

# Regional Perspective: Distribution of Powers and Cooperation Patterns under EU Law as Applicable to CBRN Protection

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## 1 Introduction

The management cycle applicable to CBRN events is, in certain critical respects, incompatible with the multilevel allocation of competences and powers which characterises the fundamental architecture of the European Union (EU).<sup>1</sup> Exactly as in the case of the EU legal provisions dealing with natural and man-made disasters in general,<sup>2</sup> it is not possible to identify a unitary legal framework applicable at the supranational level for CBRN event prevention, preparedness, response and recovery. Relevant provisions are spread out across the EU Treaties and legislation,<sup>3</sup> covering different aspects and distinct stages of the management cycle. Moreover, CBRN events are not explicitly mentioned in EU primary law: EU Treaties only mention possible CBRN-related events, such as ‘armed aggression’ (Article 42(7) TEU), ‘disasters’ (Article 3(2)(g) TEU and Articles 107(2)(b), 196, 214, 222 TFEU), ‘terrorist attacks/threats/activities’ (Articles 75, 83 and 222 TFEU), and ‘exceptional occurrences’ (Articles 107(2) (b) and 122 TFEU). Also relevant is that the Treaties recognise the primacy of the Member States’ prerogative powers over their essential functions, including the exclusive competence of the Member States in maintaining law and order and safeguarding national security (Article 4(2) TEU). As is apparent, all these features risk downsizing the EU role and undermining supranational cooperation on CBRN matters.

Against this background, this chapter seeks to provide a general survey of the cooperation instruments elaborated at supranational level to maximise

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- 1 S Garben, I Govaere (eds), *The Division of Competences between the EU and the Member States – Reflections on the Past, the Present and the Future* (Hart 2017).
  - 2 M Gestri, ‘EU Disaster Response Law: Principles and Instruments’, in A de Guttry et al (eds), *International Disaster Response Law* (TMC Asser Press 2012).
  - 3 For a general survey, see Eurojust, *CBRN-E Handbook* (June 2017) <<https://op.europa.eu/en/publication-detail/-/publication/9c70e7ce-8c65-11e7-b5c6-01aa75ed71a1>> (all links were last accessed 5 June 2021).

the joint efforts of the EU and the Member States in the area of CBRN protection. The ultimate goal is to identify general trends and approaches in the allocation of competences and powers between the Union and the Member States in the CBRN domain and to detect critical points that could be relevant in the analysis of the different EU sectoral policies dealing with that domain.<sup>4</sup>

The analysis has been divided into three sections. Section 2 sheds light on the prerogative powers retained by Member States with regard to public order and national security, assessing to what extent those prerogative powers can affect the effectiveness of the EU's action in the CBRN domain. Section 3 is a mapping exercise: it identifies the major forms of cooperation elaborated in the CBRN domain at supranational level and considers their possible influence on Member States' action. Section 4 focuses on two meaningful EU primary law provisions – namely Articles 42(7) TEU and 222 TFEU – that are quite illustrative of the delicate balancing act involving the EU and the Member States with respect to protection from CBRN events.

## 2 Member States' Prerogatives under Article 4(2) TEU

In approaching the cooperation framework that the Union and Member States have elaborated on CBRN matters, it is particularly apt to start off by considering the role played by the so-called 'national identities clause'. Enshrined in Article 4(2) TEU, the clause imposes upon the Union a general obligation to respect the essential functions of the Member States, as well as their exclusive competence in protecting public order and national security.<sup>5</sup> One could therefore conclude that only Member States may act in such domains. In other words, a straight-forward, first reading of the clause could be interpreted as excluding any possibility for the Union to interfere with matters over which the Member States exercise sovereign prerogative powers; thus, significantly limiting the Union's capacity to manage CBRN matters. It is indeed evident that some CBRN matters are strictly intertwined with the security policies of the Member States while, in other cases (in particular when related to natural

4 Such analysis is carried out by other chapters in this volume, *ie* ch 10 by Villani, ch 14 and ch 19 by Ferri and ch 33 by Farnelli. These chapters do not deal with the cooperation framework concerning radiological and nuclear substances which is mainly carried out within Euratom. The latter cooperation is analysed by Balboni in ch 15.

5 Cf. B Guastafarro, 'Sincere Cooperation and Respect for National Identities', in R Schütze, T Tridimas (eds) *Oxford Principles of European Union Law – The European Union Legal Order*, vol. 1 (OUP 2018); G Di Federico, *L'identità nazionale degli Stati membri nel diritto dell'Unione europea* (Editoriale Scientifica 2017).

events), they involve the maintenance of public order – a circumstance that can be named here as ‘the CBRN-security nexus’.

Yet, on closer inspection, a different interpretation of the clause is possible. In particular, if one considers the attitude shown by the European Court of Justice (ECJ) towards Members States’ reserved powers, the conclusion may be reached that those powers do not exclude *per se* the possibility for the Union to exercise its influence in the corresponding domain. The doctrine elaborated by Luxembourg judges – also known as the ‘framing of powers’ doctrine – imposes a general obligation upon the Member States to exercise their prerogative powers *having due regard to EU law*.<sup>6</sup> In practice, besides the need to respect, in any case, the fundamental values upon which the Union is based (Article 2 TEU),<sup>7</sup> the national identities clause must be read in conjunction with the other principles governing the interaction between the Union and the Member States, which are enshrined in Article 4 TEU. In particular, it is the principle of sincere cooperation (Article 4(3) TEU) that ensures that national identities do not amount to general reservations to the effectiveness of EU law.<sup>8</sup> The strengthening of the loyalty duties of the Member States – especially the abstention duties flowing from the loyalty clause enshrined in Article 4(3) TEU – contributed to blurring the divide between EU and Member State prerogatives, leading in turn to a more flexible understanding of the principle of conferral, mentioned in Article 4(1) TEU.<sup>9</sup>

Numerous are the areas where such an approach has been affirmed in the case law of the ECJ: loss and acquisition of nationality,<sup>10</sup> social security,<sup>11</sup> organisation of education systems,<sup>12</sup> organisation of justice,<sup>13</sup> and direct taxation.<sup>14</sup>

6 Case C-457/18 *Slovenia v Croatia* ECLI:EU:C:2019:1067, Opinion of AG Pikamäe, para 138. Cf. L Azoulai, ‘The ‘Retained Powers’ Formula in the Case Law of the European Court of Justice: EU Law as Total Law?’ (2011) 4 *European Journal of Legal Studies* 192; B de Witte, ‘Exclusive Member States Competences – Is There Such a Thing?’, in S Garben, I Govaere (n 1); L Boucon, ‘EU Law and Retained Powers of Member States’, in L Azoulai (ed) *The Question of Competence in the European Union* (OUP 2014).

7 See, for instance, Case C-502/19 *Oriol Junqueras Vies* ECLI:EU:C:2019:1115, where the Court recognised that MEPs’ immunities, which help to give concrete form to the value of democracy referred to in Article 2 TEU, shall prevail over the reaction put in place by a Member State (Spain) to preserve its territorial integrity against a secession bid.

8 Guastaferrero (n 5); G Di Federico (n 5) 149; F Casolari, *Leale cooperazione tra Stati membri e Unione europea* (Editoriale Scientifica 2020) 207.

9 Casolari (n 8) 88.

10 Case C-369/90 *Micheletti* [1992] ECR I-4239, para 10.

11 Case C-647/13 *Melchior* ECLI:EU:C:2015:54, para 21.

12 Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] I-9161, para 24.

13 Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531, para 52.

14 Case C-279/93 *Schumacker* [1995] I-225, paras 21–24.

Quite significantly, the Court has also recognised its relevance with regard to the maintenance of public order and the safeguarding of internal security.<sup>15</sup> In particular, the Court of Justice has stated that the recognition by EU primary law of Member States' prerogatives in situations which may affect law and order or public security cannot lead to the conclusion that 'the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law'.<sup>16</sup>

### 3 Supranational Cooperation Schemes

Having clarified the extent to which Member States' prerogatives and retained powers may influence EU action on CBRN events, it is now time to identify the major supranational CBRN cooperation schemes that have been elaborated so far. The analysis will start by considering binding measures that impose uniform or harmonised rules and obligations upon the Member States (3.1). This will be followed by consideration of mechanisms that support or facilitate action by the Member States themselves (3.2). The survey will conclude with a reference to the role that non-binding acts adopted by EU institutions may play in the CBRN domain (3.3).

#### 3.1 *Cooperation through Harmonisation: From the Protection of the Internal Market to the Fight against Terrorism*

A first form of cooperation elaborated at supranational level aims at establishing harmonised procedures and rules among Member States for dealing with specific CBRN substances. On the one hand, this cooperation promotes a high level of human health and the protection of the environment from risks posed by CBRN substances. On the other hand, it ensures the proper functioning and integrity of the internal market and the related freedom of movement of goods. The need to preserve this freedom, which represents one of the fundamental pillars upon which the internal market is based, explains why cooperation in this area is quite strong, as well as the mandatory nature of the Member States' related duties. Indeed, even though the EU's competence related to the functioning of the internal market is shared in nature, the pre-emption exercised by the Union in triggering that competence gives the former a (temporary) exclusive power, preventing Member States from legislating

15 Case C-265/95 *Commission v France* [1997] I-6959, paras 33–35.

16 Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic* ECLI:EU:C:2020:257, para 143.

in the same areas. This strengthens the supranational cooperation and minimises the risks of differentiations and ‘race to the bottom’ effects of the relevant legal framework.

Particularly illustrative of such a trend is the REACH Regulation, a veritable milestone of environmental and health protection at EU level, which concerns the registration, evaluation, authorisation and restriction of chemicals.<sup>17</sup> The REACH Regulation was adopted on the basis of Article 114 TFEU – the most important legal basis for the establishment and functioning of the EU internal market<sup>18</sup> – and its 141 articles and 17 annexes require Member States to comprehensively align their legislation on chemical substances and follow uniform procedures for collecting and assessing information on the properties and hazards of those substances, thus leading to a common playing field for their internal market.<sup>19</sup>

The same logic informs the Regulation on classification, labelling and packaging of substances and mixtures (CLP Regulation),<sup>20</sup> which is based on the United Nations’ Globally Harmonized System (GHS) and grounded on Article 114 TFEU, and the Regulation concerning the export and import of hazardous chemicals, also known as the Prior Informed Consent (PIC) Regulation.<sup>21</sup> Although the PIC Regulation was adopted on a different legal basis – *ie* Article 192(1) TFEU together with Article 207 TFEU – it also introduces a uniform normative framework, by establishing an import and export regime for these substances among the Member States and by placing common obligations on companies wishing to export chemicals to non-EU countries. The link with the common commercial policy (Article 207 TFEU), a domain covered by an exclusive competence of the Union, explains why, like in the case of the REACH and CLP Regulations, the PIC Regulation imposes a strict cooperation framework upon the Member States.<sup>22</sup>

17 Regulation (EC) 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L396/1.

18 M Kellerbauer, ‘Article 114 TFEU’, in M Kellerbauer et al (eds), *The EU Treaties and the Charter of Fundamental Rights* (OUP 2019).

19 For a detailed analysis of the REACH Regulation, see L Bergkamp (ed), *The European Union REACH Regulation for chemicals: Law and practice* (OUP 2013).

20 Regulation (EC) 1272/2008 of 16 December 2008 on classification, labelling and packaging of substances and mixtures [2008] OJ L353/1.

21 Regulation (EU) 649/2012 of 4 July 2012 concerning the export and import of hazardous chemicals [2012] OJ L201/60.

22 This is also the case with Regulation (EC) 428/2009 on a supranational regime for the control of exports, transfer, brokering and transit of dual-use items. See also ch 25 by Viterbo, in this volume.

Actually, cooperation mechanisms by means of harmonising measures have also been adopted in the CBRN domain within the framework of other sectoral policies of the Union. By relying on the main legal basis for EU environmental measures, that is, Article 192(1) TFEU, legislative frameworks have been developed concerning the handling<sup>23</sup> and shipment of waste,<sup>24</sup> as well as the control of major-accident hazards involving dangerous substances.<sup>25</sup> With a view to ensuring a high level of protection for human health and the environment throughout the Union in a consistent and effective manner, these instruments introduce harmonised procedures to be implemented by Member States. Likewise, in the context of the EU transport policy (Article 100 TFEU), a common vessel traffic monitoring and information system and common requirements concerning the transport of dangerous or polluting goods have been adopted,<sup>26</sup> while the so-called ‘flexibility clause’ (Article 352 TFEU) has been triggered to develop the first European procedures for the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.<sup>27</sup>

Also in these cases, in line with what we have seen with regard to the internal market legislation on CBRN matters, the shared nature of relevant EU competences implies a pre-emption requiring Member States not to legislate in the same domains (unless the Union decides to cease exercising its competence). However, this does not mean that Member States are completely prevented from acting unilaterally. Not only do States have the possibility to invoke the CBRN-security nexus, thus exercising their own prerogatives to maintain public order and national security, but they may also enjoy – unlike the cooperation mechanisms on chemicals – a larger discretion in adopting implementing measures. The latter circumstance is due to the (rather) limited degree of harmonisation pursued by the great majority of these further pieces of legislation. This is the case, for instance, with the European critical infrastructure (ECI) Directive which represents, according to the legislature, ‘a first step-by-step approach to identify and designate ECIs [...] As such this Directive should be reviewed with a view to assessing its impact [...] and

23 Directive 2008/98/EC of 19 November 2008 on waste [2008] OJ L312/3.

24 Regulation (EC) 1013/2006 of 14 June 2006 on shipments of waste [2006] OJ L190/1.

25 Directive 2012/18/EU of 4 July 2012 on the control of major-accident hazards involving dangerous substances [2012] OJ L197/1.

26 Directive 2002/59/EC of 27 June 2002 establishing a Community vessel traffic monitoring and information system [2002] OJ L208/10.

27 Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection [2008] OJ L345/75.

extending its scope of application' (Recital 5). A similar reasoning applies to Directive (EU) 2017/541 on combating terrorism: based on Article 83(1) TFEU, the Directive establishes 'minimum rules' on the definition of terror-related criminal offences and sanctions, and for the protection of, support of and assistance to, victims of terrorism (Article 1).

### 3.2 *Cooperation through Assistance and Coordination. The Union Civil Protection Mechanism and the Framework Concerning Serious Cross-Border Threats to Health*

A different cooperation scheme consists of mechanisms put in place by the Union to assist, support and coordinate Member States in facing CBRN-related scenarios. Unlike the cooperation instruments discussed in the previous subsection, these mechanisms are not intended to impose any obligation on the Member States to align their laws and regulations with EU standards. On the contrary, they are based on the weakest form of competence the EU may exercise, that is, the supporting and coordinating competence. Pursuant to Article 2(5) TFEU, the exercise of such a competence does not produce any preemptive effect and shall not entail harmonisation of Member States' legislation. Yet, weakness does not necessarily mean uselessness. Indeed, if one considers the two major pieces of legislation adopted so far by the Union under supporting competences related to CBRN matters, namely Decision No 1082/2013/EU on serious cross-border threats to health and Decision No 1313/2013/EU on a Union Civil Protection Mechanism (UCPM), it is evident how relevant such cooperation established at supranational level may become.<sup>28</sup> The functioning of these two instruments is extensively illustrated in another chapter.<sup>29</sup> Here, it suffices to mention that they have contributed to establishing an integrated platform of cooperation for managing calamitous events. But even more importantly, this result has essentially been achieved *without imposing any specific duties upon the States*. More precisely, by means of conditionality mechanisms (which are mainly based on the financial assistance of the Union), the two instruments have led to a *voluntary harmonisation* among the Member States, facilitating the prevention, preparedness and response to disasters.

As for the UCPM, this has been realised by encouraging the pre-commitment of national resources for emergency response (the European Civil Protection Pool) in disaster scenarios, by supporting the Member States' prevention and preparedness efforts and, more recently, by creating a European last-resort

28 The two Decisions have been adopted on the basis of Articles 168 and 196 TFEU, respectively.

29 See ch 19 by Ferri in this volume.

reserve of additional capacities (the ‘rescEU’ reserve) that are acquired, rented or leased by Member States thanks to the financial support of the European Commission.

Decision 1082/2013/EU has introduced a variety of measures concerning the monitoring, early warning, and combating of serious cross-border threats to health, in order to coordinate and complement national policies. Of particular relevance for present purposes is the procedure for the joint procurement of medical countermeasures. This initiative arose because of the H1N1 flu pandemic of 2009, which highlighted weaknesses in the abilities of Member States to access and purchase pandemic vaccines and medications – weaknesses that have been further highlighted in the context of the COVID-19 pandemic. Quite significantly, the Joint Procurement Mechanism is based on a Joint Procurement Agreement (JPA) providing for *voluntary cooperation* which enables participating Member States to jointly purchase medical countermeasures. In the context of the COVID-19 crisis, Member States have decided to include the ongoing negotiations under the JPA in a fast-track procurement procedure supported by the Emergency support facility established by Regulation (EU) 2016/369.<sup>30</sup>

Without adopting the top-down logic that characterises the cooperation schemes based on the approximation of Member States’ laws and regulations, both Decisions have nonetheless contributed to putting all Member States on a level playing field in managing disaster scenarios. However, in the wake of the COVID-19 pandemic, both the Union and the Member States have called for a significant revision of the voluntary schemes of cooperation in this field, so as to strengthen the cooperation and fill the existing gaps. In both cases, the decision has been taken to reshape the mechanisms in a stronger way. In 2020, the European Commission adopted two proposals for reframing the UCPM and the Cross-border health threats Decisions. As for the UCPM, its revision aims at strengthening the system, which is understood to be excessively based on Member States’ voluntary resources, a situation that may undermine the capacity to intervene when, as in the case of COVID-19, all, or most, Member States are impacted by the same emergency (or threat) simultaneously.<sup>31</sup> Concerning the Cross-border health threats Decision, the European Commission has proposed strengthening the framework of

30 Council Regulation (EU) 2020/521 of 14 April 2020 activating the Emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak [2020] OJ L117/3.

31 Doc. COM(2020) 220 final, 2 June 2020. The Commission’s proposal has been adopted in May 2021: Regulation (EU) 2021/836 of 20 May 2021 amending Decision No 1313/2013 [2021] OJ L185/1.



preparedness and response to threats by creating a single legislative mechanism, which should pave the way for the establishment of a European Health Union.<sup>32</sup> Additionally, both the Joint Procurement Mechanism and the Union's guidance on the adoption of common measures at EU level should be further enhanced by the new mechanism.

It is true that the planned revisions are likely to help reinforce the supranational management of calamitous events (including CBRN-related events). That said, given the limited competences the Union may exercise in the domains of health and civil protection, it is doubtful that such revisions could legitimate a further strengthening of supranational prerogative powers without a substantive shift in the understanding of those competences. It must not be forgotten that criticisms of the 'soft' nature of EU prerogative powers have already been raised regarding the existing mechanisms.<sup>33</sup> It follows that a clearer (and more legally sound) solution, leading to a significant enhancement of EU prerogative powers in those areas, should ideally imply a change to the current allocation of competences between the Member States and the Union through Treaty revision.

### 3.3 *Cooperating Softly ...*

This brings us to consider another way of establishing cooperation schemes on CBRN matters: the possibility of introducing common arrangements by means of EU soft law instruments.<sup>34</sup> The instrument, *par excellence*, for this is the action plan. In particular, building upon previous plans, in 2017, the European Commission adopted a new action plan to enhance preparedness against chemical, biological, radiological and nuclear security risks.<sup>35</sup> Adopting an all-hazards approach, the plan includes a series of actions that should be implemented at supranational and national level to improve the overall capacity to manage CBRN risks and events. Viewed from this perspective, the action plan defines objectives and timetables for developing specific policies, which may be invoked to justify the adoption of specific pieces of legislation, and which shape the background against which the existing legislation should be understood and interpreted.

While action plans may be the 'gold standard', it is impossible to ignore that a range of soft law instruments have gained terrific momentum in the

32 Cf. doc. COM(2020) 727 final, 11 November 2020.

33 F Casolari, 'Europe (2018)' (2019) 1 Yearbook of International Disaster Law 346.

34 Interestingly, as stressed in other chapters in this volume, this seems to be a general trend concerning the international law framework applicable to the CBRN domain.

35 Doc. COM(2017) 610 final, 18 October 2017.

context of the reaction to the COVID-19 pandemic. In fact, since March 2020, the EU institutions (in particular, the EU Commission) have been adopting non-binding instruments – such as guidelines and recommendations – with a view to establishing coordination mechanisms among the Member States that facilitate joined-up responses to the pandemic.<sup>36</sup> Particularly illustrative of the rationale behind such an approach is the Joint European Roadmap towards lifting COVID-19 containment measures.<sup>37</sup> Adopted on 15 April 2020, the Roadmap constitutes a joint effort by the European Commission and the European Council where the two institutions urge the establishment of a common framework among the Member States in order to prevent unilateral decisions from undermining the integrated nature of the internal market, as well as the common response put in place to fight against a cross-border threat to public health.<sup>38</sup> All in all, the Roadmap echoes the ECJ's reasoning for elaborating the 'frame of powers doctrine':<sup>39</sup> Member States' loyalty duties towards the Union require a supranational coordination (including in cases where national prerogatives may be relevant) and impose abstention obligations when unilateral action risks jeopardising the EU's objectives. Significantly, the Roadmap clarifies that the coordination of relevant measures shall take place in the context of the Integrated Political Crisis Response (ICPR), a set of arrangements established to respond at Union political level to crises having a wide-ranging impact or political significance, which should be used by the Council in the event of the invocation of the solidarity clause enshrined in Article 222 TFEU.<sup>40</sup>

Such an approach has both advantages and disadvantages. Supporters might claim that a soft-law approach will ensure more rapid, flexible and effective management, even in cases where the allocation of competences between the EU and the Member States is not completely clear. Detractors claim that the downside of such a flexible approach is that it may become too flexible, thus raising doubts as to its legitimacy and transparency and preventing the possibility to establish a permanent platform of cooperation among EU

36 See AM Paces, M Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) *European Journal of Risk Regulation* 283; O Stefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (2020) 5 *European Papers. European Forum* 663.

37 Available at <[https://ec.europa.eu/info/sites/info/files/communication\\_-\\_a\\_european\\_roadmap\\_to\\_lifting\\_coronavirus\\_containment\\_measures\\_0.pdf](https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf)>.

38 *Ibid.*, 5–6.

39 Above, sect 2.

40 Below, sect 4.

actors and Member States.<sup>41</sup> Notwithstanding the fact that ECJ case law has helped to clarify the possible legal effects of EU soft-law instruments, though not excluding the possibility of assessing their validity in light of EU primary law,<sup>42</sup> it is evident that the informality characterising such instruments risks undermining the notion of a 'Union based on the rule of law', that is, the fundamental condition that both the EU and the Member States must respect the constitutional framework established by EU primary law.<sup>43</sup>

#### 4 In Search of the Right Balance: Article 42(7) TEU and Article 222 TFEU

There is one last form of possible cooperation among the Union and the Member States in the CBRN domain that deserves to be mentioned. It arises out of the possibilities offered by the so-called mutual assistance and solidarity clauses. Both clauses are intended to represent a *last resort mechanism* that may be triggered by a State in need, provided that all national and supranational tools available did not give an effective response.

Enshrined in Article 42(7) TEU, the mutual assistance clause requires Member States to aid and assist 'by all the means in their power' other EU States that are the victim of armed aggression. The clause thus introduces legal obligations upon Member States. However, Article 42(7) TEU, in line with the national identities clause, also highlights the need to respect 'the specific character of the security and defence policy' of Member States, as well as their commitments under the NATO umbrella. Moreover, no further elements are given for assessing the appropriateness of Member States' assistance. Also relevant is that the clause excludes any institutional involvement of the EU machinery. In sum, the clause allows for significant flexibility in its implementation, and it is mainly framed as an intergovernmental instrument triggering a horizontal cooperation among Member States.<sup>44</sup>

41 G Di Federico, 'Stuck in the middle with you ... wondering what it is I should do. Some considerations on EU's response to COVID-19' (2020) 7 *Eurojus.it* 60, 77–78; M Eliantonio, O Stefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 *European Journal of Risk Regulation* 159.

42 Cf. Case C-501/18 *BT v Balgarska Narodna Banka* ECLI:EU:C:2021:249.

43 Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] 1339, para 23.

44 T Ramopoulos, 'Article 42 TEU', in M Kellerbauer et al (n 18) 281–282.

Conceived as one of the political responses to the terrorist attack in Madrid (2004) and the floods in Central Europe (2002), the solidarity clause, which is enshrined in Article 222 TFEU, requires the Union and the Member States to act jointly if a Member State is a victim of a terrorist attack or the victim of a natural or man-made disaster.<sup>45</sup> Therefore, this clause also introduces substantive obligations for Member States. That said, there are, however, important differences between the two clauses. First, the events allowing a State to trigger Article 222 TFEU can hardly be covered by Article 42(7) TEU. Secondly, Article 222 TFEU is firmly rooted in the institutional framework of the Union. As this chapter has already anticipated, the EU ICPR provides the platform upon which decisions concerning the management of relevant crises are based. Furthermore, unlike the mutual assistance clause, the solidarity clause is covered by the jurisdiction of the ECJ, thus opening the possibility for judicial scrutiny of the behaviour of relevant actors. A third element which deserves to be mentioned is related to the duty bearers under the two clauses: whilst Article 42(7) TEU only mentions Member States' obligations, Article 222 TFEU also provides for solidarity duties upon the Union, leading to the introduction of a vertical cooperation with the EU States.

In light of the foregoing, it may be concluded that while the mutual assistance clause reflects in its entirety the intergovernmental nature of defence policy, also recognising a reinforced role to the margin of appreciation Member States may play in that field, the solidarity clause tries to carry out a balance between the prerogatives of Member States – pursuant to Declaration No 37 on Article 222 TFEU the latter keep the right to choose the most appropriate means to comply with their solidarity obligations towards the Member State concerned – and the need to put flesh on the bones of European solidarity through the institutionalisation of the procedures and enforcement mechanisms. In this light, and considering the foregoing considerations concerning the other forms of cooperation mechanisms (and the possible impact of the CBRN-security nexus), it is not surprising that the solidarity clause has never been triggered so far. On the contrary, following the terrorist attacks of 13 November 2015 in Paris, France decided to invoke Article 42(7) TEU, despite the lack of reference to terrorism in the Treaty provision, thus developing an informal bilateral discussion with other Member States.<sup>46</sup>

45 For a general analysis of the clause, see M Gestri (n 2), S. Villani, *The Concept of Solidarity within EU Disaster Law. A legal assessment* (Bononia University Press, 2021) 199.

46 NIM Nowáky, 'The invocation of the European Union's Mutual Assistance Clause: A Call for Enforced Solidarity' (2017) 22 *European Foreign Affairs Review* 357.

## 5 Concluding Remarks

This chapter has analysed the cooperation frameworks the EU and the Member States have elaborated to manage the CERN matter. In this respect, the following conclusions may be drawn. As in the case of EU disaster law, the legal framework concerning CERN matters is highly fragmented and largely dependent on a flexible allocation of competences between the Union and the Member States. Such a flexibility is caused by different factors. First, the CERN-security nexus may play a relevant role in giving Member States the possibility to exercise a margin of appreciation in implementing EU law. This chapter has argued, in line with the ECJ's case law, that the possibility for Member States to rely on their retained powers in maintaining public order and national security is inversely proportional to the intensity of EU competences. In other words, the more EU law is capable of affecting municipal law – as in the case of the EU approximation measures related to CERN products – the more Member States will have difficulties in invoking derogations from the supranational legal framework. Secondly, flexibility may depend on the specific features of the EU competences at stake. In particular, we have seen that the coordinating and supporting competences in the domains of health and civil protection have led to the development of cooperation platforms which heavily rely on States' will. Thirdly, flexibility may be a consequence of the emergency scenario which the Union and the Member States are facing. In this respect, the flexible approach largely consists of recourse to soft-law instruments establishing cooperation frameworks at the intersection of EU and Member States' competences. The reaction to the COVID-19 pandemic is a clear illustration of this growing attitude.

Undoubtedly, a flexible approach may present some advantages that help to ensure a quick and tailor-made action; also, it becomes evident from the foregoing that it is generally easier for Member States to accept soft or informal cooperation mechanisms than hard solutions – their reluctance to make full use of the solidarity clause is nothing but an example of that trend. However, flexibility is not unproblematic. On the one hand, it prevents the Union and the Member States from developing stable solutions; on the other, it risks undermining respect for the EU rule of law, a risk which is already visible in other emergency-related scenarios (such as the economic and financial crises and the so-called 'refugee crisis') where a similar approach has been developed.<sup>47</sup>

47 C Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 *Oxford Journal of Legal Studies* 325; F Casolari, 'The 'unbearable' lightness of soft law: on the European Union's recourse to informal

It is thus essential for EU institutions and Member States to take a resolute course of action to ensure a strengthening of the supranational capacity to manage CBRN matters (and, more generally, disaster scenarios). A first possibility, in this respect, could be a reconsideration of the existing legal bases, promoting the extension of their possible scope – such a maximalist approach is already visible in the use of Article 207 TFEU in the context of the EU common commercial policy.<sup>48</sup> Even more importantly, lessons learned from the COVID-19 pandemic should lead the Union and the Member States to go the extra mile in an effort to agree on a revision of EU primary law that may really contribute to improving resilience at supranational level.<sup>49</sup>

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48 G Kübek, 'Redefining the boundaries of the Common Commercial Policy and the ERTA doctrine' (2018) 55 *Common Market Law Review* 883.

49 Cf. *Joint Declaration on the Conference on the Future of Europe. Engaging with Citizens for Democracy – Building a More Resilient Europe* (10 March 2021) <[https://ec.europa.eu/info/sites/info/files/en\\_-\\_joint\\_declaration\\_on\\_the\\_conference\\_on\\_the\\_future\\_of\\_europe.pdf](https://ec.europa.eu/info/sites/info/files/en_-_joint_declaration_on_the_conference_on_the_future_of_europe.pdf)>.

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