EU LAW LIVE
PRESS

EU LAW IN TIMES OF PANDEMIC

THE EU'S LEGAL RESPONSE TO COVID-19

EDITED BY

DOLORES UTRILLA
ANJUM SHABBIR

EU LAW LIVE PRESS

EU Law Live Press is part of EU Law Live, promoting quality legal analysis and information in all relevant fields of the European Union's legal order

www.eulawlive.com

E-Book first published in 2020

Published in the EU by EU Law Live S.A.

Designed by Javier López

EU LAW IN TIMES OF PANDEMIC

THE EU'S LEGAL RESPONSE TO COVID-19

EDITED BY

DOLORES UTRILLA
ANJUM SHABBIR

EU LAW LIVE
PRESS

EU LAW IN TIMES OF PANDEMIC

THE EU'S LEGAL RESPONSE TO COVID-19

EU LAW LIVE PRESS

CONTENTS

Part II. DEMOCRACY AND RIGHTS

Part III. HEALTH (AND RISK) REGULATION

Part IV. BANKING, FINANCE, AND EURO

Part V. INTERNAL MARKET

Part VI. COMPETITION AND STATE AID

Part VII. JUSTICE AND LITIGATION

FOREWORD FROM THE EDITORS

The COVID-19 pandemic has posed unprecedented legal challenges to the EU institutions and to the EU Member States. From early 2020, these actors fought the crisis firstly through emergency measures aimed at adapting the mismatch between the ordinarily applicable legal framework and a health, social, and economic emergency deploying devastating effects across borders and areas of activity. Soon afterwards, however, it became evident that medium and long-term measures would be needed in order to address the systemic effects of the crisis over the European economy, society, and legal framework. At the end of 2020, the European legal space is immersed in a process of profound reflection and envisaging a redesign of some of its core features, reaching from fundamental principles and values such as the rule of law or solidarity to sector-specific elements related to the Economic and Monetary Union, health and risk regulation, or State aid control.

This book looks into the EU's legal response to the pandemic across a wide spectrum of areas of law. It offers a narrative of the evolution, scope, and spirit of the EU's approach to a crisis like no other in the history of European integration. It thus provides for a comprehensive overview of the inherent tensions, weaknesses, and strengths of Europe as a political, legal, economic, and social Union in times of ground-breaking disruption.

The book is structured into seven parts, brought together by a General Introductory Chapter. Part I explores the impact of the COVID-19 crisis on EU institutional law, focusing primarily on the challenges posed by the pandemic to the core principles of solidarity and rule of law, as well as to the functioning of EU institutions, agencies, and bodies. Part II is devoted to COVID-19 legal challenges in the field of democracy and human rights, with a particular emphasis on migration and data protection issues. Part III assesses the EU's legal response to the pandemic in the area of health and risk regulation, tackling inter alia the role of the precautionary principle in times of scientific uncertainty and several issues relating to the legal framework on vaccines. Part IV addresses the delicate legal implications of the ongoing crisis in the field of banking, finance, and euro governance, including the long overdue discussion on the possible introduction of genuine EU taxes. Part V deals with internal market law and the profound alterations it is being subjected to in a context of massive pande-

mic-induced restrictions to free movement, mostly (but not only) concerning the free movement of persons. Part VI explores the role performed by, and the challenges posed to, EU competition and State aid law during the COVID-19 pandemic. Lastly, Part VII provides an overview of the main legal implications of the ongoing crisis for the functioning of the EU judiciary, conceived as the ultimate guarantor of the rule of law – a function of paramount importance, especially in times of truly large-scale restrictions of rights and of unprecedented disruptions of the pre-established legal framework.

Each Part of the book commences with an Introductory Chapter offering an overview of the main challenges posed by the crisis in the respective area of law, as well as of the steps taken by the EU to address them. These Introductory Chapters aim to map out the situation in the relevant legal fields, as well as to provide the necessary context for the Chapters contained in the respective Part of the book, written by leading legal experts on the respective matters, which further explore selected legal developments or problems within that field of law.

We are immensely grateful to the authors contributing to this book for their enthusiastic response and commitment to this collective project. Most of them have worked closely with us for several months, contributing to the coverage of the EU's legal response to the pandemic on EU Law Live under the lead of our Editor-in-Chief Daniel Sarmiento. We also take this opportunity to publicly express our gratitude to each and every one of the legal experts who generously agreed to share their expertise with the EU legal community through EU Law Live over this challenging year.

Madrid, 1 December 2020
Dolores Utrilla and Anjum Shabbir

CONTRIBUTORS

Andrea Baldini is an Associate Professor and Director of the NJU Center for Sino-Italian Cultural Studies.

Borja Barragué is an Assistant Professor of Legal Philosophy at the Universidad Nacional de Educación a Distancia.

Silvia Bartolini is a Post-Doctoral Researcher at the Université de Saint-Louis Bruxelles and a Visiting Lecturer at the University of Kent and Université Catholique de Lille.

Andrea Biondi is a Professor of European Union Law and Director of the Centre of European Law at the Dickson Poon School of Law, Kings College, London.

Enrico Bonadio is a Reader in Intellectual Property Law at City at the University of London.

Maja Brkan is an Associate Professor of EU Law at Maastricht University and an Associate Director of the Maastricht Centre for European Law. She is also a Member of the Editorial Board of EU Law Live.

Enza Cirone is a Researcher on European and Transnational Legal Studies at the University of Florence.

Karl Croonenborghs is a Legal Counsel at the Directorate-General for Economic and Financial Affairs of the European Commission.

Paul Dermine is a Max Weber Fellow at the European University Institute, Florence.

Bruno Dias Pinheiro is a Permanent Representative of the Portuguese Parliament to the EU institutions (Brussels).

Aleksejs Dimitrovs is a Legal Advisor for the Greens/EFA Group in the European Parlia-

ment.

Alessandra Donati is a Senior Research Fellow at the Max Planck Institute for Procedural Law in Luxembourg.

Stefano Dorigo is an Associate Professor of Tax Law at the University of Florence.

Christina Etteldorf is a Research Associate at the Institute of European Media Law, Saarbruecken/Brussels.

Diane Fromage is a Marie Sklodowska-Curie Individual Fellow at the Law School of Sciences Po (Paris).

Ricardo García Antón is an Assistant Professor of Tax Economics at Tilburg University.

Christos V. Gortsos is a Professor of Public Economic Law at the National and Kapodistrian University of Athens, and President of the Academic Board of the European Banking Institute (EBI).

José Igreja Matos is President of the European Association of Judges and First Vice-President of the International Association of Judges.

Michal Kianička is a former member of the Slovak EU litigation team (2010-2020).

Niels Kirst is a Ph.D. Candidate in European Law at Dublin City University.

David Krappitz is a Policy Officer at the Federal Ministry for Economic Affairs and Energy, Berlin, and an LL.M. postgraduate from the College of Europe, Bruges.

Guillermo Kreiman is a PhD Candidate in Politics at the University of Oxford.

Marco Lamandini is a Full Professor of Commercial Law at the University of Bologna, Vice-Chair of the Academic Board of the European Banking Institute, and a Member of the Academic Board of the European Capital Market Institute. He is also a Member of the Editorial Board of EU Law Live.

Sandra Mantu is an Assistant Professor of Law at Radboud University Nijmegen.

Menelaos Markakis is an Assistant Professor at Erasmus University Rotterdam. He is the recipient of the EUR Fellowship at Erasmus University Rotterdam and is affiliated with the Erasmus Center for Economic and Financial Governance.

Adolfo Martín is a Professor of Tax Law at the University of Cádiz (Spain) and held the EU Commission Jean Monnet Chair (2014-2018) on EU Tax Law. He is also a Member of the Editorial Board of EU Law Live.

Joana Mendes is a Professor of Comparative Administrative Law at the University of Luxembourg.

John Morijn is a Professor of Law and Politics in International Relations at the University of Groningen.

Ulla Neergaard is a Professor of EU Law at the University of Copenhagen.

Peter Oliver is a Visiting Professor at Université Libre de Bruxelles.

Juan Jorge Piernas is a Senior Lecturer of International Law and International Relations at the University of Murcia. He is also a Member of the Editorial Board of EU Law Live.

Oreste Pollicino is a Full Professor of Constitutional Law and Media Law at Bocconi University, and a Member of the Executive Board of the European Agency for Fundamental Rights in Vienna.

Ana Ramalho is a Copyright Counsel at Google and an invited Assistant Professor at Leiden University, with policy and legal expertise in the field of intellectual property (IP) and European law. She is also a Member of the Editorial Board of EU Law Live.

René Repasi is an Associate Professor of International and EU Law at the Erasmus University Rotterdam, and Director of the Erasmus Centre for Economic and Financial Governance. He is also a Member of the Editorial Board of EU Law Live.

Stéphane de la Rosa is a Professor of Public Law and Jean Monnet Chair at University Paris-Est Créteil.

Anniek de Ruijter is an Associate Professor at the University of Amsterdam and an expert in EU health law.

Daniel Sarmiento is a Professor of EU Law at the Complutense University of Madrid and Editor-in-Chief of EU Law Live.

Anjum Shabbir is an Assistant Editor and Legal Reporter at EU Law Live and a UK-EU lawyer.

Anne-Lise Sibony is a Professor of EU Law at the University of Louvain in Belgium. She is also a Member of the Editorial Board of EU Law Live.

René Smits is a Professor Emeritus of the Law of the Economic and Monetary Union at the University of Amsterdam, and an Alternate Member of the ECB's Administrative Board of Review.

Armin Steinbach is a Gwilym Gibbon Fellow at Oxford University (Nuffield College) and a Research Associate at the Max-Planck Institute for Research on Collective Goods in Bonn.

Daniel Thym is a Professor of European Law at the University of Konstanz.

Araceli Turmo is a Senior Lecturer in EU Law at the University of Nantes. She is also a Member of the Editorial Board of EU Law Live.

Dolores Utrilla is an Associate Professor of Administrative Law at the University of Castilla-La Mancha, and collaborates with EU Law Live as an External Assistant Editor.

Isabelle van Damme is a Counsel at a law firm in Brussels, advising on WTO law, EU law and public international law. She is also a Member of the Editorial Board of EU Law Live.

Sybe de Vries is a Professor of EU Single Market Law and Fundamental Rights at the University of Utrecht.

Maria Weimer is an Associate Professor at the University of Amsterdam and an expert in EU risk regulation. She is also a Member of the Editorial Board of EU Law Live.

Karl-Philipp Wojcik is General Counsel of the Single Resolution Board.

LIST OF ABBREVIATIONS

APP	Asset Purchasing Programme
BCBS	Basel Committee on Banking Supervision
BICC	Budgetary Instrument for Convergence and Competitiveness
BRRD	Bank Recovery and Resolution Directive
CJEU	Court of Justice of the European Union
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
CRD	Capital Requirements Directive
CRR	Capital Requirements Regulation
CRR	Capital Requirements Regulation
CSPP	Corporate Sector Purchase Programme
CSRs	Country Specific Recommendations
CVPO	Community Variety Plant Office
DG COMP	European Commission's Directorate General for Competition
EASO	European Asylum Support Office
EBA	European Banking Authority
EBI	European Banking Institute
ECA	European Court of Auditors
ECB	European Central Bank

ECDC	European Centre for Disease Prevention and Control
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECN	European Competition Network
ECT	European Community Treaty
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilisation Mechanism
EIB	European Investment Bank
EIO	European Investigation Order
EIOPA	European Insurance and Occupational Pensions Authority
EMA	European Medicines Agency
EMS	European Stability Mechanism
EMU	Economic and Monetary Union
EP	European Parliament
ERI	European Union Recovery Instrument
ESAs	European Supervisory Authorities
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESS	European Social Survey
EUIPO	European Union Intellectual Property Office
EUSF	European Union Solidarity Fund
EWRS	Early Warning and Response System

FEAD	Fund for European Aid to the Most Deprived
FRA	European Union Agency for Fundamental Rights
FSB	Financial Stability Board
GBER	General Block Exemption Regulation
GDPR	General Data Protection Regulation
GFC	Global Financial Crisis
GFSTs	Government Financial Stabilisation Tools
HSC	Health Security Committee
HMA	Heads of Medicines Agencies
ICC	International Court of Arbitration of the International Chamber of Commerce
ICN	International Competition Network
ICSID	International Centre for Settlement of Investment Disputes
IPEX	Platform for EU Interparliamentary Exchange
LTROs	Longer-Term Refinancing Operations
MEPs	Members of the European Parliament
MFF	Multiannual Financial Framework
MiFID	Markets in Financial Instruments Directive
MoU	Memorandum of Understanding
MREL	Minimum requirements for own funds and eligible liabilities
NCAs	National Competent Authorities
NCAs	National Competition Authorities
NGEU	Next Generation EU
NPEs	Non-performing exposures
NPLs	Non-Performing Loans
OECD	Organisation for Economic Co-operation and Development

OLAF	European Anti-Fraud Office
OMT	Outright Monetary Policy Transactions
PEPP	Pandemic Emergency Purchase Programme
PPE	Personal Protective Equipment
PSPP	Public Sector Asset Purchase Programme
RRF	Recovery and Resilience Facility
RRPs	National Recovery and Resilience Plans
SGP	Stability and Growth Pact
SRB	Single Resolution Board
SREP	Supervisory Review and Evaluation Process
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRMR	Single Resolution Mechanism Regulation
SSM	Single Supervisory Mechanism
SURE	European instrument for temporary support to mitigate unemployment risks in an emergency
TLTROs	Targeted Longer-Term Refinancing Operations
TEU	Treaty on European Union
TF	Temporary Framework
TFEU	Treaty on the Functioning of the European Union
UBI	Unconditional Basic Incomes
US	United States
WHO	World Health Organisation

Chapter 1

COVID-19: MAKING THE BEST OUT OF EUROPE

EU Law Live's Editorial Board

Maja Brkan, René Repasi, Marco Lamandini, Adolfo Martín, Isabelle van Damme, Araceli Turmo, Ana Ramalho, Juan Jorge Piernas, Maria Weimer, and Anne-Lise Sibony

1. Introduction[1]

The COVID-19 pandemic is rapidly changing the face of Europe. In a Union founded on the idea of free movement, borders were being erected. In an interconnected world, countries were trying to shield themselves from a threat that is global and does not respect border checks nor carry a passport. The COVID-19 pandemic is a transboundary challenge of proportions unseen since the creation of the EU. Arguably, challenges like these are why we have the European Union in the first place: to enable effective collective action in the face of transboundary problems that no Member States can address on their own. The EU is today a global regulatory power, especially in the field of risk regulation, and has an institutional structure in place to address public health risks and emergencies.

Yet, during the first months of the COVID-19 crisis national governments were calling the shots. Their divergent responses to this crisis seemed to reveal a lack of unity in the face of a humanitarian catastrophe, risking breaking up the EU altogether and calling for a reconsideration of what role the EU should play amidst the crisis.[2] However, COVID-19 has also proved that the EU can be an extraordinary instrument of cooperation and solidarity. Almost one year into the pandemic, it can be argued that the EU has navigated through these enormous challenges with considerably more skill and shrewdness than was initially expected. So has COVID-19 changed the EU? And if so, is it for the better or worse?

1 This Chapter was finalised on 1 December 2020.

2 See Alessio M. Pacces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19', *European Journal of Risk Regulation*, Vol. 11, Special Issue 2, June 2020, pp. 283-296.

2. What role for the EU?

It is well known, yet worth stressing that the EU is a Union of conferred powers. According to the EU Treaties, health policy is a national competence. Member States as the signatories of the Treaties have granted the EU only limited powers for public health emergencies. Under the current EU regulatory framework, the EU Cross-Border-Health-Threats Decision, the role of the EU is to support national crisis management.[3] It mainly acts as a hub for rapid information exchange and coordination of national crisis-responses.

There are, in principle, good reasons for this division of tasks between the EU and the Member States. The organisation of national health systems is complex and varies across Member States. Different approaches are rooted in national culture and history. In federal Member States, like Germany, competences for public health are a matter of sub-federal entities, such as the Länder. National governments are best placed to assess the availability of resources and critical infrastructures, training of staff, equipment, as well as the expected behaviour of citizens in a crisis. After all, trust in doctors and governments is shaped by cultural attitudes, and is a factor in determining the effectiveness of emergency measures, such as social distancing and lockdowns. It is therefore not surprising that Member States adopt different responses to COVID-19. They carry the political responsibility for their crisis management vis-à-vis their citizens. EU institutions, especially the European Commission, do not possess the same level of political authority, nor are they subject to the same kind of democratic accountability as national governments.

It is clear then that divergent national responses to COVID-19 cannot be completely avoided. Yet, they can and must be better coordinated. Without effective coordination, there is a steep price to pay for diversity. This is where the EU should play the role it is destined to play. The EU offers invaluable tools for coordination and support in situations of public health emergencies. If used effectively by the Member States, these tools *can* foster the mutual learning and solidarity which are so urgently needed at the moment. How well this potential is realised depends on the political will of national governments. Unfortunately, at the moment, governments seem to be thinking short-term political gain rather than medium- and long-term common European interest. Let's look at these arguments in turn.

The price of diversity is that decentralised policymaking on COVID-19 produces damaging spillovers. It undermines both the effective fight against the virus and core values of European integration, such as free movement. Firstly, national choices for a particular containment approach have external effects on other Member States. Viruses do not respect borders, and people still move around. Therefore, a delayed response in one Member State, which leads to an explosion of cases in that Member State, puts other Member States at risk as the contagion inevitably moves across the border (as occurred with tourists returning home after their winter holidays in Italy in late February).

3 Decision 1082/2013 of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision 2119/98/EC.

Secondly, divergent public health responses to COVID-19 also undermine free movement in the internal market. For several months now, we have been experiencing what it means to have borders again in Europe. The resulting restriction of the free movement of persons is likely to undermine everyone's sense of belonging to the EU. It also reduces interstate labour mobility, which, combined with restrictions of the free movement of goods, increases the likelihood of COVID-19 causing a global supply shock.[4] This is particularly worrying with regard to scarce, yet critical medical equipment, the free movement of which Member States have already tried to restrict. This shows that asymmetric COVID-19 policies create conflicting interests which, in turn, undermine cooperation between States. This is why coordination at EU level is so important, after the initial mistakes and weak cooperation with regard to putting containment measures in place. The EU offers important tools in this regard, most of which are explored in this book.[5]

Both the EU and its Member States, when acting within the scope of EU law, are legally committed to ensuring a high level of public health protection. Despite limited EU competences, Member States have to respect EU legal obligations and are not fully free to determine how much health protection is desirable. They must also respect the precautionary principle, which is triggered by the scientific uncertainty around COVID-19. While a zero-risk approach is not allowed, the precautionary principle requires policymakers to protect public health without having to wait until the reality and seriousness of risks become fully apparent or until the adverse effects materialise (*BSE*, C-157/96 and C-180/96). It also requires them to prioritise public health over economic interests (*Bayer*, T-429/13 and T-451/13).[6]

Moreover, the EU web of health competences extends beyond public health emergency powers under the Health Threats Decision.[7] The EU must integrate health protection into all its actions and policies, and can therefore use other competences, such as in the field of the Internal Market, to ensure an effective European crisis response.[8] In fact, in those areas where the EU enjoys meaningful competences under the Treaties, the EU's actions have been both significant and expedient. This is clearly the case in relation to State aid, for example, where the Commission enjoys exclusive competence to decide on the compatibility of State aid measures with the internal market, subject to the review by the EU judicature.[9]

The EU must also play a part in ensuring that the COVID-19 crisis does not lead to the lowering of fundamental rights and rule of law standards across the Member States.[10] The special powers justified by the health emergency have also led to abuses of power by municipal or police authorities in several

4 Richard Baldwin, 'The supply side matters: Guns versus butter, COVID-style', *VoxEU*, 22 March 2020.

5 See in particular Chapter 2 below, as well as the Chapters included in Part III of this book.

6 On the precautionary principle, see the contribution to this volume by Alessandra Donati (Chapter 19 below).

7 Kai P. Purnhagen, Anniek de Ruijter, Mark L. Flear, et al, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak', *European Journal of Risk Regulation*, Vol. 11, Special Issue 2, 2020, pp. 297-306.

8 On this, see Chapter 17 below.

9 On State aid measures adopted by the EU amidst the COVID-19 crisis, see the Chapters included in Part VI of this book.

10 See the Chapters included in Part II of this book.

Member States. Two major challenges arise in this regard. First, exit solutions involving contract tracing based on the Taiwanese or Korean models raise major concerns related to privacy laws and data protection. The EU presents itself as a world leader in personal data protection. Its institutions have significant competences in this area, as the GDPR shows, and EU cooperation to develop common solutions seems particularly important, especially if freedom of movement is to be reinstated before the end of the pandemic. The Commission and competent agencies should be more assertive in insisting on cooperation to prevent Member States from pursuing the development of strictly national (and probably incompatible) systems. Second, the COVID-19 crisis seems to intensify the already ongoing rule of law crisis in the EU and its Member States, such as Poland and Hungary. If the EU is to tolerate the intolerable, the health crisis will further aggravate a rule-of-law crisis that the EU is still far from handling properly.

3. The changing landscape of EU law in times of pandemic

There is no area of policy untouched by the outbreak of COVID-19. From State aid to agriculture, from banking and finance to consumer protection, there is no place to hide. The impact of this crisis is so immense that it needs a holistic approach in order to structure a coherent response in legal terms. It is the integrity of EU law and all its policy areas that are at stake, as exemplified and explained through this Book.

The first months of the COVID-19 crisis led EU law to change mode and to turn into a law of emergency, facing the daunting task of setting the standards of an EU response to what is certainly the continent's greatest economic challenge since World War II and the post-war reconstruction of the late 40s and early 50s. EU lawyers became acquainted with emergency EU law during the financial crisis of 2008, but that precedent pales in comparison to the scope and severity of the pandemic crisis. We had never faced emergency EU law such as that we have witnessed in 2020.

In connection to the aforementioned lack of competence of the EU in some areas, the experience of these months demonstrates the potential of EU Law to become a source of imaginative responses to compensate such competence deficits. A good example of this is how COVID-19 is accelerating the creation of a fiscal Union. The collapse of national economies has driven the EU to take a gigantic leap forward. As explained in Part I of this Book,[11] the Recovery Fund, the creation of new own resources, the possibility for the EU to issue significant debt, SURE and other innovative policy measures will transform the EU's ability to use financial firepower to save the European economies in unknown ways. The link of these extraordinary measures with the need to increase the EU budget is one of the most crucial political and legal issues at the heart of the EU's response to the crisis, but it is also likely to shape the development of fiscal law in Europe in the years to come.

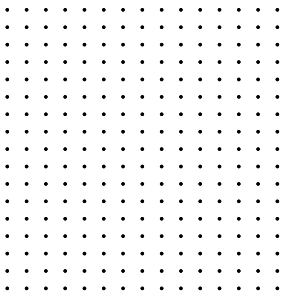
11 See Chapters 2 to 10 below.

At the same time, it has become apparent that, no matter how extraordinary the events may be, the classics of EU law are still the basic means of the toolkit. Even amidst emergency law, a lot can be done (and is being done) with existing instruments such as the well-established case law on justifications to free movement restrictions or the procedural mechanism of the infringement procedure against Member States breaching EU law. A difficult balance between creativity and orthodoxy in the use of legal instruments has been present in 2020 and is probably still lies ahead.

4. Outlook

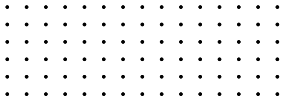
As pointed out above, despite its limited competences to act in public health emergencies the EU is far from powerless in this crisis. It has a web of competences that together enable EU action to protect European public health and to mitigate the negative effects on free movement, rule of law, and fundamental rights, among other areas.

Past crises have demonstrated that where there is political will, the EU can be very creative with how it uses its powers even in the absence of Treaty change. European leaders must make the best out of Europe. This book assesses whether and how this has happened during the first months of the COVID-19 pandemic, and explores the main transformations resulting from it for the EU as a political, economic, social, and legal Union.



Part I

INSTITUTIONAL LAW



Chapter 2

EU INSTITUTIONAL LAW IN TIMES OF PANDEMIC: AN OVERVIEW OF ONGOING TRANSFORMATIONS AND CHALLENGES

Dolores Utrilla

1. Introduction[1]

While the manifold measures adopted by the EU in response to the COVID-19 pandemic have prompted extensive commentary and research by legal practitioners and academics, the overall meaning and implications of such measures from an institutional perspective is yet to be considered and reflected upon. This is undoubtedly an arduous task for the months and years to come, as the dust settles and cross-sectoral, structural transformations emerge from what were conceived of mostly as sector-specific, conjunctural measures.

This Chapter is a preliminary attempt to contribute to that task by identifying some of the key (and ongoing) transformations triggered by the COVID-19 crisis in the area of EU institutional law. Here, this is understood as the part of the EU legal order dealing with the internal functioning of EU institutions, agencies, and bodies (including their decision-making processes and their budgetary foundations), as well as their mutual interactions and the overall relationship between the EU and its Member States, and among the Member States themselves.

With that aim, the following paragraphs look at five issues. Section 2 explores the internal functioning of the EU institutions, agencies, and bodies during the pandemic. Section 3 identifies the cross-cutting functional mechanisms used by EU actors to fight the health and economic crisis in the short and medium term, as well as the diverging role played by each of these actors in this regard. Section 4 assess-

1 This Chapter was finalised on 26 November 2020. It was prepared in the framework of the research project ‘El Derecho administrativo de Castilla-La Mancha: Diagnóstico y posibilidades de evolución en un contexto multinivel’ (reference SBPLY/17/180501/000140) funded by the Regional Government of Castilla-La Mancha and with the support of a grant of the Spanish National Research Plan (PGC2018- 101476-B-I00).

es the institutional transformations implied in the envisaged long-term measures for recovery and resilience, including how these measures might impact on the principle of institutional balance and on the interactions and distribution of powers between the EU and its Member States.

The last sections of this Chapter examine the pandemic-induced transformations of institutional law from the cross-cutting perspective of *the role of law*, that is, the functions performed by legal rules and principles within the EU legal space. It will be argued that the ongoing crisis is fostering certain structural transformations as regards the mechanisms for enforcement of the *rule of law* (section 5 below) and also as regards the *limits of law* to steer the action of EU, national, and private actors (section 6 below).

2. The functioning of EU institutions, agencies, and bodies

2.1. Disruptions and temporary adjustments

As occurred in many Member States, the most immediate and noticeable impact of the pandemic on the institutional side took the form of certain disruptions in the functioning of the EU institutions, agencies, and bodies, and led to the temporary adjustment of their internal organisation and, in some cases, of their rules of procedure.

The most relevant changes in this regard took place within the Council of the EU. On 12 March 2020, it was announced that essential Council meetings would continue (putting in place safety measures for participants), while non-essential or non-urgent Council meetings would be cancelled or postponed and, in some cases, held through the means of video conferences.[2] On 23 March 2020, the Council decided to temporarily derogate from Article 12(1) of its Rules of Procedure,[3] making it easier to adopt decisions under the written procedure (for which the ordinarily required unanimity temporarily ceased to apply for one month). More specifically, the derogation set out that a decision to use the ordinary written procedure, when taken by Committee of the Permanent Representatives of the Governments of the Member States (Coreper), shall be adopted in accordance with the voting rule applicable for the adoption of the Council act concerned (and not by unanimous vote). This was considered essential to ensure institutional continuity of its work in spite of the exceptional circumstances caused by the COVID-19 pandemic, which posed serious obstacles to ministers travelling in order to attend Council meetings, thereby affecting the possibility to reach the quorum required for decision-making at Council formal meetings under Article 11(4) of its Rules of Procedure. This derogation, due to expire on 23 April 2020,[4] was subsequently extended on a number of occasions and will continue to apply until 15 January 2021.[5]

2 General Secretariat of the European Council and of the Council of the EU, 'Continuation of decision-making in the Council and the European Council', press release of 12 March 2020.

3 Council Decision of 1 December 2009 adopting the Council's Rules of Procedure.

4 See Council Decision 2020/430 of 23 March 2020.

5 See Council Decision 2020/556 of 21 April 2020, Council Decision 2020/702 of 20 May 2020, Council Decision 2020/970 of 3 July 2020, Council Decision 2020/1253 of 4 September 2020, and Council Decision 2020/1659 of 6 November 2020.

In the case of the European Commission, limited remote working was implemented at the beginning of March for high risk employees and generalised as of 16 March 2020 for all staff in 'non-critical functions' until June, when the gradual lifting of confinement measures adopted by Member States allowed the Commission to design an action plan in several phases for a gradual return to physical work. For this, Guidelines on telework were issued and updated on a regular basis,[6] in accordance with Article 4(5) of the Decision on Telework[7] and Article 9 of the Decision on Working Time.[8] For EU agencies, targeted operational adjustments were implemented in response to the COVID-19 pandemic, most prominently through the adoption of 'social distancing measures', the implementation of teleworking, the cancellation of non-essential meetings with external visitors and/or of operational tasks, and the extension of time limits for certain deadlines (for example for the EUIPO,[9] CPVO,[10] or EASO[11]). Beyond these emergency, short-term organisational measures, on a more substantive note, the work programmes for 2020 of several EU executive bodies were promptly amended in order to accommodate the new challenges posed by the crisis: those of the Commission,[12] the European Banking Authority (EBA),[13] and the European Securities and Markets Authority (ESMA).[14]

As for the European Parliament (EP), on 2 March 2020 President David Sassoli issued a Decision on precautionary measures in response to the coronavirus outbreak, denying access to the EP buildings to persons who had visited certain regions where there was a significant risk of infection and calling off all of the EP's non-core events for a period of three weeks.[15] In late March, the EP's Bureau approved a temporary, extraordinary means of remote participation and voting procedure in order to allow members to fulfil their democratic rights and legislative duties in spite of the strict sanitary measures to avoid the spreading of COVID-19. This decision, adopted on the basis of Rules 25(2), 187 and 192 of the EP's Rules of Procedure,[16] was originally applicable until 31 July 2020, but it was later extended until 31 December 2020.[17] In September 2020, the EP's plenary sessions were transferred to Brussels due to the decisions taken by the French authorities to classify the entire Lower Rhine department (where Strasbourg is located) as a red zone.[18]

6 See for example Version 4 of the Guidelines on Teleworking in Commission Departments during the COVID-19 pandemic, 16 June 2020.

7 Commission Decision of 17 December 2015 on the implementation of telework in Commission Departments, C(2015) 9151 final.

8 Commission Decision of 15 April 2014 on Working Time, C(2014) 2502 final.

9 See for example EUIPO's Executive Director Decision No EX-20-3 of 16 March 2020 and Decision No. EX-20-4 of 29 April 2020, concerning the extension of time limits.

10 CVPO, 'CPVO adjusts working processes in reaction to COVID-19', press release of 24 March 2020.

11 EASO, 'EASO resuming full operational activities in Member States', press release of 27 May 2020.

12 Commission Communication of 27 May 2020 'Adjusted Commission Work Programme 2020', COM(2020) 440 final.

13 EBA's 2020 Work Programme (revised version July 2020), EBA/REP/2020/22.

14 ESMA's 2020 Annual Work Programme (revised version June 2020), ESMA20-95-1132.

15 European Parliament, Decision by the President on measures to be taken in connection with the COVID-19 outbreak, CP D(2020)9024.

16 Rules of Procedure of the European Parliament, December 2019.

17 European Parliament, 'Q&A on extraordinary remote participation procedure', 19 October 2020.

18 European Parliament, 'Covid19: Sassoli - Strasbourg declared red zone / Next plenary will take place in Brussels', press release of 8 September 2020.

Regarding the Court of Justice of the European Union (CJEU), on 13 March 2020 (and in line with the containment measures imposed by Luxembourgish authorities) it temporarily postponed oral hearings before both the General Court and the Court of Justice, and implemented a system of teleworking for its staff members, allowing judicial work on many cases to continue uninterrupted. Also on 13 March, the CJEU issued a statement declaring that 'procedural time limits, including time limits for instituting proceedings, shall continue to run and the parties are required to comply with those time limits', though the statement made a specific reference to Article 45 of the CJEU's Statute (regarding the possibility for parties to prove the existence of unforeseeable circumstances or of *force majeure*).[19] Oral hearings started to resume from 25 May 2020, with hygiene and social distancing protocols in place.[20]

2.2. Transparency and good administration

The described extraordinary adjustments are subject to the requirement to comply with transparency and good administration standards arising from Article 41 of the Charter. For this reason, the European Ombudsman already decided early on in April to launch a series of inquiries and initiatives looking at specific aspects of the work of different EU institutions, agencies, and bodies over the crisis.

The Ombudsman began by examining the transparency of the activity of the Commission and the Council during the COVID-19 emergency. On 20 April, a letter was sent to the Presidents of these institutions recalling that transparency obligations are not diminished in times of crisis and that all decisions related to the pandemic - including those taken under accelerated or emergency procedures - needed to be taken as transparently as possible, while temporary measures should be publicised, explained, and regularly reviewed. Both European Council President Michel and European Commission President von der Leyen replied detailing the measures put in place to reinforce transparency over the crisis, stressing the actions aimed at communicating their activities to the public.[21]

This was followed by the opening, in late July, of an inquiry into the Council's response to COVID-19, focusing on the Council's decision to temporarily derogate from its Rules of Procedure and the implications that this entails for its decision-making process and the transparency thereof. In the course of this inquiry, which is still ongoing, the Ombudsman sought to inspect certain documents held by the Council, which has recently replied, agreeing to the inspection request and setting out a list of documents which would be made available for inspection.[22] Also in late July, and as a follow up to her letter in April, the Ombudsman set out a series of detailed questions to the European Commission, notably regarding transparency related to public procurement, scientific advice, and lobbying activities in the context of the crisis.[23]

19 On this, see Daniel Sarmiento, 'Time limits and *force majeure* at the Court of Justice of the EU during the COVID-19 crisis', *EU Law Live*, 16 March 2020.

20 CJEU, 'Continuity of the European public administration of justice: the Court of Justice of the European Union provides for hearings to resume from 25 May 2020', press release of 27 April 2020.

21 The information on this case is available at the European Ombudsman's website under case number SI/1/2020/TE.

22 European Ombudsman, case number OI/4/2020/TE.

23 European Ombudsman, case number SI/4/2020/PL.

Moreover, the Ombudsman has launched another three initiatives looking into the response to the crisis by: (i) the European Investment Bank (EIB), specifically on the transparency of the terms and criteria related to new financing measures for small and medium-sized enterprises;[24] (ii) the European Centre for Disease Prevention and Control (ECDC), regarding the way in which it is gathering and assessing data linked to the pandemic;[25] and (iii) the European Medicines Agency (EMA), concerning the newly established pandemic task force, which was created to help take quick and coordinated regulatory action on the development, authorisation and safety monitoring of medicines intended for the treatment and prevention of COVID-19.[26] All these initiatives are still ongoing.

In addition to the Ombudsman's monitoring function, the European Court of Auditors (ECA) updated and revised its 2020 Work Programme in late May, shifting its priorities and announcing that it would be reviewing the response of the EU and its Member States' to both the public health and economic crises.[27] These ongoing reviews will act as preparation for full audits which will present findings, conclusions, and recommendations.

3. Measures to tackle the crisis: a cross-cutting institutional approach

Beyond the individual consideration of each of the short and medium-term operational actions adopted at the EU level to respond to the crisis, an approach to this myriad of measures from a higher level of abstraction allows one to distinguish among three different paths of action which are not unknown in EU law, but that have now been used with an unprecedented intensity and scope. These functional mechanisms, at times overlapping with each other, include the flexible implementation of the pre-existing legal framework (*infra* 3.1), the coordination of measures adopted at the national level (*infra* 3.2), and the urgent provision of liquidity to undertakings and Member States (*infra* 3.3).

A closer look at each of these functional approaches, as well as to some of their most significant examples, reveals that the use of each of them is related to the concerned subject-matter and to the extent and intensity of the EU's powers over it. In general, these measures reveal the prevalence of the EU executive and of concerted intergovernmental action, in contrast to the rather limited role of the European Parliament.[28]

3.1. Flexibility

Firstly, the EU has reacted to the pandemic through measures aimed at fostering flexibility in the application of the legal framework ordinarily applicable to national authorities and companies. This path

24 European Ombudsman, case number SI/3/2020/SF.

25 European Ombudsman, case number OI/3/2020/TE.

26 European Ombudsman, case number SI/5/2020/DDJ.

27 ECA 2020 Work Programme - COVID-19 update and revision, 28 May 2020.

28 On the European Parliament's role in the management of the COVID-19 crisis, see Elena Griglio, 'Parliamentary oversight under the Covid-19 emergency: striving against executive dominance', The Theory and Practice of Legislation Journal, Vol. 8, Issues 1-2, 2020, as well as the contribution to Part 1 by Diane Fromage and Bruno Dias Pinheiro (Chapter 10 below).

of action, followed mainly in fields of EU competence subject to a relatively high level of harmonisation, has taken several forms.

The softest manifestation has been the mere *clarification of pre-existing margins of flexibility* contained in EU hard rules, as well as the invitation to national authorities and economic operators to make use of them, through non-binding guidance and recommendations. This has happened most prominently in the field of public procurement, the Commission having adopted coronavirus-related Guidance on 1 April 2020.[29]

A far more intense phenomenon has been the *ex novo introduction of flexibility* in certain areas of EU law through soft law measures softening the obligations and/or the prohibitions established in binding rules for public powers and companies. This has been the main instrument used by the Commission in the context of State aid law (through the COVID-19 Temporary Framework adopted on 19 March 2020 and subsequently amended on several occasions)[30] and in the area of bank-lending (through an Interpretative Communication of 28 April),[31] as well as by the European Central Bank (ECB) in the context of liquidity providing operations (for example through a package of temporary collateral easing measures adopted on 7 April).[32] A mix of these two paths of action has been followed by the European Supervisory Authorities (ESAs). For example, the European Banking Authority (EBA) postponed its 2020 stress test until 2021 so that banks can focus on their core operations and critical functions throughout the coronavirus outbreak, while encouraging national competent authorities (NCAs) to make full use of flexibility under the current legal framework for banking supervision.[33] The European Securities and Markets Authority (ESMA) has provided guidance to NCAs on financial reporting deadlines in the context of the COVID-19 crisis,[34] as well as on fulfilling external audit requirements for interest rate benchmarks.[35] The European Insurance and Occupational Pensions Authority (EIOPA) has also issued guidelines in respect of supervisory practices,[36] including inter alia on product oversight and governance and on solvency of reinsurance businesses.[37]

29 European Commission, Communication of 1 April 2020 'Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis'. On this, see the contribution to this volume by Stéphane de la Rosa (Chapter 31 below).

30 On this, see the contributions to this volume by Juan Jorge Piernas López (Chapter 34 below) and Andrea Biondi (Chapter 35 below).

31 European Commission, Communication of 28 April 2020 'Interpretative Communication on the application of accounting and prudential frameworks to facilitate EU bank lending'. On this, see the contribution to this volume by Karl-Philipp Wojcik (Chapter 24 below).

32 ECB, 'ECB announces package of temporary collateral easing measures', press release of 7 April 2020. On these measures, see the contribution to this volume by René Smits (Chapter 23 below).

33 See EBA statement on actions to mitigate the impact of COVID-19 on the EU banking sector, 12 March 2020.

34 ESMA statement on actions to mitigate the impact of COVID-19 on the EU financial markets regarding publication deadlines under the Transparency Directive, 27 March 2020.

35 ESMA statement on actions to mitigate the impact of COVID-19 on the EU financial markets regarding the timeliness of fulfilling external audit requirements for interest rate benchmarks under the Benchmarks Regulation, 9 April 2020.

36 See EIOPA's approach to the supervision of product oversight and governance, 8 October 2020.

37 See respectively EIOPA's statement on supervisory expectations on Product Oversight and Governance requirements amidst the COVID-19 situation, 8 July 2020, and EIOPA's supervisory statement on the Solvency II recognition of schemes based on reinsurance with regard to COVID-19 and credit insurance, 21 July 2020.

Lastly, flexibility has been achieved by means of the *formal activation of certain extraordinary clauses set out in hard law rules*. Notoriously, this mechanism has been used by the Council by triggering the general escape clause under the Stability and Growth Pact in late March 2020,[38] thereby allowing the Commission, the Council, and the Member States to undertake the necessary measures to tackle the economic consequences of the crisis departing from the budgetary requirements that would normally apply.

3.2. Coordination

The second functional mechanism used by the EU to address the crisis in the short and medium term has been the coordination of national measures,[39] mostly of those adopted either in fields of national competence, or in fields subject to EU harmonising rules but which allow for the introduction of national derogations in exceptional circumstances.

These measures have been adopted mainly in three areas. The first one is the *internal market*, where the Commission and the Council have played a key role in the coordination of national derogations to the freedoms of movement as well as of the gradual lifting thereof.[40] Certain EU agencies, such as the ECDC, have also contributed to this task by providing their assessment on certain technical matters related to health.[41] The second field where coordination measures have been core to the EU's response is, unsurprisingly, *health law* (see Article 168 TFEU). Coordination here has been key mostly concerning national vaccination policies,[42] procedures for testing and surveillance,[43] and the authorisation, provision, and distribution of medicines. Concerning the latter, it must be noted that during the crisis the EMA has been asked to take on the role of a central coordinator of Member States' prevention and management actions, which has made it necessary to put in place new ad hoc processes and resources for this EU Agency.[44] Lastly, coordination measures have been of utmost relevance in the area of *economic and monetary governance*, where the ECB and the ESAs have adopted a set of temporary and tailored measures (some of them by means of non-binding guidance also introducing flexibility in the

38 Council of the EU, Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis, 23 March 2020.

39 On this, see Alessio M. Pacces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19', 11 *European Journal of Risk Regulation*, Special Issue 2, 2020, pp. 283-296.

40 See for example Commission Communication of 16 March 2020 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU', COM(2020) 115 final; Commission Communication of 15 April 2020 'A European roadmap to lifting coronavirus containment measures'; Council Recommendation of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction; Council Recommendation of 21 October 2020 amending Council Recommendation 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction. On the coordination of these derogations, see generally the contributions to Part 5 by Daniel Thym (Chapter 28 below) and Sandra Mantu (Chapter 29 below).

41 On this, see the contribution to Part 1 by Dolores Utrilla (Chapter 17 below).

42 Commission Communication of 15 October 2020 'Preparedness for COVID-19 vaccination strategies and vaccine deployment', COM(2020) 680 final.

43 See for example Commission Recommendation of 28 October 2020 on COVID-19 testing strategies, including the use of rapid antigen tests, C(2020) 752 final; Commission Recommendation of 18 November 2020 on the use of rapid antigen tests for the diagnosis of SARS-CoV-2 infection.

44 EMA, 'EU authorities agree new measures to support availability of medicines used in the COVID-19 pandemic', press release of 6 April 2020.

terms exposed above), in order to ensure coordination between national central banks or between NCAs when exercising their functions during the crisis.[45]

3.3. Liquidity

Echoing Mario Draghi's 'whatever it takes' from 2012, in March 2020 the ECB, the Eurogroup, and the European Council announced their commitment to do 'everything that is necessary' to tackle the crisis and its consequences.[46] This translated in the provision of immediate, temporary liquidity for Member States, banks, companies, and citizens all over the EU. Some of these liquidity measures are highly innovative and will potentially shape the contours of the EU's powers in times of crisis in the years to come.

Liquidity measures revolve basically around three pillars, namely: (i) outright monetary transactions of the ECB, (ii) the amendment of the legal framework of pre-existing EU funds, and (iii) the launch of new funds and credit lines to support the financing of emergency aid.

Firstly, the continuation of the ECB's asset purchase programme (APP) and the launch of a pandemic emergency purchase programme (PEPP)[47] have been two key steps of the EU's response to the crisis. Beyond their importance to fight the crisis, these measures − and particularly the second one, characterised by its flexibility − are of great interest in institutional terms because they allow for further exploration of the limits of the ECB's competence in times of crisis. Indeed, the PEPP (the main features of which are explained by René Smits in Chapter 23 below) is an interesting addition to the corpus of EU law on outright monetary transactions and might foster further reflection on judicial review of the ECB's action,[48] in a moment marked by the *Weiss* judgment of the German Federal Constitutional Court,[49] released in May this year.

Secondly, the Council and the European Parliament have played a central role in swiftly enabling pre-existing EU funds to be used to their fullest extent to react to the crisis over 2020. In early April

45 See for example ESMA Decision of 16 March 2020 to require natural or legal persons who have net short positions to temporarily lower the notification thresholds of net short positions in relation to the issued shares capital of companies whose shares are admitted to trading on a regulated market above a certain threshold to notify the competent authorities in accordance with point (a) of Article 28(1) of Regulation 236/2012 of the European Parliament and of the Council; EBA statement on the application of the prudential framework regarding Default, Forbearance and IFRS9 in light of COVID19 measures, 25 March 2020; ECB Recommendation of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/1 (ECB/2020/19); ECB Recommendation of 27 July 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/19; ESMA statement on actions to mitigate the impact of COVID-19 on the EU financial markets – Coordination of supervisory action on accounting for lease modifications, 21 July 2020.

46 Christine Lagarde, 'Our response to the coronavirus emergency', The ECB Blog, 19 March 2020; Eurogroup Statement on COVID-19 economic policy response, 16 March 2020; European Council, 'Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19', press release of 17 March 2020;

47 Decision 2020/440 of the ECB of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17); Decision 2020/1143 of the ECB of 28 July 2020 amending Decision 2020/440 on a temporary pandemic emergency purchase programme (ECB/2020/36).

48 On this specific issue, see Diane Fromage, '*Weiss*: The Bundesverfassungsgericht's over-expansive interpretation of the Bundestag's 'responsibility for integration' and the need to adapt judicial review procedures to the E(S)CB's specificities', Weekend Edition No. 18, *EU Law Live*, 23 May 2020.

49 BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15.

the Council amended the multiannual financial framework (MFF) for the years 2014-2020 to allow the addition to the EU budget of commitment appropriations which are higher than the ceilings laid down in the MFF, where it is necessary to use resources from several EU funds.[50] This was accompanied by the amendment, by the European Parliament and the Council, of the legal frameworks governing several EU funds in order to introduce temporary flexibility in how they can be used. That happened for example concerning the Fund for European Aid to the Most Deprived (FEAD),[51] the EU Solidarity Fund (EUSF),[52] and the EU's Structural and Investment Funds.[53] The main institutional challenge posed by this kind of action concerns accountability, transparency, and monitoring of the use of EU funds, as well as the risk of imbalances resulting from the increased margin of discretion afforded to Member States in the use of such funds, as noted early on by the ECA in its Opinion on the temporary amendments of the Structural and Investment Funds.[54]

Thirdly, short and medium-term liquidity and financial support has been provided through certain *ad hoc*, new instruments adopted during the early months of the pandemic. These include most prominently: (i) the activation by the Council of a specific Emergency Support Instrument under Regulation 2016/369 (amended for that purpose);[55] (ii) the establishment by the European Investment Bank (EIB) Group of a Pan-European Guarantee Fund following the agreement on the matter by the Eurogroup and the European Council; (iii) the Eurogroup's 'Pandemic Crisis Support' (PCS), a credit line for Member States provided by the European Stability Mechanism (ESM) and backed by the European Council; and (iv) the creation by the Council of a temporary loan-based instrument for 'Support to mitigate Unemployment Risks in an Emergency' (SURE).[56] As is noticeable, a common feature of all these instruments is their intergovernmental imprint. In addition, SURE has two particularly distinctive features from an institutional law perspective (as explained in the contributions to this volume by Karl Croonenborghs and René Repasi).[57] On the one hand, scrutiny by the European Parliament is foreseen as regards the use of the EU's financial means by the Commission, but it is excluded as re-

50 See Council Regulation 2020/538 of 17 April 2020 amending Regulation 1311/2013 laying down the multiannual financial framework for the years 2014-2020 as regards the scope of the Global Margin for Commitments.

51 Regulation 2020/559 of the European Parliament and of the Council of 23 April 2020 amending Regulation 223/2014 as regards the introduction of specific measures for addressing the outbreak of COVID-19.

52 Regulation 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency.

53 Regulation 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations 1301/2013, 1303/2013 and 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative); Regulation 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations 1301/2013 and 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative Plus).

54 ECA Opinion No 3/2020 on the proposal 2020/0054(COD) for a Regulation of the European Parliament and of the Council amending Regulation 1303/2013 and Regulation 1301/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak.

55 Council Regulation 2020/521 of 14 April 2020 activating the emergency support under Regulation 2016/369, and amending its provisions taking into account the COVID-19 outbreak.

56 Council Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

57 See respectively Chapter 5 by Karl Croonenborghs, and Chapter 6 by René Repasi in Part 1 below.

gards the definition of the financial assistance. This shortcoming, which is a consequence of the legal basis chosen to enact SURE (Article 122(2) TFEU), is nonetheless an improvement compared to the special purpose vehicles that were constructed outside the EU legal framework during the last economic crisis. On the other hand, the importance of SURE stems from the fact that it is the first ever financial assistance mechanism which is not subject to strict policy conditionality, but to 'earmarking', thereby focusing on the purpose of the assistance.

4. Measures for recovery and resilience: a cross-cutting institutional approach

The institutional dynamics of the preparation, (ongoing) process of adoption, and content of the envisaged long-term measures to ensure a sound recovery and to foster resilience are significantly different from the ones explored above. It is in this field where the European Parliament is involved at its deepest level, and also where the most profound institutional consequences of the crisis can be expected. At the present time, such consequences are deployed mainly over two axes, namely the evolving functions of the EU budget (section 4.1 below) and the anticipated transformation of the EU's health competences (section 4.2 below).

4.1. The evolving functions of the EU budget

In late May 2020, the European Commission presented its plan for post-pandemic economic recovery in the EU, a highly ambitious initiative based primarily on the 2021-2027 MFF, as well as on other budget-related pieces of EU legislation.[58] The most relevant parts of the plan, which is extremely complex and is still in the process of being adopted, are Next Generation EU and the creation of new own resources (including EU taxes) to fund the EU budget.[59] On a deeper note, the Commission's plan was built on two substantive values − solidarity and the rule of law − which involve a twist of the institutional meaning of the EU's budget and which have become the real centre of political discussion both among Member States and among EU institutions during the last months.

On 21 July 2020, and after one of its longest meetings ever, the European Council reached an agreement on the post-pandemic economic recovery plan, while introducing some significant changes from the Commission's original plans. At this stage, the understanding and the scope of solidarity was the hardest point of negotiations, with Member States initially split into two blocks (the so-called 'frugal countries' and the rest of Member States, headed by France, Italy, and Spain, with the significant support of Germany) as regards the delicate issue of debt mutualisation through a mixed system of grants and loans.[60] The deal reached by EU leaders opened the door for the first time ever to joint debt issuance and to (future) joint taxes, although in amounts lower than those proposed by the Commission,

58 Dolores Utrilla, 'The Commission's long-term budget proposal and the EU recovery plan: dissecting the jigsaw puzzle', *EU Law Live*, 8 June 2020.

59 Next Generation EU is further explored by Armin Steinbach in Chapter 3 in Part 1 below. Regarding the possible creation of genuine EU taxes, see the contribution by Stefano Dorigo in Part 4 (Chapter 26 below).

60 Dolores Utrilla, 'The European deal for post-pandemic economic recovery: content and meaning', *EU Law Live*, 21 July 2020.

and with an allegedly diminished degree of rule of law conditionality.

In turn, the latter has proved to be the main issue in the ongoing negotiations between the Council and the European Parliament, with MEPs calling for reinforced rule of law-conditionality. On 5 November 2020, a provisional agreement was reached on this point, on the basis of a pending (and amended) Commission proposal from 2018 on the general regime of conditionality for the protection of the EU budget.[61] A subsequent Chapter of this volume by John Morijn and Aleksejs Dimitrovs explores the background, meaning, and scope of this mechanism.[62]

As we await the outcome of the ongoing legislative procedures, one thing is already clear. The COVID-19 pandemic has removed the taboo of using the EU's powers to spend and to collect money to exercise substantive competences linked to central values to the EU legal order, bringing to the arena of acceptable political and legal discussion issues such as joint debt issuance, joint taxes, and rule of law-conditionality for the disbursement of EU funds. And this naturally drags along with it the opening of further structural matters, such as the role of solidarity in the EU legal order[63] or the recently proposed development of mechanisms for minimum income protection across the EU,[64] following certain initiatives at the national and at the EU level over recent months.[65] Irrespective of how the recovery plan is finally adopted and implemented, these developments are undoubtedly called on to deploy a decisive influence in the shape of EU law in the years to come.

4.2. The envisaged transformation of the EU's health competences

Rather unexplored until this year, the limited scope of EU competences in the area of human health under Article 168 TFEU has also been brought to the centre of discussion during the last few months. In her 2020 State of the Union Address at the European Parliament, Commission President Ursula von der Leyen called for lessons to be learned, saying Europe must build a stronger European Health Union, with a future-proof and properly funded EU4Health programme, a reinforced EMA, and a strengthened ECDC.[66] She also pledged to build a European Agency for Biomedical Advanced Research and Development (BARDA) to enhance Europe's capacity to respond to cross-border threats. The President further called for a debate on new competences for the EU in the field of health, as part of the forthcoming Conference on the Future of Europe. These priorities have been included in the Commission's Work Programme for 2021.[67] The issue is now on the table, and there may not be a more

61 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final.

62 See Chapter 4 by John Morijn and Aleksejs Dimitrovs in Part 1 below.

63 On solidarity, see the contribution by Ulla Neergard and Sybe de Vries (Chapter 7 below).

64 Council Conclusions of 9 September 2020 'Strengthening Minimum Income Protection to Combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond'.

65 On basic income protection, see the contribution by Borja Barragué and Guillermo Kreimann (Chapter 8 below).

66 Ursula von der Leyen, State of the Union Address at the Plenary of the European Parliament, 16 September 2020.

67 Commission Communication of 19 October 2020 'Commission Work Programme 2021 - A Union of vitality in a world of fragility', COM(2020) 690 final.

appropriate juncture to address it. One can only look forward to watching the unfolding of this new line of development of EU law, which will very much depend on the assessment of how the already existing competences are being exercised to fight the COVID-19 pandemic. Further reflection on this issue can be found in Part III of this Book.[68]

5. The Rule of Law

One of the most visible consequences of the COVID-19 pandemic has been the contribution of emergency powers provided by national legal orders to the rule of law backsliding already underway prior to the crisis in certain Member States, namely Poland and Hungary.[69] In Part II of this book, the human rights side of this problem are addressed.[70] Here, attention will be drawn specifically to the way in which the COVID-19 pandemic is boosting the use of *conditionality mechanisms linked to EU funds* as a tool to foster respect for the rule of law.

The 'no rule of law, no money'-logic has already been present on the European agenda for some time. In 2018, the European Commission strongly advocated for it in a (still pending) proposal for a regulation on the protection of the EU's budget in case of generalised deficiencies as regards the rule of law in the Member States, which has recently been modified to extend its scope to the proposed EU Recovery Instrument, as noted above and further explained in Chapter 4 below. Once adopted as a legally binding mechanism, this conditionality tool will be the first general instrument at the disposal of EU institutions specifically designed to prevent access to EU funding from Member States breaching the rule of law, thereby enhancing the enforcement of this paramount legal principle. However, the real efficiency of such a mechanism, as well as its consequences for legal certainty, will very much depend on how it is applied in practice by the EU institutions.[71]

In parallel with these Council-Parliament conversations, other EU institutions took steps advocating for different forms of rule of law conditionality for the access to EU money. In late July 2020, the Commission decided to reject the applications for funding under the twinning programme of the Europe for Citizens project in respect of six Polish towns that had declared themselves 'LGBTI-free zones'.[72] This was the first-ever Commission Decision with financial consequences in the context of the worrying steps toward LGBTI discrimination taken by Polish local authorities, in what can be understood as a manifestation of the Commission's 'no rule of law, no money'-logic. Soon afterwards,

68 See in particular Chapter 17 by Dolores Utrilla in Part III below.

69 Tímea Drinóczi and Agnieszka Bień-Kacała, 'COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism', The Theory and Practice of Legislation Journal, Vol. 8, Issues 1-2, 2020.

70 See Chapter 11 by Anjum Shabbir in Part II below.

71 Armin von Bogdandy and Justyna Łacny, 'Suspension of EU Funds for Member States Breaching the Rule of Law – A Dose of Tough Love Needed?', Max Planck Institute for Comparative Public Law & International Law (MPIL), Research Paper No. 2020-24, 30 June 2020; Michael Blauberger and Vera van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?', *Journal of European Integration*, 2020; Marco Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values', *European Papers*, Vol. 4, No. 3, 2019.

72 On this, see Dolores Utrilla, 'Towards rule of law conditionality in the management of EU funds: LGBTI free zones not eligible for town twinning funding', *EU Law Live*, 6 August 2020.

on 7 October 2020, the European Parliament adopted a broader legislative initiative for the establishment of an EU Mechanism on Democracy, the Rule of Law, and Fundamental Rights.[73] The envisaged mechanism seeks to protect the EU legal order and the fundamental rights of its citizens from the deterioration of Article 2 TEU values. The proposed mechanism was based on a new 'Annual Monitoring Cycle' including preventive and corrective measures, ranging from country-specific recommendations to budgetary conditionality.

6. The limits of law

While fostering enhanced mechanisms for implementation of the rule of law in the sense described above, the unprecedented situation of emergency posed by the COVID-19 pandemic has simultaneously challenged the ability of EU law to accommodate the urgent needs posed by the crisis and to effectively govern the actions adopted by the EU institutions, as well as by other public or private actors, in response thereto. The mismatch between the ordinarily applicable rules and the scenario to which they were meant to be applied prompted a flexible approach to the interpretation and application of pre-existing legal rules, as well as to the creation of new coordination mechanisms between national authorities. Two phenomena appertaining to the edges of the legal order have played a central role in this area, namely the rise of EU executive discretion (section 6.1 below) and of EU soft law (section 6.2 below).

6.1. The rise of EU executive discretion

Even in ordinary times, EU policy making is a highly discretionary space.[74] In extraordinary (emergency) times, this is even more so. It is therefore not surprising that the COVID-19 pandemic has brought to the limelight – yet again – the discretion of the EU executive and the limits thereof.

This is particularly so regarding the European Commission, whose energetic and decisive approach to the crisis has prompted a debate primarily focused on its efficiency, rather than on its legal boundaries. On a more reflective note, however, the responses provided by the Commission to the ongoing pandemic apparently show that, in many instances, there were no legal provisions (narrowly) constraining the value judgments contained in the Commission's choices as to how the crisis should be fought in the health, economic, and social arenas. A similar situation exists in respect of the ECB, although deeper reflection on the limits of its discretion in times of emergency has existed from the very beginning of the COVID-19 pandemic, as a result of the experience of the previous financial crisis and the consequent judicial saga – culminating, for the time being, in the BVerfG's *Weiss* judgment.

In addition to its quantitative and qualitative importance for the management of the ongoing crisis, the

73 European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)).

74 Mark Dawson, 'How Can EU Law Contain Economic Discretion?', in Joana Mendes (ed.), *EU Executive Discretion and the Limits of Law*, OUP, 2019.

use of discretionary powers by the EU executive during the pandemic is particularly relevant because it clearly points to the weakness of current procedural rules as instruments to shape the exercise of discretion in times of emergency. Indeed, one of the most prominent features of emergency law is the trend to neglect or to soften ordinarily applicable procedural requirements,[75] which in turn results in an increased need for substantive legal tools steering the exercise of executive discretion in this kind of scenario. Likewise, the use of self-binding instruments such as soft law, despite being important to put certain boundaries to the exercise of clearly delineated discretionary powers, is not enough to constrain discretion whenever this was nearly unlimited in the first place.

What we have experienced during 2020 leaves no room for doubt that executive discretion is essential in order to adapt the legal order to the changing needs of the public interest, even more so in times of emergency. Discretionary policy choices made by the EU executive over these months have undoubtedly saved lives, jobs, and companies. However, and as further explained by Joana Mendes in Chapter 9 below, this landscape of enhanced margin of manoeuvre for the EU executive also calls for a serious reconsideration of the scope and limits of executive discretion within the EU legal order. Ensuring subordination thereof to a pre-established framework of legal provisions is a key requirement lying at the very heart of the European integration: it stems not only from the rule of law, but also from the principle of representative democracy on which the functioning of the EU as such is founded.

6.2. The new youth of EU soft law

To a very large extent, the EU (as well as its Member States) is dealing with the COVID-19 crisis through soft law instruments, that is, rules of conduct which, in principle, have no legally binding force but which nevertheless may have 'practical' effects.[76] According to a recent study, 62% of the 384 COVID-19-related documents published on Eurlex up to June 2020 are soft law measures.[77] Some examples thereof have been provided in the previous sections of this Chapter, including the documents regarding coordination of economic responses to the crisis, management of clinical trials, restrictions on non-essential travel, temporary flexibilisation of State aid rules, relaxation of banking supervision standards, dividend distribution policies for credit institutions, moratoria in loan repayments, and the progressive lifting of containment measures. Overall, and closely linked to the issue of executive discretion, this rise in the use of soft law is connected with two of the short and medium-term functional approaches of the EU to the pandemic crisis, namely flexibility and coordination.[78]

75 Emergency measures adopted under public health crisis can be described as 'temporary aberrations to normal rights and procedures': see Ronan Cormacain, 'Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation', 8 *The Theory and Practice of Legislation Journal* 3, pp. 245-265.

76 Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', *The Modern Law Review*, No. 53(1), 1993, pp. 19-54.

77 Oana Stefan, 'The Future of European Union Soft Law: A Research and Policy Agenda for the Aftermath Of COVID-19', *Journal of International and Comparative Law*, forthcoming.

78 For a sector-based example of this, see Niamh Moloney and Pierre-Henri Conac, 'EU Financial Market Governance and the Covid-19 Crisis: ESMA's Nimble, Responsive, and Speedy Response in Coordinating National Authorities through Soft-Law Instruments', 17 *European Company and Financial Law Review* 3-4.

Especially during the first months of the pandemic, the use of soft law proved to be a crucial instrument for reacting in an expeditious and flexible fashion to the fast-moving challenges posed by the crisis. Yet, this unprecedented large-scale and detailed use of soft law, a legal tool suffering from important legitimacy and accountability drawbacks, warrants a renewed debate on its legal framework within the European legal space, as already suggested by some prominent scholars.[79] This need stems most prominently from the fact that the COVID-19 experience has made apparent, like never before, that in spite of lacking legally binding force, pandemic-soft law is clearly leading to other kinds of legal (and not only practical) effects. To quote just some of them, these instruments are apparently giving rise to legitimate expectations and conditioning the way in which public and private actors behave in a landscape governed by scientific and economic uncertainty.

Together with the need to clarify the processes through which soft law is issued,[80] one of the main issues posed by this intensive use of non-binding measures is their reduced degree of justiciability, as manifested primarily (though not only) in the difficulties of challenging them before courts. These obstacles are apparent when considering the rules and the case law governing the admissibility of actions against soft law instruments before both national courts and the CJEU.[81] This state of affairs is thoroughly dysfunctional if it is to be applied to a scenario such as the one arising from the COVID-19 outbreak, where obstacles to judicial review of these measures may hamper the right to effective judicial protection to an extent unknown to date. The forecast worsens whenever the use of soft law instruments (and the resulting restrictions on judicial review) follows a phased pattern, with non-binding measures by national authorities relying directly on recommendations or guidelines issued by the EU institutions during the crisis.

The positive note is that, for that very reason, the current developments in soft law governance may represent an unparalleled opportunity to rethink the balance between non-binding instruments and effective judicial protection.

In this regard, the experience of the COVID-19 pandemic may, firstly, lead the CJEU to revisit its case law regarding the admissibility of actions for annulment against administrative action adopted in the form of non-binding instruments. At the very least, the likelihood of a rise in the number of attempts by affected parties to bring direct actions against soft law instruments will place the CJEU in an optimal scenario to revisit its *ERTA* (C-22/70) and *Grimaldi* (C-322/88) doctrine. This would be in line with the solution suggested by Advocate General Bobek in his Opinion in *Belgium v Commission*: in view of a changing legislative landscape, marked by a proliferation of soft law instruments, access to the EU Courts should be adapted in order to respond to those developments, recognising the fact that

79 Oana Stefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda', *European Papers*, 2020, pp. 1-8.

80 Oana Stefan, 'The Future of European Union Soft Law: A Research and Policy Agenda for the Aftermath Of COVID-19', *Journal of International and Comparative Law*, forthcoming.

81 Giulia Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach', *European Constitutional Law Review*, 2 November 2020; Dolores Utrilla, 'Governing a pandemic through soft law: challenges for judicial review', Weekend Edition No. 21, *EU Law Live*, 13 June 2020, pp. 16-22.

there are norms generating significant legal effects that find themselves beyond the binary logic of binding/non-binding legal rules. In fact, this would not be contrary to Article 263 TFEU: it must be recalled that this provision excludes judicial review of acts *without legal effects*, which is quite different to excluding *acts which, even lacking binding force, do have legal effects* vis-à-vis third parties.

Secondly, in view of the steering function of many EU soft law instruments adopted in response to the COVID-19 crisis, and their subsequent reception by Member States through hard law measures, it is reasonable to expect that challenges before national courts may give rise to a relevant number of requests for preliminary rulings on the validity of the underlying EU recommendations or guidelines. It remains to be seen whether and how the Court of Justice will actually make use of this mechanism to scrutinise EU soft law instruments. In spite of its potential lack of coherence from a systematic perspective (according to some authors[82]), this course of action would be worth exploring as it may be useful to compensate for the Court's strict admissibility test when it comes to actions for annulment.

Lastly, part of the soft law measures adopted by Member States in response to the COVID-19 crisis are in turn based on soft law instruments adopted by the EU institutions, agencies, and bodies. This raises the question of whether such national non-binding rules and/or decisions amount to measures adopted 'in implementation of EU law' and, therefore, whether they trigger the application of the Charter. That being so, this would offer the Court of Justice the opportunity to rule on whether shortcomings under national law for bringing direct actions against domestic soft law measures are in accordance with the right to effective judicial protection under Article 47 of the Charter. As I have explained elsewhere, the potential effects of the Charter on the admissibility before domestic courts of actions against national soft law based (in turn) on EU soft law would be of particular relevance because it would facilitate indirect scrutiny of EU non-binding measures by the CJEU through the preliminary ruling procedure.[83]

82 Roberto Mastroianni, 'What's in a recommendation?', Max Planck Institute Luxembourg for Procedural Law, Research Paper Series, 2020, No. 2, pp. 129-142.

83 Dolores Utrilla, 'Governing a pandemic through soft law: challenges for judicial review', Weekend Edition No. 21, *EU Law Live*, 13 June 2020, pp. 16-22.

Chapter 3

THE NEXT GENERATION EU - ARE WE HAVING A HAMILTONIAN MOMENT?

Armin Steinbach

1. Introduction[1]

The joint proposal made by German Chancellor Angela Merkel and French President Emmanuel Macron in May has electrified the fantasy of those frustrated by Germany's dovish German stance towards European integration in recent years.[2] Some regard the Merkel-Macron initiative as paving the way to a federalised EU and have boldly suggested that Alexander Hamilton – one of the Founding Fathers of the United States and a staunch supporter of federalism – be seen as a role model. Soon after the joint proposal was announced, the EU Commission introduced the recovery plan 'Next Generation EU', which seems like a zealous move to exploit the new momentum. The plan contains a 750 billion-euro stimulus package for the Corona-hit EU, well beyond that envisioned by the unprecedented Merkel-Macron proposal.

Next Generation EU is a massive reconstruction tool targeting those sectors and Member States that are most affected by the crisis and cutting across a number of new and existing EU programmes. Specifically, Next Generation EU aims at temporarily boosting the financial firepower of the EU budget, channelling resources through a wide field of policy areas and instruments to address financial, economic, and health needs. The EU Next Generation package builds on three pillars:

i. *Supporting the recovery of Member States.* More than 80% of the financial resources from Next Generation EU are intended to be used to fund investment and support reforms in the Member States, with a focus on sectors where the need for resilience appears greatest (such

1 This Chapter was finalised on 23 June 2020.

2 German Federal Government, 'A French-German Initiative for the European Recovery from the Coronavirus Crisis', press release of 18 May 2020.

as employment, education, research, innovation, health, environment, and finance). Under the current draft of the package, the European Union Recovery Instrument (ERI) – with a budget of 560 billion euros in grants and loans – makes up the instrument's core.

ii. *Creating incentives for private investment and providing support for struggling companies.* This pillar provides measures to boost private investment and support ailing businesses. With the private sector under heavy strain due to lockdowns and the impact of the pandemic, the instrument is a forceful response to companies' liquidity and solvency needs. The Commission plans to create a solvency support instrument to ensure the supply of capital, particularly in Member States that are less able to intervene through State aid. This programme adds to the multiple state-level efforts that provide relief to companies. Over the past few months, the Commission has repeatedly relaxed its State aid rules to ensure flexibility while maintaining a level playing field for fair competition.[3]

iii. *Ensuring the reinforcement of key EU programmes*. By pooling established and new programmes for health security, civil protection, and innovation, the EU Commission wants to address imminent crises and launch long-term transformative projects. For example, the new initiative EU4Health aims to support health care systems, promote cross-border collaboration in health, and boost investments in critical health infrastructure. The Commission has also set aside 94 billion euros for Horizon Europe, which supports health and climate-related research and innovation.

2. The legal basis of the ERI – a Matryoshka doll?

The ERI is a one-off emergency mechanism totalling 560 billion euros, with grants of up to 310 billion euros available and the offer of loans of up to 250 billion euros. The instrument would provide the EU budget with the additional resources necessary to respond to the urgent challenges posed by the pandemic. A closer look reveals that the Commission's initiative is an example of creative legal engineering. With its umbrella programme and various sub-instruments, the ERI resembles a Matryoshka doll containing other programmes built on different legal foundations. The clever design avoids the hurdle imposed by the Treaty's prohibition on EU debt, unless for specified purposes such as those listed as exceptions under Article 122(2) TFEU. Typically, debt instruments for those exceptions receive guarantees from the Member States in order not to burden the Union's own resources. This was already an established practice under SURE and the European Financial Stability Facility (EFSF) during the sovereign debt crisis. The ERI also invokes Article 122(2) TFEU, which specifically names natural disasters and other exceptional events that seem tailor-made for the COVID-19 pandemic.

Unlike SURE and its predecessors, the debt issued under the ERI will be guaranteed by the EU budget itself, not by Member States. For the EU budget to have this power, the Own Resources Decision

3 On the use of State aid rules to overcome the COVID-19 pandemic, see the contributions to this volume by Juan Jorge Piernas (Chapter 33 in Part VI below) and by Andrea Biondi (Chapter 34 in Part VI below).

pursuant to Article 311 TFEU is essential. The Commission has decided to channel the borrowing activities of the ERI through the new Own Resources Decision. To that end, the Commission applies an accounting trick that allows the Commission both to strengthen the EU budget and minimise the burden on Member States' budgets. Based on the Own Resources Decision the Commission acquires financial claims vis-à-vis Member States, which lift the credit rating of the EU budget to give it the necessary borrowing capacity. At the same time, Member States are not actually obliged to pay the debt and therefore do not have to burden their current national budget. Concerning the future repayment of the EU debt, the Member States are in principle liable through their future contributions to the EU budget, yet the Commission does not want to rely on Member States alone; rather, it plans to pay off the debt with new fiscal sources such as the Emissions Trading System, a carbon border adjustment mechanism, or a digital tax. It should be noted, however, that there is no EU consensus on which of these measures is best.

While the ERI umbrella blends both Article 122 TFEU and the Own Resources Decision to justify financial assistance and take on debt, the Recovery and Resilience Facility (RRF) – one of the Matryoshka dolls within the ERI – builds on Article 175 TFEU, a norm giving substantial leeway for establishing funding mechanisms. A number of existing funds have previously been built on that basis – for example the European Union Solidarity Fund (EUSF) or the European Globalisation Adjustment Fund – albeit on a much lower financial scale. Importantly, this legal basis aims at overall economic and social cohesion in the EU. The ample policy leeway granted under Article 175 TFEU allows the Commission to pursue an agenda beyond the pandemic crisis metric. The emphasis of the RRF on green and digital transitions underscores the Commission's objective to pursue a broad agenda by linking the facility to the objectives identified in the European Semester.

In order to receive funding under the RRF, Member States will be asked to submit national Recovery and Resilience plans as part of their annual National Reform Programmes, in which the Member States respond annually to the Commission's country-specific recommendations. As an integral part of the process of the European Semester, the reform agenda developed under the auspices of the Commission will align with the Commission's overall long-term growth strategy. Additional intersections with the EU Structural Fund (especially in the areas of digitisation, infrastructure, and climate policies) are further indications that the new facility offers much continuity while boosting its financial leverage.

3. What about conditionality?

Throughout the sovereign debt crisis, conditionality was a pivotal requirement that had to be met for crisis-ridden countries to receive financial aid. With Article 125 TFEU at its core, financial assistance was conceptualised as a strict *quid pro quo*. The current context differs from the sovereign debt context in at least two ways. First, the support envisaged under the ERI does not primarily aim at preventing a country's immediate insolvency or possible risks to the currency union as a whole. While fiscal relief from the crisis remains an important objective in current initiatives, the main goal is to counterbalance the asymmetry in negative effects resulting from COVID-19, which has hit some Member States hard-

er than others. Second, Article 125 TFEU primarily aims at maintaining market pressure on Member States to promote budgetary discipline. But the current COVID-19-induced economic decline is not the result of fiscal laxity. There is no doubt that the current context falls under the ambit of Article 122(2) TFEU.

But while conditionality has successfully been avoided due to its potential political explosiveness, the RRF does stipulate a *de facto* form of conditionality, albeit in softer and more subtle ways. Legally, Article 122 ties financial assistance to 'certain conditions'. Meeting these will be key to achieving the political consensus needed for the new Own Resources Decision pursuant to Article 311 TFEU.

Indeed, access to funding is not meant to be a free lunch for Member States. First, Member States have to commit to pursuing a set of objectives established by the draft RRF Regulation.[4] With its logic of tying financial aid to the implementation of a project-based recovery plan, the facility aligns with the small-scale euro fiscal budget that emerged several years ago – the so-called Budgetary Instrument for Convergence and Competitiveness (BICC). Under BICC, Member States would have to submit proposals for reforms and investments linked to their National Reform Programmes and compatible with the national budgetary process. Not surprisingly, BICC will be replaced by the new recovery facility (a fact that might cause resentment in some euro-area countries). Drawing on the country-specific recommendations in the European Semester, Member States will have to identify reforms for which they receive grants or loans. The main difference between the facility and BICC lies in the former's stronger element of fiscal transfer. While the BICC allocated 80% of the funds based on population and the inverse of GDP per capita (and required national co-financing), the ERI also relies on unemployment to target the economically weaker countries and does not require co-financing.

Second, the draft Regulation establishing the RRF allows the Council, at the behest of the Commission, to suspend payments in the event of significant non-compliance with the obligations laid down in the Stability and Growth Pact, the Macroeconomic Imbalance Procedure, or an macroeconomic adjustment programme. Thus, while the RRF does not fall within the conditionality doctrine established by *Pringle*, where the Court neatly tied compatibility of financial assistance with Article 125 TFEU to macroeconomic conditionality, the Commission nevertheless retains a great deal of leverage to push Member States to align their policies with its overall policy agenda. This widens the overall policy space on the expenditure side. By providing both loans and grants, Article 122 TFEU removes any hurdles that could stand in the way. In addition, connecting the RRF with the European Semester significantly enhances the Commission's capacity to exercise policy formulation, supervision and guidance on key economic and social policies. One may expect that the practice of Member States reporting to Brussels in the European Semester – a tedious exercise in the eyes of the Member States due to the lack of binding force – will soon gain visibility and relevance.

4 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility, COM(2020) 408 final of 28 May 2020.

4. Conclusion

While unprecedented in scope and dimension, the ERI on closer inspection shows a pattern of bureaucratic policy-making that has become increasingly common: the full utilisation of existing structures and mechanisms whenever possible. Next Generation EU deepens the logic enshrined in the Structural Funds and the BICC by refashioning the European Semester into a source of reform and resilience plans. Its innovation is that it financially multiplies existing schemes and advances the distributive effect of the EU budget. While many have stressed its emergency character, certain elements of the proposal indicate a long-term ramping up of the EU budget well beyond the pandemic crisis.

It remains to be seen how parliaments will be able to lend legitimacy to the massive transfers shifted between Member States and the EU, with the European Semester as the emerging locus of financial distribution. As the RRF mobilises an unprecedented amount of EU-funds channelled through the European Semester, it is plausible to argue that it should be accompanied by more effective parliamentary control. On the EU level, the European Parliament should thus play a key role in ensuring proper parliamentary control and oversight of the EU's budgetary authority. On the Member State-level, there is likely to be national parliamentary scrutiny depending on national constitutional boundaries. Throughout the past financial crisis, Germany's *Bundesverfassungsgericht* turned out to be the most sceptical actor in the process of creating expansive fiscal and monetary powers at the EU level. In reference to the European Stability Mechanism (EMS), the BVerfG stressed on various occasions that the 'German Bundestag may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations', particularly when it comes to mechanisms that 'may result in incalculable burdens with budget relevance without prior mandatory consent'. This raises the question whether the German Bundestag and other national parliaments will insist on approving the massive financial disbursements prior to their release. While experience with the Structural Fund suggests that a one-time approval by the *Bundestag* will suffice, the ESM process hints that it might be more complicated, with a vote taking place for each financial aid package.

Chapter 4

RULE OF LAW CONDITIONALITY IN THE POST-PANDEMIC EU BUDGET

John Morijn and Aleksejs Dimitrovs

1. Introduction: cash meets rule of law[1]

One of the aspects of EU integration that has been most difficult to stomach for a long time is that while some Member States are clearly backsliding from the viewpoint of the rule of law, they continue to receive EU funds even if the EU Treaties state that the EU is founded on respect for fundamental values (Article 2 TEU). The previous Commission acknowledged this unsustainable tension. In 2018 it presented a proposal[2] on budgetary rule of law conditionality. Its rationale in a nutshell: 'no rule of law, no money'. This topic has been one of the most politically loaded of 2020. This chapter analyses, and reflects upon the way in which it was discussed in the July 2020 European Council Conclusions, and how these Conclusions were further translated into a new European Semester-extraordinary methodology in September, and a new Rule of Law Conditionality Regulation in November.

2. The July 2020 European Council Conclusions

At the European Council Special Meeting dealing with the Multiannual Financial Framework (MFF) and Next Generation EU (NGEU)/EU Recovery Fund-negotiations on 21 July 2020 there was unanimous agreement on rule of law protection and conditionality language.[3] Many observers had drawn attention to the necessity of rule of law conditionality in the key of MFF discussions specifically;[4]

1 This Chapter was finalised on 15 November 2020.

2 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018)324 final.

3 Conclusions of the special meeting of the European Council (17, 18, 19, 20 and 21 July 2020), EUCO 10/20.

4 Daniel Kelemen & Jacob Soll, The EU is undermining its democracies while funding its autocracies, *Politico*, 13 May 2020; John Morijn, Stel bij Europese budgetonderhandelingen de rechtsstaat voorop, de Volkskrant, 8 July 2020; Jan Nowak, 'Ons geld, ons probleem. Of hoe de aantasting van de Poolse rechtsstaat iedereen aangaat', *Knack*, 6 July 2020.

some, however, also cautioned against such an approach or strategy.[5] Yet, the ink of the texts had barely dried for them to be read and explained very differently.[6] So very differently, in fact, that one could seriously wonder whether the same text was being discussed[7]. So what is (all) the rule of law-relevant text in the European Council Conclusions? And what does it mean in its legal and policy context?

2.1. Introducing rule of law conditionality through economic conditionality?

If we go through the text chronologically, the first relevant paragraphs are the following (most relevant parts are emphasised):

> **I. NEXT GENERATION EU**
>
> Recovery and Resilience Facility […]
>
> A18. Member States shall prepare national recovery and resilience plans setting out the reform and investment agenda of the Member State concerned for the years 2021-23. The plans will be reviewed and adapted as necessary in 2022 to take account of the final allocation of funds for 2023.
>
> A19. The recovery and resilience plans shall be assessed by the Commission within two months of the submission. *The criteria of consistency with the country-specific recommendations*, as well as strengthening the growth potential, job creation and economic and social resilience of the Member States *shall need the highest score of the assessment* […].
>
> The assessment of the recovery and resilience plans shall be approved by the Council, by qualified majority on a Commission proposal, through an implementing act which the Council shall endeavour to adopt within 4 weeks of the proposal.
>
> *The positive assessment of payment requests will be subject to the satisfactory fulfilment of the relevant milestones and targets.*
>
> The Commission shall ask the opinion of the Economic and Financial Committee on the satisfactory fulfilment of the relevant milestones and targets. The Economic and Financial Committee shall strive to reach a consensus. If, exceptionally, one or more Member States consider that there are serious

5 Israel Butler, Forget tying rule of law to the EU budget. It's better to add strings to EU funding later | View, Euronews, 17 July 2020; C. de Gruyter, European values are non-negotiable, *EUobserver*, 22 July 2020.

6 https://twitter.com/ProfPech/status/1285559803880910848 and https://twitter.com/article7news/status/1285889346198024192 for a very comprehensive analysis; Daniel Hegedues, What EU leaders really decided on rule of law, *Politico*, 21 July 2020, for another early analysis.

7 https://twitter.com/notesfrompoland/status/1285585726432776195 for Poland and Hungary; https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenz-von-bundeskanzlerin-merkel-und-praesident-macron-am-21-juli-2020-1770170 for Germany; https://twitter.com/NLatEU/status/1285440602180669440 for the Netherlands; https://twitter.com/VeraJourova/status/1285664125964689408 and https://twitter.com/dreynders/status/1285918440390373376 for both the responsible European Commissioners.

> deviations from the satisfactory fulfilment of the relevant milestones and targets, they may request the President of the European Council to refer the matter to the next European Council.
>
> The Commission shall adopt a decision on the assessment of the satisfactory fulfilment of the relevant milestones and targets and on the approval of payments in accordance with the examination procedure.
>
> If the matter was referred to the European Council, no Commission decision concerning the satisfactory fulfilment of the milestones and targets and on the approval of payments will be taken until the next European Council has exhaustively discussed the matter. This process shall, as a rule, not take longer than three months after the Commission has asked the Economic and Financial Committee for its opinion. *This process will be in line with Article 17 TEU and Article 317 TFEU.*

Some rule of law specialists will be rubbing their eyes and asking: is this a mistake? What does this have to do with our topic? In fact, this language is arguably of huge significance for rule of law protection. EU institutions, in their so-called country-specific recommendations, have for some time identified problems in Member States such as Hungary and Poland as a problematic obstacle for economic growth and safe investment. These problems are rule of law problems. Let us have a closer look.

The country-specific recommendations for Hungary for 2019-2020 included: 'Reinforce the anti-corruption framework […] and *strengthen judicial independence*'.[8] The recommendations for the same Member State for 2020-2021 stated: '*Ensure that any emergency measures be strictly proportionate, limited in time, in line with European and international standards* and should not interfere with business activities and the stability of the regulatory environment'[9]. The country-specific recommendation for Poland for 2020-2021 recommended: 'Enhance the investment climate, in particular by *safeguarding judicial independence'*.[10] This may be relevant for other Member States too. To give one example, the recommendations for Malta for 2020-2021 included: 'Complete reforms addressing current shortcomings in institutional capacity and governance to *enhance judicial independence'*.[11] (Emphases added.)

All of these aspects have been widely studied and documented.[12] For the Commission to be able to decide on whether and when any NGEU monies can be disbursed to these Member States, these perti-

8 Recommendation for a Council Recommendation on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary, COM(2019)517 final.

9 Recommendation for a Council Recommendation on the 2020 National Reform Programme of Hungary and delivering a Council opinion on the 2020 Convergence Programme of Hungary, COM(2020)517 final.

10 Recommendation for a Council Recommendation on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland, COM(2020)521 final.

11 Recommendation for a Council Recommendation on the 2020 National Reform Programme of Malta and delivering a Council opinion on the 2020 Stability Programme of Malta, COM(2020)518 final.

12 Laurent Pech, Protecting Polish Judges from the Ruling Party's "Star Chamber", *Verfassungsblog*, 9 April 2020, for a recent analysis of judicial independence in Poland; Gábor Halmai, The Moment for Lies, *Euractiv*, 26 June 2020, for the problematic continuing state of emergency in Hungary.

nent (and highly damning) analyses have now become central in an immediate and immediately actionable manner. Highly significantly, this is a matter for the business-as-usual part of the EU institutional mechanisms and procedures. As the wording pointing to Article 17(1) TEU (referring to the Commission's power to execute the budget and manage programmes) and Article 317 TFEU (referring to the Commission's task to implement the budget on its own responsibility) makes clear, the European Council explicitly intended this. European Council involvement can only be exceptional, and in line with these procedures. It is notable that that wording was added at a late stage in the negotiations.[13]

The economic conditionality that was established on the insistence of the Frugal 4/5 to ensure that the Commission (more) forcefully and consistently acts on country-specific recommendations vis-à-vis Member States in the South may have significant rule of law protection spill-over vis-à-vis Member States in Article 7 TEU territory. The rule of law has been made a central concern to a central aspect of economic governance governed by the regular Community method. This is a veritable sea-change. It will require a quick accumulation of rule of law-related knowledge within parts of the EU institutions' services dealing with the budget as well as bodies like the Economic and Financial Committee.[14] Economic frugality and a values-based stance may have turned out to be compatible after all – even if unintentionally.

2.2. Deciphering the rule of law conditionality language

The paragraphs that received more attention from the viewpoint of rule of law protection read as follows (again, with our emphasised parts):

> **II. MFF 2021-2027 […]**
>
> A24. *The Union's financial interests shall be protected in accordance with* the general principles embedded in the Union Treaties, in particular *the values of Article 2 TEU.*
>
> The European Council underlines the importance of the protection of the Union's financial interests. The European Council underlines the importance of the respect of the rule of law.
>
> **ANNEX**
>
> **I.** Horizontal […]
>
> *The Union's financial interests shall be protected in accordance with* the general principles embedded in the Union Treaties, in particular *the values of Article 2 TEU.*

13 Compare with an earlier version of the Conclusions at https://www.politico.eu/wp-content/uploads/2020/07/sn00011.en20.pdf and see in that regard also the opinion of the Legal Counsel on Article 17(1) TEU and Article 317 TFEU on the powers of the Commission to execute the EU budget and manage EU programmes, EUCO 12/20.

14 https://europa.eu/efc/index_en.

> The European Council underlines the importance of the protection of the Union's financial interests. The European Council underlines the importance of the respect of the rule of law.
>
> *23. Based on this background, a regime of conditionality to protect the budget and Next Generation EU will be introduced. In this context, the Commission will propose measures in case of breaches for adoption by the Council by qualified majority.*
>
> *The European Council will revert rapidly to the matter.*
>
> The Commission is invited to present further measures to protect the EU budget and Next Generation EU against fraud and irregularities. This will include measures to ensure the collection and comparability of information on the final beneficiaries of EU funding for the purposes of control and audit to be included in the relevant basic acts. Combatting fraud requires a strong involvement of the European Court of Auditors, OLAF, Eurojust, Europol and, where relevant, EPPO, as well as of the Member States' competent authorities.

These paragraphs have already been widely analysed (see the references provided above). The contribution here is intended to be complementary. The general impression is that this was watered-down and repetitive language, muddled in a way that potentially sidelines or otherwise weakens the previously mentioned and currently pending Commission proposal on budgetary rule of law conditionality, and gives the European Council an unclear role. Let us look at these aspects in turn.

First, was this watered down? Evidence suggests it clearly was in some aspects. A leaked version of the Conclusions[15] from just a day before the final text had much more elaborate rule of law language (see paragraph A24 and paragraphs 22-27 in the Annex). The way in which the Hungarian delegation reportedly wanted to rewrite[16] that was also brought into the public arena, showing the intentions of this Member State to remove its teeth. The text agreed upon by the European Council is therefore a compromise. But, arguably, definitely not a complete surrender to rule of law proponents. Interestingly, in some respects the slimmer version was even strengthened compared to the earlier version. What seems legally significant, for example, is that direct linkage between the Union's financial interests and Article 2 TEU in general is mentioned. Twice! And, as it happens, Article 2 TEU is broader than just the rule of law, as it also contains values such as human rights and democracy.

Second, was it muddled? Of course! Particularly paragraph 23. What is specifically unclear is whether the European Council's intention was to replace the aforementioned Commission budgetary rule of law conditionality proposal altogether, or just give guidance as to its specific wording about the voting modalities in the Council. Even if some Member States tried to frame things differently, both the Com-

15 https://www.politico.eu/wp-content/uploads/2020/07/sn00011.en20.pdf.

16 https://www.politico.eu/wp-content/uploads/2020/07/Hungary-text.jpg.

mission President[17] and the Council Presidency (Germany)[18] signalled that it is simply the latter. So that left a discussion about the much narrower issue of whether the Commission should be able to recommend blockage of funding based on rule of law deficiencies for the Council to require a QMV to block that recommendation (as per article 5, paragraph 7 of the Commission proposal), or whether there should be QMV in the Council to endorse the Commission recommendation (as per the European Council Conclusions language). A very large majority of the European Parliament – including, highly significantly, the European People's Party (the home of Fidesz) – did promptly signal it did not agree with that aspect, and that it wanted Reverse QMV back.[19] This became part of the latter negotiations (see section 4 below).

Which leads to the third and final point: what is the role of the European Council (or rather: what could it be, legally)? And, in that context, what could language to the tune of 'reverting rapidly to "the matter"' mean? Rather than answering that question directly, what seems to 'matter' first is what the European Council's position can at all be with regard to – as we have just seen – giving impetus and political directions and prioritisation under Article 15(1), first sentence TEU, if it is crystal clear that it cannot itself exercise legislative functions (Article 15(1), second sentence TEU)? As we just saw, the European Council reminded itself of the inherent limitations of its own role in paragraph A19, where it clarified that anything instructed at European Council level should be in line with Article 17(1) TEU and 317 TFEU.

It is suggested that the very same logic would need to apply here. The legal base for the Commission's budgetary rule of law conditionality proposal is Article 322 TFEU, which is directly connected to Article 317 TFEU (and is actually referred to in that article). In other words, the European Council can guide legislative procedures, write political conclusions about it, but it cannot overwrite the logic and principles of the Treaties, including the principles of conferral of powers and institutional balance (Article 13(2) TEU). It seems a fairly reasonable reading, therefore, that this was just a way for the European Council to say that the Commission should know it considers this 'matter' of getting on with the Commission proposal on rule of law conditionality as urgent, and that it was expecting progress reports from the Union legislator (the Council of the EU and European Parliament) so that it could itself revert to it rapidly. This may also remain an important issue in the future, since it is important that the European Council cannot and does not overrule what has been agreed in the normal (legislative) procedure. That is not its role.

17 F. Eder, Playbook: Ursula on fire, Michel under a bus — Stuck in a Rutte — Malta mess – POLITICO, 22 July 2020.

18 https://twitter.com/ProfPech/status/1285568486417272833.

19 European Parliament resolution of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020, P9_TA(2020)0206.

3. The September 2020 Commission approach to the European Semester: an exceptional, trimmed down 2021 cycle

Not long after the July European Council, the possibility of economic conditionality being an indirect way of rule of law conditionality seemed to take a knock. On 17 September 2020, the European Commission published its 2021 Annual Sustainable Growth Strategy (ASGS), which launches this year's European Semester cycle, as well as strategic guidance for the implementation of the Recovery and Resilience Facility (RRF). For the latter, the Commission provided guidance to Member States on how best to present their RRP, which lies at the heart of the RRF, together with a standard template for such plans. The deadline for submission of the RRP is 30 April 2021, although Member States are encouraged to submit their preliminary draft plans from 15 October 2020 and to engage as soon as possible in a broad policy dialogue (including all relevant stakeholders) to prepare their RRP and to interact with the Recovery Task Force and DG ECOFIN to discuss their draft plans. A key element of this year's exceptional cycle is that the Commission will only issue recommendations to Member States and *not*, as usual, structural recommendations.[20] Of course it was precisely these structural recommendations, some examples of which were mentioned earlier, that contained rule of law-related recommendations. But it is also clearly limited to 2021 only, while the Recovery Funding runs until 2027.

It remains to be seen whether structural recommendations, and therefore the potential of rule of law conditionality through economic conditionality will return after 2021. This would be significant, and hopefully something that friends of the rule of law could insist on. Because it would add an *ex ante* rule of law conditionality test to the Commission's arsenal for the RRF that could come in addition to its *ex post* powers that were recently introduced in the Rule of Law Conditionality Regulation – to which we turn now.

4. The November 2020 Parliament-Council agreement on conditionality

On 5 November, the European Parliament and the Council of the EU reached a provisional agreement on the general regime of conditionality for the protection of the Union budget. As mentioned above, the Commission's proposal[21] to address the deficiencies related to the rule of law was presented in May 2018, and the Parliament adopted its position[22] in the first reading in April 2019. The Council, however, was able to agree on the mandate[23] for interinstitutional negotiations only in September

20 https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/european-semester-timeline/european-semester-2021-exceptional-cycle_en#changestothe2021europeansemestercycle.

21 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018)324 final.

22 European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, P8_TA(2019)0349.

23 Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, 11322/20.

2020 – following the conclusions[24] on applicable decision-making modalities in the European Council.

Throughout the process, the Parliament was proposing expansion of the scope of the new regulation, while the Council was seeking a restriction thereof. One addition was agreed upon quite quickly – to cover also the resources allocated through the EU Recovery Instrument[25] and through loans and other instruments guaranteed by the Union budget. The agreement may be summarised as returning to the Commission proposal, with one important caveat – decision-making modalities are the ones agreed by the European Council.

Where the Commission will propose an implementing act with financial measures to address the rule of law breaches in a given Member State, the decision will be taken by the Council by qualified majority (not reverse qualified majority, as proposed by the Commission and supported by the Parliament). The decision shall normally be taken within one month. If a Member State believes that the Commission proposal violates the principles of objectivity, non-discrimination and equal treatment, it may exceptionally request to discuss the matter in the European Council. Then the deadline for the Council to take a decision is extended to three months. Additionally, it is indicated that the Commission shall use Article 237 TFEU, where it deems that appropriate, to ensure that the point is on the Council agenda on time.

In order to launch the procedure, two preconditions should be met: there are breaches of the principle of the rule of law, and such breaches affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the Union in a sufficiently direct way. The reference to ‘sufficiently direct way’ is taken from the Council approach, while the element of ‘risk’ is reinstated under pressure from the Parliament. So, it is not necessary for the Commission to prove that the breaches have already had a budgetary impact; enough to demonstrate the potential impact.

As regards the scope, the mechanism covers breaches of the rule of law as such, and fundamental rights are taken into account only if judicial protection thereof or equal treatment is affected. The Parliament proposed to expand the scope, and the possibility was left to that effect in the European Council Conclusions, as mentioned above, but nothing materialised in the negotiations. However, it is specified that the rule of law should be understood having regard to the other Union values and principles enshrined in Article 2 TEU. The non-exhaustive list of examples is reinstated after the deletion by the Council – in those cases the Commission won’t have to prove that the breaches are committed:endangering the independence of judiciary;

1. failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, in-

24 Conclusions of the special meeting of the European Council (17, 18, 19, 20 and 21 July 2020), EUCO 10/20.

25 Proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic, COM(2020)441 final/2.

cluding by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;

2. limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

The Parliament, in line with its suggestions on the comprehensive mechanism for the protection of democracy, the rule of law and fundamental rights,[26] proposed that a panel of independent experts assist the Commission in identifying the breaches. Neither the Council, nor the Commission liked the idea. Instead, the agreement foresees that the Commission, apart from relying on existing sources, could proactively seek the opinion of the Venice Commission or the Fundamental Rights Agency.

The agreement also maintains the obligation of the Member State concerned to respect the obligations towards final recipients or beneficiaries. If the measures adopted concern shared management funds, the Member State in question shall report regularly. There will be a special tool for final recipients or beneficiaries to complain. In cases of non-compliance, the Commission will apply fund-specific or financial rules.

It is envisaged that the regulation will be applicable from 1 January 2021. There will be a report on its application three years after it has entered into force. Now the Parliament and the Council (by qualified majority) have to approve the agreement. Poland and Hungary have already mentioned that their position on the Multiannual Financial Framework[27] or the decision on the system of own resources[28] will depend on the agreement that is reached. And indeed, after Coreper II had endorsed the agreement on 16 November, both Member States denied their support for the acts mentioned (to be adopted unanimously by the Council).

5. Outlook: towards implementation

Looking at the Conclusions of the July 2020 Special European Council from the perspective of rule of law protection, there was a lot more than meets the immediate eye. Quite remarkably, the Heads of State and Government introduced a potentially powerful indirect ex ante rule of law conditionality mechanism on the partial terrain of NGEU without this leading to any controversy from this perspective. Perhaps it was a lack of sleep which turned out to be highly beneficial. In any event, as per the explicit text of the European Council Conclusions the billions of euros in this fund can only be disbursed to Member States that comply with country-specific recommendations. Up until that time they

26 European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, P9_TA-PROV(2020)0251.

27 Amended proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM(2020)443 final.

28 Amended proposal for a Council Decision on the system of Own Resources of the European Union, COM(2020)445 final.

included those that directly relate to the rule of law. The rule of law could thus become a central economic governance concern – which it (also) is, of course. But this notion needs to sink in still, both with rule of law and economics specialists. A first development, in September, was not promising however. By proposing, by way of exception, to skip structural country-specific recommendations and focusing only on budgetary recommendations in 2021, the rule of law potential was undermined. It is to be hoped structural country-specific recommendations will be reintroduced in 2022. That should be a point of focus for rule of law defenders. Ex ante rule of law conditionality as part of the economic conditionality is a potentially powerful additional tool.

The language about Article 2 TEU conditionality with regard to both the MFF and NGEU was more muddled. The end-result in November clarified various points, however. Even if the new mechanism only covers the rule of law among the values enshrined in Article 2 TEU, it is clear that all breaches of the rule of law count, if they have an actual or potential impact on the sound financial management of the EU budget or the protection of the financial interests of the Union in a sufficiently direct way. The mechanism is not restricted to cases of fraud or irregularities already addressed in other pieces of EU law, such as the Common Provisions Regulation.

Like it did in paragraph A19 of the Conclusions, on a future occasion the European Council may have to reconfirm the evident point that its impetus, political direction and prioritisation (Article 15(1) TEU) cannot overwrite the procedures and responsibilities laid down in the Treaties. In that sense legal principles that have made the EU a community of law and values will direct how the EU can at all deal with rule of law problems at the Member State level. Put more directly: the European Council is not itself above the rule of law. Backsliding Member States should not be able to use it as a forum where they undo what was achieved through the ordinary channels and procedures.

Perhaps most importantly, the July European Council Conclusions and the November deal on the Conditionality Regulation showed that the large but thus far silent and mostly ineffective political majority in the EU favouring rule of law protection finally upped its game, raised its voice and put its foot down – although, paradoxically, with regard to economic conditionality quite likely unwittingly.

Each of these developments stresses that rule of law protection in the EU remains a dynamic, legally complex, politically charged and highly relevant topic. And therefore one worthy of continuous close monitoring.

Chapter 5

THE EUROPEAN INSTRUMENT FOR TEMPORARY SUPPORT TO MITIGATE UNEMPLOYMENT RISKS IN AN EMERGENCY (SURE) – AN INNOVATIVE (SOCIAL) APPROACH TO EU FINANCIAL ASSISTANCE

Karl Croonenborghs

1. Introduction[1]

The establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) supports a socio-economic goal, namely helping Member States to protect employment in the current economic crisis. Besides this important policy objective, and the fact that the EU is able to mobilise sizable financial support to that avail, the instrument deserves some attention for the innovative legal and financial techniques that it mobilises.

Council Regulation 2020/672 on the establishment of SURE displays an innovative legal approach for emergency instruments under Article 122 TFEU.[2] Moreover, Member States have accepted an alternative financing technique to underpin the financial assistance offered under the instrument based on guarantees in favour of the EU. However, SURE did not fall from heaven. The political guidelines of the von der Leyen Commission had already stressed the importance of mechanisms to protect employment.[3] In response to the COVID-19 pandemic and ensuing lockdown measures, which heavily affect Member States' economies and labour markets across the EU, the Commission hinted at a very early stage its intention to support Member States where possible in alleviating the impact of the pandemic on workers.[4] On 2 April 2020, it released its SURE proposal as part of the immediate crisis response

1 This Chapter was finalised on 30 May 2020 and updated to reflect the latest factual evolutions. The information and views set out in this contribution are those of the author and do not necessarily reflect the official opinion of the European Commission.

2 Council Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

3 Political Guidelines for the Next European Commission 2019-2014 'A Union that strives for more: my agenda for Europe' by Ursula von der Leyen.

4 Commission Communication of 13 March 2020 'Coordinated economic response to the COVID-19 outbreak'.

organised by the EU. SURE eventually became one of the three safety nets for a total of 540 billion euros, which were discussed and politically endorsed by Member States in the Eurogroup on 9 April and by the European Council on 23 April. After constructive negotiations in the Council of the European Union (the 'Council'), the latter adopted SURE in a relatively short time span, by 19 May 2020.

2. The SURE instrument: key features

The key features of SURE pertain to the policy rationale of the instrument, which is expressed in its scope, the financing technique of guarantees used to support its financial firepower, and lastly, its temporary nature.

SURE's *underlying policy rationale* reveals it is a genuine socio-economic policy response at EU level to mitigate the effects of the current economic difficulties caused by the COVID-19 pandemic. In essence, the instrument supports national efforts to address the sudden and severe increase in public expenditure for national measures supporting short-time work. The latter are public policy programmes, which compensate workers for the hours not worked in case businesses suspend or substantially reduce the working hours of their employees in a crisis. Such schemes are beneficial in the long term because they prevent labour shedding and prevent a temporary shock from having long-lasting consequences on the labour market in Member States – beneficiary firms reduce their activities but need not reduce their workforce. In addition, such schemes help to sustain workers' incomes and preserve productive capacity and human capital of enterprises and the economy as a whole. The current crisis has spurred on those Member States that did not have such schemes to create them at a quickened pace.

This underlying policy rationale is firmly embedded in the *scope of SURE*. The instrument aims primarily at financing Member States' existing or new national measures directly related to short-time work schemes or similar measures aimed to protect employees and the self-employed to reduce the incidence of partial unemployment and the related loss of income caused by the COVID-19 pandemic. In an ancillary manner, some health measures, in particular those related to the workplace to contain occupational hazards and protect workers, could also be financed (Article 1(2) SURE Regulation and recital 5). The maximum amount of EU financial assistance available under SURE is 100 billion euros, all in the form of loans.

Financial assistance to Member States under SURE is possible because *the EU is able to raise borrowed amounts* under very beneficial conditions in the international capital markets due to its high credit rating. The proceeds of such borrowings are then lent on to Member States (back-to-back loans). The loans from the EU budget to Member States should be guaranteed by the Member States themselves, in line with the shares of Member States in the total Gross National Income of the Union, for a total amount of 25 billion euros. Those national guarantees, which are voluntarily committed to the EU, ensure that the contingent liabilities for the EU budget arising from SURE loans granted are compatible with the applicable multiannual financial framework and own resources ceilings. In this con-

text, were a Member State to default on a SURE loan when the EU should repay its creditors, and once the Commission has examined the extent to which it could draw on the margin available under the own resources ceiling for payment appropriations, it could call on those guarantees (Articles 4 and 11 SURE Regulation). Finally, several other budgetary safeguards are built in the scheme to ensure its financial solidity (Article 9 SURE Regulation). SURE will only become operational once all Member States have voluntarily given such guarantees to the EU up to 25 billion euros and have signed their respective guarantee agreements with the Commission (Article 12 SURE Regulation). This has been the case since September 2020.

Lastly, SURE is a *temporary instrument*. Its use will be limited to tackle the negative socio-economic impact of the COVID-19 crisis on Member States' labour markets. To this end, a 'sunset clause' allows Member States to request assistance under SURE only until the end of December 2022, although its duration can be prolonged for six months at a time if the severe economic disturbance caused by the COVID-19 pandemic persists (Article 12(3) and (4) SURE Regulation), which reflects the uncertainty regarding a second wave of the pandemic.

3. Legal reflections regarding the SURE instrument

3.1. Lending component of SURE

The innovative nature of SURE lies in the fact that it is the first example of how EU financial assistance under Article 122(2) TFEU can be used to help Member States mitigate the negative socio-economic impact of a severe economic disturbance by clearly focusing support on safeguarding the employment of workers. This approach under Article 122(2) TFEU is new in comparison to its previous use in 2010, when it was used to establish the European Financial Stabilisation Mechanism (EFSM) through Council Regulation 407/2010.[5] The latter allowed for financial assistance to Member States confronted with severe economic or financial disturbances so as to preserve the EU's financial stability in exchange for in-depth economic reforms.

However, the use of Article 122(2) TFEU is not limited to financial stability crises only. The legal basis could be used to address other types of economic difficulties, whether actual or threatened, caused by any kind of exceptional occurrence beyond Member States' control, including health hazards causing a symmetric shock in Member States' economies. The Council has a broad margin of discretion to adopt an emergency act by qualified majority voting in support of Member States' economic policies under this legal basis. This is due to the explicit crisis rationale of the provision and its placement by the Treaty drafters in the chapter on economic policy in the TFEU.

Moreover, the legal basis does not require an approach of the Council to make receipt of EU financial assistance conditional on the undertaking of economic reforms, as it did for the EFSM. The latter was

5 Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

a temporary instrument under Article 122(2) TFEU addressing the particular problems of Member States during the financial and sovereign debt crisis to restore financial market access.

The lending component of the SURE instrument meets all the requirements of Article 122(2) TFEU and is fully in line with the *Pringle* judgment (C-370/12) of the CJEU. SURE will offer *ad hoc* EU financial assistance by means of temporary loans to Member States that are facing, or are seriously threatened with, a severe economic disturbance ('the difficulty') due to ('the causal link') the COVID-19 pandemic (the 'exceptional occurrence'). Financial assistance under SURE is conditioned on the beneficiary Member State using the loan support under the instrument to finance national measures in support of employment for which public expenditure has suddenly and severely increased since the beginning of the COVID-19 pandemic (Articles 1 and 3 SURE Regulation). As such, SURE will help Member States conduct economic policies in accordance with the objectives of the EU pursuant to Article 3 TEU (such as the wellbeing of peoples, a social market economy aiming at full employment and social progress and a high level of protection, the promotion of solidarity) and Article 9 TFEU (the promotion of a high level of employment and adequate social protection in the EU's policies and activities). In addition, even though it was legally not strictly necessary in view of the legal basis concerned, the temporary nature of SURE is further strengthened by means of a sunset clause (Article 12 SURE Regulation).

3.2. Budgetary component of SURE

Much of the academic attention in the EMU legal community regarding Article 122 TFEU has focused on the second paragraph. However, the first paragraph of the provision is not to be legally underestimated. SURE is also innovative in how the instrument establishes, for the first time, a guarantee system based on Article 122(1) TFEU, which underpins the EU's borrowed amounts to enable the EU to provide financial assistance to Member States pursuant to Article 122(2) TFEU. Usually, contingent liabilities arising for the EU budget under the EU financial assistance instruments *sensu lato* are covered by the margin under the own resources ceiling for payment appropriations (EFSM, Balance of Payments Facility). Although a guarantee system supporting financial assistance under this legal basis is an innovation, such guarantees have been used in the past by the European Community to enable the provision of financial support to Member States faced with balance of payments difficulties due to the oil crisis (1975 Community Loan Mechanism). Member States also made use of guarantees to enable the European Financial Stability Facility, a public limited liability company, to raise money to lend it on to euro area Member States. In the current circumstances, the guarantee system is required to achieve the necessary financial capacity of the instrument of up to 100 billion euros while at the same time ensuring the prudent financial management of the EU necessary to maintain its high credit rating on international capital markets.

Construing a guarantee system under Article 122(1) TFEU is legally possible. Under this provision, the Council has a broad margin of discretion to decide whether its requirements are met. Article 122(1) TFEU enables the Council to decide on measures appropriate to the economic situation in a spirit of

solidarity between Member States. The COVID-19 pandemic is a sudden and exceptional event entailing a massive disruptive impact on economies and Member States' labour markets calling for a collective response. Hence, a guarantee system based on voluntary contributions by Member States in the form of guarantees constitutes a measure appropriate to the current severe economic situation caused by the pandemic, which the Council members may decide among themselves in a spirit of solidarity. It is important to emphasise that the SURE Regulation, an act of EU law, does not impose any legal obligation on Member States to provide a guarantee. Any commitment to contribute to the guarantee system based on Article 122(1) TFEU in SURE is the result of individual sovereign decisions by Member States in accordance with national law.

However, two important reflections should be made in this regard from a financial market perspective. Firstly, it is key that the national guarantees are irrevocable, unconditional and on demand. This is to ensure that financial market actors perceive the guarantees as financially credible to counter-guarantee the risk borne by the EU vis-à-vis its own creditors in the unlikely event of a Member State defaulting on a SURE loan, which the EU has financed by borrowing on the financial markets. Secondly, to further support the financial solidity of the construct, it is important that all Member States of the EU show political cohesion and voluntarily contribute guarantees to the guarantee system. This explains why, although this would not be a legal requirement for such an instrument, the availability of financial assistance under SURE is based on the active participation of all Member States in the guarantee system put in place by them in a spirit of solidarity in the Council. This basic political understanding is shared by Member States, as also evidenced by their support for the SURE instrument in the European Council.

Finally, the jurisprudence of the CJEU in *Pringle* on Article 122(1) TFEU is no impediment for SURE. So far the CJEU has only held that this legal basis cannot be used to finance Member States with severe financing problems (C-370/12, paragraph 116). Instead, SURE intends to facilitate efforts by Member States to address sudden and severe increases arising from the COVID-19 pandemic in public expenditure related to support for their labour forces, and does so on a temporary basis. Such a mechanism is in line with the purpose of Article 122(2) TFEU. Secondly, the reference in Article 122(1) TFEU to difficulties in the provision of certain products, notably in the area of energy, is no impediment either for using the legal basis beyond such a use. It merely reflects a codification of an example by the Lisbon Treaty, evidenced by the use of the word 'in particular' based on the use previously made of this clause in 2004 and 2006 in order to safeguard gas supply and establish minimum oil stocks by means of EU legal acts.

4. SURE from adoption to implementation

Since the adoption of Council Regulation 2020/672 establishing SURE in May 2020 a lot has happened. Member States committed an amount of 25 billion euro guarantees to the SURE instrument. The Commission, Member States and Council also prepared the necessary implementing decisions and loan agreements so that financial support for the benefit of interested Member States could be

made available as soon as possible to help them protect their workers and smoothen the gradual recovery of the EU's economies. At the current juncture, 18 Member States have requested support for an amount of roughly 91 billion euros[6]. The EU has also successfully issued for the first time in its history (social) bonds to finance support under SURE. First disbursements have also been made.

It remains to be seen whether, from a longer term perspective, SURE will eventually serve as a legal precursor for a more permanent EU-based scheme that could support employment in case of an economic shock. Such a permanent scheme would have to overcome the difficulties linked to entrenched sensitivities in a number of Member States regarding the national design of their social policies and social security systems. Certainly, such an EU led effort would lead to a very vivid legal and policy debate both in academia and EU policy practice.

6 See the Commission's overview for further information:
https://ec.europa.eu/info/business-economy-euro/economic-and-fical-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en

Chapter 6

A DWARF IN SIZE, BUT A GIANT IN SHIFTING A PARADIGM – THE EUROPEAN INSTRUMENT FOR TEMPORARY SUPPORT TO MITIGATE UNEMPLOYMENT RISKS (SURE)

René Repasi

1. Introduction[1]

On 19 May, the Council of the European Union adopted the European instrument for temporary support to mitigate unemployment risks in an emergency (SURE):[2] Council Regulation (EU) 2020/672.[3] The European Commission chose Article 122(1) and (2) TFEU as the dual legal basis for it. The instrument mobilises 100 billion euros of EU funds in order to financially assist Member States that set up short-time work schemes or similar measures for the sake of mitigating the risk of increased unemployment due to the economic consequences of the lockdown measures that were adopted in order to fight the further expansion of the COVID-19 virus.

The key features of the new instrument are the following:[4]

1. It hands out *loans* to the Member States concerned (Article 4);
2. The financial assistance is *strictly earmarked* to the exclusive use for (1) 'short-time work schemes or similar measures aimed at protecting employees and the self-employed' and for (2) 'the financing, as an ancillary, of some health-related measures, in particular in the workplace' (Article 1(2) and Article 3(2));
3. The *substantive condition* attached to being eligible for financial assistance is the presence of a

1 This Chapter was finalised on 16 November 2020. A previous version of the text was published in Weekend Edition No. 19, *EU Law Live*, 30 May 2020.

2 Council of the EU, 'COVID-19: Council adopts temporary support to mitigate unemployment risks in an emergency (SURE)', press release of 19 May 2020.

3 Council Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

4 On the features of SURE, see also the contribution by Karl Croonenborghs (Chapter 5 above).

sudden and severe increase in actual and possibly also planned *public expenditure* […] as of 1 February 2020 due to national measures directly related to short-time work schemes and similar measures to address the socio-economic effects of the exceptional occurrence caused by the COVID-19 outbreak' (Article 3(1));

4. There is *no further conditionality* attached to the receipt of financial assistance;

5. The financial assistance is *re-financed by dedicated debt* issued and administered by the European Commission (Article 8);

6. The *financial risks borne by the EU budget* that arise from the loans to Member States are *mitigated by voluntary* irrevocable, unconditional and on-demand *guarantees* of the Member States.

This instrument, which was proposed by the Commission at an early stage (2 April) of the debates on how the EU can mitigate the negative consequences of the economic crisis that will follow the pandemic,[5] is ground-breaking from a political and legal perspective despite its rather minimalistic economic impact.

2. A Dwarf – too small to have impact

The instrument is limited to 100 billion euros for all EU Member States. Although there are no pre-allocated envelopes for Member States, the share of loans granted to the three Member States representing the largest share of the loans granted shall not exceed 60 per cent. Moreover, the Commission intends to, first, collect requests from all Member States and then to decide on the distribution of the funds. Given that the refinancing needs of the Member States for overcoming the economic crisis that will follow the pandemic are significantly higher than 100 billion euros, SURE is, economically, only a drop in a bucket.

Its ground-breaking character becomes visible once we ignore the concrete numbers and look at the legal design of SURE, especially if we compare it to the instruments that the EU came up with during the last economic crisis. SURE overcomes the need for 'strict policy conditionality' in return for EU financial assistance and it establishes a refinancing model of loans based on EU debt, which are guaranteed by the Member States.

3. A Giant – learning lessons from the last economic crisis

In order to assist Euro area Member States that were experiencing or were threatened by severe financing problems as a consequence of the financial crisis of 2008, the Euro area governments established several vehicles: the EU-law 'European Financial Stabilisation Mechanism' (EFSM) of 2010,[6] the

5 European Commission, Proposal of 2 April 2020 for a Council Regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, COM(2020) 139 final.

6 Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

private-law special purpose vehicle 'European Financial Stability Facility' (EFSF) of 2010 and the intergovernmental 'European Stability Mechanism' (ESM) of 2012. Financial assistance granted by either of these was subject to strict conditionality in the shape of a macro-economic adjustment programme. Such programme was to be agreed on under a 'memorandum of understanding' (MoU) – a legally non-binding text, in which the Member State concerned unilaterally promised certain policy reforms in return for the unilateral promise of the funding vehicle to pay out financial assistance. A 'troika' composed of the European Commission, the IMF and the ECB ('in liaison') negotiated the MoU and observed the implementation. The policy-conditionality was long seen as the only way a supranational body could financially assist Euro area Member States without violating the so-called 'no bail-out' clause of Article 125(1) TFEU. The proponents of 'conditionality' are thought to have found the mainstay for their view in the Court's judgment in *Pringle* (Case C-370/12). Here the CJEU stated that 'Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy' (paragraph 137) and later approved that the ESM's rules which subject financial assistance to strict conditionality are in line with these requirements: 'the purpose of the strict conditionality […] is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union […], those measures being designed, inter alia, to ensure that the Member States pursue a sound budgetary policy' (paragraph 143). Whilst the Court approved strict conditionality – as foreseen by the ESM-Treaty which was the subject-matter of these proceedings – it never stated that this was the only way that the requirements the Court found in Article 125(1) TFEU could be met. The practical implementation of strict conditionality – also known as 'austerity' – created long-lasting repercussions in the societies affected by it. The bad reputation of this form of support deters governments de facto from requesting financial assistance from vehicles that are built on the formula 'assistance in return for policy conditionality'.

4. The New Formula: Financial assistance in return for earmarking

SURE overcomes this model by establishing a new formula: 'financial assistance in return for earmarking'. In other words, the one who pays defines the actual use of the payment. Although SURE is not in conflict with Article 125(1) TFEU since it is based on Article 122(2) TFEU and therefore escapes the application of the 'no-bailout' clause, it also had to overcome the requirement 'under certain conditions' set by Article 122(2) TFEU itself. In order to grant Union financial assistance under this legal basis, 'certain conditions' must be pre-defined by the Council and linked to the assistance. The EFSM, which was also established on the basis of Article 122(2) TFEU, met this requirement by establishing 'strict policy conditionality' – just as the ESM did with a view to getting over Article 125(1) TFEU.

SURE approaches the requirement in an original way, differently to that of its 'predecessor' that was founded on the basis of Article 122(2) TFEU. Instead of looking at the 'moral hazard' that might be

triggered by financial assistance to the general budget of a Member States, the price for which is not determined by financial markets anymore, SURE focuses on the purpose of the assistance. If the Union defines narrowly the subsequent use of the financial assistance by the recipient Member State, the Union resumes the political responsibility for the flow of money into the territory of this Member State. The budgetary policy of that Member State is unaffected by an earmarked financial assistance, as is the soundness of this budgetary policy. In other words, since the Member State's government is not free in how to spend the money it receives from the EU, there is no 'moral hazard' that has to be tackled by 'strict policy conditionality'. The smoothness by which this new instrument and the new formula it is built on went through the Council indicates that 'assistance in return for earmarking' was able to find significant political support amongst all Member State governments.

5. Issuing EU Debt to Refinance EU Financial Support

Without calling them 'Coronabonds' or even 'Eurobonds', SURE establishes a refinancing model for the loans that it grants based on own EU debt and makes, by that, use of the EU's excellent rating on the financial markets. This refinancing model is nothing new in EU law. The EFSM also refinanced its loans by own debt.[7] The same holds true for the Balance-of-Payments Facility for non-Euro area Member States.[8] In earlier times, the Council empowered the Commission to contract loans for the purpose of promoting investment within the Community.[9] The probably – in the meantime – best known example from the past is the 1975 Community Loan Mechanism.[10] The existence of such EU debt seems to contradict – at first sight – Article 310(1)(3) TFEU, according to which 'the revenue and expenditure shown in the [Union] budget shall be in balance' and Article 17(2) of Regulation (EU) 2018/1046 on the financial rules applicable to the general budget of the Union,[11] according to which 'the Union […] shall not raise loans within the framework of the budget'.

The contradiction between the prohibition of raising loans, on the one hand, and the somehow different practice, on the other hand, can be explained by the fact that, for predefined and specific purposes, the Union is allowed to enter into borrowing-and-lending operations. The Union may not, however, do so in order to finance the general EU budget. The ability to enter into borrowing-and-lending operations must therefore be limited to a specific purpose in the legal act enabling the Union to raise loans. Furthermore, the guarantees for these borrowing-and-lending operations have to be included in the general EU budget. Under SURE, the pressure on the EU budget is relieved by a voluntary guarantee scheme by the Member States, the participation in which is a necessary condition in order to have ac-

7 See Article 2(1)(2) of Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

8 See Article 1(2) of Council Regulation 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments.

9 See Council Decision 78/870 of 16 October 1978 empowering the Commission to contract loans for the purpose of promoting investment within the Community.

10 See Council Regulation 397/75 of 17 February 1975 concerning Community loans.

11 Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations 1296/2013, 1301/2013, 1303/2013, No 1304/2013, 1309/2013, 1316/2013, 223/2014, 283/2014, and Decision 541/2014 and repealing Regulation 966/2012.

cess to SURE loans without imposing it. Establishing such a voluntary guarantee scheme wouldn't have needed an explicit legal base in the Treaties because of its voluntary nature. Operating with incentives to join the scheme instead of legally binding commitments shows another aspect of innovation that SURE introduces in terms of design.

6. Shortcoming I: How sustainable is SURE?

Whilst some may consider the dual legal basis of Article 122(1) and (2) TFEU a strong element of SURE, it can also be seen as a weakness. Article 122 TFEU only applies to situations of 'severe difficulties'. The purpose of SURE – to prevent increasing social disparities between the Member States due to rising unemployment rates – will still remain pertinent once the pandemic and even the worst stages of the upcoming economic crisis are over. But the choice of the legal basis won't allow for extending SURE into these periods or for transforming it into an Unemployment Reinsurance Scheme. Given the purpose of SURE, it would have been commendable to also base the instrument on Article 175(3) TFEU, which allows for 'specific actions outside the [Cohesion] Funds' if necessary to attain the objective set out in Article 174 TFEU, which is the strengthening of the economic, social and territorial cohesion of the Union.[12]

The choice of this legal basis would have made transparent that SURE is about social cohesion, especially if the latter is understood as 'the degree to which disparities in social and economic welfare between different regions or groups within the European Union are politically and socially tolerable'.[13] An increase in social disparities within the EU as a consequence of a pandemic is both politically and socially intolerable so that an action on the basis of Article 175(3) TFEU would have been justified. The advantage of this choice of legal basis would not only have been to make the objective of social cohesion more visible and to allow for extending SURE into periods when there are no more 'severe difficulties', but it would have included the European Parliament in the legislative procedure and, by that, enhanced the democratic legitimacy of the instrument.

7. Shortcoming II: Where is the European Parliament?

The choice of the legal basis led to an exclusion of the European Parliament in the definition of the assistance. Only in its capacity as the EU's budgetary authority can it check on the use of the EU's financial means by the European Commission. Whilst this is already progress compared to the special purpose vehicles that were constructed outside the EU legal framework during the last economic crisis, this minimalistic involvement of the European Parliament clearly constitutes a shortcoming of SURE. The new formula of 'assistance in return for earmarking' requires a strong democratic legitimacy of the regulation that defines the earmarking. The definition of the earmarking is highly political as it

12 On this legal basis for the establishment of a European Unemployment Benefits Scheme, see René Repasi, 'Legal options and limits for the establishment of a European Unemployment Benefit Scheme', Report prepared for the European Commission's Directorate-General for Employment Social Affairs and Inclusion, 2017, p. 21.

13 Willem Molle, *European Cohesion Policy*, Routledge, 2007, p. 5.

determines the subsequent use of the funds within the Member States and shapes, by that, the financing agenda of the Member States. Whilst the exclusion of the European Parliament seems understandable with a view to keeping legislative procedures short in times of crisis, the Parliament has proven itself to act quickly if necessary.

8. Outlook: SURE as a nucleus for the European Recovery Plan

On 10 November 2020, the European Parliament and the Council reached a political agreement on the temporary 750 billion-euro recovery instrument Next Generation EU.[14] The instrument includes the issuance of own debt, which is to be secured by Member States' guarantees. The income it generates will constitute a new own resource of the EU. Access to funding instruments follows – at least in parts – the logic of cohesion funds: earmarking payments and making use of grants instead of loans. It becomes clear from a first reading of these proposals that many elements that SURE already embodies can be found in the design of the recovery instrument. Yet, the instrument goes beyond SURE in that – building on the German-French proposal of 19 May 2020 for a 500 billion-euro recovery plan[15] – it provides for grants, the usage of which will not increase Member States' annual deficit and debt levels.[16]

On 21 October 2020, the EU Commission issued the first emission of bonds to finance SURE, worth 17 billion euros, and called them 'social bonds'. The day before, private investors placed orders for the EU social bond worth 233 billion euros, which shows the huge demand for EU bonds.[17] At the time of writing the Council has approved 87.9 billion euros in financial support for 17 Member States. Those numbers show that SURE as an instrument is a success. Beyond this success in numbers, with the adoption of SURE, the EU has shown itself to have learnt lessons from the management of the last economic crisis. With the formula 'financial assistance in return for earmarking' SURE found a way out of the alleged need for 'strict policy conditionality'. SURE showed that financial assistance can be refinanced more beneficially for all actors involved by issuing EU debt. SURE can therefore certainly be called the pioneer and the door-opener for a truly European fiscal solution to mitigate together the economic crisis that we will have to face once the pandemic retreats: a Dwarf in size, but a giant in shifting a paradigm in EMU.

14 Council of the EU, 'Next multiannual financial framework and recovery package: Council presidency reaches political agreement with the European Parliament', press release of 10 November 2020.

15 'Germany, France lobby hard for EU recovery plan', DW, 19 May 2020.

16 For more information about Next Generation EU, see the contribution to this volume by Armin Steinbach (Chapter 3 above).

17 European Commission, 'European Union EUR 17 billion dual tranche bond issue due October 4 th, 2030 and 2040', press release of 20 October 2020.

Chapter 7

"WHATEVER IS NECESSARY… WILL BE DONE": TIME FOR A LESS ONE-SIDED VIEW ON SOLIDARITY IN EUROPE IN THE SHADOW OF COVID-19

Ulla Neergaard and Sybe de Vries

1. Introduction[1]

> *'Tedious were it to recount, how among neighbors was scarce found any that showed fellow-feeling for another, how kinsfolk held aloof, and never met, or but rarely; enough that this sore affliction entered so deep into the minds of men and women, that in the horror thereof brother was forsaken by brother, nephew by uncle, brother by sister, and oftentimes husband by wife; nay, what is more, and scarcely to be believed, fathers and mothers were found to abandon their own children, untended, unvisited, to their fate, as if they had been strangers.'*

In this quotation from *The Decameron*, Boccaccio in his frightening description of the state of the stricken city, Florence, during the times of the extremely deadly pestilence rampaging in the 14th century, painfully explains how solidarity among the inhabitants had completely vanished; everyone thinking of only his or herself under the most sorrowful conditions. The flaws of human nature during crises such as pandemics is thus not something new, as it instinctively prescribes a large amount of selfishness to rule. Somehow confirming such a depiction, we have in Europe during the present COVID-19 crisis, on the one hand, for instance, already witnessed individuals' hoarding of food and thefts from hospitals of essential protective equipment. At the same time, we have seen almost unsuccessful pleas for exports of doctors and ventilators from the more privileged countries to the most wounded ones, as well as little success in requests to take COVID-19 patients from the latter kinds of Member States to those countries estimated to have a higher capacity in the health sector. In addition, we have witnessed unsympathetic 'competition' between Member States in the purchase, for instance,

1 This Chapter was finalised on 23 April 2020. This was first published in EU Law Live's Weekend Edition No. 14, 25 April 2020, p. 17

of ventilators and personal protective equipment such as masks, and Member States' surprising confiscations and export bans of such items, and more. At a more abstract level, the EU has continuously been criticised for its lack of action, and generally, solidarity amongst Member States has been called for, as the Nation State appears to have been strengthened severely at the cost of the EU.

However, the picture that Boccaccio describes may well be too bleak to compare to the current situation, as we on the other hand also see how individuals both physically and mentally support each other: from 'Corona' couriers in New York and free grocery delivery services in Europe; to citizens standing at their balconies to applaud those risking their health to help others, displaying banners with expressions of thanks, or giving free concerts from their homes. Within the EU we have little by little also, for example, observed how Member States with a higher ICU capacity, particularly Germany, take COVID-19 patients from other Member States, and seen Member States send at least some spare ventilators to those Member States in need thereof. Little by little, we have also witnessed some action taking place at the EU level.

Nevertheless, especially at the start of the outburst of the crisis the increase in the preservation of self-interests appeared rather shocking. However, undoubtedly the law can to a large extent compensate for selfish human and state behaviour, and solidarity has long served both as a profound value of and a dominant aim to be pursued by the EU (as expressed in Articles 2 and 3 TEU). Thus, criticism of the EU in that regard is indeed quite severe, as solidarity among the Member States has been viewed as a kind of binding glue from the very beginning, playing a fundamental role in defining the identity of the EU. The principle of sincere cooperation, as enshrined in Article 4(3) TEU, and which entails solidarity, to which the Commission refers, constitutes, together with the principle of unity, the cornerstone of European integration; or the 'pillar of our Union', according to the letter sent by the President of the European Council, Mr Charles Michel, to the Italian President, Sergio Mattarella, on 20 March 2020. In consequence, solidarity is viewed as a special and important value and virtue of what Europe – including both the EU as such and the individual Member States – is about; something which apparently is viewed as positively distinguishing it from other continents.

Yet, how to transform the general visions of solidarity into concrete action has always been the Achilles heel of the EU, and therefore it is easily a target for criticism. For instance, in recent years the EU has been perceived as appearing quite hopeless in relation to policies requiring a kind of 'implementation' of the solidarity principle (in EU asylum policy, for example doing so through an EU system of relocation of asylum seekers throughout the EU, has been particularly difficult if not impossible). In the present COVID-19 crisis, the EU has once again proven to appear as very fragile in this regard.[2]

2 See for instance the Facebook group, '#EUsolidarity Now', which describes itself as aiming at 'a union of people helping one another to face today's challenges' and states: 'Invite your friends to this group… let's show our governments that we want more solidarity now'. It was established only by the end of March 2020, and on 8 April 2020 it already had 64,897 members. See also this article by Heiko Maas, Federal Minister of Foreign Affairs, and Olaf Scholz, Federal Minister of Finance, 'A response to the corona crisis in Europe based on solidarity', published on 6 April 2020, in different language versions in Les Echos (France), La Stampa (Italy), El País (Spain), Público (Portugal) and Ta Nea (Greece)), who state that: "We EU member states have to act together to this end, in a spirit of European solidarity and with combined forces, in order to strengthen the European Union." Finally, it is worth mentioning that Pope Francis on 12 April 2020 (Easter) in his live-streamed speech, rather unusually also pleaded for solidarity

However, if it fails in this, euroscepticism would be likely to rise further, and the entire project would be severely endangered.

Unsurprisingly, solidarity – and the claimed presence thereof - has therefore now become one of the most profound themes presently discussed at all levels in Europe, among other things exposing deep divisions in the EU. Most significantly, the initially most affected states, Italy and Spain, have accused the much more privileged, northern nations - led by Germany and the Netherlands - of not doing enough.[3] Peculiarly, the European institutions, with the European Commission as their frontrunner, keeps on - again and again and in some contrast - to an almost exaggerated degree reassuring everyone that solidarity does indeed prevail.[4]

The purpose of the following, therefore, is to reflect upon the role of EU law in the context of the COVID-19 crisis, ultimately aiming at - in a balanced manner - analysing to what degree solidarity may have been present or lacking, under the assumption that activity/passivity respectively can be considered as indicators thereof.[5] In other words, as referred to in the title of this Chapter, it is our intention to analyse to what degree it is detectable that whatever is necessary to support Europeans and the European economy will be done, as has been promised by EU Commission President von der Leyen,[6] and that "… the truth is… that Europe has now become the world's beating heart of solidarity".[7] More precisely, we will take a bird's eye view and focus on three of the most pertinent, ultimately interrelated, dimensions: the presence of solidarity with regard to the health dimension (section 2), the economic dimension (section 3), and the rule of law dimension (section 4). This will reflect that the handling of the present crisis essentially takes place in three rather different respects, namely the saving of lives, the saving of economies, and the saving of essential democratic values and rights. Taking a bird's eye view, within these three focal points, we self-evidently have to limit ourselves to those elements of the most significant interest.

2. The Health Dimension

The most immediate concern of the present crisis is, of course, the protection of people's health against the impact of COVID-19. It is thus not surprising that, once the risks of the coronavirus became clear,

within the EU as he said that: "Today, the EU finds itself faced with an epochal challenge, on which not only its future but also that of the entire world will depend. Let us not miss the opportunity to demonstrate, once again, solidarity, even by resorting to innovative solutions." He also called for the EU to unite in its response to the outbreak, just as it did after World War II, when the "continent rose thanks to a concrete spirit of solidarity which allowed it to overcome the rivalries of the past".

3 See e.g. Katya Adler, 'Coronavirus pandemic: EU agrees €500bn rescue package', *BBC News*, 10 April 2020.

4 The European Commission has for example established a webpage entitled 'Coronavirus: European Solidarity in action', inter alia stating: "Across the European Union, countries, regions and cities are stretching out a helping hand to neighbors, helping those most in need. This is European solidarity in action".

5 As a delimitation, we are neither analysing global solidarity, nor acts of solidarity provided from either Member States or the EU to non-Member States. For a general overview of worldwide government responses to the COVID-19, see the Oxford COVID-19 Government Response Tracker.

6 See for example the European Commission's Economy webpage.

7 European Commission, Speech by President von der Leyen at the European Parliament Plenary on the EU coordinated action to combat the coronavirus pandemic and its consequences, 16 April 2020.

the EU Member States quite rapidly took all necessary measures to protect the health of their citizens. At first, they adopted different strategies and measures to contain the spread of the coronavirus, which led many to wonder why there was not a common or at least a more coordinated EU response. The originally poor status of European cooperation to deal with the corona-crisis can to a large extent be explained by the relatively weak legislative powers of the EU in the field of public health, which appears to make the development of a substantive and targeted approach to COVID-19 difficult.[8]

Whereas paragraph 1 of Article 168 TFEU reiterates that a high level of health protection shall be ensured in the definition and implementation of all EU policies and activities, paragraphs 5 and 7 stipulate that there is no harmonisation of national laws to protect and improve human health, and that management, organisation, and delivery of medical care and health services are a matter and responsibility for the Member States. In other words, according to Article 6 TFEU, the protection and improvement of human health is only covered by the EU's *supplementary* competences.[9]

Meanwhile some Member States closed their borders, others sought to restrict the exportation of protective clothes, face masks and gloves, or to requisition these goods. The four fundamental freedoms, particularly the free movement of goods and persons, constituting the cornerstone of the EU internal market, have been severely restricted.[10] With respect to the free movement of persons, 15 Schengen countries decided to derogate from the Schengen internal border controls-free area and reintroduce border checks on persons: Austria, Belgium, Czechia, Denmark, Estonia, Finland, France, Germany, Hungary, Lithuania, Norway, Poland, Portugal, Spain and Switzerland.[11] Together with restrictions on various modes of transportation one can but only imagine the impact these measures have had on the free movement of workers and persons within the EU.[12]

Furthermore, the Commission on 16 March 2020 recommended that Member States apply a temporary 30-day coordinated restriction of non-essential travel from third countries into the EU.[13] On 8 April 2020, the Commission invited Member States and non-EU Schengen countries to extend the temporary restrictions on non-essential travel to the EU until 15 May 2020.[14] These measures, of course,

8 See also the blog by Sybe A. de Vries, 'How COVID-19 reveals the tensions between the EU's Single Market and the protection of public health', *Renforce Blog*, 24 March 2020.

9 See also Sybe A. de Vries, *Tensions within the Internal Market – The functioning of the Internal Market and the Development of Horizontal and Flanking Policies*, Europa Law Publishing, 2006, pp. 305-307; Kai P. Purnhagen, et al 'More competences than you knew? The web of health competences for Union action in response to the COVID-19 outbreak', 11 *European Journal of Risk Regulation*, 2020, pp. 297-306; and Ulla Neergaard, 'EU Health Care Law in A Constitutional Light: Distribution of Competences, Notions of "Solidarity", and "Social Europe"', in Johan van den Gronden, et al (eds.) *Health Care and EU Law*, T.M.C. Asser Press/ Springer, 2011, pp. 19-58.

10 See with regard to the free movement of persons, Sergio Carrera & Ngo Chun Luk, 'Love Thy Neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area', *CEPS*, 3 April 2020. See also the contributions to this volume by Daniel Thym (Chapter 28 in Part V below) and by Sandra Mantu (Chapter 29 in Part V below).

11 Sergio Carrera & Ngo Chun Luk, 'Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area', *CEPS*, 3 April 2020, p. 2.

12 Ibid.

13 European Commission, Communication COM(2020) 115 final of 16 March 2020 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU'.

14 European Commission, Coronavirus: Commission invites Member States to prolong restriction on non-essential travel to the

have serious repercussions for third country nationals as well as refugees. There are exceptions for *nationals* of EU Member States seeking to return home as well as travellers with an essential function or need, such as health professions or frontier workers.

Without really knowing whether the rapid closing of borders would actually work, the instinct of turning inwards and a resurgence of national egotism[15] is not only legally questionable,[16] but has also in this context put the solidarity principle and thereby the European integration process seriously to the test.

Yet Member States have considerable leeway in protecting the health of their citizens within the framework of the internal market, which has been the long-standing case law of the CJEU. According to one of the classical judgments of the Court of Justice, *De Peijper* (C-104/75, paragraph 15), the interest of public health ranks first amongst the interests mentioned in Article 36 TFEU: 'Health and life of humans rank first among the property or interests protected by Article 36 and it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure […]'. That public health takes a prominent place in EU law is furthermore emphasised by *inter alia* Article 35 of the EU Charter which states that 'everyone has a right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices'. Furthermore, it states that 'a high level of health protection shall be ensured in the definition and implementation of all Union policies and activities'. This 'public health integration requirement' can also be found in Article 168(1) TFEU, which constitutes the legal basis for health measures, and Article 114(3) TFEU, which is the internal market legal basis.

Importantly, Article 36 TFEU constitutes the Treaty exception for national measures restricting the free movement of goods, which are prohibited on the basis of the fundamental internal market provisions of Articles 34 or 35 TFEU. Article 35 TFEU prohibits export restrictions by Member States but the Court of Justice in its case law has provided for a more restrictive interpretation than Article 34 TFEU on imports. National measures which have actual effects that are 'none the less greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of the Member State' are prohibited by Article 35 TFEU (*Gysbrechts*, C-205/07, paragraph 43). This appears to be the case where Member States - for reasons of security of supply - prohibit or restrict the exportation of essential protective equipment and medical instruments like ventilators.[17]

Despite the importance of the public health exception in Article 36 TFEU and the restrictive reading of Article 35 TFEU, Member States do not have a 'carte blanche' in shielding their national market

EU until 15 May, Press Release, 8 April 2020.

15 Stefan Lehne, 'How the Coronavirus Is Testing the EU's Resilience', *EU Observer*, 25 March 2020.

16 Sergio Carrera & Ngo Chun Luk, 'Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area', *CEPS*, 3 April 2020.

17 See also Wouter Devroe and Nina Colpaert, 'Corona and EU economic law: Free movement of goods', *CoRe Blog*, 15 March 2020.

with a view to protecting the health of its own population. There are conditions that need to be fulfilled to prevent the internal market being overly disrupted – although these conditions in times of crisis can be considerably relaxed – and that the health and well-being of all citizens is endangered at the same time. The European Commission as guardian of the Treaties needs to act as a tightrope walker by engaging in a dialogue with Member States and businesses (industry) and by urging mutual solidarity.[18] It has meanwhile sought to reinforce national restrictive measures for the benefit of public health on the one hand and mitigate their effects on free movement where possible on the other. Examples are border management measures to protect health and to ensure the availability of goods and essential services at the same time, as well as guidelines on so-called 'green lanes' to ensure speedy and continuous flow of goods across the EU and to avoid bottlenecks at key internal border crossing points.[19]

Nevertheless, the COVID-19 crisis reveals that the project of the internal market, which is one of the four key areas defined by the European Council in its response to the pandemic[20] and which even eurosceptic politicians still seem to cherish, and its foundational principles are much less solid and more fragile than we previously thought. The picture is, however, not as bleak as Boccacio's grim description of Florence. This is because the internal market also constitutes the avenue, the breeding ground for the EU and its Member States to address at least part of the health crisis and economic disruption, despite the limited powers of the EU in the field of public health on the basis of Article 168 TFEU.[21] Along with the measures mentioned above, proposals have been made to boost the resilience of Europe by converging fair working conditions in Europe, inter alia, for health professions so that the brain drain and export of nurses from some Member States can be curtailed and by facilitating the free movement of doctors, nurses and other health professionals.[22] Other, internal market related, measures concern the setting-up of a voluntary joint public procurement scheme between Member States for the purchase of medical equipment.[23] Interestingly, the President's Conclusions on the European Council's video conference held on 23 April 2020 also mention the production of essential goods in Europe as of utmost importance. It would be interesting to see how this policy would be given specific expression in different Member States and in an internal market without internal borders.[24]

18 European Commission, European Coordinated Response on Coronavirus: Questions and Answers, 13 March 2020.

19 European Commission webpage: Coronavirus response. On EU action to protect the free movement of goods amidst the pandemic, see the contribution to this volume by Peter Oliver (Chapter 30 in Part V below).

20 Conclusions of the President of the European Council of 23 April 2020 following the video conference of the members of the European Council.

21 Sybe A. de Vries, *Tensions within the Internal Market – The functioning of the Internal Market and the development of Horizontal and Flanking Policies*, Europa Law Publishing, 2006; and Kai P. Purnhagen, et al, 'More competences than you knew? The web of health competences for Union action in response to the COVID-19 outbreak', cit.

22 Compare e.g. Claire Dhéret and Simona Guagliardo, 'Boosting Europe's resilience with better health systems: Lessons from the COVID-19 crisis', *EPC*, 14 April 2020.

23 European Commission's Coronavirus response webpage; and European Commission, Communication 2020/C 108 I/01 of 1 April 2020 'Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis'. See also Benjamin Fox, 'Why search for a role you've already found?', *Euractiv*, 15 April 2020. On the impact of COVID-19 in the area of public procurement, see the contribution by Stéphane de la Rosa (Chapter 31 in Part V below).

24 Conclusions of the President of the European Council of 23 April 2020 following the video conference of the members of the European Council.

In conclusion, despite the different containment strategies of the Member States with their unprecedented disruptive effects on the functioning of the EU Single Market, in the course of the COVID-19-crisis we can increasingly discern acts of solidarity within the EU. The Commission and EU legislators have furthermore adopted a whole range of measures which seek to endorse Member States' efforts to protect the health of their citizens. The EU Single Market may thereby constitute a perfect breeding ground to, albeit within limits, strengthen the face of health of the EU.

3. The Economic Dimension

Beyond any doubt, the saving of lives currently is – and must be - the absolute top priority. However, the observed wounded state of the European economies, which is already considered as being at a tremendous level due to the lockdowns of societies and the financing of the heavily increased costs in the health sectors, is also of huge importance. The responses to this challenge have already taken place both at the national and the EU levels. In what follows, these two aspects will therefore be considered.

Regarding the responses at the Member State-level, these have most significantly taken place in the shape of different national aid programmes aiming at preserving jobs and undertakings and eventually facilitating a sound economy of the Member State in question. By now, impressive sums of money in many Member States have already been channelled into the system either in the form of loans or as direct aid, however in principle are largely of relevance only to the Member State in question itself (rather than serving as transnational solidarity shaped as direct help to other Member States).[25]

Elements in such aid programmes are, in principle, often in need of approval by the EU, namely under the regime of State aid law. In that regard, the European Commission has seemingly worked quickly and flexibly to decide whether such specific national measures constitute lawful State aid measures or not.[26] One tool of relevance is Article 107(2)(b) TFEU, which is applicable when Member States need to be able to compensate specific companies or specific sectors for the damages directly caused by exceptional occurrences, precisely as is currently being witnessed. The first approval took place on 12 March 2020, when the European Commission announced, within 24 hours of notification, that it had greenlighted a Danish aid scheme of 12 million euros to compensate organisers for damage suffered due to the cancellation of large events or of events targeted at risk groups due to the COVID-19 outbreak.[27]

25 For an overview of national measures by country, see European Commission, 'Policy measures taken against the spread and impact of the coronavirus', 6 April 2020. Also, according to the Council of the EU: 'Report on the comprehensive economic policy response to the COVID-19 pandemic', press release of 9 April 2020, paras. 5-6: 'To date, the aggregate amount of Member States' discretionary fiscal measures amounts to 3% of EU GDP, a threefold increase since 16 March, on top of the significant impact of automatic stabilisers. Furthermore, Member States have so far committed to provide liquidity support for sectors facing disruptions and companies facing liquidity shortages, consisting of public guarantee schemes and deferred tax payments, which are now estimated at 16% of EU GDP, up from 10% on 16 March'.

26 See generally the contribution by Jorge Piernas (Chapter 34 in Part VI below) and by Andrea Biondi (Chapter 35 in Part VI below).

27 'Commission grants its first approval of State aid to compensate damage caused by COVID-19 outbreak', *EU Law Live*, 13 March 2020.

A Temporary Framework for approval had also been adopted by the European Commission on 19 March 2020 to enable Member States to use the full flexibility foreseen under State aid rules to support their economy and help overcome the extremely difficult situation triggered by the coronavirus outbreak.[28] It is based on Article 107(3)(b) TFEU. It distinguishes between the following five categories of national aid: (1) aid in form of direct grants, repayable advances or tax advantages; (2) aid in the form of guarantees on loans; (3) aid in the form of subsidised interest rates for loans; (4) aid in the form of guarantees and loans channelled through credit institutions or other financial institutions; and (5) short-term export credit insurance.[29]

Thus, the general flexibility demonstrated and the speed in the handling of cases, which so far has been the response to the current emergency situation with regard to State aid, appears to be rather appropriate.

The responses at the EU level to the economic crisis are, after all, of much larger importance for the analytical perspective taken here. Demonstrations of solidarity in that context is - at the end of the day - a matter of more than an expression of emotional sympathy, as it is essentially a matter of a willingness to transfer money from some Member States to others. In the context of the Economic and Monetary Union (EMU) and the problems it has previously faced, among others due to a lack of solidarity among Eurozone countries, the famous, Nobel prize-winning economist, Stiglitz, has crucially pointed out that:

> *When a group of countries shares a common currency, success requires more than just good institutions … For reforms to work, decisions have to be made, and those decisions will reflect the understandings and values of the decision-makers. There have to be common understandings and values of the decision-makers of what makes for a successful economy and a minimal level of 'solidarity', or social cohesion, where countries that are in a strong position help those that are in need. Today, there is no such understanding, no real sense of social cohesion. Germany says repeatedly that the Eurozone is not a 'transfer union' – that is, an economic grouping in which one country transfers resources to another, even temporarily in a time of need.* [30]

The critique here appears to be widely acknowledged, and in relation to the present COVID-19 crisis the difficulties referred to have once again shown their ugly face as the core of the problems. It has appeared to be challenging to reach consensus as to whether solidarity in the sense of explicit obligations of the stronger Member States to help those in need by transfers of economic resources should eventually prevail.

28 European Commission, Communication C(2020) 1863 of 19 March 2020 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (amended on 3 April 2020).

29 See further e.g. Andrea Biondi, 'State Aid in the Time of COVID-19', *EU Law Live*, 25 March 2020; Alfonso Lamadrid de Pablo and José Luis Buendía, 'A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund', *EU Law Live*, 1 April 2020; and José Luis Buendía and Angela Dovalo, 'State Aid Versus COVID-19. The Commission Adopts a Temporary Framework', 19 *European State Aid Law Quarterly* 1, 2020, pp. 3-7.

30 Joseph E. Stiglitz, *The Euro and Its Threat to the Future of Europe*, Penguin Random House, 2016, p. 22.

Despite the opposing views as to the depth of transnational solidarity, by now certain responses to the crisis have already taken place. The considerations behind them have seemingly been manifold, among other things including questions such as whether the help should be provided within the EU, namely by involving all Member States, or only taking place within the Eurozone; whether the Member States in need of economic aid should receive it unconditionally as grants or rather, for example, in the shape of loans with conditions attached to them; and whether the idea of 'Eurobonds', now in new disguises and often referred to as 'Coronabonds' or 'Recovery bonds', should be revitalised and realised, which could have the potential to become a construction based on a new version of solidarity.[31] In what follows, we will elaborate further on the actual steps already taken or envisaged.

At the absolutely general level, it has (as also referred to in the title of the Chapter and briefly mentioned in Section 2) been pronounced by Commission President von der Leyen, that whatever is necessary to support Europeans and the European economy will be done.[32] She has also expressed that the EU's next long-term budget should be a key instrument in the recovery plan to confront the huge economic consequences of the COVID-19 crisis, and has in that context made reference to an EU Marshall Plan to be laid under the Multiannual Financial Framework (MFF), the EU's long-term budget.[33] This has, however, not yet been laid, but the Commission is planning to present an updated proposal by the end of April 2020.[34] It is intended to play a central role in the economic recovery[35].[36]

At a more specific level, many responses have already been launched; at times under the yoke of challenging negotiations.[37] Most significantly, a critical moment occurred just before Easter. Thus, on 7 April 2020 an important teleconference of the Eurozone finance ministers (the Eurogroup) took place. However, although lasting until the next day, it was on that occasion not possible to reach an agreement on the next economic package.[38] The difficulties of reaching an agreement could be seen as a sign of the hesitance of some Euro-States to exercise genuine solidarity with and trust in others that were more in need, but not necessarily so. It could also be a demonstration of economic accountability despite the

31 According to Markus K. Brunnermeier, Harold James & Jean-Pierre Landau, *The Euro and the Battle of Ideas*, Princeton University Press, 2016, p. 111, it was already during the euro crisis that a debate about Eurobonds emerged: 'However, the introduction of Eurobonds was not linked with a budgetary transition of power to Brussels. Eurobonds without the transition of budgetary power would have undermined the two-pillar strategy of the Maastricht Treaty and Stability Growth Pact: first, market discipline through credible enforcement of the no-bailout rule should (1) through interest rate responses provide member states the right incentives to contain public debt levels and (2) further rules to limit budget deficit and debt levels.' These authors make it clear (at p. 224 et seq) that Eurobonds have over the years been proposed in many different forms, but essentially their introduction would include some kind of debt mutualisation with joint liability, by many considered too risky. Simply speaking, the idea could be said to be that the Eurozone-countries would borrow money together, which would then be directed to those countries in need thereof.

32 European Commission, Speech by President von der Leyen at the European Parliament Plenary on the EU coordinated action to combat the coronavirus pandemic and its consequences, 16 April 2020 .

33 See e.g. Beatriz Rios, 'Von der Leyen: EU budget should be the Marshall plan we lay out together', *Euractiv*, 2 April 2020.

34 Jorge Valero, 'Commission to put forward updated MFF by end of April', *Euractiv*, 7 April 2020.

35 Council of the EU, Report on the comprehensive economic policy response to the COVID-19 pandemic, press release of 9 April 2020, para. 20. See also the Conclusions of the President of the European Council following the video conference of the members of the European Council, 23 April 2020, in which it is emphasised that the MFF will need to be adjusted to deal with the current crisis and its aftermath.

36 See the contribution by Armin Steinbach (Chapter 3 above).

37 For an overview of events, see e.g. the European Commission's Timeline of EU action.

38 See e.g. Jorge Valero, 'Eurogroup fails to progress on economic response to pandemic', *Euractiv*, 8 April 2020.

prevailing times of despair and panic.

In any event, on the evening of 9 April 2020, the EU Finance Ministers finally reached agreement on a 540 billion euro-package to support Member States, companies and workers.[39] The press release on the matter uses direct references to solidarity, as in the introductory part it is stated that '[w]e are committed to do everything necessary to meet this challenge in a spirit of solidarity', and in the concluding part it is pronounced that '[w]e will act together in solidarity and we will deliver'.[40] The package thus includes, more specifically, a massive safety net of 540 billion euros for Eurozone Member States via the ESM (about 2% of the Eurozone's GDP (240 billion euros) will be available), for companies in all EU Member States through the EIB, and for workers in all EU Member States via the European Commission's new instrument 'SURE'[41].[42]

This last-minute package was unsurprisingly received with both compliments and criticism. Under all circumstances, the European Central Bank (ECB) has assessed that up to 1.5 trillion euros would be needed this year to tackle the economic crisis caused by the pandemic, which is a strong indication that more is needed (as the agreement reached only constitutes one third thereof).[43] It is thus of importance to note that further steps are already being considered. Among these, focus for the leaders seem to be to discuss the recovery plan to relaunch the economy once the pandemic starts receding, and the possibility of reaching agreement as to issuing the abovementioned, politically extremely sensitive 'Coronabonds'.[44] The intention is then that the European Council takes this work forward.[45]

By now, then, many different responses have already been launched. According to the Commission, as announced in the beginning of April 2020, the following economic measures, besides State aid, are the essential ones:[46]

39 See e.g. Jorge Valero, 'Eurogroup agrees on €540 billion corona-package', *Euractiv*, 10 April 2020**,** and Council of the EU, 'Report on the comprehensive economic policy response to the COVID-19 pandemic', Press Release 223/20, 9 April 2020.

40 Council of the EU, 'Report on the comprehensive economic policy response to the COVID-19 pandemic', press release of 9 April 2020, paras. 1 and 22.

41 Council of the EU, 'Report on the comprehensive economic policy response to the COVID-19 pandemic', press release of 9 April 2020.

42 On SURE, see the contributions to this volume by Karl Croonenborghs (Chapter 5 above) and by René Repasi (Chapter 6 above).

43 See e.g. Francesco Guarascio, 'ECB urges measures worth 1.5 trillion euros this year to tackle virus crisis – sources', Reuters, 8 April 2020.

44 Jorge Valero, 'Eurogroup agrees on €540 billion corona-package', *Euractiv*, 10 April 2020. It is regarding these bonds explained by Daniel Gros, 'EU solidarity in exceptional times. Corona transfers instead of corona bonds', *CEPS in Brief*, that: 'The simplest way would be for the EU to issue "eurobonds" and then make a large transfer to Italy or other countries in need. But that is not possible because the Treaty stipulates (Art. 310.1) that the EU budget has to be in balance. This is why a number of proposals have been made to find a way around this prohibition of a deficit via guarantee schemes, sometimes involving the ESM.' Also see e.g. Matthias Goldmann, 'The Case for Corona Bonds. A Proposal by a group of European Lawyers', *Verfassungsblog*, 5 April 2020, or 'European Finance Minister Ponder Coronabonds', *The Economist*, 9 April 2020.

45 European Council, 'Statement by the President of the European Council Charles Michel following the agreement of the Eurogroup', press release of 10 April 2020.

46 European Commission, COVID-19. EU Coronavirus Response, 2 April 2020. For an overview, see also Council of the EU, 'Report on the comprehensive economic policy response to the COVID-19 pandemic', press release of 9 April 2020.

a) Mobilisation of the EU budget and the European Investment Bank (EIB) to save people's jobs and to support companies hit by the crisis:

   - The Commission's SURE instrument, which protects jobs and people at work ('The Commission put forward Temporary Support to mitigate Unemployment Risks in an Emergency – SURE – to help people keep their job during the crisis. SURE provides funding to Member States of up to 100 billion euros by covering part of the costs related to the creation or extension of national short-time work schemes.')

   - Liquidity measures to help hard-hit SMEs **('**The EIB Group will aim to create an additional 20 billion euros of investment in small and medium-sized businesses, partly using its own capital and partly backed by the EU budget. The Commission will make available 1 billion euros in an EU budget guarantee to the European Investment Fund (EIF), so it can provide liquidity to SMEs, mobilising 8 billion euros in total to help at least 100,000 companies.')[47]

b) The Coronavirus Response Investment Initiative ('The Commission tabled an investment initiative to provide Member States with immediate liquidity. It consists of unspent cohesion policy funds. The initiative also includes a 100% financing rate by the EU for measures to fight the crisis, so Member States do not have to frontload money. New methods under the Fund for European Aid to the Most Deprived to reach the most vulnerable, such as home deliveries and the use of electronic vouchers to reduce the risk of contamination. Flexibility to redirect funding between programmes and regions to fund corona-related actions. Support to fishermen and farmers.')

c) EU Solidarity Fund ('The EU Solidarity Fund can provide support to Member States affected by public health crises like the one caused by the coronavirus.')

d) Flexibility of the European fiscal framework ('The European Commission has triggered the 'escape clause' to allow exceptional fiscal support. This will allow applying the maximum flexibility to our budgetary rules to help national governments financially support healthcare systems and businesses, and to keep people in employment during the crisis.')[48]

47 According to the European Commission: 'This will go towards bridging loans, credit holidays and other measures designed to alleviate liquidity and working capital constraints for SMEs and mid-caps. The European Investment Bank Group, including the European Investment Fund, which specialises in support for small and medium-sized enterprises, will work through financial intermediaries in the Member States and in partnership with national promotional banks. The proposed financing package consists of: Dedicated guarantee schemes to banks based on existing programmes for immediate deployment, mobilising up to €20 billion of financing; Dedicated liquidity lines to banks to ensure additional working capital support for small and medium-sized enterprises and mid-caps of €10 billion; Dedicated asset-backed securities purchasing programmes to allow banks to transfer risk on portfolios of small and medium-sized enterprise loans, mobilising another €10 billion of support'.

48 This step is intended to enable national governments to better support the national economies as the budgetary rules have been significantly relaxed. In other words, the activation should take place, so as to enable 'a coordinated and orderly temporary deviation from the normal requirements for all Member States in a situation of generalised crisis caused by a severe economic downturn either in the Euro Area or the EU as a whole; cf. Dionyssis G. Dimitrakopoulos and Georgette Lalis, 'COVID-19: how has the EU reacted so far?', *LSE Blog*, 3 April 2020. As also stated by these authors, it is thus intended to give much more room to pursue fiscal policy

e) The ECB's response to coronavirus emergency ('The Commission's economic measures will complement the European Central Bank's €750 billion Pandemic Emergency Purchase Programme of private and public securities during the crisis, in addition to the €120 billion programme decided earlier.'[49])[50]

f) Screening of foreign direct investment ('On 25 March, the Commission issued guidelines to help Member States screen foreign direct investments and acquisitions of control or influence. The aim is to protect critical European assets and technology in the current crisis.')[51]

It is finally worth mentioning that on 17 April 2020, the European Parliament voted in favour of a rapid implementation of a number of Commission proposals to tackle the coronavirus crisis.[52] Also, at the much awaited videoconference of the members of the European Council, which took place on 23 April 2020, the following main elements were decided upon:[53]

> *"We welcomed the Joint Roadmap for Recovery. It sets out some important principles, such as solidarity, cohesion and convergence. It further defines four key areas for action: a fully functioning Single Market, an unprecedented investment effort, acting globally, and a functioning system of governance.*
>
> *It is of utmost importance to increase the strategic autonomy of the Union and produce essential goods in Europe.*
>
> *Following the meeting of the Eurogroup in an inclusive format on 9 April 2020, we endorsed the agreement on three important safety nets for workers, businesses and sovereigns, amounting to a package worth 540 billion euros.*

measures commensurate with the scale of the crisis. Also see Council of the EU, 'Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis', press release of 23 March 2020; and European Commission, 'Coronavirus: Commission proposes to activate fiscal framework's general escape clause to respond to pandemic', press release of 20 March 2020. Furthermore, see Eurogroup, 'Report on the comprehensive economic policy response to the COVID-19 pandemic', press release of 9 April 2020, para. 8, where it is stated: 'On 23 March, Ministers of Finance agreed with the assessment of the Commission that the conditions for the use of the general escape clause of the EU fiscal framework, a severe economic downturn in the euro area or the Union as a whole, are fulfilled. This offers the flexibility necessary to the national budgets to support the economy and to respond in a coordinated manner to the impact of the COVID-19 pandemic. Overall fiscal guidance will be provided within this framework and as part of a streamlined European Semester exercise'.

49 Also, see the ECB's press release of 18 March 2020, 'ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)', and Dionyssis G. Dimitrakopoulos and Georgette Lalis, COVID-19: how has the EU reacted so far?, *LSE Blog*, 3 April 2020.

50 On this, see the contributions in Part IV by Paul Dermine and Menelaos Markakis (Chapter 22 below) and by René Smits (Chapter 23 below).

51 On this measure, see the contribution by Dolores Utrilla & Juan Jorge Piernas in Part VI (Chapter 33 below).

52 European Commission, 'Coronavirus: Commission welcomes Parliament's quick green light for proposed new resources to protect lives and livelihoods', press release of 17 April 2020. It is stated that: 'The votes today allow for: an unprecedented redirection of cohesion policy funds to address the effects of the public health crisis (CRII+ Initiative); an additional €3.08 billion of EU funds for healthcare (the Emergency Support Instrument) and emergency medical capacity (rescEU); additional funding for the European Centre for Disease Prevention and Control; and a number of other support measures. The Parliament's green light follows the swift approval by EU Member States in the Council for the majority of these initiatives; the CRII+ Initiative and the postponing of the Medical Devices Regulation still require approval by the Council'.

53 Conclusions of the President of the European Council of 23 April 2020 following the video conference of the members of the European Council, press release of 23 April 2020.

We called for the package to be operational by 1 June 2020.

We also agreed to work towards establishing a recovery fund, which is needed and urgent. This fund shall be of a sufficient magnitude, targeted towards the sectors and geographical parts of Europe most affected, and be dedicated to dealing with this unprecedented crisis.

We have therefore tasked the Commission to analyse the exact needs and to urgently come up with a proposal that is commensurate with the challenge we are facing.

The Commission proposal should clarify the link with the MFF, which in any event will need to be adjusted to deal with the current crisis and its aftermath.

The Eurogroup in an inclusive format will continue to closely monitor the economic situation and prepare the ground for a robust recovery.

We remain committed to giving the necessary impetus to work on the recovery fund as well as the MFF, so that a balanced agreement on both can be found as soon as possible." [54]

The above mentioned agreement reached by the Eurogroup on 9 April 2020 was, importantly, endorsed. However, the exact future of a possible recovery fund is still unsettled and the most crucial issues are still left unsolved in that regard. Therefore, it is still too early to assess it as to how it may constitute an expression of solidarity, but it seems to be of significance that it is, after all, stated that there is agreement of working towards its establishment. Under all circumstances, the EU responses in the economic area are so far, in principle, many and manifold, but many more - and especially the recovery fund – are essential to add.[55] In general, the EU responses in total are nevertheless more than simply an expression of solidarity, namely in fact a demonstration of a certain degree of genuine transnational solidarity.

In sum, the many reactions both nationally and at the EU level ultimately to save the European economies from an immediate economic disaster already appear by now to be quite impressive and quite in contrast to anything ever experienced before. The national responses are, however, in general obviously only of interest internally in a given Member State and thus do not serve as a demonstration of transnational solidarity, but it is still of interest here that the Commission has reacted very quickly and flexibly within the area of State aid law. Also worth stressing is that certain limitations in the room for manoeuvre at the EU level are caused by an unwillingness of some Member States to transfer the necessary competences – as well as money.[56] However, whether the initiatives were initiated sufficiently quickly, are enough and are the best of all available choices is still too early to assess, but a spirit of solidarity with respect to the economic dimension is definitely detectable.

54 For the above mentioned Joint European Roadmap for Recovery, click here.

55 European Commission's Economy webpage.

56 Fundamentally, the design with regard to the distribution of competences contains strong tensions as monetary policy for the Eurozone Member States is the exclusive competence of the EU, whereas the national economic policies can only be coordinated by the EU, as these, as a point of departure, are in principle the responsibility of the Member States.

4. The Rule of Law Dimension

As Professor of Political Science and Law, R. Daniel Kelemen, has tweeted: "The pandemic will eventually end; the economy will eventually recover. But democracy, once lost, may never come back. And we're much closer to losing our democracy than many people realize."[57] The sad relevance of this reflection is that legal steps in many Member States have been taken in the shadow of the COVID-19 crisis, which challenge the prevailing rule-of-law ideals in Europe.[58] According to Article 2 TEU, the EU is, inter alia, founded on the values for democracy, the rule of law and fundamental rights. In a number of pivotal judgments the CJEU has emphasised that Member States under the principle of loyal cooperation, of which solidarity is a concrete expression, have the obligation to comply with the value of the rule of law as enshrined in Article 2 TEU. In the *ASJP* case, for instance, the CJEU held that Article 19 TEU 'gives concrete expression to the value of the rule of law' enshrined in Article 2 TEU. This latter provision directly produces obligations for Member States further to the principle of sincere cooperation as enshrined in Article 4(3) TEU.[59]

But fundamental rights such as the right to move freely, the right of equal access to health services, the right of respect for private life, the right to family life, the freedom of assembly and of association, data protection (apps controlling the movements of citizens), and so on have been severely limited since COVID-19 has spread over Europe. The containment measures have had a huge impact on the daily life of EU citizens and their right to movement.[60] Most severe have been the measures impacting the elderly, who have to stay in their homes or are confined to care homes, and may not receive visitors. Furthermore, national parliaments have reduced the number of their meetings as well as the number of parliamentarians allowed in parliament buildings and on its premises. Courts have been closed down for most hearings. And most significantly, in an increasing number of states across the globe and the EU, governments have been granted emergency powers to address the corona-crisis[61] and combat COVID-19, which, as is the case in Hungary, may even last for an indefinite period of time.[62] With respect to these emergency powers the European Commission, through a statement by its President, on the one hand recognises the need for necessary tools to act rapidly and effectively to protect the health of citizens, but on the other hand also emphasises the fundamental values and principles that cannot be set aside just like that. This is particularly so where the freedom of the media and freedom of expression are undermined and measures are not limited, necessary or strictly proportionate.[63]

57 R. Daniel Kelemen: twitter.com/rdanielkelemen/status/1248591730502504448> (last accessed on 20 April 2020).

58 On this problem, see the contributions by David Krappitz and Niels Kirst in Part 2 (Chapter 11 below) and by José Igreja Matos in Part VII (Chapter 37 below).

59 *Associação Sindical dos Juízes Portugueses*, C-64/16, para 34; see also *Commission v Poland*, C-619/18.

60 See also Joint European Roadmap towards lifting COVID-19 containment measures.

61 See in general: Christian Bjornskov and Stefan Voigt, 'The State of Emergency Virus', *Verfassungsblog*, 19 April 2020. See with regard to, for instance, Sweden: Ester Herlin-Karnell, 'Corona and the Absence of a Real Constitutional Debate in Sweden', *Verfassungsblog*, 10 April 2020.

62 See also Anna Katharina Mangold, 'How Corona Aggravates the Crises of the European Union and Threatens Its Existence. Call for European Democratic Solidarity', *Verfassungsblog*, 6 April 2020. See also Jennifer Rankin, 'Hungary's emergency law incompatible with being in EU, say MEPs group', *The Guardian*, 31 March 2020.

63 European Commission, 'Statement by President von der Leyen on emergency measures in Member States', 31 March 2020.

To closely monitor the situation, as the European Commission says it does, will in the end not at all be sufficient. Strikingly, the European Commission avoids mentioning specific Member States, particularly Hungary, and nor did the 13 Member States name it in a joint letter expressing their concern about the impact of emergency measures on the rule of law.[64] Once the COVID-19 crisis has overcome its peak, we will have to wait and see whether the legal tools, including the Article 7 TEU procedure, or financial measures will and can be used, and are in any case sufficient to enforce democracy and rule of law values as enshrined by Article 2 TEU.[65] Meanwhile the Secretary General of the Council of Europe, Marija Pejčinović Burić, presented a toolkit for respecting human rights, democracy and the rule of law during the COVID-19 crisis.[66] But the President of the European Council's conclusions following the video conference on 23 April do not refer to the rule of law or fundamental rights' aspects of the Member States' response to COVID-19 at all. The ongoing weakening of the rule of law in some EU Member States will ultimately undermine the key principles of solidarity and cohesion in the EU.

As a matter of fact, the presumed conflict between the protection of public health on the one hand and other fundamental rights and public interests on the other is an apparent contradiction. If we take the WHO's definition of public health as our starting point, which stipulates 'health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity', the protection of the rule of law and fundamental rights should be important values in the fight against COVID-19 as well.

Other fundamental rights-concerns have been raised about the possible use of apps, which in the exchange of data, track the spread of the virus, ultimately with a view to understand its course and to contain it.[67] Some individual Member States call in tech companies to ask directly for data, with little public clarity on what exactly is being provided. Some governments even rushed out apps that apply individual-level location tracking to enforce quarantine measures.[68] Despite their potentially positive effects, using these apps may constitute important drawbacks, particularly where the protection of personal data is concerned. An app is not a 'wand', which could combat an epidemic just like that, as data may not always be reliable and conclusions may well be wrong.[69] Important legal safeguards should be introduced and scientific reliability should be guaranteed with a view to protecting the rule of law.

64 Statement by Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden, on the Dutch Government's website, 1 April 2020.

65 See with regard to the situation in Hungary in particular Kees Cath, 'Not letting the COVID-19 crisis go to waste, ensuring the effective enforcement of the European value of the rule of law in Hungary during times of Corona', *Renforce blog*, 30 April 2020.

66 Council of Europe, Coronavirus: guidance to governments on respecting human rights, democracy and the rule of law, 8 April 2020.

67 On data protection challenges arising from the pandemic, see the contributions in Part 2 by Christina Etteldorf (Chapter 14 below) and by Oreste Pollicino (Chapter 15 below).

68 Natasha Lomas, 'Call for Common EU approach to apps and data to fight COVID-19 and protect citizens' rights', *TechCrunch*, 8 April 2020.

69 Maxim Februari, 'Gruwelijk misverstand: 'privacy' is het punt niet', *NRC Handelsblad*, 12 April 2020.

Meanwhile the European Commission published a recommendation on 8 April 2020 on 'a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobile data'.[70] According to the recommendation, the Commission's approach aims 'to uphold the integrity of the single market and protect fundamental rights and freedoms, particularly the rights to privacy and protection of personal data'. Its purpose is to set up a process for developing a common approach, such as a Toolbox, to use digital means to address the crisis. But throughout the recommendation much emphasis is laid on justification and proportionality to address data protection and privacy concerns. Also here, Member States are under the obligation to cooperate loyally and to show solidarity in finding an approach that balances health protection, free movement and other fundamental rights, like the protection of personal data and privacy.

So, the COVID-19 crisis causes severe challenges for the rule of law and fundamental rights of EU citizens, and thereby ultimately also for the key EU principles of loyal cooperation and solidarity. The backsliding of the rule of law in a number of Member States is further reinforced through the emergency measures, but must be put to a halt as part of the exit strategy and lifting of the containment measures. Furthermore, the principle of loyal cooperation requires Member States to find a balanced approach between different, conflicting fundamental rights. The relatively strong EU data protection regime is crucial here.

5. Conclusions

To conclude – inevitably at this stage only on a preliminary basis - many minds are currently evaluating the ability of different models of society to cope with the crisis. In that 'competition', the citizens in rich and sophisticated welfare states appear to be the winners - all parameters included - as they are living in the most responsible and safe societies, in which solidarity internally is present through law almost in the tiniest details, including universal health care systems, social safety nets and help packages for economic actors, and where democratic guarantees and the respect of fundamental rights are capable of surviving.

We would, however, also have a lot of hope in the EU as a model of society, as it has, after all, within the prevailing limits done quite well already. The reactions were at first far too slow, which had extremely tragic consequences in some of the Member States, and could have been avoided. In fact, we are all forever left with terrifying images of the times when COVID-19 arrived in Northern Italy, and of the despair and far too many deaths that followed.[71] Later, the reactions came little by little and

70 European Commission, Recommendation C(2020) 2296 final of 8 April 2020 'Commission Recommendation on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data'.

71 Accordingly, the EU offered Italy an apology; see European Commission, 'Speech by President von der Leyen at the European Parliament Plenary on the EU coordinated action to combat the coronavirus pandemic and its consequences', 16 April 2020 , in which it was said: "You cannot overcome a pandemic of this speed or this scale without the truth. The truth about everything: the numbers, the science, the outlook – but also about our own actions. Yes, it is true that no one was really ready for this. It is also true that too many were not there on time when Italy needed a helping hand at the very beginning. And yes, for that, it is right that Europe

often in a piecemeal manner, and were severely troubled by certain legal powers likely to be far too limited for the needs as well as the existence of rather opposing views as to the way forward.

Nevertheless, to us it does not seem fair to say that solidarity in the shape of action is not there at all. Some of the explanation, as it has been explained, is to be found in the fact that Member States have formerly not been willing to transfer the necessary competences. That framework will undoubtedly eventually have to be reconsidered, but would often require fundamental Treaty amendments. However, we must all learn, being as we are in a kind of a social experiment - constituting probably the largest challenge to the EU since its foundation - that no one has ever experienced before, where human wisdom, responsibility and solidarity is to be so strongly called for. Improvements are to be expected, as there still is a long road ahead of us, but it did not after all begin too badly considering the frightening and almost paralysing circumstances at the time of the outbreak of the pandemics. However, only time will tell whether the steps taken are sufficient. Despite much undergoing significant change and huge challenges prevailing, we would as our final statement simply refer to the following words of Albert Camus in 'The Plague' as a request to all of us: "[W]e should go forward, groping our way through the darkness, stumbling perhaps at times, and try to do what good lay in our power."

as a whole offers a heartfelt apology. But saying sorry only counts for something if it changes behaviour. The truth is that it did not take long before everyone realised that we must protect each other to protect ourselves." Also see the regret expressed by President of the European Council, Mr Charles Michel, voicing that "…Europe's way of working, also evident during the coronavirus crisis, is 'too slow' and called for more solidarity with countries that have been hard-hit by the pandemic, like Italy and Spain." See e.g. 'Michel: EU's way of working is 'too slow'', *Euractiv*, 20 April 2020.

Chapter 8

DISTRIBUTING THE CAKE IN TIMES OF PANDEMIC: WEIGHING THE PROS AND CONS OF THE UNIVERSAL BASIC INCOME PROPOSAL

Borja Barragué and Guillermo Kreiman

1. Introduction[1]

On 15 May 2020, the European Commission registered the proposal for a European Citizens' Initiative called 'Start Unconditional Basic Incomes (UBI) throughout the EU'.[2] The initiative itself sets out both the objectives and the criteria that define the UBI. Regarding the first, the UBI has the double objective of guaranteeing the material existence and the social and political participation of all people. Regarding the second, the four characteristics that define the UBI are its universality, individuality, unconditionality and sufficiency.

Based on these four criteria, the UBI is defined as an economic cash benefit that the government of a political community pays to each of the legal residents of its territory (individualised payments) so that everyone can meet, at least, their basic needs and fruitfully exercise their rights ('high enough' amount), regardless of whether we are rich or poor (universality), and whether or not we are willing to take part in paid work (unconditionality).

Only two weeks later, on May 29th, the Spanish Government approved the implementation of an income support programme called '*Ingreso Mínimo Vital'* (IMV) (Minimum Vital Income).[3] Unlike the UBI, the IMV is a cash transfer that takes household units as a benchmark (not individuals), whose potential beneficiaries are households with low or no incomes (it is not universal), and that links the cash transfer to job seeking agreements (it is not unconditional).

1 This Chapter was finalised on 3 June 2020.

2 Commission Implementing Decision 2020/674 of 15 May 2020 on the proposed European citizens' initiative entitled 'Start Unconditional Basic Incomes (UBI) throughout the EU'.

3 See Royal Decree-law 20/2020 of 29 May 2020 establishing the Minimum Vital Income.

So *yes*, Spain is going to implement an income support programme aimed at fighting poverty and guaranteeing a certain economic security for all households; but *no*, it is not going to implement a basic income. Is this good news or, on the contrary, would it have been a better option to stick to a programme similar to the European Citizens' Initiative and opt for an UBI? Let's see.

2. The underlying rationale of cash transfers

Governments and political actors with very diverse ideologies have proposed various measures aimed at guaranteeing a minimum economic security for the population. Cash benefits often have a place in the toolbox with which governments try to mitigate the economic effects of crises. There are good reasons for this.

Contrary to what some political leaders affirm, there is plenty of evidence showing that the beneficiaries of economic benefits do not spend the money they receive from cash transfers on alcohol and tobacco.[4] These transfers seem to contribute to health improvements (including for children),[5] and that, if well designed, they help citizens that receive it to permanently escape from poverty.[6] Furthermore, most of the evidence finds there is no effect on the number of hours worked. In other words, cash transfers do not seem to discourage work either. In fact, some jobs show increases in hours worked as a result of beneficiaries migrating to better jobs.[7]

In short, the most rigorous evidence shows that cash transfers, that is, giving money to people, is a very effective way of reducing poverty and improving citizens' lives, especially the most vulnerable. But as we already know, this assistance can be extended to the entire population, as in the UBI proposal, or it can target only the most vulnerable group, as proposed by the IMV. What (dis)advantages does the UBI have over targeted and conditional transfers as the IMV?

3. The European Citizens' Initiative: an assessment

The four elements with which the European Citizens' Initiative characterises the UBI respond, in every point, to the design proposed by the Belgian philosopher Philippe Van Parijs in *Real Freedom for All* (RFA), the greatest effort made so far to defend a universal and unconditional cash transfer.[8] In that book, Van Parijs defends the UBI as the institution that best realises the liberal-egalitarian ideal of social justice in its most elaborate version: that is, in the formulation of John Rawls. Van Parijs' argument to normatively justify the UBI in the framework of a liberal-egalitarian society operates in two phases.

4 David K. Evans and Anna Popova, 'Cash transfers and temptation goods: a review of global evidence', *World Bank Policy Research Working Papers*, No. 6886, 2014.

5 Esther Duflo, 'Grandmothers and Granddaughters: Old Age Pension and Intra-Household Allocation in South Africa' *The World Bank Economic Review*, No. 17(1), 2003, pp. 1-25.

6 Christopher Blattman, Nathan Fiala, and Sebastian Martinez, 'The economic and social returns to cash transfers: evidence from an Ugandan aid program', *CEGA Working Paper*, 2013.

7 Marianne Bertrand, Sendhil Mullainathan, and Douglas Miller, 'Public Policy and Extended Families: Evidence from Pensions in South Africa', *The World Bank Economic Review*, No. 17(1), 2003, pp. 27-50.

8 Philippe Van Parijs, Real Freedom for All: What (if Anything) Can Justify Capitalism?, OUP, 2020.

In the first, it affirms that one of the principles most beloved by political liberalism establishes the neutrality of the State regarding citizens' life projects. In the same way that it is not a function of the State to tell me if I have to listen to Metallica or Chopin, nor is it the State's place to tell me if I have to dedicate my life to Zen meditation or to sell insurance for a multinational corporation. In the second step, Van Parijs affirms that a State truly committed to the principle of freedom, which constitutes the core of the liberal (egalitarian) project, must guarantee the material conditions that allow its effective exercise. In other words, it must provide the material resources that transform formal freedom into real or substantive freedom. And it must do so universally, because that income floor operates as a prerequisite for the effective exercise of the rest of our rights.

However, the UBI proposed by Van Parijs raises, at least, two fundamental questions. First, from a normative perspective, the characterisation of *jobs as assets* is problematic. In RFA, Van Parijs argues that the funding of the UBI scheme will be based on taxes levied on a set of external assets that should be equally distributed, such as land or natural resources. In addition, he makes the innovative argument that labour should also be characterised as an external asset, given the inequalities created both by the scarcity of employment and by the quality differences in the job market. Therefore, citizens should be unconditionally entitled to an equal share of employment rents through the UBI, without any requirement to actively participate in the labour market.

The problem is that this conception quickly collapses into a collective action problem,[9] as every citizen will have incentives to free-ride, violating the principle of reciprocity, and leaving the burden of contribution only to those willing to work. This would decouple the right to a share of the product of social cooperation from the obligation to contribute to it. This is problematic for two reasons.

In normative terms, this is problematic because it violates the Rawlsian conception of society as a system of mutual cooperation for the benefit of everyone. And from a practical standpoint, this is problematic because it violates deeply held notions of fairness as strong reciprocity, an intrinsic feature of what Samuel Bowles and Herbert Gintis called the *Homo Reciprocans*.[10]

Second, and turning now to a more consequentialist approach, evidence shows that preferences for redistribution are a highly contentious issue that exhibit sharp differences not only across countries,[11] but also within countries according to income levels and occupations.[12] The implementation of a cutting-edge measure such as UBI would require profound changes in the way redistribution is currently conceived, and more importantly, would demand an extra-effort in terms of tax contribution from most of the social and economic strata. It is highly doubtful that, despite the evidence showing that citizens

9 Mancur Olson, Jr., *The Logic of Collective Action. Public Goods and the Theory of Groups*, Harvard University Press, 1971.

10 Samuel Bowles and Herbert Gintis, 'Is Equality Passé? Homo reciprocans and the future of egalitarian politics', *Boston Review*, 1998.

11 David Rueda and Daniel Stegmueller, *Who Wants What? Redistribution Preferences in Comparative Perspective*, Cambridge University Press, 2019.

12 Philipp Rhem, 'Risks and Redistribution: An Individual-Level Analysis', *Comparative Political Studies*, No. 42(7), 2009, pp. 855-881.

support more redistributive policies during times of crisis,[13] it would have the level of political support required to make it sustainable over time. This is especially true if we compare it to programmes that require lower tax burdens, such as targeted social benefit schemes. However, this is an open empirical question.

By looking at one of the latest waves of the European Social Survey (ESS), a preliminary answer can be found. Using data from Round 6 of the ESS,[14] a comparison can be made of the preferences of citizens of the ten biggest economies of the EU on the implementation of a targeted social benefit scheme versus the implementation of an unconditional universal basic income à la Van Parijs. Figure 1 below shows that, overall, targeted programmes seem to enjoy a higher level of support than UBI. In 8 of the 10 countries analysed, there is higher support for targeted schemes, with Austria and the Netherlands as the only (very marginal) exceptions. The largest support for targeted programmes is found in countries with some of the highest levels of relative poverty rates in the EU, such as Spain, Italy, or Portugal (not included in the graph). This is quite informative about the political viability of the implementation of these programs, especially in those countries that need them the most.

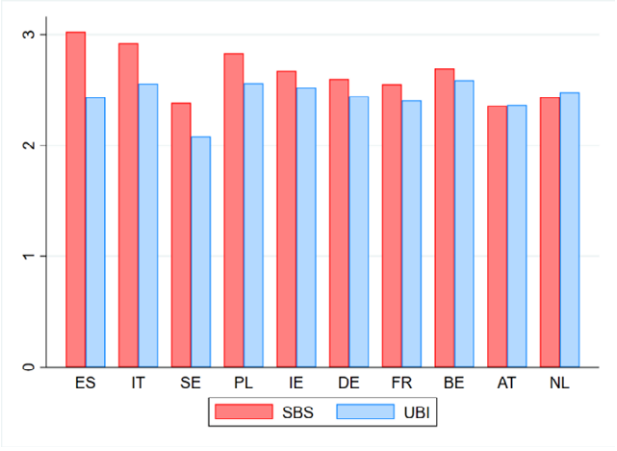


Figure 1 – Targeted Social Benefits Schemes vs. Universal Basic Income

Source: European Social Survey (Round 6)

13 Yotam Margalit, '[Political Responses to Economic Shocks]', 22 *Annual Review of Political Science*, 2019, pp. 277-295.

14 [ESS6 – 2012 Documentation Report], Edition 2.3 (published 1 December 2016).

4. Outlook

There is an ample scholarly debate on the set of policies that more adequately address the requirement of liberal-egalitarian theories of justice of improving the conditions of the least well-off. The economic consequences of the COVID-19 pandemic have opened this debate up (again). Over the last few months, we have seen how the European Commission, as well as countries such as Spain, have promoted different types of cash transfer programmes. We argue that targeted and conditional social benefit schemes seem to be better suited from a normative and empirical perspective, especially (but not only) during times of crisis. Despite its attractiveness, UBI is a questionable policy at the level of normative political philosophy, and this becomes especially problematic when we turn into real politics.

It is hard to believe, we know, but (sometimes) political theory matters.

Chapter 9

EU EXECUTIVE DISCRETION: AGAIN, IN TIMES OF EMERGENCY

Joana Mendes

1. Introduction - Strengthening executive powers[1]

The eurozone crisis brought the discretion of the EU executive, in particular that of the European Central Bank (ECB), to the front pages. The discussion on the limits of its mandate has returned in force in 2020, while the EU lives through yet another unprecedented crisis. Early on, in each of their respective fields, both the European Commission and the ECB stressed the flexibility needed to tackle the economic downturn that, in March, was already in the making.[2] In the exceptional circumstances caused by the COVID-19 pandemic, few disputed the need for an effective reaction. Before the Commission's proposal for a temporary recovery instrument, that arrived in late May, the lack of suitable reaction from the EU was the main criticism heard. At the same time, the concerns regarding the legality of the ECB's pandemic programme – that continues to sustain the shackles of the EU economy[3] - spiralled following the German Constitutional Court judgment *Weiss*.[4]

Wherever one may stand in this debate, and however needed executive action may be, the role of law in constraining and steering executive powers is far from a secondary issue. In a system that purports to abide by the rule of law, law ought not to be set aside in the name of 'whatever it takes', not least because measures adopted in situations of emergency can open the path to a further reinforcement of

1 This Chapter was finalised on 16 November 2020. A preliminary version was published in Weekend Edition No. 15, *EU Law Live*, 2 May 2020.

2 See, respectively, Commission Communication of 13 March 2020 'Coordinated economic response to the COVID-19 Outbreak', COM(2020) 112 final, and Decision 2020/440 of the ECB of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17) (see also ECB, ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP), press release of 18 March 2020.

3 'ECB signals more easing ahead as Lagarde warns of worsening outlook', *Financial Times*, 29 October 2020.

4 BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15. As is well known, the judgment pertains to ECB's Public Sector Purchase Programme (PSPP) programme.

executive powers in situations of normality.[5] The past has shown as much, and the judgment of the Court of Justice of the European Union (CJEU) in *Weiss* is an example of this dynamic.[6] Changes to the constitutional and legal framework within which EU executive actors exercise discretion ought to be substantively mediated by law, in respect for the democratic premises that the EU Treaties uphold. For this reason, because the EU's reactions to the eurozone crisis essentially revamped executive processes, and because further institutional solutions that the current pandemic may generate are likely to rely on executive powers, the developments in the area of economic and financial law of the past years require a reflection on the relationship between executive discretion and law, on academic approaches to discretion, on the role of judicial review and its limits.

2. Judicial review, law and discretion

The *Gauweiler* and *Weiss* judgments, as well as the very different *Shortselling* judgment before them, have shown that the CJEU is likely to accommodate legal interpretations that favour the capacity of executive bodies to act (the ECB in one case, the ESMA in another) in instances where that implies a significant constitutional change, at least when the EU political institutions have backed up those executive powers.[7] One may support or criticise this position on several accounts. These judgments have sparked a rich body of commentary, which cannot be usefully summarised here.

What I would like to underline is the conception of discretion of which they are emblematic. A distinction between technical discretion (a matter of cognition) and discretion proper (a matter of volition) pervades the CJEU's case law on administrative discretion, even if often only implicitly. The latter requires balancing the public interests at stake. It is necessarily and inextricably grounded on value judgments. The former entails the deployment of the executive's expertise. It is purportedly devoid of value judgments. This distinction is untenable if we do not acknowledge the many grey areas between these different types of assessment. These occur, in particular, in conditions of uncertainty in which executive bodies act prospectively on the basis of often open-ended (albeit detailed) legal mandates. But it is this very distinction that enables the CJEU to hold that 'nothing more can be required of the European System of Central Banks (ESCB) apart from that it uses its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy', whether in exceptional circumstances or not (*Gauweiler*, paragraph 75, and *Weiss*, paragraph 91). The same understanding of the discretion of the EU financial agencies, as essentially dependent on technical expertise, grounded the reasoning of the same Court when it endorsed the legality of the powers delegated to agencies in the *Shortselling* judgment.[8]

5 Jonathan White, *Politics of Last Resort: Governing by Emergency in the European Union*, OUP, 2020.

6 *Heinrich Weiss and Others v Deutscher Bundestag* (C-493/17). See, inter alia, Marijn van der Sluis, 'Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in Weiss (C-493/17)', 46 *Legal Issues of Economic Integration* 3 (2019), 263.

7 *Gauweiler v Deutscher Bundestag* (C-62/14); *United Kingdom v Parliament and Council* (C-270/12).

8 Joana Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' 80 *Modern Law Review* 3 (2017) 443.

That statement in *Gauweiler* and *Weiss* blissfully elides the deep and undeniable political dimension of the ESCB's exercise of discretion (as the case law often does). We do not need to go farther than the more recent Pandemic Emergency Purchase Programme to understand the fictitious character of such understanding of executive discretion.[9] Of course, measures such as these require technical expertise that the competent executive body – as any executive body – needs to deploy with 'all care and accuracy', at the risk of breaching procedural principles. But it is also clear that they are often deeply imbued with value judgments, which are far from irrelevant from a legal and constitutional point of view.

The perpetuation of the distinction between technical discretion and 'discretion proper' has one function in judicial review: it enables the Court of Justice to adjust its judicial review to different political contexts and, hence, to apply different variations to the standard of 'manifest error of assessment' when reviewing instances of discretion. Yet, separating the different components of discretion in distinct categories leads to a fiction that, if maintained on the basis of the Court of Justice's case law, misrepresents the role that law ought to have in relation to discretion. Law is not only a set of procedural and substantive principles that can assist the Court in determining whether an executive body deployed its expertise in a technically correct way, in conformity with equally technically-informed legal requirements. It is not only a set of tools that the courts can (and should) calibrate depending on the case that they have before it. Law reflects normative programmes and value judgements that political processes have converted into legal norms, in accordance with constitutional determinations and principles. From there emerge legally relevant criteria to the value judgments that executive bodies ought to engage with when exercising their technical discretion, if law is to retain a substantive structuring role. Despite what some formulations in its case law may convey, the EU courts do not ignore this dimension of law and discretion.[10]

However, when reality defies the legal framework, there is only so much that legal interpretation and tools of judicial review can do in the hands of courts. There are limits to how far courts can accommodate executive action within unchanged legal frameworks, without depleting the structuring role of substantive law, and of administrative law principles that can compensate for wide discretion, as the German Constitutional Court judgment *Weiss* showed.

Devising a segmented concept of discretion also plays out at another level: the distinction between interpreting indeterminate legal concepts, on the one hand, and exercising discretion, on the other. Indeterminate legal concepts are often part of the factual predicate of a legal norm (for example, 'if necessary to avoid significant adverse effects on financial stability'). Their interpretation is a matter of law, hence, as a matter of principle, subject to full judicial review of discretion. From here follows the view that determining the meaning of such concepts, as much as they may rely on complex technical assessments or involve policy choices, is not a discretionary power. Yet, once again, a formal categori-

9 See footnote 2 above.

10 See Hans-Peter Nehl, 'Judicial Review of Complex Socio-Economic, Technical, and Scientific Assessments in the European Union' in Joana Mendes (Ed.), *EU Executive Discretion and the Limits of Law*, OUPD, 2019, pp. 157-197.

sation of the different types of choices involved in decision-making – much in line with the tenets of separation of powers – needs to take heed of the many grey areas between interpreting indeterminate legal concepts and exercising discretion. Thus, for instance, defining the meaning to be given to 'particular circumstances' under the Single Supervisory Mechanism Regulation, namely those that can determine whether a bank is supervised by the ECB or by national authorities, is a matter of legal interpretation.[11] But it also depends on the Court of Justice's and on the ECB's view of how well the ECB is placed to pursue the objectives set by the regulation. Interpreting the law is not devoid of policy choices that accommodate competing value-laden assessments and judicial review does not stand alone in determining the meaning of law.

3. Constitutional implications

Distinctions between decisions resulting from the interpretation of indeterminate legal concepts, decisions entailing complex factual assessments and policy decisions stemming from weighing competing interests, allow us to dissect the different segments of the exercise of discretion with a view to determining what can be the scope and limits of judicial review.[12] They dissect the legal aspects of decision-making that can be subject to full review from the others that should remain the responsibility of administrative decision-makers, subject, possibly, to limited judicial review. These categories have been created from a perspective of separation of powers that tends to ignore that the way law develops depends also on how administrative and executive actors develop their legal mandates, by interpreting legal provisions *and* exercising discretion. They also tend to ignore that, as much as the standard of 'manifest error of assessment', also the tenet that matters of law are subject to full review may tell us little about the degree of judicial review over the administrative interpretation of legal terms. The Court of Justice's deference on issues of law may be justified for different reasons: the expertise involved in determining the content of undetermined legal concepts, the policy choices that legal interpretations may imply, the circumstances of the specific case and the context in which the judgment is issued. For this reason, but also because courts may not be called upon to adjudicate on the legality of the myriad of administrative interpretations that executive actors take on a daily basis, the categorical distinction between the exercise of discretion and the interpretation of indeterminate legal concepts does not preclude a situation in which the executive decision-maker defines, itself, the meaning of the legal conditions that delimit its authority to act (for example whether there are 'significant adverse effects on financial stability', as in the example above). They do not exclude situations in which executive actors themselves define the boundaries of their mandates, at least when backed by the relevant political actors.[13]

11 See *Landeskreditbank Baden-Württemberg - Förderbank v ECB* (C-450/17 P).

12 Silvère Lefèvre and Miro Prek, 'Administrative Discretion, "Power of Appraisal" and "Margin of Appraisal" in Judicial Review Proceedings Before The General Court', 56 *Common Market Law Review* 2 (2019) p. 339.

13 Such is the current situation of the ECB, as the German Constitutional Court rightly pointed out in its *Weiss* ruling. The irony of that judgment, however, is the belief that law, via judicial review, can bring the ECB back to its original track. *Weiss* shows, rather, the limits of law in taming the actions of the ECB (see See Marco Dani et al (2020), '"It's the political economy..!" A moment of truth for the eurozone and the EU', forthcoming.)

Of course, deference in matters of legal interpretation does not invalidate the constitutional principle that the EU Courts say what the law is (Article 19 TEU). As a matter of EU law, the Court of Justice can always overrule the interpretation of the administrative authority, even if we were to accept that interpretation may involve discretionary choices. But this is only one side of the story. Courts react to administrative interpretations and how they do so will also depend on how administrative interpretations and practices influence how law is evolving, through the complex interaction between different types of choices and assessments.

Judicial review – even in times of normality – may give us a perhaps false sense of reassurance on the capacity of law to steer the exercise of executive discretion as an external constraint. Judicial review may not be effective in structuring the discretion that stems from the complex interaction between interpretation, policy choices and technical assessments. That was the case in *Gauweiler*, without doubt an exceptional judgment, but nevertheless telling in what concerns how the tools of judicial review may be used and their limits.[14] It is much less clear why *Weiss* could be decided on the same grounds and following the same reasoning, given that the exceptionality that had justified the programme under scrutiny in *Gauweiler* was absent in this case.[15]

4. Depleting or strengthening the structuring role of law?

Discretion is an essential part of the function of executive bodies and should remain so. But what we ought to require from executive bodies when exercising discretion must be more than just a careful and accurate use of their 'expertise and [of] the necessary technical means at [their] disposal to carry out [their assessments]' within the boundaries of a legality that they help shaping. Executive bodies (and not only the more politically salient central banks) may have a constitutive role in shaping the socially desirable goals of public action and the legal relationships that fall under their mandates. Whether or not through judicial review, the law they develop must be constrained by the legal normative and democratic premises that underpin the legal system of which they are part.

The need to investigate the role of law in relation to discretion is more present than ever at a time of emergency in which, at the state level, legal constraints are relaxed, and in which the EU executive pledges to make full use of the flexibility that EU law allows for. We may be empowering the EU executive without having the means to make law one of its external constraints. If law becomes merely a set of tools to determine whether the executive's technical assessments are correct, its ethical dimension is lost as much as the democratic foundations on which it ought to stand. No matter how technical the ECB's emergency programme is, how much flexibility the ECB must be able to retain to address the uncertainty stemming from the current unprecedented situation, or how much legal engineering and complex imbrications between the Commission and Member States' governments are required to set up and implement a much-desired a EU recovery fund. Whether law will just be a vehicle for the

14 Vestert Borger, 'Central Bank Independence, Discretion and Judicial Review' in Joana Mendes (ed), *EU Executive Discretion and the Limits of Law*, OUP, 2019, pp. 118-131.

15 See references in footnote 6.

discretionary decisions of executive bodies, or steer them in an attempt to create the conditions for the realisation of justice, of social and individual rights, through processes subject to democratic oversight, is a question that both transcends and depends on law's relationship to discretion and may hold the key to the future of the EU as a legal order and as a polity.

Chapter 10

PARLIAMENTARY OVERSIGHT OF THE EU ECONOMIC RECOVERY PLAN - LESSONS LEARNED, AND WHICH WAY FORWARD?

Bruno Dias Pinheiro and Diane Fromage

1. Introduction[1]

The COVID-19 pandemic caught the European Union (EU) (and the world at large) unprepared. As the year 2020 nears its end, the EU is in a totally different place from the one in which it was when the year started. This conclusion applies to many domains, including the EU's Economic and Monetary Union (EMU). Indeed, Member States and EU institutions have mobilised in an absolutely unprecedented fashion to counter the negative economic effects provoked by the pandemic.

As is well known, EMU is characterised by the different degree of integration of its various components, for which the EU was attributed exclusive competence in the area of monetary policy (for euro area Member States), whilst economic policies are merely coordinated among Member States.[2] Following the eurocrisis, this coordination was, however, tightened, and Member States are now subject to much closer oversight by the EU institutions.[3] In this context, the European Semester for the coordination of economic policies introduced in 2010 plays a key role as it is within the framework of this mechanism that the EU and national institutions exchange their priorities and seek to guarantee that EU rules are observed.[4]

1 This Chapter was finalised on 16 November 2020. The views expressed here are strictly personal and do not bind or reflect in any way the political and institutional position of the Portuguese Assembleia da República.

2 Arts. 3(1) c) and 5(1) TFEU, respectively.

3 On the eurocrisis see, among many others: Thomas Beukers, Claire Kilpatrick, Bruno de Witte (eds), *Constitutional Change through Euro-Crisis Law*, Cambridge University Press, 2017; Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press, 2015; Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge University Press, 2014.

4 For instance, Country Specific Recommendations are approved at the EU level, and Member States transmit their draft budgets to the Commission. See further on the European Semester in: European Commission, *The European Semester* (2020); Amy Verdun and Jonathan Zeitlin (eds), 'EU Socio-Economic Governance since the Crisis: The European Semester in Theory and Practice',

Next to the reforms adopted to improve the soundness of Member States' economic and fiscal policies, several European instruments were also adopted at the peak of the eurocrisis with a view to avoiding Member States entering into (too much) financial trouble. These instruments included the European Financial and Stability Mechanism (EFSM), the temporary European Financial Stability Facility (EFSF) and the intergovernmental European Stability Mechanism (ESM).

Overall, and despite the fact that both those crisis instruments and the permanent coordination mechanisms put in place undoubtedly affect parliaments' budgetary capacity significantly, they may be said to have been largely side-lined. This finding applies both to the respective adoption procedures, and to the implementation phases.[5] This state of fact is all the more remarkable as parliaments' role in the EU had been significantly reinforced following the adoption of the Lisbon Treaty, after they had long been largely absent from the European integration process.[6]

It is against this background that this chapter aims to analyse how national parliaments and the European Parliament have scrutinised the adoption of the instruments of economic recovery put in place in response to the COVID-19, and to assess their (foreseen) involvement in their implementation. Particular emphasis is set on the implementation of the next Multiannual Financial Framework (MFF) 2021-27, including the 750 billion Next Generation EU' (NGEU) package of which the Recovery and Resilience Facility (RRF) is the main component. Additionally, practice during and since the eurocrisis will be used as a yardstick in determining whether parliamentary involvement has been, and may be expected to be, sufficient or whether any shortcomings are still outstanding.

To answer these questions, we first recall what instruments have been adopted and how parliaments have been involved in this process (section 2). We then turn to consider whether there are still any outstanding gaps in parliaments' (expected) involvement in the implementation of the recovery measures, and how these may be resolved if any (section 3). The final section concludes by outlining (some of) the remaining questions for parliamentary scrutiny in E(M)U (section 4).

2. The measures adopted to counter the consequences of the COVID-19 crisis and parliamentary involvement

The EU's response to the economic downturn induced by the ongoing pandemic may certainly be qualified as swift and all-encompassing. It is also characterised by the mobilisation of a wide variety

Journal of European Public Policy, 25(2), 2018; and for an account of the 2020 cycle: European Parliament, *Background reader on the European Semester – Autumn 2020 edition* (2020).

5 See, inter alia on these questions: Cristina Fasone, 'Taking Budgetary Powers Away from National Parliaments? On Parliamentary Prerogatives in the Eurozone Crisis', *EUI Law Working Papers*, Law 2015/37, European University Institute, Florence, 2015; Cristina Fasone, 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament?', 20 *European Law Journal* 2, 2014, pp. 164-185; Diane Fromage and Ton van den Brink, 'Special issue: National Parliaments, the European Parliament and the Democratic Legitimation of the European Union Economic Governance', 40 *Journal of European Integration* 3, 2018; Aleksandra Maatsch and Ian Cooper, *Governance Without Democracy? Analysing the Role of Parliaments in European Economic Governance*, 70 *Parliamentary Affairs* 4, 2017, pp. 645-654.

6 National parliaments were even found to have become 'European institutions'; see 'Speech by President Herman Van Rompuy to the Interparliamentary Committee meeting on the European Semester for Economic Policy Coordination', 27 February 2012.

of institutions and bodies, and by the fact that it features both immediate, and longer-term measures. Both are examined in turn in the following paragraphs, although the emphasis is set on NGEU and the MFF, which are both longer-term measures.[7]

The immediate response to the crisis is composed of four sets of measures adopted by the European Central Bank (ECB), the European Commission, the Member States acting within the (European) Council, and the European Investment Bank (EIB).

The ECB adopted a set of measures as soon as lockdowns and restrictions had to be imposed in March 2020.[8] Their objectives were to increase banks' lending capacities, to preserve financial stability through international cooperation, to guarantee that short-term concerns do not prevent lending, to preserve access to credit for firms and households, to keep borrowing affordable, and to help the economy absorb the shock caused by the pandemic. The ECB being an independent EU institution,[9] parliamentary involvement was bound to remain limited to *ex post* accountability.[10] Members of the European Parliament (MEPs) have indeed used the opportunities offered to them by the Monetary Dialogue with the President of the ECB, and by the Banking Dialogue with the Chair of the Supervisory Board to scrutinise the actions adopted by the ECB in response to the pandemic.[11]

Like the ECB, the European Commission soon reacted to the pandemic and announced a relaxation of the applicable State aid rules. Through its State Aid Temporary Framework, which it has since amended on several occasions, the European Commission gave Member States some leeway to protect the economy.[12] The escape clause allowing the rules contained in the Stability and Growth Pact to be temporarily suspended was also activated following a proposal by the Commission on 20 March 2020.[13]

Member States, too, mobilised swiftly.[14] Indeed, owing to the differing levels of fiscal space available,

7 The European Commission constantly updates a timeline of the European response to the pandemic; see < https://ec.europa.eu/info/timeline-eu-action_en >.

8 See the ECB's website section dedicated to its response to the pandemic outbreak for an account of all the measures adopted: ECB, 'Our response to the coronavirus pandemic' (2020).

9 Art. 130 TFEU.

10 The issue of the (adequate) accountability of the ECB has long been outstanding; see, inter alia, Diane Fromage, Paul Dermine, Phedon Nicolaides and Klaus Tuori, 'Special issue: The accountability of the ECB in a multilevel European order', 26 *Maastricht Journal of European and Comparative Law* 1, 2019. The European Parliament has recently started to examine this question more in-depth, a public hearing is planned on 2 December 2020: European Parliament ECON Committee, 'Improving the accountability of the ECB: public hearing', press release of 2 December 2020. Several studies were produced for the ECON Committee in September 2020, available at < https://www.europarl.europa.eu/committees/en/econ/supporting-analyses/latest-documents >.

11 See, for instance, ECON, 'Public hearing with Andrea Enria, Chair of the ECB Supervisory Board: briefing', 27 October 2020.

12 Commission Communication of 19 March 2020 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. On this Temporary Framework and its successive amendments, see the contributions in Part VI by Juan Jorge Piernas (Chapter 34 below) and Andrea Biondi (Chapter 35 below).

13 European Commission, 'Coronavirus: Commission proposes to activate fiscal framework's general escape clause to respond to pandemic', press release of 20 March 2020. See also the in-depth analysis prepared by Erik Jones for the European Parliament: Erik Jones, *When and how to deactivate the SGP general escape clause?*, Economic Governance Support Unit PE 651.378, November 2020.

14 This section builds on our previous analysis of this question in Bruno Dias Pinheiro and Diane Fromage, '*National parliaments and their (limited) role in the EU in a crisis: the example of SURE*', Weekend Edition No. 36, *EU Law Live*, 7 November 2020,

some of the Member States were likely to be able to support their economies only to a limited extent. The European Commission proposed the adoption of the temporary Support to mitigate Unemployment Risks in an Emergency (SURE) instrument in April 2020, and the Commission's proposal was approved in May 2020.[15] SURE allows the EU to provide loans (under favourable terms) of up to a total 100 billion euros to its Member States to support them in their implementation of short-term work schemes. As such, SURE is a clear sign of solidarity among EU Member States. EU funding is set to complement national resources mobilised to this end, and not substitute them. Accordingly, Member States first have to introduce short-time work schemes – leading to an increase in their public expenditure – and then they may apply to the European Commission for support under the auspices of SURE. To finance SURE, the European Commission has started to raise funds on international capital markets on behalf of the EU. These operations are backed by the EU budget, and by guarantees provided by the Member States. SURE does not require any upfront cash contributions from Member States. To back the lending scheme, Member States have committed irrevocable and callable guarantees worth 25 billion euros to the EU budget, with each guarantee calculated on the basis of their respective share of EU gross national income (GNI). Such a system is thought to ensure a high credit rating, enabling the European Commission to contract borrowings on the financial markets at favourable conditions, with the purpose of lending them on to the Member State. For parliamentary scrutiny it matters that the main decisions taken in the immediate aftermath of the COVID-19 outbreak were taken at the Council of the EU-level,[16] with the impulse coming from the European Council.

In this context, the Eurogroup has played a key role, as it already had in the management of the eurocrisis. This may be inferred from the fact that, for example, at their third video conference on COVID-19, held on 26 March 2020, European Council members assessed the EU's response to the COVID-19 pandemic and, on the response to the economic fallout, specifically 'invited the Eurogroup to present proposals within two weeks'.[17] This mandate led to the adoption by the Eurogroup, on 9 April, of a Report on the comprehensive economic policy response to the COVID-19 pandemic,[18] putting forward a 500 billion-euro support package, comprising three immediate safety nets for workers, businesses and Member States. One of those safety nets, endorsed by the Eurogroup, was SURE.[19] This is particularly noteworthy as the legal instrument chosen for SURE excluded the direct involvement of parliaments (the European Parliament and national parliaments). The legal basis is indeed Article 122(1) and (2) TFEU, which states that the Council may adopt, by qualified majority, measures to provide Union financial assistance to Member States faced with severe difficulties caused by excep-

pp. 5-11.

15 Council Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak. On SURE, see the contributions to this book by Karl Croonenborghs (Chapter 5 above) and by René Repasi (Chapter 6 above).

16 For all European Council actions on COVID-19, see: European Council, 'Timeline – Council actions on COVID-19', available at < https://www.consilium.europa.eu/en/policies/coronavirus/timeline/ >.

17 See the Joint Statement of the Members of the European Council of 26 March 2020. In fact, prior to that, the Eurogroup had already adopted a Statement on the economic policy response to the COVID-19 outbreak on 16 March.

18 Eurogroup, 'Report on the comprehensive economic policy response to the COVID-19 pandemic', 17 April 2020.

19 The other two were a precautionary credit line by the ESM and an EIB Group pan-European guarantee fund to support EUR 200 billion of financing.

tional occurrences beyond their control. This means that the European Parliament is not involved in this legislative procedure nor does it fall within the remit of the usual scrutiny/subsidiarity procedures foreseen in the Treaty of Lisbon regarding national parliaments. Some of the national parliaments were, nevertheless, quite active (SE, FI, AT, NL) in following the discussions and trying to assess the outcome of the negotiations, even though no binding motions were formally adopted. However, parliaments of the most affected countries (Spain and Italy, for example) did not carry out particular scrutiny of SURE, and nor did they adopt any motions on this instrument. This seems to reflect a broader and long-lasting trend of how different parliaments are more or less active in their EU scrutiny, with a stronger hold on Council proceedings from FI, NL, SE and AT, and a looser monitoring of the interinstitutional developments from ES and IT. In addition to this, the main negotiation forum was also the Eurogroup, an informal body where the ministers of the euro area Member States discuss matters relating to their shared responsibilities concerning the euro: this choice made parliamentary scrutiny particularly uneasy. The Eurogroup format poses serious limits to the capacity of parliaments to access the information, hold Ministers to account (it is often more difficult for a Parliamentary Committee to get a debriefing from a Minister about exchanges held at an 'informal body') and ensure the adequate oversight and transparency in a negotiation with budgetary consequences. One could argue that the formal decisions were then to be ratified by the ECOFIN and the European Council, but the fact is that the preparatory work and all the political negotiations were made outside of the formal scope of intervention of (most) parliaments.

Finally, in this summary of the measures adopted in the immediate aftermath of the COVID-19 crisis, it should be mentioned that the EIB set up a Pan-European Guarantee Fund on 26 May 2020.[20] Through this Fund, the size of which is capped to 25 billion euros, private and public sector companies, and small and medium-sized enterprises in particular, will be able to request funding until 31 December 2021.

Next to these measures, adopted as an immediate response to the economic difficulties caused by the pandemic outbreak, Member States have also sought to adopt longer-lasting instruments to facilitate economic recovery. These have taken two main forms: the specific recovery programme NGEU, and the MFF, a more permanent tool which was under discussion when the crisis broke out.[21] Despite the fact that the MFF is not a specific crisis instrument, it is examined here since, as noted by the European Council in July 2020, 'NGEU and MFF go together. We need the Recovery effort as a quick and effective answer to a temporary challenge, but this will only yield the desired result and be sustainable if it is linked to and in harmony with the traditional MFF that has shaped our budgetary policies since 1988 and offers a long-term perspective'.[22] In fact, '[t]he choice, made by the European Council in July, to link Next Generation EU to the existing European financial procedures and, in particular to the

20 EIB, 'EIB Board approves €25 billion Pan-European Guarantee Fund in response to COVID-19 crisis' , press release of 26 May 2020; EIB, 'Fact sheet: The Pan-European Guarantee Fund in response to COVID-19', 2020.

21 At the time of submission, negotiations are stalled by a yet-to-be formalised veto by Hungary and Poland. Hence, all the conclusions drawn here are necessarily provisional.

22 European Council, 'Special meeting of the European Council' (17-21 July 2020) Conclusions, p. 1.

seven-year budgetary cycle, was somewhat mandatory, both for the overlapping timing – the MFF not having being adopted since it was first presented in 2018, but due by the end of 2020 –and for the need to respect the EU Treaty provisions (Articles 310 and 312 TFEU) and the Financial Regulation (Regulation EU, Euratom 2018/1046, Articles 7, 17 and 33), in particular the principles of unity of the budget, of equilibrium, of sound financial management and of ordered development of the expenditures within the limits of the own resources'.[23]

As had been previously agreed for SURE, Member States consented to the Commission borrowing funds to finance NGEU. NGEU is composed of seven programmes, the most important of which is the RRF, and including the European Recovery Instrument, which will be examined in the next sub-section. More specifically, the Commission is to be authorised, by means of the Own Resources Decision, to borrow 750 billion euros on the financial markets. A portion of 360 billion euros of that 750 billion would be granted to Member States in the form of loans, whilst the remaining 390 billion euros would be given to them as grants: that is, they would not need to be repaid. Repayments would, additionally, be required at a much later stage - not until 2058. The Commission's bond issuance programme would be backed by funding provided by the Member States from a (temporary) expansion of the own resources ceilings. These changes require both the involvement of national parliaments, and the European Parliament. Note, however, that the European Parliament is not a co-legislator in all the processes required for the adoption of the different components of NGEU.[24] Additionally, as highlighted by Cristina Fasone,[25] the timeframe for the approval of NGEU makes adequate parliamentary scrutiny particularly difficult, especially considering that parliaments currently also have to operate remotely.

The RRF, which is the main instrument of NGEU as mentioned above, is proposed on the basis of Article 175(3) TFEU on the EU's cohesion policy, and the Structural Funds that contribute to its objective. It provides that '[i]f specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions'. The European Parliament is thus a co-legislator. By contrast, in the process of the necessary changes to the Own Resources Decision, which is governed by Article 311 TFEU, it is only to be consulted by the Council whilst national parliaments' consent may be required: Article 311(3) TFEU indeed foresees that '[t]he Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements'.

23 Cristina Fasone, 'The European Parliament faces up to the Recovery and Resilience Facility', in Bruno Dias Pinheiro and Diane Fromage (eds), *National and European parliamentary involvement in the EU's economic response to the COVID crisis*, Weekend Edition No. 36, *EU Law Live*, 7 November 2020, p. 13.

24 Ibid, p. 12.

25 Ibid.

Finally, the MFF is to be adopted by means of the consent procedure (Article 312 TFEU) which therefore means that the European Parliament has a right of veto. It has threatened to use it on several occasions, but it is doubtful whether this would be a wise move.[26] On the one hand, the negotiations have already been particularly cumbersome, and are still jeopardised by a yet-to-be-formalised veto by Hungary and Poland at the time of submitting this contribution in early December 2020. On the other, even if the economic outlook may not be as gloomy as it seemed earlier in 2020,[27] there is no doubt an urgent need to support Member States' recovery. Against this background, and considering that support for recovery could be set up by means of an intergovernmental treaty or by means of enhanced cooperation,[28] the European Parliament should not give in altogether if the respect for the rule of law, and thus the EU's financial interests, are threatened. However, if this minimum is guaranteed, it should arguably not seek to exercise more power than is strictly necessary in an attempt to re-affirm its own institutional position, like it did in previous EU budgetary negotiations.[29]

Furthermore, despite its formally relative weak standing in other aspects of the setup of the European recovery plan outlined above, the European Parliament has sought to use the powers at its disposal to try and gain more influence. In fact, the European Parliament has always defended that the budgetary negotiation should be seen as a package of the MFF and the Own Resources Decision – no agreement on the MFF would be granted without a binding commitment from the Council on Own Resources. For that reason, it adopted a resolution on the Council decision on Own Resources in which it proposed the establishment of a binding calendar on the creation of new own resources[30] to be enshrined in the future Interinstitutional agreement on budget discipline, cooperation and management.

Turning to national parliaments' scrutiny of NGEU, it appears that they have not used the Early Warning System for the control of the respect for the principle of subsidiarity to express their opinions, but some of them submitted some contributions in the framework of the Political Dialogue with the European Commission.[31] Some national parliaments used this opportunity to praise the measures proposed. Interestingly, none of the parliaments of the 'Frugal Four' (Austria, Denmark, The Netherlands

26 See Cristina Fasone, 'The European Parliament faces up to the Recovery and Resilience Facility', in Bruno Dias Pinheiro and Diane Fromage (eds), *National and European parliamentary involvement in the EU's economic response to the COVID crisis*, Weekend Edition No. 36, *EU Law Live*, 7 November 2020, pp. 12-20.

27 ECB, 'Interview with Helsingin Sanomat: Interview with Luis de Guindos, Vice-President of the ECB, conducted by Petri Sajari on 24 November 2020'.

28 sébastien Platon, 'Plan de relance européen: Il existe des moyens de contourner le veto polono-hongrois et d'adopter ce plan entre les 25 autres Etats membres', *Le Monde*, 24 November 2020. Specifically on the use of the enhanced cooperation procedure: Guy Verhofstadt, 'We need to call Orbán's bluff by going ahead without him', *EUobserver, 1*8 November 2020.

29 See on this episode: Olivier Costa and Florent Saint Martin, *Le Parlement européen*, La documentation française, 2nd edn, 2011, pp. 134-135.

30 European Parliament, Legislative Resolution of 16 September 2020 on the draft Council decision on the system of own resources of the European Union (10025/2020 – C9-0215/2020 – 2018/0135(CNS)) TA0220. The European Parliament's actions to try and exercise influence are examined more in-depth by Cristina Fasone. Cristina Fasone, 'The European Parliament faces up to the Recovery and Resilience Facility', in Bruno Dias Pinheiro and Diane Fromage (eds), *National and European parliamentary involvement in the EU's economic response to the COVID crisis*, Weekend Edition No. 36, *EU Law Live*, 7 November 2020, pp. 12-20, p. 14.

31 Ton van den Brink, 'National Parliaments and the Next Generation EU Recovery Fund', in Bruno Dias Pinheiro and Diane Fromage (eds), *National and European parliamentary involvement in the EU's economic response to the COVID crisis*, Weekend Edition No. 36, *EU Law Live*, 7 November 2020, pp. 21-28, p. 24.

and Sweden) expressed any reasoned opinion on the ground of a breach of subsidiarity, nor did they submit any contribution in the framework of the Political Dialogue. However, as they did for SURE, they interacted with their own governments on the issue.

In sum, the instruments adopted at the EU level to counter the economic consequences of the pandemic have been numerous and diverse, and they were proposed swiftly. Despite the breadth of these measures, their economic importance, the change of mindset they undoubtedly embody owing to their large reliance on bonds issued by the European Commission, and to the large share of grants foreseen in the RRF, we observe that the involvement of both the European Parliament and national parliaments remained partial and their scrutiny limited.

The following subsection examines what parliamentary involvement might be expected to look like in the implementation of the longer-term recovery measures, and how the outstanding gaps could be remedied.

3. How to resolve the outstanding gaps in parliamentary involvement?

As mentioned in the introduction, the COVID-19 outbreak arose after the EU had already had to adopt significant reforms in the economic domain to face the consequences of the Great Financial Crisis, which was but one amongst the various crises the EU has been facing over the past decade. It was not only the EU that had to constantly reinvent itself in response to these numerous and heterogeneous crises. The European Parliament too, and especially national parliaments, had to adapt to this fast-track ever-evolving environment. These overlapping crises may even be viewed to have, to some extent, permanently altered the institutional balance within the EU: for instance, during the eurocrisis, but also in the response provided to the COVID-19 pandemic so far, the main political decisions at the European level were taken by the European Council, that is by Heads of States and Governments.[32] Moreover, in both cases, a significant role was played by the Eurogroup as the main negotiation forum, even if the Eurogroup follows a format that 'poses serious limits to the capacity of parliaments to access the information, hold Ministers to account (...) and ensure the adequate oversight and transparency in a negotiation (...) the fact is that the preparatory work and all the political negotiations were made outside of the formal scope of intervention of (most) Parliaments'.[33]

Is it worth noting, however, that the role that parliaments, both the European and national, can play in the scrutiny of the implementation of this recovery plan should be enhanced with comparison to the one exerted in the approval of the Council Regulation establishing a European Union Recovery Instru-

32 See on the European Council's dominance and executive dominance within the EU generally: Deirdre Curtin, 'Challenging Executive Dominance in European Democracy', 77 *The Modern Law Review* 1, 2014, pp. 1-32; and on the ongoing development: Alain Lamassoure, 'Le Conseil européen: un "souverain" auto-proclamé à la derive', *Fondation Robert Schuman Question d'Europe* No. 574, 2020.

33 Bruno Dias Pinheiro and Diane Fromage, 'National parliaments and their (limited) role in the EU in a crisis: the example of SURE', Weekend Edition No. 36, *EU Law Live*, 7 November 2020, pp. 5-11, p. 9. See also on the Eurogroup's accountability: Leo Hoffman-Axthelm, 'Vanishing act: the Eurogroup's accountability', *Transparency International*, 2019.

ment to support the recovery in the aftermath of the COVID-19 pandemic based on Article 122 TFEU, for which the Council is the only decision-maker. We argue that, as von Ondarza rightly points out,[34] 'the EU needs parliamentary involvement even in times of crisis'. The unprecedented scale of the measures taken, the fact that the amount of money to be absorbed from 2021 'will be several factors greater than earlier amounts',[35] and also the ambition to mainstream the EU priorities in the investment priorities of Member States poses enormous challenges to all stakeholders.

The Economic Governance Support Unit (EGOV) of the European Parliament recently published a very timely and in-depth analysis of the parliamentary involvement in the implementation of the EU recovery plan,[36] which sets out the theoretical, but also the practical, framework for this chapter.[37] In fact, this analysis puts the emphasis on the main pillar of the EU recovery plan, the RRF, highlighting that its implementation: (i) 'depends on detailed national Recovery and Resilience Plans (RRPs) being agreed upon, and projects meeting implementation milestones. [(ii)] The RRPs will be embedded in the European Semester, the EU's framework for economic policy coordination'.[38] Moreover, this Chapter points out the risks to the implementation of the RRPs and the objective evaluation of their progress within the European Semester, because of the multilayered institutional and political system in which the Semester takes place. While arguing solely on the need for enhanced involvement of the European Parliament to 'potentially increase transparency and accountability for national policy makers (as well as the Commission and Council)' and the inherent potential benefits that 'could improve project delivery and thus benefit the recovery',[39] our point is that the *greater role for parliaments needed* also refers to the need for further involvement of the national legislatures in the oversight of the recovery plan.

However, and before delving into the specific possibilities for this parliamentary oversight, we should take one step backwards and look at the European Semester's achievements and shortcomings so far. An earlier survey,[40] also conducted by the EGOV Unit of the European Parliament in 2018, summarised a set of findings on the role of national parliaments in the European Semester for economic policy coordination. While acknowledging that 'that the results of any survey are based on a simplification of reality (...) the results have shown that the level of involvement of national parliaments during the European Semester process varies substantially across Member States. The "most involved"

34 Nicolai von Ondarza, 'The European Parliament's Involvement in the EU Response to the Corona Pandemic A Spectator in Times of Crisis', SWP Comment 2020/C 45, October 2020.

35 See Zsolt Darvas, 'Will European Union countries be able to absorb and spend well the bloc's recovery funding?', *Bruegel Blog*, 24 September 2020.

36 Thomas Wieser, *What Role for the European Semester in the recovery plan?*, Economic Governance Support Unit PE 651.368, October 2020.

37 The EGOV unit has, generally, been actively examining this question. See the Briefing prepared by Cristina Dias and Alice Zoppé, *Thematic Digest: "The role for the European Semester in the recovery plan"*, Economic Governance Support Unit PE 659.615, November 2020.

38 Thomas Wieser, *What Role for the European Semester in the recovery plan?*, Economic Governance Support Unit PE 651.368, October 2020, p. 3.

39 Ibid.

40 Kajus Hagelstam, Wolfgang Lehofer and Matteo Ciucci, *The role of national parliaments in the European Semester for economic policy coordination*, Economic Governance Support Unit PE 614.494, April 2018.

parliament scores around seven times better that the "least involved" parliament'. One key finding, however, is relevant for our analysis: at 'Member State level, drawing a clear link between the degree of national parliamentary involvement and the Country Specific Recommendations [CSRs'] implementation rate seems to be more difficult. However (...) it can be noted that a higher involvement of national parliaments in the European Semester is slightly associated with a higher implementation rate of the country-specific recommendations'.[41]

The current Semester process, while being a remarkable exercise of multi-level engagement in public policy at EU level, has shown some weaknesses, of which we highlight two: first, and despite the efforts to tackle this in the last couple of years, the CSRs are usually very broadly defined, which makes potential results less tangible and their implementation more difficult to assess; secondly, these recommendations are often not mainstreamed in the national political debates, which results in a lack of ownership, including by Parliaments. Hence, the adequate involvement of (national) parliaments was already an outstanding issue prior to the European Semester's reconducted use as a vehicle of the RRF. This new use has only made the need for reform even more pressing. Indeed, in the framework of the RRF, the elaboration of the national RRPs, their approval, monitoring and implementation are directly linked to the disbursement of the amounts and mainstreamed within the Semester. This might have the potential to increase the national ownership, and therefore reinforce the incentives for a deepened parliamentary oversight. Participation may also be more attractive to parliamentarians in view of the stakes at play: ensuring swift economic recovery will likely be a salient issue, and may be expected to become subject to public attention, and hence an important issue with a view to being re-elected.

On the other hand, the negotiation process on the MFF and NGEU showed the divisions among Member States, with opposing narratives between the so-called 'frugals' and the 'friends of cohesion', for instance.[42] Therefore, and since we reckon that these narratives are politically there to stay, it is worth noting, as Ioannidis highlights,[43] that the legal basis used for the NGEU was Article 122 TFEU, which refers to both those who defend the need for *solidarity* mechanisms in emergency times, but also to the ones who advocate *responsibility*, due to its temporary character. Hence, and setting out what he labels as 'An agenda for the future', Ioannidis argues that '[t]wo strategies can help mitigate these risks associated with the justified shift to more solidarity: focus on trust-building between Member States and the democratic scrutiny of transfers'.

This is, in our view, what sets the stage for the need for parliamentary oversight of the EU recovery plan, not only for the sake of transparency and accountability on how national governments spend

41 Kajus Hagelstam, Wolfgang Lehofer and Matteo Ciucci, *The role of national parliaments in the European Semester for economic policy coordination*, Economic Governance Support Unit PE 614.494, April 2018, p. 21.

42 See the summary above and for more details: Ton van den Brink, 'National Parliaments and the Next Generation EU Recovery Fund', in Bruno Dias Pinheiro and Diane Fromage (eds), *National and European parliamentary involvement in the EU's economic response to the COVID-19 crisis*, Weekend Edition No. 36, *EU Law Live*, 7 November 2020, pp. 21-28.

43 Michael Ioannidis, *'Between responsibility and solidarity: covid-19 and the future of the European economic order'*, Max Planck Institute for Comparative Public Law and International Law Research Paper Series No. 2020-39, 2020.

European money, but also because of how the European Semester can be the 'game changer'[44] for the economies of the Member States and their link to the common European priorities. Furthermore, such a change would also be particularly welcome for it is, in fact, long overdue. Whereas national parliaments had been found to have adapted only to a limited extent to participate in the European Semester a few years after its introduction,[45] it may be hoped that the fact that this question will be included in the next bi-annual report of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC)[46] may act as a trigger, with particular emphasis on the scrutiny of the national RRPs. It may not necessarily be needed for parliaments to adopt specific procedures as pre-existing ones may suffice and be used for this new purpose. But conducting a reflection and checking that this is indeed the case would be welcome at this stage. In conducting their reflection, national parliaments should strike the right balance between the need to participate efficiently, and the danger of creating a heavier burden if they establish new, additional, procedures. Similarly, parliaments need to decide whether to create new, ad hoc, structures or to rely on existing ones, and whether the bulk of their scrutiny should be conducted by specialists (the relevant sectoral committees) or by generalists (the EU affairs committee, and the plenary to some extent). Issues such as adequate and timely access to information should be addressed as well.

It is certainly impossible to design a one-size-fits-all solution in view of the great diversity among parliaments which covers their structures, the applicable rules, political cultures at large, as well as their standing within the different (institutional and political) systems of the Member States.[47] Nevertheless, it is fair to say that some minimums should be ensured at the EU level, particularly with a view to guaranteeing adequate information: the duty set on the EU institutions to transmit some documents to national parliaments directly since the entry into force of the Lisbon Treaty[48] should certainly be extended to all the documents exchanged in the framework of the European Semester. Such a change should, in fact, not only be temporary but it should rather be made permanent as this could contribute to remedy the shortcomings that have always existed in the framework of the European Semester. Furthermore, considering how intrusive the RRPs will be for Member States and how all-encompassing they will have to be in light of the fact that they will touch upon a wide range of issues, it may be assumed that parliaments will have to design procedures that will allow for the coordination among, and the involvement, in due time, of several sectoral committees. The independent fiscal councils that Member States were required to set up following the adoption of 'eurocrisis law', as well as the parliamentary budgetary offices, should also be duly involved and used as sources of independent infor-

44 Thomas Wieser, *What Role for the European Semester in the recovery plan?*, Economic Governance Support Unit PE 651.368, October 2020, p. 25.

45 COSAC, '19th Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', 2013.

46 COSAC, '35th Bi-annual Report' in preparation under the upcoming Portuguese Presidency (first half of 2021).

47 See for a comparison of national parliaments and their structures: Claudia Hefftler *et al*. (eds), *The Palgrave handbook of national parliaments in the European Union*, Palgrave Macmillanm 2015; Teresa Freixes Sanjuán *et al*. (eds), *Constitucionalismo multinivel y relaciones entre parlamentos*, Centro de estudios políticos y constitucionales, 2013.

48 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) OJ C 306, Art. 1 Protocol 1.

mation for parliaments in the former case. This may be expected to be a relatively easy reform to conduct seeing as they have lost their main task following the suspension of the rules enshrined in the Stability and Growth Pact, the observance of which they were created to check.

On the other hand, national parliaments should join and follow closely the way the EP is self-assessing its own role within the European Semester. It is worth mentioning here that, upon the request of the Committee on Economic and Monetary Affairs of the European Parliament, several papers were commissioned to external experts on the linkages between the RRF and the European Semester, as well as on the role of the European Parliament in the RRF. Their main purpose was to assess whether the Semester is an adequate governance framework for the recovery measures, especially regarding: (i) the identification of the EU priority areas; (ii) the analysis, the adoptions and the monitoring of the national recovery plans; and (iii) the performance of the European Parliament scrutiny and accountability role.[49]

Our view is that these are the exact same questions national parliaments should be asking themselves at this point. This should be done not only making use of the existing structures for interparliamentary cooperation, namely COSAC, for a more generalist exchange of best practices and compared information, but also adapting the overall structure and output of the Interparliamentary Conference on Stability, Economic Coordination and Governance in the European Union (often dubbed the 'Article 13 Conference'), which has the potential to evolve into a sort of 'parliamentary chamber', or at least to serve as a *permanent* forum of interparliamentary cooperation dedicated to the implementation of the EU Recovery Plan. So far, the added-value of the Article 13 Conference has given ground to mixed evaluations, and several proposals of reforms have been voiced over the years.[50] Using it for the purpose of guaranteeing adequate parliamentary involvement, and of fostering interparliamentary cooperation among national parliaments, and between them and the European Parliament would hence not only contribute to enhancing the (democratic) legitimacy of the RRF, and the EU measures for economic recovery, but it could also, potentially, contribute to consolidation of this interparliamentary conference in the future.

For this parliamentary scrutiny to be effective, parliaments will nonetheless need access to regular and reliable data, with a potential role for the Parliamentary Budgetary Offices and/or Independent fiscal councils in this context as mentioned previously, and they should also strengthen their national ownership of the European Semester cycle, namely by increasing interaction with their national governments and by establishing the necessary synergy between the draft budgetary plans, national reform plans and the RRF reporting. Ideally, the template that the European Commission issued for Member States

49 Cristina Dias and Alice Zoppé, *Thematic Digest: "The role for the European Semester in the recovery plan"*, Economic Governance Support Unit PE 659.615, November 2020.

50 See on the strengths and weaknesses of this Conference, for instance, Nicola Lupo and Elena Griglio, 'The conference on stability, economic coordination and governance: filling the gaps of parliamentary oversight in the EU', 40 *Journal of European Integration* 3, 2018, pp. 358-373.

to submit the national RRPs[51] could include a section dedicated to this domestic dimension and the envisaged oversight of the implementation of priorities for reforms and investments included in the national RRPs. In view of the role the Treaties and some pieces of secondary legislation already (directly) attribute to national parliaments, such an inclusion would, in our view, not encroach upon the EU's duty to respect Member States constitutional identities, as enshrined in Article 4(2) TEU.

Moreover, national parliaments should seize the opportunities brought by the new ways of organising their work due to the pandemic to also develop new ways of scrutiny. At COSAC level, and during the two presidencies of 2020, a practice was established and consolidated to organise video conferences with different Commissioners (for example Executive-Vice President Margrethe Vestager, Vice-President Věra Jourová, Commission Didier Reynders, besides meeting with the Chief Negotiator Michel Barnier).[52] This has proven to be a format which allows national parliaments and the European Parliament to engage directly with EU Commissioners on specific policy dossiers, in a more informal way than the traditional 'choreography' of interparliamentary conferences, turning out to be a worthy and very informative feature of the Political Dialogue with the Commission mostly unexploited so far.[53] If targeted in the right way and in the adequate moments within the European Semester, this dialogue could be an important step forward in the ownership and access to data that parliaments definitely lack. In fact, videoconferencing as a tool could also be used more extensively in the framework of the Article 13 Conference, and perhaps joint (virtual) sessions of the Article 13 Conference and COSAC could even be envisaged to allow for the participation of MPs with the required expertise. To enhance the usefulness of those virtual exchanges, the long-standing question of the timing of the bi-annual Article 13 Conference meetings within the European Semester should perhaps be addressed, and those meetings potentially tabled at a different moment when parliaments' input may be best incorporated.[54]

Along the same line, in the past few years, a staff-to-staff network dedicated to the European Semester has been developing under the driving force of the EGOV Unit, fostering an exchange of information and best practices about a parliamentary perspective of this policy cycle.[55] This involves not only the cooperation of the European Parliament and national parliaments at staff level, but also engagement with Commission and Council staff dealing with the European Semester, which has also been very useful in terms of building capacity and knowledge at the administrative level. That is, in our view, a prerequisite for a more informed and in-depth political scrutiny. In fact, 'it also appears [based on the 2018 EGOV survey mentioned earlier] that the administrative resources dedicated to this policy do-

51 European Commission, 'Commission Staff Working Document Guidance to Member States Recovery and Resilience Plans' (2020) SWD 205 final, 17 September 2020.

52 See the part dedicated to COSAC on the Platform for EU Interparliamentary Exchange (IPEX), available at < https://secure.ipex.eu/IPEXL-WEB/conference/getconference.do?type=082dbcc564afa0210164b2da9f5102f8 >.

53 Whilst the written dimension of the Political Dialogue is well-known, its non-written dimension is often unperceived. However, ever since the Commission of Jean-Claude Juncker, it has played an important role and commissioners have, for example, regularly visited national parliaments. See European Commission, 'Annual reports on relations with national parliaments' (up to 2017).

54 This issue was, for instance, debated when the Article 13 Conference was being designed. See further in Diane Fromage, 'European Economic Governance and Parliamentary Involvement: Some Shortcomings of the Article 13 Conference and a Solution', *Les cahiers européens de Sciences Po*, No. 01/2016, 2016, p. 12.

55 More information available at < https://www.europarl.europa.eu/committees/en/econ/econ-policies/economic-governance >.

main are rather limited in many national parliaments'.[56] It shows the potential for national parliaments and the European Parliament to enhance cooperation in the area of multilevel economic governance through knowledge-sharing in addition to existing initiatives, to ensure a better understanding of how the European Semester is evolving, based on joint monitoring at EU level and implementation at national level.

4. Conclusion: The remaining questions

This chapter has highlighted that parliamentary scrutiny and involvement in the adoption of the economic instruments adopted to mitigate the negative effects of the pandemic has been uneven and partial, both at the national and at the European levels. Several factors, such as the legal bases used, timing and required speedy procedures, the hindrances for adequate parliamentary scrutiny caused by sudden lockdowns, or political cultures may account for this. It naturally remains that the EU's (and its Member States') capacities to mobilise must be praised at any rate, even if this finding could be criticised from a democratic point of view.

It is nonetheless urgent that adequate democratic participation be possible in the phase that will (hopefully) start in early 2021, that is the implementation phase of the longer-term measures (MFF and NGEU). Indeed, regardless of how the economic situation within the EU continues to evolve and whether new measures are required, parliamentary involvement in the implementation of the RRF must be enhanced and, by the same token, this could be used to reinforce their role in the framework of the European Semester generally, since large asymmetries still exist in this regard across the different Member States, and since the European Parliament is still only marginally involved. At the national level in particular, greater parliamentary involvement appears all the more necessary in view of the importance of the RRF and of the ensuing impact on national policies, but also because, as highlighted in this Chapter, the European Semester as it has been implemented so far presents important shortcomings, inter alia as a result of very limited national ownership, an issue which only a closer involvement of the national parliaments may resolve. National parliaments should follow the initiatives taken by the European Parliament, and increasing interparliamentary cooperation, both among national parliaments and between them and the European Parliament, could be a useful means to gain information and exchange best practices, both of which national parliaments could, in turn, put to good use in exercising their scrutiny at the national level.

In comparing the management of the COVID-19 crisis to the eurozone crisis of 2010-2014, a striking institutional difference with political significance appears though: during that period, virtually all the negotiations were held at the highest level, namely by the European Council. Observers lost count of how many summits took place at the height of the crisis, with the Eurogroup playing an important, but more discrete role. One could argue that, given the commonly existing obligation of governments to

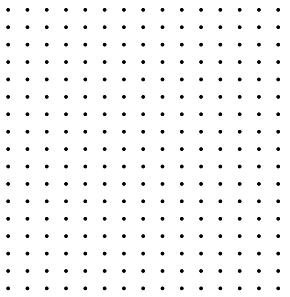
56 Kajus Hagelstam, Wolfgang Lehofer and Matteo Ciucci, *The role of national parliaments in the European Semester for economic policy coordination*, Economic Governance Support Unit PE 614.494, April 2018, p. 21.

debrief their parliaments after each (European) Council meeting, this might have favoured closer scrutiny and also an enhanced politicisation of the process. By contrast, during the current pandemic, the Eurogroup played a much larger role. In this regard, another interesting aspect worth noting was that all the SURE-related proceedings of the Eurogroup[57] were held in the so-called inclusive format,[58] with the 19 euro area Finance Ministers, but also in the presence of the eight non-euro area Member States, which brings yet another layer of complexity into the process. In fact, how can parliaments, from both the euro area and non-euro area Member States, monitor and assess the Eurogroup's proceedings: is it a systemic issue of economic and monetary stabilisation for EMU-19? Is it an enhanced feature of the European Semester with regard to employment for EU-27? Is it a decisive step towards new paths, such as common debt issuance or a deepened social EU with an unemployment insurance scheme?

All these outstanding issues are relevant for (all) national parliaments and the European Parliament and they should, individually and collectively, act to provide the necessary adequate responses to them: indeed, not only did all parliaments have to approve several pieces of legislation throughout the COVID-19 crisis, but they could and should also have to play a key role in the more medium-term strategy to overcome the difficulties caused by the pandemic in their quality of organs of democratic representation.

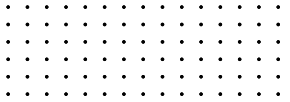
57 See further on the Eurogroup at < https://www.consilium.europa.eu/en/council-eu/eurogroup/ >.

58 See Eurogroup, 'Draft Agenda: Eurogroup in inclusive format 7 April 2020', 2 April 2020.



Part II

DEMOCRACY AND RIGHTS



Chapter 11

THE DEFENESTRATION OF HUMAN RIGHTS AND DEMOCRATIC VALUES DURING THE PANDEMIC: THE EU'S RESPONSE

Anjum Shabbir

1. Introduction[1]

Measures taken throughout this year to fight the COVID-19 pandemic at the Member State and EU levels, especially in early 2020 and now again in late 2020, have led to deliberate restrictions of, but also an incidental curbing of, fundamental rights.

This overview to Part II examines what are or may be the offending measures to the European Union's human rights law and democratic values, in particular under the Charter of Fundamental Rights of the European Union (though the relevant human rights and democratic values can be found in a vast array of national, European, and international law instruments – and noting that all are relevant for the EU law context) (section 2).

A selection of COVID-19 related measures paint the general picture: (section 2.1) restrictions on movement; (section 2.2) states of emergency - explored further from a specific angle by David Krappitz and Niels Kirst (Chapter 12); (section 2.3) contact tracing policies - considered in more detail by Oreste Pollicino, and with a wider analysis of the impact on privacy by Christina Etteldorf (Chapters 14 and 15); and (section 2.4) the halting and suspending of asylum and immigration procedures, the impact of which is thoroughly investigated by Silvia Bartolini (Chapter 13).

Besides those intentionally imposed State measures, unintended phenomena have also emerged, such as COVID-19 related racism and discrimination (in particular against those of Chinese origin, but also against Roma), and connected disinformation circulating over the internet through social media targeting, which can have negative consequences on the rights to privacy and data protection, freedom of expression (as a democratic value) and even the right to health through the undermining of European healthcare systems, addressed by Enza Cirone (Chapter 16).

1 This Chapter was finalised on 6 December 2020. It has been adapted from an earlier version that was first published on EU Law Live on 26 November 2020.

The overview also takes a general look at whether and how breaches of those rights and values could be justified (section 3), and finally considers, in more detail, the EU's judicial, legislative and policy responses to breaches related to the pandemic (section 4).

2. The impact of COVID-19 related measures on human rights in the EU

2. 1 Restrictions on movement

Member States imposed far-reaching limitations on movement to the extent of obligatory confinement to one's home within a Member State or the even more restrictive 'self-isolation', through national 'containment' measures. Travel was prohibited within a Member State, and to other Member States - prevented by closing national borders (including some EU-level actions). At the time of writing, measures closing borders had been reimposed by Denmark, Finland and Hungary.[2]

This directly curtailed a significant number of EU human rights and democratic values, and to a significant extent. Most obviously, freedom of movement was completely curbed (Article 45 of the Charter), with some overlap with the right to liberty and security (Article 6 of the Charter – corresponding to Article 5 ECHR). Not being able to access public spaces or hold gatherings also meant the freedom of assembly and association (Article 12 of the Charter) and freedom of thought, conscience and religion (Article 10 of the Charter – corresponding to Article 9 ECHR) could not be exercised.

The prohibition on visiting family members from other households whether in the same Member State or another prevented enjoyment of the right to respect for private and family life (Article 7 of the Charter – corresponding to Article 8 ECHR), and more controversially, by those who were even banned from attending the funeral of family members. Confining individuals to the household also diminished the protection of vulnerable women under that Article (consider the State's positive obligations in respect of domestic violence under Article 8 ECHR, the Victim's Rights Directive 2012/29,[3] the Anti-Trafficking Directive 2011/36,[4] and that the EU has signed the Istanbul Convention).

The closure of educational establishments such as schools and universities in almost all the Member States (except Sweden) had an impact on the right to education (Article 14 of the Charter) and rights of the child (Article 24 of the Charter).

In some Member States it was shown that governments paid insufficient care and attention to migrants, the elderly, the disabled, the homeless, the Roma community, or prison inmates, to protect them from COVID-19 transmission, in apparent discrimination against protected categories (Article 21 of the Char-

2 See the EU's official migration and home affairs website on temporary reintroduction of border controls for the latest updates.

3 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

4 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

ter and Article 18 TFEU).

2.2. State of emergency measures

Some – but not all (out of choice or due to impossibility in their legal traditions) – Member States imposed varying types of emergency measures such as a state of emergency, health of emergency, state of crisis, state of epidemic and more in response to the pandemic outbreak, which allowed legally-prescribed derogations to be made from the above mentioned human rights and democratic values.[5] These measures have, at the time of writing, been reimposed in France, Czechia, and Slovakia after being initially lifted, due to the number of rising cases of COVID-19.

Particular concern has emerged over the nature, legal basis, scope, duration, proportionality, and possible abuse of such powers that mean such measures might not be justified or lawful in certain Member States.[6] For example, in Greece, the Netherlands, Poland and Slovenia, the end dates of emergency measures were unknown. In Hungary a 'state of danger', although temporally limited, strengthened criminal law enforcement mechanisms against news organisations, and has been described as giving 'almost unlimited legislative power' to the Hungarian government that 'has since been used to suspend the operation of the GDPR' and defavour opposition parties' - outcomes which 'have no plausible connection with COVID-19'.[7]

This means breaches of EU human rights as a result of COVID-19 measures extends also to democratic values, given the lack of parliamentary oversight, the suppression of freedom of expression and information (Article 11 of the Charter), and due to another type of COVID-19 related measure this time, the freedom of assembly and association (Article 12 of the Charter).[8] States of emergency are even considered as impacting the right to property (Article 17 of the Charter) due to the requisitioning of goods.

Such emergency measures deserve particular scrutiny as practice shows that the gravest human rights violations can occur in such circumstances, if the greater powers are abused beyond the purpose for which they have been imposed.[9]

2. 3. Contact tracing and collection of health, travel and location data

5 European Asylum and Support Office, 'COVID-19 emergency measures in asylum and reception systems', 2 June 2020, pages 7-9, offering a timeline and explanation of when such measures were first imposed and then lifted by a large number of Member States between February and May 2020; this European Parliament Briefing of June 2020; and Daniel Sarmiento, EU law in extraordinary times, *EU Law Live*, 18 March 2020.

6 Evident early on from the perspective of the European Commission through this 'Statement by President von der Leyen on emergency measures in Member States' on 31 March 2020.

7 Joelle Grogan, 'States of Emergency', *Verfassungsblog*, 26 May 2020

8 See the contribution by David Krapptiz and Niels Kirst below (Chapter 12).

9 For examination of the impact on democracy also beyond the EU context, see 'Challenges that the COVID-19 Pandemic poses to the rule of law, democracy and human rights', the Max Planck Institute (MPIL) Research Paper Series No. 2020-23.

Member States (supported by EU actions) - and private companies[10] - considered or implemented national policies of tracing individuals who had been in touch with anyone who has tested positive for COVID-19. This requires large-scale collection, storage, processing and sharing of information about sensitive data such as one's health (such as symptom-reporting), real-time locations, and residence, in order to prevent the virus spreading further, through traditional methods, but also the novel method of an application on a smartphone ('contact tracing') (consider also drone surveillance and thermal imaging). Such data collected from telecommunications providers may also be anonymised and used for statistical purposes, and may be passed on to third parties.

This has an impact on data privacy and protection rights[11] as enshrined under Articles 7 and 8 of the Charter, to which express reference is made in EU secondary law such as the General Data Protection Regulation 2016/679,[12] and e-Privacy Directive 2002/58.[13] At the Council of Europe-level, see also Convention 108[14].[15]

The GDPR principles to take into account for such data collection and processing, which additionally require respect for fundamental rights, include data minimisation, transparency, accountability and confidentiality (Article 5 GDPR), as well as security (Article 32 GDPR). And the relevant GDPR rights are right to information about data processing (Article 13 GDPR), the right to access that information (Article 15 GDPR), the right to have that data erased (Article 17 GDPR), the requirement for consent to be obtained for processing to be lawful (Article 6(1)(a) and 7 GDPR), and the possibility of withdrawing consent (Article 7(3) GDPR).

2. 4. No processing of asylum applications and other suspended procedures

The majority of Member States prevented third country nationals crossing into EU territory as a COVID-19 related measure, some Member States pushing back boats with asylum seekers onboard or declaring their ports 'unsafe'.

Some stopped accepting asylum applications or suspended the processing of asylum applications, including by closing facilities without prior notification, discontinuing personal interviews, suspending transfers under the Dublin III Regulation, the validity of residence permits, family reunification procedures,

10 The Council of Europe provides a good overview of the specific apps that have been rolled out in each EU Member State, as well as other countries, and their install rates on its website, available at: https://www.coe.int/en/web/data-protection/contact-tracing-apps. See also the FRA's report 'Coronavirus pandemic in the EU - Fundamental rights implications: With a focus on contact-tracing apps'. 28 May 2020, pages 48-51.

11 For more on EU privacy rights in the context of COVID-19, see Chapter 14 by Christina Etteldorf, who points out that individuals 'may be obliged to accept encroachments on their privacy or to actively disclose something if this serves a legally protected interest, which must be given priority in individual cases, such as public health' through the mass collection, storage and usage of data.

12 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

13 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

14 The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108).

15 See the contributions by Christina Etteldorf and Oreste Pollicino below (Chapters 14 and 15).

and return procedures.[16]

This is not in line with the principle of non-refoulement provided for in EU primary law under Article 78(1) TFEU.

The right to asylum (Article 18 of the Charter) and related rights (Asylum Procedures Directive 2013/32, Reception Directive 2013/33, and Dublin III Regulation 604/2013) nigh-on disappeared, as asylum seekers and migrants were either unable to make applications for asylum, to progress ongoing asylum applications, or were held in overcrowded conditions and unable to enter or leave reception centres.

This also put them at a higher risk of infection with limited facilities and healthcare.

Also called into question was the right to protection in the event of removal, expulsion or extradition (Article 19 of the Charter) which requires that nobody be returned to a situation of persecution or serious harm, and Articles 3 and 4 of the Schengen Borders Code, according to which border control authorities must respect the rights of refugees and international protection obligations.

There is also the question of compliance with Article 15(4) of the Return Directive 2008/115, where detention ceases to be justified if there is no prospect of removal, and the person concerned must be released immediately.

3. Justified restrictions of human rights in an emergency

The Charter is the primary fundamental rights instrument to consider as directed by the EU Treaties (Article 6(1) TEU), with which national actions and measures must be in compliance whenever they are adopted in implementation of EU law, as well as the general principles of EU law protecting fundamental rights (Article 6(3) TEU).

As referred to the introduction, international law also remains relevant despite this honing in on the Charter, as for example a non-negligible number of the 50 Charter rights correspond to rights under the European Convention on Human Rights (ECHR) in meaning and scope (such as Articles 2, 4, 6, 7, 10, 11, 13, 17, 19, 20, 21, 23, 48, and 49), or have been given a more extensive meaning and scope by the case law of the Court of Justice of the European Union (Articles 8, 9, 12, 14, 47 and 50).

Charter rights are not all absolute in nature: limitations to many of them are legally permissible. Although it is not expressly set out which rights are absolute, it can be gleaned from the Charter's Explanatory Memorandum and ECtHR case law that the list includes Articles 1, 4, 5, 10, 48, 49 and 50 – none of which have been mentioned in the Charter rights listed above (section 2.1 to 2.4).

Any restriction or 'limitation' of the Charter rights highlighted in this overview as being impacted by

16 See the contribution by Silvia Bartolini below (Chapter 13).

COVID-19 measures therefore must be justified. They must respect the 'essence of the right' as set out in CJEU case law,[17] be 'provided for by law' – namely be expressed in a measure, 'meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others' – that is, have a legitimate aim, which includes the grounds of public health, 'be necessary' to achieve that legitimate aim, and comply with the 'principle of proportionality' – meaning that it should not go further than what is necessary to achieve that aim, further to its Article 52(1), and must not be discriminatory. Ultimately, the interest in fulfilling the legitimate aim – to protect public health – must be balanced with interference with fundamental rights.

See in particular Christina Etteldorf's assessment pointing out the need for a balancing exercise that legislators, authorities applying measures, and court interpretation in any related disputes, must carry out in weighing interests and reconciling health protection with the protection of privacy in the 'relatively young area' of data protection law, specifically Article 8 of the Charter, the GDPR, and e-Privacy Directive.[18]

In order for such data processing to be lawful, justified and proportionate, there must for example be a clearly defined purpose(s) of the contact tracing app (Article 6 GDPR) - and for which the GDPR does allow restriction on the grounds of public health (Article 23(1) GDPR), and it must be proportionate. This means that, to take this further as an example, that contact tracing must actually be an effective and necessary means of protecting public health. Or, that the design of a contract tracing app would have to consider where contacts should be logged, whether data should be saved in server logs if a server is included, whether data should be authenticated and encrypted data, how users can be informed of their rights, how data storage can be limited to what is necessary, and overall, how the minimum and only the necessary amount of data can be collected and processed. On top of that, the right to private and family life and protection of personal data must also be respected.

Those rights listed as corresponding to the ECHR must also pass the qualified rights-tests under the ECHR and ECtHR case law standards (Article 52(3)), or meet the requisite conditions to qualify for derogations that are possible further to an application made under its Article 15 'in time of war or other public emergency threatening the life of the nation'.[19] The legitimate aim of protection of health can for example be found in Article 5(1)(e) ECHR (allowing detention to protect against an infectious disease) and Articles 8 to 11 ECHR, and limitations must be prescribed by law, be necessary to achieve that aim, and proportionate to that aim.[20]

17 Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' 20 *German Law Journa*l, 2019, pp. 779–793.

18 See the contribution by Christina Etteldorf (Chapter 14).

19 For example, Estonia, Latvia, and Romania applied for and obtained ECtHR derogations, which were withdrawn in May 2020 (only partially by Latvia).

20 To read more about derogations in times of the pandemic from the ECHR perspective, see Allan Greene, 'Derogating from the European Convention on Human Rights in response to the Coronavirus Pandemic: if not now, when?' *European Human Rights Law Review* 3, 12 July 2020.

4. The EU's response

4.1 The Judicial Perspective: the Court of Justice

Assessment of whether COVID-19 measures amount to lawful restrictions or unlawful breaches in application of the test laid out in Article 52 of the Charter and related CJEU case is a significant task, for national judiciaries and the Court of Justice of the European Union (CJEU) to carry out. It will be piecemeal and revealed over time - the time lag owing to the need for individually litigated cases at the national level with national courts examining compliance with the Charter, and an extra time lag for cases where it is unclear what the interpretation of EU law and the Charter is, by reaching out to the Court of Justice of the European Union for clarification in the form of preliminary rulings pursuant to Article 267 TFEU.[21]

Any litigation will also be characterised by other complexities.

First, the red lines under EU law will be very fact- and Member State-specific, characterised by the relevant policies and measures that were and are introduced at the national level – rather rapidly – in response to urgent circumstances. For example, Spain's far-reaching lockdown in March confined residents to their homes with minimal exceptions, whereas Sweden and Germany applied less restrictive measures – but the former has been comparatively more overwhelmed by the number of cases of COVID-19 and related deaths that were spreading rapidly through its territory. Christina Etteldorf points this out in respect of fundamental rights protected under data protection law, noting it is detrimental to the consistent application of EU law (Chapter 14).[22] Any CJEU ruling therefore would have to provide a useful response, but may also be more abstract in order to be useful to all Member States.

Second, the actual offending measure – which can be a national law measure or an EU law measure or both – may be hard to single out, untangle or identify from a combination of measures that have been applied – and temporally as measures have changed constantly – even weekly – in response to varying pandemic-threat levels that could be described as country-specific. On top of that, many of those measures have been applied in the form of policy measures, soft law measures and recommendations.[23]

Third, an additional hurdle has to be overcome for Charter rights to be invoked in the first place, relating to the restriction of the Charter's scope to measures falling within the field of application of EU law (Article 51(1) of the Charter), and the need for them to be invoked hand in hand with provisions of EU law, or less clearly, 'the scope of EU law'. These could for example be provisions under the above men-

21 The process can however be seen as swifter than that under the ECtHR, for which domestic remedies must first be exhausted – new attention to the possibility to request an advisory opinion from that court under Protocol no. 16 is however interesting to consider in that regard). See Dolores Utrilla, 'ECtHR's advisory jurisdiction on the move: Bioethics Committee requests first-ever advisory opinion' *EU Law Live*, 26 June 2020.

22 See the contribution by Christina Etteldorf (Chapter 14).

23 Read Dolores Utrilla, 'Governing a Pandemic through Soft Law: Challenges for Judicial Review', Weekend Edition No. 21, *EU Law Live*, 13 June 2020, for more on the challenges that the choice of soft law pandemic measures raises.

tioned Citizens' Directive, Schengen Borders Code, GDPR, e-Privacy Directive and Asylum and Migration Directives, Victims Directive, Anti-Trafficking Directive and so on. Or, where there is no such specific EU provision, but the scope of EU law could be engaged: the closure of educational establishments impacting the right to education and rights of the child is a field reserved to the Member States' competence, but could be important under EU law from the perspective of non-discrimination. This remains unclear. Whilst derogation from the fundamental freedoms is deemed 'application of EU law', the scope of application of the Charter with respect to national measures that implement or apply EU law is the subject of long-standing discussion.[24]

Finally, there is already academic discussion of the dangers of judgments delivered examining the breach of fundamental rights during the COVID-19 crisis, for example that 'contain statements of purported principle which are confused and confusing and, if left unqualified, represent dangerous precedents in terms of rights protection'.[25]

4.2. The EU's legislative and policy response

The EU's legislative response reveals that the earliest, predominant, and most robust legislative – and binding – measures emanating from the EU in response to the COVID-19 crisis did not have much to do with protecting human rights and democratic values[26] – with the glaring and obvious exception of the right to health and life, serving as a ground for restrictions of other human rights.

The legislative response from the EU institutions has been and continues to be tipped rather heavily toward the fields of State aid,[27] the smooth operation of the internal market,[28] and the impact on the economy, far outweighing the response to the human rights and democracy aspects. The policy response was also lopsided in the attention given to the risks to some rights and values over others – for example the impact on privacy and data protection rights, and on the right to asylum and related rights (as will be seen in the separate thematic sections examining the EU's response below).

It cannot be denied that there have been Action Plans presented by the Commission in the areas of anti-racism (which refers to the pandemic),[29] human rights and democracy (but which does not refer to the pandemic)[30] and a new Migration and Asylum Pact which is also general but includes reference to an

24 Explore this further by reading 'The scope of application of fundamental rights on Member States' action: in search of certainty in EU Adjudication' by Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, *Eric Stein Working Paper no. 1/2011*; and 'Mapping the Scope of EU Fundamental Rights: A Typology' by Benedikt Pirker, 3 *European Papers* 1, 2018, pp. 133-156.

25 In the context of UK judges examining the breach of Articles 3, 5 and 8 ECHR concerning vulnerable individuals, and through the prism of the Human Rights Act 2008: 'Public Health Emergencies and Human Rights: Problematic Jurisprudence arising from the COVID-19 pandemic' by Dr Stephanie Palmer and Dr Stevie Martin, forthcoming in the European Human Rights Law Review (2020).

26 See this Timeline of EU action on the Commission's website, which is updated regularly.

27 See Part 6 below.

28 See Part 5 below.

29 Commission Communication of 18 September 2020, 'A Union of equality : EU anti-racism action plan 2020-2025', COM(2020) 565 final.

30 Joint Communication of the Commission and High Representative of 25 March 2020, 'EU Action Plan on Human Rights and

emergency 'blueprint' for crises.[31] It also issued Guidance on how to protect EU data protection rights in the COVID-19 context, and how to continue protecting certain EU asylum and immigration rights during the crisis. But the Commission's President's State of the Union address[32] does not make any reference to human rights infringements in the context of the pandemic, which do require a special kind of attention given the circumstances and the year in which the address has been made. The priority of human rights in the specific COVID-19 context – which will certainly persist beyond this year – was also not mentioned in its 2021 Work Programme.[33]

The tenuous exception is that of a rule-of-law conditionality measure designed to force Member States to respect that core fundamental right, tying it to the release of recovery funds.[34]

Concerning the COVID-19 related measures impacting on restrictions of movement (section 2.1), although closure of the internal borders was condemned by the European Parliament,[35] the European Commission itself, with an initial and slight delay but in parallel with the Member States, adopted a Communication for a Temporary Restriction on Non-Essential Travel to the EU on 16 March,[36] which closed the EU's external borders with Guidance on how to facilitate transit arrangements to repatriate EU citizens, and the effects on visa policy on 30 March[37] – but did not mention avoidance of the potential human rights breaches involved. Indeed, its earliest responses in February and March were to help citizens stranded abroad to return to their place of residence through diplomatic means and the Union Civil Protection Mechanism, calling for 75 million euros from the EU budget to be made available to help Member States repatriate EU nationals.

In a later Communication on the third assessment of the restrictions adopted on 11 June it did also at least *take note* of the fact that when implementing such measures to protect public health that they ought not to discriminate between Member States' own nationals and other EU citizens resident in the Member States by listing non-discrimination as a principle, including in terms of the right to entry, and facilitating returns of residents.[38] However, as highlighted by Daniel Thym, the Member States 'hardly bothered to comply with their reporting obligations including "all relevant data detailing the events that constitute a serious threat" to allow the Commission to control state action and suggest less coercive means' – seeing

Democracy 2020-2024', JOIN(2020) 5 final.

31 See the contribution by Silvia Bartolini (Chapter 13 below) which further discusses the 'emergency blueprint'. Commission Communication of 23 September 2020, 'on a New Pact on Migration and Asylum', COM(2020) 609 final.

32 State of the Union Address 2020, 'Building the world we want to live in: a Union of vitality in a world of fragility', 16 September 2020.

33 European Commission's 2021 Work Programme, 19 October 2020.

34 See the contribution by John Morijn and Aleksejs Dimitrovs (Chapter 4), and Dolores Utrilla 'Towards rule of law conditionality in the management of EU funds: LGBTI free zones not eligible for town twinning funding', *EU Law Live*, 6 August 2020.

35 See this update briefing of the European Parliament dated April 2020.

36 European Commission Communication, COVID-19: Temporary Restriction on Non-Essential Travel to the EU for a Temporary Restriction on Non-Essential Travel to the EU, 16 March 2020.

37 See two follow-up Communications on 8 April - on the assessment of the application of the temporary restriction on non-essential travel to the EU; and 8 May - on the second assessment of the application of the temporary restriction on non-essential travel to the EU.

38 Commission Communication on the third assessment of the restrictions, 11 June 2020.

the requirement that there is a 'serious threat to public policy or internal security' as a political preference rather than a legal constraint,[39] and which is highly important to consider when assessing whether there has been a breach of EU fundamental rights.

4.3 The Commission's response as Guardian of the Treaties

Circling back to the arena of the EU's judicial response, the Commission, under its mandate as 'Guardian of the Treaties', is entitled to commence infringement proceedings under Article 258 TFEU against Member States for breach of EU law – including of course human rights protected under the Charter, as a parallel course of action to individual national and CJEU litigation to address human rights breaches.

In March the Commission stated that it would be monitoring the situation in terms of compliance with proportionality and necessity in line with fundamental rights.[40] It was even invited to do so by a Joint Statement signed by 19 Member States in April, who themselves recognised the 'risk of violations of the principles of rule of law, democracy and fundamental rights' through emergency measures, and called for them to 'be limited to what is strictly necessary … proportionate and temporary in nature, subject to regular scrutiny, and respect the aforementioned principles and international law obligations'.[41]

Later in July it was reported that the European Commission would be outsourcing human rights monitoring by spending 350,000 euros on a platform that every fortnight updates its monitoring of COVID-19 related measures or developments from a democracy and human rights perspective for those that 'do' or 'may lead to a violation of human rights or democratic benchmarks and be considered disproportionate, unnecessary, illegal or indefinite if enforced or maintained over time' in 162 countries including the Member States.[42] This occurs through an online tool prepared by the International Institute for Democracy and Electoral Assistance (International IDEA), which also operates INTER PARES – similarly funded by the EU to track measures taken in response to COVID-19 by most parliaments worldwide.

The only specific action that can be seen so far in this respect is in the Commission's commencement of an infringement procedure against Hungary in October[43]: it sent a letter of formal notice considering that 'new asylum procedures set out in the Hungarian Act and Decree introduced in response to the coronavirus pandemic are in breach of EU law, in particular the Asylum Procedures Directive (Directive 2013/32/EU)[44] interpreted in light of the Charter of Fundamental Rights of the European Union. Hungary has 2 months to reply to the arguments raised by the Commission'. If it does not do so, the Commis-

39 See Chapter 28 below.

40 European Commission, 'Statement by President von der Leyen on emergency measures in Member States' press release of 31 March 2020.

41 Joint Statement – Rule of Law in the context of the Covid-19 crisis, by Sweden, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal and Spain, updated 8 April 2020.

42 'EU launches another tool on pandemic's threat to human rights' *Devex*, 8 July 2020.

43 European Commission, 'October infringements package: key decisions' press release of 30 October 2020.

44 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

sion may take the next step in the infringement procedure and send a reasoned opinion.

Particularly interesting in this respect is the innovative proposal by David Krappitz and Niels Kirst of a way that the European Commission could utilise its competence to commence Article 258 legal infringement proceedings for breaches of democratic values due to abusive state of emergency powers, in what is a novel emergency situation, based on Article 10(2) TEU - see Chapter 12 below. Consider in parallel Daniel Thym's concerns of the politicisation of the field, and his perception that the European Commission has behaved more like a political mediator than a law-based 'guardian of the treaties', as it had done in response to other crises such as terrorist attacks in the early 2010s, and the refugee crisis of 2015-15 (see Chapter 28).

4.4 The EU agencies' response

The most direct EU response to the impact of COVID-19 measures on human rights comes in the form of identifying them through reports which have no legal value – from the Fundamental Rights Agency (FRA), and the European Asylum and Support Office (EASO).

In June, the EASO published a report examining the impact of COVID-19 in asylum and reception procedures for the period March to May 2020, in which it noted that most measures are aimed at restricting otherwise basic freedoms, and considered challenges to the legal basis for emergency measures.[45] The FRA collected information which was published almost monthly in bulletins covering the period from March-September, focusing on the elderly, the impact on Roma and Travellers, the legality of emergency measures, the homeless, and prisoners.[46] In terms of a less passive response, it has at least, together with the European Institute for Gender Equality (EIGE), called on the EU and the Member States to better protect the rights of women through 'long lasting action' as they face a higher risk of domestic violence as a result of COVID-19 related measures.[47]

4.5. Thematic responses: data protection law and asylum and migration law

As mentioned above, the EU's response has been lopsided: not only in human-rights law compared to non-human rights law, but also within the type of human rights law to which attention has been paid. Far more output and specific actions from the EU can be noted in terms of addressing breaches through COVID-19 related measures concerning EU data protection and privacy rights and asylum and migration law, than with respect to the other COVID-19 related measures that may result in breaches as referred to

45 European Asylum Support Office, 'COVID-19 emergency measures in asylum and reception systems', 2 June 2020. See page 17, and more on that report in the section on the EU's response to asylum and migration matters below.

46 FRA bulletin no.1 'Coronavirus pandemic in the EU - Fundamental Rights Implications', 8 April 2020; FRA bulletin no. 2 'Coronavirus pandemic in the EU - Fundamental Rights Implications', 20 May 2020; FRA bulletin no. 3 'Coronavirus pandemic in the EU – Fundamental Rights Implications:with a focus on older people', June 2020; FRA bulletin no. 4 'Coronavirus pandemic in the EU - Fundamental Rights Implications', 29 July 2020; and FRA bulletin no. 5 'Coronavirus pandemic in the EU – impact on Roma and Travellers', 29 September 2020.

47 Fundamental Rights Agency, 'EU rights and equality agency heads: Let's step up our efforts to end domestic violence', press release of 29 April 2020.

in this overview (restrictions on movement in section 2.1, states of emergency in section 2.2).

4.5.1 - Data Protection Law

EU Agencies such as the FRA, European Data Protection Board (EDPB), and European Data Protection Supervisor (EDPS) were rather vocal with respect to the fundamental rights protection *with respect to data protection law* early on in the COVID-19 outbreak - the FRA noted in its first bulletin that such fundamental rights must continue to be respected, and recognised the need for an in-depth analysis in its second; the EDPB added guidance on when derogations could be allowed - and later in June also reiterated the need for restrictions on data subject rights in connection to the state of emergency in Member States to be justified; and as a final example, the EDPS committed to an analysis of long-term data protection-human rights implications.[48]

The Commission also showed a lot of movement in this respect, recognising that 25 different pieces of guidance had been issued on how to comply with data protection rights, and deciding on a common European Approach for contact tracing.In April the Commission took several actions: it issued a Recommendation on a Common EU Toolbox, and Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection, drawing on the advice of the EDPB and EDPS. To examine the Recommendation in particular, it focused on recalling that any interferences must be lawful, any breach must be justified and in line with permitted derogations and tests of proportionality and necessity, setting out key principles and limits to data processing, and referring to existing EU law that still had to be respected – most notably the GDPR, Directive 2011/24, and Directive 2002/58. An EU gateway linking Member States' contact tracing apps eventually went live in October.[49]

The European Parliament for its part issued a Resolution of 17 April 2020, agreeing on the Commission's suggestion to promote voluntary use of a contract tracing app, warning against data storage on centralised databases, and also advocating full transparency. It reiterated, in a Plenary debate on 14 May 2020, the need for contact tracing apps to be 'truly voluntary, non-discriminatory and transparent', strictly limited to their purpose, for data to be deleted as soon as possible in the circumstances, and generally for data protection and privacy laws to be respected, and that it will continue to monitor the situation.[50]

Reflecting on the above, much can be said of the regular and loud voicing of EU institutions and agencies

48 European Data Protection Board, 'Statement on the processing of personal data in the context of the COVID-19 outbreak', 19 March 2020; European Data Protection Board, 'Thirtieth Plenary session: EDPB response to NGOs on Hungarian Decrees and statement on Article 23 GDPR' 3 June 2020; European Data Protection Supervisor, 'Carrying the torch in times of darkness', 30 April 2020.

49 Commission Recommendation (EU) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data, 14 April 2020; Commission Communication, Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection, 17 April 2020; see also the brief reference to human rights compliance in 2.3. 'Making full use of contact tracing apps' in the Commission Communication on additional COVID-19 response measures, 28 October 2020.

50 European Parliament, resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences; European Parliament, 'COVID-19 tracing apps: MEPs stress the need to preserve citizens' privacy', press release of 14 May 2020; European Parliament 'Covid-19 tracing apps: ensuring privacy and use across borders' updated on 1 December 2020;

on how to legitimately restrict *data protection rights* in the context of the pandemic over the year, rather than other fundamental rights that are arguably deserving of greater or at least equal scrutiny.

4.5.2 - Asylum and Migration

Issues relating to the COVID-19 measures taken that essentially hit the stop button on asylum and migration processes (section 2.4) did see some responses in the form of guidance from the Commission and the EASO.

Initially though, in March, in the wake of the coronavirus pandemic, the EU strengthened its support for refugees from Syria and vulnerable persons *who were not trying to cross into EU territory*, but in third countries such as Iraq, Jordan, and Lebanon through a new package of almost 240 million euros, raising the total assistance via the EU Regional Trust Fund in Response to the Syrian Crisis to more than 2 billion euros.[51]

However, it did then look inwards – on 16 April 2020 the European Commission issued guidance to Member States in the form of a Communication advising on issues related to asylum, return and resettlement[52], on how to derogate from EU human rights in this field: for example, it pointed out that Member States can have a six-month extended period to examine applications as a temporary derogation and that it could extend the time limit for registration of applications to ten working days. The Commission also gave, in a Communication, Guidance on transfers under the Dublin III Regulation to resume them 'as soon as practically possible', which it described as of significant importance, and pointed out that no derogation from the rule existed and encouraged Member States, to the extent possible with emergency health measures, to continue resettlement-related activities for unaccompanied minors during the period of crisis and be prepared to resume resettlements under safe conditions for all involved, when this is again possible.

Concerning personal interviews, EASO issued practical recommendations in a report examining the impact of COVID-19 in asylum and reception procedures for the period March to May 2020.[53] It advised on conducting them remotely, following guidance issued by the European Commission to EU Member States, to which EASO also contributed, and which were based on good national practices from across Europe and existing EASO practical guides and tools on personal interviews.

The Commission also published a Pact on Migration and Asylum, as mentioned above, which generally proposed an independent monitoring mechanism to investigate allegations of fundamental rights at borders but also includes an 'emergency blueprint'. This will be particularly interesting given that the Com-

51 European Commission, 'EU approves close to €240 million to strengthen resilience in neighbouring countries hosting Syrian refugees in light of the coronavirus pandemic' press release of 31 March 2020.

52 Commission Communication, COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, 17 April 2020.

53 European Asylum Support Office, 'COVID-19 emergency measures in asylum and reception systems', 2 June 2020.

mission called for an extraordinary Frontex Management Board meeting on 10 November,[54] as a reaction to reports of complicity of the European Border and Coast Guard Agency (Frontex) in illegal pushback operations which, coincidentally or due to the circumstances of the pandemic, have occurred - namely violations of EU fundamental rights involving an EU Agency itself. The European Ombudsman has opened an inquiry to assess Frontex's Complaints Mechanism in this context.[55]

5. Conclusion

A wide array of human rights and democratic values have been impacted or deliberately limited, to a significant extent, and were (selectively) identified in this overview as occurring through COVID-19 related measures, imposed to try to protect the life and health of the populations of EU Member States to fight the pandemic. The overview pointed out some of the fundamental rights and democratic values as specifically enshrined in EU law, and in particular the Charter of Fundamental Rights, and briefly pointed out the legal justification tests that are necessary for breaches and derogations of those rights and values.

It also gave a bird's eye view of the EU's response to such breaches and derogations: showing that there has been a weak policy and legislative approach (the final adoption and effectiveness of the rule of conditionality-mechanism yet to be seen) - which is shifted more in favour of non-human rights measures; that where action has been taken in the policy context, it remains tipped also in the favour of some human rights and values over others - namely in the fields of data protection and migration and asylum law; it also anticipates the pending national and EU judicial assessments, complex exercises given the specificity of the EU human rights legal order and the circumstances of the crisis; and finally highlights that there is ample room for debate and discussion over the Commission's role as the 'Guardian of the Treaties'.

The reports of the FRA and EASO are helpful sources in the monitoring process, but it can be argued that there is a need for a higher level of scrutiny and response to protect EU citizens – as that is necessary even in – especially in – times of crisis and emergency.

54 'Commission calls for Frontex meeting over migrant pushback reports', *Politico*, 8 November 2020.

55 European Ombudsman, 'Ombudsman opens inquiry to assess European Border and Coast Guard Agency (Frontex) "Complaints Mechanism"', press release of 12 November 2020.

Chapter 12

AN INFRINGEMENT OF DEMOCRACY IN THE EU LEGAL ORDER

David Krappitz and Niels Kirst

1. A battle for EU values in the Member States[1]

The current pandemic in Europe and beyond has challenged the essence of democratic orders. In many EU Member States a state of emergency was introduced.[2] These states of emergency are in certain cases connected with a far-reaching curtailment of fundamental liberties, the free press and civil society, and even basic democratic functions.[3] While a temporary state of emergency can be justified amid the COVID-19 pandemic, some governments – at least temporarily – undermined the values of democracy.[4] This Chapter explores to what extent the EU can operationalise the value of democracy enshrined in Article 2 TEU and protect it within the Member States.[5]

The autocratic tendencies of certain Member States' governments have, over the last few years, led to an open conflict with the European Commission.[6] The Commission, as Guardian of the Treaties, must protect the values of the EU which are enshrined in Article 2 TEU. Changes to the judiciary, a curtailment of civil society, and non-implementation of Council Decisions openly violate some of the values enshrined in Article 2 TEU. These developments have been dubbed as a 'rule of law crisis' in the EU. The current circumstances lead us to ask if we are now facing a 'democracy crisis' in the EU.

1 This Chapter was finalised on 22 November 2020. This contribution reflects the authors' views only.

2 Karolina Zbytniewska, 'Coronavirus: Which European countries introduced the state of emergency?', *Euractiv*, 6 May 2020.

3 Edit Zgut, 'Authoritarian Regime Durability. The Bread and Butter of Hungarian and Polish Backsliding during COVID-19', *Visegrad Insight*, 7 May 2020; Kriszta Kovács, 'Hungary's Orbánistan: A Complete Arsenal of Emergency Powers', *Verfassungsblog*, 6 April 2020.

4 Laura Livingston, 'Understanding Hungary's Authoritarian Response to the Pandemic', *Lawfare*, 14 April 2020.

5 For further reflection on this topic, see the contributions in Part I by Ulla Neergard & Sybe de Vries (Chapter 7 above) and in Part VII by José Igreja Matos (Chapter 37 below).

6 Giulio Preti, 'The Commission fights Poland all the way over the rule of law', *KSLR EU Law Blog*, 1 April 2020.

The COVID-19 pandemic seems to be the next chapter in this ongoing 'value crisis' in the EU. While the Polish Government initially avoided enacting the state of emergency to ensure the re-election of the incumbent Polish President,[7] the Hungarian government has enacted an emergency law with wide-ranging powers for the government.[8] The situation in both Member States rapidly changed in the first weeks of the pandemic.[9] These cases demonstrate that thought must be given to whether the EU can ensure democratic functioning in the Member States. This Chapter aims to explore this question and initiate a debate about whether the principle of democracy in the EU legal order can be the subject of legal proceedings.

2. The Commission's approach to safeguarding the values of Article 2 TEU

The Commission moved from a hesitant stance in 2012 to an active stance with regard to value enforcement in 2020. The original tool enshrined in the Treaties to protect the values of Article 2 TEU is the Article 7 TEU procedure. Having said that, this political process to counteract infringements upon the values of Article 2 TEU has been described as dead by scholars.[10] In particular, the voting requirement of unanimity under Article 7(2) TEU seems politically unachievable at this point. Similarly, the so-called rule of law framework, initiated by the Commission in 2014, has not yielded any substantive results despite an exchange of letters sent in vain.[11] Not until recently has the Commission started to use the infringement procedure under Article 258 TFEU to litigate value infringements committed by the Member States. This procedure allows the Commission to sue Member States if they fail to comply with EU law. Initially a purely legal tool, it has yielded substantial results and led to several judgments in which the CJEU declared large parts of the Polish reform of the judiciary as incompatible with the value of the rule of law in the EU legal order.[12] Scholars and commentators have lauded this new line of case law of the CJEU and have urged the Commission to intensify the use of Article 258 TFEU to protect the values of Article 2 TEU.[13] As infringement proceedings under Article 258 TFEU have proven to be a valid tool to protect the rule of law in the Member States, does Article 258 TFEU have the same prospects with regard to the protection of democracy in the Member States?

7 Aleksandra Kustra-Rogatka, 'The Constitution as a Bargaining Chip. COVID-19, Presidential elections in Poland and a Constitutional Amendment Bill under Consideration', *Verfassungsblog*, 21 April 2020. In the meantime, the Polish Government decided to postpone the election to a later date: see Marcin Zaborowski, 'The Cancelled Election: How Law and Justice is Breaking Democracy in Poland', *Visegrad Insight*, 11 May 2020.

8 Specifically, the emergency law allows the executive to rule by decree, prescribes imprisonment for the dissemination of 'fake news' and it lacks a sunset clause. See Gábor Halmai and Kim Lane Scheppele, 'Don't Be Fooled by Autocrats! Why Hungary's Emergency Violates Rule of Law', *Verfassungsblog*, 22 April 2020. An English version of the Hungarian emergency law is available here.

9 Marcin Zaborowski, 'The Cancelled Election: How Law and Justice is Breaking Democracy in Poland', *Visegrad Insight*, 11 May 2020; 'Orban gibt Sondervollmachten zurück', *DW*, 15 May 2020.

10 Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision', 38 *Polish Yearbook of International Law*, 2018, pp. 166-187.

11 Molly O'Neal, 'The European Commission's Enhanced Rule of Law Mechanism', SWP Comment 2019/C 48, December 2019.

12 See for example the CJEU's Press Release No. 81/19 of 24 June 2019 concerning the Court of Justice's judgment in *Commission v Poland* (C-619/18).

13 Olivier De Schutter, 'Infringement proceedings as a tool for the enforcement of fundamental rights in the European Union', *Open Society European Policy Institute*, October 2017.

3. Safeguarding EU values in the Member States via the CJEU

3.1. Rule of Law

In 2018, the CJEU provided a potential remedy to the ongoing rule of law crisis in certain Member States. In the seminal *ASJP* (C-64/16) judgment, which concerned a lowering of the salary of Portuguese judges, the Court found that the value of the rule of law enshrined in Article 2 TEU can be operationalised via Article 19 TEU.[14] This was a groundbreaking development in EU law. The case established the competence of the CJEU to assess and protect the independence of the judiciary in the Member States.

Subsequently, the CJEU used this new competence to declare that the Polish judiciary reform would infringe upon the principle of effective judicial protection in EU law in *Commission v Poland* (C-619/18).[15] This was the first fully-fledged occasion on which the CJEU applied Article 19 TEU to protect the value of the rule of law in the Member States.

The CJEU found that Article 19(1), second subparagraph, TEU requires Member States to provide effective legal protection in areas covered by EU law. As Member States' courts may apply EU law they fall within the *ratione materiae*, therefore, Member States' governments have to ensure that they provide for an independent judiciary. Thus, Article 19 TEU operationalised the value of the rule of law (through an independent judiciary) enshrined in Article 2 TEU.

3.2. Democracy

The methodology established by the CJEU in *ASJP* to protect the value of the rule of law in the Member States could serve as a blueprint to protect the value of democracy. Where the value of the rule of law finds specific expression in Article 19 TEU, the same is true for the value of democracy and Article 10 TEU. This was recently affirmed by the CJEU in *Junqueras* (C-502/19):

> '[…] Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy which gives concrete form to the value of democracy referred to in Article 2 TEU […].' (paragraph 63)

Does this imply that Article 10 TEU, similar to Article 19(1), second subparagraph, TEU, contains normative substance which would render it applicable to the democratic functioning of the Member States?

Article 10(1) TEU states that the functioning 'of the Union' shall be founded on representative democ-

14 Laurent Pech and Sébastien Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in Associação Sindical dos Juízes Portugueses', *EU Law Analysis*, 13 March 2018.

15 Jakub Jaraczewski, 'Age is the limit? Background of the CJEU case C-619/18 Commission v Poland', *Verfassungsblog*, 28 May 2019.

racy. It appears that this paragraph refers solely to the EU as a legal entity which is distinct from its Member States. The Member States, in turn, are more immediately addressed in Article 10(2), second subparagraph, TEU which states that:

> 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.'

Can this subparagraph serve as a legal ground for the protection of the value of democracy in the Member States?

4. The content of Article 10(2) TEU: descriptive or normative?

To apply Article 10(2), second subparagraph, TEU, it is necessary to define the normative content of that Article. Looking at the wording of Article 10(2), second subparagraph, TEU, it might appear to be purely descriptive. However, there are clear indications as to its normative value.[16]

Article 10(2) TEU specifies the principle of representative democracy laid down in Article 10(1) TEU. The approach that Article 10(2) TEU follows is referred to as a dual concept of democratic legitimacy.[17] According to this concept, the EU draws its democratic legitimacy via two strands: first, from its citizens through the election of the European Parliament, and second, from national governments represented in the European Council and Council of Ministers. The latter are 'themselves democratically accountable either to their national Parliaments, or to their citizens'. The Article, thus, follows the concept of input legitimacy.

Member States form one strand of democratic (input) legitimacy to the EU. They fulfil a function, foreseen by the Treaty, to provide the EU with democratic legitimacy (legitimising function). The EU, in turn, can only draw democratic legitimacy from the Member States insofar as their governments can be held democratically accountable. Decisions of a government that cannot be held democratically accountable suffer from a lack of democratic legitimacy; a democratically unaccountable government cannot provide input legitimacy to the decision-making process of the EU. Subsequently, it fails to fulfil its legitimising function under Article 10(2), second subparagraph, TEU. This constitutes a deviation from Article 10(2), second subparagraph, TEU that cannot be deemed acceptable to the drafters of the Treaties.

Article 10(2), second subparagraph, TEU must, therefore, be read as placing upon Member States the obligation to ensure a democratically accountable government in order to guarantee democratic legitimacy. As a corollary, Member States are subject to a legal obligation to fulfil their legitimising func-

16 For a similar approach, see John Cotter, 'The Last Chance Saloon. Hungarian Representatives may be Excluded from the European Council and the Council', *Verfassungsblog*, 19 May 2020.

17 Cf. Armin von Bogdandy/Jürgen Bast, *Europäisches Verfassungsrecht*, (Springer 2009), p. 9.

tion in order for the EU to meet the principle of representative democracy as a whole.[18]

5. All governmental activity or EU activity only?

Having identified that Article 10(2), second subparagraph, TEU contains normative value, it is, however, unclear whether this normative value stretches over all activities of Member States' governments or is limited to government activity in the European Council and the Council. The contributions of some scholars can be read as sympathising with the latter view.[19]

The counterfactual, however, is two-fold: First, is democratic accountability of only EU-related governmental activity sufficient to satisfy the legitimising function? Secondly, is EU-related governmental activity at all separable from other governmental activity from a legitimacy point of view?

Whereas the first question might well allow for a positive answer, an affirmation of the latter must be clearly rejected. In a representative democracy, individual decisions are not legitimised (as is possible in plebiscite decision-making), but officials who are elected (and thereby legitimised) to take decisions. Subjects of legitimisation are thus elected officials. Legitimisation is not limited to governmental activity in the EU context only or particularly, but for these elected governmental officials for a predefined period of time.

Trying to isolate the EU activity of a government from its other activities is not possible from the aspect of democratic legitimacy. Article 10(2), second subparagraph, TEU therefore requires systemic democratic structures in the Member States.[20] This Chapter therefore continues to look at the requirements that national governments must meet with regard to democratic legitimacy.

6. An approximation of the normative content of Article 10(2) TEU

Which elements of democracy can be identified that must be met by Member States in order to meet the requirement under Article 10(2), second subparagraph, TEU? As an exhaustive definition of the normative content of democracy would go beyond this contribution, we will limit our approach to an approximation of the content of Article 10(2), second subparagraph, TEU.

To start with the negative side of the approximation: A 'fully harmonised' understanding of democratic accountability in the EU seems neither possible nor desirable. In many Member States, the understanding of democracy and its institutional setup is deeply rooted in their individual history and must be considered an aspect of national identity according to Article 4(2) TEU.

Turning to the positive side of approximating the normative content, the core aspect is that Member

18 Cf. Nettesheim, Article 10, in Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, (C.H. Beck 2020), paragraphs 65, 74.

19 Ibid., paragraph 74.

20 Cf. Haag, Article 10, in von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, (Nomos 2015), paragraph 6.

States provide input legitimacy to the EU. Input legitimacy is provided, in parliamentary systems, through an expression of political will, usually by way of election of parliamentarians and is, via a so-called chain of legitimacy (*Legitimationskette*), passed on to government. Unlike the wording of Article 10(2), second subparagraph, TEU, this might imply for parliamentary systems that the chain of legitimacy must not only exist between a parliament and its government but the parliament itself must receive its legitimacy from the people by way of election. There must be an uninterrupted chain of democratic legitimacy between the people, exercising their democratic rights in an election, via their national Parliament through to the national government;[21] in presidential systems, the legitimacy is directly provided by the people to the president.

The requirements that elections must fulfil are further defined by Article 3 of the First Protocol to the ECHR (ECHR-P1) and the ECtHR's case law. According to Article 6(3) TEU, the rights in the European Convention on Human Rights constitute general principles of EU law: it is therefore reasonable to look at Article 3 ECHR-P1 to define the EU's standard of democratic elections.

According to Article 3 ECHR-P1, elections have to be free, take place at reasonable intervals, by secret ballot, and under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. This standard is equally to be met for the election of the European Parliament under Articles 14(3) TEU and 39(2) of the Charter of Fundamental Rights (see Article 53 of the Charter). Thus, it must be recognised as an established EU standard for democratic elections that must be met in order to ensure the democratic accountability of national governments under Article 10(2), second subparagraph, TEU.

Drawing from Article 3 ECHR-P1, an election that ensures 'the free expression of the opinion' requires that voters can inform themselves freely, that candidates (especially opposition candidates) can conduct an unobstructed election campaign, that public media reports in an unbiased way and that private media can report without state interference. Some of these elements are protected by the 'political' fundamental rights that are enshrined in the Charter, such as freedom of expression (Article 11(1)), freedom of information (Article 11(1)), freedom of the media (Article 11(2)), freedom of association (Article 12(1)) and freedom of assembly (Article 12(1)). All of these fundamental rights can be found both in the ECHR and the Charter and were historically considered general principles of EU law based on the common constitutional traditions of the Member States.

Besides accountability via elections, national parliaments must have ongoing minimum rights of control over the government (as exemplified in *Cherry/Miller No. 2* by the UK Supreme Court[22]). These rights include, inter alia, information rights, effective possibility to engage the public (for example via independent media), but also inter-institutional rights such as the right to vote the government out of office (for example by a vote of no confidence).

21 Ibid., paragraph 10.

22 Joelle Grogan, 'The Rule of Law, not the Rule of Politics. Commentary on the Cherry/Miller No. 2 Judgment', *Verfassungsblog*, 1 October 2019.

7. Conclusion

The actions of the respective governments in Hungary and Poland during the COVID-19 pandemic demonstrated that democracy is a fragile commodity in the Member States. How to address this curtailment of democratic principles in the Member States lies at the heart of the democratic functioning of the EU. This Chapter aimed to explore possible pathways for the Commission to bring infringement proceedings against a Member State which curtails democratic principles. We have demonstrated that Article 10(2) TEU contains legal obligations that may serve as a substantial basis for infringement proceedings against Member States with autocratic tendencies. We argue that the Commission should break new ground by operationalising further Articles of the Treaties as this approach has proven successful in the rule of law crisis.

The Article to protect democratic values in the Member States is present in the Treaties and should be carefully considered by the Commission in the ongoing value crisis. As the CJEU has stated, Article 10 TEU operationalises the value of democracy enshrined in Article 2 TEU. Article 10(2), second subparagraph, TEU requires that Member States' governments are democratically legitimised through elections. There must be a continuous chain of legitimacy from the electorate to the government. Article 3 ECHR-P1 provides the necessary guidance in the interpretation of democratic elections, whereas illustrations of parliamentary rights of control can be found in constitutional traditions of the Member States. In conclusion, we argue that the Commission should seriously consider bringing infringement proceedings on the basis of Article 10(2), second subparagraph, TEU if further instances of attacks on the principle of representative democracy occur in the Member States.

Chapter 13

THE MIGRATION AND ASYLUM CRISIS IN TIMES OF PANDEMIC

Silvia Bartolini

1. Introduction[1]

The COVID-19 outbreak is acting as a 'force multiplier' exacerbating the already existing shortcomings and weaknesses of the EU migration and asylum policy. It is challenging the EU and its Member States to adapt containment measures to the reality of the asylum and return procedures in a way which protects public health, whilst simultaneously ensuring respect of Directive 2013/32 on common procedures for granting and withdrawing international protection ('Directive 2013/32'), Directive 2013/33 laying down standards for the reception of applicants for international protection ('Directive 2013/33'), Directive 2008/115 on common standards and procedures in Member States for returning irregularly staying third-country nationals ('Directive 2008/115'), and EU fundamental rights as enshrined in the Charter.

The COVID-19 pandemic is further exposing how *individualist* reactions by Member States are particularly deleterious to the survival of a common EU migration and asylum policy, and to the preservation of the common principles and values upon which the EU is founded. Particularly emblematic is the new restriction on access to asylum in Hungary, as a response to the pandemic. Third country nationals arriving at the Hungarian border wishing to seek refuge in the EU are automatically turned away and directed to a designated Hungarian Embassy, where they will be able to lodge their application for international protection.[2] This calls into question respect for core procedural and substantial safeguards enshrined in Directive 2013/32 and Directive 2013/33 as well as the principle of non-re-

1 This Chapter was finalised on 15 November 2020. It should be further noted that this contribution comes within the scope of the project Séminaire Interdisciplinaire d'Etudes Juridique de l'Université de Saint-Louis Bruxelles et Université Catholique de Louvain.

2 See the Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger.

foulement and the right to asylum, as enshrined in Article 19(2) and Article 18 of the Charter respectively.

At the same time, the ongoing health crisis is offering the EU a real chance to address the widespread concerns of its inability to come forward with a common and sustainable solution and overcome Member States' reluctance to work together for a common policy on migration and asylum based on rights' protection, solidarity and efficiency. From this perspective, the Commission has presented, on 23 September 2020, a new Pact on Migration and Asylum which addresses how to tackle the shortcomings and weaknesses of the EU asylum and migration system and considers how the EU can anticipate and react swiftly to situations of crisis.

The above COVID-19 related challenges and developments vis-à-vis asylum and migration issues will be discussed in section 2.

In these confusing times, the Court of Justice's contribution is essential to the survival of the EU as a community based on common values and principles. Indeed, in two key rulings delivered during the first wave of the COVID-19 pandemic, on 2 April 2020 concerning the failure of certain Member States to accept quotas of applicants for international protection, (*Commission v Poland, Hungary and Czech Republic* (Joined cases C-715/17, C-718/17, C-719/17), and on 14 May 2020, concerning the detrimental impact of an amendment to Hungarian asylum law ('Law No XX of 2017') (*FMS and Others* (Joined cases C-924/19 and 925/198), the Court of Justice strongly reconfirmed that the principle of solidarity, the rule of law and respect for EU fundamental rights should guide the EU and its Member States through times of crisis (section 3).

2. The EU's Challenges and Developments in Times of Pandemic

The spread of the virus and the enactment of containment measures not only had a direct impact on our daily lives, but also on third country nationals, who are caught within the threads of asylum and return procedures.

2. 1 Reception and Detention Centres

The biggest challenges are twofold. The first challenge relates to the reception centres where applicants for international protection are stranded until national authorities decide their future. According the Fundamental Rights Agency's first quarterly bulletin of the year ('FRA bulletin'),[3] those centres pose a particular problem when it comes to putting in place the required hygiene measures and social distancing rules, because they are overcrowded and usually without adequate sanitation facilities. The same challenge is posed by immigration detention centres that are also overcrowded.[4]

3 FRA bulletin 'Migration: key fundamental rights concerns', April 2020.

4 FRA bulletin, p. 22 and p. 29.

The hotspots in the Greek islands are a particular cause for concern because - despite the risk of COVID-19 - applicants for international protection are placed in overcrowded, inadequate tents with limited access to food, basic sanitation systems and health care (Human Rights Watch Dispatches[5]). This ongoing situation is producing real, serious and continuing detriment contrary to Article 4 of the Charter, which provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment. Particularly emblematic of this dire situation was the Moira camp on the island of Lesbos, which burst into flames on the evening of 8 September 2020, leaving nearly 13,000 individuals, including children, without shelter or access to food and essential services (Human Rights Watch Dispatches[6]). Arguably, the assistance provided to Greece after the blaze via the EU Action Plan[7] and Germany's acceptance of 1,500 applicants for international protection, was only an interim solution to a bigger and deeper structural problem, namely the failure of the EU hot spots approach, and more generally the EU reception system's ability to comply with the common standards for reception, as enshrined in Directive 2013/33.[8]

Throughout the first wave of COVID-19, the EU, along with its Member States, has tried to adapt containment measures already in place within their territory to the reality of reception and immigration detention centres. According to the European Asylum Support Office's report on asylum and reception systems, published in June 2020,[9] information on hygiene and restrictions introduced by governments, including social distancing measures, were made available in most of the Member States to the *residents* of those centres.[10] It has also emerged from the EASO report that most Member States have created emergency shelters to increase capacity, and decrease occupancy rates, in line with social distancing rules, as well as enabling newly-arriving applicants to be isolated as a precautionary measure.[11] Nevertheless, only some Member States have put in place strict prevention and hygiene rules.[12]

With regard to the most vulnerable, namely older people and people with underlying medical conditions, unaccompanied children, people with disabilities, pregnant women, and those with newborns, the EU and its Member States could certainly have done much more to protect them. In particular, the situation of unaccompanied children is highlighted in the FRA's bulletin as a specific concern.[13] Indeed, during the COVID-19 outbreak, many children continued to live in precarious and overcrowded conditions. In addition, although the EU Commission's Action Plan for immediate measures to support Greece highlighted the need for the immediate relocation of unaccompanied minors from the Greek

5 Eva Cossé, 'Greece's Moria Camp Fire: What's Next?', Human Rights Watch 12 September 2020.

6 Ibid.

7 European Commission, ' 'Extraordinary Justice and Home Affairs Council: Commission presents Action Plan for immediate measures to support Greece', press release of 4 March 2020.

8 Mouzourakis, 'The reception of asylum seekers in Europe: failing common standards', *EU Migration Law BLog*, 20 April 2016.

9 EASO report 'COVID-19 emergency measures in asylum and reception systems', 2 June 2020.

10 EASO report, p. 14.

11 EASO report, p. 16.

12 EASO report, pp. 15, 17 and 22.

13 FRA bulletin, p. 8.

islands, in reality only a few unaccompanied children were actually relocated; 12 to Luxembourg and 47 to Germany.[14] The EU's highly anticipated Strategy on the Rights of the Child (2012-24) raises hopes vis-à-vis a transversal application of the fundamental rights of the child, as enshrined in Article 24 of the Charter, and most notably respect for the principle of the best interests of the child. Arguably, that principle calls for national authorities to take action and find suitable and immediate solutions for children caught between the threads of migration and asylum procedures.

Finally, it is notable that the Commission's advice on implementing rules on asylum, return and resettlement, while the COVID-19 pandemic is ongoing, recommends the suspension of the Dublin procedure.[15] According to the EASO report, several Member States had indeed suspended the transfer of third country nationals seeking international protection under Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person ('Dublin III Regulation').[16]

2.2 Access to International Protection

The second challenge is to ensure access to international protection in times of pandemic.

On the one hand, the health emergency led the EU to close its external borders, and the Member States to close their internal borders. Italy, in particular, without prohibiting access, announced that its ports were unsafe. Similarly, Malta announced that it was not in a position to guarantee the rescue of third country nationals on board any boat, ship or other vessel, nor to ensure the availability of a safe place on its territory to any persons rescued at sea.[17] This meant that many individuals seeking international protection were stranded at sea on boats with no Member States willing or wanting to receive them. The effect has been to deprive them of the possibility of access to the asylum procedure and their right to claim protection under Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees, or for persons eligible for subsidiary protection, and for the content of the protection granted.

Particularly emblematic of this approach is Hungary's indefinite suspension of the admission of irregular migrants to transit zones[18] and the creation of more stringent rules with regard to access to international protection, namely via Act LVIII on Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger, which essentially prevents third country nationals

14 EASO report p. 22.

15 European Commission, 'Coronavirus: Commission presents guidance on implementing EU rules on asylum and return procedures and on resettlement', press release of 16 April 2020..

16 EASO report, p. 13.

17 EASO report, p. 9.

18 EASO report, p. 9.

wishing to apply for international protection from entering its territory. This has been criticised because, 'Based on the new act, people arriving at the border of Hungary with the wish to seek asylum will be turned away and directed to declare such intent at a designated Hungarian Embassy. This may expose asylum-seekers to the risk of refoulement which would amount to a violation of the 1951 Refugee Convention and other international and regional human rights instruments to which Hungary is a State Party'.[19]

On the other hand, the respect for containment measures has also affected the opportunity for asylum seekers to have access to asylum procedures. For instance, in order to respect physical distancing, the registration of applications, as well as personal interviews were suspended.[20] In their quest to address the situation, the Member States have more or less successfully put in place interim solutions, such as remote hearings, electronic tools, or automatic extensions to deadlines.[21] In this regard, the EASO report takes the view that 'e-administration' measures, such as (semi-)automated systems of registration of basic data supporting the making/lodging process, remote interviewing via IT means, and various systems of electronic data-sharing and processing, such as electronic case files, should not only be *used* throughout the COVID-19 emergency but on a more permanent basis, in order to render the asylum and return procedures more efficient.[22]

Finally, when the Commission presented its new proposal for tackling the shortcomings and weaknesses of the EU asylum and migration systems on 23 September, it included a set of recommendations, regulation proposals, and amendments to existing directives and regulations, revolving around the following five main themes ('new Pact on Migration and Asylum'), one of which specifically addresses emergency situations.

2.3 The Commission's New Pact on Migration and Asylum

First, the Pact proposes a new Migration Preparedness and Crisis Blueprint that will enable the EU to cope with situations of crises and force majeure with anticipation, preparedness and coordination. The Blueprint will include all existing crisis management tools and set out the key institutional, operational and financial measures and protocols. On this basis, operational support would be immediately deployed upon request by a Member State.[23] Along those lines, the Commission also proposes to create a European task force to resolve the emergency situation in the Hotspots on the Greek island in a durable way.[24]

19 UNHCR, 'Access to asylum further at stake in Hungary - UNHCR', press release of 29 June 2020.

20 EASO report, p. 10.

21 EASO report, p. 6.

22 EASO report p. 6.

23 Commission Communication of 23 September 2020 'A New Pact on Migration and Asylum', COM (2020) 609 final ('Communication from the Commission'), p. 13.

24 European Commission, 'Migration: A European taskforce to resolve emergency situation on Lesvos', press release of 23 September 2020.

Second, the Pact addresses a more efficient management of the external borders. In order to allow for swift determination of the status of a person and the procedure applicable to their arrival at the EU's external border, the Commission proposes pre-entry screening of all third country nationals and applications for international protection, to be conducted via border procedures. In the spirit of speeding up the asylum process, the Commission brings forward two standards of asylum procedures.[25]

The asylum border procedure would be used for asylum claims with low chances of success, namely those presented by applicants misleading the authorities, originating from countries with low recognition rates, or posing a threat to national security, without requiring legal entry to the Member State's territory. This would imply that lodging an application for international protection does not provide for an automatic right to enter the EU. The *normal* asylum procedure will be triggered for the *other* asylum claims. The Commission considers that this would bring clarity for those with well-founded claims. For those whose claims have been rejected in the asylum border procedure, an EU return border procedure would apply immediately.[26] This would remove the automatic suspensive effect of an appeal, namely the right to remain in the Member State's territory while a decision is pending.

However, it should be noted that under the Commission's proposal the most vulnerable are excluded from the application of border procedures, in particular, 'unaccompanied children and children under the age of 12 together with their families should be exempted from the border procedure unless there are security concerns'.[27] This recognises that throughout the whole asylum procedure, child-centred procedural guarantees and additional support should be provided, including through effective alternatives to detention, promoting swift family reunification, and ensuring that the voice of child protection authorities is heard. It should be further guaranteed that throughout the asylum process, children have adequate accommodation and assistance, including legal assistance, prompt and non-discriminatory access to education, and early access to integration services.[28]

Third, a new solidarity mechanism to cope with migratory pressure or disembarcations for search and rescue operations. This mechanism would be provided in a new Asylum and Migration Management Regulation and in a nutshell it will be triggered on the basis of a Member State's series of assessments and reports of its situation of particular pressure. It is essentially focused on relocation and return sponsorship, with the latter consisting of a Member State providing all necessary support to the Member State under pressure to swiftly return those who have no right to stay, with the guarantee that the supporting Member State will take full responsibility where return is not carried out within a set period.[29]

25 Communication from the Commission, p. 5.

26 Ibid, p. 6. Communication from the Commission, p.6.

27 Ibid, p. 9.

28 Ibid.

29 Ibid, pp. 7-8.

Fourth, a common EU system for returns is proposed, which combines stronger structures inside the EU with more effective cooperation with third countries, for return and readmission. In particular, this system should be developed by building on the recast of the Return Directive and effective operational support including through Frontex.[30] It should further integrate return sponsorship and serve to support its successful implementation. Accordingly, the Commission proposes to create the role of a Return Coordinator within the Commission and of a Frontex Deputy Executive Director on Returns.[31]

Finally, comprehensive partnerships with third countries are proposed. The Commission places great emphasis on the need for the EU and its Member States to cooperate with third countries on migration control and readmission agreements via bilateral engagements, combined with regional and multilateral commitments.[32] Although the externalisation of asylum and migration responsibilities may appear to 'perform' well as it *de facto* makes it very difficult for third country nationals to reach the EU territory, it raises several concerns especially when 'partnerships' are based on soft law instruments and concluded with third countries, such as Libya and Turkey, where third country nationals are exposed to EU fundamental rights abuses. This can clearly jeopardise the principles and values that the EU wishes to protect and promote.

3. The Court of Justice's Essential Contribution in Times of Crisis

During the pandemic, the role of the Court of Justice has been particularly crucial as it has brought to the forefront the principles and values upon which the EU is founded and reiterates that those very principles and values should guide the actions and reactions of all the Member States, especially in times of crisis. From this perspective, two key rulings should in particular serve as a guidance through this pandemic and as a warning that no crisis can be solved by the Member States acting alone and circumventing those core principles and values.

The first ruling is *Commission v Poland, Hungary and Czech Republic* where the Court of Justice placed emphasis on the centrality of the principle of solidarity in asylum matters and on the limited nature of Article 72 TFEU which can never be used as an easy getaway from asylum obligations.

The second ruling is *FMS and Others* where the Court of Justice made clear that Member States cannot set up national rules derogating from EU law on the pretext that they have to deal with an existing situation of crisis. Member States must ensure respect for the rule of law and the procedural and substantive guarantees provided in Directive 2013/32, Directive 2013/33 and Directive 2008/115.

30 Ibid, pp. 10-11.

31 Ibid.

32 Ibid, pp. 20-23.

3. 1 Commission v Poland, Hungary and Czech Republic

The Court of Justice's ruling in *Commission v Poland, Hungary and Czech Republic* must be read through the lens of the EU's response to the asylum and migration crisis. In 2015, a massive and sudden flow of third country nationals - escaping from the horrors of the Syrian civil war - crossed the EU's external borders into Greece and Italy in the hope of finding immediate refuge in the EU. As frontline Member States, Greece and Italy soon became unable to cope with the large numbers of applicants for international protection. With their asylum and reception systems seriously disrupted, they could not guarantee the right to asylum as enshrined in Article 18 of the Charter.[33]

Greece and Italy's inability to process asylum applications inevitably led to secondary movements towards Northern Europe, prompting Member States such as Germany, Austria, Slovenia, Sweden and France to temporarily reintroduce internal border controls and fuelled the surge of extremist political parties challenging the core of EU values and principles.

As a response the Council adopted - on the basis of Article 78(3) TFEU - Decision 2015/1523 and Decision 2015/1601 introducing a temporary relocation mechanism for the benefit of Greece and Italy. Whilst Decision 2015/1523 laid down a system of voluntary quotas regarding the 40,000 applicants for international protection, Decision 2015/1601 provided a system of mandatory quotas for the relocation of an additional 120,000 applicants. Those Decisions formed part of a series of measures aiming not only at relieving the most exposed Member States from the significant pressure on their asylum and reception systems but also at improving those systems.

The temporary relocation scheme made possible a derogation from the Dublin III Regulation as it discharged Greece and Italy – the first countries of arrival - of their responsibility as primary responsible states to process applications for international protection and transferred that obligation to the other Member States.

The adoption of Decision 2015/1523 and Decision 2015/1601 was unwelcome in Eastern Member States and marked a bloc-type resistance to the relocation of applicants for international protection in Eastern Member States. As an immediate expression of their discontent, Hungary and Slovakia, supported by Poland, brought an action for an annulment of Decision 2015/1601 pleading the illegality of the mandatory relocation system. The Court of Justice in *Slovakia and Hungary v Council* (Joined cases C-643/15 and C-647/15) dismissed the action by confirming the lawfulness of the relocation measures, placing emphasis on the fact that those measures were founded on the principle of solidarity and a fair sharing of responsibilities, entailing that where the asylum system of a Member State is under great strain, there is an obligation for the other Member States to intervene and help.

Notwithstanding the judgment of the Court of Justice and the pressure from the Commission to imple-

33 Patrick Weil and Pierre Auriel, 'Political Asylum and the European Union. Proposals to overcome the Impasse', *La Revue des Droits de l'Homme*, 2018, p. 4.

ment the relocation programme, three Member States, namely Poland, Hungary and the Czech Republic, refused to take in their fair share of applicants for international protection. Indeed, in December 2015, while Poland pledged to the Commission that it would accept relocation of 100 applicants for international protection, none of those applicants were relocated and no further pledges were made. Hungary did not at any point pledge to accept any applicants. Lastly, in February and in May 2016, the Czech Republic, having initially indicated that 50 applicants for international protection could be relocated to its territory, accepted only 12 applicants which were relocated from Greece, and made no further pledges. Consequently, the Commission brought the matter before the Court of Justice which declared that those Member States had failed to fulfil their obligations under EU law.

Two main principles arise from the Court of Justice' ruling which should guide the Member States' actions and reactions in these times of pandemic when dealing with asylum and migration matters.

First, is the principle of solidarity which necessarily implies burden sharing. Member States should not refuse to help and work together instead of wrangling with each other over which of them should take in applicants for international protection who manage to cross the EU's external border. Transposing this principle in the ongoing health crisis would imply that the Member States ought to overcome any reluctance and start relocating a significant number of asylum seekers from the Greek islands, starting from the most vulnerable. Further, it would necessarily imply working together - in full compliance with the principles and values upon which the EU is founded - for the ongoing EU migration and asylum policy reform to come to fruition.

The second principle is that Article 72 TFEU does not function as a general clause of prevention and cannot not be used as an easy getaway from asylum and migration obligations. The Court of Justice made clear in *Commission v Poland, Hungary and Czech Republic* that Article 72 TFEU which states that Title V shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security has to be interpreted in a strict way.[34] In other words, it should not be read as conferring leeway on Member States to depart from the provisions of EU law based on no more than a reliance on the responsibilities related to the maintenance of law and order and the safeguarding of internal security, but instead, requires that they prove that it is *really* necessary to *use* that derogation order to exercise their responsibilities on those matters. In national proceedings, whilst it is true that the national competent authorities enjoy a wide margin of discretion when determining whether or not there are reasonable grounds to consider an applicant for international protection as a danger to national security or public order, they can only rely on Article 72 TFEU where there are consistent, objective and specific evidence that provides grounds for suspecting that an applicant for international protection represents an actual or potential danger to national security or public order.[35] Therefore, Member States cannot not rely on Article 72 TFEU for the purposes of general prevention and without establishing any direct link with a particular

34 *Commission v Poland, Hungary and Czech Republic*, paragraph 144.

35 *Commission v Poland, Hungary and Czech Republic*, paragraph 159.

case. In times of pandemic, this principle calls for the Member States to refrain from using the ongoing crisis as a pretext to automatically restrict access to asylum procedure on the basis of Article 72 TFEU.

3.2 FMS and Others

The Court of Justice was called on in *FMS and Others* to assess the detrimental impact of Law No XX of 2017 on the rights of applicants for international protection. This law in essence imposes a mandatory and unlimited detention on all applicants for international protection and those whose applications have been rejected and are waiting to be returned to their country of origin, by depriving them of the substantial and procedural guarantees provided in Directive 2013/32, Directive 2013/33 and Directive 2008/115 as interpreted by the Court of Justice.

It is notable that the enactment of Law No XX of 2017 also propelled the Commission to initiate infringement proceedings pursuant to Article 258 TFEU against Hungary - before the pandemic outbreak - on the ground that by enacting that law it failed to fulfil its obligations with regard to Directive 2013/32, Directive 2013/33 and Directive 2008/115 (C-808/12) (whilst Advocate General Pikamäe has delivered his Opinion essentially endorsing the Commission's claims, the Court of Justice's judgment is still pending).

It should be noted further that the Commission also commenced infringement proceedings before the outbreak of the pandemic against Hungary (C-821/19), concerning the criminalisation under Hungarian law of support to asylum applicants (known as the 'Stop Soros' law), and the unlawful limitation of the right to asylum via the introduction of new non-admissibility grounds for asylum applications (the Court of Justice's judgment is still pending, as is the Advocate General's Opinion).

The Court of Justice's ruling in *FMS and Others* demonstrates how *individualist* reactions by Member States vis-à-vis asylum and migration issues, are particularly deleterious to the EU legal order, to the survival of a common EU migration and asylum policy, and to the preservation of the common principles and values upon which the EU is founded.

Three main principles arise which should guide the Member States in these times of pandemic.

First, respect for Article 47 of the Charter throughout the asylum and migration procedures. With particular regard to the return procedure under Directive 2008/115, every return decision (also those amending the initial return decision by amending the country of destination) must be capable of being appealed or reviewed before a judicial or administrative authority or body composed of members who are impartial and independent. This entails that Member States - even in times of health crisis - should ensure that a third country national is able in accordance with Article 47 of the Charter to lodge an appeal before an authority which 'function[s] autonomously without receiving orders or instructions from any source whatsoever, being thus protection against external interventions pressure liable to

impair the independent judgment of its member and to influence their decisions'. [36]

Second, national courts have the obligation to disapply any provision of national law, which is contrary to an EU provision that has direct effect. Consequently, even if there is an absence of a remedy to ensure effective judicial protection of EU rights under national law, there is a duty on the national court to hear an action contesting the legality of an administrative return decision under EU law. [37] This is particularly relevant especially in times of pandemic where Member States such as Hungary have introduced new restrictions on access to asylum. On the basis of the principle of sincere cooperation, the national courts are called to restore legality and ensure the realisation of justice under EU law. In this light, where a judgment of the Court of Justice exists finding that national legislation that allows an application for international protection to be rejected as inadmissible, on the ground that the person concerned arrived in the territory of the relevant Member State via a third state in which they were not exposed to persecution, or at risk of serious harm, or in which a sufficient degree of protection is granted, is incompatible with EU law, the national court will have to accept to examine a new asylum application. Otherwise, the applicant's right to asylum under Article 18 of the Charter would be seriously compromised.[38]

Finally, a national court, hearing an action against a return decision, may examine the validity of that decision when it is based on the ground that is contrary to EU law. If such a decision is annulled, the removal of the third country national concerned should be postponed, as required by Article 9(1)(a) of Directive 2008/115, where removal is in breach of the principle of non-refoulement.[39]

Third, Member States must ensure that the detention measures are imposed in strict compliance with the procedural and substantive safeguards provided in Directive 2013/32 and Directive 2008/115. In *FMS and Others*, the Court of Justice makes it clear that no Member State can circumvent those obligations by designing disguised detention centres such as the Roszke and Tompa transit zones in Hungary.[40] Indeed, the Member States, when contemplating a detention measure against an applicant for international protection and/or an irregularly staying third country national, have to comply with the conditions and guarantees enshrined in Directive 2013/32 and Directive 2008/115 also when applying border procedures. The respect of EU law cannot be *suspended* under the pretext of an ongoing situation of crisis.

36 *FMS and Others*, paragraph 135.

37 *FMS and Others*, paragraph 141.

38 *FMS and Others*, paragraphs 192 to 199.

39 *FMS and Others*, paragraphs 200 to 203.

40 It should be noted that after the Court of Justice's ruling in *FMS and Others*, the transit zones were closed.

4. Concluding Remarks

The COVID-19 pandemic has even more strongly shown the necessity for the EU to find a common and sustainable solution to the challenges the EU faces in the field of asylum and migration law as described above, and one which balances more effective control of the EU's external border with respect for EU principles and values. Entry into the second wave of COVID-19 calls for the EU and its Member States to put in place containment measures that address the specific issues raised above concerning reception and detention centres, and access to international protection, namely to ensure respect for the substantive and procedural guarantees provided in Directive 2013/32, Directive 2013/33 and Directive 2008/115. The role of the Court of Justice and the national courts, as has been demonstrated, is essential in providing guidance on the next steps. Finally, the New Pact of Migration and Asylum should also serve as guidance for the Member States in these times of pandemic in the hope that it can realistically offer a comprehensive and viable solution to tackle a crisis in line with the EU's principles and values.

Chapter 14

EFFECTIVENESS VERSUS INTEGRITY - HOW COVID-19 IS AFFECTING PRIVACY

Christina Etteldorf

1. Introduction[1]

The current coronavirus crisis is having a significant impact on social and economic life. It is not only the virus itself that restricts our freedoms, but above all the measures taken to contain it. To be used in an effective way, the various measures need one thing more than anything else: data. The more extensive and specific the database, the more uncomplicated and rapid the access to it, the more accurate the risk assessments and the more effective preventive measures can be – in principle. The opposite is true, however, regarding the right to privacy if the information basis also includes personal data. The greater the anonymisation of such data, the more decentralised the way it is stored and the more 'superficial' the data, the more likely it is that the integrity of the private sphere of individuals is preserved. Reconciling health protection and the protection of privacy presents the EU Member States with unexpected challenges.

2. It's all about Data – it's all about Privacy

As diverse as the measures that are taken, or at least that are considered to stop the spread of the pandemic, are, so are the data that may be concerned by these different measures. In addition to the usual data exchange that regularly occurs when individuals are in contact with each other, the discussion currently focuses mainly on health data, location or connection data, as well as communication data. Health data are of interest to a variety of recipients. Employers are interested in information on the health status of their employees in order to be able to fulfil their operational protection obligations; authorities in order to be able to take individual orders and further preventive health protection measures; research institutions in order to analyse the spread of the virus. Even for private individuals it is

1 This Chapter was finalised on 16 May 2020.

important and ideal to know more about a potential risk of infection in relation to their social contacts. The use of location data is discussed in the context of assessing the effectiveness of physical ('social') distancing and confinement measures, warning and trac(k)ing applications, and the identification of 'infection hotspots'. Communication data is also used to track contacts, which is hoped to be achieved by analysing chats in social networks, for example.

The data mentioned above are regularly personal data, namely data which allow the identification of a specific or at least identifiable natural person. Although the term 'anonymisation' is often referred to in the context of coronavirus measures, it does not necessarily mean that the data is indeed anonymous in the legal sense. Anonymisation is often not possible at all, only possible to a limited extent or not in a meaningful way. The 'real' anonymisation, the irrevocable and complete removal of personal information, would often contradict the purpose of the use of that data for the preventive measures mentioned. Moreover, it often cannot be ruled out (for example in the case of certain location data) that the seemingly anonymous data could be used to draw conclusions on identifiable persons by combining the data with further information sources.

Although the types of data referred to are therefore very different, they all have in common that they are protected by the fundamental right to privacy guaranteed in Article 8 of the EU Charter of Fundamental Rights and by national constitutional law, which is given expression to in EU and national data protection law. Therefore it is not a question of whether these types of processing of data encroach on the rights of the individual, but the extent to which they do so depends on the category of data (health, location, and so on) as well as on the degree of detail they disclose.

3. A Moral Dilemma

Everyone has the right to the protection of personal data concerning him or her (Article 8(3) of the Charter). However, this right is not absolute, and may be subject to limitations. Individuals may be obliged to accept encroachments on their privacy or to actively disclose something if this serves a legally protected interest, which must be given priority in individual cases, such as public health.[2]

In addition to such legal duties to tolerate certain measures or cooperate, which arise, for example, vis-à-vis employers or authorities, (non-binding) social duties also play an important role in the context of privacy protection. The individual bears a social obligation towards society, which can be well illustrated by the solidarity 'movement' under the hashtag #StayHome. This responsibility, and also the will of the individual to be as cooperative as possible in order to contribute to the containment of the pandemic, can tempt people to be careless in exercising their own privacy rights. At present, health protection, or more specifically 'the protection of life and limb', simply has better and more catchy arguments than data protection, also and above all in the public perception. This is all the more dangerous if individuals do not have data protection-friendly alternatives to protect themselves and others.

2 On this, see also the contribution in Part 2 by Oreste Pollicino (Chapter 15 below).

The voluntary download of an immature 'corona app' or the voluntary reporting of a person's state of health to third parties, which some data protection authorities have called for as a 'social obligation', is certainly a noble idea and based on the best of intentions. However, the actual voluntary nature (and thus legality...) of such actions (and the data processing involved...) must at least be questioned in light of social pressure and the lack of alternatives. It is precisely against the background of this moral dilemma between health protection and privacy protection that it is extremely important for state actors to create suitable procedures that take both interests into account. The lack of a legal basis with appropriate protection mechanisms should not be paid for by individuals with the loss of their rights.

4. The Protection of Privacy is Crisis-proof

"Europe's data protection rules are the strongest in the world and they are fit also for this crisis, providing for exceptions and flexibility". Didier Reynders, Commissioner for Justice of the European Commission, expressed this conviction in the context of fighting the coronavirus in a press release at the beginning of April.

Indeed, the rules of the GDPR[3] and the ePrivacy Directive[4] contain comprehensive rules on the processing of personal data, in particular special rules on health and location data, which require, inter alia, legality, transparency, data minimisation and purpose limitation as well as compliance with transparency obligations and data subjects' rights.

Member States may provide for exceptions to these EU rules on the national level in order to pursue specific public interest objectives such as the protection of public health. However, not only do the respective provisions of the GDPR and the e-Privacy Directive make this subject to the reservation of a necessary, appropriate and proportionate legal basis respecting data subjects' rights, but the obligation to respect fundamental rights also requires a balancing with other legitimate interests. According to the Court of Justice of the European Union (CJEU), this is directed both at the legislator and the authorities in applying, and at the courts in interpreting, the respective law. The CJEU provides guidance on the weighing of the various interests as well as on the limits of the scope for implementation.

This also applies in times of crisis.

5. Is the Protection of Privacy still crisis-proof?

With its development in the 1970s/80s, data protection law is still a relatively young area of law. It has not yet been confronted with an international pandemic of this magnitude, which is associated with a multitude of restrictions on individual liberties. Furthermore, the pandemic has demanded rapid action

3 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46.

4 Directive 2002/58 of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

under pressure with hardly any time for supranational coordination. While in theory national exceptions to EU requirements would have to be very similar due to the orientation towards (European) fundamental rights and the principle of proportionality as given expression to by the CJEU, there is plenty of room for national exceptions.

This applies above all in the area of health protection - a regulatory matter which is largely the responsibility of the Member States. The CJEU has consistently held that, in order to assess whether a Member State has observed the principle of proportionality in this area, account must be taken of the fact that the health of persons rank foremost among the rights and interests protected by the EU founding treaties, namely the TFEU, and that it is for the Member States to determine *the degree* of protection which they wish to afford to public health, and the way in which that degree of protection is to be achieved.[5] Since that level may vary from one Member State to another, Member States must be allowed a measure of discretion.

Although the essence of the fundamental right to privacy must remain unaffected, there is still room for restrictions, the degree of which can be influenced by national (constitutional) traditions or the actual impact of the pandemic in a particular area. Statements at the EU level on crisis resilience of EU data protection law should therefore be considered with reservation.

6. Threats to Consistency

The intrusion of privacy by coronavirus measures is not only threatening individual rights, but the diversity of approaches is also detrimental to the consistent application and enforcement of data protection law within the EU, which was the primary objective when the GDPR was introduced as a directly applicable regulation. This is demonstrated not only by differences in opinions of national data protection authorities on compliance regarding crisis measures, but also by different actions taken by governments.[6] Although early attempts were made at the EU level to take countermeasures, for example through the European Commission's Communication on data protection concerning corona apps and the use of mobility data,[7] many emergency laws are already in force or on the way to being so, which collide with the (non-binding) requirements set out there. This can also lead to lasting differences in the level of data protection within the EU, given that once systems have been introduced they are often difficult to reverse. In this context, it is worth remembering the rules on (telecommunication) data retention, which are still a concern for courts and academia today after nearly two decades of discussion since their initial introduction.

5 See for example the Court of Justice's judgment in *Malta Dental Technologists Association* (C-125/16).

6 Christina Etteldorf, 'EU Member State Data Protection Authorities Deal with COVID-19: An Overview', 6 *European Data Protection Law Review*, 2, preprint, 2020. [Note of the editors: the final and updated version of this study is available here].

7 European Commission, Communication of 16 April 2020 'Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data Protection', C(2020) 2523 final.

Chapter 15

FIGHTING COVID-19 AND PROTECTING PRIVACY UNDER EU LAW: A PROPOSAL LOOKING AT THE ROOTS OF EUROPEAN CONSTITUTIONALISM

Oreste Pollicino

1. Introduction[1]

Singapore: it is a normal May afternoon in the Pandemic season in Bishan-Ang Mo Kio Park.

A four-legged robot, fitted with a camera, is walking through the park staring at visitors. One's first impression might be that it is a new walking surveillance tool developed in relation to the COVID-19 pandemic. However, as is often the case with first impressions, this would be misleading, or even incorrect.

It is true that the robot is fitted with cameras: however, they are not able to track or recognise specific individuals, and do not collect any personal data. The robot only broadcasts a recorded message reminding park visitors to observe safe distancing measures.

Although the first impression is surely incorrect as regards the intentions of the robot, from a more general viewpoint it certainly does hit the mark: indeed, as Korean philosopher Byung-Chul Han has argued, 'to confront the virus Asians are strongly committed to digital surveillance'.

This robot indeed is just one of the surveillance instruments in times of pandemics. Contact tracing apps have played a critical role in providing a granular map of the virus since the very beginning. While in Europe, most countries are still debating the safest technological model to implement, this has not occurred when looking to the east.

Before even thinking about the law, we must compare different cultural models. On the one hand there

1 This Chapter was finalised on 16 May 2020.

is the Asian model rooted in collectivism, where 'the term "private sphere" does not appear', and 'has facilitated the construction of a whole infrastructure for surveillance that is highly effective in containing an epidemic'. On the other hand, there is the individualist European model. According to the Korean philosopher, this is less effective because the systemic use and uncontrolled use of big data is simply not compatible with the European constitutional matrix for protecting fundamental rights in general, and privacy in particular.

In the light of this background, I shall attempt to show that the narrative concerning the cultural difference between those two models is well-founded regarding legal implications whilst at the same time being totally misleading in the ultimate idea that it seems to give. A trade off must be made between the degree of precision of the virus map and the need to respect the quite demanding European data protection regime.

2. The rights to privacy and to personal data under Article 52 of the Charter and the GDPR

With regard to my first aim, as far as the allegedly less effective (in terms of the fight against the virus) European contact tracing model is concerned, my take would be that the beauty of European constitutionalism could be precisely what might appear to be an obstacle from a Far Eastern perspective. Even the most necessary and important goal (such as in this case ensuring safety and, ultimately, protecting life) cannot be achieved by interfering with the essence of contrasting fundamental rights. And the rights at issue, in this case the rights to privacy and to personal data, should not be violated in a disproportionate manner.[2] At the end of the day this is the spirit (and the letter) of Article 52 of the Charter of Fundamental Rights of the European Union. The Court of Justice has not done anything to hide (see the judgments in *Digital Rights Ireland*, C-293/12 and C-594/12, and *Schrems*, C-362/14) how this spirit has shaped its case law, creating a super-fundamental right to privacy even before the adoption of GDPR.

In other words, even without the legendary GDPR, it would already be enough to read Article 52 of the Charter carefully in order to assert that the EU Bill of Rights does not allow for digital surveillance systems but only anonymous digital alerting systems. It is no coincidence that, since the very first call for European Data Protection Supervisor (EDPS) proposing a pan-European approach and the European Commission Recommendation of April 8 proposing a common Union toolbox,[3] Bluetooth technology was the suggested option and GPS was essentially excluded. The question of 'with whom' (if the answer is anonymised) is much less intrusive than the question about 'where'.

Before returning to EU responses to the pandemic as far as the (apparent) trade-off between public health and privacy is concerned, it should be added that, whilst the framers of the GDPR might not

2 On this point, see also the contribution in Part 2 by Christina Etteldorf (Chapter 14 above).

3 European Commission, Communication of 8 April 2020 'Recommendation on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data'.

exactly have predicted the COVID-19 pandemic, they did get quite close. Recital 46 provides, amongst other things, that some 'types of processing may serve both important grounds of public interest and the vital interests of the data subject of public interest and the vital interests of the data subject as for instance when processing is necessary for humanitarian purposes, including for monitoring epidemics […]'.

This means that European constitutional law and the EU legislative compass are sufficiently solid and precise to provide a point of reference during the pandemic. We do not need to count, as the President of Italian Constitutional Court Marta Cartabia has said in more general terms, on exceptional laws for exceptional times. If the Constitution is to act as our general compass, the relevant provisions of the Charter and the GDPR are the specific guides for identifying the limits to contract tracing in Europe.

The primary European constitutional principles that must be taken into consideration are freedom, individual choice, dignity and solidarity, which lie at the root of the recommendation that usage of the app should be voluntary. The 'binding suggestion' was confirmed by the initial responses that followed, starting with the joint statement of the European Commission and the President of the European Council proposing a European Roadmap for lifting COVID-19 containment measures, the Commission guidance paper on COVID-19 apps,[4] and the release of a Common EU Toolbox for Member States ('Toolbox') by the EU's eHealth Network, a Commission-established body comprised of Member State authorities responsible for eHealth matters, as well as a letter by the European Data Protection Board ('EDPB') in response to the guidance.[5]

3. An assessment of proposed COVID-19 apps

There is the view that adoption of the app should be free, based on individual trust, yet at the same time a choice made by individuals as a token of collective responsibility.

However, voluntary adoption does not mean that the legal basis for the processing should be consent. This message has been clearly stressed since the outset in the responses mentioned earlier from the European Institutions, and also in even greater detail in the more recent EDPB Guidelines.[6] It must be clearly stressed, as the EDPB has done many times, that the fact that usage of the contact tracing app is voluntary does not mean that the processing of personal data by public authorities must necessarily be based on consent. When public authorities provide a service, based on a mandate assigned by and in line with requirements laid down by law, it would appear that the most significant legal basis for processing is necessity for the performance of a task in the public interest (Article 6(1)(e) GDPR). As regards health data, Article 9(2)(i) GDPR clearly states that it is even possible to process health data

4 European Commission, Communication of 16 April 2020 'Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection'.

5 eHealth Network, 'Mobile applications to support contact tracing in the EU's fight against COVID-19 - Common EU Toolbox for Member States', 15 April 2020.

6 EDPB, 'Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak', 21 April 2020.

where it is 'necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health'.

As stated in the first Recommendation referred to above, the idea of a pan-European app would mean Member State authorities, represented in the eHealth Network, establishing a process for exchanging information and ensuring interoperability of applications in cross-border scenarios. In other words, even without having a common technological framework of contract tracing apps in Europe, the idea is to find a common legal language European app, which can generate results based on the main ingredients of: voluntary adoption, temporary retention of data, bluetooth technology, as well as open source and decentralised storage systems in which the data controller is a public authority.

There are essentially two main challenges for a real European interoperable language: one from below and one coming from above.

As regards the first challenge, Member States could for example have relied on the operating model that is already functioning well on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation) adopted on 23 July 2014.[7] It creates a European internal market for electronic trust services – namely electronic signatures, electronic seals, time stamps, electronic delivery services and website authentication – by ensuring that they will operate across borders and have the same legal status as traditional paper-based processes. They did not follow this model, hence the risk of national fragmentation is really high. There are no indications at the moment of any desire by Member States to truly seek to set up a pan-European model and this situation could also frustrate the idea of a common legal framework for contact tracing apps in context.

Looking at the risk from above, this concerns the global strategy adopted by Apple and Google, which are cooperating in order to launch a system 'to assist in enabling contact tracing', whereby apps can notify smartphone users if they have come close to people infected with COVID-19. It is very tempting to follow the path proposed by the two web giants.[8] The proposal seems to be entirely consistent with the ingredients of the European approach mentioned earlier.

However if, as has been said, the contact tracing system is to be based on trust, it should come as no surprise that a degree of digital distrust has been displayed by some states, with France in the lead, toward the new private powers, which are now competing with the public authorities in the digital domain and which, in the recent past, have been (in)famously known in Brussels for their abuses of dominant positions.

Besides, adopting such a model would require not only users but also EU Institutions to trust these private actors without having the possibility to check how personal data are then stored, processed or

7 Regulation 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

8 Apple, 'Apple and Google partner on COVID-19 contact tracing technology', press release of 10 April 2020.

used, thus transforming a global health emergency into an opportunity to grow and enhance their political and economic power.

In a way, the fear is that once Apple and Google have done the hard work, they will then also decide the rules of the game: it is not clear whether this is or is not taken seriously by the State and European Institutions, but perhaps should be in light of Frank Pasquale's suggestion that there is a shift from territorial sovereignty to functional sovereignty, by which means digital platforms would fall into the hands of private powers competing with and taking over public powers.

4. A matter of proportionality

Until now the focus has been on the first of the two of my initial claims: the beauty of European constitutional law in relation to the protection of contrasting fundamental rights, even in the throes of the pandemic, and the difficulty in speaking a pan-European language as regards app interoperability.

I would like, very briefly, to dedicate a few words to the second claim I mentioned earlier. In my view the dominant narrative according to which a trade-off must be made between the degree of precision of the virus map and the need to respect the quite demanding European data protection legal regime is entirely misleading. And the reason is simple. This essentially focuses only on the proportionality test and not, as Article 52 of the Charter, but also Article 23 GDPR and Article 15 of the e-Privacy Directive show,[9] on the necessity of the limitations on privacy. In other words, it is taken for granted that the app will be effective in combatting the virus, and it is consequently taken for granted that it will be necessary. This is a typical expression of, in Morozov terms, technology solutionism according to which every problem must find an almost immediate technological solution. In this case, the solution should be the digital contact tracing system.

The truth is that we do not have any empirical evidence that this is the solution - at least where app downloading is voluntary there will be no penalties for those who choose otherwise (the ABC of a liberal democracy model). Even in Singapore, which is far from such a model and where there is a high degree of digitalisation and an even higher degree of trust in the public authorities, the app (tracing together) has been downloaded by a low percentage of the population and does not appear to have had any significant impact reducing infection. Finally, even in Europe, doubts concerning its necessity (effectiveness) are on the rise.

Belgium plans to continue with traditional contact tracing as it does not consider that there is sufficient evidence that the instrument will be effective. In Austria only 4% of the population has downloaded the app, despite pressure from the government. In the Netherlands, the supervisory authority has stated that it will not be in a position to approve it unless it is confirmed as being effective. Finally, in France, the CNIL will only approve it after a parliamentary debate has been held and studies have been com-

9 Directive 2002/58 of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

pleted showing it to be effective.

These responses represent an alarm bell that is not ringing: if we cannot be reasonably certain that the digital tracing model which is in compliance with European constitutional law will be effective and hence necessary, then even minimum restrictions on privacy become problematic.

The alternative is moving from the European modelling of exposure notification to an Asiatic one based on digital surveillance or, in the best scenario, on walking and scary robots in parks.

I would be inclined to immediately exclude the said option, it would be an unforgivable betrayal of the roots of European constitutionalism.

Chapter 16

MISINFORMATION ABOUT COVID-19: IS THE EUROPEAN UNION WELL EQUIPPED TO FIGHT THE 'INFODEMIC'?

Enza Cirone

1. Disinformation in times of pandemic[1]

One aspect that makes the COVID-19 outbreak different from previous epidemics is the major role that social media plays in everyday life. The possibility to effectively convey information (for instance, on suggested behaviours or on restrictions) to millions of people, in a short space of time, can be an asset in fighting the new coronavirus emergency. Unfortunately, however, social media can also contribute enormously to the dissemination of incorrect information and veritable fake news.

In February 2020, addressing his remarks on the novel coronavirus outbreak at the media briefing, the Director General of the World Health Organization (WHO) stated that 'we are not just fighting an epidemic, we are fighting an infodemic'.[2] This neologism has been coined to launch a warning: disinformation and fake news can cause confusion and be as dangerous as the virus itself.

Therefore, the question arises of which measures should be deployed to limit misinformation within the so-called information society. Ensuring that information is accurate, intelligible and that it spreads from credible sources seems the key factor for a successful outcome. In other words, users must be provided with easy-to-understand but, at the same time, evidence-based answers able to debunk fear and doubts. In this respect, a big challenge stems from so-called microtargeting, a practice that, using algorithms to profile users, leads to the creation of polarised groups which tend to acquire information adhering to their worldviews ignoring dissenting information.

1 This Chapter was finalised on 18 March 2020.

2 As defined by the WHO, an infodemic is 'an overabundance of information—some accurate and some not—that makes it hard for people to find trustworthy sources and reliable guidance when they need it'. See WHO, Novel Coronavirus(2019-nCoV) Situation Report No. 13, 2 February 2020.

Any strategy aimed at counteracting the spread of misinformation on COVID-19 should therefore focus on the development and promotion of 'digital resilience'.

The WHO has tried to build cooperation with social media platforms, including Twitter, Facebook, Tencent and TikTok, launching a Google SOS alert to push WHO information to the top of people's search results for queries related to COVID-19. On the WHO's website there is a dedicated 'myth busters' section aimed at countering false rumours. Moreover, thanks to the huge amount of data circulating on the web (big data) and the use of profiling techniques, the WHO is also working with Facebook to target specific segments of the population with ads providing tailored health information. One cannot hide that these initiatives raise several concerns from the perspective of the protection of personal data. They appear, nonetheless, to be of utmost importance, given that a significant percentage of the population use social media as the main source of information.

But what about the role of the EU? According to the WHO, Europe is the epicentre of the coronavirus and there is little doubt that the current global crisis risks jeopardising European values.

EU Institutions have outlined a broad set of actions based on a multi-stakeholder approach to counteract this phenomenon. All relevant actors, from public institutions to social platforms, from news media to single users, must work together in order to ensure freedom and transparency in searching for and spreading news, and in detecting false or inaccurate information.

2. Prior action against disinformation at the EU level

Notably, the European Commission has taken the lead – commencing long before the COVID-19 outbreak - in the public debate about online disinformation, laying out the need to protect European values and democratic systems.

Following public consultation in January 2018, the European Commission set up a High-level Expert Group on fake news and online disinformation, comprising the largest technology companies, fact-checkers, journalists, academics and representatives from civil society. In March 2018, the Group of Experts released the final report entitled 'A Multi-Dimensional Approach to Disinformation' which suggests a definition of the phenomenon and formulates recommendations, such as the promotion of information literacy and the improvement of online transparency. Importantly, the experts pointed out that the definition of 'fake news' may be inadequate since political debate often resorts to defining news with contrary content as unreliable or fake.

In light of this report and various other initiatives,[3] the European Commission launched a self-regulatory Code of Practice on disinformation, which representatives of online platforms, leading social networks, advertisers and advertising industry have voluntarily signed. The Code sets out a wide range

3 Joint Communication of the Commission and the High Representative of 6 April 2016 'Joint Framework on countering hybrid threats - a European Union response'.

of commitments and identifies best practices, including actions to improve the scrutiny of ads placements, tackle fake accounts and malicious use of bots (automated programmes that run through the internet), and guarantee transparency in issue-based advertising.

In addition, endorsing the European Council's call for measures to 'protect the Union's democratic systems and combat disinformation',[4] the European Commission elaborated an Action Plan against disinformation, putting in place a robust framework for coordinated actions (notably, by supporting independent fact-checkers and researchers and promoting media literacy).[5] One of the key elements of this plan is represented by the EU's rapid alert system, a tool to monitor fake news campaigns and facilitate the exchange of information.

Furthermore, the European External Action Service (EEAS) reinforced the East StratCom Task force, by integrating experts in data mining and analysis in order to better address Russia's ongoing disinformation campaign (also called a hybrid threat).

3. Fighting pandemic disinformation in the EU

More recently, initiatives specifically targeting the spread of online disinformation concerning COVID-19 have been implemented. Social media platforms and other stakeholders have engaged in efforts of their own, removing misleading video, scrubbing posts with uncertain health advice and empowering the fact-checking platform to track coronavirus rumours circulating online.

They have also been working with third-party fact-checkers to review false content and, as proof of their work, all major social media companies have issued a joint statement inviting other companies to work closely together. These actions may be further improved by asking companies to provide more details about the time of response to the flagging of content as false.

Recently, the EU Commissioner for Values and Transparency, Věra Jourová, held a meeting with the most important tech firms in the world to discuss measures to counteract the flow of online disinformation concerning the new coronavirus. As she stated, the rapid alert system has been enabled in order to 'share information on ongoing foreign disinformation campaigns with one another, and coordinate responses'. Notably, the EEAS has intensified its monitoring of the disinformation tide because, according to an internal EU report, Russian pro-Kremlin media have mounted a 'significant disinformation campaign' to aggravate the infodemic and undermine the national healthcare system.

In addition, the European Court of Auditors has recently launched an audit to assess the EU's action against the spreading of misleading information; the reason for this assessment is that the rise of social media and new technologies brings about increasing challenges and, given that, 'EU citizens must

4 European Council Conclusions of 22 March 2019 on fighting disinformation.

5 Joint Communication of the Commission and the High Representative of 5 December 2018 'Action Plan against Disinformation'.

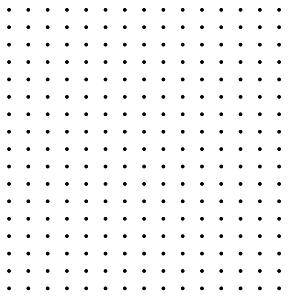
know whether the EU action plan against disinformation is effective'.

The use of advertisements on Facebook, despite the concern for data protection, is proving useful to guide users towards reliable sources of information. Yet, the misuse of ads through the malicious practice of clickbait still represents one of the main problems affecting EU initiatives.[6]

In order to promote trustworthy knowledge, and limit the disruptive effect of manipulated information, all relevant actors need to cooperate to improve digital education providing users with adequate tools to filter information and, consequently, make informed decisions.

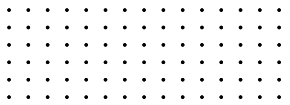
In conclusion, whilst the virus and misinformation are spreading fast, the EU has a long road ahead to foster digital resilience against the ongoing 'infodemic'. A change of pace is more than urgent.

6 Clickbait is web content with a sensationalist title aimed at attracting users by encouraging them to click on a link to complete the reading.



Part III

HEALTH (AND RISK) REGULATION



Chapter 17

THE EU AS A HEALTH AND RISK REGULATOR IN THE CONTEXT OF THE COVID-19 PANDEMIC – CHALLENGES AND TRANSFORMATIONS

Dolores Utrilla

1. Introduction[1]

The history of European integration can partially be explained as the result of successive crises leading to an even closer Union. This general assertion is all the more valid when it comes to public health law, a field where the EU has been equipped with blushingly weak powers, in stark contrast to its competences in other areas.[2] The weakness of the EU's health powers has become more apparent than ever over the past few months. This is fostering a renewed discussion on how such powers can and must be used, and on whether they should be expanded, in order to allow the EU to act as an effective regulator amidst a (suddenly perceived by all!) risk society,[3] at least in the face of cross-border infectious disease outbreaks, which have rightly been defined as a 'quintessential case calling for harmonisation and coordinated action superseding national borders'.[4]

This Chapter explores the EU's legal framework for fighting cross-border health threats, as well as the measures adopted and envisaged in this field at the European level during the first months of the COVID-19 pandemic. This overview shows that, while the EU is stretching and exploring its health powers to an unprecedented extent, certain structural transformations will be needed in the longer term, if Europe is to learn lessons from the ongoing pandemic.

1 This Chapter was finalised on 1 December 2020.

2 Scott L. Greer and Olga Löblovà, 'European integration in the era of permissive dissensus: neofunctionalism and agenda-setting in European health technology assessment and communicable disease control', *Comparative European Politics*, No. 15, 2017, pp. 394–413.

3 Ulrich Beck, *Risk Society: towards a New Modernity*, Sage Publications, 1992.

4 Andrea Renda and Rosa Castro, 'Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic', *European Journal of Risk Regulation*, Vol. 11, Special Issue 2, 2020, pp. 273-282.

2. Pre-existing EU legal tools to fight infectious disease outbreaks

Article 168 TFEU carefully limits EU competences in the area of public health, preserving the Member States' responsibility and autonomy for health services.[5] According to Articles 168(1) and (2), the EU can support, coordinate, and complement national public health policies, which can be directed towards surveillance, warning, and combating epidemics and other serious cross-border health threats. In particular, the EU *shall* promote cooperation between Member States in the field of human health, especially in cross-border areas, and to support their action where necessary. However, all these competences are rather limited, because under Article 2(5) TFEU competences to coordinate, support, and supplement can neither supersede national competence, nor entail harmonisation of Member States' laws or regulations in the relevant field.

Under this framework, the most relevant instrument of secondary legislation is the 2013 Cross-Border Health Threats Decision.[6] Adopted in the wake of the influenza H1N1 outbreak, it does not enable forceful EU action, but rather sets out a system of inter-administrative cooperation consisting of three main parts:

1. The Early Warning and Response System (EWRS), an online portal connecting public health agencies in Europe and which facilitates the notification at the EU level of alerts related to serious cross-border health threats, as well as the administrative exchange of information regarding the evolution of threats and the measures adopted by the competent authorities.

2. The extension of the functions of the European Centre for Disease Prevention and Control (ECDC), an EU agency entrusted with the tasks of surveillance, detection, and risk- assessment of threats to human health from communicable diseases and outbreaks of unknown origin. Consensus on the need for an agency in this field emerged after the SARS outbreak in 2003, and the ECDC was created in 2004.[7]

3. The Health Security Committee (HSC), a European administrative network of national experts built on the basis of a pre-existing informal group composed of high-level representatives from Member States.[8] The HSC's function is to assist the Commission in promoting the exchange of information, as well as in preparing, planning, communicating risks and crises, and designing responses to them.

5 Elias Mossialos, Govin Permanand, et al (eds), *Health systems governance in Europe: the role of European Union law and policy*, Cambridge University Press, 2010.

6 Decision 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC.

7 See Regulation 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control.

8 See the Conclusions of the Council Presidency of 15 November 2001 on bioterrorism.

The Health Threats Decision provides for a procedural framework for the conclusion of voluntary joint procurement agreements for the provision of medicinal counter measures for large scale disease outbreaks (Article 5). It further empowers the Commission and its agencies to conduct risk assessment of the threats to public health, including possible public health measures, where necessary for the coordination of the response at the EU level (Article 10). However, relevant gaps existed in the implementation of the Health Threats Decision as of 2016,[9] and by the start of the COVID-19 pandemic the ECDC was considered to be understaffed and under-budgeted,[10] with no dedicated budget for EU health emergencies.

In addition to the coordinating, supporting, and supplementary competences enshrined in Articles 168(1) and (2) TFEU, Article 168(5) TFEU empowers the EU to adopt 'incentive measures' designed to protect human health and in particular 'to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health'. This EU competence, untested at the beginning of the COVID-19 pandemic, has two clear limits, namely the prohibition of harmonisation and the obligation to respect the Member States' responsibilities for the organisation, delivery, and financing of health services and medical care (Article 168(7) TFEU).

On top of the specific health powers enshrined in Article 168 TFEU, other provisions of primary law grant competence to the EU to adopt certain measures which can be necessary to fight cross-border health threats. These are in particular: Article 16(2) TFEU regarding data protection, a fundamental issue because data sharing is key to understanding the evolution of an outbreak and adopting the corresponding measures; Article 114 TFEU concerning the functioning of the internal market, which can be used to regulate pharmaceutical and medicinal products; Articles 180 and 182 TFEU for the funding of collaborative research; and Article 207 TFEU regarding the common commercial policy, which can be used to adopt measures concerning the exports of medical products and equipment.

Moreover, the solidarity clause in Article 222 allows the EU and its Member States to act jointly to assist a Member State in its territory, at the request of its political authorities, in the event of (inter alia) a 'natural disaster'. On this basis, in 2013 a Council Decision enabled the EU to pool resources under a Civil Protection Mechanism,[11] further reinforced in 2019 by RescEU, which allows the EU to use its internal funds, pre-committed national funds and EU co-financed Member States' capacities to respond to a major emergency.[12]

Lastly, beyond legal bases and competences, the EU has at its disposal certain regulatory techniques

9 European Court of Auditors, Special Report 28/2016 'Dealing with Serious Cross-Border Threats to Health in the EU: Important Steps Taken but More needs to be Done'.

10 Andrea Renda and Rosa Castro, 'Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic', *European Journal of Risk Regulation*, Vol. 11, Special Issue 2, 2020, pp. 273-282.

11 Decision 1313/2013 of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism.

12 Decision 2019/420 of the European Parliament and of the Council of 13 March 2019 amending Decision 1313/2013 on a Union Civil Protection Mechanism.

and principles which are particularly relevant to face cross-border health threats. The most important ones, which are addressed in the following chapters of this book, are the unique EU risk regulation structures and the precautionary principle.[13] For the former, the EU is a world leading risk regulator with an institutional structure in place to address public health risks and emergencies. However, the scientific uncertainty surrounding COVID-19 makes it difficult for the EU to effectively perform this function. Precisely because of that, the precautionary principle is now largely being invoked by the authorities of the EU and its Member States as a ground for the restrictive measures taken to limit the spread of COVID-19.[14]

3. The response to the COVID-19 crisis: measures and shortcomings

3.1. Information and coordination measures

One of the most important functions of the EU over the last few months has been the continuous provision of risk assessments and scientific guidance concerning the evolving epidemiological situation. In early March 2020, the Commission set up an advisory panel of independent scientific experts on COVID-19, including epidemiologists and virologists, to formulate EU guidelines on science-based and coordinated risk management measures.[15] At the same time, the ECDC launched (and keeps updating on a permanent basis) a COVID-19 dashboard which allows users to monitor COVID-19 pandemic data at both European and global levels, as well as transmission rates within countries in the EU/EEA and UK.[16] However, experience in recent months shows that the EU in general and the ECDC in particular lack the necessary resources and tools to effectively function as a knowledge hub regarding communicable diseases, something that would be necessary to enhance the European and national ability to respond to them. Surveillance across the EU has proven slow and inconsistent, with varying degrees of quality and detail, while the ECDC can merely provide technical guidance on methodologies for information gathering, lacking any powers to force Member States to provide the information in the prescribed manner.[17] The need to enhance the framework governing the use of big data in public health decision-making has also become apparent, and in July 2020 the Big Data Steering Group set up by the European Medicines Agency (EMA) and the Heads of Medicines Agencies (HMA) published its Workplan for 2020-2021, which envisages specific actions to that end.[18]

13 See respectively the contributions to this volume by Anniek de Ruijter and Maria Weimer (Chapter 18 below) and by Alessandra Donati (Chapter 19 below).

14 Klaus Messerschmidt, 'COVID-19 legislation in the light of the precautionary principle', *The Theory and Practice of Legislation Journal*, Vol. 8, Issue 3, 2020, pp. 267-292.

15 European Commission, 'COVID-19: Commission launches European team of scientific experts to strengthen EU coordination and medical response', press release of 17 March 2020.

16 Available at https://www.ecdc.europa.eu/en/covid-19-pandemic.

17 Scott Greerc and Anniek de Ruijter, 'EU health law and policy in and after the COVID-19 crisis', *European Journal of Public Health*, Vol. 3, No. 4, 2020, pp. 623-624.

18 HMA-EMA Big Data Steering Group, Workplan 2020-2021, adopted on 27 July 2020.

In addition to this, the Commission, as well as some of its agencies, further provided guidance to Member States on measures aimed at limiting the spread of the virus,[19] including on procedures for testing and tracing[20] (and on data protection within these procedures),[21] as well as on actions to enhance national preparedness for health emergencies.[22] However, in the absence of a legally binding obligation to follow these standards, disparity among Member States continues to exist in these areas. Binding acts adopted therein have been scarce,[23] and some of the most effective measures in these fields have been adopted jointly by Member States deciding to advance their cooperation in certain areas on a voluntary basis.[24]

3.2. Regulation and provision of medical equipment and medicines

During the early months of the COVID-19 pandemic, shortages of medicines, medical staff and medical devices and equipment (such as ventilators or protective masks), led some Member States to implement export bans for these critical goods,[25] something that had previously already occurred during the H1N1 influenza pandemic in 2009.[26] These shortages and self-interest measures, together with the need for accelerated development and approval of COVID-19 medicines and medical devices, became critical problems in Europe, to which the EU reacted in a number of ways.

Firstly, regulatory and coordination measures were adopted to increase European production capacities. On 17 April 2020, EMA, together with the EU Member States and pharmaceutical companies, launched an enhanced fast-track monitoring system for medicines to prevent and mitigate supply i

19 See inter alia EU Agency for Safety and Health at Work, 'COVID-19 Guidance for the Workplace', March 2020, and 'EU guidance for a safe return to the workplace', April 2020; European Commission, Joint European Roadmap towards lifting COVID-19 containment measures of 15 April 2020; Council Recommendation 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.

20 See Commission Communication of 15 April 2020 'Guidelines on COVID-19 *in vitro* diagnostic tests and their performance', C(2020) 2391 final; ECDC, Technical Report of 19 May 2020 'Surveillance of COVID-19 at long-term care facilities in the EU/EEA'; ECDC, Technical Report of 15 September 2020 'COVID-19 testing strategies and objectives'; Commission Recommendations of 18 September 2020 'EU health preparedness: Recommendations for a common EU testing approach for COVID-19 agreed by the Health Security Committee on 17 September 2020'; ECDC, Technical Report of 6 October 2020 (fifth update) 'Infection prevention and control and preparedness for COVID-19 in healthcare settings'; Commission Recommendation of 28 October 2020 on COVID-19 testing strategies, including the use of rapid antigen tests; Commission Recommendation of 18 November 2020 on the use of rapid antigen tests for the diagnosis of SARS-CoV-2 infection

21 See Commission Recommendation of 8 April 2020 'A common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data' C(2020) 2296 final; eHealth Network, Common EU Toolbox for Member States of 15 April 2020 'Mobile applications to support contact tracing in the EU's fight against COVID-19'; Commission Communication of 16 April 2020 'Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection', C(2020) 2523 final.

22 Commission Communication of 15 July 2020 'Short-term EU health preparedness for COVID-19 outbreaks', COM(2020) 318 final; Commission Communication of 28 October 2020 on additional COVID-19 response measures, COM(2020) 687 final.

23 For an example, see Commission Implementing Decision 2020/1023 of 15 July 2020 amending Implementing Decision 2019/1765 as regards the cross-border exchange of data between national contact tracing and warning mobile applications with regard to combating the COVID-19 pandemic.

24 This is the case, for example, of the digital infrastructure developed as an IT tool for exchange of data, with the support of the Commission, by the Member States participating in the eHealth Network.

25 Andrea Renda and Rosa Castro, 'Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic', *European Journal of Risk Regulation*, Vol. 11, Special Issue 2, 2020, pp. 273-282.

26 Angus Nicoll and Martin McKee, 'Moderate pandemic, not many dead—learning the right lessons in Europe from the 2009 pandemic', *European Journal of Public Health*, Vol. 20, Issue 5, 2010, pp. 486-488.

sues with crucial medicines used for treating COVID-19 patients.[27] Both the European Commission and the EMA published guidelines for EU Member States with concrete actions for preventing shortages of medicines[28] (as well as of health workers),[29] and for medicine developers and companies on adaptations to the regulatory framework to address challenges arising from the COVID-19 pandemic.[30] This line of action led the EMA to extraordinarily take over the role of central coordinator in supporting Member States' activities in fighting disruptions in the supply of medicines. This is an important step because under ordinary circumstances most medicine shortages are normally dealt with at the national level.

Exceptional regulatory measures to avoid shortages were further adopted in respect of essential medical devices and equipment. In March 2020, the Commission adopted revised harmonised standards relating to critical medical devices for the fight against COVID-19,[31] and issued Guidance for manufacturers concerning the production of essential medical equipment.[32] In late April, the European Parliament and the Council adopted Regulation 2020/561, which amended and deferred by one year the date of application of certain provisions of the Medical Devices Regulation 2017/745 in order to ensure the continuous availability of medical devices on the EU market.[33] Soon afterwards, the Commission published Guidance on the adoption of EU-wide derogations for medical devices in accordance with Article 59 of the Medical Devices Regulation, thereby indicating to national authorities under what circumstances they can authorise the placing on the EU market of medical devices for which the relevant conformity assessment procedures have not been carried out, but the use of which is in the interest of public health or patient safety or health.[34]

Secondly, the EU tried to reinforce the availability of medical goods through the setting up of a strategic stockpile of medical devices under RescEU,[35] and also by signing joint procurement contracts for medical equipment and medicines under the 2014 Joint Procurement Agreement for medical counter-

27 EMA, 'Launch of enhanced monitoring system for availability of medicines used for treating COVID-19', press release of 21 April 2020.

28 Commission Communication of 8 April 2020 'Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak', C(2020) 2272 final.

29 Commission Communication of 7 May 2020 'Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC'.

30 The list of non-binding guidance documents addressed to medicine developers and other stakeholders is available at the EMA's website.

31 European Commission, 'Coronavirus: harmonised standards for medical devices to respond to urgent needs', press release of 25 March 2020.

32 European Commission, 'Q&A on conformity assessment procedures for protective equipment', 30 March 2020, updated on 10 July 2020; 'Guidance on the applicable legislation for leave-on hand cleaners and hand disinfectants (gel, solution, etc.)', 30 March 2020; 'Q&A on conformity assessment procedures for 3D printing and 3D printed products to be used in a medical context for COVID-19', 30 March 2020.

33 Regulation 2020/561 of the European Parliament and of the Council of 23 April 2020 amending Regulation 2017/745 on medical devices, as regards the dates of application of certain of its provisions.

34 European Commission, Communication of 19 May 2020 'Guidelines on the adoption of Union-wide derogations for medical devices in accordance with Article 59 of Regulation (EU) 2017/745'.

35 European Commission, 'COVID-19: Commission creates first ever rescEU stockpile of medical equipment', press release of 19 March 2020'.

measures (JPA).[36] The voluntary joint procurement mechanism allows Member States to act in a co-ordinated (and therefore stronger) manner when negotiating to purchase medical products in the market. However, the weaknesses of this mechanism and the need to consider the possible introduction of solidarity obligations in this area have become apparent over the past few months, in view of the fact that many Member States participating in joint procurement procedures have simultaneously negotiated bilateral contracts with manufacturers for pandemic counter measures, and that joint procurement does not provide for redistribution to those countries that are hit hardest.[37]

Thirdly, scarcity problems were addressed also through certain measures relating to the free movement of goods and to exports and imports of medical equipment.[38] Some highlighted actions in this regard are the establishment, in March 2020, of a temporary export authorisation system in respect of certain products of personal protective equipment (PPE),[39] as well as of 'green lanes', that were created to give priority to transport of essential goods, food, vital medical goods, and PPE.[40] The EU further requested the Member States to 'revoke any restrictive national actions taken, formally or informally, concerning either exports to third countries or trade between the Member States within the Single Market'.[41] Concerning imports, already in early April 2020 the Commission announced that it had swiftly approved requests made by all Member States and the UK for customs duties relief for goods in the time of disaster under Article 74 of Customs Regulation 1186/2009 and Article 51 of VAT Directive 2009/132.[42]

3.3. Development and distribution of vaccines

In addition to the aforementioned actions regarding medicines and medical equipment, the EU has also taken a series of measures in the field of vaccine development and distribution. In June 2020, the European Commission launched an EU Vaccines Strategy, proposing a joint EU approach to how vac-

36 See for example European Commission, 'European Commission secures EU access to Remdesivir for treatment of COVID-19', press release of 29 July 2020.

37 Anniek de Ruijter, Roel M.W.J. Beetsma, Brian Burgoon, et al, 'EU Solidarity and Policy in Fighting Infectious Diseases: State of Play, Obstacles, Citizen Preferences and Ways Forward', Centre for European Studies Research Paper No. 2020-3, University of Amsterdam, 2020.

38 For a general overview of the first measures adopted by the EU in these areas, see Darya Budova, 'Export, import and EU circulation of protective and medical equipment in the context of COVID-19 outbreak', *EU Law Live*, 1 April 2020.

39 See Commission Implementing Regulation 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation, subsequently extended by Commission Implementing Regulation 2020/568 of 23 April 2020 making the exportation of certain products subject to the production of an export authorisation. On these measures, see Isabelle van Damme, 'European Union imposes export restrictions on personal protective equipment', *EU Law Live*, 17 March 2020.

40 See Commission Guidelines of 16 March 2020 'Guidelines for border management measures to protect health and ensure the availability of goods and essential services', C(2020) 1753 final, and Commission Communication of 23 March 2020 'Implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services', C(2020) 1897 final.

41 Commission Communication of 19 March 2020 'Guidance note to Member States related to Commission Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorisation, as last amended by Commission Implementing Regulation (EU) 2020/426'.

42 See Commission Decision of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020, C(2020) 2146 final.

cines are developed, manufactured, and distributed.[43] The Strategy aims at securing sufficient supply of vaccines throughout the EU through Advanced Purchase Agreements with individual producers, the Commission providing upfront finance, and making use of the existing regulatory framework in a flexible manner to achieve its objectives. This includes an accelerated procedure for authorisation, flexibility in relation to labelling and packaging, and a proposal to provide temporary derogations from certain provisions of the GMO legislation to speed up clinical trials of COVID-19 vaccines and medicines containing genetically modified organisms.

Within this framework, in July 2020 the Council of the EU adopted a Regulation facilitating COVID-19 vaccine development, which provided for a temporary derogation from the prior environmental risk assessment ordinarily required by EU law for vaccines.[44] In late August, the Commission announced that it had reached a vaccine-purchase agreement with the pharmaceutical company AstraZeneca for ensuring swift access to 300 million doses of the vaccine, with an option for a further 100 million doses.[45] In October 2020, the Commission adopted a Communication on COVID-19 vaccination strategies and vaccine deployment, including immediate and key elements to be taken into consideration by Member States for their COVID-19 vaccination strategies in order to foster preparation by Member States of a common vaccination strategy for when a safe and effective vaccine is available.[46]

In spite of the relevance of these measures, it must be noted that no EU-wide vaccination policy exists, with vaccination programmes falling under the competence of Member States who have considerable divergences in approach to the matter. This might pose problems concerning vaccination coverage and the mechanisms to fight vaccine hesitancy and refusal, as explained in a subsequent chapter of this book.[47]

4. Towards a reform of the EU legal framework regarding public health?

In her State of the Union Address at the Plenary of the European Parliament, given on 16 September 2020, Commission President Ursula von der Leyen called for a debate on new competences for the EU in the field of health, as part of the forthcoming Conference on the Future of Europe.[48] No concrete official proposals have been made so far in this area, in respect of which little political appetite to revise the Treaties seems to exist for the time being.

43 European Commission, Communication of 17 June 2020 'EU Strategy for COVID-19 vaccines', COM(2020) 245 final.

44 Regulation 2020/1043 of the European Parliament and of the Council of 15 July 2020 on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19).

45 European Commission, 'Coronavirus: Commission signs first contract with AstraZeneca', press release of 27 August 2020.

46 Commission Communication of 15 October 2020 'Preparedness for COVID-19 vaccination strategies and vaccine deployment', COM(2020) 680 final.

47 See Chapter 20 below.

48 State of the Union Address by President von der Leyen at the European Parliament Plenary, 16 September 2020.

Beyond potential developments at the level of EU primary law, the Commission's priorities in the field of the European Health Union, as included in its Work Programme for 2021, include the setting up of a future-proof and properly funded EU4Health programme, a reinforced EMA, and a strengthened ECDC, together with the establishment of a new European Agency for Biomedical Advanced Research and Development (BARDA) to enhance Europe's capacity to respond to cross-border threats.[49]

Meanwhile, academic proposals on how to enhance the exercise of the existing EU competences and tools in the area of cross-border health threats are on the rise. These include inter alia the introduction of enhanced solidarity and of better coordination regarding the acquisition and distribution of personal protective equipment, medicines, and vaccines to countries most in need;[50] a more science-based regulatory system with more capacity and flexibility for responding rapidly to situations of crisis;[51] the use of incentive measures under Article 168(5) TFEU to supply medical resources coupled with standards of performance on the Member States' side (as long as this does not affect the configuration of national health systems, but other issues such as the management of private activities);[52] and the interpretation of EU health competences as a 'web' which is stronger than its individual threads, and as such 'extends its legal powers beyond those of the separate threads of the discrete competence norms'.[53]

49 See Commission Communication of 19 October 2020 'Commission Work Programme 2021 – A Union of vitality in a world of fragility', COM(2020) 690 final.

50 Anniek de Ruijter, Roel M.W.J. Beetsma, Brian Burgoon, et al, 'EU Solidarity and Policy in Fighting Infectious Diseases: State of Play, Obstacles, Citizen Preferences and Ways Forward', Centre for European Studies Research Paper No. 2020-3, University of Amsterdam, 2020.

51 Alan G. Fraser, Piotr Szymański, et al, 'Regulating drugs, medical devices, and diagnostic tests in the European Union: early lessons from the COVID-19 pandemic?', *European Heart Journal*, Vol. 41, Issue 23, 14 June 2020, pp. 2140–2144.

52 Scott Greerc and Anniek de Ruijter, 'EU health law and policy in and after the COVID-19 crisis', *European Journal of Public Health*, Vol. 3, No. 4, 2020, pp. 623-624.

53 Kai P. Purnhagen, Anniek de Ruijter, Mark L. Flear, et al, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak', *European Journal of Risk Regulation*, Vol. 11, Special Issue 2, 2020, pp. 297-306.

Chapter 18

THE COVID-19 CRISIS: LESSONS FROM RISK REGULATION FOR EU LEADERS

Anniek de Ruijter and Maria Weimer

1. Introduction[1]

The EU is living in a state of public health emergency. The COVID-19 epidemic continues to rapidly spread across the EU causing a massive upheaval of public health systems, politics, economic relations, free movement and last, but not least, the lives of millions of people across the continent. According to the WHO, COVID-19 is an international pandemic with 64,603,428 confirmed cases to date, and 1,500,614 deceased worldwide.[2]

The public health risk associated with a pandemic outbreak epitomises what Ulrich Beck and other sociologists of risk have referred to as late-modern, man-made or manufactured risks. This particular disease fits the bill in that it is arguably the result of globalisation and of the diminishing space for - and human consumption of - wildlife. The management of such risks defines the structures of contemporary society, transforming it into what Beck calls the 'risk society'. The latter is defined by the paradoxical co-existence of progress and risk – while reaping the benefits of globalisation and technological progress, we are also increasingly faced with its negative side-effects and new contemporary risks that are not truly controllable nor fully measurable.

The COVID-19 outbreak displays all the characteristics of such late-modern risks, particularly due to the globalised context in which it takes place, which is key when we are trying to conceive of appropriate regulatory responses. Such risks are often 'invisible,' which means that they evade human perceptive abilities and can only be identified through recourse to specialised science. The case of COVID-19 is such a risk, in that in terms of policy there is only the preparedness for the unknown –

1 This Chapter was finalised on 14 March 2020.

2 Figures from World Health Organization updated on 4 December 2020.

and now when the risk is manifesting, we are scrambling to understand its global magnitude and impact. At the same time, COVID-19 also painfully illustrates the distributional aspect of these types of risks – when their manifestation comes with enormous economic, social, and human costs provoking conflicts over distribution and testing solidarity among people and states.

The good news is that unlike the way that Donald Trump might have it, the EU is a world leading risk regulator with a constitutional commitment to a high level of protection of public health and an institutional structure in place to address public health risks and emergencies. The bad news is that situations of scientific uncertainty and high politicisation make it very hard for the EU to play this role. The COVID-19 crisis presents a steep challenge to the EU as a risk regulator given the unprecedented level of the current emergency. The EU and Member States have to take decisions in the face of rapid spread of the disease, rapidly changing scientific information and therefore under considerable time pressure. How can the legal framework as developed in the context of EU risk regulation and public health help in guiding the EU's response?

2. The EU legal framework for EU public health emergencies

According to the EU Treaties, responding to public health emergencies, such as COVID-19, is primarily a responsibility of the Member States. EU action is limited to supporting, coordinating or complementing action by Member States, as well as adopting incentive measures and recommendations (Article 168 TFEU). This is due to limited EU competences in matters of health policy. However, EU action in the field of public health emergencies should be seen within the broader EU framework of public health law and policy. The EU commitment to ensuring a high level of human health protection in the definition and implementation of all its policies and activities is enshrined both in the Treaties and the EU Charter of Fundamental Rights.

Over the years, the EU's role in responding to public health emergencies has grown, especially as a result of the Anthrax scare in 2001 and the consecutive health scares of SARS and Bird Flu. In response to the last large scale event of the Swine flu outbreak, the EU regulatory system was boosted by the 2013 Health Threats Decision[3].[4] The latter is applicable to a wide scope of public health emergencies (including bioterrorism and environmental risks) and formalises some coordination and emergency management and decision-making procedures. The Decision incorporates an older Communicable Disease Early Warning and Response Mechanism (EWRS). It also institutionally formalises the Health Security Committee that encompasses a number of sub-groups including one on public health communication. The European Centre for Disease Control (ECDC) manages the Early Warning and Response Mechanism through which contact-tracing of infected individuals throughout the EU becomes possible and communications about disease outbreaks can be communicated in a closed sys-

3 Decision 1082/2013 of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision 2119/98.

4 Anniek de Ruijter, 'Mixing EU Security and Public Health Expertise in the Health Threats Decision', in Maria Weimer and Anniek de Ruijter (eds), *Regulating Risks in the European Union*, Hart Publishing, 2017.

tem of national public health institutions. The ECDC is also regularly updating its risk assessment on the COVID-19 situation in Europe. The health ministries are represented in the Health Security Committee which is chaired by the European Commission.

Under this framework Member States are obliged to inform the ECDC, the Health Security Committee and the European Commission of counter measures that are adopted at national level, ideally before these are implemented. Furthermore, urgent implementing measures can be taken by the Commission for triggering the manufacturing and central authorisation of pandemic vaccines and other emergency medicines. For this purpose, the system also provides the Commission with the ability to declare an emergency in case the WHO has not done so. Cross-sectoral coordination is taking place in a more ad-hoc manner in that the European Commission established a 'COVID-19 response team', with five commissioners coordinating the work in different areas.

Furthermore, the Health Threats Decision foresees the possibility of voluntary public procurement of medicinal countermeasures and medical equipment. In the aftermath of the Swine Flu outbreak a mandatory system was envisaged to ensure EU solidarity in times of emergency and to respond to the vast asymmetries that occurred in the procurement of swine flu vaccines across the EU.[5] However, in 2013, by the time the Swine Flu was already out of the regulators' minds, the Member States only agreed to sign on to a voluntary system of public procurement. Currently 20 Member States have signed on to a tender for medical supplies, in order to prevent 'useless competition between EU Member States and prevent international speculation.'

2. Lessons from EU risk regulation

What are the lessons from EU risk regulation and its underlying principles, as developed through a long line of EU legislative and case law developments, for the current management of the COVID-19 outbreak in Europe? The role of EU law, and of law more generally, in the face of scientifically complex and rapidly moving developments, is to organise the process of how public decisions on risk should be taken. It is the adherence to such a legally mandated process that makes the outcome of decisions legitimate and acceptable. A fundamental principle of EU risk regulation is the principle of *risk analysis*, which mandates that every decision-making process on risk must consist of a *scientific risk assessment*, and a politically responsible and *democratically legitimated risk management*. It must also be accompanied by effective *risk communication* between and among public authorities and between the latter and citizens. The main purpose of the risk analysis principle is to ensure a balance between science and politics in risk regulation.

5 Anniek de Ruijter, 'EU Public Health: Countermeasures to Swine Flu', in Anniek de Ruijter, *EU Health Law & Policy: The Expansion of EU Power in Public Health and Health Care*, OUP, 2019.

2.1. The risk assessment of COVID-19

A risk assessment is an essential procedural guarantee, which flows from the more general duty of care, and ensures scientific objectivity. It must be independent, excellent and transparent, and be carried out by scientific experts (*Pfizer*, T-13/99), mostly by specially designated agencies, such as the ECDC. With regard to risk assessment the COVID-19 poses significant challenges, as there is no scientific certainty with regard to the precise nature of the risk. In this regard most national agencies are well informed and coordinated by the ECDC. However, the risk assessment in the case of COVID-19 clearly goes beyond the assessment of the hazard, namely the virus itself, but also includes questions concerning critical infrastructures (business continuity, availability of medical equipment, surge capacity of hospitals) and the way these will be affected in the Member States. Here it is clear that currently the EU Health Security structure is scrambling to play catch up. This challenge was already outlined in the evaluation of the Influenza A H1N1 outbreak, but in the meantime it is clear that risk assessment in this regard is highly fragmented and politicised, where not all Member States are eager to share how many antivirals they have stacked up in their stockpiles.

2.2. The risk management of COVID-19

Following the CJEU's case law, science must inform, but should not be the sole basis for making normative choices involved in public decision-making. It is the task of risk managers, considering scientific advice, to decide on whether action is warranted and what kind of action. This means difficult, political and ethical choices, which can vary from one society to another according to the threshold of risk deemed acceptable. In other words, which risks societies are willing to accept, and what the levels of protection should be, is a decision for political institutions. In doing so, risk managers are obliged to ensure a high level of public health protection (Article 9 and Article 168 TFEU). They must also consider particular circumstances on a case-by-case basis, the severity of impact on public health, the reversibility of such impact, and the current perception of risk based on available scientific evidence (*Bayer*, T-429/13 and T-451/13).

Most critically, risk managers must consider the precautionary principle, a fundamental principle of EU risk regulation, and a general principle of EU law.[6] It requires the authorities in question to take appropriate measures to prevent specific potential risks to public health by giving precedence to the requirements related to the protection of those interests over economic interests (*Bayer*, T-429/13 and T-451/13). A situation of scientific uncertainty triggers the application of this principle. While a zero-risk approach is not allowed, the precautionary principle calls on the institutions to take protective measures without having to wait until the reality and seriousness of risks become fully apparent or until the adverse health effects materialise (*BSE*, C-157/96 and C-180/96). Moreover, precautionary measures have to be proportionate. In other words, they must be appropriate to contain and mitigate the outbreak and not more restrictive than necessary to achieve the ultimate objective of public health protection.

6 See the contribution in Part 3 by Alessandra Donati (Chapter 19 below).

3. What role for EU leadership?

What we currently see is that many commentators and citizens are looking at the EU as a benchmark of whether their own country is taking the right precautions. However, legally the Member States have clearly chosen to only give the EU a limited role in this respect, for example when it comes to ensuring the availability of a centrally authorised vaccine. As a consequence, it is to be expected that once vaccines become available, a situation similar to the Swine Flu H1N1 outbreak will occur, where some Member States through pre-purchase agreements bought all the vaccines available for the whole of the EU. Another area where we might expect contention is when the EU will give guidance for the determination of risk-groups for vaccination and the treatment of the virus with antivirals. During Swine Flu (which might be considered a dry-run for what we are facing today) Member States did not all follow the EU's advice on risk groups and treatment protocols, which caused a lot of distrust and unrest among the population.

At the same time, we would not find it desirable for the EU to fully take charge of the risk management in the Member States. And many calls for a simplistic centralisation of coordination and health powers at EU level are disregarding the vast complexity of organising public health and healthcare at Member State level that goes far beyond the issues of redistribution of public finances. If the EU was to oblige the Member States to order a particular vaccine for medical countermeasures or to take a certain precautionary approach, it would not be able to consider these intricate differences. The (public) health systems in the Member States differ vastly, even within the states due to federation, culture, availability of resources, training of staff, equipment and the upkeep of critical infrastructures in general. So here we see the Member States adopt very different responses. Which is to be expected. So why would we need the EU then in a risk management role?

We do need the EU to manage and coordinate the science and the appropriateness of treatment. We also need the EU to organise solidarity through a mandatory system of public procurement of medicinal equipment and medicines; and we even need the EU to make the choice as to who – what countries – receive these items first. In other words, we could use the EU to organise solidarity among Member States, even when this means having the highly political role of determining risk groups and treatment plans, and being able to dish out vaccines and antivirals.[7] This would rationalise the response and ensure its efficiency and effectiveness. The more proactive stance of the EU from early March 2020 is a good sign in this respect. However, on all other aspects, the Member States should remain in charge of risk management in public health emergencies.

When national governments and public authorities manage COVID-19 risks, they should be clear about their political responsibility. While it is the task of risk assessors to communicate scientific advice including uncertain information transparently, risk managers have to be transparent about political choices. Politicians must be able to take political responsibility for action, and explain clearly

7 See the contribution by Ulla Neergard and Sybe de Vries (Chapter 7 above).

which legal, political, ethical, or socio-economic considerations inform their actions next to scientific advice. They should not hide behind science, nor act as scientific experts. Risk assessment and risk management are often intertwined in practice, but the responsibilities are clear. Democratically elected politicians, not scientists, will be held responsible for how they handle the COVID-19 crisis.

The COVID-19 crisis puts Europe's capacity to govern both effectively and legitimately to a test. It sheds light on the unique features of the European integration project (such as its commitment to unity in diversity), as well as unleashes some of its darker tendencies. Like in other situations of uncertainty and political and economic upheaval, this crisis can be both a threat to and an opportunity for European integration. Will Europe's response to COVID-19 unleash negative dynamics of populism and protectionism, or will it strengthen the EU system of public health governance, and more generally, the EU's sense of collective identity and solidarity? Let us hope so. The EU is at a crucial point and further actions will determine which direction will be taken.[8]

8 For further reading, see Maria Weimer, *Risk regulation in the Internal Market - Lessons from Agricultural Biotechnology*, OUP, 2019; Maria Weimer, 'The Origins of "Risk" as an Idea and the Future of Risk Regulation', *European Journal of Risk Regulation*, No. 8, 2017, pp. 10-17; Mark Flear and Anniek De Ruijter, 'Guest Editorial to the Symposium on European Union Governance of Health Crisis and Disaster Management: Key Norms and Values, Concepts and Techniques', 10 *European Journal of Risk Regulation*, 2019, pp. 605-609.

Chapter 19

THE CORONAVIRUS CRISIS IN EUROPE: IS THIS THE *TIME* OF THE PRECAUTIONARY PRINCIPLE?

Alessandra Donati

1. Wide use of the precautionary principle[1]

As was the case in the past for other major health crises (such as mad cow disease, SARS, and the avian flu crisis), the precautionary principle is now largely being invoked by the authorities of the EU Member States as a ground for the restrictive measures taken to limit dissemination of the coronavirus. The reference to precaution is so widely spread that one might consider that this principle is the key legal instrument for the management of the COVID-19 crisis. Indeed, according to the established case law of the CJEU, the conditions for the application of this principle are met (*National Farmers' Union e.a.*, C-157/96). On the one hand, we are facing a serious *risk* for public health that requires the adoption by the competent authorities of adequate protective measures, and, on the other hand, this risk is *uncertain*. Based on the available scientific knowledge, the source, the rhythm, the modalities, and remedies to fight against the spread of this virus remain unclear and are subject to uncertainty.

2. A questionable use of the precautionary principle

However, a closer look at some of the measures adopted by the Member States raises concern. In Italy, the government first applied some restrictive measures to Lombardy and other provinces of the North. It was only when the risk of coronavirus spreading quickly was already clearly documented that the same restrictive measures were applied to the rest of the Italian territory. Some days later in France, notwithstanding the Italian example already showing the need to take immediate and serious measures to avoid the spread of COVID-19, the government decided to wait until the number of infected people rose, before urging the population to respect containment measures. The same reasoning applies to

1 This Chapter was finalised on 28 March 2020.

other EU countries, such as Germany, Luxembourg, and Spain, where more restrictive measures recalling the Italian ones were only adopted in the last few days when the risk of spreading of COVID-19 was already well grounded. What these examples show is that there might be a divergence between the *time* taken to implement these measures and the *time* required for the application of the precautionary principle.

3. The time of the precautionary principle

Time has proven to be an extraordinary complex concept for physicists, philosophers, psychologists, and others exploring its multiple dimensions.[2] For some, time denotes the continuum of past, present, and future, or the idea of history and destiny. For others, time has a rhythmic quality, being associated with sequences and cycles, such as seasonal weather changes. For still others, time indicates the time embedded in events and things or the particular point or period when things happen.[3] Time is also an intrinsic element of the legal system. Time is not something that exerts an influence on law, but rather law itself structures how we perceive time, by regulating and normalising the experience of time.[4]

The precautionary principle is closely related to the notion of time, which shapes its definition. The precautionary principle can be defined as a principle of *anticipated action* that requires the competent authorities to anticipate the traditional time for the adoption of a measure to protect the environment and public health.[5] This means that decision-makers shall not wait until the risk is certain, from a scientific point of view, but shall act before, when the risk is only uncertain. From this perspective, the precautionary principle entails a significant change in the time-management of risks. Based on the definition of precaution as a principle of anticipated action, it could be argued that the time of precaution results from the combination of *scientific* and *political* time.

3.1. The time of science

First of all, the time of precaution is the *time of science*. For the CJEU, the application of precaution is conditional upon the carrying out, by highly competent and impartial scientists, of a scientific risk assessment (*Monsanto Agricoltura Italia*, C-236/01). The purpose of the risk assessment is to evaluate the probability of occurrence of the uncertain risk and the severity of its potential effects in order to exclude from the scope of the precautionary principle the uncertain risks that are not scientifically grounded. Indeed, as stated by the CJEU, only the uncertain risks that are scientifically documented can justify the anticipation of the time of action based on the precautionary principle (*Gowan Comércio Internacional e Servicos Lda*, C-77/09). Thus, the time of precaution is the time of science because it corresponds to the time needed to execute such risk assessment and it reflects the scientific knowl-

2 Penelope J. Corfield, *Time and the shape of history*, Yale University Press, 2007.

3 Benjamin J. Richardson, *Time and environmental law*, Cambridge University Press, 2018.

4 Carol J. Greenhouse, 'Just in time: temporality and the cultural legitimation of law', 98 *Yale Law Journal*, 1989, pp. 1631-1651.

5 Alessandra Donati, *Le principe de précaution en droit de l'Union européenne*, Phd Thesis, University Paris 1 – Pantheon Sorbonne, 2019.

edge available when the risk assessment is implemented.

3.2. The time of politics

Second, the time of precaution is also the *time of politics*. When applying the precautionary principle, decision-makers are granted a wide margin of appreciation. To limit such discretionary power, the CJEU has defined a set of procedural obligations that the competent authorities shall respect. On the one hand, decision-makers shall take into account with due care the results of the scientific risk assessment and shall motivate their decisions based on the available scientific data (*Animal Trading e.a.*, T-333/10). On the other hand, they shall conduct a cost-benefit analysis (*Basf Agro BV vs Commission*, T-584/13). The purpose of such analysis is to compare the positive and negative consequences of the action based on the precautionary principle with the positive and negative consequences of the inaction. A precautionary measure should only be taken if it can provide a benefit in terms of reducing the risk to an acceptable level and thus, if its advantages outweigh its disadvantages.[6] To carry out the cost-benefit analysis, the decision-makers shall not only take into account the results of the scientific risk assessment but also all the other factors (including economic, political, and social factors) that may have an impact on the appreciation of the risk at stake. In light of the above, it can be argued that the time of precaution is also the time of politics because it corresponds to the time needed by the authorities to comply with such procedural requirements before implementing a precautionary measure.

4. The time of the precautionary principle and the time of emergency in a situation of pandemic

On 11 March 2020, the WHO declared COVID-19 a pandemic, pointing to a large number of cases of the coronavirus illness in over 152 countries and territories around the world and the sustained risk of further global spread. In a situation of a pandemic, the time of the precautionary principle should be distinguished from the time of emergency.

4.1. The time of the precautionary principle

As indicated above, the *time of the precautionary principle* is the time of anticipation. To avoid the occurrence of uncertain risks threatening the environment or public health, decision-makers should anticipate the time of action by adopting preventive measures. However, to ensure that these measures are not arbitrary and discriminatory, decision-makers shall respect the scientific and political time of precaution by complying with the relevant procedural obligations. Under the framework of anticipation and concerning the COVID-19 crisis, the EU Member States should not have waited until the risk of spreading of the coronavirus was certain in their own countries. Still, they should have acted before when the risk of contagion coming from China was only uncertain. It is only at this stage, or at the latest when the virus started to spread in Italy, that the precautionary principle should have been applied by anticipating the time of action.

6 Commission Communication of 2 February 2000 on the precautionary principle.

4.2. The time of emergency

If the time of the precautionary principle is not respected, we enter into the second time-dimension of a pandemic: the *time of emergency*. Emergency determines a compression of the time of action, requesting more to be done quicker. In such circumstances, there is no longer a need to prevent the occurrence of risk (which has already occurred) but the need to mitigate its effects. In other words, the measures to be adopted are no longer preventive measures that should comply with the scientific and political time of precaution, but mitigation measures aimed at reducing the exposure to the population of the risks and limiting the further spread of the disease. In this context, to be able to act in a fast and smooth way, the authorities need to dispose of a broad discretionary power.[7] In this respect, in France, Emmanuel Macron, by declaring a 'state of war', announced that new legislation would be introduced to enable the government to respond to emergencies and, where necessary, to legislate by ordinance in areas strictly related to the coronavirus crisis management. In similar terms, in Luxembourg, Prime Minister Xavier Bettel declared a 3-month emergency period allowing the government to take faster measures outside of the regular legislative procedure.

4.3. The reconciliation between the time of the precautionary principle and the time of emergency

A possible reconciliation between the time of the precautionary principle and the time of emergency should be based on two pillars: a *time for synchronisation* and *time for a change*. First of all, a better synchronisation should be ensured between the national and the global level of regulation of risks, as by definition a pandemic affects many regions and countries of the world. The ongoing health crisis shows the intense degree of interdependence achieved by our societies as a result of globalisation, where not only does the production, transportation, and consumption chain have a worldwide dimension, but the risks are also global. In a climate change scenario where the environmental and health risks will significantly increase, leading eventually to an extended planet-wide emergency-like condition, there is a need to enhance the coordination of a pandemic by combining a timely national and global management. In other words, we need national communities to empower the various actors to protect the environment and public health efficiently. Still, only the global community will be able to define common goals and the resulting responsibilities by timely application of the precautionary principle.

To enable such synchronisation, at least within the EU, we need a time for change that will foster a new understanding of some of the basic foundations of EU regulation. On the one hand, the coronavirus crisis is threatening European construction in requests for a more suitable interpretation of its unique market. Such interpretation should guarantee free movement, while at the same time adequately protecting public health and ensuring the financial stability of the EU. On the other hand, the emergence of the coronavirus underlines the importance and need for a uniform legislative framework at the EU

7 Jocelyn Stacey, 'The environmental emergency and the legality of discretion in environmental law', 52 *Osgoode Hall Law Journal* 3, 2015, pp. 985-1028.

level. From this perspective, it seems more necessary than ever to reflect on an increase of EU competences in the field of public health to allow for a harmonised and consistent application of EU health policy across all Member States, especially in the case of a health crisis.

5. The cyclical time of a pandemic

'Pandemics do not end overnight. A pandemic virus may cause several waves of severe epidemics worldwide over the following years before continuing to circulate as seasonal influenza'.[8] As with all other pandemics, even the coronavirus will be of a cyclical nature. After its first appearance, it will come back and spread again, with a hardly predictable intensity. This means that the decision-makers will have a new chance to face this virus. We will see if next *tim*e, the decision-makers will anticipate the *time* of action by applying in due *time* the precautionary principle, or as is the case in the ongoing pandemic, they will wait for the *time* of emergency before implementing effective risk management measures.

8 WHO, Guide to revision of national pandemic influenza preparedness plans, 2017.

Chapter 20

COMPULSORY VACCINATION AND EUROPEAN LAW: BALANCING OPPOSING PRINCIPLES

Dolores Utrilla

1. Introduction[1]

Although a vaccine against COVID-19 is not yet available, the pandemic has already brought to the limelight a number of legal issues concerning vaccination policies. Current debates mainly concern the pressing question of how to fairly and efficiently distribute COVID-19 vaccines, once they exist, in an anticipated scenario of scarcity.[2] However, an incipient debate also exists as regards the longer-term issues of vaccine hesitancy, anti-vaccination attitudes, and mandatory vaccination.

In Europe, vaccination policies fall under the competence of national authorities. However, they are also relevant from the perspective of European law, both at the EU and the Council of Europe levels. The question then arises of whether and how these legal orders may prevent or limit potential future national schemes making it compulsory to have a COVID-19 vaccination.

To address this issue, it is necessary to take into account, firstly, the rationale and the legal structure of compulsory vaccination schemes (sections 2 and 3 below). Then, the requirements arising from European law for mandatory vaccines will be explored, both with regard to the ECHR (section 4 below) and to EU law (section 5 below). Lastly, this analytical and legal framework will be used to assess the specific features and challenges of potential national mandates for COVID-19 vaccination (section 6 below).

1 This Chapter was finalised on 4 September 2020. It was prepared in the framework of the research project 'El Derecho administrativo de Castilla-La Mancha: Diagnóstico y posibilidades de evolución en un contexto multinivel' (reference SBPLY/17/180501/000140) funded by the Regional Government of Castilla-La Mancha and with the support of a grant of the Spanish National Research Plan (PGC2018- 101476-B-I00).

2 See the European Commission Communication of 17 June 2020 'EU Strategy for COVID-19 vaccines'.

2. The logic of mandatory vaccines

Vaccination is one of the most powerful and cost-effective public health measures, as well as the primary tool for primary prevention of communicable diseases. It functions through the achievement of *herd immunity*, a situation where a sufficient proportion of a given population (up to 95% for some diseases) is immunised, thereby reducing the number of hosts a virus can newly infect and slowing down the spread of the disease until the virus itself dies out.

Therefore, beyond the protective effect of vaccines for each individual subject, their collective immunising effect for society as a whole depends on their *coverage rate*. This in turn means that a certain number of people not being vaccinated results in the loss of collective effectiveness of the corresponding vaccine, even if a high percentage of the population is vaccinated. This explains why mandatory vaccination is one of the strategies historically developed by some States to protect the community when the coverage rate achieved by means of non-binding recommendations is not satisfactory. This strategy relies on two main elements, namely the legal features of herd immunity and the phenomena of vaccine refusal and vaccine hesitancy.

Regarding the features of herd immunity, it is important to note that *free-rider arguments* may arise because it is a *collective good* – in the sense that it can be achieved only through the cooperation of a large number of people – and a *public good* – in the sense that it is non-excludable and non-rivalrous, meaning that access to it cannot be prevented and it is unaffected by others making use of it.[3] More specifically, herd immunity is non-excludable in the sense that it is not possible to exclude someone from benefitting from herd immunity, even if she does not contribute to the good through having a vaccination herself. Herd immunity is also non-rivalrous, in the sense that anyone benefitting from it does not reduce the extent to which others can benefit as well.[4] These features provide a standard public-goods justification for promoting vaccinations of highly contagious diseases, including through coercion.[5]

Accordingly, debates around compulsory vaccination arise whenever there is a significant percentage of *vaccine refusal or hesitancy* in a given social community. In recent years, these phenomena have led to occasional outbreaks of vaccine-preventable diseases in Europe and beyond. In 2017, over 14,000 people contracted measles in the EU - more than three times the number reported in 2016. According to a global survey conducted in 2016[6] and the 2019 vaccines Eurobarometer,[7] Europe has the high-

3 Angus Dawson, 'Herd protection as a public good: vaccination and our obligations to others', in Angus Dawson and Marcel Verweij (eds), *Ethics, Prevention, and Public Health*, Clarendon Press, 2007. pp. 160–187; Alberto Giubilini, Thomas Douglas, and Julian Savulescu, 'The moral obligation to be vaccinated: utilitarianism, contractualism, and collective easy rescue', *Medical Health Care Philosophy*, No. 21(4), 2018, pp. 547–560.

4 Angus Dawson, cit.

5 Richard A. Epstein, 'It Did Happen Here: Fear And Loathing On The Vaccine Trail', *Health Affairs*, No. 24(3), 2005, pp. 740-743.

6 Heidi J. Larson, Alexandre de Figueiredo, Zhao Xiahong, *et al*, 'The State of Vaccine Confidence 2016: Global Insights Through a 67-Country Survey', 12 *EBioMedicine*, 2016, pp. 295–301.

7 Special Eurobarometer 'Europeans' attitudes towards vaccination', April 2019.

est rate of negative responses in terms of perception of the importance, safety and effectiveness of vaccines, leading to the highest degree of vaccine reluctance among the public. Other reasons why people choose not to vaccinate are complacency, inconvenience in accessing vaccines, religious convictions, and distrust in the pharmaceutical industry. In this regard, safety-related concerns are one of the key determinants of vaccine hesitancy, despite the fact that vaccines in the EU undergo rigorous testing both pre- and post-licensing, in line with Directive 2001/83 and Regulation 726/2004. At a more general level, vaccine hesitancy has been a cause for concern for the WHO ever since 2011,[8] and in 2019 it declared this to be a global concern.

3. The legal conundrum behind compulsory vaccination

From a normative point of view, the legal problem underlying mandatory vaccination comes in the form of a classical balancing test between opposing principles. The typical conflict situation involves the general interest for society in safeguarding public health vis-à-vis the individual rights of those rejecting vaccinations, although other scenarios are possible too, as will be explained below with reference to EU law.

In this regard, legal provisions making vaccination compulsory, and therefore a trade-off of certain rights of those who oppose vaccination, rely on a utilitarian approach to law. They can be explained as 'rules of conditional precedence' (in the language of Alexy), the formulation of which is the result of a prior weighing up of at least two conflicting principles. The legal correctness of a rule of this kind allegedly warrants that the degree and intensity of the harm caused to the sacrificed principle is proportionate to the degree and intensity of benefit achieved for the prevailing one, considering the circumstances at hand.[9]

Although Alexy's balancing theory is not uncontroversial, this systematic approach to mandatory vaccination corresponds to the existing case law on the matter at the national and at the international levels, and allows for rationalisation of its assessment from a European constitutional perspective. In this regard, three main points are worth mentioning here, concerning the principles in conflict (*infra* 3.1), the proportionality test (*infra* 3.2), and the issue of compensation (*infra* 3.3).

3.1. Conflicting principles

Firstly, balancing is needed insofar as there is a collision of legal rules qualifying as principles and that have, *prima facie*, the same legal rank and importance. This is generally the case with compulsory vaccination.

On one side of the scales, there is the need to protect public health, as well as the health of each individual (including those vaccinated against their will) and particularly of people whose specific medical

8 See for example the 2014 Report of the SAGE Working Group on Vaccine Hesitancy.

9 Robert Alexy, *Theorie der Grundrechte*, Suhrkamp, 1986.

conditions prevent them from receiving a vaccine. Most European jurisdictions confer constitutional status on these public interest goals, usually shaping them as fundamental rights (namely as positive obligations arising from them). This side of the balance may be supported by additional arguments, such as the need to ensure the sustainability of public health services (because vaccination is much cheaper than treatments for illnesses that could have been prevented, and because it alleviates the risk of collapse of health services) or of the socio-economic system in general (which may be seriously damaged if there is an uncontrolled spread of a disease, as the ongoing pandemic clearly shows). These other public goals do also have constitutional status in some jurisdictions. In other cases, they can be linked to the constitutional principle of democracy whenever the legislature decides to protect them.

On the other side of the scales there are the fundamental rights of those opposing vaccines. Depending on the context, these may include the right to physical integrity and to health protection (due to the risks of vaccine side-effects); the right to private life and the freedoms of thought and religion (because mandatory vaccination disregards the individual's free consent and might oppose one's religious views); the right to family life (which might be affected when compulsory vaccines are imposed on children against their parents' will); the rights to privacy and non-discrimination (because when vaccination becomes mandatory people may be compelled to declare and prove whether they complied with their obligation); and the rights to education, to work, and to free movement (whenever vaccination is shaped as a requirement for their exercise).

A recent example of this typical balancing situation can be found in Germany, where the Measles Protection Act (*Masernschutzgesetz*) adopted on 10 February 2020 imposes a mandatory measles vaccination for children. According to the German Federal Constitutional Court, this is justified by the State's positive obligation to protect the fundamental rights to life and physical integrity, and because the measure protects not only those vaccinated and the community in general, but also those individuals who cannot be vaccinated themselves for medical reasons.[10] The argument is therefore similar to the US Supreme Court's in its much-heralded seminal case *Jacobson v Massachusetts* (1905), where it was held that the police powers of the Federated States include the authority to establish mandatory vaccination laws aimed at protecting public health and safety.[11] Assessing the legality of a compulsory vaccine against smallpox, the US Supreme Court stressed that real liberty for all cannot exist if each individual is allowed to act without regard to the injury that his or her actions might cause others. It therefore ruled that 'the restrictions posed by a mandatory vaccination programme fall within the many restraints to which every person is necessarily subjected for the common good', it being immaterial that a portion of the community thought the vaccination worthless or even injurious.

10 *Bundesverfassungsgericht*, Decision of the First Senate of 11 May 2020 (1 BvR 469/20) rejecting several applications for interim measures against Article 20(8) of the *Infektionsschutzgesetz* (IfSG) as amended by the *Masernschutzgesetz* of 10 February 2020.

11 Supreme Court of the United States, Judgment of 20 February 1905, *Henning Jacobson v Commonwealth of Massachusetts* (197 U.S. 11).

3.2. Proportionality

Secondly, the question of whether mandatory vaccination is legally justified depends on whether it is proportionate. It therefore cannot be answered in universal terms and in one go, because the relative weight of the arguments for and against compulsory vaccination depends on the circumstances of the case. A principle can take precedence in one situation and be defeated in another, for balancing - as well as the proportionality assessment that it comprises - operates on a strictly circumstantial basis.

Although the structure of the proportionality test varies among different jurisdictions, it generally revolves around three steps, namely the necessity of the restriction, its suitability to achieve the goal pursued, and the equilibrium between the intensity of the restriction and the benefit achieved through it.

The intensity of the restriction is thus key for the proportionality assessment. Such intensity may be adjusted through a series of mechanisms, including (i) the scope and content of the obligation to undergo vaccination, (ii) the introduction of exceptions and flexibility clauses, and (iii) the establishment of compensatory schemes.

The legal obligation to undergo vaccination may be shaped in different ways and as applying at different levels of intensity depending on two main elements, namely whether the mandate is addressed to the public in general or only to targeted groups, and what the legal consequences for non-compliance are. These may include the use of force and the imposition of fines or other penalties. This happens whenever vaccination is shaped as an obligation in the strict sense, so that lack of compliance involves an infringement of the legal order which can lead to the imposition of sanctions and to compulsory enforcement. More frequently, however, national mandatory vaccination schemes associate non-compliance with the banning of certain activities which might create an enhanced risk of contagion to others. The most widespread example of this is the design of mandatory vaccination as a precondition for exercising free movement rights, accessing certain services and jobs, or for school enrolment and attendance.[12] In these cases, the restriction is less intense because vaccination is shaped not as a true obligation, but as a mere legal duty, in the sense that non-compliance leads to the loss of certain advantages or to the impossibility to exercise certain rights in full, but not to compulsory enforcement and to the imposition of penalties. A combination of both kinds of legal consequences for non-compliance is also possible.

Moreover, the broader the scope of application of the corresponding legislative provision is, the more necessary it will be to introduce certain flexibility clauses that allow enforcement authorities to regard the specific circumstances of each individual case, so that the final decision is proportionate.

Two mechanisms are typically used to reinforce proportionality of mandatory vaccination schemes.

12 Kevin M. Malone and Alan R. Hinman, 'Vaccination Mandates: The Public Health Imperative and Individual Rights', in Richard A. Goodman, Mark A. Rothstein, Richard E. Hoffman, et al, (eds), *Law in Public Health Practice*, OUP, 2003, pp. 262-284.

The first one allows exceptions for cases in which the medical condition of the patient makes it apparent that the vaccine would seriously impair his or her health. A reinforced degree of proportionality on the application of any such rule can be achieved by recognising some discretion for enforcing authorities as to what constitutes 'a serious risk for health' in view of the patient's condition, the specific features of the vaccine at hand, and the risks resulting from the exception for the health of the community as a whole. The second typical mechanism is the establishment of compensation schemes. However, these are not exclusively linked to the principle of proportionality and therefore deserve separate treatment.

3.3. Compensation

The fact that mandatory vaccination may cause injury to some individuals in a relatively few number of cases does not necessarily prejudice its validity, but does call for adequate means of compensation. This structure is typical of lawful damages, which are those inflicted through acts that lawfully sacrifice the rights of some to address a situation of necessity for the community.[13] These damages have received particular attention within the American legal scholarship,[14] compulsory expropriation being their best-known manifestation.[15] Expressed in the language of Calabresi and Melamed, this means that whenever legal rules cease to protect a right through a 'property' rule, to merely protect it by means of a 'liability' rule, a duty to compensate arises as a manifestation of the still existing, but sacrificed right.[16] Therefore, liability rules, as forced transfers, have two components, namely deprivation and compensation.[17] Compensation is deemed in these cases as a commutative justice imperative: whenever an individual has to suffer a sacrifice for the benefit of the community, then the community has the duty to compensate him or her.

In general terms, it can be assumed that the mere obligation to undergo vaccination against one's own will does not cause damage that is eligible for compensation, because the sacrifice of the individual's rights can be deemed to be balanced with the benefit arising from the vaccine for his or her health, both as an individual and as a member of the community. In these cases, those rejecting vaccines are both victims and beneficiaries of the measure, and therefore no compensation duty arises. In other words, the sacrifice of the individual freedoms arising from a lawful compulsory vaccination programme is not indemnifiable as such, because lawfulness presupposes that the measure is proportionate and that therefore individual sacrifices are compensated by individual benefits resulting from the vaccine. However, this equilibrium is disrupted whenever certain individuals suffer a particularly intense harm

13 See Luis Medina Alcoz, 'El problema de la culpa en el Derecho de daños', in Raúl Letelier Wartenberg (ed.), *La falta de servicio*, Abeledo-Perrod: Thomson Reuters, 2012, pp. 363-456.

14 Francis H. Bohlen, 'Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality', 39 *Harvard Law Review* 3, 1926, pp. 307-324; Mark A. Geistfeld, 'Necessity and the Logic of Strict Liability', 5 *Issues in Legal Scholarship* 2, 2005; James Gordley, 'Damages Under the Necessity Doctrine', 5 *Issues in Legal Scholarship* 2, 2005; Kenneth W. Simons, 'Self-Defense, Necessity, and the Duty to Compensate, in Law and Morality', 55 *San Diego Law Review* 2, 2018.

15 Dolores Utrilla, *Expropiación forzosa y beneficiario privado: Una reconstrucción sistemática*, Marcial Pons, 2015, pp. 39-44.

16 Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', 85 *Harvard Law Review* 6, 1972, pp. 1089-1128.

17 Jules L. Coleman, *Risks and Wrongs*, Cambridge University Press, 1992.

due to the implementation of mandatory vaccination programmes. This happens mainly in case of injury connected to a vaccine's side-effects.[18]

This explains why compensation schemes are considered an inherent element of compulsory vaccination programmes in many jurisdictions, such as the United States,[19] France and Italy.[20] A clear example of the rationale underlying compensation in these cases is provided by the Italian Constitutional Court, which in 1990 declared that the 1966 Act on Polio Compulsory Vaccination was unconstitutional insofar as it did not provide for any fair compensation to be charged to the State for damage as a result of infection or other serious illness following compulsory polio inoculation. According to the Italian Constitutional Court, 'this compensation is justified […] by a balanced consideration of the principles of section 32 of the Constitution in relation to the solidarity between individuals and the collectivity, which justifies the imposition of medical treatment'.[21]

4. European law standards

4.1. ECHR law

The ECtHR has never declared a scheme of compulsory vaccination in itself as being contrary to the ECHR. From the perspective of the prohibition of torture and of inhuman or degrading treatment (Article 3 ECHR), the Strasbourg-based court has ruled that forced medical treatments in general are admissible, provided that they are medically necessary and in conformity with accepted medical standards (*X v. Germany*, 1980; *X v. Germany*, 1981; *X v. Denmark*, 1983). However, no ECtHR ruling has been given on how Article 3 ECHR applies to mandatory vaccination, which has usually been assessed under other ECHR rights, in particular the right to private life (Article 8 ECHR) and the freedom of thought, conscience and religion (Article 9 ECHR).

As an involuntary medical treatment, compulsory vaccination has been considered as a (justifiable) interference with the right to respect for one's private life, which covers the physical integrity of a person (*X and Y v. the Netherlands*, 1985), so that any compulsory medical intervention, even if it is of minor importance, constitutes an interference with this right (*Salvetti v. Italy*, 2002; *Y.F. v. Turkey*, 2003). Any such intervention also interferes with Article 6(2) of the Oviedo Convention on Human Rights and Biomedicine, which requires informed consent for any medical intervention (*M.A.K. and R.K. v. United Kingdom*, 2010).[22]

18 Elisa Scotti, 'State liability for lawful acts and the principle of compensation', *Ius Publicum Network Review*, 2014.

19 Through the National Vaccine Injury Compensation Program, created by the 1986 National Childhood Vaccine Injury Act as a no-fault alternative to the traditional tort system.

20 Eleonora Rajneri, Jéan-Sebastien Borghetti, Duncan Fairgrieve and Peter Rott, 'Remedies for Damage Caused by Vaccines: A Comparative Study of Four European Legal Systems', 1 *European Review of Private Law*, 2018, pp. 57-96.

21 *Corte Costituzionale*, Judgment No. 307 of 22 June 1990.

22 On this, see Juana I. Acosta, 'Vaccines, Informed Consent, Effective Remedy and Integral Reparation: an International Human Rights Perspective', 131 *Vniversitas*, 2015, pp. 19-64.

In its landmark case *Solomakhin v. Ukraine* (2012), the ECtHR ruled that mandatory preventive vaccination against diphtheria was justified by the *need to protect the health* of the applicant and of the public at large, in view of the *disease's virulence* and of the complicated *epidemiological situation* in the country and in the region in which the applicant resided (emphasis added). Furthermore, the Strasbourg-based court noted that the medical staff had conducted previous checks on the applicant's suitability for vaccination, and that therefore *necessary precautions were taken* to ensure that the medical intervention would not be to the applicant's detriment to the extent that would upset the balance of interests between the applicant's personal integrity and the public interest of protecting the health of the population (emphasis added). The ECtHR also took into account that the applicant's allegations about the quality of the vaccine and about its negative side-effects had been thoroughly examined by the domestic courts and found to be unsubstantiated. For these reasons – which might be taken as yardsticks for future cases – the ECtHR concluded that Article 8 ECHR had not been breached in the case at hand.

The freedoms of thought, conscience and religion (Article 9 ECHR) protect the freedom to accept or refuse a specific medical treatment, or to select an alternative form of treatment, regardless of how irrational, unwise or imprudent such choices may appear to others. However, the ECtHR ruled in *Jehovah's Witnesses of Moscow and Others v. Russia* (2010) that the patient's interest in directing the course of his or her own life should prevail over public health concerns 'absent any indication of the need to protect third parties – *for example, mandatory vaccination during an epidemic*' (emphasis added). In a previous case, the ECtHR reached the (quite disputable) conclusion that a requirement that minor children undergo a vaccination against hepatitis B does not constitute an interference with Article 9 ECHR since it applies to everyone regardless of their religion or personal convictions (*Boffa and 13 Others v. San Marino*, 1998).

Now, the ECtHR will have a privileged opportunity to further develop its case law on the matter in the pending Grand Chamber case *Vavřička and Others v. the Czech Republic*, a complaint made by several Czech nationals regarding the Czech national legislation imposing the obligation to have their children vaccinated against a number of infectious diseases according to a statutorily defined schedule. The contested Czech legislation shapes vaccination as a requirement for school admission and sets out sanctions for parents refusing vaccination. Under these rules, vaccination is not automatic, but preceded by a medical examination, with exemptions for people with adverse medical conditions. The vaccination obligation is accompanied by an act for compensation for compulsory vaccination, which entered into force in 2020. The ECtHR has been called on to determine whether a mandatory vaccination scheme of this kind is compatible with Articles 8 and 9 ECHR, as well as with the right to education in Article 2 of Protocol No. 1 to the ECHR. The relevance of the matter becomes apparent in view of the fact that the Governments of France, Germany, Poland and Slovakia, as well as several non-governmental organisations, were granted leave to intervene in the written proceedings. On 1 July 2020, a hearing was held, and the case is to be decided by the end of the year.

No ECtHR judgment exists as regards the specific issue of compensation for injury arising from compulsory vaccination schemes. In general terms, the Strasbourg-based court has made it clear that Article 8 ECHR imposes on States a duty to provide adequate means of ensuring compensation for injuries caused by medical errors made by the State (*Codarcea v. Romania*, 2013). According to the ECtHR, if injuries result from compulsory medical interventions, and redress and compensation are not available, then there might be a restriction of the right to an effective remedy and the right to integral reparation (*Glass v. United Kingdom*, 2004). The question is how this applies to damage arising from mandatory vaccines.

In 2013, a case against Turkey concerning the failure to compensate individuals injured by a non-compulsory vaccine was held to be inadmissible (*Baytüre and Others v. Turkey*, 2013). In the ECtHR's view, the State cannot be blamed for failing to take due measures to protect the individuals' physical integrity if accidents occur in the context of a voluntary vaccination campaign. According to the ECtHR, '*in a system where vaccination is not compulsory*, and in the absence of medical error, the introduction of a compensation system for victims of harm arising from a vaccination amounts to a social security measure', which falls outside the scope of Article 8 ECHR (emphasis added). This suggests the *a contrario* argument that certain compensatory duties may arise for national authorities as regards injuries resulting from mandatory vaccination programmes.

This same conclusion follows from the ECtHR's inadmissibility decision in *Salvetti v. Italy* (2002), concerning the Italian rules on mandatory vaccination against polio. Although the case was rendered inadmissible *ratione temporis*, the ECtHR stated in an *obiter dicta* that 'the level of compensation is a relevant element when examining the necessity of the interference under Article 8 ECHR'.

4.2. EU law

No EU-wide vaccination policy exists, with vaccination programmes falling under the competence of Member States who have considerable divergences in approach to the matter. According to a survey conducted in 2010 in 27 Member States (plus Iceland and Norway), 15 countries had no mandatory vaccination schemes, while 14 of them did. From 2010 onwards, the trend towards mandatory vaccination has strengthened in countries such as Italy, France, Romania, and Finland.

This is not irrelevant from the point of view of EU law. Pursuant to Article 168 TFEU, the EU is bound to ensure a high level of human health protection in the definition and implementation of all its policies and activities by means of, inter alia, actions to prevent illnesses (see subsection 4.2.1 below). Moreover, national vaccine mandates may affect the functioning of certain key areas of EU law, especially free movement law (see subsection 4.2.2 below). Lastly, whenever national compulsory vaccination programmes trigger the application of the Charter, they must be assessed in light of it (see subsection 4.2.3 below).

4.2.1. EU legal action in the field of vaccines

The coordinating and supportive role of the EU in the field of human health (Article 168 TFEU) is of particular interest in the area of vaccination policies, due to the cross-border nature of vaccine-preventable diseases and to the common challenges faced by national immunisation programmes. One Member State's immunisation weakness puts at risk the health and security of citizens across the EU.

Even though the EU has not gone so far as to recommend that Member States should establish mandatory vaccination programmes, it has for some time now supported and coordinated national efforts to address the problem of vaccine hesitancy and to increase coverage rates in the Member States. Some remarkable steps in this regard are the Vaccine European New Integrated Collaboration Effort (VENICE) and the Joint Action on Vaccination. In 2018, the European Parliament recommended Member States extend vaccine coverage beyond early childhood to all population groups, and called on the Member States and the Commission to reinforce the legal basis for immunisation coverage.[23] A similar approach was taken soon afterwards by the Council of the EU, which called on Member States to develop and implement vaccination plans aimed at increasing vaccination coverage.[24] The European Commission has also been an active supporter of national policies extending vaccination. On 29 June 2017, it called for EU action to promote the uptake of vaccination in humans, recalling the benefits of immunisation as a public health intervention.[25] In this vein, the Vaccination Initiative, included in the 2018 Commission Work Programme, aims to establish a European Vaccination Information Sharing system (by 2021) and to develop a common vaccination card or passport for EU citizens (by 2022).

Beyond this kind of coordinating and supportive measure, a further question is whether the EU has powers to create binding law prohibiting, imposing, or conditioning the adoption of COVID-19 vaccine mandates in the Member States or in the EU as a whole. Two elements must be recalled in this regard. Firstly, although the Treaty bans harmonisation in the field of public health (Article 168(7) TFEU), it allows the EU to adopt harmonising measures that have the effect of improving health, so long as those measures remove obstacles to trade or remove appreciable distortions of competition (Article 114 TFEU; *Tobacco Advertising*, C-376/98). Secondly, the EU can adopt binding measures that incentivise Member States' actions to protect and improve human health (Article 168(5) TFEU). In the exercise of these powers, which are still untested, the EU must respect national responsibilities for health services and medical care (Article 168(7) TFEU). However, it has been recently argued that the precautionary principle, the proportionality principle, and the right to healthcare in Article 35 of the Charter might enable a flexible interpretation of this limit to the EU competence, so as to allow for measures incentivising Member States to provide localised, temporary, *ad hoc* and context-specific solutions to concrete public health cross-border problems.[26]

23 European Parliament Resolution of 19 April 2018 on vaccine hesitancy and the drop in vaccination rates in Europe.

24 Council Recommendation of 7 December 2018 on strengthened cooperation against vaccine-preventable diseases.

25 Communication from the Commission of 29 June 2017 'A European One Health Action Plan against Antimicrobial Resistance'.

26 Kai P. Purnhagen, Anniek de Ruijter, Mark L. Flear, *et al*, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak', 11 *European Journal of Risk Regulation*, 2020, pp. 297-306.

4.2.2. Freedoms of movement

In view of the severe disruptions caused by COVID-19 containment measures, there is no doubt at this stage that an effective vaccine would be extremely beneficial for free movement in general and for the smooth functioning of the internal market in particular. However, eventual national measures imposing mandatory vaccination may also hinder or make less attractive the exercise of the freedom of movement, should vaccination be shaped as a prerequisite to exercise it. This may call on the Court of Justice to rule – for the first time ever – on the compatibility of such national measures with the freedom of movement that affects the cross-border movement of persons, including the general freedom of movement for EU citizens, for workers and of establishment.

For those situations not covered by secondary EU legislation (Articles 27 *et seq* of Directive 2004/38), this would give rise to a balancing test under the relevant Treaty provisions that would be slightly different from the typical, exclusively human-rights based one. On one side of the balance would be the affected freedoms of movement; on the other, the imperative reason of public health upon which the corresponding national measure is based (which in turn might be supported by the beneficial effects that compulsory vaccination may have in the medium-term for the exercise of free movement in general).

It must be recalled in this regard that the Court of Justice has traditionally taken a deferential approach to Member States' discretion in those cases where national measures interfering with free movement were based on grounds of public health, particularly in scenarios of scientific uncertainty (see for example *Commission v France (Energy drinks)*, C-24/00, and *Debus*, C-13/91 and C-113/91). The fact that one Member State imposes more stringent rules than another in relation to the protection of public health does not mean that those rules are incompatible with the Treaty provisions on the fundamental freedoms (*Commission v Italy*, C-110/05).

This case law concerns predominantly the free movement of goods, while the public health exception has been dealt with to a much lesser extent in the case law regarding the free movement of persons, where it has been interpreted in stricter terms (see *Emir Gül v Regierungspräsident Düsseldorf*, C-131/85; *Commission v Luxembourg*, C-111/91; and *O-Flynn v Adjudication Officer*, C-237/94). However, even here the Court of Justice has ruled that, when assessing whether the principle of proportionality has been observed, account must be taken of the fact that it is for the Member State to determine the level of protection which it wishes to afford to public health and the way in which that level is to be achieved. Since the level of protection may vary from one Member State to the other, Member States must be allowed discretion (see *Apothekerkammer des Saarlandes and Others*, C-171/07 and *Blanco Pérez and Chao Gómez*, C-570 and C-571/07, concerning the freedom of establishment).

4.2.3. The Charter

Just like any other national measure, national compulsory vaccination programmes must comply with the Charter whenever they constitute 'implementation of EU law' within the meaning of Article 51(1) thereof, as defined by the case law of the Court of Justice. In this regard, and because vaccination policies fall under the competence of the Member States, the most likely way for them to be covered by the Charter is through their interference with the freedom of movement, so that both layers of EU control would apply simultaneously.

As is well known, ever since the *ERT* case (*Elliniki Radiophonia Teleorassi*, C-260/89), the Court of Justice has understood that it has jurisdiction to review national measures derogating from the fundamental freedoms from the perspective of compliance with fundamental rights. After the entry into force of the Charter, this approach was confirmed in cases such as *Pfleger* (C-390/12) and *AGET Iraklis* (C-201/15). According to this line of case law, where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the Treaty, it must be regarded as 'implementing EU law' within the meaning of Article 51(1) of the Charter.

In such a case, Member States may benefit from the exceptions to free movement provided for by the TFEU (among which is the public health derogation) only in so far as the national measure concerned also complies with the fundamental rights of the Charter. If the moment arrives for the Court of Justice to assess national mandatory vaccination schemes in this light, different Charter provisions may be involved depending on how the national measure is shaped. The more relevant ones are the right to life (Article 2), the right to physical integrity, which includes the right to free and informed consent (Article 3), and the right to preventive health care (Article 35). Other potentially relevant Charter provisions include inter alia the right to private and family life (Article 7); the right to data protection (Article 8); the freedoms of thought, conscience and religion (Article 10); the rights to education (Article 14), to work (Article 15) and to conduct a business (Article 16); the prohibition of discrimination (Article 21), and the freedom of movement and residence (Article 45).

Given that no harmonisation whatsoever exists in the area of vaccination policies, the Charter is called on to be applied here as a minimum standard of protection, and therefore national authorities and courts remain free to apply higher national levels of protection of fundamental rights (Åkerberg Fransson, C-617/10). However, it must be noted that the relevant provisions of the Charter, and in particular Articles 2, 3, and 35 thereof protect not only the rights of those opposing vaccination, but also of those supporting it. This hinders the application of these provisions as 'minimum standards of protection' and thereby makes it difficult to predict the result of any such balancing.

In the absence of case law on similar matters, particular importance is to be given to the ECtHR's jurisprudence as an interpretative standard of those Charter rights corresponding to ECHR rights, as established in Article 52(3) of the Charter. The reader is referred to section 4.1 above in this regard.

5. The particular challenges of a COVID-19 compulsory vaccine

The analytical and legal frameworks in sections 2 to 4 above provide some hints on how European law may condition national mandatory COVID-19 vaccination schemes, should they be adopted. In this regard, they provide useful guidance for any State in designing and implementing compulsory vaccination policies.

Firstly, the circumstantial character of the balancing exercise underlying any such scheme, together with scarce case law on similar matters under ECHR law and the inexistence of precedents under EU law, precludes reaching a clear and unique conclusion on the matter. The only apparent result is that no absolute *prima facie* and abstract prohibition of mandatory vaccination programmes can be derived from European law, and that it sets out conditions under which such programmes can be lawful. This is highly relevant not only in legal, but also in political terms. Given the controversial nature of compulsory vaccination, international and supranational courts are thus left with a crucial responsibility in implicitly (de)legitimising such national policies, thereby fostering or discouraging their adoption and orienting its content and scope.

Secondly, it is clear that the balancing test that the ECHR and/or the CJEU would be called on to perform if a measure of this kind is brought before them would present significant differences when compared to other compulsory vaccination schemes. Such differences regard mainly the *necessity* test (which may work in favour of mandatory vaccination) and the *potential harm* for those subject to the obligation to be vaccinated (which may advocate against compulsory schemes or, at least, for a particularly high level of safeguards in their design and implementation).

As for the necessity of the measure, a distinction can be made between (i) the need to fight the COVID-19 disease through a vaccine, and (ii) the need to make such a vaccine compulsory.

Regarding the former, it is apparent that the public health concern posed by the coronavirus crisis has an unprecedented intensity. This stems inter alia from the extremely high rate at which it spreads (by comparison with other communicable diseases), its relatively high morbidity rate (which in turn leads to a higher herd immunity threshold), the fact that it affects a broad part of the population in a very severe way (particularly those with underlying medical conditions and people of a certain age), and its ability to collapse public health systems (thereby negatively impacting the care that patients of other illnesses may be receiving). Additionally, in the absence of an effective treatment for the coronavirus disease, no alternative means to protect the population exist, apart from containment measures that lead to severe socio-economic disruptions and that entail additional restrictions of many other fundamental rights.

Concerning the need to impose vaccination mandates, it depends on the level of vaccine refusal and hesitancy, which is highly specific to the context, country, and type of vaccine. The greater the population's reluctance concerning vaccines, the greater the need for mandatory vaccination schemes. To

be proportionate, any such scheme should be based on sufficient evidence of the existence of significant percentages of refusal and hesitancy, ideally once sufficient informative and non-mandatory campaigns have been implemented. In general terms, however, there seem to be reasons to think that a COVID-19 vaccine would be rejected by a relevant amount of the population. A multi-country European study on attitudes towards COVID-19 vaccination conducted in April this year showed that, on average, around 74% of the population would be willing to be vaccinated, with deep variations across countries: willingness ranges from 62% in France and 70% in Germany to approximately 80% in Denmark and the UK.[27] The highest rates of vaccine hesitancy and refusal were found among younger people who, as is well known, are usually less severely affected by the coronavirus disease, but who play a crucial role in its spread. Among those participants in the survey that were unsure about being vaccinated in the future, more than half (55%) said they were concerned about potential side effects of a COVID-19 vaccine. A common concern expressed by the participants is the perception that a COVID-19 vaccine might be experimental, without sufficient studies on side effects, and that the vaccine may not be safe for specific groups, such as pregnant women and people with particular pre-existing medical conditions. Other sources of distrust are the unprecedented fast development of vaccines in the current crisis and the extremely intense political, economic and social pressure to make them available as soon as possible.

When it comes to the rights of those opposing mandatory vaccination schemes, the specific features of the COVID-19 outbreak suggest that their health may be exposed to a particularly serious level of risk as a consequence of the vaccine. Firstly, higher risks of injury as a result of side-effects stem from two circumstances which are not usually present in other mandatory vaccination programmes, namely that the vaccine would probably be administered to all or very broad parts of the population at the same time, and that no previous massive long-term experience regarding COVID-19 vaccination exists. Secondly, higher risks of injury may arise from the accelerated procedure of development and approval of any early coronavirus vaccine. Emergency procedures for the approval of vaccines allow them to be greenlighted based on less than the usual, or missing, clinical data available for assessing the safety of medicines.[28] EU law thereby allows the lowering of the duty of care for the approval of medicines in case of emergency, in that the timeline of the approval process is shortened and less medical evidence for the risk-benefit analyses will have to be provided by the producer of the medicine.[29] However, it is unclear whether and how concerns about the specific safety of a given vaccine arising from its fast-tracked development can be taken into account by courts, once the competent expert technical bodies have certified that it is safe. Under these circumstances, it can be presumed that the provision of adequate compensation schemes for cases where injury has occurred may play a decisive role in the assessment of the proportionality of COVID-19 vaccine mandates.

27 Sebastian Neumann-Böhme, Nirosha E. Varghese, Iryna Sabat, et al, 'Once we have it, will we use it? A European survey on willingness to be vaccinated against COVID-19', 21 *The European Journal of Health Economics*, 2020, pp. 977-982.

28 See the Health Threats Decision 1082/2013, Article 2 of Regulation 507/2006, and Article 21 of Regulation 1234/2008.

29 Filipe Brito Bastos and Anniek de Ruijter, 'Break or Bend in Case of Emergency?: Rule of Law and State of Emergency in European Public Health Administration' 10 *European Journal of Risk Regulation* 4, 2020, pp. 610-634.

Thirdly, COVID-19 has proven different also from the perspective of the discretion afforded to national authorities to fight it through preventive measures. In general, both ECHR law and EU law recognise that public health concerns lie at the very heart of national sovereignty, even in non-emergency situations, which results in judicial self-restraint and deference in the assessment of measures protecting it. The ongoing crisis shows that such margin of appreciation is even broader when it comes to the adoption of exceptional measures in the context of an unprecedented public health crisis. This is an element not to be disregarded, as it may decisively condition the result of the proportionality test to be conducted by the ECtHR and/or by the CJEU … if that moment comes at all.

Chapter 21

ON THE ETHICAL FOUNDATION OF PROPRIETARY RIGHTS: COVID-19, PUBLIC HEALTH, AND THE LIMITS OF PATENTS IN THE EUROPEAN CONTEXT

Enrico Bonadio and Andrea Baldini

1. Introduction[1]

In mid-March 2020, Nunzia Vallini – a journalist working for a local newspaper in Brescia, a city in northern Italy – got in touch with Cristian Fracassi, engineer and chief executive of Isinnova, a 3D printing start-up.[2] The hospital in Brescia, which would sadly become famous as one of the European epicentres of the pandemic, saw a spike in hospital admissions due to COVID-19 infections in that period. The number of patients needing intensive care skyrocketed to 250 in just a few days, and the hospital was running out of respirator valves, with the official supplier unable to meet the sudden demand. The valve, originally produced by UK manufacturing company Intersurgical which owns patent rights protecting such a technology, allows ICU patients to be connected to breathing machines. The design enables a maximum eight hours of use, therefore requiring frequent replacement.

In collaboration with engineer Alessandro Romaioli, Isinnova reverse-engineered the valve, after Intersurgical apparently refused to share the schematics of this product.[3] The release of the 3D printed version of the reverse-engineered valves started immediately after the first positive trial. Time was in effect of the essence: many were already dying as a consequence of COVID-19 complications, which in Italy would claim 45,000 lives.[4] "We're trying to save lives," Fracassi replied during an interview with *BBC News*, which was instrumental in bringing this case into the media spotlight for having highlighted a potential patent and public health issue.

1 This Chapter was finalised on 17 November 2020.

2 'Coronavirus: 3D Printers Save Hospital with Valves', *BBC News*, 16 March 2020.

3 Jay Peters, 'Volunteers Produce 3D-Printed Valves for Life-Saving Coronavirus Treatments', *The Verge*, 17 March 2020.

4 Gianfranco Alicandro, Giuseppe Remuzzi, and Carlo La Vecchia, 'Italy's First Wave of the COVID-19 Pandemic Has Ended: No Excess Mortality in May, 2020', *The Lancet* 396, no. 10253 (September 12, 2020): e27–28, https://doi.org/10.1016/S0140-6736(20)31865-1.

In effect, early reports of the news suggested that Intersurgical was ready to go to court, threatening to sue Isinnova for patent infringement. Amidst public outcry, Charles Bellm – managing director of the UK company – later issued a statement claiming that his group had never considered a lawsuit. "[W]e were contacted at the end of last week for manufacturing details of a valve accessory," Bellm said, "but could not supply these due to medical manufacturing regulations, we have categorically not threatened to sue anyone involved".[5]

2. Patent protection in Europe and the ethics of pandemic litigation

The Italian case was only one among the many similar controversies in intellectual property (IP) protection that emerged internationally.[6] How things actually unfolded in this story (and other similar ones) is somewhat irrelevant here: what is important is a more general question about the ethics of IP that the story raises. If Intersurgical had decided to sue Isinnova, such a legal move would have been perfectly legal: but would have that been a morally justifiable action? And, by bringing this doubt into the legal domain, should European laws accept or ignore claims of IP infringement in extreme circumstances such as a pandemic?

It should be noted as a preliminary matter that patents are strongly protected in Europe. The European Patent Convention (EPC), which is not an EU instrument,[7] provides a solid legal framework for the granting of European patents. Pharmaceutical companies from all over the world regularly obtain European patents to protect a wide range of new medicines – which they use to recoup the (often huge) investments necessary to develop them. Patent protection is therefore key to the pharmaceutical industry, also in Europe. This also clearly emerges from the recent European Parliament Resolution 'The EU's Public Health Strategy Post-Covid-19' of 10 July 2020.[8] While the Resolution calls on the Commission and the Member States to allow maximum sharing of COVID-19 health technology-related knowledge, IP and data to the benefit of all countries and citizens (Paragraph 6), on the other hand it also reminds us that the EU must keep a robust European IP regime to incentivise research, development, and manufacturing, to make sure that Europe remains a world leader in innovation (Paragraph 23).

With that being said, one could argue that behaviours seemingly disregarding the imminent death of many individuals as well as the concrete possibility of further spreading of a dangerous virus appear morally disputable. Patents, one may very well add, should not make access to drugs or life-saving technologies more difficult, especially during a pandemic. Should we allow for restrictions of circula-

5 Jay Peters, 'Volunteers Produce 3D-Printed Valves for Life-Saving Coronavirus Treatments' *The Verge*, .

6 For a discussion of international patent controversies during the pandemic, see for instance Enrico Bonadio and Andrea Baldini, 'COVID-19, Patents and the Never-Ending Tension between Proprietary Rights and the Protection of Public Health', 11 *European Journal of Risk Regulation* 2, pp. 390–95, https://doi.org/10.1017/err.2020.24.

7 European Patent Convention (Convention on the Grant of European Patents) of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000. The EPC has been signed by 38 Contracting States, including countries which are not EU Member States.

8 European Parliament Resolution 2020/2691(RSP) 'The EU's Public Health Strategy Post-Covid-19' of 10 July 2020.

tion of knowledge and its outcome to increase profits in times of a health crisis? The COVID-19 pandemic has taught us many things, but when looking at patent laws, perhaps its most important lesson has to do with the ethical justification of IP. Put in a nutshell, IP protection cannot be fully or effectively vindicated by egoistic theories.[9] In other words, personal gain – broadly understood both as existential self-realisation[10] or economic profit[11] – does not offer solid moral ground to justify IP in extreme and urgent situations such as those produced by the COVID-19 crisis. And egoistic takes on IP justifications clearly show their limits when major conflicts between individual and societal well-being emerge. These months of global lockdown have been a powerful reminder of a simple truth about humans: we are a community of unity, whose collective well-being also makes individual self-satisfaction possible.

3. The relevance of collective well-being

After all, collective well-being was taken into consideration by the German judiciary when a compulsory licence over a patent owned by the Japanese company Shionogi was granted to Merck in 2017. While controversial, compulsory licences allow eligible drugmakers to legally manufacture and sell generic versions of patented drugs during national emergencies, public health crises, or in other instances of extreme need. In that case the German Federal Patent Court granted Merck the compulsory licence to continue selling the HIV drug Isentress, which contains the patented active ingredient raltegravir.[12] The decision was also confirmed by the German Federal Supreme Court shortly after.[13]

The grant of the compulsory licence was preceded by a patent infringement claim brought by Shionogi (owner of the European patent over the raltegravir) against Merck before the District Court of Duesseldorf in 2015[14] after licence negotiations between the parties were unsuccessful. The Japanese company sought, *inter alia*, an injunction preventing Merck from using raltegravir in their drugs. The court stayed the suit pending the opposition proceedings against Shionogi's European Patent initiated by Merck before the European Patent Office.[15] In the meantime, Merck applied for the grant of a compulsory licence before the German Federal Patent Court. As Shionogi objected to the claim brought forward, Merck requested the Court to grant the compulsory licence by way of a preliminary order. The request was lodged pursuant to Section 85 of the German Patent Act. This provision allows compulsory licences to be granted as an interim measure where the applicant is able to furnish evidence that the prerequisites for granting a compulsory licence as outlined within Section 24(1)-(6) of

9 For an instructive survey of philosophical justifications of intellectual property, see Adam Moore and Ken Himma, 'Intellectual Property', in *The Stanford Encyclopedia of Philosophy*, Ed. Edward N. Zalta, Winter 2018 (Metaphysics Research Lab, Stanford University, 2018), https://plato.stanford.edu/archives/win2018/entries/intellectual-property/.

10 Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, Ed. Allen Wood, Cambridge: Cambridge University Press, 1991.

11 John Locke, *The Second Treatise of Government*, Ed. Peter Leslett, Cambridge: Cambridge University Press, 1988.

12 Decision of 11 July 2017; X ZB 2/17, GRUR 2017, 1017.

13 Decision of 21 November 2017; 3 Li 6/16, GRUR 2018, 803.

14 Landgericht Düsseldorf (4c O 48/15).

15 The patent was subsequently revoked by the EPO Board of Appeals in 2017 - EPO, Technical Board of Appeal 3.3.01, T 1150/15, decision of October 11, 2017 – Merck & Co., Inc. v. SHIONOGI & CO., LTD.

the Patent Act are given and that an urgent public interest in granting the licence exists. In this specific case, the licence was granted because the health of many people was at risk, including that of pregnant women, infants, young kids as well as newly infected and long-term patients.[16] In particular, it was held that the public interest justified the compulsory licence, also taking into account the effects that an injunction against Merck would have created for HIV patients. The German Federal Supreme Court's release clarified as follows:

> 'The Federal Court also shares the assessment of the Federal Patent Court that a public interest in the granting of a compulsory licence is credible. It is true that not every HIV or AIDS patient is required to be treated with raltegravir at any time. There are, however, patient groups that needed raltegravir to maintain the safety and quality of treatment. These include, in particular, infants, children under 12, pregnant women, people who need prophylactic treatment because of the risk of infection, and patients who are already treated with Isentress and who are threatened with significant side effects and interactions when switching to another drug' [translated from German by Google Translate].[17]

This German case is certainly exceptional. There are no (recent) reported decisions in Europe where compulsory licences of pharmaceutical patents have been granted. Yet, this example shows us something important: the *public* need to access important life-saving medicines may in some specific circumstances override the *private* interests of patent owners in restricting such access (indeed, as patents constitute monopolies, their owners are usually able to charge higher prices for their patented products and thus restrict availability). The collective good thus may supersede the financial interests of specific companies.

4. Conclusion

In ethical theory, altruistic forms of consequentialism offer a suitable philosophical framework that could capture these exceptional cases, thus providing us with a more robust justification of IP that balances individual and collective needs and concerns.[18] While recognising the ethical relevance of egoistic demands, altruistic consequentialism places those within a larger altruistic framework whose final horizon is societal utility. Traditionally, altruistic consequentialism has offered justifications based on the collective gain that follows from offering people incentive for innovation.[19] By giving rewards to the efforts of certain ingenious individuals, IP protection has been considered a powerful

16 Christof Hohne, Compulsory Licences in Germany: A Tool for Licensing Negotiations?, 8 March 2019, available at https://www.europeanpharmaceuticalreview.com/article/84768/compulsory-licenses-in-germany-a-tool-for-licensing-negotiations/.

17 The Google translation has been taken from a blogpost by Andrew Goldman, German Federal Supreme Court Affirms Compulsory License on HIV Drug, 13 July 2017, published in the Knowledge Ecology International (KEI) website. See the webpage at https://www.keionline.org/23403.

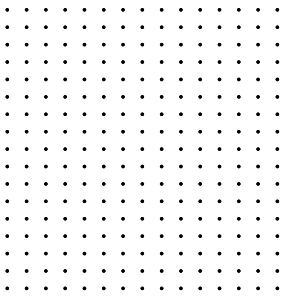
18 In ethical theory, altruistic consequentialism is usually called utilitarianism. In this context, we opt for this alternative terminology ('altruistic consequentialism') to avoid a potential ambiguity with what is known as the 'utilitarian theory' of IP (i.e., IP rights represent an encouragement from the State for the production of inventions and cultural products useful to society).

19 Tom G. Palmer, 'Are Patents and Copyrights Morally Justified - the Philosophy of Property Rights and Ideal Objects Symposium on Law and Philosophy', 13 *Harvard Journal of Law & Public Policy* 3, 1990, pp. 817–66.

stimulus to creativity, whose consistent exercise appears to be instrumental in maximising social utility, which is the key principle of altruistic consequentialism.

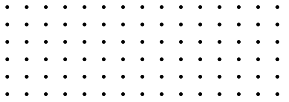
But conventional altruistic consequentialism is inadequate insofar as it conceptualises innovators in terms of individual subjects, which could be either persons, institutions, or companies. And yet, at a time where scientific cooperation is at one of its historic peaks, we cannot fail to witness and acknowledge once again that the logic of discovery is of a distributive kind: innovators are likely to be collective rather than individual subjects, and laws should find ways to protect the possibility of collaboration. This in turn seems at odds with commonsensical takes on IP, but it is certainly a welcome implication of altruistic understandings of patents.

Balancing altruistic and egoistic motives in innovation is certainly difficult – and there is no exact science to that. Prudence and tact are essential requirements of effective management of IP protection. Especially when dealing with public health emergencies of a global scale such as the COVID-19 pandemic, profit may very well have to bow to ethical or moral concerns. There is no denying that IP laws play a generally significant role in promoting research with positive societal impact, but they are not flawless, and we should not exclude a need for reform to meet these new challenges. The key is to lay out conditions for strengthening the mutual trust that international public health cooperation requires.



Part IV

BANKING, FINANCE, AND EURO



Chapter 22

THE EU FISCAL, ECONOMIC AND MONETARY POLICY RESPONSE TO THE COVID-19 CRISIS

Paul Dermine and Menelaos Markakis

1. Introduction[1]

The COVID-19 crisis stands as an unprecedented test for our continent. As economic systems come to a halt, the spectre of recession and meltdown resurfaces. There are obvious parallels to be drawn between the current situation and the sovereign debt crisis the Eurozone was confronted with over the past decade. The risks they give rise to and the policy discussions they triggered look very much look alike. The two situations also beg the same existential questions as to the limits and asymmetries of the currency union most Europeans currently live in. But the COVID-19 situation also has its own unique features. Its disruptive potential is enormous, as it precipitated European economies, almost overnight, into war-like conditions. But it will also, in all likelihood, remain temporary. More importantly, the economic shock that hit the continent, however violent, is broadly symmetric, and affects Member States in similar ways. Eurogroup President Mario Centeno made this very clear: "The challenge our economies are facing today is in no way similar to the previous crisis. This is a symmetric external shock. Moral hazard considerations are not warranted here. We must bear this in mind when we consider coronavirus dedicated instruments."[2] The anatomy of the COVID-19 crisis might ease the adoption of important measures, and by reducing the gap between 'defensive hawks' and 'integrationist doves', break long-standing taboos in the Eurozone.

In this Chapter, we assess the main measures, already taken or currently contemplated by the EU, in response to the COVID-19 crisis and to mitigate its impact on Eurozone economies. The discussion begins with the recent monetary decisions taken by the ECB (section 2). The focus then shifts to the strategy deployed on the economic and fiscal side. We will analyse (section 3) the coordination of national fiscal responses and their accommodation under the rules of the Stability and Growth Pact, (section 4) the role of the European Stability Mechanism and (section 5) joint debt instruments.

1 This Chapter was finalised on 27 March 2020.

2 Remarks by Mário Centeno following the Eurogroup videoconference of 24 March 2020.

2. Monetary policy measures of the ECB

Our colleague Christy Ann Petit has brilliantly explained the measures taken by the ECB during the first weeks of the pandemic[3] (including the measures taken by ECB banking supervision).[4] It will be recalled that, according to the monetary policy decisions of 12 March, additional longer-term refinancing operations (LTROs) will be conducted, temporarily, to provide immediate liquidity support to the euro area financial system.[5] As regards targeted longer-term refinancing operations (TLTROs), considerably more favourable terms will be applied during the period from June 2020 to June 2021 to all outstanding TLTRO III operations during that same time. Moreover, a temporary envelope of additional net asset purchases of 120 billion euros will be added until the end of the year, ensuring a strong contribution from the private sector purchase programmes. Reinvestments of the principal payments from maturing securities purchased under the asset purchase programme (APP) will continue, in full, for an extended period of time.

Furthermore, on 18 March the ECB announced 'a new temporary asset purchase programme of private and public sector securities to counter the serious risks to the monetary policy transmission mechanism and the outlook for the euro area posed by the outbreak and escalating diffusion of the coronavirus, COVID-19'.[6] The Pandemic Emergency Purchase Programme (PEPP) will have an overall envelope of 750 billion euros. Purchases will be conducted until the end of 2020 and will include all the asset categories eligible under the existing APP. Purchases under the PEPP 'will be conducted in a flexible manner', which 'allows for fluctuations in the distribution of purchase flows over time, across asset classes and among jurisdictions'. It is noted by the ECB that, 'to the extent that some self-imposed limits might hamper action that the ECB is required to take in order to fulfil its mandate, the Governing Council will consider revising them to the extent necessary to make its action proportionate to the risks that we face'. Notably, the limits per issue and per issuer under the public sector asset purchase programme (PSPP) will not apply to PEPP holdings (Article 4 of Decision 2020/440).[7]

Notwithstanding the limited available information, the legality of the PEPP has been positively assessed by Sebastian Grund[8] and René Smits,[9] and not-so-positively assessed by Marijn van der Sluis.[10] Following the CJEU's rulings in *Pringle*, *Gauweiler* and *Weiss*, it is relatively safe to conclude that the PEPP falls within the ECB's monetary policy mandate, in light of the objectives pursued by

3 Christy Ann Petit, 'An ambitious and collective response to the COVID-19 shock? ECB's monetary policy package and recent EU policy measures', *EU Law Live*, 18 March 2020.

4 ECB, 'ECB Banking Supervision provides temporary capital and operational relief in reaction to coronavirus', press release of 12 March 2020.

5 See ECB, 'Monetary Policy Decisions', press release of 12 March 2020.

6 ECB, 'ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)', press release of 18 March 2020.

7 Decision 2020/440 of the ECB of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).

8 Sebastian Grund, 'The Legality of the European Central Bank's Pandemic Emergency Purchase Programme', *Delors Institute Policy Brief*, 25 March 2020.

9 See Chapter 23 below.

10 Marijn van der Sluis, 'Fighting the fallout: the ECB adopts a purchase programme in response to the coronavirus', EU Law Live, 24 March 2020.

PEPP and the means used for their attainment. As regards the prohibition of monetary financing (Article 123 TFEU), it is true that the European System of Central Banks (ESCB) 'does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU' (*Gauweiler*, paragraph 97). However, we cannot deduce from *Weiss* that the removal of the limits per issue and per issuer would, in and of itself, allow the potential purchasers of government bonds on the primary markets to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from public authorities and bodies of the Member States concerned (paragraphs 109ff). Furthermore, the PEPP does not circumvent, at this moment in time, the objective of Article 123(1) TFEU, because it does not lessen the impetus of the Member States to follow a sound budgetary policy. As noted above, the underlying economic situation is different to what it was during the previous crisis. The proportionality of the PEPP is not in question either. The recitals in the preamble to Decision 2020/440 explain why this is so.

There are demands to go further. It is argued by Paul De Grauwe that the ECB should 'buy government bonds in *primary* markets, effectively issuing money to finance member states' budget deficits during the crisis'.[11] However, it was already held in *Pringle* that the 'grant of financial assistance to a Member State … clearly does not fall within monetary policy' (paragraph 57). Furthermore, as openly admitted by the author himself, this would violate Article 123 TFEU, which 'prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments' (*Pringle*, paragraph 123). Article 123 TFEU 'employs wording which is stricter than that used in the "no bail-out clause" in Article 125 TFEU' (*Pringle*, paragraph 132). It follows, according to the Court in *Gauweiler*, that 'that provision prohibits all financial assistance from the ESCB to a Member State' (paragraph 95) – a dictum that was repeated in *Weiss* (paragraph 103). Consequently, the only way for the ECB to act in the way suggested would be to amend Article 123 TFEU.

3. Coordination of national fiscal responses and their accommodation under the Stability and Growth Pact

The Eurozone remains an asymmetric currency union, where economic and budgetary sovereignty still primarily lies at the national level. It is thus in a decentralised manner that the fiscal reaction to the economic fallout from the COVID-19 crisis has been first operated, with States offering direct and indirect support measures to their receding economies. The Eurogroup has however provided a useful platform to coordinate the economic response and the fiscal stimuli to the ongoing crisis. In its statements of March 2020, the EU ministers of finance emphasised the need for a resolute, ambitious and

11 Paul de Grauwe, 'The ECB Must Finance COVID-19 Deficits', *Project Syndicate*, 18 March 2020.

coordinated policy response.[12]

The EU in general, and the Commission in particular, have also deployed far-reaching efforts to accommodate the exceptional responses that this unprecedented crisis calls for. It is along those lines that the Commission has very quickly set up several temporary frameworks, and significantly relaxed the EU rules on State aid or competition law to accompany the supportive measures taken at the national level.[13]

It is along similar lines that the Commission proposed, on 20 March, to activate the general escape clause of the Stability and Growth Pact (SGP).[14] The clause was introduced as part of the 'Six-Pack' reform of the SGP, and seeks to offer Member States the fiscal leeway to deal with periods of 'severe economic downturn' (Articles 5(1) and 9(1) of Regulation 1466/97 and Articles 3(5) and 5(2) of Regulation 1467/97). Contrary to what has been relayed in the press, this clause does not amount to a generalised suspension of the SGP. States remain bound, as a matter of principle, by the EU's fiscal rulebook, but they are entitled to depart from their 'normal' trajectory for the purposes of crisis management. It remains nonetheless the case that the clause stands out as the most far-reaching form of flexibility under the SGP, and its activation is as significant as it is unprecedented. On Monday 23 March, the Eurogroup supported the Commission's proposal, considering that the conditions for the activation of the general escape clause were met, and specifying that discretionary stimuli ought to be designed in a 'timely, temporary and targeted' manner.[15] On the same day, the European Fiscal Board, the EU's fiscal watchdog, welcomed the activation of the clause.

At this stage, these announcements remain mere (although crucial) political declarations, which will be further operationalised when the Commission examines the convergence and stability programmes later in spring and assesses the draft budgets of Eurozone countries in October. The signal sent is, however, timely and welcome. For the first time in the short but already turbulent life of the SGP, the EU freezes adjustment trajectories, and tells States that they may spend as much as it takes to smoothen the effects of the COVID-19 crisis. The lessons of the sovereign debt crisis have seemingly been learnt, and the EU has now come to appreciate the importance of counter-cyclicality and coordinated fiscal stimuli in times of economic downturn.

However flexible the EU might be, it remains the case that the economic situation of Eurozone Member States, and the state of their public finances, diverge. Their ability to maintain life support for their economies is very different.[16] The developments of the past few days are clear testament to that. While

12 Eurogroup Statements on COVID-19 economic policy response of 16 March 2020 and of 23 March 2020.

13 On these State aid measures, see the contributions in Part VI by Juan Jorge Piernas (Chapter 34 below) and by Andrea Biondi (Chapter 35 below).

14 Commission Communication of 20 March 2020 on the activation of the general escape clause of the Stability and Growth Pact, COM(2020) 123 final.

15 Statement of EU ministers of finance of 23 March 2020 on the Stability and Growth Pact in light of the COVID-19 crisis.

16 Adam Tooze and Moritz Schularick, 'The shock of coronavirus could split Europe – unless nations share the burden', *The Guardian*, 25 March 2020.

Berlin abandoned its sacrosanct 'schwarze Null' and announced an unprecedented 750 billion-euro rescue package, Rome's response has been far more limited, amounting to a timid 28 billion-euro scheme. That is the reason why so many in Europe are now calling for a collective fiscal response at Eurozone level. Two options are currently on the table: relying on the European Stability Mechanism, and/or issuing joint debt instruments.

4. Using the European Stability Mechanism's firepower

The EU's permanent crisis fund, the European Stability Mechanism (ESM), has not yet been utilised to address the situation. Its available lending capacity is 410 billion euros, namely 3.4% of the Eurozone's GDP. An ESM programme would carry the added advantage that the ECB could implement its Outright Monetary Transactions (OMT) programme, which would involve outright transactions in secondary sovereign bond markets. However, 'strict and effective conditionality' is required for OMTs, which 'can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line [ECCL]), provided that they include the possibility of EFSF/ESM primary market purchases'.

From the press conference following the Eurogroup videoconference of 24 March, it emerges that the Eurozone finance ministers' preferred option would be to use the ECCL. The Eurogroup President has noted that, "There is broad support to consider a Pandemic crisis support safeguard based on an existing ESM precautionary instrument, such as the … ECCL… The features of this instrument would need to be consistent with the external, symmetric nature of the COVID-19 shock. This is also true for any attached conditionality. … The size of the available instrument could be in the range of 2% of members' GDP, as a benchmark."[17] The ball is now firmly back in the courts of the Heads of State or Government. However, the joint statement of the members of the European Council after the videoconference of 26 March came up short (paragraph 14). For their part, Bénassy-Quéré et al propose that 'a new, dedicated Covid Credit Line with a long duration, access conditions and ex post conditionality' be added to the list of ESM financial instruments.[18]

From a legal perspective, conditionality is a constitutional requirement, as per the CJEU's interpretation of 'the no-bailout clause' (Article 125 TFEU) in *Pringle* (paragraphs 135 to 137). The current ESM Treaty and the ESM Guideline on Precautionary Financial Assistance set out the eligibility criteria and the procedures to be followed for granting precautionary financial assistance. Countries are, however, understandably reluctant to subject themselves to a macroeconomic adjustment programme in order to benefit from precautionary financial assistance and/or OMTs. The COVID-19 crisis is no-one's fault, hence conditionality is highly contentious.[19] In this connection, it should be noted that the draft revised ESM Treaty makes important changes to precautionary financial assistance instruments.

17 Remarks by Mário Centeno following the Eurogroup videoconference of 24 March 2020.

18 Agnès Bénassy-Quéré, Arnoud Boot, Antonio Fatás, et al, 'A proposal for a Covid Credit Line', *VoxEU*, 21 March 2020.

19 Beatriz Rios, Florence Schulz, Gerardo Fortuna, and Jorge Valero, 'Leaders clash over stimulus against pandemic, pass hot potato to Eurogroup', *Euractiv*, 27 March 2020.

Notably, access to a Precautionary Conditioned Credit Line (PCCL) would no longer require a Memorandum of Understanding detailing the conditionality attached to the programme. Instead, it would require the continuous respect of the eligibility criteria listed in draft Annex III, as documented by a Letter of Intent (see draft Article 14).

Unfortunately, ESM reform has not yet been finalised. What is more, not all countries would meet the eligibility criteria for a PCCL and, as argued by Dias and Zoppè, 'It remains unclear whether a precautionary credit line would qualify for access to the … OMT' (point 6).[20] In our opinion, this would be unlikely, as the above mentioned OMT press release seems to single out the ECCL in this respect. Claeys and Collin argue that 'the ECB should clarify its original OMT press release and state that a PCCL should be considered sufficient as a pre-condition to activate an OMT programme'.[21] This would indeed be the preferred option. We do not regard this as legally problematic, since conditionality should be appropriate to the financial instrument chosen and the economic situation obtaining in the Member State concerned. As such, it may indeed take the form of continuous respect of pre-established conditions, provided that the incentive of the recipient Member State to conduct a sound budgetary policy would not be diminished (which is clearly not at issue here, insofar as government expenditure is linked to addressing the COVID-19 crisis).

5. Joint debt instruments ('corona bonds')

A last initiative considered to tackle the effects of the COVID-19 crisis is the issuance of joint debt at Eurozone level. The idea of so-called 'corona bonds' was first evoked by Giuseppe Conte during the March 17 European Council, and received immediate support from States like France and Spain.[22] Germany and the Netherlands did not reject the idea from the outset, but deemed it premature, as all other possible policy options would first need to be considered.[23] The Eurogroup meeting on March 24 confirmed that the idea remained on the table, but was not given priority at the time.[24] Despite the explicit call from nine Member States (led by Italy, France and Spain) to work towards a common debt instrument,[25] the European Council on March 26 failed to reach consensus, and gave the Eurogroup two more weeks to present concrete proposals.[26]

The logic behind 'corona bonds' is rather simple: joint debt instruments are issued at Eurozone level, with a collective (and thus more credible) guarantee from all involved Member States, hence easing access to funding throughout the Eurozone, especially for those in the weakest financial position. The

20 C. Dias and A. Zoppè, 'The proposed amendments to the Treaty establishing the European Stability Mechanism', European Parliament Economic Governance Support Unit Policy Paper, 2020.

21 Grégory Claeys and Antoine Mathieu Collins, 'Does the Eurogroup's reform of the ESM toolkit represent real progress?', *Bruegel*, 13 December 2018.

22 Gerardo Fortuna, 'Italian PM floats idea of 'corona-bonds' to restart EU economy', *Euractiv*, 18 March 2020.

23 Jorge Valero, 'Germany and Netherlands 'open' to considering 'coronabonds'', *Euractiv*, 19 March 2020.

24 Jorge Valero, 'Eurogroup nearing agreement to use bailout fund against pandemic', *Euractiv*, 25 March 2020.

25 Sarantis Michalopoulos, 'Nine member states ask for eurobonds to face coronavirus crisis', *Euractiv*, 25 March 2020.

26 Joint statement of the Members of the European Council of 26 March 2020.

label is fresh, but the idea is certainly not new. It was explored by economists and policy-makers abundantly during the sovereign debt crisis, and was declined in various concrete proposals (euro-bonds, euro-bills, stability bonds, and so on), which all crashed against the inflexibility of a group of Eurozone Member States. For the champions of national responsibility, fiscal solidarity and risk mutualisation have always constituted an absolute no-go. The current situation is different, however. The COVID-19 crisis has its own features, and the deadlocks of the past might soon be broken.

The legal issues raised by any project for the issuance of joint debt instruments remain broadly the same, however. First, there is the question of competence for the EU to establish a debt mutualisation regime. Following Articles 2(3) and 5 TFEU, the EU only has a 'coordinating' competence for economic and fiscal policies. Admittedly, it has never been clear what policy coordination entails exactly, and recent reforms under the economic pillar have brought about a very broad and far-reaching understanding of the notion. It remains clear however that joint debt issuance is, to say the least, reaching the outer edge of what the Treaties seem to tolerate. Secondly, though much would depend on the features of 'corona bonds', they must not contradict 'the no-bailout clause' consecrated by Article 125 TFEU. The clause embodies a philosophy of national fiscal responsibility and avoidance of moral hazard in the currency union. The understanding of this clause was admittedly relaxed as a result of the sovereign debt crisis. In its *Pringle* ruling, the Court favoured an interpretation restructured around the principle of policy conditionality. It remains to be seen how 'corona bonds' might be technically structured, but these constitutional constraints will in any case limit the degree of ambition of such a project.

6. Tentative conclusions

In contrast to the previous crisis, the EU has acted at breakneck speed and adopted important measures, on all fronts, to address the situation. There seems to be a strong political commitment to do 'whatever it takes' so that there will be no new Eurozone crisis. It is crucial however that this commitment is soon translated into further concrete action. The ECB's action will need to be complemented by an ambitious joint fiscal response at Eurozone level. For our part, we have argued in favour of the legality of the measures adopted thus far, and raised some question marks regarding some of the proposed initiatives. It is hoped that the measures adopted will be effective in addressing the difficulties facing the Member States. For this would mean that COVID-19 has largely been contained and that the situation has not further escalated. Writing from the safety of our homes, this is all we can hope for.

Chapter 23

THE EUROPEAN CENTRAL BANK'S PANDEMIC BAZOOKA: MANDATE FULFILMENT IN EXTRAORDINARY TIMES

René Smits

1. Introduction[1]

In the last few weeks we have seen the eruption of a world-wide COVID-19 pandemic. After the outbreak of the disease in Wuhan (China), it spread globally, affecting first thousands, then millions of people whose lives were turned upside-down as they were asked, or compelled, to respect 'social distancing' to prevent contagion, to stay at home, work at a distance, and self-isolate or go into quarantine. The social and economic effects of the pandemic are huge.

Allow this sociologist-cum-lawyer to begin with the social disruption before focusing on the legal issues of the European Central Bank's (ECB) response. Suddenly, values are resurfacing that, in the 'normal' economic life of many, had not figured prominently. For example, the environment and Planet Earth breathed afresh: air quality was reported to have improved significantly above areas closed down for work and transport, providing a glimpse of the steps mankind needs to undertake to avoid a climate change catastrophe.[2] As CNBC reports: 'the pandemic's unintended climate impact offers a glimpse into how countries and corporations are equipped to handle the slower-moving but destructive climate change crisis'.[3] Simon Kuper, in his column in the Financial Times, also offered insights on the possible greening of our societies over time ('*Coronavirus could help push us into a greener way of life - For all its horror, the pandemic may change our habits when nothing else could*').

Other values that are resurfacing include family life; the recognition of the vital roles of cleaners,

1 This Chapter was finalised on 23 March 2020 and it was written in a personal capacity: the author's academic views cannot be attributed to the ECB.

2 'Air quality is improving in countries under coronavirus quarantine', *France24*, 22 March 2020;

3 'Air pollution falls as coronavirus slows travel, but scientists warn of longer-term threat to climate change progress', *CNBC*, 22 March 2020.

teachers, health workers and other indispensable people for a society to conduct its business – their social status and earnings dismal compared to those of entrepreneurs, innovators and managers; and the possibilities of working remotely from one's 'home office' for those whose jobs allow them to do so.

One wonders what the effects of this re-evaluation will be over the long term. Of course, any serenity people may feel because of the sudden stillness of their daily lives and the opening of new modes of living only apply to those with the comfort to do so. For people relying on food banks that cease to operate, and for refugees on Lesbos, times have become immeasurably harder.

At policy level, choices that have been mainstream for a long time seem reversible overnight: the idea of 'helicopter money' may have lost its 'taboo status', as Martin Sandbu describes in the *Financial Times's Big Read*,[4] as does Jonathan Freedland in *The Guardian* in respect of Great Britain.[5] His words are worth being repeated here: '[j]ust as there are no atheists on a sinking ship, there are no free-marketeers in a pandemic'. The same holds for a basic income for all.[6] The history of this idea, once considered mainstream and now utopian, has eloquently been described by Rutger Bregman *in Utopia for Realists*.[7] The joint issuance of bonds by Euro Area governments is proposed by German economists in the *Frankfurter Allgemeine Zeitung* (FAZ): '*Krisen-Anleihen mit einer gemeinschaftlichen Haftung*' (crisis bonds under joint liability),[8] and see also 'A proposal for a Covid Credit Line',[9] research-based policy analysis and commentary from leading economists.

Yet, hitherto national responses have prevailed. One nation goes into 'lockdown', the other belatedly orders social distancing. This may be due to local specificities: the severity of contagion, the availability of intensive care units, and other considerations.

Yet, it seems that governments rely on their own disease control centre's recommendations as if there were no prior experience abroad (in China, Taiwan, Singapore), or closer by (Italy), and as if there is no European Centre for Disease Prevention and Control (ECDC), the website of which publishes a daily update on the COVID-19 outbreak.

In their televised speeches to the nation, neither Dutch Prime Minister Mark Rutte, who said 'all 17

4 Martin Sandbu, 'Coronavirus: the moment for helicopter money - Economic taboos are being broken to finance the huge government deficits needed to fight the crisis'.

5 Jonathan Freedland, 'As fearful Britain shuts down, coronavirus has transformed everything', 20 March 2020.

6 A study on the role of basic income policies in times of crisis can be found in the contribution by Borja Barragué and Guillermo Kreiman (Chapter 8 above).

7 Rutger Bregman, *Utopia for realists and how we can get there*, Bloomsbory, 2017.

8 Jens Südekum, Gabriel Felbermayr, Michael Hüther, et al, 'Europa muss jetzt finanziell zusammenstehen - Die Starken müssen den Schwachen helfen. Jetzt ist der Moment, wo die oft beschworene Schicksalsgemeinschaft Europa Flagge zeigen muss. Ein Aufruf führender Ökonomen' ('Europe must now stand financially together - the strong must help the weak. Now is the time when Europe, often implored to be a community of destiny, has to fly the flag. A call from leading economists'), *Frankfurter Allgemeine Zeitung*, 21 March 2020.

9 Agnès Bénassy-Quéré, Arnoud Boot, Antonio Fatás, et al, 'A proposal for a Covid Credit Line', *VoxEU*, 21 March 2020.

million of us will have to work together to overcome it' in a television speech on 16 March 2020,[10] nor German Chancellor Angela Merkel, who as I write this, is in quarantine after a doctor who gave her a vaccine tested positive for coronavirus, in an address to the nation on 19 March 2020, mentioned Europe or the need for international cooperation.[11] Each referred to their own public health institutes (the Robert Koch Institute and the *Rijksinstituut voor Volksgezondheid en Milieu* (RIVM), respectively).

A jointly-decided closure of the *external* borders of the Schengen Area (proposed by the Commission on 19 March 2020)[12] came after border closures of the hitherto barely visible *internal* borders on which Member States allegedly did not inform each other or the Commission prior to the closures.[13]

Similarly, on the economic front, there is no European Union or Euro Area fiscal stimulus, but at best a coordinated response (the Polish Prime Minister questioning whether it was really a new effort or just a relabelling of existing money flows).[14]

The Eurogroup statement of 16 March sums up national responses and welcomes EU initiatives but did not (could not) release budgetary funds.[15] The envisaged, dismally inadequate budgetary instrument for convergence and competitiveness that the Euro Area finally agreed upon last year has not yet been activated.

2. The EU's response is crucial and forthcoming

As in the 2008 Great Financial Crisis (GFC), and the subsequent sovereign debt crisis in the Euro Area, effective federal action is needed, and still – mostly – lacking. As said, there is no fiscal stimulus from the centre, as there is no competence to enact such a measure which, just as in 2008, shows that Europe cannot act as swiftly as the trans-Atlantic currency union (the US) can. In the GFC, the European Commission and the ECB acted in tandem to save the Single Market and single currency as much as possible.[16] They have now both acted rapidly, each within their respective fields of competence.

The European Commission adopted a State aid Temporary Framework,[17] which brings back memories of the adoption of its 2008 Bank Guarantee Communications,[18] ultimately resulting in the 2013 Bank-

10 Television address by Prime Minister Mark Rutte of the Netherlands, 16 March 2020.

11 Address to the nation by Federal Chancellor Merkel, 19 March 2020.

12 Commission Communication COM(2020) 115 final of 19 March 2020 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU'.

13 An overview of border closures carried out by Member States under the Schengen Borders Code is available here.

14 See the Financial Times article 'Poland criticises EU 'smoke and mirrors' coronavirus response - Brussels' measures insufficient and help for workers should be priority, says finance minister'.

15 Eurogroup Statement of 16 March 2020 on COVID-19 economic policy response.

16 See my contribution in 'European supervisors in the credit crisis: issues of competence and competition', in Mario Giovanoli and Diego Devos (Eds.), *International Monetary and Financial Law in the light of the Global Crisis*, OUP, 2010, pp. 305-327.

17 Commission Communication of 19 March 2020 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. On this, see the contributions in Part VI by Juan Jorge Piernas López (Chapter 33 below) and by Andrea Biondi (Chapter 34 below).

18 Commission Communication of 25 October 2008 'The application of State aid rules to measures taken in relation to financial

ing Communication,[19] which the Court of Justice interpreted in the *Kotnik* (C-526/14) judgment. The first decisions approving coronavirus outbreak-related state support measures (in favour of two German state aid schemes, and one Italian scheme to support production and supply of medical devices) were reported on 22 March 2020, a Sunday.

On 12 March 2020, the ECB adopted three significant monetary policy decisions:

1. Increased provision of liquidity to the markets through Longer-Term Refinancing Operations (LTROs);

2. An increase of 120 billion euros in its programme of asset purchases ('a temporary envelope of additional net asset purchases of €120 billion will be added until the end of the year');

3. Extra favourable conditions on Targeted Longer-Term Refinancing Operations; under this TLTRO III, funds that banks report to have lent-on to the real economy, notably to Small and Medium-sized Enterprises, can benefit from an interest rate of up to 25 basis points below the average ECB deposit facility rate.

As banking supervisor, the ECB also adopted measures on 12 March 2020, allowing banks to use capital buffers, to get relief in the composition of capital for Pillar 2 Requirements (that is, the additional capital a bank needs to hold over the statutory capital under the Capital Requirements Regulation[20] as a result of the Supervisory Review and Evaluation Process (SREP) pursuant to Article 97 ff. of the Capital Requirements Directive[21]).[22] After announcing on 12 March that it would 'consider operational flexibility in the implementation of bank-specific supervisory measures', the ECB followed up on 20 March with new measures to permit 'flexibility in prudential treatment of loans backed by public support measures' and by 'introduc[ing] supervisory flexibility regarding the treatment of non-performing loans (NPLs)'. Furthermore, the ECB wants banks to avoid the possibly procyclical effects of capital requirements and financial reporting. More importantly perhaps, the ECB postpones - for six months - the enforcement of major supervisory decisions, such as deadlines for remedial actions imposed as a result of on-site inspections, in the context of the review of internal models to calculate banks' risk-weighted assets, and other supervisory measures.[23]

---

institutions in the context of the current global financial crisis'.

19 Commission Communication of 30 July 2013 'Communication on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis' ('Banking Communication')'.

20 Regulation 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation 648/2012.

21 Directive 2013/36 of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87 and repealing Directives 2006/48 and 2006/49.

22 ECB, 'ECB Banking Supervision provides temporary capital and operational relief in reaction to coronavirus', press release of 12 March 2020.

23 See ECB, 'FAQs on ECB supervisory measures in reaction to the coronavirus'.

The ECB's main announcement in mid-March was on a new Pandemic Emergency Purchase Programme (PEPP),[24] explained by ECB President Christine Lagarde.[25] The ESCB will purchase 'private and public sector securities' in amounts of up to 750 billion euros. Eligible securities are the marketable instruments that can be purchased under the current Asset Purchasing Programmes (APP). Flexibility is to be the hallmark of the new programme: whereas 'the benchmark allocation across jurisdictions will continue to be the capital key of the national central banks', the buying operations will see fluctuations 'over time, across asset classes and among jurisdictions'. Instruments issued by non-financial companies will be included in the commercial paper purchased under the Corporate Sector Purchase Programme (CSPP). The 'main risk parameters of the collateral framework' will be adjusted to allow for wider collateral to be posted at the ESCB. A 'whatever it takes' sentence is added, with the necessary reference to the mandate, as in ECB President Mario Draghi's statement on 26 July 2012 that "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough", made at the Global Investment Conference in London. The ECB states that the 'Governing Council will do everything necessary within its mandate'. This comes right after a wide-ranging statement that includes all sectors of European society:

> The Governing Council of the ECB is committed to playing its role in supporting all citizens of the euro area through this extremely challenging time. To that end, the ECB will ensure that all sectors of the economy can benefit from supportive financing conditions that enable them to absorb this shock. This applies equally to families, firms, banks and governments.

Below, I will explore what can be said, at this juncture, about the legality of the ECB's PEPP.

3. PEPP and other ECB measures are legal

The primary law legal basis for the emergency response of the ECB is Article 127(1) and (2) TFEU. This provision mandates the ESCB to conduct ('define and implement') the monetary policy of the EU[26] and entrusts them to strive for price stability as a primary objective and, as a secondary objective ('Without prejudice to the objective of price stability'), to support the economic policies of the EU 'with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 [TEU]' (see below for the full text of Article 3 TEU with the most relevant terms underlined by me). Article 3(1)(c) TFEU makes clear that monetary policy is an exclusive EU competence, just as 'competition rules necessary for the functioning of the internal market' are an exclusive EU competence pursuant to Article 3(1)(b) TFEU.

The reference to the secondary objective of the ESCB is relevant for several reasons. First, it puts the

24 ECB, 'ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)', press release of 18 March 2020.

25 Christine Lagarde, 'Our response to the coronavirus emergency', *ECB Blog*, 19 March 2020.

26 In the context of the non-adherence to the monetary union of Denmark, which has an opt-out (Protocol (No 16) on certain provisions relating to Denmark), and of eight other Member States that have a derogation under Article 140 TFEU or their respective accession treaties, for 'Union' read: 'Euro Area'. Article 139 TFEU and Article 42 ESCB Statute regulate the applicability of EMU law provisions to the 'opt-out' Member States.

support of (hitherto largely national)[27] economic policies in a wider, EU perspective. Second, it makes clear what the EU stands for and which objectives its monetary authority ultimately needs to support, while respecting its prime mandate to maintain price stability. In the current context, special attention is warranted for: the well-being of Europeans (no further explanation needed), their security (which includes physical and mental security, and health - see also, Article 9 TFEU, one of the 'integration clauses', quoted below), full employment and social progress (which are under severe threat now), combatting social exclusion (think food banks and refugees), promoting social justice and protection (relevant in the context of mass unemployment; and the same holds for:) economic and social cohesion. Furthermore, the EU's role on the global stage is set from the perspective of, again, the protection of EU citizens and security, the sustainable development of Planet Earth (which must include conditions that are not conducive to pandemics, and which guarantee health for all sentient beings - see Article 13 TFEU which recognises animals as sentient beings whose welfare requirements need respecting), solidarity and mutual respect among peoples (relevant at this time for international health cooperation) and the protection of human rights (among which is the right to life (Article 2 Charter of Fundamental Rights of the European Union ('Charter'), and the right of access to health care - see Article 35 of the Charter which specifies that '[a] high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and practices').

Article 3 TEU

'1. The EU's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

27 Articles 2(3) and 5 TFEU make clear that economic policies are coordinated at EU level while national (that is, State) competences remain prevalent. These competences are exercised in the context of a number of EU provisions (Articles 120 and 121 TFEU) and prohibitions (Articles 123-125 TFEU) and procedures (Articles 126 and, for the Euro Area, 136 TFEU). Post-crisis economic governance strengthening has shifted the balance somewhat towards EU competences which, nevertheless, are focused on overseeing national policies.

> It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
>
> 4. The Union shall establish an economic and monetary union whose currency is the euro.
>
> 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
>
> 6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.'

Relevant for the context of the ECB's mandate are the so-called integration clauses of the TFEU. These provisions call for consistency among EU policies (Article 7) and notably require adherence to objectives of equality between men and women (Article 8), employment, social protection and health (Article 9), non-discrimination (Article 10), the environment (Article 11), consumer protection (Article 12) and animal welfare (Article 13). This consistency requirement is an additional argument for the ECB's mandate to be interpreted as not 'standing aloof' of the EU's wider objectives. In the current context, Article 9 is especially relevant:

> 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.

This perspective makes it clear that the ECB's mandate includes measures that it considers conducive to the exercise of monetary policy and the support of economic policies with a view to the achievement of the EU's objectives.

A further legal basis for the ECB's PEPP can be found in Article 18.1 of the ESCB Statute which, as a protocol attached to the TFEU, has Treaty status. It gives the ECB and National Central Banks (NCBs) the power, in order to achieve the ESCB's objectives (Article 127(1) TFEU, Article 2 ESCB Statute) and carry out its tasks (Article 127(2) TFEU),[28] inter alia, to buy and sell 'claims and marketable instruments' and to conduct credit operations with credit institutions and other market participants, on the basis of adequate collateral.

There have been precedents for extraordinary monetary policy measures which have been tested in court. In two references by the German Constitutional Court to the CJEU, the mandate of the ESCB to

28 See, also, Articles 127(4) and (5) and Article 128 TFEU; Article 3 ESCB Statute; see, also Articles 4, 5, 16 and 25 ESCB Statute.

undertake unconventional measures has been explored when (draft) instruments were reviewed. In *Gauweiler* (C-62/14), the ECB's announced Outright Monetary Policy Transactions (OMT) were held to be within the mandate. In *Weiss* (C-493/17), the Public Sector Purchasing Programme (PSPP) of the ECB was assessed as falling within its mandate. The PSPP is the quantitatively most significant of the Asset Purchasing Programme (APP); the Quantitative Easing (QE) the ECB engaged in rather late compared to other major central banks (the Bank of Japan, the US Federal Reserve System and the Bank of England). Broadly speaking, under the PSPP, NCBs purchase bonds issued by their own Member States and the ECB buys bonds issued by Euro Area supranational organisations. From these judgments, support for the PEPP can be derived.

Let us recall how the Court of Justice described how monetary policy influences the economy at large in paragraph 50 of *Gauweiler*:

> 'The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the 'impulses' which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB's decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB's ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining to the primary objective laid down in Article 127(1) TFEU'.

And, in paragraph 65 of *Weiss*: '(…) the transmission of the ESCB's monetary policy measures to price trends takes place via, inter alia, facilitation of the supply of credit to the economy and modification of the behaviour of businesses and individuals with regard to investment, consumption and saving'.

So, the ESCB, having exclusive competence to conduct monetary policy, has a pivotal role to play in the economic conditions of business and individuals, even when economic policies affecting companies and citizens are primarily in the hands of national governments.

It is important in this context to recall that the Court of Justice wisely commented upon the division of competences, with monetary policy an EU matter and economic policies an issue for the Member States: while each sphere belongs primarily to one level of governance, there is no absolute separation: '(…) the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies' (paragraph 60, *Weiss*).

The case law makes clear that the ESCB's mandate includes the option to ensure that the transmission mechanism functions smoothly: 'the aim of the programme is to safeguard both "an appropriate monetary policy transmission and the singleness of the monetary policy"' (paragraph 47, *Gauweiler*), and:

'the objective of safeguarding an appropriate transmission of monetary policy is likely both to preserve the singleness of monetary policy and to contribute to its primary objective, which is to maintain price stability' (paragraph 49, *Gauweiler*).

The smooth functioning of the monetary policy transmission channels is core to market disturbances over recent weeks. ECB executive directors have squarely tackled this issue in their comments. 'We will not tolerate any risks to the smooth transmission of our monetary policy in all jurisdictions of the euro area', wrote ECB Executive Board Member Philip Lane, in the ECB Blog on 12 March 2020.[29] In her interview with the *Frankfurter Allgemeine Zeitung* (*FAZ*) published on 21 March 2020, his colleague Isabel Schnabel said:

> "Our actions are always determined by our mandate of price stability. And for this we need a functioning transmission mechanism so that monetary policy is passed on to the real economy. That mechanism had recently become impaired, as manifested by the sudden rise in euro area government bond yields. It was affecting all euro area countries, even Germany. When that happens, monetary policy has to step in" (emphasis added).

Later in the interview, she reiterates that "[t]he central bank must act (…) when the transmission of monetary policy to the real economy is at risk". Isabel Schnabel's reasoning may indicate that the ECB's motivation of the PEPP is still squarely within the first leg of the ESCB's mandate (price stability). My approach would be to consider that the secondary mandate is also clearly supportive of the PEPP.

Speaking of reasoning, we have to await the legal instruments that the ECB will adopt (at the time of writing these had not yet been published) to evaluate the reasons behind drawing up the PEPP. The case law makes clear that such reasoning will be scrutinised by the Court of Justice based on the preamble of the relevant legal act(s) but can also be found in other communication from the ECB:

> '(…) the successive decisions of the ECB relating to the PSPP have consistently been clarified by the publication of press releases, introductory statements of the President of the ECB at press conferences, accompanied by answers to the questions raised by the press, and by the accounts of the ECB Governing Council's monetary policy meetings, which outline the discussions within that body.' (paragraph 37, *Weiss*; see, also, paragraph 39 with references to press conferences of the ECB President).

On legal acts to be adopted and possibly reviewed by the Court of Justice, it is noteworthy to remark that it has interpreted a press release before, and has assessed draft legal acts on the OMT, as well as also having previously based its findings on non-published ECB legal acts in the context of the PSPP. This is clear from paragraph 71, *Gauweiler*:

29 Philip Lane, 'The Monetary Policy Package: An Analytical Framework', *ECB Blog*, 12 March 2020.

> 'Although an examination of whether the obligation to provide a statement of reasons has been satisfied may be undertaken only on the basis of a decision that has been formally adopted, in this case it must nonetheless be found that the press release, together with draft legal acts considered during the meeting of the Governing Council at which the press release was approved, make known the essential elements of a programme such as that announced in the press release and are such as to enable the Court to exercise its power of review' (see, also paragraph 28 on the admissibility of a request for a preliminary ruling based on a press release).

This is also clear from the *Weiss* judgment which refers to an unpublished ECB Guideline adopted in the context of the PSPP.[30] As one may feel uncomfortable with the judiciary basing its findings on unpublished legal acts of an active programme such as the PSPP, one may expect the ECB to publish the full array of legal acts supporting the PEPP.

There is currently no indication that the PEPP will be used in a selective manner, namely to affect interest rates in certain jurisdictions of the Euro Area in particular. The only State-specific measure announced concerns the eligibility of Greek government bonds (for which a waiver will be granted according to the ECB's press release of 18 March 2020),[31] hitherto excluded from the PSPP.[32] Should this become so, the case law (paragraph 55, *Gauweiler*) provides a precedent to support such an outcome:

> 'As regards the selective nature of the programme announced in the press release, it should be borne in mind that the programme is intended to rectify the disruption to the monetary policy transmission mechanism caused by the specific situation of government bonds issued by certain Member States. In those circumstances, the mere fact that the programme is specifically limited to those government bonds is thus not of a nature to imply, of itself, that the instruments used by the ESCB fall outside the realm of monetary policy. Moreover, no provision of the FEU Treaty requires the ESCB to operate in the financial markets by means of general measures that would necessarily be applicable to all the States of the euro area'.

When confronted with extraordinary, once-in-a-century circumstances, it is clear that the discretion which the Court of Justice allows policy-makers will be widely drawn. In paragraphs 24, 30, 73, 91 and 92 of *Weiss*, the Court made five references to the ESCB's 'broad discretion'. Discretion also figured in *Gauweiler*, in paragraphs 68, 69 and 75. Such broad discretion will not prevent the judiciary from exercising review, when asked. Judicial review will include – beyond adequate reasoning –

30 Paragraphs 85, 88, 95, 114, 115, 119, 121, 125, 135, 137, 139, 142, 148 refer to the Guideline on a secondary markets public sector asset purchase programme (ECB/2015/NP3).

31 ECB, 'ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)', press release of 18 March 2020.

32 See the letter of 16 January 2019 from ECB President Mario Draghi to MEP Stelios Kouloglou referring to Guideline 2015/510 of the ECB of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) as the relevant legal instrument to determine whether Greek government bonds meet the minimum credit requirements, specifying that 'eligibility for the PSPP is a decision for the ECB Governing Council to take on the basis of its own independent debt sustainability assessment and other risk management considerations. In this regard, a central precondition for PSPP eligibility of Greek government securities is that they fulfil the ECB's minimum credit requirements'.

whether there has been a manifest error of assessment, or a misuse of powers, and whether proportionality has been upheld. Article 5(4) TEU provides: 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.

In both *Gauweiler* in paragraphs 67 to 92, and *Weiss*, in paragraphs 72 to 100, the Court of Justice extensively explored the proportionality of the measures, recognising in this review the ECB's broad discretion: '(…) the principle of proportionality requires that acts of the EU institutions be appropriate [should be suitable] for attaining the legitimate objectives pursued by the legislation at issue and do [should] not go beyond what is necessary in order to achieve those objectives' (paragraph 67, *Gauweiler*; paragraph 72, *Weiss*, with [slightly different wording] between square brackets).

On proportionality, Isabel Schnabel rightly points out that this is a core issue when assessing the legality of measures.[33]

4. Conclusion

This analysis bodes well for the legality of the ECB's response to the coronavirus pandemic. One hopes that the Court of Justice will not be requested to assess this legality, by a Member State or by concerned citizens who have access to constitutional review mechanisms. This is not the time for legal quibbling. Yet, the legality is core to the idea of a society under the rule of law.[34] And it will co-determine the next steps to take: when extraordinary times allow for extraordinary measures they must also lead to reflection on the next steps to avoid a recurrence of unpreparedness. This applies to the health policies: as already set out by Daniel Sarmiento, the protective clause to keep health care a national prerogative may have to be amended.[35] The contours of an EU Health Union might include not only common standards for medical professions but, also, extensive interactions on health research, making the ECDC an authoritative and effective agency in times of health hazards, ensuring the availability of medicines across Europe, and a joint approach to the pharmaceutical industry in price-setting and the availability of medicine for all EU citizens alike, while acknowledging the necessarily local character of health care, close to those very citizens.

But let me stick to my field of expertise, the law of the Economic and Monetary Union. Unfinished business is to be taken up once the crisis is over:

- How to treat sovereign risk on banks' balance sheets equitably and prudently;
- Adopting a European Deposit Insurance System, stalled in the Council;

33 When the FAZ asks: "The German Constitutional Court might put a spanner in the works when it rules on the legality of the bond purchases in May", she answers: "Against this backdrop, it's important that our measures are proportionate. (…)".

34 See René Smits, 'The ECB and the rule of law', *ECB Legal Conference*, 2019.

35 Daniel Sarmiento, 'EU law in extraordinary times', *EU Law Live*, 18 March 2020.

- Revamping and extending the European Stability Mechanism (ESM), beyond the current revamp and, ultimately, integration of the ESM in the Union legal framework, proposed but, again, stalled.

History will not judge lightly those who, between the crises, have organised obstruction to the construction of a stronger union (for example, joint action in the fiscal field to allow automatic stabilisers to work across the currency union and linking deposit insurance and unemployment insurance schemes),[36] or those *outre-Rhin* who choose to be deaf to Emmanuel Macron's recurrent insistence on shaping European sovereignty, including in EMU affairs. But quarantine has odd effects on the self-reflection of people who suddenly find themselves isolated, '*en exile*' as Albert Camus eloquently describes in *La Peste* (1947). Redemption is still possible. Will the *Bundesverfassungsgericht* (German Constitutional Court, *BVerfG*) wish to mark the 75th anniversary of the end of the Second World War to issue its sequel judgment to *Weiss* by finding that massive buying of government bonds is outside the mandate of the ECB, or of the *Bundesbank*, or undermines German constitutional identity, as the *BVerfG*'s deferral of its judgment from 24 March to exactly 5 May lets one surmise? Beyond Europe, as Yuval Noah Harari rightly points out in an article in the Financial Times, the pandemic leaves us two choices, 'between totalitarian surveillance and citizen empowerment' and 'between nationalist isolation and global solidarity'.[37] Thus, beyond Europe, solidarity and cooperation are paramount, now and in the face of climate change. A return to core value of the European integration project is called for.[38]

These are contemplations for the longer term, reflecting on what the coronavirus crisis teaches us as Europeans and as global society, also by way of 'dress rehearsal' for the incisive changes in the economy, in transport and food patterns, in short: in our daily living, that the ongoing climate change catastrophe will forcefully invite us to make soon. For now, still in the midst of the COVID-19 crisis, Europe's two federal executive institutions implement their mandates strongly and in a timely manner. Focusing on the ECB's pandemic purchasing programme, in as far as it is known on the basis of the press release, its mandate of implementation is firmly within the law of the EU.

36 Dutch Finance Minister Wopke Hoekstra is quoted in *The Financial Times*, 3 December 2018, and in parliamentary proceedings of 12 December 2018, to have boasted that the proposed budgetary capacity for the Eurozone was an elephant that he managed to turn into a mouse, and a caged mouse at that.

37 Yuval Noah Harari, 'The world after coronavirus', *The Financial Times*, 20 March 2020.

38 René Smits, 'The Invisible Core of Values in the European Integration Project', 45 *Legal Issues of Economic Integration* 3, 2018, pp. 221–227.

Chapter 24

THE EU'S RESPONSE TO THE COVID-19 PANDEMIC IN THE FIELD OF EU BANKING REGULATION

Karl-Philipp Wojcik

1. Introduction[1]

The COVID-19 outbreak and the subsequent pandemic health crisis have led to the closure of international borders and lockdowns imposed by governments all over the world. These confinement measures disrupted global supply chains and dried up consumption. The following simultaneous supply and demand shocks, together with their immediate negative impact on the liquidity of businesses and households, caused a severe exogenous economic shock to the EU Member States' economies and beyond.

It is worth noting that, unlike the global financial crisis, it was a virus and not the banks or other financial institutions that have caused the economic crisis. Moreover, the economic stress has been, for the time being, limited to the real economy, while the financial system and in particular the banking system have demonstrated a remarkable resilience. That resilience is largely due to the far-reaching regulatory reforms undertaken at global and EU level over the past decade to better regulate the financial services sector. Credit institutions in particular are nowadays far better capitalised, less highly leveraged, less reliant on short term funding and better supervised than when they entered the economic crisis caused by the global financial crisis. As a consequence, the key to understanding the EU's regulatory and legislative response to the COVID-19 pandemic in the field of EU banking regulation lies in the realisation that policymakers' attitude towards banks has dramatically changed: instead of being part of the problem banks are now perceived to be part of the solution.

1 This Chapter was finalised on 24 July 2020, during the author's time as a Member of the European Commission's Legal Service. The views are those of the author and do not necessarily reflect the official opinion of the European Commission.

2. Monetary, fiscal, and supervisory responses to the COVID-19 crisis

From the start of the COVID-19 health crisis in Europe in February 2020 it became rapidly clear that one of the major immediate challenges was to bridge short-term liquidity needs of businesses which were unable to produce and to sell their products to households which in turn were squeezed by a fall in income due to temporary or permanent layoffs. Policymakers in the EU at various levels addressed this challenge with monetary, fiscal, and supervisory measures.

2.1. Monetary measures

The ECB very quickly started easing the conditions of its monetary policy operations, for instance by temporarily changing key parameters for the application of its targeted longer-term refinancing operations (TLTRO III)[2] and by temporarily easing collateral requirements for the purposes of Eurosystem credit operations. Furthermore, the ECB created new monetary policy instruments, notably by adding a new temporary Pandemic Emergency Purchase Programme (PEPP)[3] to its existing kit of asset purchase programmes on 24 March 2020.[4] The PEPP's firepower is impressive and stands now at 1.35 trillion euros.[5]

2.2. Fiscal measures

At the same time, EU Member States have provided significant and coordinated fiscal stimulus to support affected workers and their economies. The Commission facilitated such swift and effective action by Member States in communicating very early that it was driven by the goal to ensure solidarity in the Internal Market and willing to make temporary use of the flexibility of EU State aid rules.[6]

Furthermore, Ministers of Finance agreed with the assessment of the Commission that the conditions for the use of the general escape clause of the EU fiscal framework had been met. This gives Member States the necessary fiscal space in the application of the Stability and Growth Pact for combatting the consequences of the COVID-19 pandemic. Additional fiscal stimulus will be provided through the various budgetary measures announced or proposed by the Commission or the cushion provided by the SURE Regulation.[7]

2 ECB, 'ECB announces easing of conditions for targeted longer-term refinancing operations (TLTRO III)', press release of 12 March 2020.

3 Decision 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme.

4 The secondary markets public sector asset purchase programme (PSPP), alongside the third covered bond purchase programme, the asset-backed securities purchase programme, and the corporate sector purchase programme, constitute the expanded asset purchase programme (APP) of the ECB.

5 ECB, 'Monetary policy decisions', press release of 4 June 2020. On the PEPP, see in particular the contribution to this volume by René Smits (Chapter 23 above).

6 European Commission, Communication of 13 March 2020 (COM/2020/112 final) 'Coordinated economic response to the COVID-19 Outbreak', and Communication of 19 March 2020 (2020/C 91 I/01) 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' and subsequent amendments.

7 Council Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak. For a detailed assessment of SURE, see the contri-

Finally, the discussions on fiscal measures have in the meanwhile moved on from the immediate COVID-19 crisis response to the question of how to finance the recovery. These discussions are centred around the Multiannual Financial Framework (MFF) currently being negotiated and the Next Generation EU package proposed by the Commission on 28 May 2020.[8] The package includes a new Recovery and Resilience Facility, proposes changes to the Own Resources Decision and would allow the Commission to significantly tap financial markets on behalf of the EU.[9]

2.3. Measures taken by banking supervisors and global regulators

In parallel, both global and EU banking supervisors have taken various measures to alleviate the shock of COVID-19 on banks and to allow them to be part of the solution.

The ECB as the Banking Union's direct banking supervisor very quickly communicated its temporary flexibility to banks meeting certain capital requirements, buffer requirements and the liquidity coverage ratio.[10] In order to preserve the banks' capital positions it nevertheless recommended on 27 March 2020 that banks do not pay out dividends and refrain from share buy-backs.[11]

The Single Resolution Board (SRB) as the Banking Union's central resolution authority likewise indicated its flexibility and readiness to use the discretion provided by the Banking Union framework to adapt transition periods, reporting requirements and MREL targets.[12]

The European Banking Authority (EBA) provided important input through its data analyses, which confirmed that EU banks were generally sufficiently capitalised for the crisis.[13] Particularly important are the new EBA Guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis.[14] They refer to measures taken by many Member States which granted some forms of moratorium on payments of credit obligations, with the aim of supporting the short-term operational and liquidity challenges faced by borrowers. The EBA guidelines clarify the prudential treatment of such moratoria.

Finally, global banking regulators, like the Basel Committee on Banking Supervision (BCBS), an-

butions to this volume by Karl Croonenborghs (Chapter 5 above) and by René Repasi (Chapter 6 above).

8 European Commission, 'Europe's moment: Repair and prepare for the next generation', press release of 27 May 2020.

9 On these measures, see the contributions to Part I of this volume by Armin Steinbach (Chapter 3 above), Karl Croonenborghs (Chapter 5 above), and René Repasi (Chapter 6 above).

10 See ECB, 'ECB Banking Supervision provides temporary capital and operational relief in reaction to coronavirus', press release of 12 March 2020, or 'ECB Banking Supervision provides temporary relief for capital requirements for market risk', press release of 16 April 2020.

11 Recommendation of the ECB of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/1.

12 See for instance SRB, 'An extraordinary challenge: SRB actions to support efforts to mitigate the economic impact of the COVID-19 outbreak', and 'COVID-19 crisis: the SRB's approach to MREL targets; 'MREL: the next steps', 8 April 2020.

13 EBA, 'EU banks sail through the Corona crisis with sound capital ratios', press release of 14 April 2020.

14 EBA, Guidelines of 2 April 2020 'Guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis'.

nounced a one-year-delay for the initial deadline to implement the final Basel III standards.[15] The IASB, upon request of the Financial Stability Board (FSB) and the G20 introduced a more forward looking approach to loan-loss provisioning under its IFRS 9 accounting standard.[16]

2.4. Conclusion on the monetary, fiscal, and supervisory responses to the COVID-19 crisis

The monetary, fiscal and supervisory measures taken immediately after the COVID-19 outbreak[17] are heavily geared towards tackling the liquidity needs of undertakings and households. From this perspective, it is evident that banks play a crucial role as liquidity providers to the real economy. The flexibility and forbearance granted can be explained with the policymakers' goal to ensure that banks continue to provide liquidity and credit to undertakings and households and do not – in the face of an economic downturn – withdraw from the market. Even more so, banks are expected to act as 'conduits' for the provision of liquidity and credit, for instance when distributing public sector financing to borrowers or when used in moratoria schemes – a task which has even been welcomed by the CEOs of banks.[18]

In light of the policy context set out above and the specific role attributed to banks in the COVID-19 crisis, the second part of this Chapter will analyse the specific legislative response adopted by the EU in the field of banking supervision.

3. The EU's legislative response to COVID-19 in the area of banking supervision

3.1. The Commission's 'banking package' of 28 April 2020

In reaction to the COVID-19 crisis on 28 April 2020, the Commission adopted a 'banking package'. It consists of two distinct elements: (i) an Interpretative Communication on the application of the accounting and prudential frameworks to facilitate EU bank lending (the 'Interpretative Communication'),[19] and (ii) a proposal for a legislative amendment to Regulation 575/2013 (the Capital Requirement Regulation, 'CRR').[20]

3.1.1. The Interpretative Communication of 28 April 2020

The Commission's Interpretative Communication illustrates well the policy response of the EU in the

15 BIS, 'Governors and Heads of Supervision announce deferral of Basel III implementation to increase operational capacity of banks and supervisors to respond to Covid-19', press release of 27 March 2020.

16 IFRS, 'Application of IFRS 9 in the light of the coronavirus uncertainty', press release of 27 March 2020.

17 See for a constant update on the various measures taken, the COVID-19 newsletter published by the European Banking Institute (EBI).

18 Société Générale's CEO Frédéric Oudéa apparently described banks as 'doctors of the economy'.

19 European Commission, Communication of 28 April 2020 (COM(2020) 169 final) 'Commission Interpretative Communication on the application of the accounting and prudential frameworks to facilitate EU bank lending - Supporting businesses and households amid COVID-19'.

20 COM(2020) 310 final.

field of banking regulation as well as the delicate policy trade-offs involved.

a. The Commission's expectations for banks

The Interpretative Communication very candidly recalls the Commission's expectation that banks have to play a key role in limiting the economic impact of the COVID-19 crisis and promoting a rapid recovery by providing effective transmission channels for public finance and maintaining the flow of liquidity and credit.[21] To this end, the Commission encourages them explicitly to make full use of the flexibility provided by the existing accounting and prudential rules when dealing with events caused by the COVID-19.[22]

On the other hand, the Commission is wary of a potential 'overuse' of such flexibility which could lead to a weakening of banks in the mid- and long run, and which would impede their role in the economic recovery. To this end, the Commission tries to contain negative effects by asking banks to continue measuring their various risks accurately, consistently and transparently. With the same aim, the Commission calls on banks to adapt their business models to digitalisation, remain vigilant as regards fraud, not to pay out dividends and take a conservative approach on variable remuneration.[23]

These seemingly diverging goals show well that an 'instrumentalisation' of banks for liquidity provisioning to struggling businesses and households may, as a side effect, actually increase the risks for banks and may make them less safe.

b. Confirmation of flexibility in the application of accounting and prudential rules

Another important objective of the Interpretative Communication is to consolidate and to confirm the various flexibility announcements made by various EU authorities (EBA,[24] ECB,[25] ESMA[26]) on the interpretation of those EU rules applied by them. The Commission's key objective in this regard is to provide for maximum legal clarity and to ensure the integrity of the Internal Market in the application of the single rulebook.[27]

21 See European Commission, Communication of 28 April 2020 (COM(2020) 169 final) 'Commission Interpretative Communication on the application of the accounting and prudential frameworks to facilitate EU bank lending - Supporting businesses and households amid COVID-19', pp. 3, 10.

22 Idem, p. 3.

23 Idem, pp. 10 ff.

24 See EBA Statement on the application of the prudential framework regarding Default, Forbearance and IFRS9 in light of COVID-19 measures, 25 March 2020; EBA Guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis, 2 April 2020.

25 ECB, 'Banking Supervision FAQs on ECB supervisory measures in reaction to the coronavirus', 20 March 2020; ECB, Banking Supervision letter to significant institutions 'IFRS 9 in the context of the coronavirus (COVID-19) pandemic', 1 April 2020.

26 ESMA, 'Statement on Accounting implications of the COVID-19 outbreak on the calculation of expected credit losses in accordance with IFRS 9', 25 March 2020.

27 European Commission, Communication of 28 April 2020 (COM(2020) 169 final) 'Commission Interpretative Communication on the application of the accounting and prudential frameworks to facilitate EU bank lending - Supporting businesses and households amid COVID-19', p. 4.

c. The accounting rule IFRS 9

During the last financial crisis, it became apparent that, also due to the applicable accounting rules at the time, banks had too little loan-loss provisions for the default of their borrowers. The IASB issued IFRS 9 in 2014. The Commission endorsed that standard in 2016.[28] IFRS 9 sets out a framework for determining the amount of expected credit losses (ECL) that should be recognised. It requires that lifetime ECLs be recognised when there is a significant increase in credit risk (SICR). This approach leads to an earlier recognition of losses and a more realistic view of the bank's financial situation. In the prudential context, recognition of losses leads to a reduction in Common Equity Tier 1 capital.

While making the application of IFRS 9 for banks mandatory as of 1 January 2018, the EU legislator also provided for transitional provisions which exceptionally allow banks to add back some of the IFRS 9 induced losses to their own funds.[29]

The Commission addresses IFRS 9 related concerns resulting from the fact that COVID-19 might deteriorate borrowers' ability to pay back loans, lead to increased recognition, lowering of own funds and hence a reduced capacity to provide liquidity to borrowers in need.

Against this background, the Commission encourages banks to exercise their judgement fully and flexibility when applying and where provided by IFRS 9 in order to avoid an unnecessary decrease in own funds. Specifically, the Commission clarifies its interpretation that loans which were subject to moratoria do not necessarily amount to substantial modifications or automatically lead to loss provisioning. Moreover, the Commission encourages banks to make use of the transitional arrangements under Article 473a CRR which allow adding back IFRS 9 induced loan-loss recognition to their prudential own funds.

On substance, the Commission confirms the announcements made by EBA, ESMA and IASB, contributing to legal certainty.

d. Prudential classification of Non Performing Loans (NPLs)

Concerns had also arisen as to the prudential impact of state guarantees and of moratoria introduced by governments to support the real economy.

The Commission clarifies that the EU prudential framework does not automatically consider a

28 Commission Regulation 2016/2067 of 22 November 2016 amending Regulation 1126/2008 adopting certain international accounting standards in accordance with Regulation 1606/2002 of the European Parliament and of the Council as regards International Financial Reporting Standard 9. For a detailed analysis of the endorsement procedure incorporating international financial reporting standards into binding EU law see Karl-Philipp Wojcik, *Die internationalen Rechnungslegungsstandards IAS/IFRS als europäisches Recht*, Duncker & Humblot, Berlin, 2008, pp. 70 ff.

29 Article 473a CRR.

borrower to be in default when he calls on a guarantee. Otherwise this would lead to provisioning requirements, which in turn would reduce a bank's capacity to lend going forward.

Similarly, the Commission takes the approach that the moratoria schemes introduced during the COVID-19 crisis are of a general and preventive nature, thus confirming the EBA guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis. The existence or use of moratoria does not automatically trigger a forbearance qualification under prudential rules[30] with negative consequences for the capital position of the credit institution. In both cases though, banks will still need to make a case-by-case assessment on the borrower's likeliness to pay.

Finally, the Commission announces in its Interpretative Communication a legislative proposal to make targeted amendments to the relevant EU prudential rules in order to provide for further legal certainty. That proposal was adopted simultaneously with the Interpretative Communication.

3.1.2. The Commission legislative proposal of 28 April 2020

The legislative proposal to amend the CRR tabled by the Commission on 28 April 2020 does not aim to alter the EU's prudential framework fundamentally. It forms rather part of the Commission's general response to address the COVID-19 crisis. Its general objective is to adjust the prudential framework in a way that facilitates banks to lend to the real economy. For this reason, the amendments proposed are of a rather technical nature. Some of these amendments will incorporate certain interpretations provided by the Commission in its Interpretative Communication as well as implement certain developments at the global regulatory level.

The proposal suggests changing the prudential framework in five ways:

a) Postponement of the application of the new leverage ratio buffer

In the course of the COVID-19 pandemic the BCBS agreed at international level to defer the deadline for implementing the final Basel III framework by one year.[31] As a consequence, the Commission proposed to postpone by one year, until 1 January 2023, the application of a new leverage ratio requirement for global and systemically important banks.

b) Adjustment of transitional provisions regarding the impact of IFRS9 accounting on regulatory capital

Already in its Interpretative Communication the Commission has presented its interpretation

30 Article 47b CRR.

31 BIS, 'Governors and Heads of Supervision announce deferral of Basel III implementation to increase operational capacity of banks and supervisors to respond to Covid-19', press release of 27 March 2020.

in relation to the concerns raised by the potential negative impact of IFRS9 accounting on a bank's capital position. In order to provide more legal clarity, the Commission proposes specific changes to Article 473a CRR which will facilitate the 'add back' of potential loss provisioning to the Common Equity Tier 1 capital due to a deterioration of borrowers' ability to pay in the economic crisis. To this end, the proposal suggests inter alia to prolong the transitional period for such 'add back', a change in the formula to calculate 'add backs' and an option for banks to reconsider using 'add backs'.

c) Treatment of publicly guaranteed loans under the NPL prudential backstop

Non-performing exposures guaranteed or insured by an official export credit agency receive preferential treatment under the CRR.[32] Such NPLs do not enter into the calculation of provisioning requirements. The Commission proposes to extend this preferential treatment to exposures guaranteed or counter-guaranteed by the public sector in the context of measures aimed at mitigating the economic impact of the COVID-19 pandemic.[33]

d) Exclusion of exposures to central banks from the leverage ratio

To ensure that liquidity measures provided by central banks in a crisis context would be effectively channelled by credit institutions to the economy, the Commission proposes to change the way the leverage ratio is calculated. In particular, it is proposed to exclude certain central bank exposures from the calculation of the leverage ratio without an explicit exemption by the supervisor.

e) Frontloading of certain capital benefits

Finally, the Commission proposes to frontload capital benefits by anticipating the application date of provisions on the treatment of certain software assets, the provisions on certain loans backed by pensions or salaries, the provisions on the revised supporting factor for small and medium-sized enterprises (SME) and on the new supporting factor for infrastructure finance. The new date would be the date of entry into force of the amending regulation. This frontloading will again free prudential capital and facilitate the channelling of credit to businesses and households.

3.2. The adoption by the European Parliament and Council on 24 June 2020 of Regulation 2020/873 amending Regulations 575/2013 and 2019/876 as regards certain adjustments in response to the COVID-19 pandemic

In a fast track legislative procedure, on 24 June 2020, the European Parliament and the Council adopt-

32 Article 47c CRR.

33 COM(2020) 301 final , p. 6.

ed Regulation 2020/873 amending Regulations 575/2013 and 2019/876 as regards certain adjustments in response to the COVID-19 pandemic.

This act entered into force on 27 June 2020 and became applicable from that very day. It follows closely the proposals made by the Commission. In addition, it adds a number of elements which do not, however, change the nature of the proposed act.

- Prudential filter for sovereign bond exposures. The legislators temporarily reintroduced a prudential filter for sovereign bond exposures. It is meant to mitigate the impact of the current volatility of financial markets on public debt instruments held by banks.

- Additional flexibility for supervisors to mitigate negative effects of the extreme market volatility on the back-testing of internal models. The amending regulation gives banking supervisors additional flexibility to mitigate a possible increase in capital requirements due to the extreme market volatility observed during the last few months due to the COVID-19 outbreak. This additional flexibility applies to the back-testing requirement of banks' internal models.

- Favourable treatment of bonds denominated in the domestic currency of another Member State. Public financing through the issuance of government bonds denominated in the domestic currency of another Member State was considered an option to support measures to fight the consequences of the COVID-19 pandemic. To avoid unnecessary constraints on banks investing in such bonds, the legislators reintroduced transitional arrangements for such exposures with respect to their treatment under the credit risk framework and to prolong the transitional arrangements with respect to the treatment of such exposures under the large exposure limits.

- Frontloading of favourable treatment of certain elements concerning the leverage ratio exposure. To further alleviate the capital burden on banks, the adopted Regulation frontloads the more favourable treatment of the leverage ratio exposure value of regular-way purchases and sales awaiting settlement from 28 June 2021 by one year.

- No mandatory dividend pay-out ban. During the legislative negotiations one of the most contentious issues discussed concerned a legislative obligation to suspend dividend payments by banks. As already indicated above the ECB had recommended on 27 March 2020 that banks within the Banking Union do not pay out dividends and refrain from share buy-backs.[34] Some MEPs requested to introduce a mandatory dividend pay-out ban. They argued that this would prevent the evaporation of the capital relief provided by the new amendments to shareholders. However, taking account of the existing ECB recommendation, their request did not find a majority. Nevertheless, legislators compromised to add a new recital to the regulation which reads:

34 Recommendation of the ECB of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/1.

> In the exceptional circumstances triggered by the COVID-19 pandemic, stakeholders are expected to contribute to efforts towards recovery. EBA, the European Central Bank and other competent authorities have issued recommendations for institutions to suspend dividend payments and share buybacks during the COVID-19 pandemic. To ensure the consistent application of such recommendations, competent authorities should make full use of their supervisory powers, including powers to impose binding restrictions on distributions for institutions or limitations on variable remuneration, where appropriate, in accordance with Directive 2013/36/EU. Based on the experience from the COVID-19 pandemic, the Commission should assess whether additional binding powers should be granted to competent authorities to impose restrictions on distributions in exceptional circumstances.

4. Assessment and outlook

The COVID-19 crisis and the ensuing economic stress are posing enormous challenges to policymakers. They have to deal with an immediate liquidity shock due to the confinement measures taken which were effectively 'mothballing' many economies. Moving forward, policymakers need to organise a swift and quick recovery, even when no vaccine or effective medical treatment against COVID-19 has been found yet.

Fortunately, this time and by contrast to the last global financial crisis, banks and the financial sector were not the cause of the economic crisis. That is why there is the wide consensus that banks will play a part in the solution of the challenges ahead.

Up to now – and this is the big common thread of the responses given by the EU – the measures taken in the area of EU banking regulation serve mainly to alleviate the accounting and prudential framework in such a way as to facilitate and ensure the continuous flow of liquidity and credit from banks to households and businesses.

As a *quid pro quo*, policymakers put a lot of pressure on banks to effectively hand out credit. This is a reasonable approach which banks are even welcoming.[35] One may ask whether this may not pave the way into a future in which banks are regarded more as utilities, comparable to service providers of basic needs such as electricity, water or communication service providers.[36]

However, this is also not an approach without risks – risks of which the same policymakers are obviously aware as they know that they tread a fine line. The risk is that what is still a liquidity squeeze becomes a more protracted solvency crisis of businesses and households in an environment of an

35 Patrick Jenkins, 'Banks should not be shamed into a do-gooder lending binge', *Financial Times*, 13 April 2020.

36 The discussion had already started before the COVID-19 outbreak, see for instance John M. Schiff, 'Is Basel turning banks into utilities?', *Journal of Financial Perspectives*, No. 3(1), 2015, pp. 4-12; see for criticism on this view Matthias Lehmann, 'Mothballing the economy and the effects on banks', in Christos Gortsos & Wolf-Georg Ringe, *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, p. 155-172 (167).

increased fiscal indebtedness of Member States. In that case, banks which followed the public call and have generously continued their lending activity may fall in the trap of rising non-performing exposures, higher loan loss provisioning, deterioration of their regulatory capital, which – together with legacy issues still present from the last global financial crisis, such as a rather low profitability of European banks in general – may effectively impede their ability to contribute to a swift economic recovery and trigger a self-reinforcing vicious circle.

In addition, if banks – despite their current resilience – are adversely affected by further deteriorating conditions in the real economy and cannot raise their profitability in the current 'lower for longer'-interest environment, they may themselves become part of the problem to solve.

Fortunately, the EU has introduced, with the Banking Union (while still incomplete), and post-financial crisis regulation (in particular the BRRD and the SRMR), a legal framework which is capable of effectively dealing with failing banks without having to have recourse to taxpayer's money. However, depending on the size of the economic downturn and the unavoidable hit to banks' balance sheets going forward, the EU resolution framework will be exposed to a severe test by a more systemic than idiosyncratic crisis. Furthermore, having grown used to the extensive use of public support over the last months, Member States might be tempted to step in with public financial support to rescue banks which they see as instrumental in financing the economic recovery, raising concerns as to whether they will honour their promise to taxpayers to never again bail out banks with public money.

Due to the central role of credit institutions in our economies, the EU will continue to address the various challenges stemming from the COVID-19 outbreak by finding the best policy responses available in the area of EU banking regulation. It won't get boring.

Chapter 25

THREATS TO EU FINANCIAL STABILITY AMIDST THE PANDEMIC CRISIS

Christos V. Gortsos

1. The robustness of the EU banking system before the current pandemic crisis[1]

Unlike in the case of the 2007-2009 Global Financial Crisis (GFC), the root cause of the current COVID-19 pandemic (hereinafter 'pandemic crisis') was not caused by failings of the financial sector. It was rather caused by an almost completely unpredictable (as to its extent) risk. In addition, the current focus is on the rescue of companies in the economy's real sector: banks, which were at the centre of the GFC, are currently, on a global scale, much better capitalised and with stronger liquidity, while financial stability has overall been enhanced as well.

The relatively better financial condition of EU credit institutions in the period just before the outbreak of the pandemic crisis, but which also continued during the crisis can mainly be attributed to four factors:

i. The *first* is the so-called 'Basel III impact', namely the fact that credit institutions benefited, in terms of capital adequacy, from having implemented macro-prudential buffers, which were introduced, at global level, by the 2010 Basel Committee on Banking Supervision's 'Basel III regulatory framework'. These are available to allow them to effectively contribute to the short- and longer-term financing of economic activity and recovery in the EU. They complement the higher quality of capital, which has also been a by-product of the Basel III regulatory framework, as applied in the EU by the micro- and macro-prudential pillars of the 2013 single rulebook, namely the Capital Requirements Regulation and Directive (CRR and CRD IV, as in force).

1 This Chapter was finalised on 12 November 2020.

ii. The *second* factor is the establishment and operationalisation, in 2011, of the European System of Financial Supervision (ESFS), a by-product of the 2009 Report drawn up by the *de Larosière* High-Level Group (the *de Larosière* Report). This has contributed to increased cooperation among national authorities competent for prudential supervision in banking, capital markets, insurance and financial conglomerates within the operation of the so-called 'European Supervisory Authorities' (namely the EBA, the ESMA and the EIOPA), as well as to a substantial macro-prudential oversight of the European financial system under the auspices of the European Systemic Risk Board (ESRB).

iii. The *third* factor is the improvement in the quality of micro-prudential banking supervision, exercised since 2014, for the euro area Member States, by the European Central Bank (ECB) for significant credit institutions and by national competent (supervisory) authorities (NCAs) for less significant credit institutions within the Single Supervisory Mechanism (SSM), namely the first pillar of the Banking Union (designed and established as a response to the fiscal crisis in the eurozone). As illustratively noted in the *de Larosière* Report, the financial system of several states were not exposed (at least primarily), or were less significantly exposed, to the GFS not only because they were equipped with a strong institutional and regulatory framework, but also because micro prudential supervision of their banking system was, admittedly, suitable.

iv. *Finally*, since 2014, the EU solvency crisis management framework has also been enhanced by the (new) banking resolution framework laid down in the Bank Recovery and Resolution Directive (BRRD), the content of which was heavily influenced by the international financial standards developed by the Financial Stability Board (FSB). This framework was (globally) designed to effectively address the 'too big to (be left to) fail problem', in relation to which the FSB consultation report of 28 June 2002 '*Evaluation of the effects of too-big-to-fail reforms*' stresses that these reforms made banks, globally, more resilient and resolvable, but certain gaps still need to be addressed. For the euro area in particular, also applicable is the Single Resolution Mechanism Regulation (SRMR), which forms the basis for the second pillar of the Banking Union, consisting of the Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF). Even though resolution action has been taken only in a few (albeit rather important) cases in the EU, the progress made on resolution planning, in order to make credit institutions resolvable, and the (related) build-up of minimum requirements (for own funds and) eligible liabilities (MREL) are considered as important elements in order to maintain the resilience of the banking system and preserve financial stability. The resolution planning framework will be further enhanced as of 2021 upon application of the revised rules laid down in the legislative acts which revised (in 2019) the initial ones (BRRD II and SRMR II), also introducing into EU law for the largest credit institutions the total loss-absorbing capacity (TLAC) standard.

Overall, one can reasonably argue that, just before the outbreak of the pandemic crisis, the EU banking system was quite robust and is in a safe position to positively contribute to its management. *Inter alia*, according to the quarterly Risk Dashboard of the European Banking Authority (EBA) of 14 April 2020, which covers data of the fourth quarter of 2019 and summarises the main risks and vulnerabilities in the EU banking system ahead of the crisis, EU credit institutions' capital ratios and asset quality had (on average) constantly improved before the outbreak of the crisis, even though return on equity has worsened (which is *per se* an aspect of serious concern). As recently noted by Andrea Enria, Chair of the ECB Supervisory Board: "Unlike in the 2008 financial crisis, banks are not the source of the problem this time. But we need to ensure that they can be part of the solution."

2. A brief overview of EU economic policy responses to the crisis and the role of the ECB

Immediately after the outbreak of the crisis, the EU developed a (rather) consistent strategy, which has taken into account the spill-overs and interlinkages between EU economies and the need to preserve confidence and stability. The measures taken, in order to deal with health emergency needs, support economic activity and employment, preserve monetary and financial stability and prepare the ground for recovery, contain a combination of government fiscal *stimuli* (with extensive resort to the principle of solidarity), emergency liquidity and monetary policy measures and measures relating to financial stability. In this respect, the role of the ECB in the euro area has been predominant:

i. *First*, in its capacity as a monetary authority within the Eurosystem, the ECB adopted several bold monetary policy measures (very close to those taken by central banks on a global basis), taking into account its primary objective of price stability, the instruments at its disposal, both conventional (interest rate) and unconventional (balance-sheet), and the limitations set by the TFEU.[2] It established inter alia a new (and separate) asset purchase programme, the 'Pandemic Emergency Purchase Programme' (PEPP), which entered into force on 25 March.

ii. *Second*, since the prudential regulatory framework governing credit institutions (CRR and CRD IV) embeds elements of 'flexibility', and by considering that making full use of this flexibility is essential to overcome the financing pressures faced by firms and households, the ECB, as a banking supervisory authority, within the SSM, and complemented by the EBA, adopted specific measures to ensure that credit institutions have the capacity to foster credit flows to households and businesses in a flexible way during the pandemic crisis.[3] The financial stability-related measures taken by the ECB within the SSM include those relating to the relaxation of some macro-prudential buffers, the adaptation of the composition of specific capital requirements, the reduction of credit institutions' capital requirements for market risk (to maintain their ability to provide market liquidity and continue their market-making activi-

2 E.g., the prohibition of monetary financing of fiscal policy measures by the purchase of government bills and bonds in the primary market by virtue of Article 123 TFEU.

3 At global level, equivalent initiatives were undertaken as well, in accordance with the Report of the Basel Committee on Banking Supervision of 3 April 2020 on 'Measures to reflect the impact of COVID-19'.

ties) and the application of flexibility regarding, mainly, the treatment of non-performing loans (NPLs). Notable is also its Recommendation addressed to credit institutions not to pay dividends nor to undertake irrevocable commitment to pay out dividends for the financial years 2019 and 2020, while credit institutions should also refrain from share buy-backs aimed at remunerating shareholders.[4] Furthermore, the ECB fully supported (in its Opinion of 20 May) the Regulation of the European Parliament and of the Council amending the CRR 'as regards adjustments in response to the COVID-19 pandemic' (the 'CRR quick fix'), which was adopted in late June.

iii. *Finally*, noteworthy is also the contribution of the ESRB in the field of financial macro-prudential oversight, which has addressed major pandemic-related systemic vulnerabilities, such as financial system-implications of fiscal measures taken to protect the real sector of the economy and the impact of large-scale downgrades of corporate bonds on markets and entities across the financial system. Since the ECB is heavily involved in the ESRB's operation and the decision-making process, this is yet another field in which the ECB's contribution is significant as well.

It is also noted that, with a view to achieving the objective of preserving financial stability at euro area level, while allowing flexibility in the application of the resolution framework amidst the crisis, the Chair of the Single Resolution Board (SRB), Elke König, made targeted interventions in relation to credit institutions' resolution planning. In addition, in relation to financial stability in capital markets, the European Securities and Markets Authority (ESMA) has also taken a series of specific measures, such as guidance on accounting implications for listed companies, measures relating to short selling bans and the maintenance of conduct of business obligations under the 2014 Markets in Financial Instruments Directive (as in force, MiFID II).

3. Challenges ahead

The discussion concerning financial stability amidst the current crisis is multidimensional. The measures adopted so far have been mainly designed as temporary ones. The flexibility provided to credit institutions to prolong the periods for the classification of loans as non-performing is justified in terms of providing liquidity support to the fragile real sector of the economy. It, nevertheless, entails the risk of accumulation of problems after the lapse of the 'moratorium' period, the extent of which will vary both among Member States (depending on the depth and the duration of the current and upcoming economic recession) and among credit institutions in each Member State (depending on the composition of their loan portfolio, mainly in relation to exposures on individuals and companies in sectors most severely affected). The undoubtedly most acute problem is, indeed, the expected increase in the ratio of credit institutions' NPLs (and more broadly non-performing exposures (NPEs)), which (as

4 On the basis of the 'comply or explain principle', credit institutions which are unable to comply with the Recommendation, should immediately explain the underlying reasons to their joint supervisory team (JST).

already mentioned) on average significantly decreased during the years following the GFC and the euro area fiscal crisis. They are expected to increase across the board (and in certain cases significantly) in almost all Member States (including within the euro area) both in relation to loans granted to firms and households before the outbreak of the pandemic crisis, to the extent that these will be affected by the severe slowdown of the economy, as well as to credit loans granted (and to be granted) during the crisis (albeit in certain cases covered by State guarantees).

We are currently in the midst of the second phase of the pandemic crisis, the duration and precise impact of which on the economy still cannot be accurately determined. The views on the economic outlook and economic projections are quite diverging, constantly revised and vary among Member States. However, it is quite reasonable to consider that in the medium-term the crisis will, globally, have a negative impact on the banking system and lead to corporate restructurings therein. It is taken as a given that the ultimate public policy objective, namely the preservation of financial stability, should not (and is not expected to) be compromised. From this perspective, the role of supervisory and resolution authorities and the decisions they will take are of utmost importance. Taking into account the existing set of tools available in order to achieve the financial stability goal and in view of the necessary flexibility that has to be (and is being) applied, the effectiveness of policy reaction under the current conditions will be basically tested against two benchmarks: *first*, how supervisory authorities will navigate credit institutions in appropriately balancing two of the primary objectives of the current policy agenda, which may, nevertheless, in the medium-term become conflicting ones: *on the one hand*, supporting the real sector of the economy financially (and hence employment) and, *on the other*, preserving financial stability; and *second*, how the triggers embedded in the framework to activate the existing set of tools will be activated by both supervisory and resolution authorities.

3.1. On the role of banking supervisory authorities

National banking supervisory authorities, the EBA and the ECB are alert on the front of increasing NPLs as a consequence of the severe economic downturn, which, *inter alia*, is evidenced by several ECB Reports. The short-term alternatives for resolving this (rapidly) emerging problem are several:

i. *First*, the role of credit institutions' own credit risk management assessment is a decisive factor. This applies, in particular, to the provision of new credit and loans to households and businesses during both the current and the upcoming phases of the pandemic crisis; while demand for bank credit has surged and is expected to further increase, it may nevertheless (in several cases) not be fully supported by solid economic fundamentals of (prospective) borrowers. In addition, it is also more than evident that credit institutions' operational risk frameworks have also been impacted by the crisis, inducing them to accordingly revise their capital planning scenarios.

ii. *Second*, it is the quality in the exercise of prudential banking supervision which will be of primary importance in addressing the NPLs problem. On this basis of the single methodology

and set of harmonised tools used pursuant to the Supervisory Review and Evaluation Process (SREP) framework,[5] both the ECB within the SSM and national supervisory authorities (for non-participating Member States) will be in a position to assess, on a consistent basis, all four areas covered by this SREP methodology and, in particular, credit institutions' risks in capital and in liquidity. Furthermore, the conduct of stress testing exercises of credit institutions' portfolios, either by the supervisory authorities, including the ECB, or by the EBA, may have temporarily been suspended (at least on a generalised basis), but are still an absolutely necessary tool in order to identify weaknesses under the current exceptional conditions.

iii. *Third*, the creation of a European Asset Management Company ('bad bank'), which would be set up in order to absorb a significant stock of NPLs, has already been proposed as an alternative solution to this emerging problem.[6] Relevant discussions are at an early stage and such an entity would not become operational in the short-term (provided that a decision could be reached at all given the existing divergent approaches). However, the expectations from such an alternative solution should be modest in view of several limitations to its use.

For the medium-term horizon, and to the extent that problems will accumulate, three aspects deserve attention in relation to the action of supervisory authorities:

i. *First*, of critical importance will be their supervisory approach to bank consolidation (mergers and acquisitions) in a (generally accepted) 'overbanked' European financial system,[7] as well as the use of their specific supervisory powers and their early intervention powers.[8]

ii. *Furthermore*, of particular interest is whether the conditions for granting public support to credit institutions meeting the (strict) conditions for 'precautionary recapitalisation'[9] could be interpreted and applied in a flexible way in order to accommodate the needs arising amidst the current crisis. It is noted in this respect, that in accordance with Commission Communication of 20 March on a 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (as in force), this framework, which allows public support to be extended to companies under more flexible conditions, while ensuring the necessary level playing field in the single market, also applies to credit institutions in relation to their precautionary recapitalisation.[10] In principle, credit institutions with weak fundamentals before the outbreak of the pandemic crisis should be excluded from such a flexible interpretation of the conditions pertaining to precautionary recapitalisation; on the other hand, more radical, tem-

5 This is governed by Articles 97-101 CRD IV.

6 A similar proposal aired in 2017 by Andrea Enria (in his capacity as Chair of the EBA) has been formalised.

7 Relevant in this respect is the ECB Draft Guide on consolidation in the banking sector of 1 July 2020.

8 The former powers are governed by Articles 104 CRD IV (as in force) and 16 SSMR, and the latter by Articles 27 BRRD and 13 SRMR.

9 As provided for in Articles 32(4), point (d)(iii) BRRD and 18(4) SRMR.

10 On this Temporary Framework, see the contributions in Part VI by Juan Jorge Piernas (Chapter 34 below) and by Andrea Biondi (Chapter 35 below).

porary solutions (by means of a legislative amendment) could also be considered for credit institutions treated as systemically important according to the criteria laid down in the regulatory framework and those whose insolvency could have a significant negative impact on the financial system due to adverse market circumstances or financial stress, without unwinding the resolution framework in place, but complementing it.[11]

iii. *Finally*, in the worst case scenario, and even though it is evidently premature to assess to what extent credit institutions will reach the point of meeting the 'failing or likely to fail' criterion and, hence, what resolution action will have to be undertaken in relation to them, this is an aspect which may become of significant concern from the end of this year onwards (predominantly due to the expected rise in the rate of NPLs). In this respect, it is (usually) the supervisory authorities which will be called upon to adequately assess the occurrence of this (first) resolution condition, which constitutes the clearest indication of the link between supervisory and resolution functions.

3.2. On the role of banking resolution authorities

With regard to resolution planning, the SRB has already presented its approach in view of the uncertainty and disruption caused to the economy by the pandemic crisis, setting out its remit on potential operational relief measures, its actions to support efforts to mitigate the economic impact of the crisis and its dealing with MREL targets under the SRMR II. It is more than evident that resolution authorities are determined not to compromise on these targets, which they (correctly in the author's view) consider as essential in terms of financial stability.

Nevertheless, equal attention must be paid to the application, amidst the crisis, of the framework governing the resolution of credit institutions, which (with the exception of Greece in 2015) has not yet been tested under conditions of a generalised, systemic crisis. In particular, banking resolution authorities (including in the SRB as the EU hub within the SRM) will have to take delicate decisions once the first resolution condition (namely, the determination concerning the fulfilment of the failing or likely to fail criterion) is met by credit institutions (on top of their power to make this determination themselves, even though this is usually made – as already noted – by supervisory authorities), paving the way for resolution action. In this respect, three main challenges arise:[12]

11 See on this Christos V. Gortsos, Michele Siri, and Marco Bodellini, 'A Proposal for a Temporarily Amended Version of Precautionary Recapitalisation Under the Single Resolution Mechanism Regulation involving the European Stability Mechanism', *European Banking Institute Working Paper Series*, No. 73, 2020, with further references.

12 An additional challenge refers to the potential activation of the so-called Government Financial Stabilisation Tools (GFSTs) for the provision of public support to ailing credit institutions, which (exceptionally and under strict conditions) is permissible under the regulatory framework in force. Since bail-in is a prerequisite for the activation of GFSTs, which by design are tailor-made for systemic crises, in view of the (above mentioned) negative effects of bailing-in deposits (even if only uncovered ones), it is expected that this will not be a priority option. These tools are governed by Articles 37(10) and 56-58 BRRD and are not available to the Member States which have opted not to make use of the relevant discretion under the BRRD.

i. The *first* relates to the application of resolution tools. In this respect, the question arises whether, under the current circumstances and on a generalised basis, the bail-in resolution tool can (or more precisely should) be considered as an appropriate instrument when resolution authorities take resolution action, due to the amplifying effect of its application for (already) distressed individuals and businesses. The author defends the view that a decision to make use of this tool, at least in relation to the deposits of companies (of any size), could have severe pro-cyclical effects to the detriment of economic activity and financial stability to the extent that loans of depositors affected by the application of the bail-in tool would, very probably, become non-performing, either because depositors may have been granted loans by the credit institution under resolution, or due to overall liquidity problems arising from deposits' conversion into equity or writing down.

ii. The *second* challenge, for the euro area, is linked to the capacity of the SRF to support, according to its mission,[13] the financing of resolution actions of a large scale. In this respect, it is noted that the adoption of the common backstop to the SRB for the SRF, which is long overdue, may prove extremely imperative in the forthcoming turbulent months and years. Nevertheless, its establishment may be further delayed due to the ESM's primary focus on the operationalisation of the 'Pandemic Crisis Support' instrument, which will absorb a significant amount of its funds. A closely related aspect is the capacity of national deposit guarantee schemes (since the European Deposit Insurance System (EDIS) is not in place yet as well) to contribute to the financing of resolution, by virtue of their second main function (the first being the 'payout/paybox' one).

iii. Finally, the *third* challenge, albeit for the longer term, is the (minimum at least) harmonisation at EU level of the framework governing the liquidation of credit institutions.[14] This should be considered as a main missing element of the Banking Union, which allows the application, due to fragmentation, of diverging rules among Member States when the decision has been taken by resolution authorities (including the SRB) to implement a resolution action.

13 This is governed by Article 76 SRMR.

14 A reasonable proposal recently made by Elke König for the medium-term is the creation of a centralised administrative liquidation tool, by means of legislative amendment which could provide for the power to transfer certain assets and liabilities in an orderly liquidation.

Chapter 26

THE CORONAVIRUS EMERGENCY AND SOLIDARITY IN EUROPE: IS IT TIME FOR A EU TAX?

Stefano Dorigo

1. Introduction[1]

The world and Europe are – hopefully – leaving behind the pandemic of COVID-19. However, its effects will last longer. In the space of a few weeks the health crisis has disrupted the life and activities of most of the inhabitants on the planet, breaking into a context that seemed to be dominated by unshakable confidence in progress, well-being and the capacity of the current social and economic balance – although with several open issues, like the environmental one – to adequately meet the needs of citizens and companies.

As for the legal aspects, the crisis has highlighted once again that action by the EU mostly depends on the will of its Member States. It has been clear since the beginning that, at the present stage, the EU lacks sufficient financial resources of its own, namely resources that are released from the control and conditioning of the Member States. The ongoing debate about the use of EU funds to meet the urgent necessities of some (highly indebted) States shows that action by the EU institutions is still influenced by the will of one or a few States due to rules requiring unanimity. Hence, the initial stage of the crisis emphasised the difficulties of affirming an effective continental solidarity even in the face of the disastrous effects of an unprecedented crisis. It is not surprising, then, that precisely in that dramatic moment the PSPP Decision of the German Constitutional Court opened up a difficult conflict with the EU legal system (and in particular the CJEU), reaffirming the idea that Member States are and remain the masters of the Treaties.[2] As has been noted,[3] this could raise uncertainty with regard to the outcome

1 This Chapter was finalised on 23 June 2020.

2 German Federal Constitutional Court, Judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

3 Miguel Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court', *Verfassungblog*, 6 May 2020.

of the actual effort by the EU institutions to mutualise the economic effects of the crisis.

However, the current historical moment could open the door to unexpected developments. The crisis has dramatically demonstrated the inequalities that still characterise the EU common space. A different vision could then emerge, based on the principle of solidarity and the need for the EU to be equipped with adequate own resources to meet the challenges of the globalised world.

The European Commission's recent proposals for the reform of the own resources system seem to move in that direction. Having in mind the aim to 'repair damage from the crisis and prepare a better future for the next generation',[4] the Commission has recognised that the recovery should be driven by 'solidarity, cohesion and convergence'. Therefore, the Commission suggests a package of EU programmes to support recovery, called 'Next Generation EU', which should be financed through the introduction of a basket of new own resources.[5] These include two green own resources, an Emissions Trading System-based own resource and a carbon border adjustment mechanism: a digital tax applied on companies with a turnover above 750 million euros, based on the work of the OECD and the G20 on the taxation of the digital economy; and an own resource 'based on the operations of enterprises (...) that draw huge benefits from the EU single market and will survive the crisis, also thanks to direct and indirect EU and national support'.[6]

It is not my intention to describe here all the proposed new resources. Rather, I would like to focus on the third and last option which, at a first glance, might appear to be a fiscal own resource based on the taxation, at EU level, of the income of companies that thrive on the freedoms and rights made possible by European law. This proposal deserves attention, as it would appear to recognise, for the first time, a link between the enjoyment of European public goods and the payment of a contribution, in a context in which direct taxation has always been conceived of as a domain reserved to the Member States.

2. Towards EU taxes: proposals and implications

The Commission's Communication does not offer any details as to how this own resource should be built. However, in its previous proposal for a Council Decision on the System of Own Resources of the EU,[7] the Commission had already addressed in some detail the projected own resource based on the revenues of companies. There, it referred to the introduction of a common consolidated corporate tax base (CCCTB), which would then be apportioned among Member States. A call rate between 1% and 6% would be applied to the tax base apportioned to each Member State in order to calculate the amount

4 European Commission, Communication of 27 May 2020 (COM(2020) 456 final), 'Europe's moment: Repair and Prepare for the Next Generation'.

5 On Next Generation EU, see the contribution by Armin Steinbach (Chapter 3 above).

6 European Commission, Communication of 27 May 2020 (COM(2020) 442 final), 'The EU budget powering the recovery plan for Europe'.

7 COM(2018) 325 final.

of the own resource to then be transferred to the EU budget.

It is clear that the own resource based on the operations of enterprises cannot be conceived of as a real fiscal resource: its amount does not depend on the company's ability to pay and the collection is still to be made by Member States. Therefore, a screen is still kept between the payers and the European budget. Furthermore, the Commission qualifies all the proposed new own resources as temporary measures, which are only intended to operate in the most acute context of the crisis, and will disappear once the emergency has been overcome.

Hence, the proposal is still too conservative. Solidarity, which is frequently recalled as the foundation of the whole new system of financing the EU budget, comes to the fore only on the investment side, that is, as the justification of the various recovery measures. However, there is apparently no room for solidarity on the financing side. Those who provide the resources for the recovery programmes are thus destined to remain more or less unaware of their effective use.[8]

This is not new. Every day, individuals and companies take advantage of the freedoms, goods and services made available by the EU legal system, without directly contributing to their cost. In 2017, a document on the future of the EU budget emphasised that 'for the price of less than one cup of coffee per day' European citizens have the opportunity of enjoying the huge benefits stemming from the EU policies.[9] This nice formula reveals the underlying problem. As European citizens, we all enjoy the effects of European policies, but we do not directly contribute to it. That euro per day corresponding to our morning coffee does not go directly to the European institutions: it is part of the taxes that everyone pays to their State of residence. It is the Member State, then, which makes financial transfers to the EU budget. No European citizen knows how much of his or her own contributions to the State goes to the EU funds; and no one knows how these resources are spent by the EU in his or her State or elsewhere.

In sum, the EU system of financing continues to pass over the heads of its citizens, who have a full set of rights but have no duties to contribute to the cost of the latter. Hence, they are unable to perceive the European added value they enjoy on a daily basis. And since there are no duties, the principle of solidarity remains outside our daily lives and is shaped, measured by the yardstick of conditionality and the cold and inflexible rules of austerity, once again by Governments.

No surprise, then, that populism and a sense of distrust towards the EU are taking hold in many Member States. The EU - so the argument goes - does not solve the problems: it is not able to tax the enormous profits of digital multinational enterprises (MNEs), to manage immigration at the borders and now to help States shaken by the effects of the health crisis. However, it keeps asking the Member States to transfer part of their revenues to the EU budget. This is a question of ignorance, of course:

8 For a comprehensive view of the COVID-19 implications for solidarity in Europe, see the contribution by Ulla Neergard and Sybe de Vries (Chapter 7 above).

9 European Commission, 'EU Budget for the Future'.

ignorance of what we receive daily from the EU and of what we would miss if the EU did not exist (do not forget the dramatic and still unresolved experience of Brexit). But the problem cannot be solved, as some say, only with more information.

An apparently unpopular paradox could point the way. It suggests the option of equipping the EU with a real own tax, that is a tax introduced and managed by the EU, directly paid by the individuals and companies and destined to finance the functions of common interest that the EU is growingly called to fulfil.

3. Taxes and citizenship

At the beginning of this year, together with some colleagues from the University of Florence, I concluded a multiannual research project aimed at studying the possibility of providing the EU, without changing the Treaties, with a fiscal own resource. The title of the project was "I pay, therefore I am (European citizen)". Rethinking the Cartesian motto highlights the fact that the EU tax is only a means of tackling broader issues: the meaning of EU citizenship and the potential transnational declination of the concept of solidarity.

The research project was inspired by the observation of the difficulties in which the EU has been struggling for some time: the traditional vulgate of the EU as a den of technocrats, enslaved to the logic of international lobbies and far from the needs of the citizens of the Member States - if not in contrast with them - has evolved over time into more refined forms of ideological elaboration, which describe the evils of the EU integration as risks for the freedom and well-being of national societies. Yet this seemed to us, as law scholars, rather surprising: the European Communities, before, and the EU, today, have granted the continent decades of peace, prosperity and economic growth. EU law, thanks in particular to the fundamental freedoms, has granted individuals and companies the right to move freely in the European space for the most different of purposes: working, studying, carrying out business, looking for better conditions of life. Fundamental rights, through the case law of the CJEU, have experienced unprecedented growth, making the EU an area of freedom and justice for all.

Then why populism? Why the criticism of Europe's inefficiency and remoteness from the 'real' problems of civil societies? Why the nationalist thrusts, which culminated in Brexit? The reflection that we made on the genesis of these disruptive trends led us to highlight a series of critical points that now are again in the spotlight during and after the pandemic crisis. These points are evidence that the EU is still an unfinished construct and this incompleteness, preserved by the Member States to protect their sovereignty, must be urgently overcome today.

Let it be clear that incompleteness is not about the actions of the EU. As noted before, the quantity and quality of the 'European public goods' that the EU makes available every day to Member States, citizens and companies cannot be seriously questioned. The real problem lies, in our view, in the screen that the States have placed between Europe and its citizens: a screen justified for obvious electoral

reasons and internal political return, but which in fact prevents most people from really perceiving the huge benefits that the EU brings.

What is missing, in short, is the direct relationship between citizens and the EU. Genuine participation in the community of Europe requires that, alongside rights, there are also duties. But at present, no EU citizen has a direct duty towards the EU Institutions.

4. Taxes and participation in a community

Here the importance of an EU tax can really be perceived. From a philosophical point of view, tax is at the crossroads of all those characters which are now too weak in the EU system: solidarity, a sense of belonging, social rights. If an own tax would be attributed to the EU, a multitude of objectives could be pursued at once: granting the EU sufficient resources to respond to the current crisis avoiding vetoes by the Member States; allowing citizens to 'feel' their responsible participation in a supranational community; and finally making it clear that the economic sacrifice is imposed not for gaining some personal benefit, but to finance the EU policies to the advantage of the weakest persons, no matter the State to which they belong.

The EU is increasingly called upon to implement active policies to ensure well-being in the common area. Therefore, just as States need resources and therefore a fiscal policy to pursue their own objectives, the EU must also be given adequate funding powers to ensure that its policies can be adequately pursued. Hence, the time is ripe for the introduction of a genuine European tax: a tax which applies to situations of advantage made possible by the participation in the EU system and whose revenue serves to fulfil functions of common interest to all Member States and their citizens.

While tax is usually perceived in national systems as a negative element, in the European context it could act as a driver for greater integration and thus as a tool for cohesion between citizens. The duty to pay taxes affects those who are part of a certain community and is aimed at financing the activities and services that its governing bodies aspire to provide to their affiliates. A tax established by the EU and intended to finance its functions can therefore give rise to a virtuous process, centered on the identification of a 'European public interest', in which taxpayers, precisely because they are directly called upon to finance services from which they benefit (or may benefit), are able to assess the quality of the performance of these functions and develop a European sense of civic responsibility according to the 'I pay, I see, I vote' formula - which must be adapted to the supranational context.

Apart from the technical features of the EU own tax, here it is worth noting that the tribute could serve for the achievement of more far-reaching goals, which ultimately revolve around the recognition of a European solidarity that binds together not only the EU and its Member States (vertical solidarity), but predominantly the EU and its citizens and the latter among themselves (horizontal solidarity). In short, an EU own fiscal resource could impact deeply on the way the European citizenship is perceived. A citizenship finally provided with duties, which ceases to be a mere slogan, being dependent on the

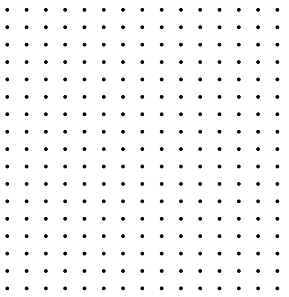
citizenship of a Member State, and becomes an autonomous concept which symbolises belonging to an organised and solidarity-based community. Recalling an inspired expression of Professor Miguel Maduro, here lies the 'miracle' of European citizenship: 'access to European citizenship is gained through nationality of a Member State, which is regulated by national law, but, like any form of citizenship, it forms the basis of a new political area from which rights and duties emerge, which are laid down by Community law and do not depend on the State'.[10]

It is still doubtful whether the debate that is taking place in Europe will actually lead to the expected results. The uncertainty of unanimity which, even if Article 311 TFEU were to be taken as the appropriate legal basis, is still necessary for the introduction of an EU 'own' tax suggests caution in this respect. At the end of the day, a political decision is needed, and everyone knows how difficult this could be. However, it does not seem that the actual implementation of the desired outcome can discriminate between the success or the failure of the whole project. Rather, the issue remains secondary.

What seems relevant is, in fact, the spread of a new awareness that the debate on the reform of the financing of the EU budget is highlighting: the awareness that a tribute, conceived and carried out at supranational level, can be the right instrument to achieve social objectives and therefore to generate an awareness of belonging which, in turn, constitutes an embankment against market-driven and speculative drifts. Europe is at a crossroads, and in order to ensure its survival all of us - no longer just as law scholars but as true European citizens - must keep alive the perception of the huge benefits that the European integration has brought and still brings to each of us. Keeping in mind that those benefits have a cost which has to be financed irrespective of their actual or potential enjoyment.

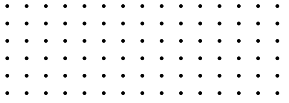
Once Europe is done, now we have to turn to the Europeans. And for this we need duties, especially fiscal duties, which are the true hallmark of a community of solidarity.

10 *Janko Rottman* (C-183/08), Opinion of Advocate General Miguel Poiares Maduro of 30 September 2009, point 23.



Part V

INTERNAL MARKET



Chapter 27

HOW THE PANDEMIC ROCKED THE CORE OF THE EU AN OVERVIEW OF THE INTERNAL MARKET AND COVID-19

Anjum Shabbir

1. Introduction[1]

The Internal Market, the EU's single and united territory with 'open borders' between Member States across which people, goods, services and capital can move freely, was dealt what is the biggest ever blow it has ever received as a result of the COVID-19 outbreak and related measures. This partly reflects the complexity inherent in the crisis-response of a territory where public health matters and other regulation falls partly under national competence, and is partly subject to harmonised EU rules.

National responses included, first, a unilateral, fragmented and uncoordinated closing of internal borders and imposition of travel restrictions by 16 Schengen Area-Member States in March. This almost completely stopped the cross-border movement of people, greatly impacted the provision of services (affecting professionals and businesses), and impeded the supply and circulation of goods as well as capital. This is described by European Commissioner for Home Affairs Ylva Johannson herself as a chaotic situation.[2] Second, national and unilateral restrictions such as intra-EU export bans and limitations on equipment related to healthcare were also put in place by some Member States because of the soaring demand and the shortage of supplies in the EU. This further affected the free movement of goods, which Peter Oliver explores the implications of in his contribution to this Part (Chapter 31).

When EU coordination measures did spring up eventually, albeit with a slight delay, those border controls were mostly lifted in June, and mostly in parallel. This allowed for a period of reflection of the policy and legislative lessons to be drawn from 'the near-death experience of the Schengen area', as Daniel Thym has examined in this Part (Chapter 29), and which Sandra Mantu has also considered in terms of the jeopardising of the highly important right of EU citizenship and EU non-discrimina-

1 This Chapter was finalised on 1 December 2020.

2 Commissioner for Home Affairs Ylva Johannson: "When the virus is present in all member states, closing borders between those member states is not a very effective way of dealing with the infection and with the virus," Crisis made EU countries act like panicked shoppers, says commissioner, *Politico,* 2 June 2020.

tion rules (Chapter 30). The pandemic did not however disappear over the summer, despite the lower number of cases reported over that period. The 'second wave' of the pandemic now striking Europe and the world means that other travel-restricting measures that had replaced internal border controls continued, or were made greater use of: entry, information and other requirements such as completing Passenger Locator Forms, testing negative for COVID-19 before intra-EU travel, or completing quarantine upon arrival in another Member State - and a few Member States still have internal border controls in place.

This overview considers how such COVID-19 related measures may infringe core EU law provisions unless they are justified, proportionate, non-discriminatory, or are lawful further to use of an available derogation, with particular attention paid to: the Schengen Area (section 2), free movement of persons (section 3), and the free movement of goods and services (section 5). The EU's preventive and constructive approach to the impact of those measures is also revealed, through a combination of political diplomacy, initiatives, guidelines and soft law measures, and sector-specific legislative amendments providing for COVID-19 specific derogations (sections 4 and 6).

The effect of such measures on the free movement of capital, which may also potentially be in breach of Article 63 TFEU, are explored in detail in this Part by Ricardo García Antón (Chapter 33), who considers potential issues of justification under the grounds of public policy and public security, and specific matters arising in that area of the Internal Market. And, in connection with the above, the pandemic-related supply shortages, in addition to the problems faced by supply-chains and in transporting goods, also led to EU action being taken in the field of public procurement, with the Commission 'loosening up' the EU rules as much as possible in order to address this aspect of the crisis. That flexible use of the EU's public procurement legal framework and its shortcomings is examined by Stéphane de la Rosa (Chapter 32).

2. The need for review and reform: the 'Schengen response'

When the COVID-19 outbreak was first internationally and formally recognised in the EU in early March, as mentioned above, several (but not all) Member States that are part of the Schengen Area unilaterally closed their land, sea and air borders with other Member States as a measure intended to stem the spread of the virus. Austria first closed the border with Italy on 11 March, Hungary followed on 12 March, Lithuania and Czechia on 14 March, and Poland on 15 March, and in the week after Germany, Norway, Portugal, Estonia, Spain, Finland and Belgium also closed their internal borders.

This technically occurred in breach of Article 1 of the Schengen Borders Code,[3] which requires 'the absence of border control of persons crossing the internal borders' and Chapter 1 of that Regulation. Imposing such restrictions is nonetheless legally possible by making use of derogations set out under Articles 25 and 28 of the Schengen Borders Code.

3 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

A 'specific' and urgent derogation of 20 days (renewable) is possible under Article 28 of the Schengen Borders Code for cases requiring *immediate* action, allowing internal border controls to be put in place on the grounds of a *serious threat to public policy or internal security*. Such border control-periods can be renewed for a maximum period of two months, which many Member States applied initially (a few however, and questionably, extended existing internal border controls put in place for other reasons). It must be noted at this juncture that 'public health' is not explicitly mentioned as a ground to justify the derogation (but it is however an express ground set out in the derogations available under the Citizens' Directive, discussed below).

Many Member States also, or additionally, made use of a 'general' derogation for foreseeable events under Article 25 of the Schengen Borders Code on the same grounds as above - of serious threat to public policy or internal security. The use of this derogation must also be *temporary*, reference being made to a 30 day-period, potentially extendable to a maximum of six months, but only when within the scope and a duration that is *strictly necessary to respond to the serious threat*. The provision sets out that this is an option that must be used as a *last resort*. This derogation has been employed by nearly all the Member States.

There is a need for a country and measure-specific review of the lawful use of those derogations, and application of the proportionality tests inherent in such exceptions, where the measures are not clearly justified. There are a number of arguments in favour of such scrutiny. First, flagrant violations of the procedural and substantive requirements of the above mentioned Schengen-law are pointed out as clearly existing, such as by Daniel Thym.[4] Second, alternative measures such as testing and tracing, or the provision of sufficient medical facilities should be considered for whether they diminished the need to close borders, pertinent given that there are some scientific assessments that do not consider closing borders to be an effective measure. Third, some Article 25 derogations have been or were in place beyond the six-month expiry date for some Member States (such as Denmark). Fourth, it has been observed that the legal basis for Articles 25 and 28 should not be interchangeable so as to allow the derogation to be extended beyond the maximum possible period they provide for, described as a 'malpractice'.[5] Fifth, the notification requirement that comes as part and parcel of the derogations, under Article 27 of the Schengen Borders Code, is also important to consider.[6] Even where Member States issued notifications (some have not), they do not appear to provide detailed reasons for imposition of border restrictions. It has been noted elsewhere that Member States have not issued separate notifications for different grounds, and also that not all border restrictions that are currently in place are related to the COVID-19 pandemic.

4 See Chapter 28 below.

5 Policy Department for Citizens' Rights and Constitutional Affairs, 'In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU', *Study requested by European Parliament's LIBE Committee*, p. 55. The study describes the 'resulting picture' as 'showing an instrumental use of different legal bases' of the Schengen Borders Code 'which results in unlawfully extending the originally-envisaged deadlines' under that instrument.

6 Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq.of the Schengen Borders Code: available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control.pdf

The Commission has the duty to monitor compliance with EU law and launch an infringement procedure in the event of detecting a breach of EU law in its role as 'guardian of the Treaties', and the Schengen Borders Code also grants the Commission the power to issue an 'opinion' in cases where it has doubts about the necessity and proportionality of national measures. Another less heavy-handed tool allowing for such review is also the Regulation on the Schengen Evaluation Mechanism for evaluation of compliance with the Schengen *acquis*, which some consider has *de facto* come to replace infringement procedures.[7] But none of those options available to the Commission has been used so far.[8]

What could explain this monitoring 'lethargy' is that despite public health quite obviously not being an explicitly laid out ground in the Schengen Borders Code justifying the closing of internal borders, the Commission appears to be ambiguous in regarding the pandemic as either a ground of its own, or as fitting into the meaning of a public policy or internal security issue. As support for that view, in its Guidelines for border management measures published on 16 March 2020, the Commission outlined that '[i]n an extremely critical situation, a Member State can identify a need to reintroduce border controls *as a reaction to the risk posed by a contagious disease*',[9] but then two paragraphs later states that the 'conduct of *health checks of all persons entering the territory of Member States does not require the formal introduction of internal border controls*'.[10]

Reading in an entirely new ground for justification of a derogation is however debatable, and it remains to be seen how the Court of Justice would resolve any dispute raising such matters - bearing in mind that it customarily interprets derogations applied under the Schengen Border Code strictly, and that its case law often relates to expulsions or returns of illegally staying third country nationals (*Petrea*, C-184/16; *E*, C-240/17; *Arib* C-444/17). (See also Ricardo García Antón's acknowledgment of this expansive and stretched-out interpretation of the Commission with respect to the free movement of capital under Article 63 TFEU, for which restrictions are only justified on grounds of public policy and public security, in Chapter 32 below.)

It cannot however be said that the European Commission has not at all registered the 'threat' to the Schengen Area and the core EU foundations it epitomises. It convened the first ever 'Schengen Forum' on 30 November, at which it was discussed how to improve the evaluation mechanism of implementation of the Schengen rules and improve the rules themselves, on possible operational improvements, and legislative changes to the mechanism, how to monitor and detect possible deficiencies and effective follow-up.[11] Another such Forum is expected to take place in early 2021. Reform is clearly

7 Saila Heinikoski, Covid-19 bends the rules on internal border controls: Yet another crisis undermining the Schengen acquis? | FIIA – Finnish Institute of International Affairs, *FIIA briefing paper 281,* 29 April 2020.

8 Article 27(4) and Article 33 Schengen Borders Code. See also Policy Department for Citizens' Rights and Constitutional Affairs, 'In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU', S*tudy requested by European Parliament's LIBE Committee*, p. 51.

9 European Commission, COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 16 March 2020, point 18, p. 4. Emphasis added.

10 Ibid., point 20, p. 4. Emphasis added. These Guidelines were followed by Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy, 30 March 2020.

11 European Commission, First Schengen Forum: Towards a stronger and more resilient, press release of 30 November 2020.

needed and likely to be welcomed, as this is not actually a new problem. It is not the first crisis that has revealed the enforcement issues around the Schengen Borders Code: the responses of six Schengen-Area Member States to migration waves since 2015 show an existing flouting of the rules on deadlines to remove border controls (Germany, France,[12] Austria, Sweden, Denmark and Norway).[13]

3. Free movement of people - an emphasis on addressing the plight of workers

Closing the borders may also have contravened another lynchpin of the entire Union: the free movement of persons as protected by EU law, in particular the right to move and reside freely as an EU citizen under Article 20(2)(a) TFEU and Article 21(1) TFEU, and Article 5 of Citizens Directive 2004/38 granting the right of entry to EU citizens to host Member States (and including the manner in which travel restrictions were imposed, raising issues under Article 18 TFEU on the prohibition to discriminate against EU citizens of other Member States).

However there are also derogations available enabling such restrictions under the Citizens Directive, under Articles 27(1) and 29, which are more clearly appropriate to rely upon to address the COVID-19 outbreak as they expressly set out *public health grounds* for diseases that are 'infectious' or have 'epidemic potential' (the other grounds being public policy and public security). A similar test of proportionality however, in terms of nature of the measure, duration of the measure, and suitability of the measure for the objective applies.

As with the derogations provided under the Schengen Borders Code, for which notifications must be made, notifications are also required under Article 30 of the Citizens Directive, but under this exemption must be given *to persons concerned* by the border restrictions of the public health grounds for them including the possibility of an *appeal* against the action, measure or decision: in practice this would mean a large amount of correspondence given the hundreds of million people in the EU affected, and entail that any entry refusals once the internal border controls were lifted could also be subject to this requirement. The only clear exception to having to do so is if that is 'contrary to the interests of State security' - which is more appropriate for a criminal law or counter-terrorism context than a pandemic. It is obvious, but as is also pointed out elsewhere, it is not likely that such notifications, reasoning and appeal-system requirements have been complied with.[14]

As mentioned above in respect of the Schengen Borders Code, it is not clear that the Commission has been monitoring whether EU law has been complied with under these free movement provisions broadly: but, action by a number of EU institutions was taken at least to address the impact of closed borders in response to the pandemic on frontier, cross-border, seasonal, and healthcare *workers* - who

12 For further reading on the legal issues surrounding France's application of the Schengen Borders Code restriction in the light of that other crisis, see Sébastien Platon 30 days, six months… forever? Border control and the French Council of State, *Verfassungsblog,* 9 January 2018.

13 Read Jakub Jasiewicz, A not-so-temporary reinstatement of internal border controls?, *Leiden Law Blog,* 16 May 2018.

14 Ségolène Barbou, La libre circulation des personnes dans l'Union européenne à l'épreuve du Covid-19, *Le Club des Juristes,* 12 May 2020.

provided essential services,[15] and/or found it impossible to reach their place of work. The Commission, in the same way that it responded to the closure of borders in general, released Guidelines to ensure the free movement of workers[16] at the end of March. The plight of seasonal workers in particular was also addressed: there was a European Parliament resolution in June, the European Commission issued Guidelines in July,[17] and the Council of the European Union commissioned a study and adopted Conclusions in October,[18] as their precarious working and living conditions (exploitation and termination of contracts) made them more vulnerable to COVID-19 and related measures (consider the example of 250,000 Romanian seasonal workers who had no choice but to return to Romania[19]). Guidance was also provided for health professionals during the pandemic, the Commission recognising that Member States were unable to provide sufficient medical staff to fight the pandemic and continue other (also critical) medical services, which also meant that training of health professionals had to be put on hold. The Communication it issued addressed practical concerns regarding the implementation of Directive 2005/36 on professional qualifications in respect to healthcare professionals.[20]

No *binding* measures were proposed or taken but Member States were at least invited to 'fully enforce' existing EU free movement laws including in the field of *employment law*.

4. Preventive and constructive action to address border controls and travel restrictions

Taking a step back from considering the specific legality tests for COVID-19 related measures closing borders and restricting free movement in the EU as referred to above, it could be said that it was rather *preventive action* and a *constructive approach* that was taken by EU actors.

Pursuant to a European Council meeting of 26 March, in April a European Roadmap was unveiled - jointly decided by the former with the European Commission - towards a gradual and phased out lifting of COVID-19 containment measures which represents an attempt to provide the EU with a *co-ordinated exit strategy* that included the removal of internal borders in a first stage, based on scientific and health criteria, with external borders being considered in a second stage. This was followed by various extended measures of EU coordinated restrictions on travel. [21]

15 European Commission Communication, Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships, 14 April 2020.

16 European Commission Communication, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, 30 March 2020.

17 European Commission Communication, Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak, 17 July 2020.

18 Council of the European Union, Conclusions on Improving the working and living conditions of seasonal and other mobile workers, 9 October 2020.

19 See the contribution by Sandra Mantu in Chapter 29. See also Sophie Robin-Olivier, Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility, *European Papers*, Vol. 5, 2020, No 1, *European Forum*, 16 May 2020, pp. 613-619.

20 European Commission Communication, Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC, 8 May 2020.

21 European Council and European Commission, Joint European Roadmap towards lifting COVID-19 containment measures, 17 April 2020. See heading 6, part 4(b). Commission Communication on the third assessment of the application of the temporary

And, as already mentioned earlier, by June, internal border controls were lifted fully: by Austria, Poland, Belgium, Estonia, Germany, Switzerland, Iceland and Slovakia in June, and Czechia, Hungary, Portugal and Spain in July, with Finland, Lithuania and Norway still having them in place until mid-September, France until the end of October, and Denmark until mid-November. The lifting of restrictions was either replaced or taken over by other travel measures that make entry to a Member State conditional: Passenger Locator Forms, the requirement of a negative COVID-19 test, an obligation to self-isolate upon arrival, and so on. These were based on a wide range of divergent criteria, some sanctionable by administrative fines ranging from 2,000 to 10,000 euros, or even a sentence of imprisonment (which should also trigger an alarm bell in terms of proportionality as discussed in the sections above).

At the beginning of September, the Commission took steps to propose a coordinated approach to the restriction of free movement in response to the pandemic through a proposal that recognised the Member States' competence in imposing travel restrictions, but which at least acknowledged that unilateral measures had resulted in 'significant disruptions', 'diverging measures' that are 'often adopted at very short notice' and 'based on very different criteria'. The EU coordination it proposed was based on ensuring the objective of Article 21(2) TFEU is ensured, as well as on the legal bases of Articles 46, 52(2), 168(6) TFEU (protection of health). The Commission called for a Council *Recommendation* under Article 292 TFEU that would set out general principles guiding COVID-19 related restrictions - in particular how they ought to be justified, with common criteria and thresholds in making decisions on whether to apply travel restrictions.[22]

Such Council Recommendation was then considered, adopted, and published on 14 October.[23] It largely adopted the Commission's suggestions, and set out its aim as being to avoid measures restricting free movement to protect public health resulting in fragmented approaches and disruption, as well as to increase transparency and predictability for citizens and businesses. In terms of justification of restrictive measures, it also acknowledged that any such measure must be proportionate and non-discriminatory, and must be lifted as soon as the epidemiological situation allows. As proposed by the Commission, it supported the production of information by the European Centre for Disease Prevention and Control (ECDC) through a weekly map updated every Thursday, colour-coding on the basis of risks of COVID-19, and epidemiological data provided by the Member States, as well as the common criteria referred to, and requirements that ought to be met regarding prior notification of measures to the Commission, other Member States, and the public. An extending Council Recommendation was published on 4 November 2020.[24]

---

restriction on non-essential travel to the EU, 11 June 2020.

22 European Commission, Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, 4 September 2020.

23 European Commission, Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, 14 October 2020.

24 Council Recommendation (EU) 2020/1632 of 30 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic in the Schengen area.

Later that month, a European Council meeting of 19 November made very brief reference to the *lifting* of restrictive measures, but as already mentioned, with the 'second wave' of the pandemic, internal border controls have been continued, or been reimposed by at least some Schengen-Area Member States: Denmark, Finland and Hungary (and Norway).[25] That brings us full circle, rendering the above discussions on lawfully imposing internal border controls and travel restrictions as a response to the COVID-19 pandemic relevant again - albeit on this occasion bringing the need to assess the lawfulness and proportionality of entry and information requirements, and quarantine and surveillance measures which are imposed on cross-border travellers in the EU more strongly to the fore.[26]

5. Free movement of goods and services

The intense slowing down and almost skidding to a halt of cross-border transportation as well as people due to the closure of borders, other travel restrictions and COVID-19 containment measures also had an impact on the free movement of goods. Supply chains and the provision of services of all kinds were disrupted, with the travel and tourism sectors in particular seeing the number of services provided plummet.

To make matters worse, certain Member States also imposed export bans and restrictions on the trading of medical, and especially personal protective equipment (such as face masks), and medicine, of which there were shortages in stock in order to respond to the COVID-19 outbreak. Belgium, Bulgaria, Czechia and Hungary put in place export bans on certain pharmaceutical drugs; Bulgaria decreed an exporting licensing requirement on disinfectants; Germany imposed an export ban on personal protective equipment (PPE); Bulgaria placed an export ban on certain medical equipment; and Czechia and France applied export bans on face masks.[27]

This impacted the intra-EU export of those products, technically in breach of EU free movement of goods law - in particular the prohibition in Article 35 TFEU on quantitative restrictions on exports or measures of equivalent effect, unless such measures have been notified and can be justified under the ground of protection of health under Article 36 TFEU (see the contribution by Peter Oliver, Chapter 30, who raises these concerns and the issue of national incitement to 'buy national').

In contrast to the weak EU-law monitoring response as discussed above in sections 2 and 3, the Commission clearly recognised the impact on the free movement of goods caused by the pandemic and related measures, and the need for justification of measures under Article 36 TFEU, in its clear expression of a threat to commence legal procedures for non-compliance. This is visible in an early Communication which states 'in case Member States do not sufficiently adapt their rules, the Commission

25 European Council, Video conference of the members of the European Council, 19 November 2020.

26 See the EU's official migration and home affairs website on temporary reintroduction of border controls for the latest updates. For a factual country-by-country update up to 20 November 2020 in the press see also: Coronavirus travel rules: European countries' border restrictions and travel measures explained, *Euronews,* updated 20 November 2020.

27 Benedikt Pirker, Rethinking Solidarity in View of the Wanting Internal and External EU Law Framework Concerning Trade Measures in the Context of the COVID-19 Crisis, 5 *European Papers* 1, *European Forum*, Insight of 25 April 2020, pp. 573-585.

will take legal action'.[28] In fact, the Commission *has* commenced an infringement procedure against Bulgaria for violation of Articles 34 and 49 TFEU, as discussed by Peter Oliver (Chapter 31).

But, similarly to what has been discussed above (section 4), the EU, in particular the Commission, has on the whole also taken a preventive and constructive approach to the impact on the free movement of goods and services caused by the pandemic-related measures, shown through a raft of different measures, derogations and legislative amendments adopted rapidly and throughout the year.[29]

6. Preventive and constructive action to address border controls and travel restrictions

EU-wide 'temporary export restriction' for third countries to prevent prohibitory intra-EU export measures

First, the Commission tackled the national intra-EU export bans and restrictions by adopting a Commission Implementing Regulation in mid-March,[30] which added a new six-week requirement for an authorisation to be provided for the exportation of certain products *outside of the EU*, with specific reference to the COVID-19 pandemic, in order to protect supplies of those products within the EU - especially PPE,[31] and remove the justification for intra-EU export bans and restrictions (national measures subsequently being removed). It was later clarified in Guidance issued on 20 March that this was a 'temporary export restriction' rather than an export ban, and that it did not infringe the EU's international obligations,[32] and about a month later the Implementing Regulation was narrowed in scope and added humanitarian exceptions.[33] This mirrors the approach taken to closed borders: the EU addressing the situation through internal coordination and imposing restrictions more widely at its external borders.

Transport measures to facilitate the free movement of goods (and services)

Second, also around mid-March, the Commission issued Guidelines to ensure the availability of goods and services - in particular food and health supplies, with a focus on the transport of essential goods and supplies across the EU[34] and measures to minimise supply chain disruptions.[35] Through a Com-

28 European Commission Communication, Coordinated economic response to the COVID-19 outbreak, 13 March 2020, under heading 3.1. It also notes in the first paragraph under that heading that 'Unilateral national restrictions to the free movement of essential supplies to the healthcare systems create significant barriers and affect dramatically Member States' capacity to manage the COVID-19 outbreak.'

29 European Commission, 'October infringements package: key decisions', press release of 30 October 2020.

30 Commission Implementing Regulation (EU) 2020/402 of 14 March 2020.

31 Isabelle van Damme, Analysis: "European Union imposes export restrictions on personal protective equipment", *EU Law Live,* 17 March 2020.

32 European Commission Communication, Guidance note to Member States related to Commission Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorisation, as last amended by Commission Implementing Regulation (EU) 2020/426, 20 March 2020.

33 Commission Implementing Regulation (EU) 2020/568 of 23 April 2020.

34 European Commission, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 16 March 2020.

35 See the European Commission's Communication on additional COVID-19 response measures, published on 28 October 2020.

munication of 23 March, it called for the designation of 'Green Lanes' by Member States at their borders to give priority to freight transport crossing borders, to prevent delays and hold ups due to the closure of borders or other travel restrictions, later updated by a Communication of 28 October.[36] Derogations based on the disruption of the pandemic were also granted from EU transport legislation concerning licensing, certificates and authorisations (though not all made use of by Member States), which were extended at the end of August by three Commission Decisions.[37]

Sector-specific steps to assist the free movement of goods

Third, sector-specific measures were also taken: in an obvious step given the nature of the crisis, the EU took steps to replenish European stocks of health and medical supplies including PPE, especially to ensure their availability to health care professionals.[38] In terms of accelerating processes for such equipment and making them accessible, a request was made to the European Committee for Standardization and the European Committee for Electrotechnical Standardization which agreed to make several European standards for certain medical devices and personal protective equipment freely available; the Commission also decided to adopt revised harmonised standards relating to critical medical devices for the fight against COVID-19.[39] A Recommendation was also issued specifically to accelerate approvals of essential equipment and products,[40] and information was provided to manufacturers on conformity assessment procedures for PPE.[41]

Measures were also taken to assist other areas impacted by market disturbances, for example in respect of the wine, fruit and vegetable industries.[42]

Tax and customs duties to alleviate the burden on companies

Fourth, proposals and ultimately a raft of legislative measures, were adopted to alleviate tax burdens

36 European Commission Communication on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential service, 24 March 2020; and European Commission Communication upgrading the transport Green Lanes to keep the economy going during the COVID-19 pandemic resurgence, 28 October 2020.

37 Commission Decision 2020/1235, Commission Decision 2020/1236, Commission Decision 2020/1237.

38 European Commission, COVID-19: Commission creates first ever rescEU stockpile, press release of 19 March 2020; European Commission, Coronavirus: Commission issues questions and answers to help increase production of safe medical supplies, press release of 30 March 2020. See also the Commission Communication Short-term EU health preparedness for COVID-19 outbreaks, 15 July 2020, heading 2.

39 European Commission, Coronavirus: harmonised standards for medical devices to respond to urgent needs, press release of 25 March 2020.

40 European Commission, Recommendation (EU) 2020/403 of 13 March 2020 on conformity assessment and market surveillance procedures within the context of the COVID-19 threat, 16 March 2020.

41 European Commission, Conformity assessment procedures for protective equipment , 10 July 2020.

42 Commission Implementing Regulation 2020/975. Agreements and decisions on market stabilisation measures in the wine sector were authorised. Commission Delegated Regulation 2020/592 of 30 April 2020 introduced a number of derogations to existing rules to help the fruit and vegetables and wine sectors cope with the impact of the COVID-19 pandemic. Commission Delegated Regulation 2020/1275 of 6 July 2020 amending Delegated Regulation 2020/592 set out derogations to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it. See also Coronavirus: measures to support the agri-food sector, press release of 22 April 2020.

and suspend tariffs,[43] and Guidance on customs issues related to the COVID-19 emergency was first provided on 30 March.[44] Specific measures then followed, including the suspension of tariffs and taxes on specific goods under strict conditions; the provision of relief from import duties and a VAT exemption for goods needed to combat the effects of the COVID-19 outbreak;[45] an extended temporary exemption from customs duties and VAT on the import of medical and protective equipment from third countries;[46] and an amending Council Directive setting out rules on temporary measures in relation to VAT applicable to COVID-19 vaccines and in vitro diagnostic medical devices in response to the COVID-19 pandemic.[47] The Council of the European Union also agreed on several legislative amendments to grant companies more time to comply with rules on cross-border information reporting and exchanges in the field of taxation to address the severe disruptions created by the COVID-19 pandemic.[48]

EU measures for service-providers and businesses

The EU has taken similar measures to address the impact of COVID-19 related measures on the freedom of services (in areas covered by Articles 49 to 62 TFEU, the Services Directive 2006/123, and not discussed here but also in the areas of financial services, postal services, transport safety, and passenger rights - for example on refunds for cancelled travel by air and train). Generally it can be noted that in June Internal Market and Industry Ministers released a joint statement on a Recovery Plan for Europe, taking into account SMEs in particular,[49] but the most evident action has been taken to assist the aviation, and the travel and tourism sectors.

Protecting the aviation industry

Early on in March the Commission addressed the impact of the pandemic on the international and

43 Darya Budova, Analysis: "Export, import and EU circulation of protective and medical equipment in the context of COVID-19 outbreak', *EU Law Live,* 1 April 2020.

44 European Commission, Taxation and Customs Union webpage offering Guidance on Customs issues related to the COVID-19 emergency.

45 Commission Decision (EU) 2020/1101 of 23 July 2020 amending Decision (EU) 2020/491 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020. This was extended in October by Commission Decision (EU) 2020/1573 of 28 October 2020 amending Decision (EU) 2020/491 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020.

46 Article 2(1)(a) of Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, and Article 2(1)(a) of Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods. See Commission Decision on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020, 1 April 2020.

47 Council Directive (EU) 2020/2020 of 7 December 2020 amending Directive 2006/112/EC as regards temporary measures in relation to value added tax applicable to COVID-19 vaccines and in vitro diagnostic medical devices in response to the COVID-19 pandemic.

48 Council Directive (EU) 2020/876 of 24 June 2020 amending Directive 2011/16/EU to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic.

49 See the European Commission's website here, and the joint statement in the Council of Europe's press release of 12 June 2020 here.

European aviation industry in terms of it being able to meet its obligations under the EU Slot Regulation, which required air carriers to operate at least 80% of their allocations to maintain those slots, but which was nearly impossible given the sharp drop in air traffic and demand for supply. An amending Regulation was swiftly adopted and published on 31 March,[50] extended recently in October.[51] Temporary provisions were also introduced in May to ease financial pressure on aviation operators and ground handlers, due to measures imposed to fight the COVID-19 pandemic, which in November the Commission decided ought to be extended.[52]

Boosting Travel and Tourism

Efforts were made from May onwards with a package of measures including a Communication, Guidance and Recommendations to boost tourism across the EU[53] as flights, hotel stays and package tours were cancelled and could not be booked anew[54] - including through funding, easing State aid rules. The EASA and ECDC also provided guidance on health and safety in aviation,[55] and the Council of the EU also in fact issued Conclusions on 24 July on compliance with hygiene and 'infection control' to promote cross-border passenger transport. A website was also launched as a hub to provide information on what restrictions and health and safety measures were in place, which was kept updated (Re-open EU website), and which has recently been encouraged as a measure to use again with the second 'winter wave' of the pandemic.

Funding for farmers and fishermen

A final and brief mention in addition to the above should also be made of the farming and fishing sectors. First, in June, the Council of the EU adopted a Regulation allowing Member States, as an exceptional measure, to pay up to 7,000 euros to farmers and up to 50,000 euros to small and medium-size enterprises (SMEs) active in processing, marketing or development of agricultural products or cotton, except fishery products. The aim was to provide support to the farmers and SMEs worst-hit by the COVID-19 crisis and to address the liquidity and cash-flow problems stemming from the closures of shops, markets and restaurants.[56] Second, amendments to both the European Maritime and Fisheries

50 Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports. See Article 8(2) of Council Regulation 95/93, read in conjunction with Article 10(2) thereof.

51 Commission Delegated Regulation (EU) 2020/1477 of 14 October 2020 amending Council Regulation (EEC) No 95/93 as regards the temporary extension of exceptional measures to address the consequences caused by the COVID-19 pandemic 2020/1477.

52 The four proposals are available through this webpage of the Commission: https://ec.europa.eu/transport/media/news/2020-04-29-coronavirus-package-measures-support-transport-sector_en

53 Dolores Utrilla, Insight: "Commission Package for recovery of the tourism and transport sectors" *EU Law Live,* 13 May 2020.

54 European Commission, Communication on Tourism and transport in 2020 and beyond, 13 May 2020. See also the Guidance and Recommendation through this link: https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic_en#supporting-recovery-of-eu-tourism

55 EASA, ECDC, COVID-19 Aviation Health Safety ProtocolOperational guidelines for the management of air passengers and aviation personnel in relation to the COVID-19 pandemic, 30 June 2020.

56 Regulation (EU) 2020/872 of the European Parliament and of the Council of 24 June 2020 amending Regulation (EU) No

Fund Regulation and Common Market Organisation Regulation were adopted by the Council to mitigate the impact of the COVID-19 pandemic on the fishery and aquaculture sector.[57]

7. Conclusion

The outbreak of the COVID-19 pandemic was and is undeniably a significant blow to the European Union's core tenets as enshrined in the fundamental freedoms of people, goods, services and capital, and Schengen - symbolically as well as functionally. The initial responses of Member States, to take unilateral measures to close borders, impose travel restrictions, and put in place intra-EU export restrictions, severely restricted those rights - that being possible as long as there is legal justification for doing so or derogations apply (which is yet to be explored). The Commission does not appear to have made much use of its monitoring and compliance powers in that respect. But it can be noted that EU actors took a considerable number of coordinating, preventive and constructive measures over the year that consisted in: closing the EU's *external* borders; requiring export authorisations from *third countries*; providing guidance on protection of at least the free movement of essential, seasonal and healthcare *workers*; removing obstacles for transportation of goods; relieving the burden on businesses and industries by reducing VAT, customs duties, and tariffs on goods - particularly medical equipment; as well as through the legislative amendments enabling sector-specific (aviation, travel, tourism, farming, fisheries) derogations to alleviate resulting burdens. Perhaps even more rigorous action will come after the European Council meeting that is due to take place on 15 January 2021, and which could take into account (as hoped for by the Council of the EU[58]) a strategic report from the Commission which assesses how the Single Market has responded to the COVID-19 crisis, as well as any output from the Single Market Enforcement Task-Force.[59]

In conclusion, the EU response to the impact of the COVID-19 pandemic and related measures in the Internal Market can hardly be accused of not being robust - but the above shows that the emphasis lies in some areas over others - with more legislative movement for example in the field of taxation and industry-protecting measures, and a focus on the workforce that props business up to ensure the free movement of goods and services, more so than the weaker soft law measures to protect the free movement of persons in general from the fallout of the crisis. Whether all those measures, in all cases, and on a Member State-specific basis, were justified and proportionate remains to be seen.

1305/2013 as regards a specific measure to provide exceptional temporary support under the European Agricultural Fund for Rural Development (EAFRD) in response to the COVID-19 outbreak. In the following month in July, further support was provided for farmers through amending measures. Official publication was made on 24 July of Commission Implementing Regulation 2020/1009 of 10 July 2020 amending two implementing regulations (Nos. 808/2014 and 809/2014) as regards certain measures to address the crisis caused by the COVID-19 outbreak. See also Temporary derogations from CAP payment rules for 2020 in response to COVID-19 crisis now published.

57 The draft regulation dated 20 April 2020 is available here: https://data.consilium.europa.eu/doc/document/PE-9-2020-INIT/en/pdf

58 Council of the European Union, Conclusions on a deepened Single Market for a strong recovery and a competitive, sustainable Europe, 11 September 2020.

59 European Commission Communication, Long term action plan for better implementation and enforcement of single market rules, 10 March 2020.

Chapter 28

THE UNEXPECTED RESURGENCE OF THE SCHENGEN AREA

Daniel Thym

1. Introduction[1]

Few people would have thought in March 2020 that most Member States would lift border controls, abandon travel restrictions and discontinue quarantine requirements by the end of June 2020. The Schengen area seemed to fall victim to the hectic measures decided upon in national capitals during the first weeks of the COVID-19 pandemic. In an unprecedented move, many Member States did not only introduce temporary border controls; they also instituted far-reaching travel restrictions, which effectively brought the free movement of persons within the European Union to a near standstill. Borders were not only being controlled, they were closed. Nothing comparable had happened during 60 years of EU integration.

By late June 2020, the situation looked different. Many Member States allowed their citizens to leave the country and welcome visitors without requiring compliance with a narrow list of legitimate reasons. To be sure, the external travel ban towards third countries remained in place, even though the Commission proposed to gradually ease existing restrictions. Airlines started offering their services to the Mediterranean and other holiday destinations. Tourists were expected to flock back to the beaches or mountain resorts across Europe just in time for the prime summer season.

This Chapter will highlight three lessons that experts of EU law and policy should draw from the near-death experience of the Schengen area and the unexpectedly swift resurgence of border-free travel.

1 This Chapter was finalised on 23 June 2020.

2. Lack of effective supranational governance structures

The surprisingly quick return to the *status quo ante* should not deflect our attention from the severe weaknesses in the legal and institutional governance of the Schengen area, which were laid bare in May 2020. Procedural and substantive requirements for the 'temporary' reintroduction of border controls in the Schengen Borders Code do not seem to have played a major role in the political decisions about introducing or lifting internal controls in response to the COVID-19 pandemic.[2]

Closer inspection of the notifications sent by national governments shows that they hardly bothered to comply with their reporting obligations, including 'all relevant data detailing the events that constitute a serious threat' to allow the Commission to control state action and suggest less coercive means. Similarly, the substantive requirement that only 'a serious threat to public policy or internal security' may justify internal border controls, is treated not as a legal constraint, but as a question of political preference.

These massive procedural and substantive deficits matter even if we conclude that there were good reasons to find that border controls were legal at the height of the pandemic.[3] The European Commission, in particular, behaved more like a political mediator than a law-based 'guardian of the treaties' – mirroring a similar approach to the proliferation of border controls over ever longer periods of time in response to the terrorist attacks in the early 2010s and the migration and refugee policy crisis of 2015/16.

I doubt whether any proposals to reform the statutory prescriptions in the Schengen Borders Code would substantially alter the situation. Experience over the past years shows that the supranational integration method has lost its former capacity to effectively control and steer state action. We are witnessing what one might call a 'diplomatisation' of EU law, when political will takes precedence over legal arguments. Similar developments can be observed in the field of economic and monetary union, asylum policy or regarding the question of a debt-financed financial support scheme in reaction to the COVID-19 pandemic.

3. The dynamics of intergovernmental cooperation

The surprisingly rapid renaissance of the Schengen area was driven by clusters of Member States. Most notable were the concerted efforts between Germany, Austria, Switzerland and France (together with the Benelux countries) as well as an initial free movement 'bubble' between the Baltic states. These preliminary 'Mini-Schengen' developed a momentum of their own and included more and more countries within a few weeks.

2 Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

3 Daniel Thym, 'Travel Bans in Europe: A Legal Appraisal', *Verfassungsblog*, 19 March 2020.

While debates among ministers in the Council and the mediating function of the Commission played a role in the swift return to the standard situation of border-free travel, we should not overemphasise the role of supranational institutions. In particular, the overly cautious Commission Communications failed to develop a political or legal momentum towards the resurgence of the Schengen. The idea of a pan-European set of criteria developed by the European Centre for Disease Prevention and Control (ECDC) together with national public health authorities to guide national decisions, for instance, did not get off the ground.

While the focus on intergovernmental cooperation may be counterintuitive for legal academics and practitioners, it should be noted that it is not a novelty. The Schengen acquis was originally developed outside the Community framework by a group of Member States – and experiences with the COVID-19 pandemic illustrate how important the commitment on the part of the Member State continues to be. National capitals are not necessarily the selfish 'bad guys' as opposed to the pro-integrationist supranational institutions. They can play an indispensable and constructive role.

4. The symbolic significance of open borders

It was no coincidence that border closures played a prominent role in the fight against the pandemic, even though their practical effects were limited, once the virus had spread among the population. Borders can fulfil important symbolic functions transcending the practical effects of more police checks or travel restrictions. They convey a message of political determination and convey a sense of security in times of crises when the population feels insecure and threatened. It is this symbolic function that has motivated governments across the world to emphasise the protective dimension of borders in recent years, in a noticeable contrast to the openness that was prevalent after the end of the Cold War.

If that is correct, the initial closure of the internal Schengen borders had implications which considerably transcended the immediate effects on inter-state travel. They signalled a general distance from the European project – in the same way as the lifting of border controls coincides with a policy environment in which the Member States and the EU institutions have finally agreed on a joint way forward on how to respond to the broader economic and social repercussions of the pandemic.

In that respect, the unexpected renaissance of the Schengen area is much more than a technical question of home affairs policy. Social psychology informs us that perceptions of threat tend to reinforce a distinction between 'us' and 'them'; we aim for protection within our in-group when feeling vulnerable. It is important, therefore, 'who' protects us both against the immediate danger to our health and the economic effects of the pandemic. If the EU wants to be more than a 'fair weather construction', it must ensure that the institutions, policies and rules, which make up the European project, are being upheld and reinforced during the crisis. It is a good sign, therefore, that the borders are open again.

Chapter 29

EU CITIZENSHIP AND COVID-19: A CRISIS OF CITIZENSHIP?!

Sandra Mantu

1. Introduction[1]

For those of us for whom home is split between EU countries, COVID-19 made us re-evaluate our relationships with the States to which we legally, socially, emotionally and economically belong. This is partly linked to the travel restrictions that have been introduced by several EU states, jeopardising the most well-known and most appreciated right of EU citizenship: the right to freedom of movement.

In a book that I co-edited and that was published at the start of the COVID-19 crisis, various authors examine how EU citizenship reconstructs in unexpected ways what citizenship as a status means and stands for.[2] The book seeks to capture the tensions that result from the nature of EU citizenship itself – which is not a citizenship status similar to national citizenship, nor an immigration one - in relation to family life, equality and expulsion. It argues that EU citizenship has made its presence felt especially through the right to free movement and the distinctive form of mobility that it champions, centred around the citizen's right to move and the State's diminished capacity to refuse entry and terminate residence rights. In this current context, where free movement is illusory for most of us, is there anything left of EU citizenship?

2. Travel restrictions and the EU's response

The travel restrictions and bans imposed by several Member States have brought yet again into clear view the tense relationship between freedom and security and placed the right to mobility into the spotlight.[3] As EU citizens were stuck at internal borders and the free flow of goods and services was

1 This Chapter was finalised on 5 May 2020.

2 Sandra Mantu, Paul Minderhoud, and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights*, Brill I Nijhoff, 2020.

3 On this, see the contribution in Part V by Daniel Thym (Chapter 28 above).

threatened, the EU attempted to come up with a unified response. Initially, this response focused on the external borders. The Commission adopted a Communication on 16 March 2020 calling for temporary restrictions on non-essential travel from third-countries into the EU+ area which was endorsed by the European Council.[4] The Commission followed with a Communication on 30 March providing guidance on the implementation of the temporary restrictions.[5] On 8 April 2020, the Commission invited the Member States to prolong the restriction of non-essential travel until the 15th of May, based on the assessment of the restrictions in place.[6] To deal with the fact that intra-EU mobility was severely affected by the reintroduction of internal border controls, in addition to other national containment measures, the Commission adopted several Communications aimed at ensuring the functioning of the internal market and imposing a coordinated set of measures, including in relation to workers.[7] Workers carrying out critical occupations, including frontier workers and posted workers, as well as seasonal workers - especially in agriculture if they perform critical harvesting, planting or tending functions - are designated as special categories of persons whose mobility should not be hindered.

The wisdom and legality of the EU response have been discussed critically.[8] From a citizenship and migration perspective, it is usually at the border and in relation to the right to enter a state that the differences between citizens and foreigners become most apparent: own nationals enjoy a right to enter their state of nationality. The Commission's communications link the imposition of restrictions to non-essential travel into the EU+ area to the obligation for the Member States to admit their own citizens and third country nationals legally residing on their territory. Exceptionally, other third-country nationals are authorised to enter the EU if they have an essential function or need. For those with a right to enter the EU and for those third country nationals exempt from the travel ban in light of their essential function or need, the Member States may impose restrictive measures such as self-isolation, provided that similar measures are imposed in respect of nationals upon return from an area affected by COVID-19. The EU+area is defined as including 'all Schengen Member States (including Bulgaria, Croatia, Cyprus and Romania), as well as the four Schengen Associated States. It would also include Ireland and the United Kingdom if they decide to align'.[9] EU Member States are asked to encourage their citizens and residents not to travel outside their territories to prevent the spread of the virus. Guidelines adopted on 30 March instruct the Member States to apply the Schengen Border Code in a strict manner upon entry and verify the authenticity of relevant documents. They are allowed to limit the number of crossing points which remain open and must communicate to the Commission the list

4 Commission Communication of 16 March 2020 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU'.

5 Commission Communication of 30 March 2020 'Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy'.

6 Commission Communication of 8 April 2020 'Assessment of the application of the temporary restriction on non-essential travel to the EU'.

7 Commission Communication of 30 March 2020 'Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak'.

8 Daniel Thym, 'Travel Bans in Europe: A Legal Appraisal (Part I)', *EU Migration Law Blog*, 18 March 2020; Sergio Carrera and Ngo Chun Luk, 'Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area', *CEPS Papers in Liberty and Security in Europe*, No. 2020/4, April 2020. On this, see the contribution in Part V by Daniel Thym (Chapter 28 above).

9 Commission Communication of 16 March 2020 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU'.

of relevant crossing points. Special attention is paid to the situation of EU citizens stranded in third countries who wish to return home. States are instructed to facilitate onward transit of EU citizens and their family members irrespective of nationality and of third country nationals holding a residence permit and their dependants who are returning to their Member State of nationality or residence.

3. Member States and internal borders

While on paper most EU efforts seem to be channelled towards the external border, in practice the decision of national governments to close down their borders challenges the reality of intra-EU mobility. In some Member States, such as Romania, the biggest threat was seen as coming not from outside the EU but rather from within. The Romanian diaspora became the equivalent of COVID-19 and were presented by the media as a threat to national security. Romanians returning from Italy and Spain due to restrictions imposed there that saw them lose their jobs became a source of anxiety and the subject of extensive restrictive measures. Romania declared a State of Emergency on 16 March 2020 due to the spread of COVID-19 and its expected effects.[10] This measure was prolonged by another month until the 15th of May. Among the reasons for taking this measure was the success of restrictive measures already taken by EU Member States in containing the spread of the virus, including measures taken by EU Member States where large Romanian communities were present. The State of Emergency imposed covers the restriction of rights and liberties, including freedom of movement, the right to private and family life, the inviolability of domicile, the right to education, freedom of association, the right to private property, the right to strike and economic freedom.

In the first month of the State of Emergency, the Romanian Government adopted several military ordinances (MO) containing measures to prevent the spread of COVID-19 that affect all persons entering or leaving Romania. They include isolation and quarantine for persons coming from high risk areas, gradual closure of border crossings, restriction or prohibition of road, rail, maritime, water and air travel. By now this has led to the suspension of flights operated to and from countries on the list of COVID-19 'red areas' (including Austria, Belgium, France, Germany, Italy, the Netherlands, Spain, the Swiss Confederation, Iran, Turkey, the UK, and the USA). An MO of 24 March 2020 (3/2020) established that all persons entering from a 'red area' country must be placed into institutional quarantine for 14 days, while those travelling from the remaining 'yellow area' countries must go into self-isolation. An earlier MO of 21 March 2020 prohibited the entry through border crossing points of aliens and stateless persons unless they were transiting Romania through corridors of transit organised by agreement with neighbouring countries. In line with the EU position, exceptions were introduced for certain categories of third country nationals and stateless persons.

MO no.7 of 4 April 2020 made exceptions for the transport of seasonal workers from Romania to other states with the approval of the competent authorities of the country of destination via irregular

10 Romania, Decree on the establishment of the emergency situation on the territory of Romania (*Decret nr. 195 din 16 martie 2020 privind instituirea stării de urgență pe teritoriul României*), 16 March 2020. Official translation in English available here.

flights (charters). The relaxation of travel restrictions for seasonal workers through the same MO that suspended regular flights to and from countries where seasonal workers are to travel, coupled with restrictions against own nationals returning home are an exemplification of contradictions incumbent in EU citizenship. Romanian media showed chaotic images of Romanians hoarded in the parking lot of one of the regional airports without complying with any social distancing measures, waiting to be flown to Germany, where they were eagerly awaited to start picking asparagus and strawberries.

The exportation of (cheap) labour – Romanian nationals - is Romania's most successful export product and as such, for them exceptions can be made from travel restrictions even in times of crises. The 'new migration diaspora' is expected to do its bit for Romania's economic well-being by working elsewhere and spending their money at home. Yet, it is unclear what legal treatment awaits seasonal workers engaged in critical agricultural work upon their return 'home'. The Commission guidelines do not enlighten us. Yet, it is precisely in this context of 'home' treatment where the reach of EU citizenship reveals its limits, not least due to the intricate distribution of competences between the EU and national levels and the possibility to derogate from free movement on grounds of public policy, public security and public health.

Even in times of crisis, as workers, EU citizens continue to enjoy mobility rights as part of the internal market, and are the subject of repatriation efforts. Nonetheless, what the COVID-19 crisis reveals is the increasingly blurred lines between EU citizens and own nationals as part of the same supranational system. It is high time to take EU citizenship seriously.

Chapter 30

COVID-19 AND THE FREE MOVEMENT OF GOODS: REACHING FOR THE PLACEBO OF PROTECTIONISM

Peter Oliver

1. Introduction[1]

We live in dark and testing times, and the EU has been – and continues to be – sorely tested by the current pandemic, in particular because the Member States have not always shown the solidarity expected of them under the Treaties, particularly Articles 2, 3(3) and 4(3) TEU. As regards the free movement of goods within the EU, recent decades have seen a generally high level of compliance by the Member States with this area of EU law, but this has been marred by a number of restrictions imposed since the pandemic struck.

Initially, the Commission was criticised for failing to act with sufficient speed, but on 13 March it issued a formal Communication,[2] which was followed by a second Communication dated 16 March.[3] Over the subsequent weeks and months, the Commission has taken a raft of other measures, which are summarised on its website.[4]

The restrictions in question fall into three categories: export restrictions on personal protective equipment (PPE) and medicines, border controls, and the incitement to purchase national goods. These categories will now be considered in turn.

1 This Chapter was finalised on 14 November 2020. The author wishes to thank Hans Ingels for answering his queries about questions of fact, but any errors in this paper are attributable to the author alone.

2 European Commission, Communication of 13 March 2020 'Coordinated economic response to the COVID-19 Outbreak', COM(2020) 112 final.

3 European Commission, Communication of 16 March 2020 'Guidelines for border management measures to protect health and ensure the availability of goods and essential services', COM(2020) 1753 final.

4 Available at https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response_en.

2. Export Restrictions on PPE and Medicines

By early March, a number of Member States, including France and Germany, had restricted exports of personal protective clothing and medicines, because they were in short supply.[5] They were not alone in imposing an outright export ban. Manifestly, such measures are caught by the prohibition in Article 35 TFEU on quantitative restrictions on exports or measures of equivalent effect. But were they justified? Needless to say, the only relevant ground of justification under Article 36 (including the mandatory requirements) is public health.

Each Member State can rely on Article 36 TFEU to protect the health of its own population**.** *So long as an export restriction is genuinely appropriate and justified to achieve that end*, nothing in the Treaties precludes a Member State from relying on it to the detriment of the population of its fellow Member States[6]. In the celebrated case of *Dassonville*, AG Trabucchi asserted that Member States can rely on Article 36 'only for the purpose of the protection of their own interests and not for the protection of interests of other States' (Case 8/74, page 860).

However, that is by no means the end of the matter. On page 4 of its above mentioned Communication of 13 March, the Commission stated:

1. A simple export ban alone cannot meet the legal requirement of proportionality. Such a measure does not, in itself, ensure that the products will reach the persons who need them most. They would therefore prove unsuitable to reach the objective of protecting the health of people living in Europe. For example, an export ban would not avoid stockpiling or purchasing of goods by persons who have no or limited objective need and would not ensure channelling the essential goods where they are most needed, for example for infected persons or health institutions and staff.

2. Measures without a clearly identified scope restricted to actual needs, a solid rationale and/or a limited duration may increase the risk of scarcity and therefore are very likely to be disproportionate.

Fortunately, over the last 20 years, the Court of Justice has substantially refined its approach to the justification of restrictions on the four freedoms, and the benefits of that development are clearly visible here. Previously, the principle of proportionality was a relatively blunt instrument in this regard: anomalies were generally disregarded and the Court scarcely troubled to consider whether a national measure was fit for purpose ('appropriate').

5 Francesco Guarascio and Philip Blenkinsop, 'EU fails to persuade France, Germany to lift coronavirus health gear controls', *Reuters*, 6 March 2020.

6 However, Tomislav Sokol advocates the contrary approach: 'Public Health Emergencies and Export Restrictions: Solidarity and a Common Approach or Disintegration of the Internal Market' 57 CMLRev. 1819, 2020. This novel theory is based on the principle of solidarity and on the idea that under Article 36 TFEU the principle of proportionality should be applied more rigorously to export restrictions than to import restrictions.

That is clearly illustrated by the antiquated English statute on Sunday trading, which was repeatedly challenged in the 1980s as being contrary to what is now Article 34 TFEU (for example in *Torfaen* (C-145/88). This legislation was riddled with incongruities. For instance, it was prohibited to sell the Bible on a Sunday, but not pornographic magazines. At the time, nothing in the case law of the Court of Justice suggested that these anomalies in any way prevented the measure from being justified. Since *Gambelli* (C-243/01, paragraph 67) that has changed: the Court ruled there that a restriction on establishment and services (*in casu* in the betting sector) could not be justified unless it was 'suitable for achieving' the desired objectives (that is, appropriate) and that it must serve to attain those objectives in a 'consistent and systematic manner'.

You have to be an especially benighted restriction to fail the 'appropriateness' test, since that is tantamount to a finding that the measure is nonsensical; but a few do fail. A rare example is *Humanplasma* (C-421/09), which concerned a restriction on imports of blood for medical use. Like other Member States, Austria prohibited the remuneration of blood donors, a measure which was generally recognised as being in the interests of public health. However, unlike the other Member States, Austria also precluded institutions collecting blood from reimbursing donors' local travel expenses and serving them light refreshments. Accordingly, the sale in Austria of blood obtained without observing this unusually strict rule was prohibited. This restriction was held to constitute a measure of equivalent effect within the meaning of Article 34 TFEU. In the absence of any apparent rationale for going beyond the prohibition of remunerating blood donors, the Court found that this rule was both inappropriate and disproportionate.

As for the requirement that measures be consistent and systematic, this arose in *Commission v Portugal*, which concerned a ban on affixing tinted film to car windows. The Member State claimed that the restriction was justified on the basis that it assisted the police in combating crime and checking that seatbelts were being worn. However, this argument was dismissed inter alia on the basis that it was perfectly lawful in Portugal to sell vehicles fitted with tinted windows at the outset (C-265/06, paragraph 43)!

In the event, Germany was persuaded to change its position radically and even undertook to dispatch a considerable quantity of medical equipment to Italy. The other Member States fell into line afterwards. From the Commission's Communication of 20 March,[7] it is clear that the quid pro quo was the adoption by the Commission of Implementing Regulation 2020/402, which prohibited exports from the EU of PPE for six weeks, subject to the grant of a waiver by the Member State concerned.[8] The link between the two developments is clear: once goods have left the territory of a Member State, it cannot be sure that they will remain in the EU.

7 European Commission, Communication of 20 March 2020 'Guidance note to Member States related to Commission Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorisation, as last amended by Commission Implementing Regulation (EU) 2020/426'.

8 Commission Implementing Regulation 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation.

Subsequently, the Commission took a range of other measures to boost the production of PPE and ensure the speedy standardisation of such products.[9]

3. Border Controls

Numerous Member States introduced border controls, when the crisis struck. These measures caused substantial delays at several frontiers, thereby seriously threatening supply chains. This problem was particularly acute at borders with Poland: in some cases, lorries queued for up to 20 hours in Germany to cross into Poland, with tailbacks stretching as far as 50 km inside Germany.[10] However, this was by no means an isolated case: on 19 March, very long queues also built up at the borders between Germany and France (more than 20 km), the Czech Republic and Germany (13 km) and Slovakia (16 km), Slovakia and Hungary (16 km) and Hungary and Romania (16 km) (see the Commission's Communication of 28 October, paragraph 1.4).[11]

On 16 March, the Commission published a Communication of a very general nature which called on Member States to keep supply chains open, especially for essential products such as medicines, medical equipment, essential and perishable food products and livestock.[12] In particular, this document stated: '*Emergency transport* services should have *priority* within the transport system (for example via 'green lanes')' (emphasis in the original). This was followed by a videoconference of EU Ministers of Transport,[13] which endorsed the Commission's proposal relating to green lanes – a move which was also warmly welcomed by the European Parliament.[14] This led the Commission to issue a further communication dated 23 March specifically devoted to green lanes.[15]

The latter Communication is very detailed and cannot be exhaustively summarised here, but the key passage reads as follows:

> 1. … wherever internal border controls exist or have been introduced, Member States are requested to designate immediately all the relevant internal border-crossing points of the trans-European transport network (TEN-T) and additional ones to the extent deemed necessary, as 'green lane' border crossings – for land (road and rail), sea and air transport.

9 See here: https://ec.europa.eu/growth/coronavirus-response_en.

10 'Traffic chaos at German-Polish border a threat to local supply chains?', *DW*, 19 March 2020.

11 European Commission, Communication of 28 October 2020 'Upgrading the transport Green Lanes to keep the economy going during the COVID-19 pandemic resurgence', COM(2020) 685 final.

12 European Commission, Communication of 16 March 2020 'Guidelines for border management measures to protect health and ensure the availability of goods and essential services', COM(2020) 1753 final.

13 European Commission, 'COVID-19: EU Member States join forces to keep priority traffic moving', press release of 18 March 2020.

14 European Parliament, 'Delivering masks across borders: EU Single Market protecting citizens' health', press release of 18 March 2020.

15 European Commission, Communication of 23 March 2020 'On the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services', COM(2020) 1897 final.

2. Going through these 'green lane' border crossings, including any checks and health screening of transport workers, should not exceed 15 minutes on internal land borders. The 'green lane' border crossings should be open to all freight vehicles carrying any type of goods.

3. Member States should act immediately to temporarily suspend all types of road access restrictions in place in their territory (weekend bans, night bans, sectoral bans, and so on) for road freight transport and for the necessary free movement of transport workers.

4. Transport workers, irrespective of their nationality and place of residence, should be allowed to cross internal borders. Restrictions such as travel restrictions and mandatory quarantine of transport workers should be waived, without preventing competent authorities from taking proportionate and specifically adapted measures to minimise the risk of contagion.

Fortunately, the level of compliance with the principles spelt out in this Communication has been high, apparently because the Member States quickly realised that otherwise supply chains would break down and large numbers of products would be missing from supermarket shelves. In its above mentioned Communication of 28 October 'upgrading' the Green Lanes, the Commission stated: 'While 90% of the 178 crossing points of the TEN-T network are compliant with the Green Lanes Communication, some 5% of border crossings continue to experience waiting times [of] well over 15 minutes, mostly at [non-Schengen borders between Member States]'. Nevertheless, the Commission saw the need for improving the Green Lane scheme, and this communication therefore set out a series of further measures to be taken, including a number of legislative changes.

Finally, at the virtual summit of the European Council held on 29 October, the Heads of State and Government of the Member States undertook to keep their borders open.[16]

4. Incitement to Purchase National Products

Regrettably, since the outbreak of the COVID-19 crisis, governments or individual ministers in a range of Member States including Austria, Bulgaria, the Czech Republic and Greece have called on the population to favour national agricultural products over imports.[17] Even President Macron has been quoted as saying that France's agricultural sector needed to become more 'independent',[18] and his Minister of Agriculture went further, calling for 'food patriotism', even if it meant that consumers ended up paying more for (say) French tomatoes than for their imported counterparts.[19] In May, it was reported that the French Government had even persuaded the major supermarkets such as Carrefour

16 David M. Herszenhorn, Jacopo Barigazzi, and Hans von der Burchard, 'EU leaders link arms for long coronavirus fight', *Politico*, 30 October 2020.

17 Natasha Foote, 'Commission warns against shift towards protectionism in agri-food sector', *Euractiv*, 23 April 2020.

18 Katy Askew, 'COVID-19 and protectionism in the food chain: An à-la-carte approach to EU rules?', *Foodnavigator.com*, 15 April 2020.

19 Yves Calvi, 'Coronavirus : Didier Guillaume "appelle au patriotisme alimentaire" sur RTL', *RTL*, 13 May 2020.

and Leclerc to switch almost all their supplies to local producers.[20] According to the same press report, the Polish Government had named and shamed dairies for processing imported milk.

Of course, there is nothing to prevent businesses or other private parties from encouraging people to favour national products. On the other hand, ever since the judgment in *Commission v Ireland* (*Buy Irish*) (249/81), it has been plain that it is quite a different matter when such protectionism emanates from the State. The ruling in this case, in which the undersigned played a small part as the junior agent for the Commission, established that Article 34 TFEU can extend to non-binding measures. In *AGM-COS.MET* (C-470/03, paragraph 66), the Court went further, finding that repeated statements by a civil servant to the effect that the claimant's products were dangerous were unlawful if the public could 'reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office'. No doubt, where the official is a minister, that condition will be fulfilled in most, if not all, cases. The fact that this case concerned a Directive on forklift trucks, and not Article 34 TFEU, is not relevant.

Nevertheless, it is questionable whether an isolated statement by a minister inciting businesses and consumers to give preference to domestic goods can constitute a breach of Article 34 TFEU. That is quite different from what occurred in the *Buy Irish* case, which concerned a systematic, sustained and widespread publicity campaign. Equally, the campaign of denigration of the claimant company's products in *AGM-COS.MET* also took the form of repeated statements, albeit by a single civil servant. In addition, claims that an imported product is dangerous, such as those in *AGM-COS.MET,* are obviously even more harmful than attempts to persuade the public to give preference to domestic products.

In contrast, where a government exerts pressure on supermarkets to favour national products, as is said to have apparently happened in France, that would indeed violate Article 34 TFEU. Unfortunately, the precise facts are not clear.

On any view, the steps taken by the Bulgarian Government are particularly extreme: it has adopted binding measures forcing retailers to favour domestic products. Unsurprisingly, this has prompted the Commission to commence infringement proceedings, which have now reached the reasoned opinion stage. The Commission claims that these measures violate Article 49 TFEU on the freedom of establishment as well as Article 34 TFEU.

For completeness, the increasing trend towards giving preference to local agricultural products for environmental reasons deserves a mention here. In its recent Communication on the Farm to Fork Strategy, the Commission promised that 'with a view to enhance [sic] resilience of regional and local food systems, the Commission in order to create shorter supply chains will support reducing dependence on long-haul transportation'.[21] As stated in the opening paragraphs of this Communication, the

20 Zosia Wanat and Eddy Wax, 'Coronavirus reheats Europe's food nationalism', *Politico*, 15 May 2020.

21 European Commission, Communication of 20 May 2020 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system', COM(2020) 381 final.

Farm to Fork Strategy lies at the heart of the European Green Deal.[22] Having said that, this statement cannot in any way be read as a suggestion that public authorities should discriminate against products from other Member States.

Favouring local and regional products is of course a generally recognised and very laudable environmental policy, but it has to be implemented in a manner which is compatible with the free movement of goods. Buying domestically produced food is not at all the same as buying local food. In France, the distance between Quimper near the western tip of Britany and Menton in the south-east of the country is 1,013 km. Since Menton lies only a few kilometres from the Italian border, it follows that for the Mentonnais food originating in the area around Ventimiglia (the nearest Italian town) is 'local', whereas products from the area around Quimper are not. Consequently, products should be treated as 'local' if they have been grown or bred within an appropriate radius of the point of consumption. Conceivably, even that might be unsatisfactory in some instances: the ecological advantages of farming methods practised beyond that radius might outweigh the harm to the environment caused by transporting goods over a longer distance. However, such cases are likely to be very rare.

In any event, this somewhat fraught issue does not arise here, since we are concerned with blatant discrimination against imports.

5. Conclusion

It is a sobering thought that, more than 60 years after the Treaty of Rome came into force, the immediate and Pavlovian reaction of most, if not all, Member States to the most grave crisis facing the world since the Second World War was to resort to the placebo of protectionism (although of course there is nothing protectionist about a State taking the appropriate health measures with respect to individuals entering it's national territory, including lorry drivers). Having said that, it seems that under pressure from the Commission the Member States repealed their export restrictions and stopped their excessive border controls quite quickly. Accordingly, it appears that only the 'buy national' measures have lingered on, although generally speaking they take the form of an isolated statement by a minister.

22 European Commission, Communication of 11 December 2019 'The European Green Deal', COM(2019) 640 final.

Chapter 31

THE COVID-19 CRISIS: EU PUBLIC PROCUREMENT LEGAL FRAMEWORK AT A CROSSROADS

Stéphane de La Rosa

1. Introduction[1]

It is almost certain that most branches of EU law will be affected or even transformed by the COVID-19 crisis. This is particularly true for European public procurement law, since the use of public contracts is on the front line to meet the current most essential needs, especially for the supply of medical devices.

A general overview of the tenders related to the COVID-19 pandemic - which are published on a dedicated link of the SIMAP -[2] is worth a look, if only merely to appraise the amazing scale of needs reflected by a huge and growing number of contracting authorities.

All over Europe, essential goods are missing: protective gear, hydraulic installations, hospital beds, safety clothing, and protective goggles are now in the spotlight for thousands of public purchasers. Several months after the beginning of the pandemic, one must recognise that essential medical devices are still needed, with a permanent flow of published tenders reflecting needs for high-technological products such as hyperbaric chambers for hospitals or medical breathing devices. These contract notices are only the tip of the iceberg, as the overwhelming majority of medical supply contracts has been awarded directly, at least during the first wave of the pandemic, following a negotiated procedure without prior publication.

To address these issues, the Commission published Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis on 1 April.[3] As a non-binding tool,

1 This Chapter was finalised on 16 November 2020.

2 Available at simap.ted.europa.eu/web/simap/covid-related-tenders.

3 European Commission, Communication of 1 April 2020 'Guidance from the European Commission on using the public pro-

the Guidance acknowledges a situation of extreme and unforeseeable urgency and considers, as a starting point, that the 'European public procurement framework provides all necessary flexibility to public buyers to purchase goods and services directly linked to the Covid-19 crisis as quickly as possible'.

Nevertheless, taking a step back, the question of the adequacy and the relevance of the current normative framework has to be raised. Although it is too early to draw final conclusions, I would like to share some basic considerations, both from a short (section 2 below) and medium term perspective (section 3 below).

2. Addressing emergency issues for public contracts: a widespread use of flexible tools laid down in the EU's public procurement rules

By stressing such flexibility, the Guidance appears to be a toolbox, designed to help contracting authorities to consider several options such as the ground of urgency in order to substantially reduce the deadlines to accelerate open or restricted procedures (but maintaining the publication of a notice), or the ground of 'extreme urgency', which allows the award of a public contract by a negotiated procedure without publication (Article 32 of Directive 2014/24).[4]

As such procedure obviously derogates from the core principles of public procurement – namely transparency, non-discrimination and equality between tenderers – its use is possible under very restrictive conditions, which are clearly synthesised in the guidance. Consistently with previous but rare rulings from the Court (*Commission v Germany*, C-275/08, *Consiglio Nazionale degli Ingegneri*, C-352/12), the Commission recalls the need for a contracting authority to justify an 'unforeseeable event' – understood as the impossibility to meet daily need for health devices and equipment – and the impossibility, in practice, to comply with general deadlines.

Moreover, a practical added value of the Guidance is to stress the necessity to consider alternative strategies, such as sending representatives directly to the countries that have necessary stocks and can ensure immediate delivery, getting involved in joint public procurement under the coordination of the Commission or seeking innovative solutions, for example interacting with the market to identify the appropriate type of medical devices or specific gear.[5]

In the present troubling times, such direction is clearly welcome and useful, especially for small contracting authorities which have to supply protective gear to their inhabitants.

The critical moment of the pandemic, which has not totally ended, has given rise to specific issues for

curement framework in the emergency situation related to the COVID-19 crisis'.

4 Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18.

5 European Commission, 'Coronavirus: Commission bid to ensure supply of personal protective equipment for the EU proves successful', press release of 24 March 2020.

the conclusion of public supply contracts.

Firstly, the situation of economic dependency of public bodies, which plays a key role in facing the pandemic, may be viewed with incredulity. Too often, contracting authorities had left it to the market to define their own needs. As a result, many of them put aside a proper planning strategy for essential needs, as if they were convinced by the market's capacity to satisfy, at any time, a public need. That is however an arguable view, as it ignores both the existence of asymmetric supply side shocks (as is currently the case) as well as the existence of an imperfect market.

The situation becomes a real concern when we consider the origin of basic products, manufactured in third countries. Yet, a proposal – still pending – for a regulation on the access of third-country goods and services to the EU's internal market in public procurement,[6] as well as the publication in 2019 of specific Guidance on the participation of third-country bidders,[7] have laid down foundations for considering a level-playing field and for seeking more balanced conditions to ensure the highest quality standards. However, the question of a paradigm shift has to be considered: regarding the collective and social needs, what is the real added value of belonging to the Agreement on Government Procurement of the WTO? How should the key notion of the most economically advantageous tender be appreciated when essential goods are at stake? For such goods, I suggest that the whole value chain has to be reconsidered, by focusing less on the price award criteria (and more generally by stressing less on the economic value of the contract) and by recognising the general welfare of the users as a ground for awarding the contract. These orientations could include a better recognition for local suppliers and a priority given for short chain contracts.

Secondly, massive practices of fraud by suppliers or intermediaries remain unsolved. Almost everyone in Europe has in mind the story of a given hospital, or a region or a public administration which has had to face the delivery of counterfeit or defective products or, even worse, a supply failure where at the last minute the supplier sells the products to a higher bidder. Unfortunately, EU law is not designed well to deal with such issues. In the procurement directives, the definition of fraud is restrictive and circumscribed to fraud that is to the detriment of the EU's financial interests. Moreover, fraud issues are mostly considered at the stage of awarding the contract (in order to exclude the participation of economic operators previously found guilty of fraud or corruption) and not at the level of execution. Clearly, given the increasing practices of fraud and corruption, a legal gap has to be addressed – perhaps by strengthening EU investigative powers, through OLAF or the European Public Prosecutor's Office.

Lastly, the usefulness of public-public cooperation – historically founded by the seminal case *Teckal*

6 European Commission, Amended Proposal of 21 January 2016 for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2016) 34 final.

7 European Commission, Communication of 24 July 2019 'Guidance on the participation of third-country bidders and goods in the EU procurement market', C(2019) 5494 final.

(C-107/98) – has to be better considered. To face the pandemic, a number of contracting authorities set up inventive forms of cooperation with voluntary and non-profit associations, sometimes with the participation of private entities. However, having regard to well- established case law (*Stadt Halle*, C-26/03), the Court does not usually show great interest in considering such form of cooperation, which allows direct awards to be made without advertising measures. For instance, the Court previously ruled, in *Hospital de Sebutal* (C-574/12) that the award of a public contract by a hospital to a non-profit association whose partners were not only public sector entities but also private social solidarity institutions carrying out non-profit activities cannot be regarded as an 'in-house' entity. As a result, such a contract - even if its purpose is to supply support services for the hospital - has to be tendered through a competition procedure.

In the present situation, and given the need to preserve the self-organisation of public entities, it seems to me that such legal reasoning is highly disconnected from the practice and requirements of public health services. If the European Union copes with the crisis thanks to the adaptability and the flexibility of EU rules, it will also have to consider the evolution of a body of conceptual frameworks - especially for public procurement contracts and their excessive embeddedness in a competitive order.

But these considerations have to be put into perspective with a more general appraisal of the legal rationale which underlines EU rules in the field of public contracts.

3. Reshaping the legal rationale of EU rules in the field of public contracts: a step back vis-à-vis competitive requirements?

Beyond the need to face concrete and urgent issues for the award of public contracts, the COVID -19 crisis reveals a path to consider, in a more general way, the theoretical foundations of the EU rules applying to public procurement contracts and the way to favour changes. Two observations have to be considered in that perspective.

First of all, one cannot ignore a sound tendency to favour greener public procurements, together with strong commitments for social requirements, both at the stages of the award and the execution of the contracts. These approaches are now at the heart of the Commission's political agenda, as expressed in a New Circular Economy Action Plan.[8] This focus on the circularity of the economic chain must be approved, especially from the perspective of strengthening the link between public procurement tools and current issues for public policies.

Nevertheless, one has to bear in mind that these ongoing changes are likely to interfere with the interpretation of core principles of public procurement, as they have been understood in the case law of the Court since the seminal case *Telaustria* (C-324/98). The evolutions of practices in public purchase could not be fully consistent with the current interpretation of core principles. For instance tender

8 European Commission, 'Changing how we produce and consume: New Circular Economy Action Plan shows the way to a climate-neutral, competitive economy of empowered consumers', press release of 11 March 2020.

clauses containing requirements on a specific localisation of a product (including for medical products, see for instance the case *Medisanus* (C-296/15)), or clauses asking bidders to justify a local domiciliation of the workforce (see the case *Dupont de Nemours*, C-21/88) are seen by the Court as being incompatible with the principle of transparency or equality. In a similar way, the Court did also consider that the requirement, contained in the technical specifications of a contract, to oblige a bidder to justify a geographical localisation for the delivering of care services was a breach of the principle of equal treatment, as such specification does not afford equal access for tenderers (*Grupo Hospitalario Quirón SA*, C-552/13).

Given the tendency and the political will to introduce local considerations in the award of public contracts, both for social, green or societal matters, one can wonder about the persistence of such interpretations in the midterm. Yet, the Court will probably have to appraise the compatibility of new tools, aiming at reinforcing the requirements of localisation and sustainability of public contracts. From that perspective, the Court could enlarge or specify the range of the current overriding reasons of general interest which are used in its legal reasoning to justify restrictions to the principle of transparency or to the freedom to provide services. As the result, legitimate objectives such as the encouragement of small and medium-sized undertakings to participate in a contract (*Borta*, C-298/15, paragraph 59) and the need to preserve and secure a smooth execution of the contract (*Tedeschi*, C-402/18), could be widened in the coming legal interpretation of EU rules in the field of public procurement. We should not rule out that a new path for the judicial interpretation of the core principles of public procurement is maybe at stake, with the recognition of new grounds to limit the general objective of enlarging access to the market for all economic operators, which currently prevails in the Court's legal reasoning.

Secondly, the reshaping of EU rules on public procurements cannot be dissociated from the current debate on fair competition at the external level and on the need to preserve the EU internal market from unfair practices. Yet, the White Paper on levelling the playing field as regards foreign subsidies, presented on 17 June 2020,[9] appears to be a significant step to consider the adoption of new tools to prevent distortions, especially when foreign subsidies allow a subsidised bidder to make a bid that would not be sustainable otherwise. Consistent with the current political agenda on EU 'economic sovereignty', the Commission pushes for the adoption of tools aiming at preserving the internal market. In its recent Impact Assessment following the White Paper, the Commission has confirmed the relevancy of developing new legal instruments, including new detection mechanisms and the possibility to consider unfair foreign subsidies as a new legal ground, in the Directives on public procurement,[10] for excluding bidders located in third countries from the possibility of submitting to public contracts within the EU.

9 European Commission, White Paper of 17 June 2020 'Levelling the playing field as regards foreign subsidies', COM(2020) 253 final.

10 Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18; Directive 2014/25 of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17.

Although the final legislative proposal has not been finalised yet, a gap with previous institutional positions on a general opening to competition of public procurement is undoubtedly at stake. Procedures leading to specific forms of market closures are now concretely considered as an appropriate way to preserve the efficiency of the EU framework on public procurements. It is not yet a step back on the competitive paradigm on which these rules were built, but at least a significant inflection of it.

Chapter 32

THE CHALLENGES OF COVID-19 ON THE SCOPE OF THE FREEDOM OF CIRCULATION OF CAPITAL (ARTICLE 63 TFEU)

Ricardo García Antón

1. Introduction[1]

COVID-19 has put the need for strong EU-coordinated political action on the table. On the one hand EU solidarity must inspire suitable mechanisms to alleviate the disastrous economic and financial consequences of the pandemic. On the other hand, the protection of the public health of European citizens is vital. Therein lies the goal of the recent Guidelines of the European Commission to keep EU companies and critical assets afloat in areas such as health, medical research, biotechnology and infrastructures.[2]

Such protection of strategic companies and assets is channelled through the screening mechanism to prevent a foreign investor from acquiring or taking control over a company that could undermine Europe's security or public order. The screening adds a derogation from the freedom of circulation of capital in Article 63 TFEU. Such derogation on the grounds of public policy or public security is expressly allowed by Article 65(1)(b) TFEU and justifies the legal framework on screening (Regulation 2019/452).[3] In this Chapter, I will focus on the scope of the free movement of capital to point out the salient issues and the main challenges ahead derived from the COVID-19 crisis.

1 This Chapter was finalised on 2 April 2020.

2 Commission Communication of 25 March 2020 'Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)'.

3 Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

2. The scope of Article 63 TFEU – Distinction between EU situations v. EU-third countries

Despite its narrow scope in the Treaty of Rome (Articles 67-73 TEC), the current wording of the freedom of circulation of capital is found in the Treaty of Maastricht. Article 73b of the EC Treaty (now Article 63 TFEU) states as a general rule that all restrictions on the movement of capital and payments between Member States, and Member States and third countries, are prohibited. As the EU free movement of capital does not require reciprocity, third countries are allowed to discriminate against EU Member States in return.

The 'capital openness' within the free movement of capital does not apply equally to the rest of the EU freedoms, which are exclusively applicable to the Member States. Therefore, potential qualification conflicts arise between the EU freedoms applicable to assess the restrictive domestic measure at stake. In the field of direct taxation, for example, national restrictions derived from the distribution of dividends from a third country may simultaneously be covered under the freedom of establishment and the free circulation of capital. In the overlapping of EU freedoms, the Court of Justice has distinguished between intra-EU cases and EU-third country cases.

In relation to intra-EU cases, cases like *Baars* (C-251/98), and *Test Claimants in the FII Group* (C-446/04), and *Burda* (C-284/06), the freedom of establishment prevails over Article 63 TFEU provided that the intention of the national legislation was to apply to those shareholdings which enable the holder to exert a definitive influence on the company's decisions. In cases in which the intentions pursued by the national legislation were not clear or the size of the holding was irrelevant for the domestic law, the Court of Justice examined the facts of the case to search for indicia of definitive influence. In these intra-EU cases, provided the cases are framed under the freedom of establishment, foreign direct investment can also be also affected.

An example of this approach can be found in *Deister and Juhler* (joined cases C-504/16 and C-613/16) The case concerned German anti-treaty shopping rules applied to a distribution of dividends to non-resident parent companies, which were in the Netherlands and Denmark. As the order of reference did not contain information on the purpose of the German legislation, the Court of Justice focused on whether the precise holding granted a definite influence over the decisions of the subsidiary. Accordingly, the fact that the parent held all the share capital (*Juhler*) or 26.5% (*Deister*) was decisive to examine these cases under the freedom of establishment.

With regard to the relationship between the EU and third countries, the factual analysis of the shareholding is discarded. Therefore, the relevant criterion is the intention of the national legislation (*Kronos International*, C-47/12; *SECIL*, C-464/14). In *SECIL*, the fact that the intention of the Portuguese legislation was irrelevant to whether there was a definitive influence on the shareholding meant the case was adjudicated under the free movement of capital. The freedom to provide services/establishment prevails when domestic law jeopardises the conditions of access to market (*Fidium Finanz*, C-452/04; *Anton van Zantbeek*, C-725/18). Since in the majority of tax cases involving third

countries (distribution of dividends, withholding tax refund, and so on), the intention of national legislation was not tailored to the 'definitive influence', the cases are adjudicated under Article 63 TFEU. These restrictive tax measures make the investment in an EU country by a third country national in comparison with a domestic investment less favourable, but do not jeopardise the conditions of access to the market of non-EU entrepreneurs. The 'capital openness' intended in Article 63 TFEU is in principle achieved.

3. Overriding reasons of general interest

In a third country–EU Member State scenario, the 'capital openness' within Article 63 TFEU is curtailed at the level of justifications. In tax cases, the Court of Justice is more favourable to admitting overriding reasons of general interest provided by the Member States to justify the restriction of the free movement of capital than in EU internal situations (*Rimbaud*, C-72/09). The Court accepts justifications based on the need to guarantee effective supervision and ensure the effectiveness of tax collection. Member States cannot grant the same tax advantages to non-EU enterprises on the grounds that they cannot verify whether these enterprises satisfy equivalent conditions of domestic enterprises.

In non-tax cases, restrictions to Article 63 TFEU under the public policy and public security exceptions are narrowly interpreted (*Association Église de Scientologie de Paris*, C-54/99). The Court of Justice accepted Belgian legislation that ensured a minimum level of energy supplies in the event of a serious threat in *Commission v Belgium* (C-503/99). Such restriction was subject to a formal statement of reasons and to an effective review by the courts. However, in *Commission v Spain* (C-463/00), such legal guarantees did not exist in the Spanish system of prior approval of certain decisions in privatised undertakings (mergers, share purchases, change of object, and so on).

In the recent Guidelines issued due to COVID-19, the Commission suggests that permissible grounds of justification (public health, protection of consumers, preserving financial equilibrium, and so on) and the proportionality test should be interpreted more broadly by the Court of Justice, to accept restrictions to the free movement of capital.

4. EU Intermediate companies owned by third country nationals

One of the most controversial issues in relation to the free circulation of capital is the treatment of intermediate companies located in EU Member States (holding companies) owned by third country nationals. Such schemes target the exemption and elimination of withholding taxes related to dividend and interest flows provided in the Parent Subsidiary Directive[4] and Interest Royalty Directive.[5] Are these schemes abusive? What are the substantive requirements needed for these intermediate holding

4 Council Directive 2011/96 of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

5 Council Directive 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments.

companies to benefit from the Directives?

To tackle such '*Directive-Shopping'*, the Court of Justice precludes the Member States from introducing an irrebuttable presumption of fraud and abuse (*Eqiom*, C-6/16; *Deister* C-613/16). Therefore, tax authorities must carry out an individual examination of the whole scheme to determine whether it is abusive. Such domestic anti-abuse provisions could be justified under the objectives of combatting tax evasion and avoidance and safeguarding a balanced allocation of taxation. Even so, the objective of combatting tax havens could work as a justification to restrict the EU freedoms (*Felixstowe Dock*, Case C-80/12).

Only cases in which the schemes are a 'wholly artificial arrangement which does not reflect economic reality and whose purpose is unduly to obtain a tax advantage' could be struck down (*Deister*, C-613/16, paragraph 65). Thus, holding companies with insignificant substance (such as with a phone line, rented office and a few employees) are not abusive *per se*, but the Court proposes a case-by-case overall assessment of the arrangement.

Finally, the EU general principle of prohibition of abusive practices which shares the rank of primary law (the EU fundamental freedoms) will have an extraordinary impact in combatting abuse at the EU and domestic levels (*N Luxembourg 1*, C-115/16; and *T Denmark*, C-116/16). Respected authors such as W. Schön and F. Vanistendael have already observed that an anti-abuse principle under primary law could work as a restriction of the direct effect awarded to the fundamental freedoms. To the extent that the notion of abuse of law has been broader, Member States have stretched their power to review schemes.

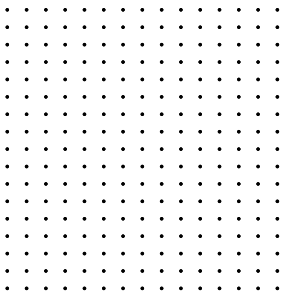
In these judgments, the Court of Justice gave several indicia in order to guide national courts in the assessment of the schemes (that is, the sole activity of the holding is the receipt of interest and immediate transmission to the beneficial owner, insignificant taxable profit, and so on). On the scope of the principle of abuse of abusive practices, there are still doubts. For example, is it autonomous from the beneficial owner provision in the Interest and Royalty Directive?

5. Challenges ahead derived from the COVID 19 – Guidelines

In this Chapter, the 'capital openness' derived from Article 63 TFEU is not a 'bed of roses' from foreign direct investment coming from third countries. Its scope can eventually be narrowed down. First, in relation to the overriding reasons of general interest, the Court of Justice is traditionally more favourable to admitting the justifications provided by the Member States to restrict the freedoms. Second, the case law on abuse (*Eqiom*, *Deister*), and especially the emergence of the general principle of prohibition of abusive practices, may seriously jeopardise the use by third country nationals of holding structures in the EU to simply benefit from the Directives.

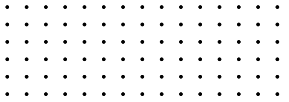
In the COVID-19 Guidelines, the Commission is quite optimistic that the serious threats to public health and financial equilibrium could work as valid justifications to restrict the scope of Article 63 TFEU in the screening mechanisms. However, two main arguments can thwart such an optimistic view in a potential Court of Justice assessment of the domestic measures. First, such derogations of the free movement of capital are interpreted narrowly and second, the Court balances other principles such as legal certainty and the possibility of judicial review of these restrictive measures (*Commission v Spain*, C-463/00). Again the proportionality test could play a major role in determining the breach of EU law.

In my view, the public health emergency stemming from the COVID-19 does not mean in EU law language 'a free-for-all'. Member States like Spain, through Royal Decree 8/2020, have imposed serious temporal restrictions on foreign direct investment (more than 10% shareholding in companies) in key sectors (such as telecommunications, energy, mass media). Such limitations to the foreign direct investment, albeit subject to the prior authorisation system, would likely be scrutinized by the Court of Justice. It would be highly interesting to observe whether the Court accepts the Commission's suggestion in the Guidelines to broaden the scope of Article 63 TFEU in an emergency scenario such as the one derived from the COVID-19.



Part VI

COMPETITION AND STATE AID



Chapter 33

IMPACT OF THE COVID-19 CRISIS IN THE AREA OF COMPETITION AND STATE AID LAW: AN OVERVIEW

Juan Jorge Piernas and Dolores Utrilla

1. Approach[1]

In times of economic disruption, an adequate competition policy - as well as its efficient enforcement - is key to strike a fair balance between the need to allow certain flexibility to public and private operators facing dire economic consequences, on the one hand, and the necessary preservation of a competitive market structure in the medium and long term, on the other. This assumption, which has been at the heart of the EU's approach to competition and State aid law and policy from the very beginning of the COVID-19 pandemic, encapsulates the three main distinctive features of the European response to the crisis in these areas.

Firstly, the flexibility needed in times of economic crises is not only for the vertical dimension of competition law (mainly the issue of public support to companies experiencing temporary liquidity problems through State aid), but also for the horizontal side (in particular, but not exclusively, the mechanisms for reinforced cooperation between economic actors, including competitors, especially in some sectors). Both dimensions have been present in the actions adopted by the EU's institutions in response to the COVID-19 pandemic – most prominently through the European Commission's Directorate General for Competition (DG COMP).

Secondly, the EU's response has been based on the premise that competition law is called on to play a crucial role not only in the initial – and probably more visible – phase of reaction to economic crises, but also in the subsequent stages of recovery and economic consolidation. Short-term measures must therefore be followed by, and be compatible with, medium- and long-term ones, and all of them must keep at the centre of the strategy the cohesion and preservation of competition in the Single Market

Thirdly, under EU primary law, the existence of competitive markets is a long-term imperative which must prevail over short-term interests and needs. This explains the Commission's insistence on a rein-

1 This Chapter was finalised on 16 November 2020.

forced level of vigilance during the pandemic, all while recognising the need for flexible application of the rules under the extraneous circumstances caused by the COVID-19 pandemic. In the Commission's view, this is critical in order to ensure that the economic recession is overcome and that the subsequent economic recovery is both fast and fair. The Commission has therefore rejected a suspension of the main rules and principles of EU competition law, requested by some, but it has adopted a pragmatic and flexible approach to navigate the current crisis.

2. Flexibility challenges

In the context of the COVID-19 crisis, this overarching 'flexibility' challenge involves several specific concerns from the perspective of competition law at the EU and at the national level. Such challenges include, inter alia, the extraordinary need for public support by companies that would be viable in the absence of the crisis (*infra* 3); the continued relevance of merger control and the difficulties posed to it by the lockdowns and other measures adopted to contain the virus (*infra* 4); the particularly intense need for public guidance regarding cooperation between competitors in the area of antitrust (*infra* 5); and the urgency to detect and to fight COVID-19 related antitrust violations, such as excessive pricing behaviours in breach of EU competition (and/or) consumer protection rules (*infra* 6).

The following sections of this chapter give an overview of the main issues posed by the COVID-19 crisis in these selected areas,[2] as well as of the responses adopted thereto by the Commission and the National Competition Authorities (NCAs). Some of the more relevant actions undertaken in this regard – namely those concerning State aid – will be further addressed in the subsequent Chapters of this volume.

3. State aid

Both the 2008 financial crisis and the ongoing pandemic prove that State aid rules are called on to play a crucial role in the fight against economic crises.[3] The relevance of State support measures to ensure continuity of companies and therefore to prevent or alleviate situations of massive bailout is indisputable. This is all the more so under the exceptional circumstances posed by the ongoing pandemic, where businesses are suffering from extraordinary restrictions adopted to contain the virus, finding themselves in acute need for support in order to survive, to preserve their value, and to protect their workers' jobs. This explains why this was one of the first areas of EU law to be called into action, as the COVID-19 crisis had instant economic repercussions on virtually all economic sectors: State aid control is a mechanism fit for 'dealing with the *interregnum*'.[4]

2 For a more detailed overview of how these and other components of EU competition law are being impacted by the COVID-19 pandemic, see Francisco Costa-Cabral, Leigh Hancher, Giorgio Monti, and Alexandre Ruiz Feases, 'EU Competition Law and COVID-19' (2020) *TILEC Discussion Paper* No. DP2020-007.

3 On this, see the contribution in Part VI by Juan Jorge Piernas (Chapter 34 below).

4 Andrea Biondi, 'Governing the Interregnum: State Aid rules and the COVID -19 Crisis' (2020) *Market and Competition Law Review*.

However, as noted in the Chapters in this volume by Andrea Biondi[5] and by Juan Jorge Piernas,[6] tailored safeguards are necessary to avoid the nefarious consequences for competition in the Single Market stemming from massive capital injections being made by Member States, and by some of them in particular.

Well aware of the need to achieve a compromise between flexibility and control, the Commission swiftly reacted to the COVID-19 pandemic through the issuance of a set of soft law instruments purporting to allow Member States the maximum discretion to act under the TFEU State aid rules, but under a Temporary Framework, thus limiting the extraordinary application of the rules to the unprecedented situation that we are experiencing. Based on the experience gained during the 2008 financial crisis, on 19 March 2020, the Commission adopted the COVID-19 State aid Temporary Framework on the basis of Article 107(3)(b) TFEU, which allows Member States to grant support to remedy a serious disturbance to their economy.[7] This framework was subsequently amended and extended on four occasions, on 3 April 2020, 8 May, 29 June, and 13 October 2020.[8] The reader is referred to the following Chapters of this book for further analysis and assessment of the purpose, scope, and content of these instruments.

Overall, this Temporary Framework has proved to be a useful tool for quickly adapting the pre-existing State aid framework to the extraordinary and urgent needs for liquidity of companies in the Member States. It allowed the Commission to act swiftly over the first months of the pandemic, authorising hundreds of national measures to support the economy in the context of the crisis. However, it is not yet clear whether the flexibility recognised by the Temporary Framework, in conjunction with the asymmetric financial capabilities of the Member States to grant State aid will have lasting consequences for competition and for the cohesion of the Single Market. In any event, the quantitative and qualitative importance of State aid control during this period is apparent when considering that the European Commission launched, in March 2020, a specific section devoted to COVID-19 related State aid on its competition website which it continues to regularly update.

Although most of the Commission's efforts in this area have been channelled through the Temporary Framework under Article 107(3)(b) TFEU, other legal bases have also been applied to face the consequences of the pandemic. In this regard, the first decision related to COVID-19 was adopted under Article 107(2)(b) TFEU, which provides for the possibility of granting State aid to make good the damage caused by natural disasters or *exceptional occurrences*, COVID-19 being defined as an 'ex-

5 See the contribution in Part VI by Andrea Biondi (Chapter 35 below).

6 See the contribution in Part VI by Juan Jorge Piernas (Chapter 34 below).

7 Commission Communication of 19 March 2020 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'.

8 See respectively: Commission Communication of 3 April 2020 'Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'; Commission Communication of 8 May 2020 'Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'; Commission Communication of 29 June 2020 'Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'; Commission Communication of 13 October 2020 '4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance'.

ceptional occurrence'.[9] Other decisions have subsequently been adopted under this provision to compensate undertakings for the direct damages caused by the pandemic.[10] Similarly, Article 107(3)(c) TFEU (aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest) has also been applied by the Commission to, inter alia, foster the granting of public funds to the health sector,[11] although this provision has also been invoked to provide liquidity support to airlines.[12]

In addition, over the past few months, the Commission has extended (until 2023) and adjusted some relevant hard law rules in this area, namely the *de minimis* Regulation 1407/2013 and the Block Exemption Regulation 651/2014.[13] It has further prolonged a considerable amount of pre-existing guidelines governing specific categories of aid, and introduced targeted amendments thereto.[14]

In parallel with these developments, the increased need of companies for public support seems to be easing the use of State aid mechanisms to foster certain policy objectives, shared by the EU and the Member States, such as the fight against tax avoidance. In this regard, the Commission has greenlighted a number of coronavirus-related State aid schemes which specify that the beneficiaries of the scheme must reside for tax purposes in the EEA, and/or that such beneficiaries cannot have tax residence in the so-called 'tax havens' within the meaning of the EU Council conclusions on the revised list of non-cooperating countries for tax purposes[15].[16] Indeed, the Commission went one step further and, in July 2020, published a Recommendation to Member States on making State financial support to undertakings in the EU conditional on the absence of links to non-cooperative jurisdictions, thus confirming the possibility, and even the desirability, of introducing such conditionality in all COVID-19 related State aid.[17]

This seems to confirm the already perceivable trend to increase the range of EU policy goals to which State aid might contribute. Indeed, State aid control has been portrayed as a risk management tool

9 See SA.56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19.

10 The list of State aid decisions adopted under Article 107(2)(b) TFEU can be consultated at https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf

11 See SA.58477 concerning a 1.46 billion-euro UK scheme to distribute free medical grade personal protective equipment in the context of the COVID-19 outbreak.

12 See SA.57369 concerning the injection of €1.2 billion urgent liquidity support to the Portuguese TAP

13 Commission Regulation 2020/972 of 2 July 2020 amending Regulation 1407/2013 as regards its prolongation and amending Regulation 651/2014 as regards its prolongation and relevant adjustments.

14 Commission Communication of 2 July 2020 'Prolongation and amendments of the Guidelines on Regional State Aid for 2014-2020, Guidelines on State Aid to Promote Risk Finance Investments, Guidelines on State Aid for Environmental Protection and Energy 2014-2020, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication on the Criteria for the Analysis of the Compatibility with the Internal Market of State Aid to Promote the Execution of Important Projects of Common European Interest, Communication from the Commission on the Framework for State aid for research and development and innovation, and Communication from the Commission on the application of Articles 107 and 108 TFEU to short-term export-credit insurance.

15 Council Conclusions of 18 February 2020 on the revised EU list of non-cooperative jurisdictions for tax purposes.

16 See in this regard SA.56996 concerning a Polish COVID-19 related State aid scheme in the form of repayable advances for micro, small and medium-sized enterprises.

17 European Commission, Recommendation of 14 July 2020 on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions, C(2020) 4885 final.

during the first months of the pandemic.[18] These developments are particularly noteworthy as, in the medium and long term, the foreseeable economic effects of the COVID-19 pandemic will probably make it necessary to pay greater attention to the consequences for competition and for the cohesion of the Single Market brought about by the asymmetric granting of funds by the EU Member States.[19]

4. Merger control and foreign investment

In the area of merger control, the COVID-19 crisis specifically poses the need to adapt existing procedures and rules for in-depth investigations to a landscape governed by restrictions of movement and social distancing measures. These measures have led competition authorities to face difficulties, in particular in collecting information from the notifying parties and third parties, such as their customers, competitors and suppliers.

In this regard, from the very beginning of the pandemic the OECD made a recommendation to competition authorities, in view of the containment measures limiting the movement of people and the need to adjust to crisis-related priorities, to explore the use of flexibility within procedures for merger review, being mindful of due process rights. In a similar vein, the Commission advised the deferral of merger notifications, although it will review notified transactions if there are compelling reasons for doing so. To this extent, the Commission recommends the use of electronic filing while maintaining the application of the existing Merger Regulation,[20] which has shown itself to be fit for purpose even in the most adverse conditions. In a similar vein, some European jurisdictions adjusted legal deadlines for merger filings (as happened in Spain[21]) or allowed for electronic filing of merger notifications and for the use of telephone or video conferences to communicate with merging parties and market participants (for example in Germany[22]).

Beyond these pandemic-specific problems, competition authorities responsible for reviewing mergers faced the challenges usually associated with economic crises. These include, inter alia, issues such as how to conduct a competitive assessment of mergers in the face of significant and rapid changes in market circumstances; how to implement remedies in such a severe crisis; and how to manage increased derogation requests for jurisdictions that have standstill obligations. Challenges may also arise in relation to the eventual increase in the number of mergers, as industry tends to reorganise itself following an economic shock. Commission Executive Vice-President and Commissioner for Competition Margrethe Vestager has recently stressed that the biggest issue for EU competition authorities in this field will be avoiding excessive concentration that adversely affects businesses and consumers.[23]

18 Delia Ferri, 'The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis' *European Journal of Risk Regulation*, 2020, pp. 1-20.

19 Alessandro Rosanò, 'Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law' 5 *European Papers* 1, 2020, pp. 621-631.

20 Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

21 Announcement of the Spanish Competition Authority of 19 March 2020 on the timelines for administrative procedures in the context of the COVID-19 pandemic.

22 Announcement of the German Competition Authority of 17 March 2020 on communications with the *Bundeskartellamt* in the context of the COVID-19 pandemic.

23 Margrethe Vestager, Speech at the 2020 Annual Fordham Competition Conference, 8 October 2020.

In this regard, a call is made for the criteria for evaluating the 'failing firm' defence in cases where undertakings buy weakened rivals to play a crucial role in preventing the crisis from undermining the competitive structure of the internal market.

The EU has also been attentive to the risk for EU strategic industries and companies to be acquired by State-backed third country investors. These concerns led the Commission to issue Guidelines to ensure a strong EU-wide approach to foreign investment screening.[24] Following the formal entry into force of the Foreign Direct Investment (FDI) Screening Regulation 2019/452 in April 2019,[25] but ahead of initiation of the full operation of such framework on 11 October 2020, these Guidelines urged Member States to protect strategic industries, particularly those related to the health (including research) sector, from 'predatory buying' by foreign investors and advised them to consider other protectionist options, including the acquisition of 'golden shares' or special rights in certain companies. Under current EU law, EU Member States are responsible for preventing such 'predatory purchases', but the Commission Guidelines of 20 March 2020 might represent the germ of a European common investment policy.[26] The adoption of these measures is coherent with other measures recently adopted or under elaboration, such as the White Paper on foreign subsidies in the Single Market, published in June 2020.[27]

5. Antitrust and cooperation among companies

Under the dire conditions created by the pandemic some competitors have had to cooperate in order to undertake certain investments and activities. Well aware of this context, on 23 March 2020, the European Competition Network (ECN) – which includes the Commission, the European Surveillance Authority, and the National Competition Authorities (NCAs) of the EU and the EEA – addressed this concern by means of a Joint Statement on how to apply EU competition law during the crisis.[28] The ECN Joint Statement clarified that the ECN would not actively intervene against necessary and temporary measures of cooperation among companies put in place in order to avoid a shortage of supply of scarce products to all consumers. A similar statement by the International Competition Network (ICN) was published on 8 April 2020.[29]

In this context, and given the magnitude of the sanctions that can be imposed for unlawful cooperation under EU and national law, guidance by enforcement agencies is key to clarify what can and cannot be done. The COVID-19 pandemic hence made the need for soft law guidance particularly apparent. In

24 Commission Communication of 25 March 2020 'Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation 2019/452 (FDI Screening Regulation)'.

25 Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

26 Sabrina Robert-Cuendet, 'Filtrage des investissements directs étrangers dans l'UE et COVID-19: vers une politique commune d'investissement fondée sur la sécurité de l'Union' 5 *European Papers* 1, 2020, pp. 597-611.

27 European Commission, White paper of 17 June 2020 (COM(2020) 253 final) on levelling the playing field as regards foreign subsidies, Brussels, 17.6.2020 COM(2020) 253 final.

28 ECN Joint Statement of 23 March 2020 on the application of competition law during the COVID-19 crisis.

29 ICN Steering Group Statement of 8 April 2020 on competition during and after the COVID-19 pandemic.

this line, the ECN Joint Statement explicitly recommended companies that have doubts about the compatibility of their cooperation initiatives with EU/EEA competition law to reach out to the Commission, the EFTA Surveillance Authority or the relevant NCA for informal guidance. This guiding function is expected to increase as the recovery and post-recovery phases advance, in particular in the context of the digital and green transitions, where high investments – and therefore enhanced horizontal cooperation – will be necessary.

Almost immediately, in late March, the Commission launched a specific website with guidance to companies and associations concerning how the EU competition rules apply to concrete cooperation initiatives with an EU dimension. Soon afterwards, it published further guidance in the form of a Temporary Framework Communication addressed to companies cooperating in response to urgent situations related to the pandemic outbreak, in particular shortages in medicines due to the increase in demand and the simultaneous disruption of supply chains.[30] The Communication clarifies the conditions and steps for obtaining (oral) guidance or a 'comfort letter' issued by the Commission, and underlines that cooperation in the health sector, under the conditions set out in the guidance will not be considered unlawful, although it would cause competition concerns under normal circumstances. In turn, NCAs reinforced their services in order to provide a quick response to market operators seeking guidance on how to engage in cooperation agreements.

In addition to these non-binding measures, for certain markets the Commission adopted temporary derogations from EU competition rules, authorising agreements and decisions on market stabilisation measures in relevant economic sectors. This happened in the potatoes, live plants and flowers, milk, and wine sectors.[31] By contrast, the Commission has not yet adopted, to date, interim measures under Article 8 of Regulation 1/2003, although this is a tool at the Commission's disposal 'in cases of urgency due to the risk of serious and irreparable damage to competition'. Those cases have arguably taken place in the last few months concerning some scarce products, yet the procedural and substantive requirements that have to be met for the adoption of these measures might have meant the Commission refrained from resorting to this instrument.[32]

6. Opportunistic competition law violations

Lastly, one specific feature of the COVID-19 crisis is the disruption of supply chains, leading to short-

30 Commission Communication of 8 April 2020 'Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak'.

31 See Commission Implementing Regulation 2020/593 of 30 April 2020 authorising agreements and decisions on market stabilisation measures in the potatoes sector; Commission Implementing Regulation 2020/594 of 30 April 2020 authorising agreements and decisions on market stabilisation measures in the live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage sector; Commission Implementing Regulation 2020/599 of 30 April 2020 authorising agreements and decisions on the planning of production in the milk and milk products sector; and Commission Implementing Regulation 2020/975 of 6 July 2020 authorising agreements and decisions on market stabilisation measures in the wine sector.

32 See in this regard Francisco Costa-Cabral, Leigh Hancher, Giorgio Monti, and Alexandre Ruiz Feases, 'EU Competition Law and COVID-19' *TILEC Discussion Paper* No. DP2020-007, 2020, p. 12.

ages in a number of essential products. Scarcity heightens the risk posed by predatory pricing behaviour and other forms of exclusion and of abuse of dominance, because excessive price may arise even in the absence of collusion and of a dominant company in the relevant market.[33] In connection with this, it must be recalled that excessive pricing by non-dominant companies is not covered by Article 102(a) TFEU, but that it can be caught by consumer protection rules. Distinguishing legitimate from illegitimate pricing practices, as well as deciding how best to deal with the latter, creates substantial challenges for competition (and also for consumer protection) authorities.

In its Joint Statement of 23 March 2020, the ECN announced that it would not hesitate to take action against companies taking advantage of the pandemic by forming cartels or abusing their dominant position, and to adopt the necessary measures to ensure that products considered essential to protect the health of consumers (such as face masks and sanitising gel) remain available at competitive prices. Under this approach, on 8 April 2020 the Commission issued a comfort letter to the association of pharmaceutical manufacturers 'Medicines for Europe' in relation to a voluntary cooperation project to address the risk of shortages of critical hospital medicines for the treatment of coronavirus patients.[34] On the consumer protection chapter, the Consumer Protection Cooperation (CPC) Network adopted, on 20 March 2020, a Common COVID-19 Position, requesting online platform operators to identify and take down illegal practices in this area.[35]

At the same time, some NCAs' enforcement authorities are looking into excessive pricing behaviour in sectors affected by the crisis, and have started investigations into anticompetitive practices in areas such as that of funeral services, hydro-alcoholic gels, and financial lending.[36]

Overall, these developments represent an unprecedented testing ground for competition law in Europe. It remains to be seen whether the aftermath of the COVID-19 crisis will lead to further fine-tuning of the Commission's upcoming review of antitrust policies, as well as of other parts of its competition policy. For the time being, it seems that the European Commission and national competition authorities are more concerned with navigating the current crisis, and with helping businesses navigate it as well, than with investigating and punishing anticompetitive behaviour. The time will probably come for that. It is, however, suggested that EU and national competition enforcers should remain vigilant and should not hesitate to apply the existing rules to their full extent in relation to opportunistic behaviour by undertakings, particularly in cases of cartels and abuses of dominant position, as such conduct is particularly reprehensible under the current circumstances, where so many are suffering so much.

33 Penelope Giosa, 'Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation' *Journal of European Competition Law & Practice*, 2020.

34 European Commission, Comfort letter of 8 April 2020 on coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients.

35 CPC authorities, Common position of 20 March 2020 'Stopping scams and tackling unfair business practices on online platforms in the context of the coronavirus outbreak in the EU'.

36 So, for example, the Italian Antitrust Authority, which in late February 2020 launched investigations against Amazon and eBay about significant price increases for healthcare related products on their platforms over the first months of the COVID-19 pandemic. Similarly, the UK antitrust authority launched an investigation in June 2020 concerning excessive Pricing for Hand Sanitisers.

Chapter 34

STATE AID IN TIMES OF PANDEMIC: LESSONS FROM RECENT CRISES

Juan Jorge Piernas

1. Introduction[1]

In addition to the devastating impact on individual lives and public health, the COVID-19 outbreak is generating dire economic effects. The reaction of EU Member States to the crisis through the injection of a significant amount of public resources into the economy, and particularly in some sectors, may also bring about considerable competition distortions. In this context, the State aid regime has, once again, had to strike a balance between the need to avoid an economic meltdown and the goal of protecting effective competition in the internal market. This contribution briefly analyses the Commission's reaction to the COVID-19 crisis in light of the previous response of the 'Guardian of the Treaties' to the last severe challenge to the State aid discipline, that is, the 2008 financial crisis.

2. The Commission's approach during the financial crisis

During the financial crisis, the European Commission's policy on State aid evolved from a very lax approach, motivated by the high economic and political tension of the early days of the crisis, towards a stricter approach, as the financial and economic context was becoming more stable. The Commission's method of progressively increasing the rigidity of State aid control was based on the publication of soft law instruments stating how it intended to approach the compatibility of aid for banks firstly, and for the real economy subsequently, in different phases of the crisis.

The adoption of soft law instruments, particularly of seven communications related to the financial sector and a temporary framework related to the 'real economy', together with a very permissive interpretation of the rules at the beginning of the crisis under a (then) exceptional legal basis (Article 107(3)

1 This Chapter was finalised on 12 November 2020.

(b) TFEU), allowed the Commission to avoid direct confrontation with Member States in a difficult context in which it was even 'requested by some' to suspend the application of the State aid discipline altogether.[2] Over time, the European Commission also pursued a number of regulatory objectives, in addition to the traditional protection of competition, such as financial stability, countering moral hazard, or the return to long-term viability of financial institutions. Indeed, in the absence (at the time) of a supranational regime for banking resolution through the EU, the State aid rules emerged as the appropriate framework to police the measures adopted by Member States to stabilise, rescue and resolve banks established within their territories. As underlined by former Commissioner Almunia 'the Commission […] acted as a *de facto* crisis-management and resolution authority at the EU level'.[3]

3. The current COVID-19 crisis

In the COVID-19 outbreak scenario, some parallels can be found with the previous crisis. Firstly, the European Commission received, also this time, requests from Member States 'to suspend State aid rules for the duration of the fight against the coronavirus pandemic'. These requests were rejected, although, again, the compromise seems to have been to adopt a very flexible interpretation of the existing rules.

Secondly, the Commission resorted to Article 107(3)(b) TFEU as the suitable legal basis for dealing with the new crisis, and it did so more promptly and with more confidence, based on the experience gained during the previous crisis. In this regard, although the first decision related to COVID-19 was adopted under Article 107(2)(b) TFEU (aid to make good the damage caused by natural disasters or exceptional occurrences – COVID-19 being defined as an 'exceptional occurrence'),[4] the Commission underlined in the press release concerning this decision that in case of particularly severe economic situations 'such as the one currently faced by Italy', Member States may grant support to remedy a serious disturbance to their economy under Article 107(3)(b) TFEU.[5] The Commission announced a day later that it was 'preparing a special legal framework under Article 107(3)(b) TFEU to adopt in case of need', which Commissioner Vestager linked to the Temporary Framework adopted in relation to the 2008 financial crisis.

The proclaimed special legal framework was adopted on 20 March 2020 as the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (the 'COVID-19 Temporary Framework').[6] So far, the COVID-19 Temporary Framework has been amended four

2 See the references in this regard by Herbert Ungerer, 'After the State Aid Action Plan: the EU's new State Aid framework', EU State Aid Summit, 23-24 June 2009.

3 Joaquín Almunia, 'Banking crisis, financial stability and State aid: The experience so far', Speech delivered on 8 March 2013.

4 See SA.56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19.

5 European Commission, 'State aid: Commission approves €12 million Danish scheme to compensate damages caused by cancellations of large public events due to COVID-19 outbreak', press release of 12 March 2020.

6 European Commission, Communication of 19 March 2020 - 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'.

times since its adoption, on 3 April, 8 May, 29 June and 13 October 2020.[7] The COVID-19 Temporary Framework will apply, in principle, until the end of June 2021.[8]

The adoption of the above mentioned Temporary Framework under Article 107(3)(b) TFEU was convenient for reasons of urgency, transparency and legal certainty. It was also fitting for the State aid discipline - again based on the experience gained during the financial crisis, to enact an extraordinary and temporary framework rather than to resort to the direct application of the existing rules, particularly of Article 107(3)(b) TFEU on a case-by-case basis. Indeed, the path taken allows for a more flexible interpretation of the rules, but only for a limited time, and under certain conditions, applicable to all the Member States.

In relation to the foregoing, if the most distinguishable measure of the Temporary Framework adopted to face the 2008 financial crisis was the possibility of granting aid not exceeding 500,000 euros per undertaking, the COVID-19 Temporary Framework allows for the granting of 800,000 euros per undertaking, among many other State aid measures, such as State guarantees for loans taken by companies from banks, or subsidised public loans to companies. In addition, the Commission clarified that the aid measures covered by the Temporary Framework may be cumulated with aid under *de minimis* Regulations. Consequently, COVID-19 related State aid may go up to one million euros per undertaking.

In this context, it should be underlined that, although the 27 Member States may lawfully grant all the State aid foreseen by the COVID-19 Temporary Framework (for example one 1 million euros per undertaking) to the undertakings established in their territory, in reality not all of them may afford that amount of public spending. In other words, some Member States will be able to provide more public support to their undertakings than others.

4. Assessment

The scope for competition distortions in the Single Market derived from uneven public interventions is striking. Arguably, this is the case with all block-exempted State aid. However, the unprecedented leeway for the granting of State aid under the COVID-19 framework ('the most flexible State aid rules ever in the EU') exacerbates the risk of competition distortions and of an asymmetric recovery. In this regard, Executive Vice-President Margrethe Vestager has recently accepted that "[o]f the around 3 trillion euros in [COVID-19 related] aid approved to-date, more than half was approved in Ger-

7 See respectively: Commission Communication of 3 April 2020 - 'Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'; Commission Communication of 8 May 2020 - 'Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'; Commission Communication of 29 June 2020 - 'Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'; Commission Communication of 13 October 2020 - '4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance'.

8 Further details on the content and scope of the Temporary Framework can be found in the contribution in Part VI by Andrea Biondi (Chapter 35 below).

many".[9] However, as Vice-President Vestager also noted, from the aid actually paid out "France has disbursed the largest amount of aid, at just above a third of the total, followed by Germany at 28%. Spain makes up about one fifth and Italy about 8%'. In any event, she concluded 'the fact remains that the four largest Member States make up over 90% of total State aid disbursed in the EU between March and end of June".

The European Commission is well aware of this risk, and the recently proposed Solvency Support Instrument will focus 'on Member States which are less able to intervene through state aid and where the economic effects of the coronavirus pandemic have been most severe, in the most affected sectors'.[10] In addition the COVID-19 Temporary Framework includes some safeguards to limit the negative consequences of the State aid granted under its provisions to prevent relocations between Member States due to the public support or the granting of aid to companies that were already in difficulties prior to the COVID-19 pandemic outbreak. It remains to be seen whether these safeguards, together with other initiatives adopted under the EU recovery package, will suffice to neutralise the distortions of competition resulting from the abovementioned public interventions, and it has already been held in this regard that the EU Recovery Plan will not be sufficient to remove the competition distortions.[11]

The reaction to the COVID-19 pandemic from a State aid viewpoint has, of course, some specificities that were not present in the 2008 financial crisis. Notably, Article 107(2)(b) TFEU, aid to make good the damage caused by natural disasters or exceptional occurrences, is a suitable legal basis, as mentioned before, to compensate the damages brought about by the pandemic, which has been duly defined as an 'exceptional occurrence' under that article. However, compensation of the direct damage caused by COVID-19, such as the cancellation of events, is clearly insufficient to deal with the severe economic consequences of the pandemic in the medium and long-run. In this regard, other measures had to be adopted to maintain macroeconomic stability, 'reducing "vulnerability" and increasing "resilience" of different economic sectors',[12] and the COVID-19 Temporary Framework responded to this need, although it casts doubts as to its long-term effects for competition and for the cohesion within the Single Market.

Another specificity of the State aid reaction to the COVID-19 pandemic should also underlined, namely, the use of Article 107(3)(c) TFEU by the Commission to incentivise the granting of public support to the health sector 'as well as enhancing preparedness to respond to any further threats stemming from the virus'.[13] In this regard, although the decision to grant State aid is a national one, and the Commission may not force Member States to grant a particular type of State aid, the efforts of the European

9 Margrethe Vestager, Speech on State Aid at the event organised by the Berliner Gesprächskreis zum Europäischen Beihilfenrecht, 30 October 2020.

10 European Commission, 'Questions and Answers on the MFF and Next Generation EU', 27 May 2020.

11 Carole Maczkovics, 'How Flexible Should State Aid Control Be in Times of Crisis?', 19 *European State Aid Law Quarterly* 3, 2020, pp. 271-283.

12 Delia Ferri, 'The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis', *European Journal of Risk Regulation*, Cambridge University Press, 27 July 2020.

13 Ibid.

Commission to signal investments that could increase the health and social resilience against the current crisis and help prepare the Member States for future crises should be commended. However, Article 107(3)(c) TFEU has also been the basis for COVID-19 related decisions to rescue flagship companies, such as Portuguese TAP,[14] which competitors have already appealed before the General Court claiming, inter alia, the violation of the principle of non-discrimination.[15] The outcome of these cases may be relevant for the future, as the Commission is preparing 'State aid guidance for Member States to invest in flagship areas'.[16]

In addition, beyond the measures described above, Member States - and the United Kingdom until the end of the transition period provided for in the Withdrawal Agreement - have several options to grant State aid to businesses affected by COVID-19. They can resort, as mentioned before, to *de minimis* aid,[17] to the General Block Exemption Regulation (GBER),[18] and to no-aid measures such as non-selective tax deductions, compensation for public service obligations that comply with the *Altmark* criteria, or public measures fulfilling the Market Economy Operator test, as interpreted by the Court of Justice of the EU.

Finally, it remains to be seen whether the European Commission will also emerge in this case as a *de facto* crisis-management authority at EU level, as it did in relation to the financial crisis, in such a sensitive domain as public health, where EU conferred powers are so limited. Some positive steps have already been taken in that direction with the measures adopted, also under the Temporary Framework, to foster public investment in the health sector (including COVID-19 and other antiviral relevant research). Similarly, the Commission has underlined, after authorising some measures where this issue was raised by the national authorities at stake,[19] that State aid should not be granted to companies with links to tax havens, and it has adopted a recommendation to all Member States in this regard.[20] We hope that a proactive and flexible application of the State aid rules will, at least, contribute to the realisation that the coronavirus is a common threat that requires a truly European answer.

In this regard, the Commission's reaction to the COVID-19 pandemic in the field of State aid will probably extend beyond the realm of public health, by supporting the twin digital and green transitions under the EU Recovery Plan to tackle COVID-19's economic impact. The unprecedented Next Generation EU is a great leap in the right direction towards a European answer, and it may also mark another milestone in a trend that could already be observed in the EU State aid field: the increasingly

14 See SA.57369 (2020/ N) COVID 19 – Portugal Aid to TAP.

15 Action brought on 22 July 2020, *Ryanair v Commission* (T-465/20).

16 Margrethe Vestager, Speech on State Aid at the event organised by the Berliner Gesprächskreis zum Europäischen Beihilfenrecht, 30 October 2020.

17 Commission Regulation 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid.

18 Commission Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

19 See SA.56996 (2020/N) – Poland COVID-19: repayable advance scheme for micro, small and medium-sized enterprises.

20 European Commission, Recommendation of 14 July 2020 'Recommendation on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions'.

protagonist role of EU institutions in channelling national funds towards common EU goals.[21] Indeed, EU institutions may feel, more than ever, empowered to have a greater say, not only on *how* to spend national funds under the State aid rules to prevent competition distortions, but also on *when* to grant aid and for *what* objectives, in order to make an efficient use of national funds (something not originally foreseen by the Treaties) while advancing EU common goals (particularly the green and digital transitions) and protecting a level playing field in the Single Market.

21 On Next Generation EU, see the contribution by Armin Steinbach (Chapter 3 above).

Chapter 35

STATE AID CONTROL AND COVID-19: A MAP TO THE TEMPORARY FRAMEWORK

Andrea Biondi

1. Introduction - The framework of the Framework[1]

As well as being a major public health emergency, COVID-19 represents a shock to both the global and Union economies. Unlike any other past crises, the pandemic is having an impact on every single sector of the economy from transport to SMEs, to retail and banking. As acknowledged by the European Commission itself, the (huge) amount of money to support the economy at this stage will have to come mostly from the pockets of national governments. The European Commission has thus decided (the other alternative being a suspension) to 'readapt' State aid rules to the current emergency. The European Commission adopted, under an ever more comprehensive umbrella, a Communication of a Temporary Framework (thereafter TF)[2] aimed at providing Member states with a quicker and more responsive notification process. The 'temporary' refers to the time limit of the TF, which will be in place until 30 June 2021 (exception, recapitalisations until 30 September 2021) to all sectors and to all companies apart from those medium-sized and large undertakings that were already in difficulty at the end of 2019. The TF's aim is twofold: first, to apply State aid control in a 'targeted and proportionate manner' as to ensure that national support measures are effective in helping the affected undertakings during the COVID-19 outbreak; secondly, to 'frame' the national support measures into the State aid control system so as to guarantee that 'the EU Internal Market is not fragmented and that the level playing field stays intact'. The Framework also emphasises that this is really not the time for a harmful subsidies race. In the Commission's view, a coordinated and proportionate application of State aid rules could be vital in preserving at least some level of European solidarity. The TF consists now of 96 articles and runs for 34 pages. At the time of writing, over 400 measures coming from all Member

1 This Chapter was finalised on 6 December 2020. Many thanks to the publishers for the kind permission to reproduce some parts of A. Biondi '*Governing the Interregnum: State Aid rules and the COVID -19 Crisis*', in *Market and Competition Law Review* 17, 2020.

2 Temporary Framework to support the economy in the context of the coronavirus outbreak (OJ C 91I, 20.3.2020, p. 1–9) TF; First Amendment (OJ C 112I, 4.4.2020, p. 1–9); Second Amendment (OJ C 164, 13.5.2020, p. 3–15); Third amendment (OJ C 218, 2.7.2020, p. 3–8.; Fourth Amendment (OJ C 340I, 13.10.2020, p. 1–10). References in this script are based on the informal consolidated version of the TF as amended on 3 April, 8 May, 29 June, and 13 October 2020.

States and the UK have been notified and around 350 decisions were adopted by the Commission.[3] Last September the Commission launched a survey to collect information from Member States on the implementation of COVID-19 related State aid measures. The full results have yet to be published but – according to Commission officials - based on the replies of 26 Member States, in the period between mid-March and end of June, of the EUR 2,300 billion in aid approved by then, around EUR 354 billion was actually granted. In absolute terms, France has granted 35% of the total aid (EUR 123 billion), Germany 27% (EUR 96 billion), Spain 19% (EUR 65 billion), and Italy about 7% (EUR 26 billion). In relative terms, compared to GDP, Spain has granted 5.3%, France 5.1%, Poland 2.9%, Germany 2.8%, Portugal 2.5%, Slovenia 1.9%, Malta 1.8%, Austria 1.6% and Italy 1.4%. At the EU level, aid granted corresponds to around 2.2% of EU GDP.[4]

2. The TF boundaries: a narrower State aid notion?

The figures reported above refer of course to these measures notified and may not fully match the actual expenditure shouldered by Member states during the pandemic. As the TF reiterates over and over again, not every State intervention has to be classified as aid, as a vast array of national measures in response to COVID-19 are not actually caught by State aid rules. Interestingly in several decisions, the Commission kept on reminding Member States that any financial support from national funds granted to health services or other public services to tackle the coronavirus situation falls outside the scope of State aid control. There is probably very little scope to be fussy on whether the health related measures have been granted as a discharge of a duty of solidarity or whether some economic features may also be present. This fine balancing act is for less complicated times.[5] Further, even when dealing with measures adopted to alleviate purely economic repercussions on the economy, the TF seems to adopt a slightly more generous stance on whether those measures should be classified as aid or not. According to the TF, any kind of horizontal measures aimed at all undertakings regarding wage subsidies or direct financial support to consumers do not fall within the scope of Article 107 TFEU. Other measures, such as incentives directed towards SMEs are likely to be block exempted and subject only to general transparency requirements. [6] Still, as most of the COVID-19 State measures are based on a series of predetermined criteria that need to be satisfied by the beneficiary to have access to the required form of relief, one may question whether these measures would – in normal times - be considered by the Commission as selective.[7] Likewise, it remains to be seen – and one has to acknowledge the enormity of the task - whether access to relief is always granted on a sort of automatic basis or whether

3 For the complete list see https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html.

4 Karl Soukup, *COVID-19 and beyond: State aid in 2020*, Estal, State Aid Conference, November 2020.

5 Johan W. van de Gronden, 'Services of General Interest and the Concept of Undertaking: Does EU Competition Law Apply?' 41 *World Competition* 2, 2018, p. 197, pp. 203-204. See also Judgement of the Court of Justice, 11 June 2020, Joined Cases *Commission and Slovak Republic v Dôvera* (C-262/18 and C-271/18 P).

6 The De Minimis Regulation no 1407/2013 is of course also applicable in this context. Further public service compensations for Services of General Economic Interest (SGEI) in the transport sector do not constitute State aid under the exceptional circumstances created by the COVID-19 outbreak.

7 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1–50, para 118.

national administrations may have opted for some variable degree of discretion in assessing access to relief conditions and by doing so, made the measure selective.[8] The TF stresses however that any measures, albeit general on their surface such as deferrals of payment of taxes and/or of social security contributions, if they are restricted for certain sectors, regions or types of undertakings, involve instead an element of aid as they are inherently selective.[9] Finally, although the legal basis is Article 107(3)(c) TFEU and thus measures need to be notified, the TF *de facto* exempts and thus favours any grant linked to R&D projects carrying out COVID-19 and other antiviral relevant research related 'to vaccines, medicinal products and treatments, medical devices and hospital and medical equipment, disinfectants, and protective clothing and equipment, and into relevant process innovations for an efficient production of the required products'. [10] The thresholds are particularly generous as, for instance, eligible aid is up to 100% for fundamental research, 80% for industrial research and industrial development plus there is a system of bonus if more than one Member State supports the projects, or if there is cross-border collaboration.

3. The TF: a map

The Temporary Framework is mainly relying on Article 107(2)(b) TFEU which requires the European Commission to, *de jure*, declare aid 'to make good the damage caused by natural disasters or exceptional occurrences' as compatible; and Article 107(3)(b) TFEU which allows the Commission to authorise aid to remedy a serious disturbance in the economy of a Member State; The rationale for these two 'emergency' legal bases is obviously the necessity to deal with a pandemic that 'poses the risk of a serious downturn affecting the whole economy of the EU, hitting businesses, jobs and households'[11] and the need to avoid 'social hardship and market failure due to significant loss of employment, the exit of an innovative company, the exit of a systemically important company, the risk of disruption to an important service, or similar situations'.[12] The first version of the TF was mainly devoted to ensuring that sufficient liquidity remained available to businesses of all types and to preserve the continuity of economic activity during and after the COVID-19 outbreak. On April 4th, a first amendment was introduced to enable Member States to do everything possible to support the research, testing and production of coronavirus relevant products. On May 13th, a second amendment was agreed. This contained rather new substantive provisions as it dealt with possible long-term repercussions by allowing Member States to proceed with recapitalisations and subordinated debt to companies in need. On June 29th the Commission adopted a third amendment excluding altogether from the TF scope of application, micro and start-up companies (undertakings with less than 50 employees and less than 10 million euros of annual turnover and/or annual balance sheet total). Finally on 13 October, a fourth amendment was introduced, prolonging the application of the TF and introducing new measures to enable Member

8 See Judgment of the Court of Justice, 29 June 1999, *DMTransport* (C-256/97), paragraph 27.

9 TF cit. above, para 3.9.

10 Id. para 3.6.

11 TF, cit. above, para 9.

12 TF. cit. above, para. 49(b).

States to support companies facing steep decline in turnover during the pandemic by contributing to part of their costs on a temporary basis to prevent the deterioration of their capital.

3.1. Damages - Article 107(2)(b) TFEU

The COVID-19 outbreak, according to the TF is to be defined 'as an exceptional occurrence, as it is an extraordinary, unforeseeable event having a significant economic impact and is not caused by a natural disaster.[13] Under Article 107 (2)(b) TFEU, aid to rectify the damage caused by natural disasters or exceptional occurrences can be declared compatible *de jure* by the Commission. Thus, the Framework seems to suggest that any measures adopted to compensate undertakings in sectors hit particularly badly by the outbreak and/or by organisers of cancelled events for damages suffered due to and directly caused by the outbreak would be compatible. The criteria developed by the Commission's decisional practice under Article 107(2)(b) TFEU are applicable: the Commission must always verify the exceptionality of the situation and that the following conditions have been met: the damage for which the compensation is granted must be a direct consequence of the natural disaster, the aid cannot result in overcompensation for damage and the aid can only rectify the damage caused by the natural disaster. Thus, in probably the first COVID-19 related notified measure, the Commission – in less than 24 hours – found a scheme devised by Denmark to compensate organisers for the damage suffered due to the cancellation of events with more than 1,000 participants was compatible with EU law. According to the Commission, the COVID-19 outbreak qualifies *as an exceptional occurrence, as it is an extraordinary, unforeseeable event having a significant economic impact* and considered that the Danish aid scheme compensates damages that are *directly linked to the COVID-19 outbreak*.[14] The ripple effects of COVID-19 on the economy are all evident in another Danish measure adopted to partially compensate media companies for the loss in advertising revenues suffered due to the coronavirus outbreak. The loss in advertising revenues will have to be calculated based on a comparison between each company's advertising revenue and their average monthly advertising revenue in 2019.[15] Interestingly, the Framework further specifies how COVID-19 related measures would be applied in relation to the Rescue and Restructuring Guidelines. According to the Commission, the principle of 'one time last time' would not apply to aid declared compatible under Article 107(2)(b) TFEU. The practical consequence of this specification is that Member States can still compensate the damages directly caused by the COVID-19 outbreak to undertakings that have already received aid under the R&R Guidelines. Some uproar was caused by the 550 million-euro loan granted by Germany in favour of the regional charter airline Condor.[16] The damages sustained were caused by the cancellation or rescheduling of airline flights as a result of the imposition of travel restrictions, but the Commission authorised, in

13 This is, in my view, correct and it actually implies that measures still to be notified – contrary to those adopted to compensate for damage caused by natural disasters, which are now largely exempted from notification under Article 50 of the GBER. See Commission Regulation (EU) No 651/2014 (GBER) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU, OJ L 187, 26.6.2014, p. 1–78.

14 SA.56774.

15 SA.57106.

16 SA.56867.

October 2019, a 380 million-euro rescue loan to the same company, making it thus arduous to split the pre-COVID-19 and post-COVID-19 relief package.

3.2. A serious disturbance to the economy

Most of the Temporary Framework, however, is devoted to the possible use of Article 107(3)(b) TFEU, that makes aid to 'to remedy a serious disturbance in the economy of a Member State' compatible with EU law. It is well known that Article 107(3)(b) TFEU has been used and relied upon by Member States and the Commission during the financial and banking crises.[17] In that context, the Commission had to initially make up new rules and principles, while the COVID-19 Temporary Framework relies heavily on the now copious decisional and regulatory experience of the Commission in the banking sector. Thus the Communication makes it very clear at the outset that a strict interpretation of any exceptional provision such as Article 107(3)(b) TFEU is necessary and that only those measures which are appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned will be deemed compatible.

3.2.1. Tackling Short Term Liquidity

The TF initially dealt with those measures adopted to tackle short-term liquidity in the economies of the Member States. Thus the TF, by relying on a series of macro-economic indicators, lists five types of aid, which would be deemed compatible:

a) Direct grants, selective tax advantages and advance payments - Member States will be able to set up schemes to grant up to 800,000 euros to a company to address its urgent liquidity needs;

b) State guarantees for loans taken by companies from banks - Member States will be able to provide State guarantees to ensure credit access;

c) Loans to companies - Member States will be able to grant loans with favourable interest rates to companies;

d) Short-term export credit insurance (known as STEC) for risks which are normally shouldered by private insurance companies, but which are now temporarily unavailable in the market due the COVID-19 pandemic. This is actually a derogation from the rules ordinary applicable to STEC.

e) Measures to ensure that banks can continue to guarantee liquidity to the real economy. The Framework 'transforms' such aid into aid directly to the banks' customers, not to the banks themselves, and provides some guidelines on how to ensure minimal distortion of competition between banks.

17 On this, see the contribution by Juan Jorge Piernas (Chapter 34 above).

Apart from these *ex ante* general categories, it would still be possible for Member States to notify the Commission of 'aid schemes to meet acute liquidity needs and support undertakings facing financial difficulties, also due to or aggravated by the COVID-19 outbreak'. The Communication seems to attribute a crucial role to banks in the implementation of COVID-19 related measures, particularly by facilitating credit for SMEs – one of the worst affected businesses. Thus, it specifies that aid granted by Member States both under Article 107(2)(b) TFEU and under (3)(b) TFEU does not have the objective of preserving or restoring the viability, liquidity or solvency of banks. Consequently, such aid would not qualify as extraordinary public financial support under Directive 2014/59/EU of the European Parliament and of the Council (the so-called the BRRD), and would also not be assessed under the strict State aid rules – bail-in rules, for example, would not be applicable to the banking sector. However, the Framework requires that 'credit institutions or other financial institutions should, to the largest extent possible, pass on the advantages of the public guarantee or subsidised interest rates on loans to the final beneficiaries'. The TF is rather detailed in specifying that aid granted by Member States, both under Article 107(2)(b) and under (3)(b) TFEU, does not have the objective of preserving or restoring the viability, liquidity or solvency of the banks. It is difficult not to imagine that such a vast deployment of State guarantees will still benefit the banks. However, the TF seems to imply that such indirect aid may have to be accepted. Consequently, such aid would not qualify as extraordinary public financial support under Directive 2014/59/EU (BRRD),[18] and would also not be assessed under the strict State aid rules — bail-in rules, for example, applicable to the banking sector.[19] The Framework further requires that 'credit institutions or other financial institutions should, to the largest extent possible, pass on the advantages of the public guarantee or subsidised interest rates on loans to the final beneficiaries'. Banks will therefore be under an obligation to show that they can effectively implement mechanisms to ensure that aid is passed on and failing that, strict aid to banks-rules will be applicable.

3.2.2 Long-term Liquidity

The third TF amendment tackles the possible long-term economic repercussions of COVID-19. It allows Member States to notify the Commission of those measures that would involve the recapitalisation of undertakings in essentially all forms: pure equity forms (capital injections, new shares) and hybrid capital instruments (unsecured bonds, profit participation rights). Recapitalisation however can only be granted to beneficiaries that were not in difficulty before the outbreak and would otherwise encounter serious difficulty maintaining operations. Eligible companies must also be unable to find financing from the market on affordable terms. The TF — in line with Commission practice — lays down some basic principles such as that the recapitalisation should be in the common interest, the aid must not go beyond the minimum level so as to restore the beneficiary viability and so on. If there is

18 OJ L 173, 12.06.2014 p. 190-348.

19 Conversely in case of the banks themselves experiencing liquidity shortage the BRRD rules will continue to apply. The TF somehow is based on a fingers crossed assumption that the economic crisis would not lead to such a disastrous consequence to eventually affect the banks liquidity as well. Still in that scenario, the TF now provides that extraordinary public support measures required by COVID-19 related problems are not going to be subject to the strict requirement of burden sharing by shareholders and subordinated creditors. TF cit. above, para. 7. For an in-depth discussion see Phedon Nicolaides 'The Corona Virus Can Infect Banks Too: The Applicability of the EU Banking and State Aid Regimes', in 1 *European State Aid Law Quarterly*, 2020.

an instance of aid exceeding 250 million euros, the Commission must be separately notified of this. The detailed rules provide mechanisms to ensure first, that the State shall receive appropriate remuneration for the investment and as a given, the closer the remuneration is to market terms, the lower the potential competition distortion caused by the State intervention. The TF also provides that the State will be incentivised to redeem its involvement and to allow the beneficiary to return to normal market conditions. Each form of recapitalisation is also subject to specific economic parameters designed to ensure the intervention conforms to market criteria.[20] The TF is indeed very alert to the possible anti-competitive impact of allowing a return to the 'State entrepreneur' –in particular those who can afford it.[21] As the Commission itself put it, 'While the Temporary Framework has been useful as an instrument to address the economic consequences of the outbreak, the use of the Temporary Framework has also highlighted disparities in the Internal Market, mainly due to the differences in economic size and budgets of Member States'.[22] The TF thus provides for a series of checks imposed both on beneficiaries and governments alike. As for beneficiaries of COVID-19 aid, they will be prohibited from advertising for commercial purposes. Most importantly, if at least 75% of the COVID-19 recapitalisation measures have not been redeemed, beneficiaries would be prevented from acquiring a more than 10% stake in competitors or other operators in the same line of business, including upstream and downstream operations. Before full redemption of COVID-19 recapitalisation measures, beneficiaries cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State. There are also several constraints on management. For instance, on remuneration and a total ban on bonuses. There should be a clear exit strategy, which the beneficiary should submit to their government, that would in turn need to submit to the Commission. The State exit from COVID-19 beneficiaries according to the TF should operate in two ways: the beneficiary can buy back the equity position of the State at market conditions or the State itself can sell its equity stake to other market operators, thus entities other than the beneficiary that are neither public authorities nor public undertakings. The sale should be MOP compliant and go through an open and non-discriminatory consultation of potential purchasers or a sale on the stock exchange. Finally, for the measures above 250 million euros, 'Member States must propose additional measures to preserve effective competition in those markets. In proposing such measures, Member States may in particular offer structural or behavioural commitments'.[23] The cumulative effect of all these conditions is particularly burdensome to the point of possibly having a discouraging effect, as companies may prefer to rely on other types of support aid, because having the State as a shareholder may make life more difficult. After all, the TF itself clearly suggests that recapitalisation measures should be considered as an instrument of last resort. The new rules brought in by the TF have been immediately tested, not surprisingly, by recapital-

20 For equity, injection by the State must be based on a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection or if the company is not listed, an estimate of its market value should be established by an independent expert or by other proportionate means. Further, any recapitalisation measure shall include a step-up mechanism increasing the remuneration of the State, to incentivise the beneficiary to buy back the State capital injections. TF cit. above paras 60 and 61.

21 Massimo Motta and Martin Peitz, 'EU State aid policies in the time of COVID-19', *VoxEU.org*, 18 April 2020.

22 TF cit. above at para 8.

23 TF cit. above, at para 72. These will need to be laid down in line with Commission Notice on remedies acceptable under Council Regulation 139/2004 and under Commission Regulation 802/2004.

isation measures for the aviation sector, a perennial problematic segment of the market now particularly hit by the pandemic. Once again, although it is still early days, the Commission was quick to act, displaying both adaptability and resilience. As for adaptability, the first measure notified and approved by the Commission on 10 June dealt with a 285 million-euro recapitalisation of Finnair, whose majority shareholder is the Finnish State. The Commission was swayed by the fact that capital was expected to rise to 500 euros, the difference contributed by several market investors, whilst State participation remained the same in terms of shares. Curiously, the Commission stated that certain governance commitments intended to provide incentives for an exit by the State and redemption of the State aid as soon as possible, are not appropriate or necessary to the same extent in these circumstances.[24] In other words, if the State is already present, there is no need to provide for an exit strategy despite the fact that the company does eventually strengthen its position in the market. How and whether the TF was going to operate with respect to public or partially public undertakings was clearly a lacuna uncovered by the Finnair decision, a lacuna promptly filled by ad hoc change of the TF that now specifies the rules applicable, thus distinguishing the two distinct situations when the State is an existing stakeholder and when the State is not an existing stakeholder.[25] The second notification also dealt with airlines: on 25 June, the Commission authorised a 6 billion-euro recapitalisation of Lufthansa. Germany submitted a business plan, containing plans of redemption by 2026. In line with TF rules, Lufthansa is subject to bans on dividends and share buyback, and limits on remuneration of their management, including a ban on bonus payments. Finally, until at least 75% of the recapitalisation is redeemed, Lufthansa will be prevented from acquiring a stake of more than 10% in competitors or other operators in the same line of business. Lufthansa is also the first example of a recapitalisation measure above 250 million euros to a company that definitively holds significant market power in its relevant markets. The Commission decided to impose structural remedies mainly consisting in the divestment of up to 24 slots/day at the Frankfurt and Munich hub airports and some related additional assets. Germany was also required, if the exit of the State will be in doubt six years after receiving the recapitalisation aid, to re-notify a restructuring plan for Lufthansa, thus making 'ordinary' State aid rules applicable again. Reactions have been mixed, with competitors already launching legal proceedings against the Commission. One decision may not be sufficient to identify what the pervading attitude of the Commission will be. A closer analogy would be with the Commission's practice regarding R & R. The guidelines make the granting of aid conditional upon several factors, including the imposition of compensatory measures, such as reduction of capacity, withdrawal from certain market segments or sale of assets. Large undertakings are those mainly affected by R & R aid and the Commission's preferred type of compensatory measure is reduction of capacity. It may be argued that as the premise of granting such aid is the pandemic, the Commission might be inclined to adapt a less strict attitude. Further, the magnitude and extent of the COVID-19 impact may make the level and intensity of the conditions vary significantly from sector to sector depending on a variety of factors and may also widen the opportunity for a further use of behavioural conditions because of their flexibility and their attitude to shape

24 SA.56809. The decision has been challenged by Ryanair.

25 TF, cit.above, para 78 bis and 78 ter.

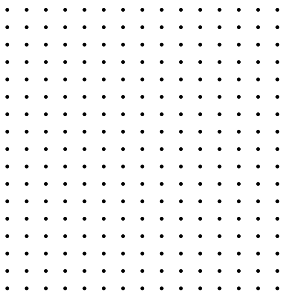
the future[26] of economic entities and their non-discriminatory open access nature. [27] A final note: another major concern is that the supply chains and generally the European economy will struggle to operate in the same way as it did pre-pandemic. The ensuing result would be a process of reshoring or better of onshoring, that is to say a relocation of business operating within domestic national borders. In short, offer a product or a service only where it is needed. The TF on this possible risk takes a drastic, and in many respects, unprecedented stance: Article 16ter provides that aid 'shall not be conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid. Such condition would appear to be harmful to the internal market'.

4. A difficult map to draw

The TF in all its extensions has confirmed the willingness of the European Commission not to stand in the way of necessary State interventions to alleviate the consequences of what is now a tragedy of global proportions. In its fourth amendment the TF notes that according to the EC Summer 2020 Economic Forecast, the EU economy is projected to contract by 8.3% in 2020, a much deeper contraction than what was previously forecasted. The TF is also striving to preserve the integrity of the European internal market and to provide at least a benchmark to operate within. The progressive extension of the TF can perhaps only exacerbate the differences existing between Member States and increase concerns over legal certainty and effectiveness, and at the same time calls for broadening its scope are to be expected. As the virus is still spreading, restrictions are still in place and the more permanent effects of the COVID-19 crisis, especially in term of unemployment and insolvencies are still to be assessed, perhaps a full debate on whether the TF has been an effective instrument or not may have to be postponed for the time being.

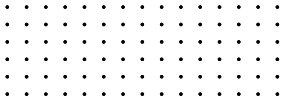
26 EU Remedies Notice, para. 17.

27 See A. Ezrachi, 'Behavioural Remedies in EC Merger Control, Scope and Limitations', *World Competition* 2006, 459. Behavioral remedies have been used for instance in guaranteeing access to key technology or infrastructure or supply obligations – all sectors possibly relevant in a COVID-19 scenario. See in the merger context *Qualcomm/NXP* Decision of 18 January 2018, Case M.8306.



Part VII

JUSTICE AND LITIGATION



Chapter 36

COVID-19 AND THE UNION'S COURTS: STRUCK BY LIGHTNING

Daniel Sarmiento

1. Introduction[1]

The disruption caused by COVID-19 in the justice system of the EU and its Member States is difficult to exaggerate. The suspension of judicial activity in several Member States, mass cancellation of hearings, a stay of enforcement measures or a shift towards online justice, are only a few examples of the rupture that COVID-19 has introduced into the ordinary management of cases, with considerable consequences for parties and for judges and staff working in the courts. Not since World War II have the justice systems of the Member States been so dramatically affected by external events.

2. Impact on the Court of Justice

The EU's court system was not immune to all the mayhem. On 13 March 2020 the Court of Justice of the European Union issued a statement to confirm that the time limits applicable to new proceedings remained unchanged (with the possibility of requesting extensions), but all ongoing proceedings at the Court of Justice (not the General Court) would benefit from a one-month extension.[2] These measures were further expanded on 5 May 2020 in light of the ongoing health crisis, but hearings timidly resumed in the month of June as the impact of the first wave of the health crisis subsided.[3]

The logistics and internal organisation of the EU courts were also distraught and put under considerable stress. On 13 March 2020 the staff of both courts were instructed to remain at home and teleworking became the standard rule for several months. The first-ever online oath took place on 23 March 2020, when Jean Richard de la Tour took over the position of the late Yves Bot as Advocate General through a remote ceremony in the presence of the President of the Court and the first Advocate General.[4]

1 This Chapter was finalised on 1 December 2020.

2 Court of Justice of the European Union, 'Change to the judicial activities of the Court of Justice as a result of the coronavirus COVID-19 pandemic', 5 May 2020. Available at https://curia.europa.eu/jcms/jcms/P_97552/en/.

3 Daniel Sarmiento, Analysis: "Time limits and force majeure at the Court of Justice of the EU during the COVID-19 crisis", 16 March 2020.

4 Court of Justice 'Entry into office of a new Advocate General at the Court of Justice', press release of 23 March 2020.

Hearings in Luxembourg were either suspended or cancelled. When the health situation improved, litigants were kindly nudged into not requesting any hearings at all, in order to avoid health risks. Once the worst of the first wave subsided and the second wave began in September 2020, hearings at the Court of Justice were limited to Grand Chamber cases only. The General Court continued holding hearings, but at a more modest pace than before. The difficult balance between crisis management, the protection of health and the safeguard of the procedural rights of the parties drove both courts into a delicate terrain which was by no means over by the time this book went to the press.

The pandemic impacted the EU Court's workload. In 2020, almost 679 new cases had been registered in the Court's docket by 21 December, in contrast with the 950 registered in 2019.[5] The General Court also suffered a significant reduction, although not as severe as the Court of Justice, with a total of 723 new registered cases by 21 December, in contrast with 886 new cases in 2020.[6] The Court of Justice was more severely impacted due to its reliance on preliminary references from national courts. COVID-19 put domestic jurisdictions under severe stress, in some cases under total suspension of activity, thus limiting the overall appetite of national judges to delay procedures further by making references to Luxembourg. The General Court's jurisdiction, entirely devoted to hearing direct actions, felt the impact of COVID-19 in its docket too, but not with the severity that the Court of Justice did.

3. COVID-19 related litigation

Irrespective of the logistical implications of COVID-19 in the operations of the Court of Justice and the General Court, the truth is that the pandemic also created a new range of topics which needed the interpretative input from EU courts sooner rather than later. It was not too long before the first preliminary reference arrived at the Court of Justice, in which a national court referred to the impact of COVID-19 as a circumstance with EU law relevance. In the case of *XX v OO* (C-220/20), the *Giudice di pace di Lanciano* raised several questions in a preliminary reference, inquiring into the impact that the suspension of judicial activity in Italy had had on the right to an effective remedy of the applicant. In a case concerning a damages action as a result of a car accident with no transfrontier links, the referring judge considered that the suspension of judicial activity resulting from the pandemic had an impact on basic EU rights of the applicant. The Court of Justice was quick to respond and, in a reasoned Order on the grounds of Article 99 of the Rules of Procedure, replied in the negative by pointing out the fact that the case raised no substantive links with EU law.[7] It is open to question if the Court would have provided a different answer if the case raised a clearly direct link with a provision of EU law, but it is telling that, on the first occasion in which COVID-19 entered the gateways of Luxembourg by way of a preliminary reference, the Court seemed to have no appetite for further discussion on the matter.

The field in which COVID-19 has proved to be the cause of major and early litigation is State aid law, an area in which the Member States and the Commission have taken bold measures, as explained in

5 Source: Court of Justice, at "Numerical Access": https://curia.europa.eu/en/content/juris/c2_juris.htm

6 Source: Court of Justice, at "Numerical Access": https://curia.europa.eu/en/content/juris/t2_juris.htm

7 OO (C-220/20, EU:C:2020:1022).

this book in the contributions by Jorge Piernas, Dolores Utrilla and Andrea Biondi.[8] It is therefore unsurprising that the first actions of annulment arriving at the General Court were challenges against the Commission's early decisions on State aid, particularly the very significant decisions touching the airline industry. In this regard, Ryanair has brought a wide array of actions against all the Commission decisions regarding Member State measures in which Ryanair's competitors were beneficiaries.[9]

Other cases arriving at the EU courts in the course of the pandemic proved to also have substantive links with EU provisions. In the case of *Guangdong Haomei New Materials and Guangdong King Metal Light Alloy Technology v Commission* (T-604/20), an action of annulment in the field of anti-dumping measures, the appellants alleged, inter alia, the Commission's failure to assess the impact of COVID-19 on commercial flows. Although in a highly technical area of the law, and in a dispute concerning the factual analysis entered into by the Commission, the truth is that COVID-19 is gradually turning into a subject of discussion in European litigation.

Of course, COVID-19 has driven Schengen to its very limits, as well as the free movement of goods,[10] particularly during the first weeks of the pandemic in March 2020. Health competences of the EU have also been stretched quite far in an attempt to improve coordination, with some major successes that fully justify such efforts. The centralised purchase of vaccines by the European Commission, or the procurement procedures launched to acquire health protection equipment at a time of shortages of facemasks and other essential material, proved that the EU can be an essential asset of immense practical use for its Member States in times of emergency. The creativity involved in the enactment of SURE and the Recovery Fund, with novel and revolutionary European bonds in support of the economic recovery in the Member States has also pushed the limits of EU competences into new domains. These developments will certainly be tested at the Court of Justice. In some cases, the key to the political consensus has been the option of referring the new measures to the Court's jurisdiction, as was the case of the new rule of law conditionality mechanism.[11]

Beyond the EU courts, early on in April a French national had challenged measures taken in France to limit the spread of COVID-19 before the European Court of Human Rights (ECtHR). He sought an injunction to force the State to provide medical professionals with surgical masks and face masks, and to offer screening and provide face masks for the population as a whole. The ECtHR however ruled that he had failed to substantiate in his individual application that he was personally affected by those measures, and the case was dismissed.[12]

8 See Part VI, Chapters 33-35.

9 *Ryanair v Commission* (T-238/20), concerning Swedish loan guarantee scheme to airlines; *Ryanair v Commission* (T-259/20) concerning the moratorium on the payment of aeronautic taxes and royalties in favour of French airlines; *Ryanair v Commission* (T-378/20 and T-379/20) concerning Danish compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines and Swedish compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines; *Ryanair v Commission* (T-388/20) concerning a Finnish State loan guarantee for Finnair.

10 See the contribution by Peter Oliver (Chapter 30), who discusses the opening of an infringement procedure by the European Commission against Bulgaria for the infringement of the EU's free movement of goods provisions.

11 See the contribution by John Morijn and Aleksejs Dimitrovs (Chapter 4).

12 Decision of the European Court of Human Rights, *Le Mailloux v. France* (application no. 18108/20) (available only in French at the time of publication).

4. Digitalisation of Justice

Despite the negative impact of the health crisis, it is also true that COVID-19 triggered an acceleration in the profound changes that all justice systems were starting to witness since the early 2000s in the field of digitalisation, now pushed to the forefront of the agenda. While some developments had already taken place in that direction at the EU courts, mostly through the introduction of electronic servicing tools like *e-curia*, the truth is that the digital age had not fully arrived at the Luxembourg court. The pandemic brought a radical change in the approach towards the use of digital resources, accelerating the introduction of online hearings for the first time, although only for certain categories of parties. In September 2020, the first online pleading took place when the agent of the Kingdom of Spain took the floor through a videocall, available live at the *Grande salle d'audience* of the Court of Justice. As of then, the intervention of other Member States became a standard routine in the reduced number of hearings held during the autumn of 2020, even if occasional hiccups in the quality of the audio, or abrupt disconnections, became part of the ordinary process of dealing with online justice.

The development of digital tools at the EU courts made it inevitable for the debate on transparency to make it to the forefront. Hearings at the Court of Justice and the General Court have traditionally not been streamed online, unlike the practice of many supreme courts, as well as the European Court of Human Rights. At the most, both courts were starting to stream online the reading of judgments and Opinions shortly before the pandemic, but not the hearings in individual cases. As Michal Kianička argues in Chapter 38 of this book, COVID-19 has inevitably made the need to provide a transparent tool of access to hearings a priority. While the pandemic carries on and hearings continue to take place, the fact that they are public is mostly symbolic, since hardly any members of the public have the ability or intention to attend events when there are health risks involved. Although there are arguments in support of restricting the online streaming of hearings, as explained by Luigi Malferrari and Alessandro Spina,[13] the truth is that the publicity of hearings in times of pandemic can only be handled fairly by promoting their online visibility. Furthermore, COVID-19 has not prevented both courts from dealing with oral arguments in highly relevant cases. Allowing the public to follow the discussions that take place in the hearing of such procedures is an imperative of transparency that the pandemic has only made ever more important.

Enhancing the digitalisation of EU courts may have practical consequences in the future. Hearings could be transformed forever, bringing European justice closer to practitioners and citizens.[14] Preliminary references in cases involving parties in the main proceedings with scarce resources have no incentives to attend hearings in Luxembourg. Although the EU courts provide legal assistance to litigants with no resources, the standard practice shows that such options are not frequently used and parties will simply not attend a costly hearing, including travelling and expensive accommodation in a Member State like Luxembourg, with prohibitive prices in comparison to those of other Member States.

13 Luigi Malferrari & Alessandro Spina, 'A Virtual Court in Luxembourg? The Issues of Digital Technologies and Webstreaming for Hearings before the CJEU', Weekend Edition No. 35, *EU Law Live*, 31 October 2020.

14 See the contribution by Judge Igreja Matos in this Part (Chapter 37).

Other changes could follow. The ten-day extension of time limits on the basis of distance is an anachronism originating in the days of postal mail. In the day and age of the internet, when all communications can take place through safe and fast digital means, granting a ten-day extension is a convenient and highly appreciated gesture for litigants, but it is obvious that the measure has no basis whatsoever on reality. Other amendments in line with digital innovation could become a reality, such as better public access to the Court's databases, which could still be much more open and available for the public than they are today. It is still difficult to understand why the parties in preliminary references have to discover who the Advocate General and the reporting judge of the case is halfway through the procedure, on the date in which the hearing is set, when the appointments were made several months in advance. Parties have a right to know how the Court deals with their cases and technology should make such information easily accessible for the public. Considerable developments have taken place lately in this direction (above all, the publication of the orders for references, a great step forward), but there is still work to be done.

4. Conclusion

Overall, COVID-19 has been an abrupt disruptor of EU and national courts, in ways that are common to other institutions. However, the conducting of judicial proceedings is a task of a particularly sensitive nature, and the interests at stake need to be treated through specific procedures that are not well adjusted to external shocks like COVID-19. Overall, EU courts have adjusted quite satisfactorily to the new and harsh reality of a health crisis, but the changes have inevitably accelerated change, some of which was eagerly anticipated. It is still to be determined if the Court of the Justice of the European Union will profit from this wave of digital transformation to adjust itself in more profound ways, or whether Covid-19 was just an exceptional circumstance to be handled, quickly to return to the standard judicial activity of life in pre-COVID-19 times.

Chapter 37

BEING A JUDGE IN TIMES OF PANDEMIC CRISIS

José Igreja Matos

"By giving the government unlimited powers, the most arbitrary rule can be made legal; and in this way a democracy may set up the most complete despotism imaginable."

— Friedrich August von Hayek, *The Road to Serfdom* (1944)

1. Deterioration of the Rule of Law and Judicial Independence in Europe[1]

Ironically, it seems that the word 'dystopia', although previously known, became familiar only when John Stuart Mill, a classical liberal, used it in one of his Parliamentary Speeches in 1868.

The recent pandemic crisis and the ensuing measures dictated by political authorities have warned us once again of the rise of totalitarian policies based on an extremely high level of control over public and private life.[2]

These grave concerns were significantly fuelled by well-known developments, in the recent past, with the intimidating decline of the Rule of Law. According to Democracy Report 2020, for the first time since 2001, autocracies became a majority, with 92 countries hosting 54% of the world's population.[3]

Regrettably, the concrete examples are abundant, in particular those concerning threats to judicial independence, an essential pillar of the Rule of Law. The most impressive ones in European Union are, certainly, very familiar. The so-called 'illiberal state' implemented in Hungary caused long-lasting

1 This Chapter was finalised on 2 November 2020.

2 On this, see also the contribution by David Krappitz and Niels Kirst (Chapter 11 above).

3 V-Dem Democracy Report 2020, 'Autocratization Surges, Resistance Grows'.

damage to the national judiciary, as the recent appointment of the new President of Supreme Court (*Kúria*) again underlined. The assault on the judicial system in Poland materialised through the euphemistically labelled 'judicial reforms' in truth directly aimed at a sole purpose: to annihilate the independence of judges.

'Something is rotten in the heart of Europe' claimed an Editorial Comment of EU Law Live commenting on the attacks on the Rule of Law and Judicial Independence and correctly advocating that it 'is time for Europe's leadership to make up its mind and fearlessly confront what could become the EU's vilest, and eventually lethal, political crisis'.[4]

The European Association of Judges, the biggest organisation of judges in Europe representing the most relevant national associations in 44 countries, have, over the years, relentlessly denounced the ongoing deterioration of the Rule of Law in our continent.[5]

Counting, on too many occasions, on the silent complicity of EU top-authorities in Brussels, populist national leaders have managed to erode the principle of separation of powers and to jeopardise an essential value for democracy built in the sole interest of citizens: to have impartial courts composed of judges that handle cases by treating all litigants equally regardless of their power.

2. Impact of COVID-19

In a background of overall anxiety vis-à-vis the safeguard of common basic principles enshrined by national constitutions and European treaties, the COVID-19 pandemic has intensified our concerns.

The philosopher Byung-Chul Han highlighted the real risk that after the shock caused by this virus, a digital police regime – emulating some Asian systems - will definitively land in Europe. If that happens, a state of emergency would become the agreed norm.[6]

Trailing this tendency, several States, particularly in central and southeastern Europe, although the phenomena does not know any borders, are already using the COVID-19 crisis to undermine the principles and the institutions upholding the Rule of Law.

Today there are well-founded reasons to be even more vigilant.

4 Editorial Board of EU Law Live, 'The Rule of Law and its Crisis – Is it Time for Europe's Leaders to Make Up Their Minds?', *EU Law Live*, 11 February 2020.

5 The European Association of Judges is a regional branch of the International Association of Judges (IAJ). Founded in 1953, the IAJ comprises associations of 92 countries around the world. A brief research in our website (www.iaj-uim.org) vigorously demonstrates our commitment to judicial independence. consult, for instance, the special sections dedicated to the situation of the Polish Judiciary or of the Turkish judges.

6 'Byung-Chul Han: COVID-19 has reduced us to a "society of survival"' *Euractiv*, 24 May 2020.

I will introduce just three eloquent cases derived from special laws presented by countries of the Old Continent:

- certainly, the worst case is Hungary – yes, an EU country! – where the new emergency bill granted the Government sweeping powers to rule indefinitely by decree with no effective checks from the other State powers, especially knowing how weakened judicial independence is in the country;

- the amnesty bill to be passed by the Turkish authorities in order to reduce the overcrowded prison population plans to exclude from this benefit all 'political' prisoners, including judges, prosecutors and lawyers. This unacceptable discrimination put forward by an authoritarian regime was explicitly condemned by the European Association of Judges;

- the inappropriate use of lengthy 'sunset clauses' to emergency bills, diminishing, for long periods of time, the proper control, namely by the judiciary, of any undue constraint on fundamental rights. The initial proposal from the British Government indicating a period of two years (!) for the Coronavirus Bill, later amended to introduce a six-month review by the Parliament, demonstrates how unaware political authorities are, even in consolidated democracies, about the importance of 'sunset clauses', shaped to circumscribe, in short periods of time, all measures that constrain fundamental rights.

Besides these examples the EU is confronted, in general, with the circumstance that Member States lack an adequate legal basis to the present massive collective encroachment on fundamental rights.

In what constitutes yet another disturbing sign, by mid-August 2020, Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Moldova, Romania, San Marino and Serbia had notified the CoE Secretary General of their intention to derogate from the European Convention on Human Rights.

The consequences are there for all to see: according to a Freedom House Special Report, the COVID-19 pandemic has fuelled an unprecedented crisis for democracy around the world. Since the coronavirus outbreak began, the situation on protection of human rights has grown worse in nothing less than 80 countries.[7]

And now, regrettably, the pandemic is still among us, confronting Europe with a terrible second wave.

7 Freedom House, Special Report 'Democracy under lockdown – The impact of COVID-19 on the global struggle for freedom', October 2020.

3. Rule of law requirements of emergency measures

An emergency bill, or other legal measure, aiming to contain the spread of the coronavirus, is obliged, in all cases, to comply with the principles of the Rule of Law, such as those of necessity, proportionality, democratic scrutiny, legal certainty, reviewability, equal protection of the law and transparency of information.

Thus, a likely violation of these well-established standards comes through the recent proposals to introduce widespread mobile phone tracking by the State (Slovakia), to utilise armoured vehicles with machine guns to patrol the streets (Albania), to publish online lists of names and addresses of quarantined citizens (Montenegro), and so on.

The balancing exercise to be guaranteed by each EU Member State must follow the crucial demands of the principle of proportionality, as Article 52(1) of the Charter of Fundamental Rights of the EU commands. It might be worth it to quote this Charter provision: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.'

In 1789, in the midst of the French Revolution, the Declaration of the Right of Man and the Citizen declared in Article 16º: 'Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.'

Without the Rule of Law human rights are overlooked, the wealth of nations inevitably declines and social order ultimately breaks down. As Winston Churchill taught us: "Those that fail to learn from history, are doomed to repeat it."[8]

National governments should not be tempted to perceive the present crisis as an occasion to overtake the essential role of independent courts as guardians of civil liberties.

4. Judges in times of pandemic

Being a judge in times of a pandemic-crisis demands greater responsibility.

First and foremost, it implies a total and unequivocal solidarity to our fellow citizens.

One can only echo Albert Camus's words in his novel 'The Plague': 'I have no idea what's awaiting me or what will happen when this all ends. For the moment I know this: there are sick people and they need curing'.

8 Laurence Geller CBE, 'Folger Library - Churchill's Shakespeare', *International Churchill Society.*

Secondly, analysing the specific case of the judiciary, the coronavirus-induced quarantines led to critical repercussions on court activities. Across all countries, the efforts to slow the spread of the deadly coronavirus have massively impacted on the functioning of the justice system.

Most of the judicial files are, or will be, inevitably deferred, if not paralysed. More backlog and further delays of cases are expected for years to come with negative effects on the growing number of complaints against the restrictions imposed during the lockdown, some of them clearly well-founded.

To address this problem it is crucial to ensure that judges, prosecutors, lawyers and judicial officers can continue to perform their professional activities, especially those directly connected with the protection of human rights in times of emergency; in this sense, public authorities must guarantee the minimum possible risk to the health of judicial practitioners and their families.

The Bangalore Principles of Judicial Conduct determine that 'a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly'. This is the situation judges are now facing. We will continue to work at the service of each citizen any time an urgent measure must be decided, anytime a ruling must be taken in matters that concern fundamental rights, protecting, in particular, the more vulnerable members of our communities.

The duty of each judge is to be promptly available to serve our fellow citizens in a permanent pledge to public service and social solidarity.[9] In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers effectively accountable.

The immense benefits of digitised court processes should be then maximised; the main concept behind technologies will be to use them as extensively as possible in order to constrain court activities only if there is no other option. Recently a judge publicly presented an example involving a trial of a respondent, in pre-trial detention, to be held in her court: the accused were to present themselves andy the production of evidence by videoconference in the prison and the witnesses were to remain in different areas of the court, previously disinfected, allowing them also to testify via Skype. It is crucial to pro-actively apply these, or other similar, solutions in order to guarantee an efficient justice system.

Envisaged measures to protect victims of domestic violence would be a welcome guideline on how to address the emerging problems caused by the forced reclusion of distressed families. According to this logic, emergency bills should regulate the situation that citizens subject to confinement should be able to move around public spaces to provide shelter for victims of crimes such as domestic violence or trafficking of human beings, as well as to help protect children or, in particular, elder people, the main victims of imposed confinements, at risk.

9 José Igreja Matos, 'Access to Justice in Times of Judicial Lockdown', *UNODC*, 1 April 2020.

Chapter 38

HEARINGS 1.1:

REMOTE APPEARANCES BEFORE THE COURT OF JUSTICE

Michal Kianička

1. Introduction[1]

After the situation improved in the summer, the autumn saw an increase in COVID-19 cases around Europe and many countries have returned to restrictions, or even lockdowns, to curb the spread of the virus.[2] Yet, at the turn of May and June, lockdown seemed to be ending in Europe, although there was still a long way to go. Some countries proceeded ambitiously, others remained cautious.

The CJEU was also hit by the crisis and has been forced to make considerable adaptations to its modus operandi.[3] In order to continue its activities and keep its wheels turning, it has for instance implemented a widespread system of remote working and simplified how to open an e-Curia account. As for the oral part of its procedure, it had suspended hearings from 16 March 2020. This piece, written before the summer, and updated for the purpose of this publication, focuses on the recommencing of hearings at the end of May 2020.[4] It discusses what has been done and how, particularly regarding the use of video conferences.

2. Back to 'normal' hearings

After an involuntary break of more than two months, the CJEU resumed its hearings on Monday 25

1 This Chapter was finalised on 10 November 2020. A related contribution by the same author was published in Weekend Edition No. 13, *EU Law Live* under the title 'Streaming of hearings: a tough call for the Court of Justice', on 18 April 2020.

2 Slovakia even tried to test the entire population.

3 See the extremely informative piece by Marc-André Gaudissart, 'La Cour de justice de l'Union européenne face à la crise sanitaire', *Revue des affaires européennes*, 2020, p. 97. On this, see also the contribution by Daniel Sarmiento (Chapter 36 above).

4 The prior version of this contribution was published in EU Law Live's Weekend Edition No. 20 under the title 'Hearings 1.1: remote appearance before the Court of Justice', on 6 June 2020.

May 2020,[5] despite some alleged resistance - even translated into official requests to postpone the re-commencement date. It has not however decided to hold *proper* remote hearings. Instead, it has chosen to organise in-person hearings in Luxembourg. It has nonetheless not returned to 'business as usual', confirmed by the instructions issued by the institution and the impressions of the stakeholders.[6]

As for the number of hearings, three were held in the first week and another four should have taken place in the second week after the 're-opening'. These numbers were far from the regular pace. According to the 2019 Annual Report, the Court of Justice alone held 295 hearings in 2018 and 270 in 2019. However, in the coming weeks, the calendar of the CJEU did become busier. In the second half of October 2020, the tempo was about three to seven hearings of the Court of Justice, and 12 or 13 of the General Court, per week.

The hearings and physical attendance have been substantially affected by the pandemic. The CJEU informed the parties before the Court of Justice and the General Court about the sanitary measures introduced in order to ensure that hearings can take place about a week before the relaunch of the hearings. The respective webpages are regularly updated according to changes in the situation.

Since spring, access to the premises of the institution has been limited and regulated. Every individual must undergo a temperature check and anyone with a temperature higher than 38°C will not be permitted to enter the court buildings. An earlier obligation to sign a specific declaration has in the meanwhile been abandoned. Protective face masks are obligatory and may be provided by the security personnel upon request. Some participants to the hearings have even reported that on certain doors, special handles which can be used with one's elbows had been installed.

Concerning the course of the hearings as such, there must be a distance of two metres between everyone. Where possible, even the chairs of the judges have been moved apart. Lecterns have been removed and parties' representatives, seated one per table, are to present their oral pleadings from the place assigned to them. In situations requiring the presence of the full Court, plastic dividers were placed between the judges, as for example during the inauguration of the European Chief Prosecutor and 22 European Prosecutors in September this year. The introductory meetings 'in the back' between the judges and the parties' representatives before the start of the hearing have been abandoned. The Court has also declared that it will not provide parties' representatives with gowns. They are either obliged to wear their own, or may even, exceptionally, be authorised to plead without wearing a gown. Tables, microphones and earphones are disinfected after each hearing, or even during if necessary. There can only be one interpreter per booth. If the number of members of the public should make it impossible to comply with the social distancing rules, the Court would broadcast the hearing into

5 This date is in fact only valid for the Court of Justice. The General Court resumed its hearings about two weeks later from 11 June 2020.

6 I wish to thank all those who shared valuable insights, ideas and information relevant to the topic, be it publicly, especially on social media, or with me personally, as well as everyone from EU Law Live who helped to shape the final version of the Chapter. Any remaining mistakes are my own.

another room.[7]

The registry of the General Court has declared that in order to facilitate travel to Luxembourg, it can, upon request, issue representatives with a document certifying that a hearing is being held. Although not explicitly stated in the instructions on the website, the registry of the Court of Justice would provide a similar document if requested.[8] It must not be forgotten here that the freedom to travel in the course of duty without hindrance forms part of the privileges enjoyed by the agents, advisers and lawyers who appear before both courts.[9]

3. Remote video participation

3.1. Terra incognita?

In the past, various expressions have described distant and unexplored, or maybe even dangerous, territories on the edges of maps. Less dramatic terms were '*terra incognita*' or '*terra ignota*'. More figurative and metaphorical terms included the famous phrases 'here be lions' ('*hic sunt leones*'), or even 'here be dragons' ('*hic sunt dracones*').[10]

On the EU law map, it is not appropriate to use one of these terms to describe the use of video conferences as a tool by the courts and tribunals. It is neither foreign to EU law as such, nor to the case law of the CJEU. Several secondary EU law instruments expressly mention the use of video conferences by the courts. One example is the so-called taking of evidence regulation: Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. It was adopted following a legislative initiative made by Germany. In its text, the Regulation refers to the use of video conferences twice – in Article 10(4) and in Article 17(4). In its original version of 2001 those two provisions were already included, although the latter was moderately changed in the course of the amendment of the Regulation in 2008. The European Commission proposed another amendment of the Regulation in 2018. The proposal is currently under the consideration of the co-legislators. The explanatory memorandum states that 'videoconferencing is rarely used to hear persons in another Member State' and thus its proposal 'addresses the need for modernisation, in particular digitalisation and the use of modern technology in the crossborder taking of evidence'. The impact assessment by the European Commission accompanying the proposal intensively discusses the issue of the use of video conferences. Article 10(4) of the Regulation also seemed to have played a role in *Aguirre Zarraga* (see paragraphs 14 and 67, C-491/10 PPU).

7 Marc-André Gaudissart, 'La Cour de justice de l'Union européenne face à la crise sanitaire', *Revue des affaires européennes*, 2020, p. 97 (p. 104).

8 Marc-André Gaudissart, 'La Cour de justice de l'Union européenne face à la crise sanitaire', *Revue des affaires européennes*, 2020, p. 97 (p. 105).

9 See Article 43(2)b Rules of Procedure of the Court of Justice and the Article 52(2)b) Rules of Procedure of the General Court.

10 Nowadays the term 'here be dragons' is used in computing. As a comment put in a code, it indicates that the next code's section somehow works, even though it is not clear why. It is meant to discourage anyone from editing the code in the fear of it being broken.

Another example of an EU secondary law instrument referring to the video conference as a tool for courts and tribunals is the so-called European Investigation Order (EIO) Directive, its full title being Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. The Directive was adopted further to a proposal made by Austria, Belgium, Bulgaria, Estonia, Spain, Slovenia, and Sweden. Its recitals 24, 25 and 26 explicitly refer to a hearing by video conference. The concept is then elaborated in Article 24 'Hearing by videoconference or other audiovisual transmission'. As stated in the explanatory memorandum, the provision (in the draft it was Article 21) was inspired by Article 10 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the EU.

Sometimes, the case law of the CJEU mentions video conferences despite the lack of express reference to it in the relevant legal framework, such as in *Radziejewski* (C-461/11). In that case, a residence requirement was a precondition for eligibility for Swedish debt relief. Advocate General Sharpston in her Opinion examined, among other things, whether the residence requirement went beyond what is necessary to achieve the objective of obtaining complete and correct information about the debtor. In paragraph 65, she arrived at the conclusion that there appear to be less restrictive means available. As an imaginable way out, she also identified the use of video conferencing (see footnote 18).

Having said that, the use of video conferences by the CJEU in its own judicial hearings had indeed been unexplored territory for the Institution for quite some time. Considering the present situation, the CJEU has nonetheless decided to explore this unknown land and, exceptionally and for the first time, to allow live remote participation in the oral part of the procedure via video conference ('remote video participation').[11]

3.2. Legal Framework

The procedural legal framework of the CJEU does not expressly mention the possibility to conduct a hearing (whether in part or as a whole) in a virtual way, for instance via tele- or video conference. On the other hand, there seem to be no legal obstacles either.

When the Statute of the CJEU ('the Statute') and the Rules of Procedure of the Court of Justice as well as those of the General Court refer to the oral (part of the) procedure, oral observations, oral pleadings, oral proceedings, oral statements, oral testimony or simply the hearing, there is no explicit reference to a physical appearance in person before the CJEU. Thus, the applicable rules leave enough room to conduct the oral part of the procedure remotely, organising a virtual oral hearing or letting the parties plead via video conference, as long as it will remain 'oral' and the parties will be 'heard' in the proper sense of word. Even the use of words like to 'attend' or to be 'present' do not alter this conclusion.

11 Although this Chapter is devoted solely to this 'external' dimension of the use of video conferences for the purpose of the hearings, the CJEU has now used video (or audio) conferences internally, for instance for deliberations. Marc-André Gaudissart, 'La Cour de justice de l'Union européenne face à la crise sanitaire', *Revue des affaires européennes*, 2020, p. 97 (p. 107).

It is in fact the same difference as between electronic submissions and submissions on paper. Both are 'written' even though those submitted electronically via e-Curia lack physical form. It is true that both Rules of Procedures had to be adapted so that the CJEU was able to introduce e-Curia. The reason for that however was that they were too narrow, as they both required the handwritten signatures of the parties' representatives, or as the case may be the parties themselves. The Rules of Procedure of the Court of Justice in Article 57(1) still require that today, whereas e-Curia has been made obligatory in proceedings before the General Court in the interim. Conversely, the Statute has not made any explicit reference to the handwritten signature, so no adaptations were necessary to accommodate e-Curia, either as an equivalent or even as a replacement to submissions on paper.

The CJEU has, at least so far, not proposed any change to its procedural rules, be it those of the Court of Justice or of the General Court, with a view to accommodating remote video participation. This is in line with the conclusion that the existing legal framework does not hinder remote video participation in their hearings. By contrast, other international courts and tribunals *have* made such amendments, such as the International Tribunal for the Law of the Sea.

3.3. Experience

Some readers may already have noticed pictures of a giant screen in the Grande Salle, placed on the left side of the wall behind the bench. By means of that screen, parties indeed have already had the opportunity to address the CJEU with their oral observations remotely via video conference. This includes France and Spain, in the first week that hearings resumed. The very first was in France in *VG Bild-Kunst* (C-392/19). Then France and Spain both pleaded remotely in joined cases État *du Grand-duché de Luxembourg* (Droit de recours contre une demande d'information en matière fiscale) (C-245/19 and C-246/19). To mention some more examples, in July 2020, Finland made oral submissions via video in cases *Centraal Israëlitisch Consistorie van België e. a.* (C-336/19) and *Bundesrepublik Deutschland* (C-505/19). Later, at the beginning of October 2020, three Member States (Finland, Hungary and Ireland) participated virtually in the hearing in Opinion 1/19 concerning the Istanbul Convention.[12] In that same month, Lithuania pleaded via video in the case *Achema and Lifosa v Commission* (T-300/19) before the General Court.

In these cases, several judgments and Advocates' General opinions have been issued so far. However, it seems that only the Advocate's General Opinion in *Centraal Israëlitisch Consistorie van België e. a.* (C-336/19, paragraph 42) refers to remote video participation. Other references to the hearings do not differentiate the parties appearing in person from those pleading remotely. This to some extent also supports, together with the missing proposal for a change to the Rules of Procedure of the Court of Justice and the General Court, my earlier conclusion that there is, legally, no difference between in-person appearance and remote video participation.

12 This was apparently a particularly difficult hearing from the logistical point of view. In addition to three remote video participants, two hearing rooms needed to be joined because all the booths in the Grande Salle were occupied and there was still not enough room for all the interpreters, who, as mentioned before, each had to have a booth to themselves.

In order to participate remotely, an official request addressed to the Court of Justice or to the General Court is necessary, explaining why it is excessively difficult, or even impossible[13] for the party to attend the hearing, but it still wishes to address the Court orally. Following that request, remote video participation is formally allowed by the President. Viable reasons that might convince the Court, by way of example, include the travel restrictions put in place by the governments, based on public health considerations, under which there are no exceptions for business travel or civil servants, or practical considerations, like extremely limited flight opportunities. However, the position of the Courts might vary in time, or even case-by-case, depending on particular circumstances, such as how many parties, at what time, and with what reasoning requested the video participation. Even the identity of the requesting party might play a role, as it might be easier to carry out the exercise at short notice with a party that has already and successfully done so before.

From the technical point of view, the CJEU does not rely on any of the solutions widely known and commonly used these days, such as Zoom, WebEx, Teams or Skype, to name only a few.[14] Instead, it works with a specific professional video collaboration platform, likely due to security reasons and in order to maintain control.[15] The quality and stability might also have played a role here, as for instance the quality of sound is crucial for the interpreters.[16] The remote video participants are not connected only for the duration of their pleadings but could follow the hearing from the beginning until the end.

The CJEU cares about the remote video participation working smoothly and for it to resemble, to the widest possible extent, physical presence.

Not leaving the incident-free operation to chance, the CJEU provides the prospective remote participants with detailed guidelines, including instructions regarding the equipment, the room (its acoustics, background, and so on), as well as the clothing and behaviour of the speaker (posture, gestures, and so on). A series of tests precedes every remote video participation, usually one about a week before the hearing and another one just before the hearing. Some have even mentioned three separate tests. Only the successful conduct of those tests enables the actual remote video participation and oral in-

13 Some sources speak in this respect of an 'absolute impossibility'. See for instance Marc-André Gaudissart, 'La Cour de justice de l'Union européenne face à la crise sanitaire', *Revue des affaires européennes*, 2020, p. 97 (p. 105).

14 In fact, various products and solutions are available on the market and were before COVID-19 probably known mostly to experts or enthusiasts, such as Lifesize, Tixeo and others. Even platforms addressing the issues of multilingualism exist, like Kudo, Interactio or Interprefy.

15 See also Luigi Malferrari and Alessandro Spina, 'A virtual court in Luxembourg? The issues of digital technologies and web-streaming for hearings before the CJEU', Weekend Edition No. 35, *EU Law Live*, 31 October 2020, p. 10.

16 It matters because missing one word, like a negation, can change the sense of the whole sentence and beyond, or missing a number can distort a reference to the case law. Apart from that, the task of the interpreters overall seems to be much more difficult with remote video participation. The parties taking part in a hearing usually provide their pleadings by email to the interpreters in advance, so they can better prepare themselves. Under normal circumstances, when the parties appear before the Court in person, the interpreters ask them just before the hearing about any last-minute changes to their speech. This usually does not happen with video participants. Moreover, the use of the so called slow-down button has also become more complicated. As it is more difficult for the presiding judge to interrupt a person pleading via video than someone being in the same room, it just takes more time to get the message through to the speaker that she or he should slow down. In addition to that, there is no dedicated button for example for a bad connection, which can only be pointed out through some phrases the interpreters use on the microphone. Finally, interpreters in general tend to put the volume higher in case of bad sound quality, which is even more acute in case of remote video participation, possibly with the risk of suffering hearing damage in the long-term.

tervention. In fact, the third Member State supposed to participate in a hearing via video-link during the first week that hearings recommenced was Belgium. It should have pleaded in a hearing for the case *SABAM* (C-372/19), but as the tests did not work out well, it did not go ahead. Still, according to the information received, the respective services of the Court preparing the remote video participation have been very helpful and responsive.

Furthermore, the Court reportedly paid proper attention during the hearings to the remote video participants and their attendance. After having delivered their speeches, they were not forgotten and were really involved in the hearing. Where appropriate, they were given the opportunity to reply to questions and even to react with a final reply. While having them on board may have caused a slight slowing down of the hearings, it apparently was not to such an extent that the participants would perceive it negatively and would complain about it.

Overall, the hearings attended remotely by certain participants seem to have worked well. Of course, such smooth operation depends on several factors.

It is necessary to have a technically reliable and well-functioning solution and equipment on all sides. Apart from that, the most crucial one is probably the will and capabilities of the presiding judge. The more attentive she or he is, the better it works. Not to be forgotten are also the difficulties that could be caused by a larger number of remote video participants. The more of them attending the hearing simultaneously, the more difficult would it be. Not only would it be more complicated to keep everything working and stable from the technical point of view, but it would also be harder to moderate the hearing and to keep everything clear. For now, it seems that the CJEU tries to limit the number of remote video participants to three; or rather simultaneous remote video connections, as one remotely connected hub can be used by more than one participant.

On the other hand, remote video participation still lags behind the in-person experience in various ways. Three major drawbacks can be mentioned, based upon experiences up to now.

First, the participants to a hearing before the CJEU physically present in the courtroom can freely choose from the translation channels available for that hearing. Anyone who has had more than the occasional experience of pleading in Luxembourg and who speaks more languages than her or his mother tongue would confirm that this opportunity is very useful. As an illustration, it might be practical to listen to questions of judges directly in French. By contrast, the remote video participants are limited to a single preselected language channel. They are not allowed to change it during the hearing, nor can they listen to more languages in parallel.

Second, being in the courtroom gives the participants the opportunity to follow the reactions of other participants to their own and foreign submissions, be it the reactions of the judges, the *référendaires*, including where applicable those of the Advocate General, or of other parties' representatives. Sometimes, body language can reveal a lot. Conversely, the same opportunity is not given to remote video

participants.[17] Their view seems to be limited to the general overview of the hearing room and/or to the view of the person speaking, be it an agent or a lawyer pleading or a Member of the Court asking a question.[18]

Third, the technical intricacies linked with remote video participation on the side of the parties and their representatives might be dissuasive or even hinder participation. Not everyone is necessarily familiar with modern technologies to the extent needed for smooth operation of the respective tool. Even in the case of an established connection, there may still be glitches, such as echoes or drop-outs. EU Member States and Institutions, as well as law firms, might require the assistance of already overwhelmed IT departments. Moreover, as proven by the example of Belgium, the experts may not succeed either. Finally, not everyone may have the necessary, compatible and inter-operable equipment and/or an internet connection with adequate bandwidth and stability.

3.4. Alternatives

Apart from further postponing the hearings and thus further delaying the delivery of justice, the CJEU had few alternatives available in order to proceed with cases, while ensuring maximum respect for the principle of the equality of arms.

It could have decided the cases based on written statements only, without holding a hearing.[19] If regular submissions would not suffice, the judges could either allow for an additional round of memoranda or ask the parties questions and let them reply in writing. In some cases, the CJEU used at least the latter option during the spring lockdown,[20] but also later.

In the alternative, when holding an in-person hearing, it could enable the party whose representative could not come to Luxembourg to submit its comments in written form. Such a 'speech' could be read out loud during the hearing in Luxembourg, as the interpreters did in the case of Belgium mentioned above or in the case of Denmark and Greece,[21] and the Court could then take it into account when

17 Marc-André Gaudissart, 'La Cour de justice de l'Union européenne face à la crise sanitaire', *Revue des affaires européennes*, 2020, p. 97 (106).

18 Surely it depends on the technical solution and its configuration. The early setup used by the Supreme Court of the United Kingdom reportedly enabled to see just the current speaker, which was later adapted so that the counsel addressing the court can now see all the justices on the screen. In the arbitration case, which led to the remarkable decision of the Austrian Supreme Court mentioned below, allegedly inappropriate behaviour occurred. One of the claims brought before the court by the arbitration respondents was that one of the co-arbitrators rolled his eyes in reaction to some points made by the respondent's representative. Funnily enough, the president of the arbitral tribunal stated before the court that the recording of the hearing does not, in the crucial moment, show the face of the alleged arbitrator.

19 Of course, the Court of Justice abandoning the hearing would be legally precluded by Article 76(3) of the Rules of Procedure of the Court of Justice, if an interested person referred to in Article 23 of the Statute, who did not participate in the written part of the procedure, had submitted a reasoned request for a hearing. In such a case, the Court of Justice would be obliged to convene a hearing. Similarly, it follows *a contrario from* Article 106(3) of the Rules of Procedure of the General Court that the latter cannot decide not to hold the hearing if any of the main parties to the case has asked for it to take place.

20 Marc-André Gaudissart, 'La Cour de justice de l'Union européenne face à la crise sanitaire', *Revue des affaires européennes*, 2020, p. 97 (p. 103)

21 Denmark was supposed to participate in the hearing in case *Bundesrepublik Deutschland* (C-505/19) in July 2020 but decided not to participate at short notice because of the travel restrictions introduced by the Danish Government just a few days before the hearing. Instead, it sent its oral submissions in writing for consideration by the Court when deciding on the case. The submissions

determining the case.

Comparing these two possibilities with the remote video participation, the latter proves the better option, if the hearing is necessary, let alone when it takes place anyway. Although not ideal, it still provides the possibility to join and to participate in an interactive debate with the Court and the other parties, listen to what has been said and react to it if necessary. Therefore, simply equating the reading of submissions of Belgium to the personal appearance of the latter Member State in the hearing does not properly take into account the particular circumstances.[22]

4. (No) remote hearings

The title of this Chapter deliberately mentions hearings 1.1 rather than hearings 2.0. That is because the CJEU has chosen a selective and limited functionality update over a complex one. Instead of going for fully virtual hearings without anyone being present in a physical courtroom, it merely added a remote component to the classic in-person hearings.

4.1. Phenomenon

There is an uptrend in proper remote hearings, conducted fully via phone or video, all over the world, as a result of the COVID-19 pandemic. It enables the courts and tribunals to ensure access to justice. What varies is the extent to which the courts hear cases remotely. Indeed, in some legal fields it remains very difficult, for example in criminal cases,[23] whereas affairs of a certain type - despite possible drawbacks - just cannot wait, such as family cases. What also differs are the technologies and platforms used. Numerous resources provide valuable information about the trend. National authorities produce helpful output, such as the data published by Her Majesty's Courts and Tribunal Service, an executive agency sponsored by the Ministry of Justice responsible for the administration of criminal, civil and family courts and tribunals in England and Wales. Up-to-date research is also invaluable, leading to comparative studies and impact assessment reports based on empirical data.[24] Finally, the website Remote Courts Worldwide provides a very useful overview. It has been set up by the Society for Computers and Law to enable justice stakeholders of all kinds to share their experiences of remote alternatives to traditional court hearings, as well as to 'learn from one another's successes and disappointments'.[25]

---

of Greece were read in the Opinion 1/19 hearing.

22 See the Opinion of Advocate General in *SABAM* (C-372/19), paragraph 15.

23 With its order from 18 November 2020, the French Government, among other things, widened the possibilities of using the video conference for the oral stage of proceedings in criminal cases. However, just before the end of November 2020, the judge hearing applications for interim measures of the French Council of State suspended certain provisions of the order, arguing that the use of video conference, without the agreement of the accused person, in certain stages of criminal proceedings is a grave and manifestly illegal infringement of the rights of the defence and the right to a fair trial. An unofficial English translation of the press release and of the decision can be consulted here.

24 For instance, there is the report of April 2020 called 'Virtual Civil Trials', put together by the foreign law research staff of the Law Library of Congress. Another example would be the rapid review undertaken by the Civil Justice Council in England and Wales, leading to the report 'The impact of COVID-19 measures on the civil justice system', published in May 2020.

25 See Richard Susskind, 'The Future of Courts', The Practice, Vol. 6 (5), July/August 2020.

Moving on to some specific examples, the United States Supreme Court, well-known for its reserved attitude towards modern technologies, held several remote hearings in May 2020 in a limited number of previously postponed cases. All were conducted via teleconference with all justices and counsel participating remotely. The recently deceased Justice Ginsburg even did so in part from the hospital. The US Supreme Court provided selected media with an audio live feed that was then distributed further and live streamed on various platforms. The audio of the oral arguments and transcripts are available on the Supreme Court's website.

The President of the Supreme Court of the United Kingdom ('the UKSC') described the response of the UKSC to the pandemic in its video message from 20 June 2020. The UKSC held its first remote hearing on 24 March 2020, just one day after the announcement of the country-wide lockdown. According to the (at least for now) current Arrangements during the Coronavirus (COVID-19) Pandemic, all hearings and judgments in the present term (1 October to 21 December 2020) will be conducted remotely via WebEx, streamed live and available on demand.

The International Court of Justice ('the ICJ') announced public hearings by videoconference on 29 May 2020. They opened on 30 June 2020 and took place in the Great Hall of Justice, with the physical presence of some of members of the ICJ. Unsurprisingly, the media and the public could have followed the proceedings live on the internet, as the ICJ has been streaming its oral hearings for years.

The Court of Justice of the European Free Trade Association States ('the EFTA Court') held its first remote hearing on 16 June 2020 in joined cases *Adpublisher v. J & K* (E-11/19 and E-12/19). On its website, it has published guidelines for participants to the remote oral hearings. It has decided to use Zoom (which was praised by some, but seen as problematic by others) and to broadcast the hearings live on its website. This means in practice that even members of the same team, like the agent of a Member State and its experts from other ministries, can attend the hearing from various places and consult each other during the session separately, for example over email or chat applications.

The European Court of Human Rights ('the ECtHR') at first cancelled all its hearings scheduled for March and April and held no hearings in May 2020. Since recommencing the hearing of cases in June 2020, they have been closed to the public and all oral submissions have been made by videoconference. The webcasts of the remote hearings are made available on the website of the ECtHR the day after each hearing.

In the field of international commercial arbitration, measures to conduct proceedings remotely had been in place before. Still, their use has been widened and further developed due to COVID-19. The International Court of Arbitration of the International Chamber of Commerce ('the ICC') released its 2021 Rules of Arbitration in October 2020. Article 26(1) thereof explicitly confirms the power of the Tribunal to decide holding a virtual hearing. When it comes to technical solutions, the ICSID relies on WebEx, while the PCA seems to have opted for Zoom. The ICC claims it is even developing its own technical solution for remote hearings. In July 2020, the Austrian Supreme Court ('OGH') rendered

an apparently ground-breaking order covering international commercial arbitration, virtual hearings and questions of a fair trial. It appears to be the first worldwide decision of a national supreme court addressing the issue of remote hearings in international commercial arbitration. Most importantly, the OGH confirmed that an arbitral tribunal could have decided to hear the case remotely over the objection of one of the parties. It also describes the use of video conference technology in judicial proceedings for hearings and/or for evidence taking as broadly used and recognised. The order addresses various other interesting aspects as well, such as the issue of different time zones or the risk of witness tampering.

4.2. Perception

Some are enthusiastic about remote hearings via video or teleconference. Allegedly, it brings various benefits, including savings in time and costs. It also brings the courts closer to those who can otherwise access it only with serious difficulty. Ultimately, it enables personal contact to be avoided and for compliance with the social distancing rules, and thus helps to prevent the spread of COVID-19.

Others have mixed, or even negative feelings, and thus remain rather sceptical.[26] Remote hearings present a challenge to some of the well-established procedural principles and standards. One of the flaws mentioned was the absence of formality and ritual or no sense of physical hierarchy or distribution of power. Similarly, some lawyers in the United States even seem to have forgotten that hearings via video are not just regular video calls but are supposed to be real court hearings. As reported on and criticised, appearing shirtless or even still in bed is just wrong.[27] Another weak point referred to is the risk of negative impact on the parity of arms caused by one party being technologically better off. Lastly, the participants to the hearing cannot connect in the same way via video as they can in the courtroom. The hearing is thus deprived of the usual, spontaneous interaction, as confirmed for instance by Lord Reed. This might be less of a problem in certain cases, as in a dispute on a purely legal point, whereas it might be a cardinal issue in other affairs, such as the ones heavily relying on witnesses. The more personal, the more problematic.

No doubt the courts, tribunals and other dispute settlement bodies now have a unique opportunity to test the modern tools in their entirety in real life, and to collect valuable data and experience. Virtual hearings are certainly better than no hearings at all, but the practice seems to confirm that they cannot fully match normal hearings. What brings it right to the point is the metaphor that a remote hearing (or any form of remote participation to the hearing) is just a spare tyre, rather than a full and proper replacement! On the other hand, we could also ask ourselves – do not some cars use as spare tyres what

26 Luigi Malferrari and Alessandro Spina, 'A virtual court in Luxembourg? The issues of digital technologies and webstreaming for hearings before the CJEU', Weekend Edition No. 35, *EU Law Live,* 31 October 2020. From the pre-COVID-19 period, see for example C. Chanais, 'Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology: Theoretical Perspectives and Comparative Law', or R. Magnus, 'New Media in the Courtroom: Benefits and Challenges', both in: Burkhard Hess and Ana Koprivica Harvey (eds), *Open Justice. The Role of Courts in a Democratic Society*, Nomos, 2018.

27 The EFTA Court for instance explicitly states in its guidelines that '[t]hose presenting arguments to the Court should wear business attire', although adding at the same time that '[w]earing cloaks is not necessary'.

other cars use as their normal tyres , just because that is sufficient, or even more suitable for them?

4.3. Wrong choice?

Is the CJEU to blame for currently choosing hearings 1.1 over hearings 2.0?

No, it is not, as long as two conditions are fulfilled. First, the hearings must be safe for everyone appearing in-person. The applied sanitary measures must reflect the actual situation and must be strictly enforced. Second, every party that wants to participate, but cannot be represented in person, should have the opportunity to attend the hearing remotely via video. On both fronts, the CJEU seems to have done its best, at least so far.

In fact, some of the drawbacks of proper remote hearings might even not be substantiated when having only certain participants connected via video. By way of illustration, there should be no (complete) lack of formality and ritual. Those appearing physically perceive it in the courtroom. At the same time, it is conveyed through the view of the courtroom and the bench to those participating remotely.

5. Outlook

It seems that as long as the situation stays uncertain and it remains extremely complicated or even impossible for the parties' representatives to reach Luxembourg in person, they will ask to be allowed to participate remotely via video and the CJEU will permit it. Let us see whether the supply will cover the whole demand and whether some of the catches and drawbacks will be eliminated.

Two questions still remain open. One – is remote video participation before the CJEU going to outlast the pandemic and become a standing part of its toolkit? And two – will the CJEU move from hearings 1.1 to hearings 2.0 sometime in the future? Everything will depend upon the CJEU as well as the parties and their representatives, particularly those of the EU Institutions and Member States who have a say in the functioning of the Court.

So far, the CJEU itself seems to perceive remote video participation as an exceptional measure. It may be forced to use it again in the future, be it due to exceptional circumstances in an individual case or to a crisis like the ongoing one. However, it does not appear that this way of attending a hearing and making oral arguments should remain generally available post-COVID-19.

I dare to say that personal preference will play an important role here. It is in fact very similar as with the hearings as such, whether they should or should not take place. No doubt that the requirements of the right to be heard and the proper administration of justice have their place here. They may eventually be the reason why in a particular case, a hearing must take place. Still, it cannot be denied that while some judges and parties' representatives like the hearings and deem them useful or even indispensable, others just do not. The latter may thus even welcome a hearing being replaced by an additional round

of written submissions. From those who prefer the hearings, one part may choose video as the tool best suiting them, whereas the other part would favour the in-person experience.

I believe that most parties' representatives belong to the latter group (explicitly confirmed by some) and they will go to Luxembourg, as soon as they can. It will not satisfy them, to immensely oversimplify, to turn on their computer, set up the webcam and click on the connect button. Certainly not in cases that are particularly important or that require their enhanced interaction. On the other hand, the debate about the possibility of conducting the hearings of and by the CJEU remotely will certainly continue. It might even be put into a different perspective by various new factors, including the impact of the fight against COVID-19 on the EU economies and the possible necessity to cut costs. However, I hope that any future solution put in place will not be to the detriment of the legal dialogue and the efficiency and proper delivery of justice and that the experience gained and the data collected will have their say as well.

EU LAW LIVE
PRESS

EU LAW IN TIMES OF PANDEMIC

THE EU'S LEGAL RESPONSE TO COVID-19

This simultaneously broad and in-depth examination concerning the COVID-19 pandemic and related EU measures in the EU law context is imperative reading for EU lawyers, researchers, institutional members of staff and policymakers seeking to understand how every field - and modus operandi of the EU Institutions - has been impacted or transformed through unprecedented legal challenges.

It is divided into the following parts:

INSTITUTIONAL LAW
DEMOCRACY AND HUMAN RIGHTS
HEALTH AND RISK REGULATION
BANKING, FINANCE AND THE EURO
INTERNAL MARKET
COMPETITION LAW AND STATE AID

DOLORES UTRILLA
Associate Professor of Administrative Law at the University of Castilla-La Mancha, and an External Assistant Editor at EU Law Live.

ANJUM SHABBIR
Assistant Editor and Legal Reporter at EU Law Live and a UK-EU lawyer.

DESIGN: JAVIER LÓPEZ