

EDITORIAL COMMENTS

Disease and recovery in (COVID-afflicted) Europe

The COVID-19 pandemic has left Europe in dire straits. Well over a hundred thousand people have died in the Union, and tens of thousands are still struggling in hospital care. To contain the spread of the virus, millions have been in lockdown for months. While countries cautiously reopen their societies, life is unlikely to get back to normal - if it ever will - until a vaccine is made generally available.

European integration is being tested to its limits. As has been acknowledged, “[t]he magnitude of the crisis confronts the EU with an unprecedented challenge”.¹ Protecting *public health* has been the immediate and overarching task. While this policy area remains the responsibility of the Member States, the EU has nonetheless provided structures and resources for fact-finding, exchange of information, coordination, and mutual assistance. The Union is also called to alleviate the *economic crisis* which is about to hit Europe with full force because of the measures taken to contain the virus, both at home and worldwide.²

To assist Member States in protecting public health and helping the economy back on track, the EU has introduced and accepted broad exceptions to its core principles. A major challenge for the Union in the time ahead will thus be to restore the normal operation of its *Single Market* and *constitutional order* more generally, as well as to reconfigure *its place in the world*. Addressing this challenge is indeed key for Europe’s long-term economic and political recovery.

It is a tall order. The pandemic has reopened old fault lines and amplified problematic trends in the Union, from economic disparities to diverging attitudes to the rule of law. Questions about cooperation, solidarity, trust, values, and thus about the fundamentals of integration and membership, are on the table.

Managing the health crisis

Italy, the first Member State hit hard by the virus, turned to others for assistance but was disappointed. With active support from troll factories, the message quickly spread that the EU had failed Italy and left it alone fighting the disease.³ As a result, the Union found itself lagging behind in the global competition of narratives accompanying the crisis. Speaking before the European Parliament, the President of the Commission admitted “that no one was really ready for this [and] too many were not there on time when Italy needed a helping hand at the very beginning”. And she considered it “right that Europe as a whole offers a heartfelt apology”.⁴

Beyond the management of the crisis itself, European solidarity has been equally tested in the search for a common post-COVID strategy for recovery. Recalling early failures in responding to the health crisis, initial discussions in the (European) Council displayed profound disagreements, and occasionally bitter exchanges among Member States about the

¹President of the European Council and President of the European Commission, *Roadmap for recovery - Towards a more resilient, sustainable and fair Europe*, 21 April 2020, p. 5.

²See in this respect the letter from Spain’s Prime Minister, available at <www.theguardian.com/world/commentisfree/2020/apr/05/europes-future-is-at-stake-in-this-war-against-coronavirus>.

³See the recent report of the EEAS, <euvsdisinfo.eu/eeas-special-report-update-2-22-april/>.

⁴<ec.europa.eu/commission/presscorner/detail/en/speech_20_675>.

role of the EU and the support which it should provide to help the most affected States get back on their feet.⁵

While national reflexes, selfishness, and lack of coordination dominated as the pandemic engulfed the continent, a degree of cooperation and solidarity has progressively materialized, however.⁶ The number and the breadth of European measures that have been taken since is indeed quite remarkable. On the health front, Member States have offered medical equipment to each other, patients from hard-hit areas have received medical care in neighbouring Member States, and EU mechanisms for crisis management are at last in full operation. The Union Civil Protection Mechanism has contributed to the repatriation of near 600 000 European citizens,⁷ stuck in countries all over the world because of travel restrictions and a near complete halt in commercial flights. The Council Integrated Political Crisis Response Mechanism was fully activated on 2 March.⁸ It ensures regular consultation and coordination between Member States on issues ranging from joint procurement of medical equipment and development of technology to trace the virus, to border controls and exit strategies. The Commission has also proposed direct support to healthcare systems of Member States, matching their spending with EU budgetary means to fund the “Emergency Support Instrument”.⁹ It has procured on behalf of Member States, and organized a common stockpile of equipment,¹⁰ while supporting research on vaccine and treatment.¹¹

Many initiatives have been taken on the recovery front too, though far from effortlessly. In another “whatever it takes” moment, the European Central Bank acted decisively and established a “Pandemic Emergency Purchase Programme”.¹² Having failed to agree on joint bonds, the Eurogroup proposed that the ESM provide a Pandemic Crisis Support, to be made available to all euro area Member States during the crisis, under simplified conditions.¹³ The Council and Parliament also approved the Coronavirus Response Investment Initiative allowing the use of cohesion policy funds to address the consequences of the health crisis.¹⁴ Member States also agreed safety nets for workers, businesses and sovereigns, amounting to a package worth 540 billion euros.¹⁵ A “Marshall-Plan type

⁵www.reuters.com/article/us-health-coronavirus-eu-netherlands/netherlands-refuses-to-go-dutch-on-eu-coronavirus-debt-idUSKCN21R31J; www.euractiv.com/section/future-eu/news/portugals-costa-criticises-netherlands-over-commitment-to-eu; www.politico.eu/article/portugal-antonio-costa-questions-dutch-commitment-to-eu-coronavirus-covid19/.

⁶European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)); Neergaard and de Vries “Whatever is necessary... will be done” - Solidarity in Europe and the COVID-19 Crisis”, 25 Apr 2020, *EU Law Live* - Weekend edition. p. 17-35.

⁷ec.europa.eu/echo/news/coronavirus-new-round-repatriations-eu-citizens-civil-protection-mechanism_en.

⁸www.consilium.europa.eu/en/press/press-releases/2020/03/02/covid-19-outbreak-the-presidency-steps-up-eu-response-by-triggering-full-activation-mode-of-ipcr/.

⁹Proposal for a Council Regulation activating the emergency support under Council Regulation (EU) 2016/369 of 15 March 2016 and amending its provisions in respect of the COVID-19 outbreak, COM(2020)175.

¹⁰See e.g. Coordinated economic response to the COVID-19 outbreak, see also the Commission Communications COM(2020)112 final of 13 March 2020 and COM(2020)143 final of 2 April 2020.

¹¹global-response.europa.eu/coronavirus-global-response-pledging-event-practical-details-2020-05-02_en.

¹²Decision (EU) 2020/440 of the ECB of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), O.J. 2020, L 91/1. The decision was taken before the controversial verdict of the German Constitutional Court on the Public Sector Purchase Programme (5 May 2020): https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html

¹³www.esm.europa.eu/content/europe-response-corona-crisis; www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/.

¹⁴https://ec.europa.eu/regional_policy/en/newsroom/coronavirus-response/

¹⁵Conclusions of the President of the European Council following the video conference of the members of the European Council, 23 April 2020; see also Proposal for a Council Regulations on the establishment of a

investment effort” has been called for,¹⁶ though not in the form of a distinct instrument. It should rather materialize by using the new Multiannual Financial Framework which the Commission has been asked to revamp to make it the “motherhood of the recovery”.¹⁷ Whether that will make its adoption any easier remains to be seen.¹⁸

Following the hesitant beginnings, EU institutions have therefore showed some responsiveness, in the interest of the Union, using various Treaty provisions and existing mechanisms creatively¹⁹ notably in the field of public health.²⁰ Indeed, as often in crisis management, the tandem European Commission - European Council has taken centre stage, bringing together a wide range of expertise and resources, and the necessary political back-up. Decisions have been made, some more swiftly than others, despite the lack of physical meetings but thanks to new and fast ways of communicating, exchanging and deliberating, albeit at the cost of transparency and accountability. The pragmatism and the quest for effectiveness have also been noticeable in the openness towards extra-EU cooperation. In particular, the EU has invited representatives of Norway and Switzerland to attend regular meetings of EU ministers of health and the interior during the pandemic. The two countries also take part in the meetings under the Integrated Policy Coordination Response.²¹

The list of initiatives is indeed impressive, and contrasts with reports of dithering in the initial phase of the crisis. But the EU was almost bound to disappoint, considering its limited competence in key areas such as public health, but also in view of the particularly high expectations that an emergency situation like a pandemic produces. Yet again, the Union is victim of the perennial expectations-capabilities gap,²² being partly discredited for the failures of (some of) its own members. As rightly pointed out in the *Roadmap for recovery* “[t]he Union can strengthen the actions taken by Member States”. Limitation of EU competence and subsidiarity can only work if Member States exercise their own powers in consideration of common EU objectives and in line with the principle of sincere cooperation. With subsidiarity comes responsibility. If it becomes an excuse for inaction and/or selfishness, more capabilities should be envisaged at EU level, at least if there is still an understanding among Member States that the objectives of the Union are worth pursuing.

Revitalizing the Single Market

While testing solidarity in the EU, the health and economic crises challenge the solidity and adaptability of the EU as a legal order too. In particular, some of the emergency measures taken by the Member States to contain the spread of the virus and to ensure medical care to their citizens have entailed a significant departure from the canons of the Single Market. Restrictions on movement of goods, particularly medical products, have been legion, occasionally leading to awkward situations between Member States.²³ Several have indeed

European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, COM/2020/139 final.

¹⁶*Roadmap for recovery*, cited supra note 1, p. 4.

¹⁷<ec.europa.eu/commission/presscorner/detail/en/speech_20_675>.

¹⁸See <www.consilium.europa.eu/en/meetings/european-council/2020/02/20-21/>.

¹⁹E.g. Art. 122 TFEU.

²⁰Alemanno, “Testing the limits of EU health emergency power”, *VerfBlog*, 18 April 2020,

<verfassungsblog.de/testing-the-limits-of-eu-health-emergency-power/>.

²¹<www.regjeringen.no/no/tema/europapolitikk/aktuelt/aktuelt/nyheter/2020/norges-samarbeid-med-eu-om-krisehandtering-av-covid-19/id2700082/>. As regards the UK’s position, see <www.politico.eu/article/brexit-sets-uk-apart-coronavirus-nhs-eu/>.

²²Hill, “The capability expectations gap, or conceptualizing Europe’s international role”, 31 *JCMS* (1993), 305.

²³<www.irishtimes.com/news/world/europe/coronavirus-european-solidarity-sidelined-as-french-interests-take-priority-1.4216184>.

closed intra-EU borders, thus restricting free movement of workers and service providers.²⁴ Derogations based on the public policy justifications have become the rule.

Meanwhile, Member States have set up numerous programmes to rescue various sectors of their economies, which have been badly hit by decisions on social distancing, quarantine, and lockdown. These measures are often at odds with EU competition and State aid rules, as well as with EU budgetary requirements.

While the use of the “general escape clause” of the EU fiscal framework has been allowed to give Member States more flexibility to use their budgets to support the economy,²⁵ the Commission has also relaxed the application of State aid rules.²⁶ Since then, most national support schemes have been allowed. It has been reported that at the end of April, the Commission had approved €1.9tn of State aid measures, via 95 decisions, covering 26 Member States plus the UK.²⁷ In the field of competition law, the Commission has provided “as necessary, antitrust guidance and comfort for cooperation between firms in ecosystems to overcome shortages on goods and services required to enable the gradual de-escalation from containment measures”.²⁸

Departures from the canons of the Single Market are nothing new. Yet, the latter is not set up to withstand a quasi-*general* suspension of the rules, in *key domains*, and in relation to *most* Member States *at the same time*. The cumulation of such phenomena results in a considerable strain on the functioning and integrity of the Single Market as a whole, and the level playing field it is designed to secure.²⁹

The Commission has taken measures to try and contain the effects of those measures on the Union’s ecosystem. Indeed, it intends to coordinate Member States’ phasing out of their restrictive measures on free movement, through continued analysis of “the proportionality of [such] measures ... as the situation evolves and will intervene to request the[ir] lifting [if] considered disproportionate, especially when they have an impact on the Single Market.”³⁰

The impact that this wide-spread derogatory regime will have on the Single Market and its foundations remains to be seen. It will partly depend on how long this exceptional situation lasts. The return to a standard operation is also methodologically potentially challenging. In particular, one may wonder how the Commission will be willing and able fully to discharge again its full mandate of guardian of the Treaties, and secure a level playing field. In view of the deeper diversity of Member States’ economic situations resulting

²⁴Some of which contrary to EU rules. To prevent unfair practices the Commission has indeed published some “Guidelines for border management measures to protect health and ensure the availability of goods and essential services”, C(2020)1753.

²⁵<www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/>.

²⁶Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (until December 2020), C(2020)1863. Further State aid relaxation is indeed expected, but the Commission has proposed that it would have some strings attached, notably as regards the payment of dividends. “EU members clash over State aid as richer countries inject more cash”, *Financial Times*, 1 May 2020.

²⁷*Financial Times*, cited previous note.

²⁸President of the European Commission and the President of the European Council, *Joint European Roadmap towards lifting COVID-19 containment measures*, 8 April 2020, p. 11. See also Commission, “Temporary Framework for assessing antitrust issues related to business cooperation in response to urgency situations related to the current COVID-19 outbreak”, C(2020) 3200. Further on the Commission’s approach compared to previous crises, see Costa-Cabral, Hancher, Monti, and Ruiz Feases, “EU Competition Law and COVID-19”, TILEC Discussion Paper No. DP2020-007, (22 March 2020). Available at <ssrn.com/abstract=3561438>.

²⁹“Editorial Comments: Is the “indivisibility” of the four freedoms a principle of EU law?” 56 CML Rev. (2019), 1189.

³⁰*Joint European Roadmap towards lifting COVID-19 containment measures*, cited *supra* note 28, p. 14.

from the current crisis, should it, and could it, phase out the temporary derogations at different speeds, thus accepting longer-term derogations for some countries than others?

Indeed, some distortions of competition may well be irreversible, and thus have a lasting damaging effect. The current relaxation of the Single Market rules, and in particular those relating to State aids, is likely to benefit the stronger economies in the EU, and deepen the asymmetries in the Single Market, and in the Eurozone.³¹ By definition, States that enjoy stronger financial capacity are in a better position to provide support to their own economies. Those already in a robust position within the Single Market will potentially be in an even stronger situation at the end of the crisis, thus deepening inequality among Member States and their economies. In addition to the progressive reactivation of the Single Market rules, the rebuilding of a level playing field will also depend on determined initiatives towards, and investment in, the most affected economies. This is key to restore the integrity of the Single Market, and maintain the integration process it underpins.³²

Reinstating the constitutional order

While testing the resilience of the Single Market, the management of the crisis also challenges the very foundations of the EU.³³ National emergency measures have had a severe impact on individual liberties. Freedom of movement both within and between Member States has been severely limited. Use of intrusive technology to control the spread of the virus raises serious concerns about personal freedoms and privacy.

Emergency measures equally upset the normal functioning of public institutions, both nationally and at European level. In particular, confinement and social distancing have curtailed parliamentary and judicial activities and functions, at the very moment the powers of the executives have been significantly bolstered. The different systems of checks and balances have thus profoundly affected across the Union.

More worryingly even, the crisis has deepened the constitutional recession in some Member States. Under the cover of protecting public health, various governments have drastically strengthened their grip on power while stifling political opposition, thereby exploiting the crisis further to pursue a political agenda that is ever more evidently at odds with the requirements of Union membership. The most illustrative of the tendency have been the far-reaching emergency measures adopted in Hungary which suspend, indefinitely, what was left of the normal constitutional operation of the State. For their part, the Polish authorities scrambled to change the electoral rules to carry on with a planned presidential election despite the health crisis, to try and secure a re-election of the incumbent.³⁴

Considering the gravity of the measures at hand,³⁵ both in themselves and compared to other Member States' emergency actions, the restrained reaction from the EU institutions

³¹*Financial Times*, cited *supra* note 26

³²Opinion 1/91, *EEA (I)*, EU:C:1991:490, paras. 16-17; Opinion 2/13, *ECHR II*, EU:C:2014:2454 para 172. It can only be hoped that the German Constitutional Court's verdict in the Public Sector Purchase Programme case mentioned above will not have a chilling effect on the EU institutions and Member States (critical) engagement.

³³"Editorial Comments: 2019 shaping up as a challenging year for the Union, not least as a community of values", 56 CML Rev. (2019), 3.

³⁴ruleoflaw.pl/commissioner-for-human-rights-impossible-elections/; the election was eventually postponed just a few days before it was due to take place without immediately providing an alternative date www.politico.eu/article/polands-ruling-party-aims-to-delay-presidential-election/.

³⁵www.faz.net/aktuell/politik/ausland/frankreich-gegen-ungarn-orbans-corona-diktatur-entruestet-macron-16735141.html, www.politico.eu/article/heiko-maas-eu-coronavirus-mistakes/; European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP))

in relation to those particular developments has been disconcerting to say the least,³⁶ particularly in view of the fact that the countries concerned are both currently subject to the procedure of Article 7(1) TEU. The EU's reaction is even more disturbing considering the way in which COVID related assistance has been distributed among Member States. The very day the Hungarian Parliament gave full power to the government to rule by decree for an indefinite period, the Commission granted assistance to the country under the EU Corona Response Investment Initiative, at twice the level that was given to Italy.³⁷ Clearly, EU institutions and other Member States will have to do much better to confront the toxic abuse of privileges of membership as well as the recurrent failures to observe fundamental requirements associated thereto. Recovery cannot be based on growing mutual mistrust.

Repositioning the EU in the world

While the pandemic has afflicted Europe, it is also a global challenge. It affects multilateral institutions, integrated value chains, and the relative power of key international actors. It may lead the EU to revisit its position on international trade, partnerships, and priorities. But the negative economic prospects – as well as the lack of internal political cohesion – may also affect the EU's position on the global plane.

Is the EU still going to be a champion of international free trade? How will it develop its relations with China and the US? Who will be the EU's main partners to defend multilateralism? Will the EU have the ability and the will to support further enlargement?³⁸ And how will it relate to developing countries and to its neighbours,³⁹ which are all going to be deeply hit by the economic recession, not to forget refugees whose situation is raising alarm?⁴⁰

In the first stages of the crisis, the EU did not hesitate long before introducing a temporary ban on the export of medical equipment. The ban has gradually been eased, but was an important signal of the EU's intention to protect its interests, also when in contradiction with, for instance, the dogma of free trade. More generally, the management of the health crisis has exposed the drawbacks of the international division of labour and globally integrated value chains. For Europe, it has laid bare its heavy dependence on supply from China and India to provide medicines, as well as medical and protective equipment. It has also raised questions as regards European food security in times of crisis.

Against this backdrop, the debate on strategic autonomy and European sovereignty is returning with a vengeance, and in much more practical terms.⁴¹ The discussion now goes well beyond the usual drive towards further integration in the field of defence, and into areas such as public health, communication and supply/production of food and medicines. While

³⁶ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_567; Halmai and Scheppele, "Don't be fooled by autocrats!: Why Hungary's emergency violates rule of law", *VerfBlog*, 22 April 2020, <verfassungsblog.de/dont-be-fooled-by-autocrats/>.

³⁷"The wizard, the virus and a pot of gold - Viktor Orban and the future of European solidarity", *European Stability Initiative Report*, 18 April 2020; Meyer-Resende, "Should Hungary and Poland benefit from next EU budget?" *EUobserver*, 6 May 2020; Kelemen and Soll, "The EU is undermining its democracies while funding its autocracies", *Politico*, May 2020 (date and ref to be added at proof stage).

³⁸Though it should be noted that accession negotiations with North Macedonia, and Albania have eventually started.

³⁹ec.europa.eu/commission/presscorner/detail/en/qanda_20_606.

⁴⁰www.euractiv.com/section/justice-home-affairs/news/refugees-left-behind-in-coronavirus-crisis-aid-groups-warn/.

⁴¹www.welt.de/debatte/kommentare/article207211135/Heiko-Maas-Was-Europa-aus-der-Corona-Krise-lernen-kann.html.

the EU is traditionally an advocate of free trade, the experience from the COVID-19 crisis may well lead to the EU developing a more cautious approach, for instance as regards delocalization of strategic industries and investments in strategic infrastructure.⁴² The potential re-localization of some sensitive production that might ensue will here again raise the question of trust between Member States. The latter will determine whether the process of repatriation takes place at the European or at the national level.

In the post-COVID global context, the “battle of narratives” will be fierce.⁴³ It already is. The crisis has indeed been a wake-up call as regards disinformation. Internal and external forces are using powerful means, especially through social media, to undermine the EU and other international institutions, such as WHO.⁴⁴ The way the EU communicates internally and externally to defend its interests has clearly been tested. Addressing vulnerabilities on that front will also be key to full recovery.

Time to deliver on the (repeatedly) renewed vows?

The EU is expected to be a responsive and efficient policy-maker, a resilient legal order guaranteeing trust among its members, and a global actor able to withstand changing geopolitical tides and defend its interests, those of its States and peoples.

The way the crisis has been handled sheds light on weaknesses and vulnerabilities, but also on the Union’s assets that should be consolidated and built upon. The EU has demonstrated some capability and thus value in handling an unprecedented situation, of the kind that could well become less abnormal. In mustering expertise and taking initiatives, which are far from being perfect, it shows the benefits of deep multilateral cooperation.

Yet, judging from the scathing, if sometimes unfair, criticism that quickly emerged as the continent was hit by COVID-19, any failure to deliver in terms of recovery is likely to be met with renewed disappointment, and reignite the recurrent question about the very *raison d’être* of the Union. All the more so since the standards for evaluating the EU’s performance tend to be more demanding than those applied to the national level, and more sweeping in their implications too: failure of the Union, which can stem from that of its members, leads to questioning its very existence, whereas the poor performance of a State may at best question the survival of its current government.

The EU needs its Member States. The pick-and-choose attitude to solidarity, and/or ruthless abuse of powers and gross disregard for the common values of Article 2 TEU in the management of the crisis have further exposed some Member States’ limited trustworthiness. Paradoxically, non-EU states such as Norway and Switzerland are proving more supportive and reliable than some EU States. The swift instrumentalization of the crisis by certain EU governments has further exposed an entrenched defiance towards the Union’s fundamental principles. This will have to be more resolutely addressed than hitherto, or acknowledged for what it is, namely an intention no longer to be bound by the requirements of membership.⁴⁵ Recovery in Europe will not be achieved with free-riders.

⁴²In this regard, see: Commission, 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), C(2020)1981.

⁴³ceas.europa.eu/delegations/china/76401/eu-hrvp-josep-borrell-coronavirus-pandemic-and-new-world-it-creating-en.

⁴⁴euvsdisinfo.eu/.

⁴⁵Hillion, “Poland and Hungary are withdrawing from the EU”, *VerfBlog*, 27 April 2020, verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/.

Maybe it is timely to recall that membership is voluntary, and that it entails commitment to the EU values and ambitions.⁴⁶ Maybe the crisis has catalysed the need for the Member States practically to act on their repeatedly renewed vows,⁴⁷ to share risks and deliver on "concrete achievements which ... create a de facto solidarity" called for 70 years ago.⁴⁸ Without such a practical engagement, the EU will be unable to face the world, and so will the Member States.⁴⁹

⁴⁶See Case C-621/18, *Wightman*, EU:C:2018:999, para 63; Case C-619/18, *Commission v. Poland (Independence of Supreme Court)*, EU:C:2019:531.

⁴⁷<www.consilium.europa.eu/en/meetings/european-council/2017/03/25/>.

⁴⁸The Schuman Declaration – 9 May 1950.

⁴⁹François Jullien, "La pandémie peut nous permettre d'accéder à la vraie vie", *Le Monde*, 16 April 2020.