

INTRODUCTION

Editorial for the Impact of the Covid-19 Pandemic: Shortcomings and Strengths of the EU Legal System in Selected Policy Domains

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This special issue on the Covid-19 Pandemic in European Union: shortcomings and strengths of the EU legal system in selected policy domains begins with two contributions that deal with the uncertain health risks caused by Covid-19, the first one on the application of precautionary principle in practice, and the second one on the growing problem of 'onslaught of health disinformation'.

The next two articles focus on the extent to which Covid-19 has impacted the cross-border mobility of people in the EU and the mobility of people within a Member State, and how this affects EU and national law.

The special issue then turns to the socio-economic consequences of Covid-19, which are analysed from the perspective of vulnerable position of creditors in the event of insolvency, the perspective of the Eurozone and the models of solidarity upon which the EMU is based, and the perspective of the position of vulnerable workers and their social rights which are enshrined in the EU Charter of Fundamental Rights.

The extent to which private companies are involved in tackling the Covid-19 crisis and how EU competition law (should) respond(s) to this, is discussed in the contribution hereafter. Finally the special issue zooms in to a contribution on the principle of solidarity that – once again – plays a pivotal role in times of crises.

Keywords: EU law; Covid-19

When the first Covid-19 cases in Europe were reported in France back in January 2020, and the first casualties could be counted only weeks later,¹ it gradually became clear that Covid-19 was going to hugely impact Member States' health care systems and (open) societies, and the functioning of the European Union as a whole. As the Covid-19 pandemic continues to unfold, this special issue takes a step back to analyse and assess its impacts on various domains of EU law and its relations to national law(s).

The most immediate concern for all Member States was, of course, to protect the health of their citizens against Covid-19. And it, I therefore not surprising, that individual Member States rapidly adopted – not always well thought-through – measures in order to contain the spread of the virus (including border closures) or to ensure the resilience of national care services (including restricting the export of essential medical equipment or medicines). Member States' initial protectionist reflexes did, however, appear indicative of a lack of solidarity within the European Union, and echoed the famous saying from Berthold Brecht's 1928 *Dreigroschenoper* that 'Erst kommt das Fressen, dann kommt die Moral.'

The EU institutions took much longer to adopt concrete measures in response to Covid-19,² which seemed in part due to the EU's limited legislative competences in the field of public health. Whereas Article 168(1) TFEU reiterates that a high level of health protection shall be ensured in the definition and implementation

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¹ BBC, 'Coronavirus: First death confirmed in Europe' (BBC World News, 15 February 2020) <<https://www.bbc.com/news/world-europe-51514837>> accessed 13 August 2021.

² <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/timeline-eu-action_en> accessed 13 August 2021.

of all EU policies and activities, Paragraphs 5 and 7 stipulate that there is no harmonization of national laws to protect and improve human health, and that the management, organization, and delivery of medical care and health services are a matter and responsibility for the Member States.³ It is easy to accuse the EU of doing too little too late, for instance most recently in relation to the EU's vaccine strategy. But because of the current division of competences between the EU and its Member States, the primary responsibility to respond to Covid-19 rests first and foremost with the Member States. Little by little, however, a growing degree of action was taken at the EU level. And so far, the European Commission and EU legislator have adopted an impressive list of (mainly soft law) measures.

On the one hand, we can see now that the pandemic has eventually provided opportunities for the EU to strengthen coordinated action and implement a shared approach to Covid-19, particularly within the broader context of the internal market. For example, the EU adopted measures with a view to keep essential border crossings open – the so-called 'Green Lanes' – and to support essential workers and the supply of essential services. Coordinated action was also taken in areas where legislative powers of the EU are limited such as public health, or in the socio-economic field by providing economic help packages. Yet, on the other hand, the pandemic has also laid bare the shortcomings of the EU's legal system, and has constituted a stress test for the EU and the legal principles upon which it is based.

The precautionary principle plays an important role instead of in adopting measures to protect people's health against Covid-19. According to the European Court of Justice in its judgment in a case in which the United Kingdom had initiated an action for annulment of the Commission Decision prohibiting the exportation of *inter alia* beef from the United Kingdom to third countries in view of an outbreak of 'mad cow disease,' the Court held that:

[W]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent. That approach is borne out by Article 130r(1) of the EC Treaty, according to which Community policy on the environment is to pursue the objective *inter alia* of protecting human health. Article 130r(2) provides that that policy is to aim at a high level of protection and is to be based in particular on the principles that preventive action should be taken and that environmental protection requirements must be integrated into the definition and implementation of other Community policies.⁴

The precautionary principle thus allows Member States considerable discretion in adopting measures in the field of health and in determining the level of protection of its citizens. But how exactly is the precautionary principle applied in national law and policy? This question is addressed by Emiliano Frediano in his contribution on 'The Administrative Precautionary Approach at the Time of Covid-19: The "Law of Uncertain Science" and the Italian Answer to Emergency.' Italy is among the Member States that have been worst affected by Covid-19 so far, and Frediani assesses whether the precautionary principle as laid down in Italian and EU law – 'in the books' – has been adequately applied in action. His critical analysis of the way in which the Italian government(s) implemented the precautionary principle on the one hand highlights the importance of using a precautionary approach in cases of health emergency, but on the other shows that its proper application critically requires effective coordinated action at different levels of government.

Apart from the factually uncertain health risks caused by Covid-19, public opinion of the pandemic was further fed by the 'onslaught of health disinformation' which Ruairi Harrison addresses in his contribution on 'Tackling Disinformation in Times of Crisis.' He explores the possibilities for the EU to tackle the growing problem of disinformation and the impacts of the 'infodemic' on European publics. Relevant in this respect are the European Commission's 'Action Plan for the European Democracy,' and the proposal for a 'Digital Services Act' which does not only amend the E-Commerce Directive but also contains provisions which aim at diminishing the spread of illegal content and disinformation through online platforms. Harrison writes that 'the Commission and the major platforms correctly acknowledged the unique public health dangers posed by Covid-19 disinformation thus necessitating the prioritization of an effective public health response over users' exercising their freedom of expression in sharing mis-or disinformation.' He then discusses the

³ See also Ulla Neergaard and Sybe de Vries, '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' in Dolores Utrilles and Anjum Shabbir (eds), *EU Law in Times of Pandemic – The EU's Legal Response to Covid-19* (EU Law Live Press 2021) 75–95.

⁴ Case C-180/96 *United Kingdom of Great Britain and Northern Ireland v. the Commission* ECLI:EU:C: 1998: 192, para 99.

best path forward in regulating disinformation in Europe looking at a number of options and more in particular at the feasibility of a more consumer-centric solution.

At the start of the Corona pandemic the decision of Member States to derogate from the Schengen internal border controls-free area by closing borders and reintroducing border checks on persons had, of course, detrimental effects on the free movement of persons. Without really knowing at the time whether the rapid closing of borders would actually work to contain the spread of the virus, the original instinct of turning inwards is legally questionable. Currently there is however, as Hanneke van Eijken and Jorrit Rijpma write in their contribution on 'Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona,' once again reason for optimism. After all, a large group of Europeans has been vaccinated, and the EU introduced the European Digital COVID Certificate to facilitate cross-border travel within the EU. Van Eijken and Rijpma critically evaluate the impact of Covid-19 on free movement within the EU and on travelling from third countries into the EU, and assess Covid-19-related travel restrictions in light of the rules of the Schengen acquis and under the provisions on the free movement of EU citizens. They argue that the existing legal framework has proven inadequate to respond to unforeseen circumstances and that ultimately more binding coordination and regulation is required to ensure legal certainty and manage mobility, especially if the coronavirus is to stay.

Not only has mobility of people *between* EU Member States been severely affected by the Covid-19 pandemic but also the mobility *within* the territory of the national state, *inter alia* through lockdowns, quarantine measures, or remote working with a view to reduce the risk of contamination. This is particularly problematic where physical presence is legally required, for instance, with a view to the validity of a legal act like types of last wills that require the physical presence of a civil law notary and/or witness. According to Jan Biemans in his contribution on 'the physical presence requirement of witnesses and notaries in the light of the COVID-19 interim measures and the EU freedom of (notarial) services,' this requirement causes an outright obstruction to passing a last will requirement, and may also conflict with the freedom to provide services under Article 56 TFEU. He carefully analyses how specific countries have responded differently to Covid-19 and the physical presence requirement, some introducing interim measures whilst using audio-video technology to allow for remote notarization. He also casts doubt upon the compatibility of the physical presence requirement with the free movement of services. Although Member States enjoy considerable leeway in restricting the freedom of establishment of notaries and the freedom to provide notarial services under the case law of the ECJ and the applicable secondary legal framework, even in the area of notarial services the requirements set by EU free movement law must be respected.

Next to its impact on free movement, the Covid-19 pandemic continues to have serious socio-economic implications as well. These are analysed from various perspectives by Hidde Volberda, Ton van den Brink and Matteo Gargantini, and Barbara Safradin, Sybe de Vries, and Simona de Heer. Hidde Volberda, in his contribution on 'Crises, Creditors and Cramdowns,' looks into the vulnerable position of creditors as an increasing amount of businesses face debts as a consequence of COVID-19, and analyses whether minority creditors are sufficiently protected under Directive 2019 /1023/EU in the event of insolvency. He also questions whether the Netherlands has adequately implemented that Directive.

The contribution of Van den Brink and Gargantini discusses the asymmetric effects of COVID-19 on the Eurozone, and how solidarity should be arranged within the Economic and Monetary Union (EMU). The controversial decision of the German Federal Constitutional Court (*Bundersverfassungsgericht*) on the European Central Bank's bond buying programme (PSPP) has, as they claim, sent shockwaves across the European continent. This decision may, together with COVID-19, have important repercussions for the models of solidarity upon which the EMU is based, and they argue that a re-design of the EMU has now become unavoidable.

The contribution by Safradin, De Vries and De Heer on 'Fundamental Social Rights Protection and Covid-19 in the EU: Constraints & Possibilities' focuses on the question of whether certain EU fundamental social rights could constitute a counterweight to the socio-economic consequences of the Covid-19 pandemic for specific categories of vulnerable workers within the EU. These vulnerable workers include critical workers such as health care workers, seasonal workers and platform workers, which have been particularly hit by the Corona pandemic for various reasons, ranging from loss of income while already economically vulnerable, to overwork and exposure to the virus. And although the EU's legislative competences in the field of social policy are limited, as well as the binding force of the EU Charter of Fundamental Rights, particularly where it concerns the social rights enshrined therein, the picture may in fact not look so grim for citizens' social rights.

It is not only the EU and the Member States involved in handling of the Coronavirus pandemic, but also private actors such as companies play a role here, for instance by seeking to overcome supply shortages of medicines, adjust disrupted supply channels or by developing new vaccines. The problem is that such practices by companies may run counter to EU competition law. Malgorzata Kozak in her contribution on 'Competition law and the Covid-19 pandemic – towards a paradigm change?' examines the possibilities for the European Commission and national competition authorities to take on board non-economic or non-competition, such as health, interests within the EU competition law framework, particularly via Articles 101 and 102 TFEU on cartels and abuse of a dominant position. Kozak carefully analyses the actions taken by the competition authorities within the EU, including the European Commission, and shows that there is indeed a need in situations like the current Corona crisis to allow for a flexible approach to the application of the competition rules.

As many of the contributions show, Covid-19 has in particular re-emphasized the importance of the principle of solidarity. The last contribution by Anne Joppe on 'EU Solidarity during the Covid-19 crisis' looks deeper into the meaning of solidarity, which is not unequivocal. She submits that Covid-19 shows that solidarity is crucial for the resilience of the internal market in times of crisis. She therefore pleads in favour of the judicial operationalisation of the value of solidarity, taking it away from its predominantly political aspirations. But, as Ulla Neergaard and I write elsewhere, '[...] it does not thus seem fair to say that solidarity in the shape of action has not been there at all.'⁵ And despite all the shortcomings of the EU legal system, which are laid bare by Covid-19, the various (legislative and soft law) initiatives by the EU tie in at the message of Albert Camus in *La Peste*, namely that we should not rest in the current situation or be overcome by fatalism: '[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 these contributions all show, Covid-19, although in some respects unprecedented, constitutes yet another crisis which the EU must endure and a stress test for its legal system. And despite all the identified legal shortcomings, Covid-19 offers opportunities, *inter alia* to rethink its foundational principles like solidarity, to re-design some of its policies, and to better protect the health and life of European citizens. The contributors of this special issue make various suggestions as to how to make the EU's legal system more resilient to future crises.

Competing Interests

I am an honorary judge at the district court of Rotterdam.

⁵ Neergaard and De Vries (n3).

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