

THE INSTITUTIONAL CONSEQUENCES OF EMERGENCY POLITICS AT THE NATIONAL AND EUROPEAN LEVELS

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Culminating more than a decade of crisis in Europe, the Covid-19 pandemic has opened an important window of opportunity for institutional and policy change, not only at the “reactive” level of emergency responses, but also to tackle more broadly the many socio-political challenges caused or exacerbated by Covid-19. Building on this premise, the Horizon Europe project REGROUP (*Rebuilding governance and resilience out of the pandemic*) aims to: 1) provide the European Union with a body of actionable advice on how to rebuild post-pandemic governance and public policies in an effective and democratic way; anchored to 2) a map of the socio-political dynamics and consequences of Covid-19; and 3) an empirically-informed normative evaluation of the pandemic.



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Abstract

A distinctive institutional configuration of multi-level emergency governance emerged in response to the pandemic. Member State democracies provided many of the coercive powers needed to deal with the immediate exigencies of a health emergency. The European Union developed novel and important coordinating roles in dealing with collective action problems. This paper proposes a framework for evaluating that institutional configuration. It assumes that legitimacy is the absence of domination and that, in emergencies, the main risks of domination come from executives. Here democracies - and groups of democracies - need to walk a tightrope. Individuals or whole democracies can be dominated either by the absence of executive powers able to solve the collective action problems that constitute emergencies or by executives that act with insufficient parliamentary, judicial or electoral oversight; or offend rights; or create externalities that produce democracy-on-democracy forms domination. We discuss how those risks are likely to vary across the levels of European emergency governance.

Keywords: Covid-19 pandemic; emergency; European Union; executive dominance.

Introduction

This paper is part of REGROUP's analysis of how the pandemic has reordered European politics and public policies at national and supranational level. Our point of departure is that a distinctive institutional configuration of multi-level emergency governance emerged in response to the pandemic. Member State democracies provided many of the coercive powers needed to deal with the immediate exigencies of a health emergency. The European Union, on the other hand, developed novel and important coordinating roles in dealing with collective action problems that member state democracies could not solve on their own. Simply put, member states did coercion. The EU did coordination.

The stakes were high. Uncoordinated member state responses would have fostered fragmentation and, therefore, even greater vulnerability to the pandemic and its secondary effects. As well as being a threat to the lives of many, Covid-19 partially closed economies, societies and political systems. Across the Union, GNP fell by 5.9 per cent in 2020, even more than in the worst year of the financial crisis (EU GNP fell by 4.7 per cent in 2009).

Given high levels of interconnectedness between European economies and societies coordination failures at the European level could have been costly, even tragic, in their consequences. Poor coordination risked speeding transmission of the virus, increasing infections, straining health systems already at breaking point, slowing any re-opening of normal life, trapping economies in a prolonged recession, and ruining the public finances of member states only recently brought to the edge of insolvency by the Euro crisis. Uncoordinated responses to the cross-border effects of Covid-19 also risked forms of domination by prolonging national emergency measures, with their curtailments of rights and interruptions to the normal oversight of executives by parliaments and courts. Poor coordination, as we will see, also entailed risks of 'democracy-on-democracy' domination.

Of course, the local and the regional levels were also important. Nor did the Union have any monopoly on any coordination beyond the state in response to a global pandemic. To the contrary, the coordinating powers of the Union often developed as means by which the EU-27 'did their bit' in contributing to more global responses to the pandemic. Nor was the pandemic 'unidirectional' in expanding the role of the EU. It also challenged some established means of coordination through the Union (be it fiscal rules or free movement rules).

As is so common in any multi-level governance involving the EU, the European and national levels also overlapped in their responses to the pandemic. Above all they a matter of avoiding executive domination. After all, any legitimate power is one that does

not dominate those over whom it is exercised; and, in emergencies, executives are the bodies most likely to dominate. Sometimes executives are the only powers that remain operational at all during emergencies. Executives can dominate whole publics where emergency powers are exercised with poor oversight by parliaments or courts. They can dominate individuals where emergency powers unnecessarily or unjustifiably interfere with rights. So, we define executive domination as the exercise of power by executives that: a) publics cannot control as equals; b) parliaments or courts cannot oversee on behalf of publics; or c) arbitrarily interfere in the rights of individuals. We will specify, explain and develop those elements more closely as the paper proceeds.

But, what if responses to an emergency are distributed between executive bodies at the national and European Union, with, as we have suggested, the two doing different things: the one coercing, the other coordinating? Where might their legitimacy be separable and where might it be mutually dependent? And, if the latter, where might the two levels complement one another, combining into a form of *non*-dominating emergency power that neither level could provide without the other? Where, in contrast, might ‘multi-level emergency governance create new risks of executive domination?’

Answering, or even posing, those questions is amongst the most important ways we can learn from the pandemic. That is especially so if multi-level emergency governance involving the EU is becoming a recurring feature of our world of fragile, interdependent systems that are all too able to transmit crises between states and democracies. It took only days, perhaps only hours, for the pandemic and banking crises to spread between the EU’s closely interconnected economies and societies.

As the foregoing is beginning to suggest, this paper’s overview of the changes wrought by the pandemic serves the further purpose of rendering the paper an agenda-setting piece for REGROUP’s examinations in subsequent work packages. Within this broader context, the paper provides a conceptual and normative framework that can set an agenda for further research into the multi-level emergency governance employed by the EU and its member states in response to Covid-19. We suggest a way of understanding the form of that multi-level emergency governance. But we also consider justifications of multi-level emergency governance and propose that we should evaluate it by how well it avoids problems of executive domination, or, in other words, by how well it holds on, even in an emergency, to standards of public control with political equality; to parliamentary and judicial oversight; and to rights protections.

Our second aim is to illustrate our conceptual and normative framework with empirical examples. Necessarily the second aim is more modest than the first. We do not attempt an exhaustive survey of all responses to the pandemic in all member states or even all shared responses at the European Union level. Rather we use examples of public control oversight and rights to confirm that our conceptual and normative framework does,

indeed, identify what we need to understand, what we need to worry about and what we need to evaluate in the form of multi-level emergency governance that emerged in response to the pandemic.

These observations serve to underline that whereas the paper naturally belongs to REGROUP WP 1 it has a broader project-integrating aim, in terms of building bridges between WPs 1 and 5 in particular. With regard to the paper's relationship to the existing literature, we build on Jonathan White's (2015; 2019; 2023) many observations about ways in which power is exercised through the European Union in emergencies. For White, the Union's very 'rationale' as a problem-solving body easily leads to an overstepping of EU 'legal and political constraints' that may, in any case, be hard to institutionalise at the Union level. That, risks a 'transnational politics of emergency arbitrariness'. But, the solution cannot be to abandon what we might call emergency governance beyond the state, if, as suggested earlier, we live in a world of multiple, fragile, interconnected systems that easily displace crises between one another and between democracies. Rather we need to identify what would be legitimate uses of the Union to coordinate responses to emergencies. That, though, is a multi-disciplinary challenge that requires insight from literatures on legitimacy and non-domination¹; on externalities and collective action problems; on institutions and law; on emergencies within single democracies and between them. We also need to study cases such as Covid-19 that can tell us about the practical difficulties of delivering standards of non-domination where emergency responses are coordinated beyond the state and as part of a multi-level system of emergency governance.

The first part of the paper sets out a conceptual framework for understanding the multi-level emergency governance employed in response to the pandemic, with sub-sections on coercive responses to the pandemic at the national level; on coordinated responses at the European level; and on elements of shared normative order between the levels. The second part of the paper sketches an evaluative framework which we will also use in our subsequent paper on indicators of executive domination (WP 5). One sub-section says some more about the absence of executive domination as a standard for the legitimacy of emergency powers. Further sub-sections discuss what is needed to assess absence of executive domination in national and EU responses to the pandemic. We conclude with some thoughts on how our conceptual and evaluative can set the agenda for further investigations.

¹ For this body of literature, we draw extensively on the investigations conducted under the H2020 project EU3D (<https://www.eu3d.uio.no/>). For a brief selection of authors see Pettit (1997; 2012). Shapiro (2012; 2016). Useful overviews of this comprehensive body of literature are found in Klein (2020), and in McCammon (2015).

Conceptual framework: Understanding responses to the pandemic as a form of multi-level emergency governance

Much recent literature has turned away from the idea of emergency powers as a state of exception outside the normal politics and procedures of the democratic constitutional state (Ginsburg & Versteeg 2020). Rather, it asks how states of emergency can be embedded in democratic institutions and constitutional procedures so that they are themselves regulated by a rule of law. To assess the institutional effects at the national and EU level of emergency responses to the pandemic we propose a further turn towards theorising what might be called ‘multi-level emergency government’. It cannot be enough for closely interconnected democracies, such as those of the EU, to ensure their own responses to emergencies develop within a framework of constitutionality, democracy and rule of law. Those democracies will also need means of solving collective action problems between themselves.

The problem is essentially one of prisoners’ dilemma (Jecker et al 2023). Democracy A and Democracy B may be best off cooperating by introducing equally severe lockdowns. But they may be uncertain of the stringency of the other. The same might go for sharing vaccines. Democracy A and B may both be best off not restricting medical supplies and even pooling them. But each may be worst off if it does *not* impose an export ban or if it does *not* reach a deal that allows it priority of supply whilst the other democracy does those bad things. Trust, norms, communication or institutions may be needed to ensure optimal and uninterrupted supplies, especially at moments of acute stress when getting through the next few hours matters more to governments than the best long-term solutions.

If some democracies are bigger, richer, more ruthless or just luckier than others in being home to medical suppliers, any law of the jungle in scrambling for medical supplies may also result in democracy-on-democracy domination. It may even have impeccable democratic procedures internally. The taming of emergency powers by the constitutions and laws of each democracy cannot be enough without the right frameworks for cooperation between interconnected democracies. That is especially so where those democracies have themselves encouraged forms of interconnection, which, for all their other benefits, also involve high levels of mutual vulnerability. That is often the case with the complex supply chains involved in producing medicines within the EU’s single market. Processes of production are often physically distributed across European states. Although speaking to the House of Commons Trade Committee in the different context of Brexit, this is how the Chief Executive of the UK Pharmaceuticals association, explained just how internationally dispersed and interconnected the production

of medicines can be.

There are 45 million packs of medicines that leave the UK every month and go to Europe, and there are 37 million packs of medicines that leave the continent and come to the UK...The production process has a number of steps; typically, it can be up to eight different steps before you get to a final medicine. The way we have developed our supply chain is that those are often done in different manufacturing plants, because it is not sensible to build the same process in different countries...As you make a medicine these things get moved around, and they can go across borders multiple times.²

All that said, co-ordination between interconnected democracies cannot be enough either. Many forms of emergency require forms of legitimate coercion of a kind that can probably only be provided by democratic states. Several responses to the pandemic required some element of coercive enforcement in the sense of ‘orders backed by threats’ (Hart 1994). Only laws that citizens can control as equals are non-dominating in having the unique legitimacy of laws by which citizens coerce themselves. Only member states, and not the EU, have many coercive powers at all; and only democratic member states, and not the EU, even approximate monopolies of legitimate coercion that are, in turn, based on the equal authorisation and public control of citizens. Emergencies expose what many democratic states cannot do on their own. But they also demonstrate what can only be done by democratic states.

Given everything that has been said so far about the need to respond to emergencies by doing different things at different levels - and given a need to do all that within normative frameworks for the rightful exercise of political power - we would expect a multi-level system of emergency governance to be a configuration with the following components:

1: At the national level, use of the coercive powers of member states to manage, contain and solve emergencies. All that, to varying degrees, within frameworks of law, rights, and constitutional and democratic procedures that member state democracies have developed for managing emergencies.

2: At the European level, use of European Union institutions to coordinate responses to emergencies in ways member state democracies cannot achieve on their own. That will include a) use of the powers, policies and citizens’ rights of the Union itself as well as b) co-ordination, at the Union level, of the powers and policies of member states. It will also include any norms that regulate inter-democracy coordination as opposed to within-democracy coercion.

² Mike Thompson, Chief Executive of the Association of the British Pharmaceutical Industry in Oral Evidence to the Business, Energy and Industrial Strategy Committee of the House of Commons 5 December 2017. Available at <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-energy-and-industrial-strategy-committee/leaving-the-eu-implications-for-the-pharmaceuticals-industry/oral/75437.html> (accessed 9 August 2022).

3: In addition to norms aimed at regulating coordination, there may be a further element to any shared normative order where national democracies are prepared to subject themselves to shared standards - such as those developed and monitored by the Council of Europe - in using their own coercive powers to manage emergencies.

But, even if those three points sketch in very general terms what we might expect of any multi-level system of European emergency governance, need they add up to an institutional re-ordering (we have borrowed this term from the REGROUP conceptual framework to help us distinguish, as best we can, what might be lasting, and not just ephemeral, institutional responses to the pandemic).

Couldn't the three points above amount to little more than a series of improvisations, or a form of bricolage, or a series of 'here today gone tomorrow' practices by which states have long come together to manage temporary problems without lasting effects on institutions? The jury may still be out. But the overall pattern seems to be one of integration through emergency with each emergency leaving significant and probably lasting institutional consequences. The financial crisis produced Banking Union. The migration crisis catalysed Frontex. Covid-19 begat health union.

But, regardless of the institutional outcomes of recent emergencies, what about the multi-level means we have sketched here of managing emergencies themselves? How novel is that as a configuration? The United States might also be thought of a system where, in responding to the pandemic, the states did coercion and the federal level did co-ordination.³ But the US is a single state with a single *demos* to a degree the EU is not. So, in conceptualising and evaluating any multi-level emergency governance in the case of the EU, we need to be aware that the Union is not a state. Rather it is a non-state, multi-democracy, multi-*demos* political order. Both problems and possibilities of multi-level emergency governance will be different in the EU's somewhat segmented political order; or, in other words, in a political order that is so often incomplete in gathering together all the ingredients of functional effectiveness and democratic politics needed for a full system of government (Bátora and Fossum 2019).

Nor should we even be surprised if responses to the pandemic formed something of their own 'segment' within wider practices of EU multi-level emergency governance. If poly-crisis has stimulated the development of multi-level emergency governance, there is no reason to expect that to be the same for all possible forms of emergency. It is perhaps more plausible to expect one form of multi-level emergency governance for pandemics; another for financial crises; another for the climate crises; another for geopolitical crises. Each may also have its own standards; its own need to organise specialised knowledge and expertise; its own standard operating procedures; its own path

³ We are grateful to Federico Fabbrini for this point.

dependencies; its own power relations. How far any multi-level emergency governance is segmented or dispersed will, as we will see, be important to our discussion of executive dominance.

Coercive responses at the national level

We start at the national level, with its special responsibility for emergency responses whose enforcement might require some form of legitimate coercion. The Oxford Coronavirus Response Tracker (OxGRT) has proposed a Stringency Index based on thirteen metrics: school closures, workplace closures, cancellation of public events, restrictions on public gatherings, closures of public transport, public information campaigns, restrictions on internal movement and international travel bans; testing policy; contact tracing; face coverings and vaccine policy.⁴ Most EU Member States employed all the foregoing measures to some degree and with some element of sanction. For example, *Welt Am Sonntag* reported that, in the first month of the pandemic, Germany's seven largest cities levied 35,000 fines.⁵ Member states differed, though, in the exact means and mix by which they employed the foregoing: and in how thoroughly they enforced restrictions and which actions they chose to limit or prohibit. For example, the European Centre for Disease Prevention and Control⁶ noted 'substantial heterogeneity in physical distancing policies and their implementation'.

Different ideas of justified coercion in a pandemic were also implicit in different member state responses. How far, for example, were unvaccinated people put under additional restrictions? In France and Germany there was a huge difference of around 50 points (out of 100) in the Oxford Stringency Index for Vaccinated and Un-vaccinated people. Still member states broadly converged on suppression strategies by which restrictive measures were increased the further the reproduction rate of the virus exceeded 1.0 (Alemanno 2020). The only exception was Sweden, which mainly aimed at mitigating the spread of the virus through the prudence of citizens and the normal treatments of the public health system.

Member states also differed in how they authorised specific measures and any more general emergency powers. There were three possibilities; i) a state of emergency based on a constitutional power to declare emergencies; ii) a state of emergency based on a statutory power to declare emergencies; iii) an ad hoc series of statutory measures without an overall framework of emergency powers. As a European Parliamentary

4 COVID-19: Stringency Index. Available at <https://ourworldindata.org/covid-stringency-index> (accessed 24 April 2023).

5 Germany: 35,000 fines issued to COVID-19 rulebreakers. Available at <https://www.dw.com/en/coronavirus-german-cities-issue-35000-fines-to-rulebreakers/a-55150482> (accessed 25 April 2023).

6 For further details see European Centre for Disease Prevention and Control: Data on country response measures to COVID-19. Available at <https://www.ecdc.europa.eu/en/publications-data/download-data-response-measures-covid-19> (accessed 14 May 2023).

Research Service study detailed, the ‘majority of member states (19/27) enacted an emergency scheme either in the form of a constitutional state of emergency (10/27) or in the form of a statutory emergency regime (14/27) or both (5/27) (Diaz Greco and Kotanidis 2020).

Another way of understanding national responses is through the rights that were affected. The European Union Agency of Fundamental Rights (2021: 5) notes that ‘the emergency measures have implications for human dignity, the functioning of democratic institutions, rule of law and overall respect for human rights’. It then goes on to list the following rights as impacted by the pandemic and member state responses to it: rights i) to social interaction; ii) to health, including the right to life and right to health care without discrimination; iii) to education; iv) to work and business activity; v) to justice where courts ceased to function; vi) to travel; vii) to privacy and Data Protection. However, other rights might be added; viii) to property (requisitioning of premises for field hospitals); ix) to religion; and political rights x) to assembly and xi) to freedom of speech. Vulnerable groups were associated with each of these limits on rights. The EU Agency of Fundamental Rights single out a) old people; b) disabled people; c) victims of domestic violence; d) Roma and travellers; e) LGBT people; f) refugees and migrants; g) detainees; h) ethnic minorities. Based on existing reporting, the balancing between rights proved difficult for most EU member states and also for non-members. Since the start of the pandemic, all European states shifted the balance of rights heavily towards limiting various constitutional and normative basic rights, such as rights to freedom of assembly, freedom of movement and right to privacy (Bjornskov and Voight, 2020; Venice Commission 2020). A more detailed examination of the balancing of rights however reveals that EU and non-EU European states, despite similarities in approaches also exhibited some nuanced differences. There were also a few outliers that diverged considerably.

Despite the limitations on various rights, undertaken during the crisis, it is notable that only three EU Member States (Estonia, Latvia, and Romania) derogated, i.e., temporarily suspended international human rights instruments (Council of Europe 2020: 6). As such, despite the limitations on human rights, almost all EU states sought to at least on a visible level to maintain the existing regime of rights. However, the absence of derogation notifications does not equate with no restrictions, as it requires a constitutional state of emergency, which only half of the EU states, including the three mentioned above, chose to implement. Secondly, it is unclear whether the existence and upholding of international instruments demonstrates a genuine balancing of rights, or more of an overlooked factor by the decision-makers.

Looking at first and second waves of the pandemic, the majority of the countries examined ended up limiting rights to freedom of assembly, freedom of movement and

right to privacy, regardless of whether this was done through constitutional state(s) of emergency or ordinary legislation. However, not all individual rights were widely limited, chief amongst them freedom of speech and access to information, albeit with some exceptions. For example, Hungary enacted a legislation which criminalised fear-mongering, with a relatively broad mandate.⁷ On the other end of the balancing act we find the states' need to ensure right to work and wider social rights, including right to housing and some form of social support. A significant number of countries examined, provided some form of financial compensation for those laid-off due the pandemic, which mostly included seasonal and service industry, along with self-employed persons. For example, Portugal, Finland and Germany either allowed self-employed persons to apply for general unemployment support or provided more direct financial support for rent and other basic necessities.

One of the most contested, if not the most careful balancing act, was arguably the balance between right to privacy and the right to information/ need to inform the public. This balancing act was especially prominent when discussing the development and roll-out of “Covid-tracer applications”. In the majority of the countries, including Italy, Germany and the Netherlands amongst others, the development was subject to criticism and concern from various human rights organisation and data protection agencies. They stressed the need to ensure that the data was anonymised, any applications' source code was to be transparent, data storage ought to be decentralised and the data stored would be removed after a specific time-limit. For the most parts, the governments and authorities responsible have indicated compliance, with the national recommendations or the EU's General Data Protection Regulation (GDPR). For example, following domestic criticism, the Ministry of Health and Federal government retraced some aspects from the legislative proposal for the development of “tracer-app” (Fundamental Rights Agency, 2020). However, in the Hungarian case, while seemingly complying with the GDPR, the Minister of Innovation and Technology has broad authorisation for data collection and storage (Milieu Consulting SPRL 2020).

When looking at the overall balancing between various rights across Europe, the challenges were largely similar across all countries. While some differences existed in the degree of restrictions, such as what was the acceptable limit for gatherings or what constituted a legally accepted reason to leave your house, the fundamental balancing acts were widely shared, with the exemption of Hungary. Even the most contentious balancing act, namely the right to privacy, followed largely shared patterns. These similarities are attributable to technological challenges and the existing legislation following the GDPR implementation, and established data protection agencies or authorities.

⁷ “Stating or disseminating any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection in a special legal order (such as the state of danger) [which was declared in response to the Covid-19] and sanctions the perpetrator to imprisonment for one to five years” (Milieu Consulting SPRL 2020: 4).

Responses at the national level also impacted on rights to representation. The Council of Europe (2020) initially observes that holding elections in pandemics leads to lower turn outs. It also notes that ‘some postponement of elections has taken place in Germany, Finland, France, Italy, Spain, Austria, Czech Republic and Poland. In Italy a referendum was postponed’. ‘Austria, Finland, France, Romania and Spain postponed local elections. The Czech Republic postponed legislative elections. Poland, which will be examined later in detail, initially decided to carry out presidential elections with compulsory postal voting. It then decided to hold both rounds at the polling station after all’. In longer emergencies the Union and its member states might be confronted by even more drastic decisions on whether to proceed with elections.

Co-ordination at the European Level

It is not hard to identify why interconnectedness required coordinated responses to the pandemic at the European level. As the Commission put it (2020b): ‘the health situation in one member state is contingent on that in others’.

Yet, a need for coordination did not always constrain nationally driven fragmentation. Movement towards more coordination at the European level was not unidirectional across the phases of the pandemic. There were several different dynamics. One was even towards the suspension, side-lining or downscaling of existing EU roles and functions. Examples are suspension of the Schengen rules on free movement in the early days of the pandemic; and, arguably more benignly, the relaxation of fiscal rules under the Treaty on Stability, Coordination and Governance. A second dynamic was towards greater member state coordination but without much increase in the involvement, powers and capabilities of Union institutions. A third dynamic was towards a reshuffling of the EU’s existing responsibilities, for example, change in the (im)balance between monetary and fiscal union. This was demonstrated that, despite suspending the rules of stability and growth pact (i.e., Treaty on Stability, Coordination and Governance), the possible positive impact of suspending the rules was not equally divided. While mostly Northern European countries with fiscal surplus could expand their national budgets with additional state loans, the mostly Southern European debtor states could not. Despite the Commission’s competences and role in making the initial proposal, the EU Member states remained the main actors in deciding to suspend the provisions of the Treaty on Stability, Coordination and Governance (Kassim 2023: 621). Indeed, the “utility” of suspension is firmly linked to the national budgetary situations, and not an increased role for EU institutions.

A fourth dynamic was towards straightforward enlargement of the powers and responsibilities of the Union. Prominent examples are the launch of a Recovery Fund (NextGenEU) and of European Health Union. As those examples suggest some responses at the

Union level were to the pandemic itself. Others were to its secondary effects. There were also many different institutional methods of European emergency governance even within single initiatives such as the European Health Union, as will become clearer in the next pages.

For sure, it is important to ask whether the different modes of European emergency governance were fragmented, coherent, adequate, justified; or, indeed, non-dominating. But to do that we must first conceptualise the different needs for coordination that the pandemic created at the European level. One need was for co-ordination of **knowledge**. The Commission (2020a) repeatedly argued that exchange of knowledge at the European level was ‘critical to the efficiency’ of national responses to new waves, new variants, new forms of transmission and new treatments. Likewise, even if travel rules on testing, proof of testing and quarantines were set by member states, compliance at the national level would be higher if those rules were thought to be proportionate to the science. That, for example, was an important reason for tasking the European Centre for Disease Prevention and Control with collecting, analysing and exchanging data. (European Commission 2020a). A second need was for co-ordination of rules. Unilateral action to reintroduce border controls in the early days of the pandemic had ‘disrupted the daily lives of millions living and working in border regions and served as an example of collective action failure of the EU (Blaubarger et al. 2023; Truchlewski et al. 2021). It had also played havoc with supply chains and flows of essential goods.

But despite the EU Member States rapid closure of borders when the pandemic first hit the EU, the EU institutions especially the DG Home managed to maintain and utilize its coordinative role. As an example of this coordination was that once the border controls limiting free movement were lifted in the Summer of 2020 after the “first wave”, they were not re-introduced at the same scale. Instead, the focus shifted to individuals, following the introduction of the “Green Pass” (Blaubarger 2022; European Court of Auditors 2022). Nonetheless, the initial patchwork of rules could have undermined one another if publics questioned whether contrasting rules could all be scientifically correct.

A third need was for co-ordination of **resources**. If the health of each member state depended on that of the others, it would be important to avoid gaps and ensure even provision of vaccines and other essential equipment. The Union’s existing powers to regulate the single market, free movement and border controls meant there were already means of reacting quickly ‘to disproportionate unilateral restrictions’ on medical supplies ‘that undermine the collective effort’ (European Commission 2020a). But the Union also developed new roles in coordinating resources through the various initiatives included in ‘health union’. It began to stockpile emergency equipment. It created a clearing house for the exchange of emergency equipment. It set up systems of joint procurement, including ‘advance purchase agreements with vaccine developers’ (European

Commission 2020b).

A fourth need was for co-ordination of **rights**. All of the foregoing forms of coordination plainly required duties, risks and principles of fairness to be defined and balanced at the European level. Joint purchase of vaccines supported fair and equal availability for citizens of member states with lower purchasing power. It also meant that the ‘risk profile’ of the different vaccines available - and all the ethical questions of balancing those risks against one another - would now also be affected by joint procurement policies at the Union level. Duties of care and correlative rights to health and vigilance in decisions on health - already Europeanised through the responsibility of the European Medical Agency for testing of medicines - would now be further Europeanised by joint purchasing. But, in one way, that was not as transformational for the EU as it might have been for any other multi-state body beyond the state. The EU already had a status as a ‘rights granter’ through the operation of its other policies (Isiksel 2016). EU citizenship, and the EU’s internal market is a coherent legally regulated organism the status and sustenance of which mattered during the pandemic. Demonstrating the rights and exclusive competence that the EU institutions had within the internal market, the Commission utilised the current state aid regime to its fullest extent, allowing €3.2 trillion to be spent during the pandemic (European Commission 2022). To do so, the Commission adopted a flexible stance and allowed Member states to provide advance payments, selective tax advantages and short-term export credit insurance (Dimitrakopoulos and Lalis 2022). Equal access to vital medicines, supply of food and other essentials tested claims and expectations that the Union was one of reciprocal rights and obligations.

If, the foregoing forms of co-ordination were needed at the European level, what co-ordination problems would a multi-level system of European emergency governance be likely to encounter? Some co-ordinations have few distributive implications and involve little disagreement on questions of rights, values and jurisdiction. Others, as seen, are conflictual and unstable, often because they involve forms of prisoners’ dilemma. If a scramble for scarce medical supplies was an example of the second, the Union’s joint purchasing power to obtain medical supplies on terms more favourable than those obtainable by any one member state was an example of the first. Also important is that some coordination problems required overcoming negative externalities where some member states have incentives to externalise harms to others. Others required overcoming any incentives to free-ride on positive externalities provided by the disease control of others. Then, of course, were instances where coordination between the EU-27 was necessary but insufficient for more global responses. How well ‘European pandemic governance’ combined with ‘Global pandemic governance’ needs investigation.

Clarifying where coordination at the European level is needed, where it is problematic, and what forms it can take, is also important to questions of justified political authority

and of institutional design in any European system of multi-level European emergency governance aimed at managing crises such as pandemics. For example, the European Commission (2020b) notes the importance of the Health Security Committee as a body where ‘member states consult one another in liaison with the Commission’. The Committee had already met ‘more than 40 times’ in the first six months or so of the pandemic. But, the Commission goes on (2020b):

the Health Security Committee has a limited capacity to enforce or coordinate national responses or to implement the agreed common approaches ... Interplay between technical discussions in European structures such as the Health Security Committee, and the Ministries of Health in Member States, is not always straightforward.

It is tempting to suppose mere co-ordinating powers do not raise questions of dominance to the same degree as coercive power; and that multi-level emergency governance at the European level is, therefore, nothing like as problematic as at the national level. However, the success or failure of the European Union in coordinating on certain outcomes could make all the difference to how far multi-level emergency governance can be used to avoid domination in a pandemic, whether that is democracy-on-democracy domination or domination of individuals. Intergovernmental cooperation might struggle to overcome prisoners’ dilemmas and negative and positive externalities between democracies in the management of pandemics. So, it might make sense for member states to constrain themselves in favour of some joint authority at the Union level. But that only raises the question of the EU’s own legitimacy in emergencies? What is its right to decide questions of right in pandemic governance? Is its legitimacy no more than that conferred by member states? Or must the Union have some rights to exercise power autonomously of member states if the latter are themselves to deal with emergencies such as pandemics in ways that best meet their own obligations to their own publics? How we should pursue that question will become clearer once we have discussed non-domination as a key standard of legitimacy in the next section.

For now, we observe that what needs to be legitimate is the whole complex of authority relations involved in the EU’s multi-level system of pandemic governance. It is not enough to argue, as we have, that the EU did coordination and the member states did coercion. We also need to identify where those two tasks, and the two levels, required one another, and how well they interacted during the pandemic. For example, Alberto Alemanno (2020) argues that the EU had some competence in health matters before Covid-19. However, what remained the exclusive competence of member states tended to obstruct responsibilities that had been assigned to the Union. Covid-19 forced a better alignment of responsibilities at the national and European levels precisely because coercive restrictions within member states were unsustainable without coordination between them. It was unlikely restrictions could be maintained indefinitely. Yet individual member states could not easily begin to lift their own restrictions if

they were too exposed to the cross-border effects of transmission from other member states. The Commission developed a role in exchanging information and assessments of likely cross-border effects and in coordinating the timing and means of any relaxation. In some cases, that even helped some member states to change the balance of their restrictions by easing some while firming up others.

Shared normative order?

We have argued that member states focussed on responses to the pandemic that required some measure of coercive enforcement. The EU focussed on responses that provided coordination between member states. But a full understanding of multi-level emergency governance in the case of Covid-19 also requires mention of any shared normative order between the European and national levels for dealing with emergencies. Crucial here are any standards which it is reasonable to expect of the Union and its member democracies precisely because they are standards to which they have committed themselves. The following are standards for the use of emergency powers to which all EU/EEA countries are committed through their membership of the Council of Europe and the UN.

1): Rule-of-law: ‘In an emergency, the rule of law shall continue to prevail’...’everyone shall be subject only to such limitations as are determined by law’. Or, as the Council of Europe (2020b) puts it, ‘a state of emergency is itself a legal institution subject to legal regulation’.

2): Authorisation: All emergency powers should be legally promulgated, whether by using a provision in the Constitution that permits emergency powers or by ordinary statute. Unless the emergency makes it impossible, any emergency powers should be authorised by parliament. The authorisation should specify reasons for the emergency powers, their content, their duration, and arrangements for the parliamentary and judicial control of those powers.

3): Notification: ‘...a state taking emergency measures that derogate’ from its obligations under Council of Europe or United Nations to protect rights ‘shall immediately notify’ those bodies and ‘other states that are members of them. Notification must include ‘an explanation of the reasons for the derogation’.

4): Necessity: Emergency powers should only be those ‘strictly required by the exigencies of the situation’. Emergency powers are not necessary where ordinary powers/normal legislation would be sufficient to deal with a problem (Council of Europe 2020a). Nor should emergency powers be used for anything else than dealing with the emergency itself.

5): Proportionality: Emergency powers should include ‘no more restrictive means than are required to achieve the purpose of the limitation’. Restrictions on rights should be the minimum necessary to achieve objectives of emergency powers (in this case containing a pandemic).

6): Time limitation: ‘The Venice Commission (Council of Europe) recommends that declarations or measures that have no specific time limit should not be considered as lawful’ (Council Europe 2020b). Normal time limits seem to be between about 10 and 90 days. If more time is needed, executives should be required to seek fresh parliamentary approval to renew or prolong emergency powers. Note also States of Emergency should not be used to make permanent changes policy and law (Council of Europe 2020a). Permanent changes will often be needed after an emergency. But they should be introduced later under normal conditions and through the normal political process.

7): Non-discrimination: Emergency powers should not be framed or applied in ways that discriminate on grounds of ethnicity, gender, etc.

8): Legal certainty/clarity: Legal rules limiting rights shall be clear and accessible to everyone.

9): Challenge and Legal remedy: ‘every emergency limitation shall be subject to legal challenge and remedy against its abusive application’... ‘both parliamentary and judicial control should be possible’ (Council Europe 2020b). Emergency measures should be open to judicial review.

10): Non-derogable rights: Some rights should be non-derogable even in an emergency. ‘States should define right that cannot be limited even in an emergency’. In the case of Covid-19 those might perhaps be freedom from medical or scientific experimentation without free consent...freedom of thought or religion...no application of laws with retroactive effect.

11): Oversight: Where possible all emergency powers should be approved and frequently renewed by the legislature (see above). Even if it is not possible for parliament to authorise a state of emergency the latter should lapse after a short time if it is not approved by parliament. Parliament ‘should have power to discontinue the emergency’ (Council of Europe 2020a). ‘The constitution and laws governing states of emergency should also provide for prompt and periodic independent review by the legislature’. Throughout all those who exercise emergency powers should know that parliament will later undertake or authorise a thorough *ex-post* review or enquiry: ‘parliament should signal its intention to subject all pandemic measures to deep scrutiny after the crisis has come to an end’ (Council of Europe 2020a). The Council of Europe also points out that parliamentary oversight is ‘especially important where legislative power has been transferred to the executive’ as part of any package of emergency powers. In those

cases there ‘should be rules setting out limits on delegations of legislative powers’.

12): Deliberation and Debate: An interesting departure was the emphasis ‘the Venice Commission of the Council of Europe put on the need for deliberation and debate of emergency powers by parliament and civil society, and not just more formal and legal constraints. As it put it, ‘for a deliberative democracy legitimacy lies in the deliberative process itself’.

How well were those standards followed in the pandemic? A full analysis would require a paper on its own. But complaints, reports of monitoring bodies etc, provide some preliminary indications of gaps and inconsistencies in the application to the Covid-19 crisis of any shared normative order suggested by Council of Europe standards. Cases of ‘kick-back by member states also suggest areas of disagreement and contestation of supposedly shared norms. Note, though, the Council of Europe standards are norms of how member states should use their coercive powers in an emergency. Do responses to the pandemic also indicate norms of how the co-ordinating powers of the EU should be used? After all, Fossum and Laycock (2021: 65) describe federal systems as commitments to ‘the fundamentals of living together with a sense of solidarity and in a spirit of cooperation’. A further question for another time is how far EU responses to the pandemic really indicated substantial concepts of solidarity, as opposed to thin and non-redistributive ones?

Evaluative framework

Non-dominance

We have set out a framework for understanding the form of multi-level emergency governance that emerged from the responses of the EU and its member states to the pandemic. We now turn from conceptualisation to evaluation. To recall, we want to evaluate how far European ‘pandemic governance’ avoided problems of executive domination. In our next paper we will go beyond the basic standards of non-domination we have identified here to develop fuller indicators of executive dominance in emergencies. But before we can do that we need to say much more about the challenges of delivering non-domination in a system of multi-level emergency governance in which member state executives coerce and EU-level executives coordinate. We might agree that public control with political equality, parliamentary and judicial oversight, and respect for individual rights are all crucial standards at both levels for avoiding executive domination in emergencies. But there are problems in delivering those standards that need to be identified if the next paper is to specify indicators that are not vacuous, overly stringent, perhaps even utopian, unactionable and of limited policy relevance.

We need to be clearer than hitherto what executive dominance is not. Then we need to specify predicaments and dimensions of executive dominance at the national and European levels. The rest of the paper explains.

We start with what executive dominance is not. We cannot say that non-domination is an absence of political power or even an absence of coercive laws. To the contrary, whole publics and individual citizens can be dominated if they are *unable* to form and control forms of political power that allow them to protect their health, their well-being or their rights (Shapiro 2016). A pandemic provides many examples of where citizens may be unable to achieve outcomes, rights and survival itself unless they belong to a political order that allows them to make coercively enforceable law through representatives they can control as equals (Hardin 1968; Mansbridge 2014).

Citizens may also need to bind themselves to reciprocally made and enforceable laws if, as seen, the ‘rights of all are to be compatible with the rights of each’: ‘a right to equal liberties’ may not amount to very much if it is not ‘backed by authorised coercion’ (Habermas 1996: 100). Again, a pandemic illustrates that. The equal right of each to protect her health has to be as compatible as possible with the equal right of each to move freely, work or go to school. Yet, those are all rights that need to be specified and made determinate. Citizens also need to be able to form stable expectations that, if they follow the rules, others will also do so. If a hundred of us wear face-masks on a flight we need some reassurance that our efforts will not be undermined by one of us not wearing a mask. But, in Habermasian terms, if the law is, *in fact*, to be specified and determinate beyond ambiguity and eccentric interpretation - if it is, *in fact*, to co-ordinate behaviours and stabilise expectations- the chances are that it will, *in fact*, need to be enforced. But none of those ways in which laws need to operate in fact are likely to be achieved if those laws are not also legitimate. Democratic societies always rely almost all of the time on self-enforcement by citizens who recognise laws as right and, therefore, obliging.

But emergencies can constrain the operation of precisely those components of the democratic state that provide legitimacy and not just enforcement. In some cases executives are left as the only functioning branch of government. In others they temporarily take over law-making powers normally exercised by legislators. Yet, for all that, we still need to distinguish desirable forms of **executive prominence** from undesirable forms of **executive dominance**. We expect executives and experts to be (pro)active under conditions of emergency. They are as noted authorised to take action at short notice and under conditions of rapid change and uncertainty. Executive dominance is when executives undertake actions that they are not authorised to do, notably when there is arbitrary or illicit exercise of power; when there is lack of consultation with those affected and notably those subjected; when executives overstep the bounds of

their authorisation and fail to provide justifications for their actions. Informality and unaccountable networks are sites of executive dominance. Decision-making in closed and in-transparent settings and bypassing of lines of authorisation and accountability are such manifestations.

Assessing executive dominance at the national level

Because national responses to the pandemic were mainly those that involved some element of coercive enforcement, the main tests of how far national authorities avoided executive domination are how far: i) they avoided unjustified interferences in individual rights, and ii) how far executives remained within a system of public control through parliamentary and judicial oversight. Those standards also feature prominently amongst the Council of Europe principles to which all member states have committed themselves. Since, however, this paper is an agenda-setting piece it is important to concentrate here on identifying questions for further research more than just cataloguing lapses and difficulties.

First, it is not enough to see the problem as just one of rights restriction. What the pandemic most required was a balancing of rights. That follows from a core justification of the democratic state as a body that is uniquely able to use any legitimate coercion to ensure the rights of all are compatible with the rights of each (Kant 2012 [1785]). So, for example, any ‘right of all’ to health that would be hard to secure without compulsory measures aimed at slowing transmission of the virus had to be balanced against the rights of each to visit elderly parents and so on. Freedom of speech is another example. The Council of Europe (2020) noted a difficulty in requiring internet providers to monitor disinformation. In an emergency, freedom of expression only becomes more important. ‘People need to be able to communicate where restrictive measures are presenting them with special difficulties’. However, some countries, especially Hungary, utilised this situation to enact vague legislation, without clear benchmarks and definitions for what constitutes misinformation.

Second, the Hungarian example demonstrates that there were possible instances where interferences in fundamental individual rights were hard to justify as part of balancing rights and perhaps not even much to do with Covid-19 at all. Another example is the Polish case, where the Government banned all forms of assemblies. While restrictions of the right to assembly were prevalent across the EU during the Covid-19, the Polish case is more profound in comparison. Firstly, the government did not employ a constitutional ‘state of emergency’, not that right to assembly can be limited beyond ordinary necessity or proportionality (Drinoczi and Bien-Kacala, 2020: 190). Secondly, what makes the ban on the right to assembly potentially challenging was that it took place during the presidential election campaign. This meant that no significant campaigning by opposi-

tion parties' candidates could be carried out, whereas the incumbent was able to travel under the presidential authority (Drinoczi and Bien-Kacala 2020). The right to free and fair elections was further challenged by the unclear and last-minute changes to electoral voting rules through legislation, which in the end resulted in the postponement of the presidential elections.

The Polish and Hungarian cases represent challenging cases in balancing rights, what makes them problematic is less the exact measures but rather the wider process and pre-existing treatment of rights. For example, most EU countries, including France, Germany, and Denmark, took measures to heavily restrict the right to assembly and made bans of public gatherings under the pandemic. These measures however contained either sunset clauses or were subject to parliamentary or judicial scrutiny. In contrast, in the Hungarian case, there was no clear sunset clause, while circumventing normal legislative procedure in favour of the executive (Bjornskov and Voigt, 2020). However, it should be noted that Cyprus and Slovenia can also be argued to have provided excessive discretion to the executive branch (Grogan and Beqiraj 2021). Finally, if one keeps in mind that in the Hungarian case there were also concerns about the right to free speech and privacy, the latter under the "tracer" app data collection, the overall picture becomes even more challenging. Arguably there for the executive dominance, while inherently risky for democratic legislative and decision-making process, can be even more damaging if compounded by additional challenges to balance of democratic rights.

Third, on the question of whether executives dominated through unnecessary shortcomings of parliamentary oversight it is important not just to look at established ways of reconciling strong executive powers with continued public control through representative bodies: notably *ex ante* authorisation and *ex post* accountability. It is also important to ask how well parliaments innovated and adapted during the pandemic itself. The European Parliament study (2023: 44-5) notes 'that some national parliaments maintained significant budgetary and legislative activity even during the worst peaks of the crisis...some continued to pass legislation'...even on 'matters unrelated to the pandemic'. Likewise others continued to use normal oversight powers including 'question time with governments' and votes of no-confidence'. Some parliaments also adapted their work to the pandemic. They developed new forms of digital interaction and digital meeting-places. The European Parliament study (2023: 31) also notes that the Covid-19 crisis increased the number of national parliaments that provided their members with means of deliberating and voting electronically (e.g. Belgium, Poland, Romania and Slovenia). So, also worth asking is how far the pandemic indicates possibilities of a 'new emergency parliamentarism. How far have adaptations to the pandemic become embedded in post-pandemic parliamentary practices? And how, realistically, can they sustain normal parliamentary oversight even in emergency?

Assessing executive dominance at the European level

If the EU coordinated between member states whilst the latter enforced restrictive measures, what would be needed for the EU's contribution to emergency governance to be non-dominating? We would expect the same core standards to apply: namely, rights, oversight and public control with political equality. We might expect risks of domination to have been lower since the Union was involved in coordination and, only indirectly, in any coercion. On the other hand, failures by the EU to coordinate could deprive member state democracies of effective yet non-dominating responses to some of the collective action problems discussed above. The institutional means of ensuring non-domination through oversight and public control with political equality could be hard to deliver at EU level. To understand all that we distinguish **three dimensions** which might plausibly develop where the Union is confronted with emergencies such as Covid-19.⁸

First, is a 'horizontal' dimension where power relations between executives, parliaments and courts change to the benefit of the first. In this instance, the totality of executives, whether at the European or national level, gain powers at the expense of all parliaments and courts. A large part of the problem is, of course, emergencies themselves: the need for quick decisions; the short-circuiting of parliamentary and judicial process where it is hard for large groups of people even to meet or deliberate. Under such conditions executives are more likely to end up making decisions on their own. One important casualty can be the relationship between the expert and the political. The probability that 'doctor knows best' - and that medics really are more likely to be right about medicine - is, of course, the classic example of where authority often involves some 'surrender' to the 'judgement' of others (Raz 1986: 38). Yet, even then, no amount of expert knowledge can, on its own, justify decisions on rights, obligations and values. Those are all decisions citizens need to be able to control as equals through representatives who may, in an emergency, be impeded from deliberating and deciding as representatives.

The predicament is clear. Pooling expertise is an important reason why member states might want to coordinate responses to emergencies such as pandemics. Assembling experts into transnational epistemic communities and policy networks also happens to be a method of governance in which the EU is well practised. But it also poses well known problems. One difficulty is asymmetries of information (Stiglitz and Weiss 1981) that favour those over whom control needs to be exercised (Krehbiel 1996). That then inhibits accountability from developing into a continuous interaction between executives, publics and representatives in the construction of politics and policy (Olsen 2017). A second problem is technocracy, even paternalism. Especially in an emergency, the expert may be forced to decide paternalistically only on the basis of her own expertise for want of

⁸ For these dimensions see Fossum and Laycock (2021).

a conversation with representative and political bodies. The result may be a form of epistemic executive domination by executive bodies that own and organise expertise.

A second dimension of executive domination is **vertical** through power concentration or unaccountable power dispersion. Here the problem is not just a risk of executives dominating all legislatures, all judiciaries and all publics in an emergency. Just some executives may also operate across the national and European levels in ways that elude public control. Risks of vertical executive domination may even be inherent to many multi-level systems: ‘modern federal-type systems are marked by overlapping jurisdictions and deeply implicated means of governing’ (Fossum and Laycock 2021: 60). Forms of multi-level governance often aim to reduce risks of executive domination by dispersing power. But dispersion of powers can turn into a confusion of powers where it is hard to attribute responsibility. As Weber puts it there can be a ‘problem of many hands’. Where everyone is responsible no one is responsible. What is intended to be a dispersion of powers can also end up as a re-concentration of powers where the same executive actors get to exercise power at the different levels.

The EU is prone to that problem. Joe Weiler (1997) once remarked that national executives re-constitute themselves as part of a legislature when they come together in the Council of Ministers. It is not even clear who is the executive at the EU level: the Commission, the Council, the European powers or national governments in their implementation of EU decisions? Nor is it clear who is the poacher and who is the game keeper: does the Council exercise oversight on the part of each national member democracy or does it exercise the powers of the Union in ways that need themselves to be overseen? What some see as the collective oversight of Union decisions by member state governments (Lindseth 2010) others see as executive domination of Union decisions to the exclusion of public contestation, debate or parliamentary supervision. Instead of supervising international bodies on behalf of their publics, governments may use international bodies to take decisions in ways their own publics and parliaments find hard to control (Bohman 2007).

Note, that we have so far identified two different risks of executive domination: the one, a risk of technocratic domination of decisions as executives get to take emergency decisions on their own; the other a more political and even intergovernmental risk of domination as a few key actors from national executives get to decide emergency responses at both national and European levels, even though part of their role is to oversee on behalf of national democracies the very European decisions of which they are part authors.

A third dimension of executive domination is ‘**constitutive**’. It has to do with how far there are even sufficiently agreed meanings and standards for constituting a form of multi-level emergency governance without executive domination. Consider many of

the things we have said so far: i) the need to embed responses to emergencies in constitutional principles, democratic procedures, rights and rule-of-law; ii) the need for multi-level forms of emergency governance that go beyond what any one European democracy can do on its own; iii) the need for shared norms for managing emergencies; iv) and, finally, the need for consultation, authorisation, accountability, transparency, public justification as basic procedures for countering risks of executive domination.

On their own, all of those things are question-begging. Just which constitutional principles, democratic procedures, rights, norms and distributions of all those things across the European and national levels would count as a non-dominant form of multi-level emergency governance.? And who is to decide all that and how? An answer from democratic theory is that all those standards must ultimately be decided by citizens as equals. Public control with political equality (Beetham 1994) is, therefore, a kind of meta-standard of democratic politics. It is also a core standard for non-domination. Political power can be effective yet non-dominating where people can effectively exercise over themselves by controlling power as equals.

But political orders differ in how far they are constituted by those who see themselves as publics and as equals. The EU may even be a kind of Interregnum between old and new ways of doing politics within and beyond the state (Olsen 2007). It somehow seems unsatisfactory either to see it as just a consociation of separate democracies or as a fully formed democracy with its own fully developed democratic institutions and democratic politics. As seen, the segmented nature of the EU's political order makes it hard to embed all executive actors in an overall system of democratic politics and control. The ingredients of democratic politics - elections, a Parliament, a party system, a public sphere - have only developed patchily within the EU's political order. Nowhere do they fit together as completely and consistently to produce a full system of democratic institutions and politics as their national equivalents. Politics, parliaments and other components of a public sphere of opinion-formation lag behind executives. Executives find it easier than parliaments or publics to cooperate and deliberate at the European level. One effect is what Erik Jones calls 'failing forwards'; or, in other words, responding to emergencies by just adding further initiatives. Another possible effect is informality or use of the European Council by executives to 'make things up as they go along' through self-authorisation of powers including many in which they themselves participate.

Conclusion

The aim of this paper has been exploratory: to suggest an agenda for further research into institutional consequences of the Covid-19 pandemic in Europe. We conceptualised the form of multi-level emergency governance which emerged in response to Covid-19 as one in which member states focussed on sometimes coercive enforcement of restric-

tions, whilst the EU coordinated responses member states were unable to achieve on their own. Across the levels member states by and large also accepted a shared norms for employing emergency powers. But how should that configuration be evaluated in further research? We have argued here for a standard of non-domination; or, in other words, one in which risks of executive domination during emergencies are ultimately within the control of publics as equals.

We noted how all that implies a need for several continuing investigations: into the detail of crisis responses; into how well member states allow for emergencies in their legal and constitutional procedures; into the kinds of coordination required at the European level; into how far member states were prepared to follow shared norms for emergencies; into how far rights were balanced in non-dominating ways; into parliamentary and judicial oversight; into how well, at all levels, any European multi-level emergency governance allows ahead of time for the maximum of oversight, control, debate and continuing democratic politics compatible with effective executive responses to emergencies; into how well the different levels ‘renormalised’ themselves after emergencies by using democratic procedures either to discard what was done during emergencies or to authorise what started as improvisations, experiments and informal changes (White 2015); into how European pandemic governance combined with needs for more global forms of pandemic governance.

But, above all, a standard of non-domination combines the need for effectiveness with procedural protections of individual rights and of the rights of whole publics and their representatives to control emergency powers as equals. That, then, will be the starting point for our next paper in the Regroup series in which we propose indicators of output, input and throughput legitimacy at the different levels of European multi-level emergency governance we have sketched in this exploratory paper.

Third, any incompleteness in EU democratic procedures needed to develop shared standards of non-domination in emergencies is matched by the insufficiency of member states in dealing with those emergencies. Member state democracies may themselves need agreed - and non-dominating - means of dealing with emergencies at the European level if they are to meet their own obligations to their own publics to deliver core standards of well-being, justice, rights and democracy itself on which their own legitimacy depends. The very absence of a fully formed democratic politics at the European level for agreeing standards of non-domination in emergencies at the least requires member state democracies to agree those standards themselves if their own legitimacy is not to be over-burdened by future emergencies.

References

- Akriav, O. (2023), Governing during the Covid-19 pandemic, *The Theory and Practice of Legislation*: 1-15
- Alemanno, A. (2020) 'The European Response to COVID-19. From Regulatory Emulation to Regulatory Coordination?' *The European Journal of Risk Regulation* 11: 307-316.
- Angelici, M., Berta, P., Costa-Font, J. and Turati, G. Divided we Survive? Multi-Level Governance during the COVID-19 Pandemic in Italy and Spain', *Publius: The Journal of Federalism* 53(2): 227-250.
- Bátora and Fossum (2019) *Towards a European Segmented Political Order. The European Union's Post-Crisis Conundrum*, London: Routledge.
- Beetham, D. (1994) 'Introduction' in D. Beetham (Ed.) *Defining and Measuring Democracy*, London: Sage/ECPR.
- Bjørnskov, C and Voigt, S (2020), "The State of Emergency Virus", *VerfBlog*, 19 April 2020, available at: <https://verfassungsblog.de/the-state-of-emergency-virus/>.
- Blauberger M, Grabbe C & Ripoll Servant, A. (2023) "EU free movement of people: fully recovered or suffering from long COVID?", *Journal of European Public Policy*, 30:4, 696-720.
- Bohman, J. (2007) *Democracy across Borders from Demos to Demois*, Cambridge MA: MIT Press.
- Council of Europe (2020a) 'Respect for Democracy, Human Rights and Rule of Law During states of Emergency', Strasbourg: Council of Europe, June.
- Council of Europe (2020b) 'Interim Report on the Measures Taken in the EU Member States as a Result of the COVID-19 Crisis and their Impact on Democracy, Rule of Law and Human Rights', Strasbourg: Council of Europe, October.
- Deutsches Institut für Menschenrechte e.V. (2020), Coronavirus pandemic in the EU - Fundamental Rights Implications, Country: Germany" *European Union Agency for Fundamental Rights (FRA) publication*, 2 July 2020, available at: https://fra.europa.eu/sites/default/files/fra_uploads/de_report_on_coronavirus_pandemic_july_2020.pdf
- Diaz Greco, M. and Kotanidis, S (2020), "States of Emergency in response to the Coronavirus Crisis. Normative Response and Parliamentary Oversight in EU Member States", European Parliamentary Research Service, PE 659.385, Brussels: European Parliament, December 2020.
- Dimitrakopoulos, G.D and Lalis, G. (2022) The EU's initial response to the COVID-19

pandemic: disintegration or ‘failing forward’?, *Journal of European Public Policy*, 29:9, 1395-1413.

Drinoczi, T. and Bien-Kacala, A. (2020), COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism, *The Theory and Practice of Legislation*, Vol.8, no.1-2, pp. 171-192

European Commission (2020a) Communication from the Commission to the European Parliament and the Council, Brussels: European Commission.

European Commission (2020b) Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions, Building a European Health Union, Brussels: European Commission.

European Commission (2022), “Statement: State aid: Commission will phase out State aid COVID Temporary Framework”, available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_22_2980/STATEMENT_22_2980_EN.pdf

European Court of Auditors, (2022), “Free movement in the EU during the COVID-19 pandemic: Limited scrutiny of internal border controls, and uncoordinated actions by Member States”, *Court of Auditors Special Report 13, 2022*, available at: https://www.eca.europa.eu/Lists/ECADocuments/SR22_13/SR_free-movement-phase-I_EN.pdf

European Parliament (2023b) ‘Draft Report on the COVID 19 Pandemic: Lessons Learned and Recommendations for the Future’, Brussels: European Parliament.

European Union Agency for Fundamental Rights (2021) *The Coronavirus and Fundamental Rights. A Year in Review*, Luxembourg: European Union Agency of Fundamental Rights.

Fossum, J.E. and Laycock, D. (2021) ‘Out of Balance: Executive Dominance in Federal Systems’ in A. Benz and J. Sonnicksen (eds) *Federal Democracies at Work*, Toronto: Toronto University Press.

Ginsburg, T. and Versteeg, (2020) ‘The Bound Executive. Emergency Powers During the Pandemic’, *Virginia Public Law and Legal Theory Research Paper*, No 52, 2020.

Grogan, J. and Beqiraj, J (2021) “Rule of Law as a Perimeter of Legitimacy for COVID-19 Responses” *VerfBlog*, 17 April 2021, available at: <https://verfassungsblog.de/rule-of-law-as-a-perimeter-of-legitimacy-for-covid-19-responses/>

Habermas, J. (1996) *Between Facts and Norms*, Cambridge: Polity.

Hardin, R. (1968) ‘The Tragedy of the Commons’, *Science*, 162 (3859): 1243-1248.

- Hart, H. (1994) *The Concept of Law*, Oxford: Oxford University Press.
- Isiksel, T. (2016) *Europe's Functional Constitution. A Theory of Constitutionalism Beyond the State*, Oxford: Oxford University Press.
- Jecker, N., Atuire, C and Bull, S. (2023) 'Towards a New Model of Global Health Justice: the case of COVID-19 vaccines', *Journal of Medical Ethics* 49: 367-374.
- Kant, I. (2012 [1785]) *Groundwork of the Metaphysic of Morals*, in H. Reiss (ed.) *Kant. Political Writings*, Cambridge, Cambridge University Press.
- Klein, S. (2020) *The Work of Politics: Making a Democratic Welfare State*, Cambridge: Cambridge University Press.
- Krehbiel, K. (1991) *Information and Legislative Organisation*, Ann Arbor: University of Michigan Press.
- Lindseth, P. (2010) *Power and Legitimacy: Reconciling Europe and the Nation State*, Oxford: Oxford University Press.
- Lovett, Frank (2022) *The Well-Ordered Republic*, Oxford: Oxford University Press.
- Mansbridge, J. (2014) 'What is Politics for?', *Perspectives on Politics* 12 (1): 8-17.
- McCammon, Christopher (2015) "Domination", *Stanford Encyclopedia of Philosophy*, available at: <https://plato.stanford.edu/entries/domination>
- Milieu Consulting SPRL, (2020), "Coronavirus pandemic in the EU -Fundamental Rights Implications, Country: Hungary" *European Union Agency for Fundamental Rights (FRA) publication*, 3 June 2020, available at: https://fra.europa.eu/sites/default/files/fra_uploads/hu_report_on_coronavirus_pandemic_june_2020.pdf
- Olsen, J. (2017) *Democratic Accountability and the Changing European Political Order*, ARENA working paper 8/2017, Oslo: ARENA.
- Olsen, J. P. (2007) *Europe in Search of Political Order*. Oxford: Oxford University Press.
- Pettit, Philip (1997) *Republicanism*, Oxford: Oxford University Press.
- Pettit, Philip (2012) *On the People's Terms: A Republican Theory and Model of Democracy*, Oxford: Oxford University Press.
- Puglierin, J. and Zerka, P (eds) (2022) *European Sovereignty Index*, European Council of Foreign Relations.
- Raz, J. (1986) *The Morality of Freedom*, Oxford: Oxford University Press.
- Shapiro, Ian (2012) "On Non-domination", *University of Toronto Law Journal*, 62: 293-335.

- Shapiro, I. (2016) *Politics against Domination*, Cambridge, MA: Belknap.
- Stiglitz, J. and Weiss, A. (1981) 'Credit Rationing in Markets with Imperfect Information', *American Economic Review*, 71(3): 393-410.
- Truchlewski Z, Schelkle W, and Ganderson J, (2021) "Buying time for democracies? European Union emergency politics in the time of COVID-19", *West European Politics*, 44:5-6, 1353-1375.
- Weiler, J. (1997) 'Legitimacy and Democracy of EU Governance' in G. Edwards and A. Pijpers (eds) *The Politics of European Union Treaty Reform*, London: Pinter: 249-287.
- White, J. (2015) 'Emergency Europe', *Political Studies*, 63 (2): 300-318.
- White, Jonathan (2019). *Politics of Last Resort: Governing by Emergency in the European Union*, Oxford: Oxford University Press.
- White, J. (2023) 'Conceptualising the EU in an Age of Emergencies', *Journal of Common Market Studies*, 61(3): 781-796.