

# Emergency! But What about Legal Protection in the EU?

Tom BINDER\*, Argyro KARAGIANNI\*\* and Miroslava SCHOLTEN\*\*\*

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## Abstract

*The EU institutions and agencies have become increasingly involved in enforcing EU law directly vis-à-vis private actors. A number of such EU entities have also acquired the so-called emergency powers, which allow interference with the legal position of a private party. Given the lack of research in this area, the question that this article addresses is whether relevant safeguards have been introduced to ensure the rule of law in such situations to prevent the abuse of executive discretion by public authorities. What are the relevant safeguards in the emergency in the EU in the first place? Having analysed relevant EU legislation and case law, the article offers a complete overview of all the existing EU entities with the emergency powers and shows a great diversity in the extent to which the EU legislator has regulated procedural safeguards in relevant law. The article discusses what safeguards need to be ensured in an emergency and argues for clarity of legislative frameworks in this respect.*

## I. INTRODUCTION

The EU has become increasingly involved in enforcing EU law directly vis-à-vis private actors.<sup>1</sup> Enforcement, ie monitoring compliance, investigating an alleged violation and sanctioning for violation, can restore non-compliance and promote attainment of policy goals. Direct enforcement by EU authorities has a potential to address a number of non-implementation issues occurring for procedural and/or substantive reasons.<sup>2</sup> Procedurally, Member States could be late with transposing EU legislation at home and could lack financial and human resources to apply and enforce EU law properly. Substantively, the wrong transposition (on purpose and not) and (political) unwillingness

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\* Junior lecturer of EU law, Utrecht University, the Netherlands: [t.j.binder@uu.nl](mailto:t.j.binder@uu.nl).

\*\* Lawyer and a PhD researcher, Utrecht University, the Netherlands, funded under the “vidi” grant of Professor M Luchtman by the Dutch Council for Scientific Research (NWO): [a.m.karagianni@uu.nl](mailto:a.m.karagianni@uu.nl).

\*\*\* Associate Professor of EU Law, Utrecht University, who gratefully acknowledges the financial support of the NWO in writing this article via her “veni” grant: [m.scholten@uu.nl](mailto:m.scholten@uu.nl). Argyro and Miroslava are members of the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE). All authors are grateful to Professor Rob Widdershoven as well as an anonymous reviewer appointed by the journal for their useful comments on the earlier drafts of this article.

<sup>1</sup> M Scholten and M Luchtman, *Law Enforcement by EU Authorities* (Edward Elgar 2017); M Scholten, “Mind the trend! Enforcement of EU law has been moving to ‘Brussels’” (2017) 24(9) *Journal of European Public Policy* 1348; M Scholten and D Scholten, “From Regulation to Enforcement in the EU Policy Cycle: A New Type of Functional Spillover?” (2017) 55(4) *Journal of Common Market Studies* 925.

<sup>2</sup> Scholten (2017), *supra*, note 1.

could lead to non-implementation. In addition, differences in national laws and procedures could cause disparities in uniform application of EU law and ineffectiveness of EU policies.<sup>3</sup>

The emerging research in the area of direct enforcement by EU authorities has mapped out the EU enforcement authorities and their cooperation with national authorities from such perspectives as accountability<sup>4</sup> and protection of procedural safeguards.<sup>5</sup> Both studies conducted by groups of international researchers and practitioners have concluded that the shift/aggregation of direct enforcement power at the EU level has not been accompanied by the establishment of appropriate accountability frameworks and procedural safeguards to ensure the rule of law.

What the studies have not yet addressed is the following. In a number of cases, the EU enforcement authorities or risk regulators have received the so-called (by the EU legislation) emergency enforcement powers to, for instance, suspend or prohibit fishing activities or dangerous food. The question is whether relevant safeguards have been introduced to ensure the rule of law in such situations to prevent the abuse of executive discretion by public authorities. What are the relevant safeguards in the emergency in the EU in the first place? No research exists in this respect. This article aims to fill in this gap in normative and empirical research, which is valuable in at least two respects. First, it maps out all the existing cases where an EU authority has a direct enforcement emergency power and discusses all these cases in a comparative way. This will help academics and practitioners be aware of the ongoing development of a proliferation of direct enforcement emergency powers at the EU level across sectors, which in turn seems to necessitate the development of the concept of emergency powers and safeguards' framework that they may require. Second, the article wishes to boost a normative debate on how safeguards and executive discretion, which is necessary for policy effectiveness, can be balanced in the emergency in the EU. The rationale behind emergency power is clear—protection of consumers, environment, public health, to name but a few—but how can it be reconciled with the rule of law ideals and the risk of abuse of public power?

We proceed as follows. We start by discussing what an emergency means in the EU (section II). To answer this question, we analyse the relevant EU legislation granting such powers to EU entities. Having checked relevant legislation in relation to all the EU executive actors,<sup>6</sup> we have drafted an exhaustive list of EU enforcement authorities (EEAs) enjoying the so-called emergency powers. We have investigated such legislation with respect to what an emergency entails, what decisions can be taken, by whom, against whom and what safeguards have been prescribed in that relevant legislation to ensure legal protection of private actors. In this section, we show that the emergency powers given to EEAs imply taking decisions affecting the legal position of private actors, such as prohibiting certain activities. The legislative framework concerning

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<sup>3</sup> M Scholten and A Ottow, "Institutional Design of Enforcement in the EU: the Case of Financial Markets" (2014) 10 (5) *Utrecht Law Review* 80.

<sup>4</sup> Scholten and Luchtman, *supra*, note 1.

<sup>5</sup> MJJP Luchtman et al., "Investigatory powers and procedural safeguards – Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)" (2 May 2017) (Utrecht University).

<sup>6</sup> Our scan included the search for terms such as "emergency", "urgency", and "threat", in the legislation of EEAs.

procedural safeguards, however, differs from EEA to EEA; needless to say, procedural safeguards should differ concerning the stage of the rule-making procedure (decision-making stage or judicial review, for example). The following question becomes what legal protection private actors can rely upon at the EU level (section III). Our focus is primarily on legal protection in the field of direct enforcement, ie decisions issued by EEAs against private actors. First, we analyse the procedural safeguards that should generally apply in an emergency in the phase of decision-making. Second, we discuss the judicial review of emergency powers. In section IV, we conclude by arguing for the importance of including procedural safeguards in legislation that grants emergency powers to EEAs to ensure the rule of law in the EU.

## II. EMERGENCY ENFORCEMENT POWERS OF EEAS

The European Commission (EC) constitutes the principal executive body of the EU, charged with overseeing the application of Union law under the control of the Court of Justice of the European Union.<sup>7</sup> However, the EC is not the sole EU entity holding direct enforcement powers. Aside from the EC, such executive bodies as the European Central Bank (ECB), the European Securities and Markets Authority (ESMA), European Medicines Agency (EMA), the European Aviation Safety Agency (EASA), the European Anti-Fraud Office (OLAF), and the European Fisheries Control Agency (EFCA) may possess some type of direct enforcement power.<sup>8</sup> In addition to this list, the EC, ESMA, EIOPA, EBA, and the European Border and Coast Guard Agency (EBCG) have been awarded particular powers, to be exercised in case of what relevant EU legislation calls an “emergency”. Also, a legislative proposal to award this type of power to the EASA is currently tabled. What is an emergency? What powers does it imply? Who can issue “emergency decisions” and against whom? What are the safeguards that the legislation envisages in such cases? This section discusses these questions based on the original data gathered and presented in Table 1.

### 1. What constitutes an emergency?

When comparing the various emergency powers awarded to the aforementioned EEAs, notable differences arise as to what constitutes an emergency that warrants the exercise of an emergency power.

The first cases in point are the emergency powers of the EC. Within the context of food policy, for instance, the EC may exercise emergency powers where it is evident that food or feed is likely to constitute a serious risk to human health, animal health or the environment.<sup>9</sup> Furthermore, as regards fishery policy, there are two categories of emergency powers to be exercised by the EC. First, under Regulation (EC) No 1224/2009, an emergency arises, *inter alia*, if there is evidence that fishing activities or measures adopted by a Member State threaten the marine eco-system requiring immediate action.<sup>10</sup> Second, under Regulation (EC) No 1005/2008, emergency measures can be adopted if there is evidence that third-country measures undermine conservation and management efforts by regional fisheries

<sup>7</sup> TEU, Art 17.

<sup>8</sup> Scholten and Luchtman, *supra*, note 1.

<sup>9</sup> Regulation 178/2002, Art 53(1).

<sup>10</sup> Regulation 1224/2009, Art 108(1).

**Table 1.** An overview of emergency enforcement powers of EEAs

<b>EEA</b>	<b>Legal Basis<sup>11</sup></b>	<b>Emergency power</b>	<b>Legal form</b>	<b>Those affected</b>	<b>Safeguards in Regulation</b>
<b>EC (food)</b>	Article 53 Regulation 178/2002	Suspend or condition the import, placing on the market, and use of food/feed; any other appropriate measure.	Commission Decision	EU/third country producers, importers, retailers and consumers of food/feed.	None
<b>EC (fisheries)</b>	Article 108 Regulation 1224/2009	Suspension or prohibition of fishing activities; closure of fisheries; more.	Commission Decision	Fishing vessels flying the flag of a Member State; fisheries; Community operators; producers, importers, retailers and consumers of fish/fisheries products;	Proportionality; limited duration
<b>EC (fisheries)</b>	Article 36 Regulation 1005/2008	Deny third country fishing vessels access to ports of the Member States; EU fishing vessels are not allowed to fish in maritime waters under the jurisdiction of a third country; more.	Commission Decision	Fishing vessels flying the flag of a third country; fishing vessels flying the flag of a Member State.	Limited duration
<b>ESMA (financial markets)</b>	Article 18 Regulation 1095/2010	Address a financial market participant to require the necessary action to comply with its obligations under EU legislation, including the cessation of any practice.	Individual decision by the Agency	Financial market participants (credit rating agencies and trade repositories)	Adversarial principle prior to decision; motivational requirement; providing information on legal remedies; repeated review of decision; publicity of decision; Board of Appeal; CJEU; obligation of professional secrecy; data protection.
<b>EIOPA (financial markets)</b>	Article 18 Regulation 1094/2010	Address a financial institution to require the necessary action to comply with its obligations under EU legislation, including the cessation of any practice.	Individual decision by the Agency	Financial institutions (insurance and occupational pensions)	Adversarial principle prior to decision; motivational requirement; providing information on legal remedies; repeated review of decision; publicity of decision; Board of Appeal; CJEU; obligation of professional secrecy; data protection.

<b>EBA</b> (financial markets)	Article 18 Regulation 1093/2010	Address a financial institution to require the necessary action to comply with its obligations under EU legislation, including the cessation of any practice.	Individual decision by the Agency	Financial institutions (credit institutions, investment firms, and financial conglomerates)	Adversarial principle prior to decision; motivational requirement; providing information on legal remedies; repeated review of decision; publicity of decision; Board of Appeal; CJEU; obligation of professional secrecy; data protection.
<b>EBCG</b> (external borders)	Article 19 Regulation 2016/1624	Organise and coordinate rapid border interventions; organise return interventions; more.	Implementing action	Third-country nationals	Fundamental rights officer; complaint mechanism; transparency
<b>EASA</b> (aviation)	Article 55 R Regulation COM(2015) 613 final	Temporary responsibility for certification, oversight and enforcement.	Implementing action	Airline operators	Appeal; CJEU

<sup>11</sup> Henceforth, where combined discussion of the European Supervisory Authorities (ESAs) EBA, EIOPA, and ESMA so permits, their respective legal bases Regulation 1093/2010, Regulation 1094/2010, and Regulation 1095/2010 shall be referred to jointly as Reg ESAs.

management organisations.<sup>12</sup> Thus, while an emergency in the context of food policy requires a serious risk to human health, animal health or the environment, to be “evident”, an emergency within the context of fishery policy requires “evidence” that conservation and management measures are undermined, or that the marine eco-system is threatened. Accordingly, it could be argued that different thresholds apply.

Another illustrative difference may be found in the either concrete or ambiguous formulation of criteria. On the one hand, the exercise of emergency powers by ESMA, EIOPA, or EBA, all within the context of financial market regulation, requires the existence of “adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union”.<sup>13</sup> On the other hand, an emergency warranting the exercise of emergency powers by the EBCG arises “where control of the external borders is rendered ineffective to such an extent that it risks jeopardising the functioning of the Schengen area”.<sup>14</sup> Under Regulation (EU) 2016/1624, this situation may arise due to two differing causes. In the first place, aforementioned ineffective control of the external borders may arise because “a Member State does not take the necessary measures in accordance with a decision of the [EBCG] management board [...]”.<sup>15</sup> In the second place, the functioning of the Schengen area may be jeopardised because “a Member State facing specific and disproportionate challenges at the external borders has either not requested sufficient support from the [EBCG], or is not taking the necessary steps to implement actions”.<sup>16</sup> Moreover, within the context of aviation safety, three cumulative conditions should be met: (1) EASA inspection or monitoring indicates serious and persisting inability of a Member State to effectively perform its duties under the proposed Regulation; (2) the EC has requested the Member State concerned to remedy this deficiency; and (3) the Member State failed to do so in a satisfactory manner and the resulting situation endangers civil aviation safety.<sup>17</sup> Thus, while the constitutive criteria of an emergency within the context of financial market regulation are formulated in a relatively general and ambiguous manner, the criteria that constitute an emergency situation warranting the exercise of EBCG and EASA emergency powers, by contrast, are far more concrete.

## 2. What emergency powers can be exercised?

Aside from the criteria constitutive of an emergency, distinctions can be made according to the emergency powers at the disposal of the EEAs. The following sections discuss the contents and legal forms of emergency powers.

### a. Contents of emergency powers

A comparison of contents of the various EEA emergency enforcement powers reveals notable differences.

<sup>12</sup> Regulation 1005/2008, Art 36(1).

<sup>13</sup> Reg ESAs, Art 18(1).

<sup>14</sup> Regulation 2016/1624, Art 19(1).

<sup>15</sup> *Idem*.

<sup>16</sup> *Idem*.

<sup>17</sup> COM (2015) 613 final, Art 55(1).

On the one hand, the emergency powers bestowed upon the EC are presented in an open-ended indicative manner. For instance, the EC emergency enforcement powers in the area of food policy include, first, suspension of the import, the placing on the market, or the use of foods and feeds originating from within the EU or a third country (of transit).<sup>18</sup> Second, the EC can lay down special conditions for those foods and feeds.<sup>19</sup> An illustrative example of this particular emergency power constitutes Commission Decision 2009/727/EC, by which the Member States were required to authorise the importation of consignments of crustaceans of aquaculture origin imported from India, intended for human consumption or animal feed, solely upon provision of results of an analytical test carried out at origin to ensure that they did not present a danger to human health.<sup>20</sup> Lastly, the EC is granted the competence to adopt any other appropriate interim measures.<sup>21</sup>

Furthermore, in the context of fisheries policy, a non-exhaustive indicative list of EC emergency enforcement powers is provided under Regulation 1224/2009.<sup>22</sup> First, the EC can suspend the fishing activities of vessels flying the flag of a Member State.<sup>23</sup> Second, it can order the closure of fisheries.<sup>24</sup> Third, the EC can decide upon a prohibition against Community operators accepting landings, placing in cages for fattening or farming, or transshipments of fish and fisheries products caught by the vessels flying the flag of a Member State.<sup>25</sup> Fourth, it can prohibit the placing on the market or use for other commercial purposes of fish and fisheries products caught by the vessels flying the flag of a Member State.<sup>26</sup> Fifth, it can decide upon a prohibition against the provision of live fish for fish farming in the waters under the jurisdiction of a Member State.<sup>27</sup> Sixth, it can prohibit the accepting of live fish caught by vessels flying the flag of a Member State for the purposes of fish farming in waters under the jurisdiction of the other Member States.<sup>28</sup> Seventh, the EC can prohibit fishing vessels flying the flag of a Member State to fish in waters under the jurisdiction of other Member States.<sup>29</sup> Lastly, it can decide upon the modification of the fishing data submitted by Member States in an appropriate way.<sup>30</sup>

Also in relation to fisheries policy, Regulation 1005/2008 provides for a non-exhaustive illustrative list of emergency measures that may be adopted by the EC in similar vein.<sup>31</sup> First, the EC can decide that a fishing vessel authorised to fish and flying the flag of a third country shall not be granted access to the ports of Member States, except in case of force majeure or distress.<sup>32</sup> Second, the EC can order that fishing

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<sup>18</sup> Regulation 178/2002, Art 53(1).

<sup>19</sup> *Idem*.

<sup>20</sup> Dec 2000/727, Art 2.

<sup>21</sup> Regulation 178/2002, Art 53(1).

<sup>22</sup> Regulation 1224/2009, Art 108(2).

<sup>23</sup> *Idem*.

<sup>24</sup> *Idem*.

<sup>25</sup> *Idem*.

<sup>26</sup> *Idem*.

<sup>27</sup> *Idem*.

<sup>28</sup> *Idem*.

<sup>29</sup> *Idem*.

<sup>30</sup> *Idem*.

<sup>31</sup> Regulation 1005/2008, Art 36(2).

<sup>32</sup> *Idem*.

vessels flying the flag of a Member State shall not be authorised to engage in joint fishing operations with vessels flying the flag of a third country.<sup>33</sup> Third, it can decide that fishing vessels flying the flag of a Member State shall not be authorised to fish in maritime waters under the jurisdiction of a third country, without prejudice to the provisions set out in bilateral fishing agreements.<sup>34</sup> Fourth, it can decide that the provision of live fish for fish farming in maritime waters under the jurisdiction of a third country shall not be authorised.<sup>35</sup> Lastly, the EC can order that live fish caught by fishing vessels flying the flag of a third country shall not be accepted for the purposes of fish farming in maritime waters under the jurisdiction of a Member State.<sup>36</sup> Thus, the EC emergency enforcement powers in the area of food and fisheries policy may include, but are not limited to, the imposition of suspensions and prohibition. In similar vein, the emergency enforcement powers attributed to ESMA, EIOPA, and EBA, all within the context of financial market regulation, exist in adopting individual decisions addressed to financial market participants requiring the necessary action to comply with their obligations under applicable EU legislation,<sup>37</sup> which may include the cessation of any practice.<sup>38</sup> Thus, much like the EC, the financial market agencies can require the cessation of any practice, which can be equated to an imposition of suspension or prohibition. Lastly, the array of emergency enforcement powers attributed to EASA may be considered broadly formulated. Under the recent proposal for a new EASA Regulation, the EC can decide to temporarily transfer a Member State's responsibility for certification, oversight and enforcement tasks—with respect to any or all organisations, operators, personnel, aircraft, flight simulation training devices or aerodromes for which the Member State concerned is responsible under that Regulation—to the EASA.<sup>39</sup>

On the other hand, the emergency powers available to the EBCG are given by means of an exhaustive list. Regulation 2016/1624 provides for an exhaustive list of emergency enforcement powers to be exercised by the EBCG upon Council decision.<sup>40</sup> First, the EBCG can organise and coordinate rapid border interventions and deploy European Border and Coast Guard teams from the rapid reaction pool, and additional European Border and Coast Guards teams as appropriate.<sup>41</sup> Second, it can deploy European Border and Coast Guard teams in the framework of the migration management support teams at hotspot areas.<sup>42</sup> Third, it can coordinate activities for one or more Member States and third countries at the external borders, including joint operations with neighbouring third countries.<sup>43</sup> Fourth, it can deploy technical equipment.<sup>44</sup> Lastly, the EBCG can organise return interventions.<sup>45</sup>

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<sup>33</sup> *Idem.*

<sup>34</sup> *Idem.*

<sup>35</sup> *Idem.*

<sup>36</sup> *Idem.*

<sup>37</sup> For all applicable legislation, see: Reg ESAs, Art 1(2).

<sup>38</sup> Reg ESAs, Art 18(4).

<sup>39</sup> COM(2015) 613 final, Art 55(2).

<sup>40</sup> Regulation 2016/1624, Art 19(3).

<sup>41</sup> *Idem.*

<sup>42</sup> *Idem.*

<sup>43</sup> *Idem.*

<sup>44</sup> *Idem.*

<sup>45</sup> *Idem.*

### *b. Legal form of emergency decisions*

In addition to a comparison based on the contents of EEA emergency enforcement powers, their corresponding legal forms may be addressed. In comparing the legal forms of EEA emergency enforcement powers, four distinct variants are unveiled.

First, some emergency powers take the form of Commission Implementing Decision. The EC emergency enforcement powers in the area of food policy, under Article 53 Regulation 178/2002, for instance, the form of Commission Decision.<sup>46</sup> Such decision shall be adopted in accordance with the examination procedure provided for in Article 5 of Regulation 182/2011, on the EC's own initiative or at the request of a Member State.<sup>47</sup> The EC emergency powers in the area of common fisheries policy, exercised under either Article 108 Regulation 1224/2009 or Article 36 Regulation 1005/2008, are also adopted in the form of Commission Decision.

Furthermore, some emergency powers take the form of implementing actions following a Commission Implementing Decision. To this extent, the emergency enforcement powers granted to EASA, under the Article 55 of the proposal, exist in implementing actions following a Commission Implementing Decision adopted in accordance with the advisory procedure of Article 4 Regulation 182/2011.<sup>48</sup>

Second, some emergency powers take the form of "individual decision" by the Agency following a prerequisite Council Decision. Within the context of financial market regulation, the emergency enforcement powers exercised by ESMA, EIOPA, and EBA take the form of individual decisions. These decisions, only to be taken following a Council Decision determining the existence of an emergency,<sup>49</sup> prevail over any previous decision adopted by the competent authorities on the same matter.<sup>50</sup>

Lastly, some emergency powers take the form of implementing actions following a Council Implementing Decision. The emergency enforcement powers attributed to the EBCG, under Article 19 Regulation 2016/1624, following a Council Implementing Decision identifying specific measures to be taken in order to mitigate perceived risks and requiring the Member State concerned to cooperate, exist in implementing actions.<sup>51</sup>

### *c. Who stands to be affected by the exercise of emergency powers?*

Further distinction can be made in relation to the various private parties that stand to be affected by the multiple EEA emergency enforcement powers discussed, ranging from individual natural persons (eg third-country nationals in the case of EBCG) to comprehensive legal persons (eg financial conglomerates in the case of EBA).

First, as regards the EC emergency powers in the area of food policy, adopted under Article 53 Regulation 178/2002, those who stand to be affected are the Union producers, (re)distributors, and users, as well as third-country producers and (re)distributors, of the feeds and foods being subjected to suspension, special conditions, or any other

<sup>46</sup> Cf TFEU, Art 288. See, for example: Commission Decision 2008/866/EC of 12 November 2008 on emergency measures suspending imports from Peru of certain bivalve molluscs intended for human consumption [2008] OJ L307/9.

<sup>47</sup> Regulation 178/2002, Art 53(1) in conjunction with Art 58(2); Regulation 182/2011, Art 5.

<sup>48</sup> COM(2015) 613 final, Art 55(2) in conjunction with Art 116(2).

<sup>49</sup> Cf Reg ESAs, Art 18(2).

<sup>50</sup> Reg ESAs, Art 18(5).

<sup>51</sup> Regulation 2016/1624, Art 19(1).

appropriate interim measure. Moreover, in relation to the EC emergency powers within the context of the common fisheries policy, under Article 108 Regulation 1224/2009, a variety of potentially affected parties can be pointed out. These measures can affect fishing vessels flying the flag of a Member State, fisheries, and other Community operators.<sup>52</sup> In addition, those primarily affected by EC emergency measures adopted under Article 36 Regulation 1005/2008 are fishing vessels flying the flag of a Member State or third country. These emergency measures are capable of affecting legal persons.

Second, within the context of financial market regulation, the emergency enforcement powers exercised by ESMA, EIOPA, and EBA affect either financial market participants or financial institutions. In the case of ESMA, the potentially affected financial market participants equate to credit rating agencies and trade repositories.<sup>53</sup> In the case of EIOPA, financial institutions that stand to be affected are insurance and occupational pension providers.<sup>54</sup> In the case of EBA, lastly, these financial institutions are defined as credit institutions, investment firms, and financial conglomerates.<sup>55</sup> Although the emergency measures here under consideration too affect legal persons, in comparison to the EC emergency enforcement powers discussed above, the former are likely to encompass the more sizeable, institutionalised legal persons. Furthermore, in relation to the emergency enforcement powers awarded to the EASA, under the proposed Regulation, those affected would primarily be aircraft operators.<sup>56</sup> Thus, here too, the enforcement powers stand to affect the more sizeable legal persons.

Finally, by contrast, those that stand to be affected by the emergency enforcement powers attributed to the EBCG, are mainly third-country nationals. Thus, here, it is individual natural persons rather than legal persons that are confronted with the EEA emergency power.

### 3. What safeguards are put in place to protect the affected?

When comparing the various safeguards put in place in order to protect those affected by the use of emergency enforcement powers by EEAs, stark differences unveil themselves as regards both the type and amount of the applicable safeguards regulated in relevant legislation. A distinction can be made between those safeguards that apply up until decision to exercise an emergency enforcement power is made, and those that apply after the decision is made.

<sup>52</sup> Cf Regulation 1224/2009, Art 4(19): “operator” means the natural or legal person who operates or holds any undertaking carrying out any of the activities related to any stage of production, processing, marketing, distribution and retail chains of fisheries and aquaculture products.

<sup>53</sup> Cf supra, note 29, Reg 1095/2010, Art 4(1): “financial market participant” means any person in relation to whom a requirement in the legislation referred to in Art 1(2) or a national law implementing such legislation applies.

<sup>54</sup> Cf supra, note 29, Reg 1094/2010, Art 4(1): “financial institutions” means undertakings, entities and natural and legal persons subject to any of the legislative acts referred to in Art 1(2). With regard to Directive 2005/60/EC, “financial institutions” means only insurance undertakings and insurance intermediaries as defined in that Directive.

<sup>55</sup> Cf supra, note 29, Reg 1093/2010, Art 4(1): “financial institutions” means “credit institutions” as defined in Art 4(1) of Directive 2006/48/EC, “investment firms” as defined in Art 3(1)(b) of Directive 2006/49/EC, and “financial conglomerates” as defined in Art 2(14) of Directive 2002/87/EC, save that, with regard to Directive 2005/60/EC, “financial institutions” means credit institutions and financial institutions as defined in Art 3(1) and (2) of that Directive.

<sup>56</sup> Cf COM(2015) 613 final, Art 3(10): “operator” means any legal or natural person operating or proposing to operate one or more aircraft or one or more aerodromes.

As regards the EC's emergency enforcement powers in the area of food policy, for instance, no safeguards are named explicitly. The relevant Article 53 of Regulation 178/2002 does, however, make merely ambiguous reference to a proportionality requirement, where it states that adoption of a specific emergency measure depends "on the gravity of the situation".<sup>57</sup> Moreover, evidently, any act of the EC may be scrutinised through invocation of the Treaty provisions on judicial control by the Court of Justice of the European Union.<sup>58</sup> Notwithstanding, no additional safeguards have been implemented in relation to this emergency measure. Within the context of the common fisheries policy, a more explicit reference is made to the proportionality principle, where it is held that "the emergency measures provided for [...] shall be proportionate to the threat".<sup>59</sup> In addition, the limited duration of the emergency measures is provided, where they "shall last not more than six months", although, "[t]he Commission may take a new decision to extend the emergency measures for no more than six months".<sup>60</sup> Notwithstanding, the amount of safeguards applicable to the exercise of EC, emergency enforcement powers remains relatively small.

As regards the emergency enforcement powers attributed to the ESAs, namely ESMA, EIOPA, and EBA, significantly more safeguards apply. In the first place, those EEAs are bound to uphold the adversarial principle in their decision-making process. Before taking the decision to exercise an emergency power, they "shall inform any named addressee of [their] intention to adopt the decision, setting a time limit within which the addressee may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter".<sup>61</sup> Moreover, ESMA, EIOPA and EBA are required to state the reasons on which their decisions are based.<sup>62</sup> Also, they are required to inform the addressees of their decisions of the legal remedies available under the respective Regulation.<sup>63</sup> In this regard, it may be noted that "[a]ny natural or legal person, including competent authorities, may appeal against [an ESMA, EIOPA, or EBA emergency measure] which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person" before the Board of Appeal.<sup>64</sup> Moreover, proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting decisions taken by the Board of Appeal.<sup>65</sup> The decisions to adopt emergency measures shall be made public and shall state the identity of the competent authority or financial market participant concerned and the main content of the decision, unless such publication is in conflict with the legitimate interests of financial market participants in the protection of their business secrets or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part

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<sup>57</sup> Cf Regulation 178/2002, preamble 17.

<sup>58</sup> TFEU, Art 263.

<sup>59</sup> Regulation 1224/2009, Art 108(2).

<sup>60</sup> *ibid*, Art 108(1); Reg 1005/2008, Art 36(1).

<sup>61</sup> Reg ESAs, Art 39(1).

<sup>62</sup> *ibid*, Art 39(2).

<sup>63</sup> *ibid*, Art 39(3).

<sup>64</sup> *ibid*, Art 60(1).

<sup>65</sup> *ibid*, Art 61(1).

of the financial system of the Union.<sup>66</sup> Furthermore, all staff of ESMA, EIOPA, and EBA are “subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased”.<sup>67</sup> In addition, the EEAs are subject to requirements for the processing of personal data under Regulation (EC) No 45/2001.<sup>68</sup> Lastly, ESMA, EIOPA, and EBA are under an obligation to review a decision to exercise an emergency measure at appropriate intervals.<sup>69</sup>

As regards the emergency enforcements powers attributed to the EBCG under Regulation 2016/1624, a particular safeguard consists in the fundamental rights officer that is tasked, *inter alia*, with monitoring the EBCG’s compliance with fundamental rights, and promoting its respect of fundamental rights.<sup>70</sup> In addition, the EBCG, in cooperation with the fundamental rights officer, must take the necessary measures to set up a complaints mechanism to monitor and ensure the respect for fundamental rights in all of its activities.<sup>71</sup> In this regard, any person who is directly affected by the actions of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation or return intervention and who considers him or herself to have been the subject of a breach of his or her fundamental rights due to those actions, or any party representing such a person, may submit a complaint in writing to the EBCG.<sup>72</sup> However, only substantiated complaints involving concrete fundamental rights violations shall be admissible.<sup>73</sup> Finally, in terms of transparency, it may be noted that the EBCG is subject to Regulation (EC) No 1049/2001 when handling applications for access to documents held by it.<sup>74</sup>

In relation to the decision to exercise the emergency enforcement powers awarded to the EASA under the newly-proposed regulation, an appeal may be brought before the Board of Appeal.<sup>75</sup> Any natural or legal person may appeal against a decision addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former.<sup>76</sup> Furthermore, it is important to note that the appeal, together with a substantiated statement of grounds thereof, must be filed in writing at the Board of Appeal’s secretariat within two months of the notification of the measure to the person concerned or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.<sup>77</sup> Actions for the annulment of emergency measure decisions of the EASA may be brought before the Court of Justice of the European Union only after all appeal procedures within the EASA have been exhausted.<sup>78</sup>

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<sup>66</sup> *ibid*, Art 39(5).

<sup>67</sup> *ibid*, Art 70(1).

<sup>68</sup> *ibid*, Art 71.

<sup>69</sup> *ibid*, Art 39(4).

<sup>70</sup> Regulation 2016/1624, Art 71(1).

<sup>71</sup> *ibid*, Art 72(1).

<sup>72</sup> *ibid*, Art 72(2).

<sup>73</sup> *ibid*, Art 72(3).

<sup>74</sup> *ibid*, Art 74(3).

<sup>75</sup> COM(2015) 613 final, Art 97(1).

<sup>76</sup> *ibid*, Art 98.

<sup>77</sup> *ibid*, Art 99.

<sup>78</sup> *ibid*, Art 103(2).

*All in all*, the emergency powers given to EEAs imply taking decisions affecting the legal position of private actors, such as prohibiting certain activities. The legislative frameworks concerning procedural safeguards differ from EEA to EEA.

More specifically, concerning the urgency of taking an emergency action or decision, differences may exist from the necessity to take an immediate action (as the term “emergency” may suggest) to situations where the action/decision can take time. This distinction can be relevant for the discussions of procedural safeguards since it can influence the possibility to lift some of the safeguards, such as those which are applicable in the time prior to taking an investigative action, for instance. This is because certain safeguards are applicable in the period leading up to the decision to exercise emergency enforcement powers. In this regard, reference could be made to the application of the adversarial principle, motivational requirements, the application of the proportionality principle, and the informing on available legal remedies. In the second place, certain safeguards are applicable after the decision to exercise an emergency enforcement power has been made. For instance, a limited duration of the relevant measure, the obligation to review the decision at appropriate intervals, the possibility to appeal and to bring the decision before the CJEU, as well as the functioning of a fundamental rights officer. In the last place, certain safeguards are applicable continuously. In this regard, transparency, as well as obligations of professional secrecy and data protection, may be pointed out. As a final remark, the emergency decisions can be addressed to the Member States requesting enforcement actions taken at the national level or directly against the individuals. This again will imply different channels and possibilities for the legal protection (at the EU and/or national levels), to be discussed in the following section.

### III. PERTINENT SAFEGUARDS IN EEA EMERGENCY POWERS IN GENERAL

In this section, we discuss the most relevant legal safeguards in the context of EEA emergency powers, regardless of whether these are mentioned in the relevant legislation or not. Our analysis follows the steps that an emergency typically entails. Before exercising their power, EEAs may need to “open the door”. Subsequently, rights of defence acquire a significant importance, since they ensure a fair procedure, as well as proportionality when the authority needs to decide promptly. Finally, legal remedies are the only “weapon” left to private parties once an emergency power has been exercised and a decision has been taken.

#### 1. Opening the door: on the inviolability of the home

The idea that business premises shall be afforded protection similar to that of private homes has developed along the years. In *Hoechst v Commission*,<sup>79</sup> the CJEU constructed a principle regarding legal persons’ right to privacy, stating that “any intervention by public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law (...)”.<sup>80</sup> In *Roquette Frères*,<sup>81</sup> it was recognised that protection for the home may be extended to

<sup>79</sup> Case C-46/87, *Hoechst v Commission* [1989] ECLI:EU:C:1989:337.

<sup>80</sup> *Idem*, para. 19.

<sup>81</sup> Case C-94/00, *Roquette Frères* [2002] ECLI:EU:C:2002:603.

cover business premises.<sup>82</sup> There, the Court ruled that the arbitrariness of on-the-spot inspections must be authorised *ex ante* by a national court. However, in the recent *Deutsche Bahn* case<sup>83</sup> the CJEU is of the opinion that the lack of *ex ante* judicial authorisation may be offset by the existence of *ex post* judicial control.<sup>84</sup> Either way, some sort of judicial control of the inspection is necessary.

## 2. Once the door is opened: rights of defence

Let us imagine that an EEA prohibits a certain economic activity. Rights of defence ensure that the administrative procedures meet minimum requirements of fairness. Below, we discuss rights that—in our view—shall be present during EEA emergency administrative procedures. In doing so, we also discuss, based on case law, under what circumstances rights can be set aside.

Legal professional privilege (LPP) implies that written communication and correspondence between lawyer and client are confidential. The two leading cases concerning LPP are *AM & S Europe*<sup>85</sup> and *Akzo Ackros*.<sup>86</sup> In the EU, LPP covers only external lawyers and not in-house legal counsels.<sup>87</sup> Information exchanged between clients and external lawyers will be protected as long as it was exchanged for the purpose of protecting the client's rights of defence. Therefore, advice falling outside this classification, such as general legal advice, is not protected.<sup>88</sup>

The right to legal assistance has been recognised by the CJEU as one of the rights of defence that must be observed during fact-finding stages.<sup>89</sup> EU case law on this right in the context of EEA actions is scarce.<sup>90</sup> However, in EU competition law, enforcement the EU Commission will typically tolerate a short delay of the inspection until a lawyer is present, even though it is not obliged to do so.<sup>91</sup> In practice, if the inspected party occupies in-house lawyers, officials tend not to delay the inspection.<sup>92</sup>

The right to be informed or adversarial principle, which consists of the right to have access to the file of the case and of the right to be heard, is enshrined in Article 41(2) CFR under the heading of “good administration”. It postulates that a person against whom an administrative procedure has been initiated must have been given the opportunity to make his views known on the basis of the documents and information used by EEAs to establish the alleged infringement.<sup>93</sup> In that respect, the access to the file of the case is a prerequisite for effectively exercising the right to be heard. The CJEU has recognised

<sup>82</sup> *Idem*, para. 29.

<sup>83</sup> Case C-583/13 P, *Deutsche Bahn v Commission* [2015] ECLI:EU:C:2015:404.

<sup>84</sup> *Deutsche Bahn v Commission*, para. 32; see also R Widdershoven and P Craig, “Pertinent issues of judicial accountability in EU shared enforcement” in Scholten and Luchtman (eds), *supra*, note 1, pp. 249–250.

<sup>85</sup> Case C-155/79, *AM & S v Commission* [1982] ECLI:EU:C:1982:157.

<sup>86</sup> Case C-550/07, *Akzo Nobel v Commission* [2010] ECLI:EU:C:2010:512.

<sup>87</sup> *AM & S v Commission*, paras. 21 and 24; *Akzo Nobel v Commission*, para. 44.

<sup>88</sup> *AM & S v Commission*, para. 25.

<sup>89</sup> *Hoechst v Commission*, para. 16; Case 85/87, *Dow Benelux NV v Commission* [1989] ECLI:EU:C:1989:379, para. 27.

<sup>90</sup> See Case C-136/79, *National Panasonic v Commission* [1980] ECLI:EU:C:1980:169.

<sup>91</sup> European Commission, Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003, para. 6.

<sup>92</sup> T Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/ Anti-subsidies Proceedings* (Kluwer Law International 2011) 152.

<sup>93</sup> Case 234/84, *Belgium v Commission* [1986] ECR 2263, para. 27.

that the right can be set aside if certain conditions, mostly relating to public interest objectives, justify such a limitation. In the *Dokter* case,<sup>94</sup> it was explained that rights of defence do not constitute unfettered prerogatives. Thus, a Dutch authority that had to act promptly against foot-and-mouth disease and hence did not grant the right to be informed,<sup>95</sup> did not act in an arbitrary manner. The Court explained that the adopted measure was not disproportionate because the interested parties were given the opportunity to contest the measures in subsequent proceedings and exercise at that stage their right to be informed.<sup>96</sup> As it can be seen, the courts will in any case engage in a proportionality test (see paragraph 3 below) and assess whether the affected parties had the possibility of judicial protection.

The duty of public authorities to give reasons is essential in giving the opportunity to the affected party to challenge the EEA decision at a later stage, based on the reasons that motivated the adoption of such a decision. The Union courts have repeatedly said that the essence of this obligation is that—through reasons—the authority gives the affected party sufficient information to allow him or her to contest the legality of the decision.<sup>97</sup> If urgency justified that the right to be heard was not granted, compliance with the obligation to state reasons is all the more important because it constitutes the only safeguard enabling the person concerned to make effective use of the legal remedies available to him in order to challenge the lawfulness of that decision.<sup>98</sup>

We can thus see that the obligation to state reasons is pivotal and should at any cost be respected, even if the urgency of the situation justifies setting aside the right to be heard.

### 3. Proportionality

The notion of proportionality is very broad in its scope.<sup>99</sup> We thus limit ourselves to points pertinent to EEA emergency powers. The proportionality principle generally means the following:<sup>100</sup> “the lawfulness of the prohibition of an economic activity is subject to the condition that prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”<sup>101</sup> Thus, proportionality comprises a four-part test: the measure must be appropriate, it should serve a legitimate objective, among different appropriate measures it should be the least restrictive one, and it should not be manifestly disproportionate. Below we discuss case law that is relevant to the issue of EEA emergency powers.

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<sup>94</sup> Case C-28/05, *Dokter* [2006] ECLI:EU:C:2006:408.

<sup>95</sup> *Dokter*, paras. 74–75.

<sup>96</sup> *Dokter*, para. 76.

<sup>97</sup> Case C-350/88, *Société française des Biscuits Delacre e.a. v Commission of the European Communities* [1990] ECLI:EU:C:1990:71, para. 49.

<sup>98</sup> *ibid*, para. 51.

<sup>99</sup> See N Emiliou, *The Principle of Proportionality in European Law – A Comparative Study* (Kluwer 1996); P Craig, *EU Administrative Law* (Oxford University Press 2012); W Sauter, “Proportionality in EU Law: A Balancing Act?” (2012) 15 *Cambridge Yearbook of European Legal Studies* 439, 466.

<sup>100</sup> Case C-331/88, *R v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex p Fedesa* [1990] ECLI:EU:C:1990:39.

<sup>101</sup> See, for instance, *ibid*, para. 13.

Even though most of these cases are concerned with action taken by Member States in the pursuit of an EU goal, it is still relevant to the extent that it can suggest what proportionality means in relation to EEA emergency powers of a similar nature.

In the *Affish* case,<sup>102</sup> a Dutch court made reference for a preliminary ruling regarding the validity of a Commission decision, which banned from the EU fish originating from Japan. The decision was taken pursuant to a Directive that foresaw protective measures in case there was fear about the potential impact of foreign imports on public health. Commission experts had visited fish plants in Japan and were concerned about manufacturing conditions and hygiene. Even though the particular fish plant from which the import was made had not been investigated, the Court dismissed the argument that a total ban was disproportionate. According to the Court, for practical reasons it was impossible to inspect all Japanese fish plants, the results of the expert visits could be extrapolated to describe the situation in Japan as a whole<sup>103</sup> and, in any case, the adoption of protective measures in public health matters required speed.<sup>104</sup>

In *Booker Aquacultur*,<sup>105</sup> the main consideration was whether the failure of the UK government to compensate the applicants for fish stocks that were destroyed due to a disease outbreak, interfered with the fundamental right to property. The Court took the view that fundamental rights are not absolute and, as such, may be subject to restrictions, insofar these restrictions meet objectives of general interest and “do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights”.<sup>106</sup> In the end, it was found that the measures enshrined in the Directive in question were *urgent* and as such aimed at guaranteeing that effective action is taken as soon as a disease breaks out.<sup>107</sup> Owing to the fact that owners were able to restock the affected farms as soon as possible and that the destroyed fish, which showed sign of disease, had no marketable value,<sup>108</sup> it was found that the right to property had not been infringed.

What we can conclude from the foregoing is that in an emergency the EEA will need to engage in a careful assessment. First, it should identify the objectives served by the legislation and assess to what extent the emergency power deployed interferes in a disproportionate manner with these objectives. It thus seems logical that public interest objectives, such as public health concerns, are important reasons to proceed with exercising an enforcement power. Our analysis shows that generally the Court is lenient with prohibitions entailing an emergency, which can be detrimental to public health and safety.

#### 4. Judicial protection

Let us now assume that a company has been shut down and/or merchandise is destroyed. The urgency obviously justified restrictions on certain rights of defence. What can the

<sup>102</sup> Case 183/95, *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* [1997] ECLI:EU:C:1997:373.

<sup>103</sup> *ibid.*, para. 35.

<sup>104</sup> *ibid.*, para. 33.

<sup>105</sup> Joined Cases C-20/00 and C-64/00, *Booker Aquaculture Ltd, t/a Marine Harvest McConnell and Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] ECLI:EU:C:2003:397.

<sup>106</sup> *ibid.*, para. 68.

<sup>107</sup> *ibid.*, para. 79.

<sup>108</sup> *ibid.*, para. 84.

private party do, if he or she disagrees with the action? This person shall have access to an effective legal remedy (Article 47 CFR). In this article we are interested with direct EEA enforcement powers vis-à-vis private actors, thus not with decisions taken by the EEAs against Member States or by Member States against private parties. We first discuss the action for annulment and then we look into the possibility of interim relief. Action for damages is also a possibility. It seems though that the strict requirements that must be met in order for it to succeed, do not render it the most appealing instrument for private parties.

*a. Action for annulment: possibilities and gaps*

Given that private parties subjected to EEA emergency powers are non-privileged applicants, it is important to examine, first, which EEA acts are reviewable and second, standing requirements, ie under what conditions access to the CJEU by non-privileged applicants is possible.

Pursuant to Article 263(1) TFEU, the CJEU reviews the legality of legislative acts and acts of the Council, EU Commission, European Parliament and of the European Council, bodies, agencies or offices intended to produce legal effects vis-à-vis third parties. Given that the parties affected by EEA actions are private parties, it is important to refer to the *IBM v Commission* case,<sup>109</sup> in which the Court expressed the view that private undertakings must be able to establish that the contested measure is “capable of affecting the interests of the applicant by bringing about a distinct change in his legal position”.<sup>110</sup> This distinct change is brought about and the decision is thus reviewable only if it is definitively laying down the position of the EEA in question.<sup>111</sup> Thus, preparatory measures are not reviewable.<sup>112</sup> However, if a party initiates proceedings against a final measure, then any irregularities that may have ensued in the preparatory stages may also be the subject of judicial review.<sup>113</sup> Anyway, the applicant must fill the action for annulment within the two-month period enshrined in Article 263(6) TFEU.

As regards standing, Article 263(4) TFEU prescribes that natural or legal persons who (a) are the addressee(s) of an act or (b) are directly and individually concerned or (c) can establish that a regulatory act is of direct concern to them and does not entail implementing measures, can fill an action for annulment. Therefore, standing may be established either if a person is an addressee of a decision, ie the decision contains his name, *or* if he or she is directly *and* individually concerned. Thus, the person to whom a decision is addressed definitely has standing. The requirements of direct and individual concern answer the question of when a party other than the addressee of a decision, who has been affected in some way by this decision, can bring an action for annulment. The possibility that a person other than the addressee of a decision may have been affected is typical in the policy areas we examined in section II. For instance, in the area of fisheries, destruction of fish stocks may affect fishing vessels, producers, importers, retailers, consumers etc. The criteria for standing were initially developed in the *Plaumann*

<sup>109</sup> Case C-60/81, *IBM v Commission* [1981] ECLI:EU:C:1981:264.

<sup>110</sup> *ibid*, para. 9.

<sup>111</sup> *ibid*, para. 10.

<sup>112</sup> Case T-193/04, *Tillack v Commission* [2006] ECLI:EU:T:2006:292, paras. 63, 64.

<sup>113</sup> K Lenaerts, I Maselis, K Gutman, *EU Procedural Law* (Oxford University Press 2014) 274.

case;<sup>114</sup> case law that followed *Plaumann* is enormous, we thus refer to Lenaerts, Maselis and Gutman,<sup>115</sup> who have encapsulated this case law in four criteria: (a) the contested measure affects directly the legal position of the person, (b) the contested measure must leave no discretion to the pertinent authority for implementing it, (c) the contested measure even though not addressed to this specific person, affects him to such an extent which is tantamount to being addressed to him, (d) the decision is not one of general application, but only affects a closed class of persons. Concerning the third possibility, namely that of a private party contesting a regulatory act that does not contain implementing measures, the applicant must only establish direct concern. In *Inuit*,<sup>116</sup> the CJEU clarified that Article 263(4) TFEU covers all acts of general application apart from legislative acts.

It can be concluded that establishing direct and individual concern may be difficult since most of the authorities, which are EU Commission services, enjoy significant discretion. This does not hold true for the EEAs that follow an agency structure. In short, the addressee of a decision has standing always, while other affected parties must establish direct and individual concern, which can be more complex. If the Commission decision is addressed to a Member State and this Member State addresses a private party, then judicial review takes place at the national level.<sup>117</sup>

#### *b. Interim measure*

Based on the axiom that measures adopted by Union institutions, bodies or agencies are lawful, actions brought before the CJEU do not have a suspensory effect.<sup>118</sup> However, if the Court deems necessary, it may suspend the contested act (Article 278 TFEU) and prescribe interim relief measures in exceptional cases.<sup>119</sup> This begs the question of what does exceptional situation mean.

Three are the substantive requirements in this regard: a *prima facie* case,<sup>120</sup> urgency<sup>121</sup> and the applicant must demonstrate that his interests for the imposition of an interim relief, when balanced with the interests of the other party, outweigh them (balance of interests). *Prima facie* case means that the main application does not appear to be *prima facie* wholly unjustified.<sup>122</sup> Urgency comprises three elements. First, it must be shown that the absence of a judgment in the main proceedings may cause to the applicant serious and irreparable damage.<sup>123</sup> The CJEU has clarified that financial damage cannot

<sup>114</sup> Case 25/62, *Plaumann v Commission* [1963] ECLI:EU:C:1963:17, paras. 106–107.

<sup>115</sup> Lenaerts et al, *supra*, note 113, 319–26.

<sup>116</sup> Case C-583/11 P, *Inuit Tapiriit Kanatami v Parliament and Council* [2013], ECLI:EU:C:2013:625, para. 60.

<sup>117</sup> See M Eliantonio, “Judicial Review in an Integrated Administration: the Case of ‘Composite Procedures’” (2014) 7(2) *Review of European Administrative Law* 65.

<sup>118</sup> A Türk, *Judicial Review in EU Law* (Edward Elgar 2009) 198.

<sup>119</sup> Case T-637/11 R, Order of the President of the General Court of 25 January 2012, *Euris Consult Ltd v European Parliament* [2012] ECLI:EU:T:2012:28, para. 9.

<sup>120</sup> Rules of Procedure of the Court of Justice, Art 160(3).

<sup>121</sup> *ibid.*

<sup>122</sup> Case C-280/93 R, Order of the Court of 29 June 1993, *Federal Republic of Germany v Council of the European Communities*, ECLI:EU:C:1993:270, para. 21; Case T-65/98, *Van den Bergh Foods v Commission*, [1998] ECLI:EU:T:1998:155, para. 61.

<sup>123</sup> Case C-377/98 R, *Netherlands v Parliament and Council*, Order of the President of the Court of 25 July 2000, ECLI:EU:C:2000:415, para. 41.

be considered as irreparable.<sup>124</sup> Second, the judge typically needs to be convinced that the damage is not just hypothetical but entails a sufficient degree of probability. Third, the applicant must establish a causal link between the contested act and the claimed damage.<sup>125</sup>

As regards the balance of interests test, it has been submitted that it essentially constitutes an “overall assessment” of the case. Thus, the judge has considerable discretion in deciding what elements of the case are the most important.<sup>126</sup> Interests typically balanced against each other is the *applicant's* interest in having the contested act suspended, the *public interest* in implementing the contested act and finally, the interests of *third parties* directly affected if an interim relief is granted.<sup>127</sup> The Court generally recognises that overriding reasons of public interest can be public health,<sup>128</sup> public safety,<sup>129</sup> market disruption,<sup>130</sup> but has been clear in that public health interests take precedent over other objectives.<sup>131</sup>

As far as private parties are concerned and their claims thereof, they must establish that the damage occurred in relation to their own interest. Arguing that the enforcement measure undermined the interests of third parties will hardly ever succeed. Other interests would only be assessed during the “balance of interests test”.<sup>132</sup>

Finally, we refer to the possibility of action for damages against the EU (Article 340(2) TFEU), which shall not be confused with the principle of State liability.<sup>133</sup> The requirements to be met cumulatively are a sufficiently serious breach of EU law affording rights to individuals, actual damage and a causal link between breach and damage.<sup>134</sup>

### c. Assessment

As we saw in section II, the legal form of EEA emergency enforcement powers can vary. The legal form of the decision is important in relation to the possibilities for judicial review. We submit that with regard to *individual decisions* taken by the EBA, ESMA and EIOPA, the addressees seem to have been granted access to judicial review in a satisfactory manner, since they have standing and can thus fill an action for annulment and seek an interim measure. Standing of other parties seems difficult, unless they can demonstrate direct and individual concern.

<sup>124</sup> Case T-52/09 R, *Nycomed Danmark ApS v European Medicines Agency (EMA)* [2009] ECLI:EU:T:2009:117, paras. 71–73.

<sup>125</sup> Case T-303/04 R, *European Dynamics SA v Commission of the European Communities* [2004] ECLI:EU:T:2004:332, para. 66.

<sup>126</sup> See FC de la Torre, “Interim Measures in Community Courts: Recent Trends” (2007) 44 *CMLR* 273, 353 at 324–25.

<sup>127</sup> Lenaerts et al., *supra*, note 113, 613–14.

<sup>128</sup> Case C-180/96 R, *UK v Commission* [1996] ECLI:EU:C:1996:308, para. 93.

<sup>129</sup> Case C-87/94 R, *Commission v Belgium*, [1994] ECLI:EU:C:1994:166, para. 40.

<sup>130</sup> Case 152/88 R, *Sofrimport v Commission* [1988] ECLI:EU:C:1988:296, para. 30.

<sup>131</sup> Case C-329/99 P(R), *Pfizer Animal Health v Council* [1999] ECLI:EU:C:1999:572, para. 102; Case C-459/00 P(R), *Commission v Trenker* [2001] ECLI:EU:C:2001:217, para. 109.

<sup>132</sup> See Case T-417/05 R, *Endesa v Commission* [2006] ECLI:EU:T:2006:41, para. 37.

<sup>133</sup> See Joined Cases C-6 & 9/90, *Francovich* [1991].

<sup>134</sup> K Gutman, “The evolution of the action for damages against the European union and its place in the system of judicial protection” (2011) 48 *CMLR* 710 et sqq.

The other legal forms that we identified in section II were a *Commission decision* and an *implementing decision*. A Commission decision can be addressed either *directly* to private parties or to Member States, with the latter being under an obligation to comply with the Commission decision. In doing so, the Member State might need to take enforcement measures vis-à-vis private parties. In this case, judicial review will take place on the national level. However, in this article we are interested with the first type of Commission decision, which is directly addressed to the private party. In such a case, the addressee does have standing before the CJEU and can thus fill an action for annulment and request an interim measure. If, however, the Commission decision is of general application, then standing of private parties is not possible.

As regards implementing actions, it is important to note that these are addressed to a Member State. In this case, the key question is to what extent the national authorities have discretion in taking the action indicated by the EEA or not. Even though we are only interested with direct EU law enforcement powers vis-à-vis private parties, it is worth mentioning that if the national authority does not enjoy discretion, the act may be challenged before the EU courts on the basis of Article 263 TFEU. If, on the other hand, the national authority has discretion, then direct concern cannot be established<sup>135</sup> and judicial review of the implementing action is possible only on the national level.

The interim relief seems to us a very important tool that private parties have at their disposal to defend themselves against the arbitrary use of an EEA emergency power. It would be plausible to argue that the thresholds that were discussed in section 3.5 can be met if we talk about a truly urgent situation.

Finally, action for damages is certainly a possibility, but in our view not very likely to succeed, unless the action was manifestly unlawful. The requirements that have to be met to establish non-contractual liability seem quite stringent.

#### IV. TOWARDS SAFEGUARDING THE EMERGENCY ENFORCEMENT POWERS OF EEAs

Now, we come back to the main questions of whether the emergency powers have been backed up with relevant safeguards and what such safeguards should be in the first place.

So, what safeguards should be there in the first place? The catalogue of procedural safeguards necessary to accompany the enforcement process includes: the right to privacy, defence rights (LPP, legal assistance, the right to be heard, the right to have access to the file and the right to be informed), proportionality and the right to an effective remedy. To what extent can these rights be reconciled with an emergency enforcement action? In our view, the emergency does not affect very much the necessity of ensuring these safeguards. At the end of the day, the emergency power leading to a decision to stop certain behaviour or eliminate certain product from the market is an exercise of public power, which needs to have a check against arbitrary or unjustified use. So, the emergency decision needs to be taken upon a relevant legal basis and be justified (the right to privacy); the rights of defence must be respected during the investigative and decision-making phases; the judicial review of the action/decision needs to be ensured; and the emergency measure needs to be proportionate.

<sup>135</sup> *Coillte Teoranta v Commission of the European Communities* [2001], ECLI:EU:T:2001:124, para. 44.

The difference with the “normal” (non-emergency action) can concern the right to be informed *in advance* and allowing time to receive legal assistance during fact finding stages, which may be balanced against the specifics of an emergency action (if a rapid action must be undertaken).

To what extent have the existing emergency powers been backed up with relevant safeguards? The picture in the legislative frameworks is quite mixed—from no safeguards (Regulation 178/2002) to quite elaborate lists (Regulations 1093/2010, 1094/2010 and 1095/2010)—and varies from one authority to the other one. What is similar, however, is that not all safeguards necessary to ensure are prescribed in the legislation which gives the emergency power. In our view, this is problematic from the point of view of ensuring the rule of law, especially such elements as the legality principle’s elements of accessibility and foreseeability as well as legal certainty. Clearly, certain safeguards come from more general sources—the Treaty, the CFR and the case law developed principles. For example, the possibility of judicial review of a decision from the Commission directed to a private party is prescribed in Article 263 TFEU. However, why should this preclude from prescribing the relevant safeguards system in specific legislative acts prescribing the emergency enforcement powers? The complexity of EU administrative system hinders transparency and the rule of law elements even more. In this light, we argue that if (emergency) powers are given, they need to be accompanied by a set of safeguards. The form that it could take may vary, from making a “horizontal” regulation establishing a “common approach” for different sorts of powers and conditions or devoting a part of the “delegating legislation” to the applicable safeguards.

Irrespective of the legal shape, prescribing relevant safeguards is important and may in some cases require tailoring to some specific situations, also because EEAs enjoy discretion in relation to the emergency power, especially if to consider the fact that the judicial review has been lenient. The discretion as to when the emergency power can be used varies from, roughly speaking, having “evidence” (Regulation 1224/2009) to a risk being “evident” (Regulation 178/2002). The discretion includes also the content of the power—from suspending to closing an activity—where the legislator does not always require the choice of the measure to be proportionate to the threat. Giving emergency enforcement powers supported with safeguards will make it clear to the EEAs how to use the powers properly, for the supervised entities what rights they can invoke and at what stage of the enforcement procedure, and for the courts upon which standards to check the emergency actions, decisions and discretion. Our suggestion is not to “invent the bicycle” for every EEA. Rather, establish a few typologies like those discussed in this article—urgent vs. less urgent emergency action and EU emergency decision directed against a private party vs. directed against a Member State—to establish a few models or types of legal protection elements for the use of emergency enforcement powers by EEAs to promote the rule of law in the EU.