution requires the government to submit *Decreti-Legge* (decree-laws) to the Chambers on the same day of adoption. Article 86 of the Spanish Constitution requires the *Decretos-Ley* (decree-laws) to be submitted immediately to Congress for debate and vote. Article 115 of the Romanian Constitution does not indicate exactly the moment at which *Ordonanța de urgență* (emergency ordinances) must

<sup>159</sup> See the four EPRS briefings cited in footnote number 13.

be submitted to the national Parliament, but requires such submission for the entry into force of these norms (together with publication in the Official Journal). Finally, Article 44 of the Greek Constitution requires acts of legislative content adopted by the President of the Republic, on a proposal of the Cabinet of Ministers, to be submitted to Parliament within 40 days of their issuance or within 40 days from the convocation of a parliamentary session.

Apart from ensuring the submission of these normative acts to the national parliaments, a prerequisite for the effective exercise of parliamentary oversight, the constitutions of these four Member States provide for a form of ex-post parliamentary oversight, requiring the national parliaments to vote on these normative acts to either repeal or approve them and/or transform them into law. In this vein, Article 77 of the Italian Constitution requires the necessary conversion of decree-laws into laws in 60 days, failing which they become void *ex tunc*. In Romania, emergency ordinances also have to be converted into laws, but Article 115.5 of the Romanian Constitution provides for the implicit approval of emergency ordinances if one or both of the Chambers of the national Parliament do not adopt an express decision on the norm within 30 days. This model seems to weaken parliamentary oversight, as it does not always require an express decision of parliament to convert the norm. The Greek Constitution requires Parliament to ratify the acts of legislative content adopted by the government in a period of three months. Parliament can amend the norm issued by the government during the process,<sup>160</sup> but if the norm is not approved within that time limit, it will cease to be in force. Article 86 of the Spanish Constitution allows Congress to exercise its oversight powers through different means, as it can either repeal, ratify or decide to convert the decree-law into a law within a period of 30 days, failing which the norm becomes void *ex nunc*.<sup>161</sup> Parliament is able to modify the content of the decree-law only if the latest decision is adopted and the decree-law is converted into a law. If not, Congress has to decide either to validate or repeal the decree-law in its entirety, a possibility that has been criticised for not allowing Congress to thoroughly examine the content of the norm, thus weakening parliamentary oversight over these special norms.<sup>162</sup>

During the first wave of the pandemic, the national governments of the four Member States resorted, in some cases extensively,<sup>163</sup> to these special legislative powers and, therefore, national parliaments had to exercise their oversight powers. For example, by the end of July 2020, the Spanish Congress had validated 19 of the 21 *Decretos-Ley* adopted by the Spanish government and had decided to convert 14 of them into laws, whereas the Italian parliament had converted into law 8 of the 16 *Decreti-Legge* adopted by government, introducing small or more substantive modifications in all of them. In Romania, Parliament substantively modified the emergency ordinances adopted by the government in the parliamentary oversight phase, or adopted laws with the same object as those emergency ordinances, in an attempt to impose its view over that of the executive branch.<sup>164</sup> It therefore seems that this ex-post type of parliamentary oversight mechanism offers parliaments a way to scrutinise governmental decisions and bring substantive modifications to the normative acts adopted by the government, although the effectiveness of the oversight exercised by parliament may be dependent on political will and on the model of parliamentary oversight put in place by the national constitution. At the same time, they provide the executive with a useful tool to address urgent situations of a different nature.

<sup>160</sup> See G. Angelou, [Lawspot](#), 3 December 2017.

<sup>161</sup> A. M. Carmona Contreras, 'El Decreto Ley en tiempos de crisis', *Revista Catalana de Dret Public*, num. 47, 2013, p. 16.

<sup>162</sup> Ibidem, pp. 17-19.

<sup>163</sup> For example, by 30 July 2020, the Spanish government had adopted 21 [Decretos-Ley](#) and the Italian 16 [Decreti-Legge](#) addressing the consequences of the pandemic.

<sup>164</sup> E.-S. Tănăsescu and B. Dima, op. cit., pp. 8-9.

The **Belgian case** is quite different from those analysed above, as Article 105 of the Belgian Constitution regulates the '*pouvoir speciaux*', a clause that does not expressly allow declaration of a constitutional emergency state, but rather allows Parliament to delegate legislative powers to the monarch (i.e. government) under special circumstances.<sup>165</sup> If that is the case, the government may make use of those special legislative powers. However, **parliamentary oversight is exercised both ex-ante, with the adoption of the legislative act granting special powers to the executive branch, and ex-post.** This is because the special powers decrees (*arrêts*), adopted by the government based on the delegation, have to be scrutinised by the legislative branch within a certain period if they touch upon matters that are constitutionally reserved for decision in parliament.<sup>166</sup> During the first phase of the Covid-19 pandemic, the Belgian Parliament adopted two different acts granting special powers to the government for a period of three months (starting on 30 March 2020).<sup>167</sup> Parliament discussed and passed both acts within a few days,<sup>168</sup> but introduced several amendments to the initial text, some of which aimed at adapting the original bill to the modifications suggested in the opinion delivered by the *Conseil d'Etat*.<sup>169</sup> Both acts allowed the government to modify, repeal or replace existing legislation in certain areas specified by the legislature. However, the decrees adopted have to be confirmed by a law within a period of one year from their entry into force and, in that case, they acquire the legal standing of laws. In the absence of such confirmation, they would become void.<sup>170</sup> Therefore, it seems clear that Belgium provides an interesting model through which Parliament can exercise meaningful oversight both ex-ante and ex-post over the measures adopted by the government in special circumstances. The national parliament in fact, not only defines the extent of the special powers granted to the executive ex-ante, but also reviews the measures adopted by the government based on those powers ex-post.

#### 4.2.4. Parliaments' exercise of its ordinary legislative powers to cope with the crisis

As indicated above, 14 EU Member States adopted measures to contain the spread of the virus or face the consequences of the pandemic, based mainly on ordinary legislation. In these cases, **parliamentary activity was decisive**, as national parliaments did not limit themselves to scrutinising governmental action, but also **adopted brand new legislation or amended existing legislation to tackle the situation** and had to do this, in some cases, within very short time-frames.

Some EU Member States amended existing legislation on public health or civil protection to be able to adopt the specific measures needed to contain Covid-19 and did so soon after the outbreak of the pandemic in Europe. This was the case, for example, in Germany or France, which amended their Infection Protection Act<sup>171</sup> and the National Health Code,<sup>172</sup> respectively, in March 2020, to allow the

<sup>165</sup> See P. Popelier, op. cit., p. 12-13; T. Moonen and J. Riemsdagh, '[Fighting COVID 19 – Legal Powers and Risks: Belgium](#)', *VerfassungsBlog*, 25 March 2020.

<sup>166</sup> Council of State, Legislative Section, [Avis 47.062/1/V](#), 18 August 2009, point 2.4.1.

<sup>167</sup> [Loi habilitant le Roi à prendre des mesures de lutte contre la propagation du coronavirus COVID-19 \(I\) \(1\)](#) and [Loi habilitant le Roi à prendre des mesures de lutte contre la propagation du coronavirus COVID-19 \(II\) \(1\)](#), both adopted on 27 March 2020.

<sup>168</sup> The bills were introduced in the Chamber of Deputies on 21 and 26 March 2020, respectively, and voted on 26 March in the Chamber, and on 27 March (only for the first legislative act), in the Senate. Only the first bill was subject to a [bicameral legislative procedure](#) (under Article 78 of the Belgian Constitution), involving both the Chamber and the Senate.

<sup>169</sup> Council of State, Legislative Section, [Avis 67.142/AG](#), 25 March 2020.

<sup>170</sup> See Article 5 of [Loi habilitant le Roi à prendre des mesures de lutte contre la propagation du coronavirus COVID-19 \(I\) \(1\)](#), and Article 7 of [Loi habilitant le Roi à prendre des mesures de lutte contre la propagation du coronavirus COVID-19 \(II\) \(1\)](#).

<sup>171</sup> The German Parliament [amended](#) the federal Infection Protection Act on 25 March 2020, allowing for the declaration of an 'epidemic situation of national importance', and conferring additional competencies upon the Federal Health Ministry. Later, several amendments to the Infection Protection Act were adopted, on 19 May 2020 and, more recently, on [18 November 2020](#).

<sup>172</sup> The French Parliament modified the Health National Code to allow the government to declare a public health emergency and adopt specific measures on 23 March 2020 (Law No 2020-290 of 23 March 2020). After that, several

national authorities to declare a specific statutory regime and adopt specific containment measures. Similarly, in Malta, the Public Health Act, used as the main legal basis to adopt containment measures in the country, was amended on 25 March 2020.<sup>173</sup> In Ireland, the Health Act 2020<sup>174</sup> and the Emergency Measures Act 2020<sup>175</sup> were amended in mid-March 2020 and became the main legal basis for containment measures, as explained in Section 3.6. In Austria, the Parliament adopted the Covid-19 Measures Act at the beginning of the pandemic, although it later amended the law on several occasions.<sup>176</sup> Finally, Croatia adopted many of its containment measures during the first wave on the basis of the Civil Protection System Act<sup>177</sup> and the Infectious Diseases Protection Act,<sup>178</sup> amended respectively in mid-March and mid-April. This was not free from criticism, however, as some of the legal changes were enacted almost one month after the first measures to contain the spread of the virus were taken by the national government.<sup>179</sup>

In certain Member States, the changes introduced to ordinary legislation to deal with the pandemic appeared to be necessary later in the crisis. In some cases, the need for legislative reform was felt when the constitutional emergency state or the statutory regime declared to address the peak of the pandemic was lifted or was about to be lifted. That was the case, for example, in Hungary, where Parliament adopted Act LVIII of 2020 on 16 June 2020, providing for special transitional rules for the period after the expiration of the constitutional state of danger and entrusting the government with the power to declare the state of epidemiological preparedness. Similarly, in France, Law No 2020-856 of 9 July 2020 was adopted to allow the national authorities to maintain specific containment measures once the statutory public health emergency state was lifted.

Some of the ordinary laws adopted or amended during the first wave of the pandemic with the aim of enabling the national authorities to adopt specific containment measures did not contain sunset clauses, with the consequence that long-standing changes were introduced in the legal framework of the Member State concerned. This was the case, for example, in France, where the changes introduced in the Health National Code did not include a sunset clause,<sup>180</sup> although some of the legal changes introduced to deal with the health emergency once the public health emergency state was lifted did.<sup>181</sup>

Although ordinary laws do normally introduce long-standing changes and are not usually accompanied with sunset clauses, many commentators have already warned against the

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amendments were adopted: on 25 April 2020 (Law [2020-473](#) of 25 April); 11 May 2020 (Law No [2020-546](#) of 11 May); 17 June 2020 (Law No [2020-734](#) of 17 June); 9 July 2020 (Law No [2020-856](#) of 9 July); 14 November 2020 (Law No [2020-1379](#) of 14 November 2020).

<sup>173</sup> Act No. X of 2020, [Public Health \(Amendment\) Act, 2020](#), 25 March 2020.

<sup>174</sup> [Health \(Preservation and Protection and other emergency measures in the public interest\) Act 2020](#), Number 1 of 2020.

<sup>175</sup> [Emergency Measures in the Public Interest \(COVID-19\) Act 2020](#), Number 2 of 2020.

<sup>176</sup> See, Federal Act on Provisional Measures to Prevent the Spread of COVID-19 (COVID-19 Measures Act) StF: [BGBl. I No 12/2020](#), at its [subsequent amendment](#).

<sup>177</sup> [Law amending to the Civil Protection System Act](#), adopted by the Croatian Parliament at its session on 18 March 2020.

<sup>178</sup> [Law amending the Law on the Protection of the Population from Infectious Diseases](#), adopted by the Croatian Parliament at its session on 17 April 2020.

<sup>179</sup> M. Petković, '[Ispravak nadležnosti Stožera civilne zaštite Republike Hrvatske novelom Zakona o zaštiti pučanstva od zaraznih bolesti](#)', *Novi Informator*, 24 April 2020.

<sup>180</sup> See, LOI no 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19.

<sup>181</sup> Article 1 of [LOI no 2020-856 du 9 juillet 2020 organisant la sortie de l'état d'urgence sanitaire](#), allowed the French authorities to adopt specific containment measures once the public health emergency was lifted and until 30 October 2020.

introduction of non-temporary changes during a crisis.<sup>182</sup> In this vein, some ordinary laws adopted or amended during the pandemic had specific **sunset clauses**, thereby embracing this more careful approach and simultaneously providing an extra layer of parliamentary oversight, since parliaments would review the decisions taken months after the peak of the crisis and decide whether to prolong, modify or let the measures in question lapse. For example, the Covid-19 Act, adopted by the Austrian Parliament at the beginning of the pandemic to empower government to adopt the necessary measures was set to expire on 31 December 2020, and all the special measures adopted would become void (Article 4).<sup>183</sup> In addition, the Irish Health Act 2020 and Emergency Act 2020 also have sunset clauses, although application of the Acts was later extended.<sup>184</sup> Finally, the Danish *Folketing* also introduced important amendments to the national Act on Measures against Infectious and Other Communicable Diseases, however the amendments were subject to a sunset clause and were set to lapse on 1 March 2021.<sup>185</sup>

Apart from national parliament participation in the management of the crisis through the adoption of new or the amendment of existing legislation enabling the national authorities to adopt the measures needed to address the pandemic, it should be noted that some national parliaments have also maintained significant legislative and budgetary activity even during the worst peaks of the crisis. In this vein, **national parliaments sometimes had to exercise their budgetary powers during the health crisis** to provide the government with the financial flexibility needed to address the pandemic and its consequences (e.g. Belgium, Estonia, France, Ireland). Similarly, some national parliaments continued to pass legislation during the pandemic, in some cases on issues unrelated to the health crisis. For example, the Belgian Parliament exercised its oversight powers in the framework of the delegation of special powers to the government under Article 105 of the Constitution, while at the same time exercising its normal legislative powers. Before and after the delegation of special powers, it adopted various laws, some of which were unrelated to the management of the pandemic.<sup>186</sup> Similarly, the French Parliament adopted 10 laws from 15 March to 30 June 2020, including some unrelated to the health emergency, seemingly maintaining a certain normality in legislative activity.<sup>187</sup> On the other side of the spectrum, some national parliaments decided to limit their activity during the peak of the first wave of the health crisis to essential activities only, postponing the adoption of ordinary legislation. For example, during the first wave of the pandemic in Europe, the Spanish Parliament focused all its efforts on scrutinising the government's use of the powers granted under the state of alarm and on the various decree-

<sup>182</sup> B. Ackerman, op. cit., p. 1 030.

<sup>183</sup> Federal Act on Provisional Measures to Prevent the Spread of COVID-19 (COVID-19 Measures Act) StF: BGBl. I No 12/2020.

<sup>184</sup> See [States of emergency in response to the coronavirus crisis: Situation in certain Member States IV](#), op. cit., July 2020, p. 8.

<sup>185</sup> See Section 2 of [Law amending the Law on Measures against Infectious diseases and other communicable diseases](#), 12 March 2020.

<sup>186</sup> Among those related to the management of the pandemic, see for example: Loi modifiant la loi du 22 décembre 2016 instituant un droit passerelle en faveur des travailleurs indépendants et introduisant les mesures temporaires dans le cadre du COVID-19 en faveur des travailleurs indépendants, 23 March 2020 ; Loi portant des dispositions diverses en matière de justice et de notariat dans le cadre de la lutte contre la propagation du coronavirus COVID-19 (1), 30 April 2020; Loi portant des mesures exceptionnelles dans le cadre de la pandémie COVID-19 en matière de pensions, pension complémentaire et autres avantages complémentaires en matière de sécurité sociale (1), 7 May 2020; Loi portant diverses mesures fiscales urgentes en raison de la pandémie du COVID-19, 29 May 2020. Among those unrelated to the management of the pandemic, see: Loi modifiant la loi du 30 août 2013 portant le Code ferroviaire, 23 June 2020; or Loi modifiant l'arrêté royal du 16 septembre 2013 fixant une intervention spécifique dans le coût des contraceptifs pour les femmes n'ayant pas atteint l'âge de 25 ans, afin d'étendre les remboursements préférentiels à toutes les femmes, 31 July 2020.

<sup>187</sup> J.-P. Derosier and G. Toulemonde, [The French Parliament in the time of Covid-19: Parliament on Life Support](#), Robert Schuman Foundation, 2020, p. 5.



laws adopted by government under Article 86 of the national Constitution, delaying all other legislative activities.<sup>188</sup>

#### 4.2.5. Parliaments' use of normal oversight tools during the first wave of the pandemic

Apart for the forms of parliamentary oversight and guidance already pointed out, which are more or less specific to the current emergency, it should be noted that parliaments of EU Member States resorted to their **normal oversight tools** to obtain fresh information on and to scrutinise governmental action. Written and oral questions, interpellations, question time with the government, governmental statements or the creation of special committees were all used by EU national parliaments during the first wave of the pandemic.<sup>189</sup> Extraordinary oversight tools, such as motions of non-confidence were also used by some national parliaments, although they were usually presented once the first wave of the pandemic was under control (e.g. Romania,<sup>190</sup> or Spain<sup>191</sup>).

In some EU Member States, parliamentary oversight activities were among the few to be maintained, even during the worst peak of the pandemic. In this vein, for example, the Greek Parliament held numerous oversight parliamentary sessions during the first wave of the pandemic.<sup>192</sup> The French National Assembly included the **weekly question time** with the government (*questions au gouvernement*) among the essential activities to be maintained during the first wave, although with some specific arrangements that applied at certain points during the crisis.<sup>193</sup> However, in the case of the French National Assembly, the arrangements introduced included limitation to the number of questions asked, a corresponding reduction on the number of members of government present to answer questions, and a limitation on the number of members of Parliament present in the hemicycle. Some authors have criticised that this arrangement reduced the power of this oversight tool.<sup>194</sup>

In other cases, parliamentary oversight was suspended or greatly reduced for a specific period, usually during the worst moments of the health crisis, and resumed some weeks later. This was the case, for example, in Spain, where Congress suspended normal parliamentary activities for two weeks as of 12 March 2020, including the usual weekly question time with the government.<sup>195</sup> During those weeks, only essential activities directly connected with the pandemic were maintained, with plenary sessions convened only to exercise Congress competences as regards the state of alarm and to discuss and vote on the decree-laws adopted by the government. Following these first weeks, parliamentary activities resumed: the Health Committee of the Spanish Congress

<sup>188</sup> The [first Law adopted](#) in 2020 was adopted on 15 July, well after the state of alarm was lifted (20 June).

<sup>189</sup> See all EPRS briefings cited in footnote 13.

<sup>190</sup> E.-S. Tănăsescu and B. Dima, op. cit., p. 9, indicating that the motion of non-confidence was presented on 17 August 2020.

<sup>191</sup> A motion of censure against the government was [presented](#) on 29 September 2020 and [rejected](#) by Congress on 22 October 2020 (298 votes against and 52 for).

<sup>192</sup> V. Kondylis, '[The Greek Parliament in the context of the Covid-19 crisis. Tackle effectively the novel pandemic](#)', Robert Schuman Foundation, 2020, p. 11.

<sup>193</sup> Assemblée Nationale, Conférence des Présidents, [Relevé de conclusions de la Conférence des présidents du mardi 17 mars 2020](#); Assemblée Nationale, Conférence des Présidents, [Relevé de conclusions de la Conférence des présidents du mardi 24 mars 2020](#).

<sup>194</sup> J.-P. Derosier and G. Toulemonde, op. cit., pp. 7-8.

<sup>195</sup> Congreso de los Diputados, Junta de Portavoces, [12 March 2020](#). Some academics have criticised this decision and questioned whether Congress effectively exercised its control powers over the government during the first wave of the pandemic. See: A. Torres Gutierrez, op. cit., pp. 8-9; M. Presno Linera, [El derecho y el reves](#), 9 April 2020.

received a weekly report from the Spanish Health Minister while the state of alarm was in force,<sup>196</sup> and a member of government, usually the Prime Minister, appeared before Congress to request authorisation to extend the state of alarm every 15 days.

Apart from the usual question time and written parliamentary questions addressed to the government, some national parliaments used parliamentary committees extensively to provide for an extra-layer of parliamentary oversight over governmental measures during the crisis. Some national parliaments used **already existing committees** to scrutinise governmental activities and decisions. This was the case of the Health Committee in the Spanish Congress, or the French Senate, in which standing committees created monitoring missions and held the hearings necessary to scrutinise the decisions made by the government during the first wave of the pandemic.<sup>197</sup> Some other national parliaments, **created *ad hoc* parliamentary committees**. For instance, the French National Assembly decided to create a specific committee on the impact, the management and the consequences of the crisis,<sup>198</sup> which acted first as an information committee to scrutinise the measures adopted by the government on the basis of the declaration of a public health emergency. From 3 June 2020, it evolved into an inquiry committee, aiming at evaluating the management of the crisis.<sup>199</sup> Similarly, although the French Senate first decided to resort to its standing committees to scrutinise governmental action during the crisis, it decided to create a specific committee of inquiry on 30 June 2020.<sup>200</sup> In a similar move, the Danish *Folketinget* decided to create a special subcommittee to evaluate the government's management of the pandemic.<sup>201</sup> The Belgian Chamber of Representatives first created a monitoring commission to scrutinise the government's actions during the pandemic and the use made of the special powers granted under Article 105 of the Constitution,<sup>202</sup> and later created a special commission in charge of examining the national authorities' management of the health crisis.<sup>203</sup> In addition, during the first peak of the crisis, the Belgian minority government was closely monitored by the 10 parties that approved the special powers acts, through weekly meetings in the Chamber of Representatives attended by the party leaders of the nine political parties supporting the government and the leader of the Nieuw-Vlaamse Alliantie (N-VA).<sup>204</sup> Although these latter meetings cannot be considered normal oversight tools, commentators point out their importance in ensuring parliamentary support for the use made by the Belgium government (a minority government) of the special powers granted to deal with the pandemic.<sup>205</sup>

<sup>196</sup> See the [list of sessions](#) of the Health Committee of the Spanish Congress.

<sup>197</sup> J.-P. Derosier and G. Toulemonde, op. cit. p. 9.

<sup>198</sup> Assemblée Nationale, [Conférence des Présidents](#), réunion du 17 mars 2020.

<sup>199</sup> Assemblée Nationale, XV<sup>e</sup> législature, [Session ordinaire de 2019-2020, Compte rendu intégral, Première séance du mardi 02 juin 2020](#), point 5.

<sup>200</sup> Senat, XV<sup>e</sup> législature, [Séance du 30 juin 2020 \(compte rendu intégral des débats\)](#).

<sup>201</sup> See [States of emergency in response to the coronavirus crisis: Situation in certain Member States III](#), op. cit, June 2020, p. 4.

<sup>202</sup> Chambre des Représentants, [Institution de la Commission chargée du contrôle de la mise en oeuvre des lois du 27 mars 2020, habilitant le Roi à prendre des mesures de lutte contre la propagation du coronavirus COVID-19](#).

<sup>203</sup> Chambre des Représentants, [Institution d'une commission spéciale chargée d'examiner la gestion de l'épidémie de COVID-19 par la Belgique](#), 25 June 2020.

<sup>204</sup> P. Popelier, op. cit., p. 19.

<sup>205</sup> Ibidem.

## 5. Conclusions

The scenario confronted by EU Member States due to the coronavirus pandemic represents a true stress test for most EU legal systems. A closer look at Member States' reactions, however, reveals generally efficient normative response, at least during the first wave.

The great majority of Member States used emergency powers, either in the form of constitutional states of emergency, or in the form of statutory regimes, or both. Notwithstanding the critical situation, however, the choice to trigger constitutional states of emergency was not an inevitable one in many Member States, as some Member States decided not to do so, even if they could in principle. Thus, only 10 Member States adopted a constitutional state of emergency, even if in principle 17 could have declared one. Instead, a statutory regime in combination with ordinary legislation was most often adopted. Normally, the activation of a state of emergency may offer enhanced guarantees, as the transfer of powers and limitation of rights is pre-established, transparent and more efficiently controlled by the judiciary. That said, Member States rarely used only one type of normative response, but preferred a combination of different normative tools. As regards statutory regimes, these were adopted by 14 Member States, sometimes because the Member State in question could not activate an emergency clause (inexistent or not suitable for a health emergency), sometimes either before or after an emergency state. Particularly, statutory regimes could have had the function either of escalating to a state of emergency or of de-escalating from one. In any case, a reaction based purely on ordinary legislation (without the declaration of any emergency mechanism or use of special legislative powers of the executive) has been rather rare, boiling down to a handful of Member States which, in the majority of cases, have been obliged to modify or expand the range of powers delegated to the executive. In five Member States, the government used special legislative powers to contain the pandemic or to address its consequences – in only three of them was the use of special legislative powers due to the impossibility of declaring a state of emergency.

Ordinary enabling legislation also played a crucial role in the normative management of the pandemic. The majority of Member States either relied on an arsenal of enabling laws that pre-existed the current emergency, or adapted pre-existing enabling laws. However, while very few Member States were not preventively equipped with a set of rules enabling the government to adopt containment measures, these Member States could also adopt the necessary empowering legislative acts quickly.

During the first wave of the pandemic, **all EU national parliaments played some role in the adoption of the above measures, or through supervising the measures adopted by the executive** to manage the pandemic. In some cases, they participated in the decisions to declare or prolong the constitutional state of emergency (8 out of 10) or the statutory regime (3 out of 14), and/or they supervised the use of government's special legislative powers (5 out of 5). In most cases, they also participated in the management of the crisis through their normal legislative, budgetary and oversight powers.

However, **parliament's involvement does not seem to have been equally sharp or significant** in all Member States, with substantive differences depending on the national constitutional and legal framework of the measures adopted to address the pandemic. Legal settings requiring **parliaments to decide** on the concrete powers to be granted to the executive **ex-ante and to do this at different stages** (due to a sunset clause or to the temporary nature of parliament's authorisation) seem to have placed national parliaments in a better position to substantially intervene in the management of the crisis. These regimes may be problematic however, if in urgent circumstances, parliaments are unable to convene and decide in a timely manner. Nevertheless, this



does not seem to have been the case during the present health crisis, as several national parliaments have shown resilience in quickly adopting relevant decisions. For example, Finland and Belgium took two or six days, respectively, to authorise declaration of a state of emergency and adopt the laws granting special powers to deal with the crisis to the monarch, i.e. the executive.

**National parliaments that did not exercise decision-making powers during the crisis**, limiting themselves to the use of information and oversight tools, or **vested with one-off ex-post decision-making powers**, may have found their role during the crisis significantly weakened, with an increased risk of a power grab by the executive. Between the two opposite approaches, stand normative frameworks requiring that parliamentary decision-making powers were exercised ex post at different moments during the pandemic. This may have provided parliaments with strong enough tools to steer the measures adopted by the government and reverse inadequate decisions, while at the same time allowing the executive to act speedily and effectively.

Other factors beyond the constitutional and legal framework may have affected parliaments' role during the crisis. Although outside the scope of this paper, examples include sanitary and organisational measures adopted by EU national parliaments to ensure continuity of parliamentary activities during the pandemic; the national political context; governments' majority/minority support in parliament; and the vertical distribution of powers within the Member State.

As the 'second wave' of the pandemic has struck in Europe, lessons learnt from the first wave may be useful to help Member States to address this new stage in the emergency and its consequences. Time, and future research, will tell us whether their normative response was more efficient during a second wave, and whether a better balance between governmental and parliamentary power was achieved.

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This study examines the normative response of the 27 EU Member States during the first phase of the Covid 19 pandemic (March to mid June 2020) and parliamentary oversight over the measures adopted. The study reveals that Member States' normative responses to the pandemic were generally efficient, as very few of them were not preventively equipped with a set of rules enabling the national authorities to adopt the containment measures needed to address the first peak of the health crisis, and because the Member States lacking those normative tools were able to adopt the necessary empowering legislative acts quickly. The study also reveals that all EU national parliaments played some role in the management of the pandemic, either through the supervision of the measures adopted by the executive to contain the spread of the virus or through the exercise of their ordinary legislative and budgetary powers to provide the government with the normative tools needed to address the pandemic.

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