Emergencies, Crises and Threats in the EU: What Role for the Court of Justice of the European Union?

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1 Introduction

The CJEU has rarely dealt with the legality of measures taken by the EU or its Member States to respond to an emergency situation, whether it be caused by a natural phenomenon or a human activity. There are a number of fundamental reasons for the paucity of case law in this area.

First of all, the primary responsibility for addressing the consequences of an emergency situation lies, as a general rule, with the State of origin. This is the single EU Member State where the event causing such a situation takes place. Therefore, any challenge to responding measures, for example on human rights grounds, must be directed against such an entity. As a last resort, the individual affected by such a violation could bring an action before the European Court of Human Rights (ECHR).\(^1\) Since the victims of a breach of

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\(^1\) See, for example, the ECHR judgments Öneryildiz v. Turkey of 30 November 2004 and Budayeva et al. v. Russia of 20 March 2008. In these cases the Strasbourg Court held that the emergency relief measures taken by national authorities as a result of an accident at a rubbish tip and a mudslide breached the provisions of the Convention. It should be noted that the Parties to the ECHR enjoy a certain discretion in countering a “public emergency threatening the life of the nation” (see the so-called “derogation clause in times of emergency” under Article 15 paragraph 1). Yet, under Article 15 paragraph 2, State parties are required to always comply with Article 2 (“Right to life”), except in respect of deaths resulting from lawful acts of war and Articles 3 (“Prohibition of torture”), 4 (paragraph 1) (“Prohibition of slavery”) and 7 (“No punishment without law”). On the interpretation of the notion of “public emergency threatening the life of the nation” see case Lawless v. Ireland (application 332/57) of 1 July 1961; on measures not compatible with Article 15(2) see A v. The United Kingdom, Judgment of 19 February 2009, 3455 E.C.H.R. 5 (2009). On the law and practise of derogation clauses in international law, see E. Sommario, “Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters”, in: A. de Guttry, M. Gestri and G. Venturini (eds.), International Disaster Response Law, The Hague, 2012, p. 323. For the time being, the EU is not subject to the obligations of the ECHR. However, the EU institutions will also become bound by the Convention provisions, after the ongoing EU accession procedure to the ECHR is completed.
the human rights protected under the Convention, may take the national authorities taking emergency action before the Strasbourg Court, the CJEU is only rarely asked to scrutinize any such measure.2

Further reasons as to why the judges in Luxembourg have little opportunity to assess the legality of emergency measures relate to the EU constitutional framework. Prior to the Lisbon Treaty there were not many legal bases justifying EU emergency action (within or outside the EU).3 Beforehand, the EU enacted measures related to emergency situations in order to safeguard the functioning of the internal market.4

Additionally, before 2009, EU action under the CFSP escaped judicial control of the CJEU, except for Article 47 of the EC Treaty. Therefore, any measure to counter emergencies within the framework of this policy could not be assessed by the CJEU, unless the CFSP Decision had a link with an EC act, as in the case of asset freezing measures against individuals supporting terrorism.5

Strictly speaking, there are only three events that resulted in the adoption of emergency acts which were subject to the scrutiny of the European Courts.

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2 See, for example, case C-28/05, G. J. Dokter, Maatschap Van den Top and W. Boekhout v. Minister van Landbouw, Natuur en Voedselkwaliteit [2006] ECR I-05431. In this case, the Luxembourg Court had to consider a national measure taken to act promptly against foot and mouth disease in the light of the right to defense. The action was not upheld. The Court underlines that in a situation of emergency, it is imperative to act promptly against foot-and-mouth disease. This means that the (national) authority may take emergency measures designed to protect public health even without previously obtaining the views of the interested parties. See paras. 76–77. In other cases, the Court was asked to examine EU measures designed to prevent rather than to remedy an emergency situation. See, for example, joined cases Booker Aquacultur Ltd (C-20/00) and Hydro Seafood GSP Ltd (C-64/00) v. The Scottish Ministers [2003] ECR I-07411. In these cases the legality of an EU act designed to control fish diseases was unsuccessfully challenged on human rights grounds (the right to property).

3 Articles 196 (civil protection), 214 (humanitarian aid) and 222 (solidarity clause) of the TFEU were only introduced with the Lisbon Treaty. Article 222 TFEU is the real novelty of the 2009 Treaty. On this article see Blockmans’ contribution to this book. The EU has acted in the area of civil protection and humanitarian aid on the basis of pre-Lisbon Treaty provisions such as Article 103 of the Euratom Treaty, in conjunction with the current Article 352 TFEU (civil protection) and the development cooperation provisions (humanitarian aid).

4 For example, the EU adopted a number of measures that had the effect of preventing national responses to an emergency in order to safeguard the functioning of the internal market in relation to bovine spongiform encephalopathy (BSE) and other crises related to food safety and/or animal health protection. See infra.

5 See infra section n. 3 on the “Kadi line of cases” starting with Case T-315/01, Yassin Abdullah Kadi v. Council and Commission [2005] ECR II-649.