

Dealing with the COVID-19 Pandemic on the EU level: Introducing the “Web of Competencies” Theory

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1. A glance at the SLO rules of the EU law

1.1. A new challenge

By the spring of 2020, it became clear that dealing with the novel coronavirus (COVID-19) pandemic – the focus of attention of the public and politicians at the national and EU levels since January – was not restricted to the field of ‘protection and improvement of human health’¹ where the EU has no competence at all to make legally binding decisions or to enforce them accordingly. The pandemic threatened the population’s health, but it also posed a serious threat to the balance of national budgets and the economy.² Thus, it also threatened the functioning of the Single Market. Therefore, the EU institutions, spearheaded by the European Commission, proposed several action plans and issued recommendations on how to maintain the proper

1 As specified by Article 6 of the Treaty on the Functioning of the European Union (TFEU), (OJ C 326, 26.10.2012, p. 47–390).

2 This involved reallocating significant amounts within the individual state budgets to cover the direct costs of fighting against the pandemic (e.g., buying medical and protective equipment) and the indirect cost in the form of state subsidies to avoid the total eclipse of the economy and rapidly rising unemployment. All these costs had to be covered during a period when states were also facing reduced tax revenues. For details, see the IMF’s analysis, Pradhan Deb et al., 2020.

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MARINKÁS, Gy. (2022) ‘Dealing with the COVID-19 Pandemic on the EU level: Introducing the “Web of Competencies” Theory’ in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 71–95. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_4

functioning of the Single Market and secure the prevalence of the basic freedoms, including people's free movement—to the extent that the Founding Treaties allowed them to do so.

This chapter focuses on the provisions of those Founding Treaties, aimed initially at maintaining the functioning of the single market, suited to tackling the problems caused by the COVID-19 pandemic. The Commission, focusing on the rule of law, scrutinized the measures brought by the member states to handle the pandemic, including the special legal order (SLO), provided it was promulgated. In this regard, the COVID-19 pandemic incited a long-lasting debate that will not be elaborated on in this chapter. The pandemic also accelerated some already slow but ongoing processes, such as the adoption of digital technologies in decision-making. The EU institutions had to adapt to the new situation in zero time. This chapter discusses the effectiveness of this adoption.

1.2. The lack of competences of the EU to regulate the SLO

Based on the Founding Treaties of the European Union,³ the adoption of constitutional and statutory rules on SLO falls within the exclusive competence of Member States. The EU and its institutions lack any competence to bring legally binding decisions in this field.⁴ However, the picture is complex. First, we can see tendencies in the regulation⁵ even though EU law is silent on the matter. It contains no provisions on whether regulation could be contained by constitutional provisions or whether a “single” statute is enough.⁶ Second, while enforcing the legal acts of the European Union enacted within the framework on the war on terror, which might require the curtailment of basic rights, the member states have to obey the basic rights guaranteed by the EU law and the case law of the Court of Justice of the European Union (CJEU).

1.3. CJEU case law on curtailing basic rights in exceptional situations

The predecessor of the European Union, the European Economic Community, was established to achieve economic goals. The establishing treaty⁷ contained no references to human

³ The consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, p. 13–390) and the TFEU.

⁴ The so-called “one million signatures for a Europe of solidarity,” among other efforts, led to an EU-level state of emergency rule, although the proposal restricted this “state of emergency” to cases of state bankruptcy in the Euro zone. See CJEU Press Release No. 93/17 on the judgement delivered in the C-589/15. *P. Alexios Anagnostakis vs. Commission* case (Luxembourg, 12 September 2017)

⁵ The fact that most legal system authorize the parliament to promulgate an SLO is one such tendency. See Till, 2019; Ságvári, 2016; Kelemen, 2019, pp. 9–34.

⁶ As an ample example in the case of the UK the requirement of constitutional regulations would be simply beyond interpretation regarding the fact that the country lacks any written constitution.

⁷ The Treaty establishing the European Economic Community (Rome, 25 March 1957)

or basic rights.⁸ The protection of basic rights was elaborated on in the case law of the Court of Justice of the European Communities (CJEC), now the CJEU.⁹ The Maastricht Treaty¹⁰ was the first founding treaty to contain any reference to basic rights, which were later elaborated on by the Treaty of Amsterdam.¹¹ Based on the provisions of the Founding Treaties, the fundamental rights guaranteed by the European Convention on Human Rights (hereafter, ECHR)¹² constitute general principles of EU law based on constitutional traditions common to the member states.¹³

A written catalogue of basic rights was still missing, however. Later, these basic rights were embodied under the Charter of Fundamental Rights of the European Union (hereafter, Charter).¹⁴ The Charter was not universally welcomed, however. First of all, those who were against empowering the Charter with legal binding force were not few in number,¹⁵ secondly until 2006 the CJEU itself abstained from making any reference to the Charter.¹⁶ Ultimately, it was the Treaty of Lisbon¹⁷ that finally empowered the Charter with legally binding force, declaring that “[the Charter] shall have the same legal value as the Treaties.” The rights guaranteed by the Charter overlap significantly with the rights guaranteed by the ECHR. Considering the special characteristics of the EU law (e.g., the rights related to EU Citizenship), in some aspects, the Charter provides enhanced protection compared to the ECHR.¹⁸

Paragraph (1), Article 51, of the Charter states the following:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

This is further elaborated on in Paragraph (2) of Article 51:

8 Some of its provisions seemed to be “induced by a care for human rights” (e.g., the rules against gender discrimination in employment). However, these provisions were intended to serve economic interests rather than human rights.

9 For details, see Kiss, 2010.

10 Maastricht Treaty (OJ C 191, 29.7.1992, pp. 1–112).

11 Amsterdam Treaty (OJ C 340, 10.11.1997, pp. 1–144).

12 European Convention on Human Rights (Rome, November 4, 1950) ETS No. 005.

13 See TFEU Declaration A/1.

14 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391–407)

15 Defeis, 2012, p. 1211.

16 This was first cited in Paragraphs 4 and 31 of the judgement of 27 June 2006 brought in the *C-540/03 European Parliament v. European Commission* case.

17 The Lisbon Treaty (OJ C 306, 17.12.2007, pp. 1–271.)

18 Marinkás, 2013, p. 103.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

The Founding Treaties do not contain any provisions on the SLO. Thus, the rights guaranteed by the Charter may only be invoked during a period of SLO, if the member state promulgated the SLO to assure the enforcement of EU law (e.g., to fight terrorism).

In relation to the COVID-19 pandemic, curtailing two basic rights—namely the right to peaceful assembly and the right to freedom of expression, as guaranteed by the Charter—incited heated social, political, and legal debates. In case of the preceding, the proportionality of the force used by certain member states' police authorities against the otherwise peaceful assemblies was at stake.

Article 12 of the Charter guarantees the right to peaceful assembly. When COVID-19 started to spread in Europe, all 27 member states curtailed citizens' right to peaceful assembly to some extent, although the measures varied in scope and strictness. These restrictions were fully reasonable and justified to protect and promote public health. However, this is only one aspect that must be considered in situations involving curtailing basic rights.¹⁹ The rules of social distancing cannot outweigh the right to peaceful assembly or exclude any other consideration since it clearly related to the principle of proportionality. Only three member states introduced a differentiated regulation: Denmark, the Czech Republic, and the Netherlands. The Netherlands repealed its differentiated regulation on April 28, 2020, and promulgated a general and undifferentiated regulation in its place, following the lead of the other member states.

The restrictions were scrutinized at the national level by some member states' constitutional or other higher courts. The Federal Constitutional Court of Germany (*Bundesverfassungsgericht*), in accordance with its permanent case law,²⁰ delivered a decision on 15 April 2020²¹ stating that considerations based on public health could not outweigh the right to assembly. France's quasi-constitutional court, the French Council of State,²² rendered a similar decision. It held that the statutory ban on any assembly held by more than ten people was unconstitutional.²³ The Slovenian Constitutional Court²⁴ delivered a decision in August 2020

19 Civil Liberties Union for Europe and Greenpeace European Unit: Locking Down Critical Voices: How Governments' Responses to the COVID-19 Pandemic Are Unduly Restricting Civic Space and Freedoms Across the EU (September 2020), pp. 11–14.

20 Kommers, 2007.

21 BVerfG, *Beschluss der 1. Kammer des Ersten Senats vom April 15, 2020*. 1 BvR 828/20.

22 *Conseil d'État*.

23 *Conseil d'État, statuant au contentieux*, Nos. 440846, 440856, 441015 (13/06/2020).

24 *Ustavno sodišče Republike Slovenije (USRS)*.

that reasons that serve as a basis for special measures had to be reviewed weekly for necessity and proportionality.²⁵ While there were no court proceedings in Belgium, the belated lifting of the restrictions on the right to assembly in July 2020 was clearly an issue. Shops had been allowed to reopen in May and bars and restaurants in June, as soon as the number of confirmed cases started to drop.²⁶

Legislation was not the only target of dispute. Enforcement also came under fire, primarily because of the uncertain legal framework or the authorities' inconsistent application of the laws. One example of the statutory framework's ambiguity was the Cypriot legislation banning any assembly where the participants gathered in "great number" but provided no guidance on what that expression means. Similarly problematic examples of imprecise legislation were the Irish and the Dutch regulations, which seemed to give discretionary power to the police, allowing them to ban any assembly they thought might violate the pandemic rules. Statements by the French police exemplify problems with the inconsistent application of the laws. They initially stated that units would not disperse the assemblies organized by the Black Lives Matter movement, even though the assemblies technically violated the then-valid rules on assembly. However, the police forces usually broke up such crowds by force, which in numerous cases ended with clashes between the police forces and protestors. The Swedish police²⁷ were also accused of disproportionate use of force.²⁸

Article 11 of the Charter guarantees the freedom of expression and information. The right includes the duty to respect the diversity of mass media and the freedom that makes this diversity possible. Restricting the right to freedom of expression must be based on a cogent reason, such as preventing the spread of misinformation. As Josep Borrell, the High Representative of the European Union, wrote, "[misinformation] in times of the coronavirus can kill."²⁹ In the first months of the pandemic, the spread of misinformation and pseudoscientific allegations was so rampant that the World Health Organization (WHO) called this phenomenon an "infodemic."³⁰ Leaving aside the obvious role of social media and many people's predilection for rumormongering, the rapid spread of misinformation was promoted by two

25 *Ustavno sodišče Republike Slovenije*, U-I-83/20 (27. 8. 2020).

26 Civil Liberties Union for Europe and Greenpeace European Unit, 2020, p. 7.

27 *Civil Liberties Union for Europe and Greenpeace European Unit*, 2020, pp. 14–15.

28 For a detailed introduction of the theory on using police force, see Lee, 2020, p. 247.

29 European Commission, "Coronavirus: EU Strengthens Action to Tackle Disinformation" (Press Release, June 10, 2020, Brussels). [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1006 [Accessed: April 2, 2021].

30 WHO, "Working Together to Tackle the 'Infodemic'" (June 29, 2020) [Online]. Available at: <https://www.euro.who.int/en/health-topics/Health-systems/digital-health/news/news/2020/6/working-together-to-tackle-the-infodemic> [Accessed: 2 April 2021].

factors.³¹ One, the SARS-CoV-2 virus causing the pandemic was a novel coronavirus, so not much was known about it. This understandably incited panic among much of the lay population. Two, even scientists familiar with similar health threats could not predict with much accuracy how rapidly the virus might spread or mutate and the probable outcomes. The lack of specific understanding of the COVID-19 coronavirus made it hard to distinguish information from misinformation in the early months of the pandemic. Governments had to accept that misinformation could undermine citizens' trust in their governments and make them less cooperative, drastically reducing the efficiency of the governmental measures. Thus, it was vital to fight misinformation.

However, the restrictions imposed by some member states proved unnecessary or disproportionate. The European Commission noticed the "infodemic" phenomenon and issued a joint communication based on the 2018 *Action Plan against Disinformation*³² entitled *Tackling COVID-19 Disinformation: Getting the Facts Right*.³³ This joint communication informed the member states about tackling misinformation effectively while adhering to the principles of necessity and proportionality. The problem was reconciling people's right to health and the general enforcement of public health requirements with the right to the freedom of expression. As the European Commission remarked, the task was impeded by the rampant spread of fake news, pseudoscientific allegations, conspiracy theories, and misleading information on health, which are not necessarily unlawful.³⁴ The "infodemic" phenomenon is mostly rooted in ignorance and confusion caused by the sheer volume of information available, although it can gain momentum from parties pushing political agendas. The European Commission recommended organizing effective information campaigns to tackle the spread of misinformation.

Conspiracy theories and hate speech are another problem.³⁵ Both can jeopardize human health, shatter the coherence of societies, and lead to violence and social turmoil. Similarly, selling fraudulent "miracle cures" and committing cybercrimes using the COVID-19 themes as bait are also harmful and need state intervention. Finally, misinformation campaigns, which are frequently directed or sanctioned by governments of countries outside the EU, can

31 A comprehensive examination of social media's role unprecedented ability to instantly spread information—and misinformation—worldwide and fuel the "infodemic" is beyond the scope of this chapter.

32 European Commission, "Action Plan against Disinformation." (December 5, Brussels), JOIN (2018) 36 final.

33 European Commission, "Tackling COVID-19 Disinformation: Getting the Facts Right." (June 10, 2020, Brussels). JOIN (2020) 8 final.

34 This author's opinion is that if all incidents of spreading misinformation were illegal, most Facebook users could be indicted.

35 From its beginning, the pandemic incited as rise in hostility and violence toward persons perceived to be Chinese. See: FRA, 2020, pp. 33–35

also cause serious harm. Such campaigns aim to further disrupt and polarize the societies of EU member states and aggrandize the government driving the misinformation campaign.³⁶

To summarize, the European Commission emphasized the need to distinguish between legal, but harmful and unlawful content. It is also necessary to determine intent—that is, whether the content was meant to deceive and cause damage to the public or gain economic benefit. If someone was acting in good faith, did not know the information to be false or potentially harmful, had no malicious intentions, but shared misinformation with family, friends, or online contacts, that disinformation sharing probably falls outside the scope of criminal behaviour. In contrast, when someone knowingly shares false or potentially harmful misinformation that might constitute a criminal act.

In some member states, such acts were already labelled criminal acts before the COVID-19 pandemic. Other member states (e.g., Hungary³⁷) introduced new rules to criminalize the spread of misinformation. The European Commission cautioned against enacting laws that defined these as crimes using overly broad terms and applying disproportionate penalties, warning that they might constrain sources' willingness to speak to journalists, lead to self-censorship, and raise concerns about freedom of expression.³⁸ Although the European Commission referred to the novel provisions of the Hungarian criminal code, it also raised concerns in its Working Document attached to the 2020 *Rule of Law Report*.³⁹ A 2020 Civil Liberties Union for Europe and Greenpeace European Unit report revealed that other member states had also failed to strike a fair balance between the protection of the society as a whole and basic rights of expression. The document spotlighted the Romanian government's measures, which gave the government censorship rights, as the most egregiously disproportionate. Based on the report, several governments (including in Western Europe and Eastern Europe) restricted the journalists' rights by applying "preliminary filters." They also identified positive examples: the French and Polish governments developed efficient cooperation with companies providing search engines to tackle misinformation.⁴⁰

36 See the position of the EU institutions regarding the offers made by China and Russia.

37 Paragraph (2) of Section 337 of the Hungarian Criminal Code (Act C of 2012) was inaugurated by Act XII of 2020.

38 COM JOIN (2020) 8 final, 3–4, pp. 12–14.

39 Commission Staff Working Document (September 30, 2020, Brussels). SWD (2020) 316 final. Country Chapter on the Rule of Law Situation in Hungary, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union, p. 17.

40 Civil Liberties Union for Europe and Greenpeace European Unit, 2020, pp. 19–22.

1.4. SLOs in the context of the rule of law: Statements from the European Commission

As mentioned earlier, the European Commission scrutinized the measures introduced by the member states with respect to the rule of law.

From the early spring of 2020, all the EU member states introduced some kind of statutory measures to handle the threat caused by the COVID-19 pandemic, from moderate SLOs to states of emergency to large-scale lockdowns.⁴¹ Two member states (Romania and Lithuania) even suspended the application of certain articles of the ECHR based on the provisions of Article 15, claiming that the state of emergency rendered it necessary. The necessity of introducing an SLO became the subject of political debates in several member states.⁴² For example, pandemic rules embroiled Hungary in the long-standing debate about the rule of law situation, which the author intentionally strives to avoid. In March, the European Commission stated its desire to scrutinize the Hungarian SLO rules. One month later Věra Jourová, vice-president of the European Commission for Values and Transparency, declared that the Hungarian SLO rules introduced in spring 2020 did not infringe on EU law.⁴³ In the country-related working documents⁴⁴ attached to the 2020 Rule of Law reports, the European Commission raised concerns regarding the SLO rules of several member states, not just Hungary. In Romania, the constitutional court⁴⁵ took the view⁴⁶ that the high fees imposed on those who broke the quarantine rules were unconstitutional “given that, as they restricted or affected fundamental rights and freedoms of the citizens or fundamental institutions of the State, they had to be adopted through a law as a formal act of Parliament and not through government emergency ordinances

41 As an example, the Cypriot government was empowered to adopt measures to tackle the COVID-19 pandemic. The government dispensed with promulgating a state of emergency but applied the law on contagious diseases. See the Commission Staff Working Document (September 30, 2020, Brussels). SWD (2020) 312 final. Country Chapter on the Rule of Law Situation in Cyprus, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union.; See furthermore: Ungvári and Hojnýák, 2020

42 Council of Europe, Notifications under Article 15 of the Convention in the Context of the COVID-19 Pandemic. [Online]. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354> [Accessed: 2 April 2021].

43 Wanat and Eder, 2020; Kirst, 2020.

44 Commission Staff Working Document (30 September 2020, Brussels). SWD (2020) 317. Country Chapter on the Rule of Law Situation in Malta, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union; Commission Staff Working Document (30 September 2020, Brussels). SWD (2020) 300 final. Country Chapter on the Rule of Law Situation in Belgium, Accompanying the Document 2020 Rule of Law Report: The rule of law situation in the European Union.

45 *Curtea Constituțională a României*.

46 *Curtea Constituțională a României*, Decision 152/2020 (6 May 2020). See also Commission Staff Working Document (September 30, 2020, Brussels). SWD (2020) 322 final. Country Chapter on the Rule of Law Situation in Romania, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union.

(GEOs).” The court system of the Czech Republic was actively weighing the constitutionality of GEOs and other legal instruments against the rule of law: it repealed several instruments.⁴⁷ The Czech government decree that ordered the state of emergency stood up to the scrutiny, however. There were also positive examples. The European Commission found that Ireland’s legislation aimed at tackling the COVID-19 pandemic remained within the framework of general rules.⁴⁸

Most member states revised their assessment of the need for SLOs in June 2020, and most repealed theirs in the same month. However, several member states maintained an elevated level of awareness. For example, while Hungary repealed its state of emergency, it introduced a state of epidemiological preparedness⁴⁹ on the 18 June 2020.⁵⁰ These moderate forms of SLOs were mostly criticized because they (i) did not serve legal certainty and (ii) concealed the ability of governments to govern by decrees. The French, Dutch, and Hungarian rules were criticized on these grounds. The rules introduced by Luxembourg were tried before the highest judicial level because of the provisions related to the mandatory hospitalization of people displaying COVID-19 symptoms.⁵¹

The release was reversed during the autumn of 2020: more member states introduced restrictions. The Hungarian government did so on 4 November 2020.⁵² The new restrictions did not trigger as much criticism as in the springtime.

The first application seeking a preliminary ruling in connection with an SLO situation was filed with the CJEU on 28 May 2020.⁵³ In essence, the domestic court asked whether the Italian legislative decree that promulgated the SLO and the subsequent one that extended its validity constituted an infringement of national courts’ independence and the principle of fair trial, considering that the legislative decrees resulted in the shutdown of the judicial system and prevented the national court from rendering decisions. Furthermore, they questioned whether the legislative decrees constituted an infringement of the right to human dignity, the right to liberty and security, the right to equality before the law, the right to non-discrimination, the right to fair and just working conditions, and the right to freedom of

47 Commission Staff Working Document (30 September 2020, Brussels). SWD (2020) 302 final. Country Chapter on the Rule of Law Situation in the Czech Republic, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union.

48 Commission Staff Working Document (Brussel, 30.09.2020. SWD (2020) 306 final. Country Chapter on the Rule of Law Situation in Ireland, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union.

49 *Járványügyi készség.*

50 Government Decree 283/2020 introducing a state of epidemiological preparedness (in force since 18 June 2020)

51 FRA, 2020, 16

52 Government Decree 478/2020 on the declaration of the state of emergency

53 C-220/20, XX v. OO case (date of submission: 28 May 2020)

movement and residence as guaranteed by the Charter. In its decision of 10 December 2020,⁵⁴ the CJEU dismissed the application. The author expected as much in light of CJEU case law.⁵⁵ The CJEU's reasoning emphasized that the statement of facts of the proceeding before the national court—namely, a procedure stemming from a traffic incident—did not have any cross-border elements and no EU law was applied in the proceeding. Regarding the second decree, the CJEU was not convinced by the national court's reasoning that the Italian regulations on traffic were enforcing EU directives. The European Commission as a Coordinator of Restrictions Imposed by Member States on the Basic Freedoms of the Single Market

2. The competences of the EU in the pandemic situation

The initial measures made by the EU to tackle the COVID-19 pandemic attracted several criticisms. Some labelled them as “disillusioning.” Others accused the EU of leaving its member states in the lurch⁵⁶ and praised China and Russia for their expressions of hope and support.⁵⁷ In Italy, “Euroskepticism” started to rise, which was not surprising, given the situation that evolved in the first months of 2020.⁵⁸ The Euroskepticism also started to grow in France and Germany, to a smaller extent.⁵⁹

Setting aside the intense emotions, we can see that the provisions of the Founding Treaties tied the hands of EU institutions. Interpreting—and in some cases re-contextualizing—they took time. Based on the concerning provisions of the Founding Treaties (e.g., Article 5 of the TEU on the principle of conferral and Article 6 of TFEU guaranteeing the competence to the EU to carry out actions to support, coordinate, or supplement the member states' actions to protect and improve human health), the EU's possibilities for fighting a pandemic were limited. The EU was not empowered by the Founding Treaties to bring any binding decisions. The existing competencies of the EU were based on Article 168 of the TFEU (public health) and Decision 1082/2013/EU⁶⁰ in accordance with Paragraph (1) of Article 168

54 C-220/20, *XX v. OO* case, the Order of the CJ of 10 December 2020

55 Somssich, 2018

56 Wojtyczka, 2020

57 Given what we know, the million-dollar question is whether this “support” was really an act of selflessness. See “Tackling COVID-19 Disinformation: Getting the Facts Right” and the document of the European Parliamentary Research Service “COVID-19 Foreign Influence Campaigns: Europe and the Global Battle of Narratives” by Naja Bentzen.

58 Scazzieri, 2020

59 Tidey, 2020

60 Decision No 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 Text with EEA relevance (OJ L 293, 5.11.2013, p. 1–15).

of the TFEU: “Union action...shall complement national policies.” Paragraph (7) of the Article clearly states that “Union action shall respect the responsibilities of the member states for the definition of their health policy and for the organization and delivery of health services and medical care.” The latter is echoed by the phrase “medical treatment under the conditions established by national laws and practices” in Article 35 of the Charter. The abovementioned Decision 1082/2013/EU promoted the exchange of experiences and best practices among the member states and elaborated on the compatibility of national strategies for preventing threats to human health.⁶¹

Thus, it is clear that as a basic rule pandemic prevention is the competence of the member states, and the EU lacks both the competence and the resources to organize health services and medical treatment. However, the EU soon left behind its initial attitude of hesitation and realized that it owned a “web of competence” (Purnhagen et al.⁶²) and began acting with more determination. It then became clear that the EU had broad competences to fight the COVID-19 pandemic.⁶³ However, these competences are found outside the provision on promoting human health.⁶⁴ Accordingly, actions of the EU to ‘support, coordinate or supplement’ aimed at ‘protection and improvement of human health’ shall be approached from the functioning of the Single Market. Based on Paragraph (1) of the TFEU, the EU has the competence to “adopt the measures for the approximation of the provisions laid down by law, regulation, or administrative action in member states which have as their object the establishment and functioning of the internal market.” These measures might directly or indirectly “serve the protection and improvement of human health.”⁶⁵ Based on Paragraph (3) of the Article, the measures mentioned in Paragraph (1) expressly protect or improve human health. This means that once new scientific facts came to light, the EU was obliged to correct its measures on the approximation.⁶⁶ For example, should the EU learn of evidence that the coronavirus could spread on food packaging, it would be obliged to revise its rules on food packaging. Furthermore, the EU is entitled to adopt incentive measures. For example, it can set achievement goals for tackling the coronavirus as a threshold to call certain financial resources from the EU budget. Purnhagen et al., citing *Procureur du Roi v. Dassonville*⁶⁷ and *Mary Carpenter v.*

61 European Commission Crisis Preparedness and Response. [Online]. Available at: https://ec.europa.eu/health/preparedness_response/overview_hu [Accessed: 2 April 2021]

62 Purnhagen, 2020

63 Purnhagen, 2020, p. 303.

64 Purnhagen, 2020, p. 303.

65 See C-376/98 *Federal Republic of Germany v. European Parliament and the Council of the European Union* (the “tobacco advertisement case”), Judgment 5 October 2000.

66 See the C-491/01 *British American Tobacco* case.

67 C-8/74 *Procureur du Roi v. Dassonville*, Judgment of 11 July 1974.

Secretary of State for the Home Department,⁶⁸ argued that the EU owned competences to coordinate the measures of member states that at first glance lacked any cross-border elements, such as school lockdowns and curfew ordinances. Purnhagen et al. further argued that the latter could hinder cross-border commuters in reaching their working places. They provided a list of examples on the possible coordinating role of the EU. These “predictions” were later proved right.

Since Decision 2019/98/EC⁶⁹ was adopted, the EU has coordinated pandemic surveillance of the member states several times. In this field, both the European Centre for Disease Prevention and Control (ECDC), established in 2005,⁷⁰ and the Early Warning and Response System (EWRS), consisting of the European Commission and the competent health authorities of the member states, successfully overcame the obstacles. The latter provided the framework for the member states to coordinate the exchange of intensive therapy beds and properly trained personnel based on demand and supply.⁷¹ The European Commission guidelines of 3 April 2020⁷² provided detailed rules on the cross-border reallocation of medical services. Among other things, it called on the member states to dispense with the application of certain legal acts of the EU⁷³ and “take a pragmatic approach for patients requiring urgent care [...]”⁷⁴

Secondly, the EU encouraged the member states to adopt unified passenger screening rules, including body temperature measurements. The legal basis is provided by Articles 168 and Paragraph (2) of Article 100 of the TFEU and the regulation on the common rules in the field of civil aviation security,⁷⁵ adopted based on the two TFEU articles.⁷⁶

68 C-60/00 *Mary Carpenter v. Secretary of State for the Home Department*, Judgment of 11 July 2002.

69 Decision No 2119/98/EC of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community (OJ L 268, 3.10.1998, p. 1–7) (no longer in force).

70 Regulation (EC) No. 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for Disease Prevention and Control (OJ L 142, 30.4.2004, pp. 1–11).

71 See the webpage of the German Foreign Ministry for information on how the German hospitals provided care for Italian and Dutch patients. German Federal Foreign Office, “How Germany is Helping Europe in the COVID-19 Crisis” (24.03.2020). [Online]. Available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/europa/maas-corona-europe/2328352> [Accessed: 2 April 2021]

72 European Commission, Guidelines on EU Emergency Assistance on Cross-Border Cooperation in Healthcare related to the COVID-19 crisis. (COM 2020/C 111 I/01, 2020.04.03.)

73 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1–123); Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare (OJ L 88, 4.4.2011, p. 45–46)

74 COM 2020/C 111 I/01, para. 4

75 Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 (Text with EEA relevance) (OJ L 97, 9.4.2008, p. 72–8)

76 For detailed analysis, Angyal, 2011

Thirdly, the EU has the competence to provide financial support for its member states through the structural funds, even though the EU budget is small compared to the GDP of the EU.⁷⁷ Based on Articles 180 and 181 of the TFEU, the EU has the competence to finance medical research, including vaccine development. In this field, Purnhagen et al. articulated a “prediction” that later proved correct: the European Commission issued its Communication ‘Preparedness for COVID-19 Vaccination Strategies and Vaccine Deployment’ on the 15 October 2020.

Furthermore, based on Paragraph (1) of Article 122 of the TFEU, “the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between member states, upon the measures appropriate to the economic situation in particular if severe difficulties arise in the supply of certain products...” Based on Paragraph (2): “Where a member state is in difficulties or is seriously threatened with severe difficulties...the Council, on a proposal from the Commission, may grant, under certain conditions, EU financial assistance to the member state concerned.”

Finally, the European Commission has the competence to allow an exemption from the prohibition of state aids, and it has not been afraid to use it during the COVID-19 pandemic.

2.1. Restrictions on the free movement of goods

Regarding the export bans imposed on influenza vaccines,⁷⁸ it is worth starting *in medias res* with the introduction of restrictions imposed by member states on medical equipment and medications to illustrate how the rules of the Single Market influence aspects of life. In accordance with the preceding points, the EU lacks the competence to bring any legally binding measure to pandemic prevention. However, as the European Commission reiterated in its communication of 13 May 2020 called ‘Coordinated Economic Response to the COVID-19 Outbreak,’⁷⁹ the abovementioned medical equipment and medications are goods within the meaning of the Founding Treaties. Accordingly, the rules of the Single Market—namely, the free movement of goods—apply. Furthermore, the European Commission took the view that the restrictions imposed by the Member States did not adequately consider the integrated nature of the supply chains and the possibility that the goods might not reach the destinations

⁷⁷ Marinkás, 2020; Marinkás, 2018

⁷⁸ Since the demand for influenza vaccines increased during the autumn of 2020, those member states with a surplus stock (Germany, Belgium, and others) imposed export bans. See Portfolio.hu: Magyarország egyelőre nem kap több influenza elleni vakcinát. 2020. október 29. [Online]. Available at: <https://www.portfolio.hu/gazdasag/20201029/magyarorszag-egyelore-nem-kap-tobb-influenza-elleni-vakcinat-454966> [Accessed: 2 April 2021]

⁷⁹ European Commission, Coordinated economic response to the COVID-19 Outbreak (COM/2020/112 final), Brussels, 13.03.2020.

where they were most needed. The European Commission stated that the restrictions on the export of medical equipment contradicted the principle of proportionality and the European Commission would treat them accordingly.⁸⁰ As Purnhagen et al. remarked, this could be interpreted as the reversion of the traditional approach of the basic rights and exemptions. That is, instead of letting the Member States exercise the rights guaranteed by Article 36 of the TFEU to restrict basic rights (e.g., restricting the free movement of medical equipment), the EU restricts its own Member States from exercising their right to provide the prevalence of the basic rights and ensure that the medical equipment reaches its destination.⁸¹

The vulnerability of the road freight sector and supply chains soon became evident: by April 2020, the volume of road freight transport dropped by 50% in Spain, by 46% in France, and by 37% in Italy compared to April 2019, seriously damaging the economy.⁸² The slowdown had two basic causes. First, once “nonessential” branches of the economy were shut down, the demand for road freight transport was drastically reduced. Second, there were supply shortages since some drivers simply went home, fearing that border closures would strand them in a foreign country without any income. However, the demand and supply found a state of balance throughout the year. The supply oriented itself to branches of the economy where there was demand. However, only entrepreneurs with a greater scope of clients could afford to lose a client here and there. Smaller entrepreneurs with fewer clients had far less flexibility and smaller safety nets.⁸³ The economic losses were serious: based on estimations published in June 2020,⁸⁴ it would take about €75 billion to restore this sector.

On 23 March 2020, the European Commission in connection with its ‘Guidelines for border management measures to protect health and ensure the availability of goods and essential services’⁸⁵ the European Commission adopted its communication on green lanes.⁸⁶ The communication’s basic points were that the continued functioning of the supply chains had to be secured and supply shortages avoided. Along with providing advice on protecting the road

80 COM (2020) 112, para. 3.1.

81 Purnhagen, 2020, 304; See: COM (2020) p. 112.

82 The author’s interpretation of the chapter verified the founders’ idea that the interconnectedness of economic interests makes cooperation of the member states inevitable. A war against a virus rather than a war among states virus was enough to verify the basic concept.

83 The state of Europe’s road freight market – 4 key insights from Sixfold’s Covid-19 map by Transport Intelligence, May 5, 2020. [Online]. Available at: <https://www.ti-insight.com/briefs/the-state-of-europes-road-freight-market-4-key-insights-from-sixfolds-covid-19-map/> [Accessed: 2 April 2021]

84 van Marle (2020)

85 European Commission, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services. Brussels (COM (2020) 1753 final), 16.03.2020.

86 European Commission, Coronavirus: Commission presents practical guidance to ensure continuous flow of goods across EU via green lanes. Brussels, 23 March 2020 IP/20/510

freight transport workers' health, the European Commission called on the member states to let the transport vehicles pass the borders without any extreme measures. The Commission stated that vehicles should not have to spend more than 15 minutes at the borders regardless of the type of goods they carried.⁸⁷

On the 28 October 2020 the European Commission issued another communication to further develop the green lanes during the second wave of the coronavirus.⁸⁸ They stated that the previously set objectives were still valid and urged the Member States to introduce and maintain an electronic administration and examination system. As the Commission noted, some of the Member States had already done so during the first COVID-19 wave. Referring to Point 19b of the 13 October 2020 Recommendation of the Council,⁸⁹ the Commission reiterated that road freight industry workers should be considered "essential workers" by every authority of every Member State; that would free them from any quarantine requirements while they were performing their "essential" tasks.

2.2. Restrictions imposed on the free movement of persons

The free movement of persons (the original wording says "the free movement of workers") is another crucial point guaranteed by several provisions of the Founding Treaties and other primary EU legal sources, such as Paragraph (1), Article 45, of the TFEU, the "Schengen acquis,"⁹⁰ and other secondary legal sources (e.g., Directive 2004/38/EC⁹¹). As with other basic rights, the Member States maintained their right to impose restrictions "on the grounds of public policy, public security, or public health" and reintroduce border control, although only temporarily. As Purnhagen et al. predicted in April 2020, the EU found its competencies to coordinate the measures of the Member States. What they wrote became a reality in the autumn of 2020 when the EU introduced unified rules on the classification of member states according to the pandemic situation and the restriction of travel and border closures.

⁸⁷ Regarding the fact that in March 2020 – even 10-15 km – long queues were a quite wide-spread phenomenon at the borders, this goal may be interpreted as ambitious.

⁸⁸ European Commission, Upgrading the Transport Green Lanes to Keep the Economy Going During the COVID-19 Pandemic Resurgence. Brussels, (COM (2020) 685 final) 28.10.2020.

⁸⁹ 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 (OJ L 337, 14.10.2020, p. 3–9)

⁹⁰ Schengen Agreement (14 June 1985); The Schengen Convention (19 June 1990)

⁹¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [...] OJ L 158, 30.4.2004, p. 77–123

The European Commission in its guidelines of 16 March 2020 reiterated that although Paragraph (1), Article 25, of the Schengen Borders Code⁹² allowed Member States to “re-introduce border control...for a limited period of time,”⁹³ the medical checks (e.g., body temperature controls) did not require such drastic measures. Actually, reintroducing border controls might result in unnecessary congestion on the borders that would cause the virus to spread more rapidly.⁹⁴ It might also increase the economic harm.⁹⁵ Should the Member States choose to reinstall border control, cross-border commuters working in the essential sectors should be able to cross the borders.⁹⁶ Furthermore, the member states should pay attention to the rules stated in *Reinhard Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* (the “Gebhard case”)⁹⁷—namely, that national measures that hinder the exercise of fundamental freedoms (i) must be applied in a non-discriminatory manner; (ii) must be justified by imperative requirements in the general interest; (iii) must be suitable for achieving the objective they pursue; and (iv) must not go beyond what is necessary to attain the goal.⁹⁸

On 13 May 2020, when the pandemic situation seemed to be improving, the European Commission issued its guidelines⁹⁹ for tourists, travellers, and entrepreneurs. The guidelines contained detailed instructions on preventive health measures that had to be implemented before the travel restrictions could be lifted. To re-launch tourism and travel and inform those wishing to travel, the European Commission launched its Re-open Europe platform.¹⁰⁰ However, the different measures introduced by the different member states (e.g., different rules on quarantine; the inconsistent application of red, orange, and green country codes; the uncoordinated border closures¹⁰¹) hindered the free movement of persons, posing an issue that had to be solved at the EU level.

92 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) (OJ L 77, 23.3.2016, p. 1–5)

93 In accordance with Article 27 of the Schengen Codex, before doing so, Member States are obliged to inform both the other Member States and the European Commission.

94 C (2020) 1753 final, paras. 18–25

95 Meninno and Wolff, 2020

96 C (2020) 1753 final, paras. 18–25

97 See C-55/94 *Reinhard Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, Judgment of 30 November 1995, para. 37

98 For more information on the Gebhard, see European Commission, “Guide to the Case Law of the European Court of Justice on Articles 49.” [Online]. Available at: <https://ec.europa.eu/docsroom/documents/22543/attachments/1/translations/en/renditions/native> [Accessed: 2 April 2021]

99 European Commission, “Tourism and Transport: Commission’s Guidance on How to Safely Resume Travel and Reboot Europe’s Tourism in 2020 and Beyond.” (Press Release, Brussel, 13 May 2020 (IP/20/854))

100 <https://reopen.europa.eu/hu> [Accessed: 2 April 2021]

101 Nicolás, 2020

In its proposal of 4 September 2020¹⁰² at the European Commission's urging, the Council adopted the Recommendation on a Coordinated Approach to the Restriction of Free Movement in Response to the COVID-19 Pandemic'.¹⁰³ The recommendation¹⁰⁴ was adopted on 13 October 2020 called 'Recommendation on a Coordinated Approach to the Restriction of Free Movement in Response to the COVID-19 Pandemic' Although Member States – in accordance with the provisions of the Founding Treaties – retained the right to reinstall border controls or to completely close the borders, the recommendation – in its paras 8-12 – set the criteria that Member States have to take into consideration, when they decide to impose restrictions on the free movement of persons, namely the number of new cases, the proportion of positive test results, and the proportion of tests done compared to the population. The Recommendation also obligated the Member States to provide the necessary data for the ECDC to determine their COVID-19 classification. Paragraphs 14–16 required the Member States to inform the other Member States and the European Commission of any planned restrictions or measures to simplify the preliminary coordination.

2.3. Easing to secure the freedom to provide services

The freedom to provide services is guaranteed by Article 56 of the TFEU, and its definition is contained by Article 57. Based on Article 58 on the field of transport (as a kind of service), Title VI of the TFEU applies. The provisions of Paragraph (1), Article 169, which transfers competences to the EU, has to be considered. Paragraph (2) of the Article says this:

The Union shall contribute to the attainment of the objectives referred to in Paragraph 1 through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States.

In modern economies, approximately two-thirds of the GDP is produced by the service sector. Tourism, transport, accommodation, catering, free time activities, and culture—all of which were hit severely by the virus—were all provide 10% of the EU's GDP.¹⁰⁵ Therefore, the

¹⁰² European Commission, Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (COM/2020/499 final)

¹⁰³ 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 (Text with EEA relevance) (OJ L 337, 14.10.2020, p. 3–9)

¹⁰⁴ European Commission, (EU) 2020/1475 of 13 October 2020 "Council Recommendation on a Coordinated Approach to the Restriction of Free Movement in Response to the COVID-19 Pandemic." (Text with EEA relevance) (OJ L 337, 14.10.2020, pp. 3–9).

¹⁰⁵ See Press Release IP/20/854 cited above.

European Commission also issued recommendations affecting those sectors. In their guidelines of 13 May 2020, the European Commission paid attention to passenger transport as an inevitable component of tourism. Based on EU law, in the case of service or travel package cancellations, travellers could choose between reimbursement, or a voucher. Since the economic consequences of the pandemic imposed severe hardships on tour operators, the European Commission acknowledged clients' right to reimbursements but favoured vouchers, which they considered a good compromise for both tour operators and clients. The European Commission also set consumer protection rules for the vouchers.

While the European Commission's proposal helped mitigate the economic consequences, long-term reforms will be needed rather than hastily improvised solutions. The presidential agenda of Germany, the then-president of the Council of the European Union, considered the long-run mitigation of the economic consequences of the coronavirus and the economic recovery as a top priority. In accordance with it, the then-trio issued a common statement¹⁰⁶ on 12 October 2020 which foresaw the revision and reform of the current consumer protection rules.

The European Commission and the Council were not the only entities that provided guidelines and advice to economic operators and the population. Various EU agencies did the same. The European Union Aviation Safety Agency (EASA) issued guidelines concerning the conditions on safe travel. The European Consumer Centre (ECC) provided advice to consumers and merchants on protecting themselves from the ever-spreading online frauds related to the coronavirus,¹⁰⁷ educating merchants and consumers about the perpetrators' favourite scams and methods.¹⁰⁸ In March¹⁰⁹ and April¹¹⁰ 2020, the European Commissioner for Justice at the time, Didier Reynders, sent a letter to several internet provider platforms, social media providers, and search engine and web-shop operators asking their help in removing false and fraudulent COVID-19-related content from their platforms in accordance with the common points of the Consumer Protection Cooperation Network (CPCN).¹¹¹ Procedural Adoption by EU Institutions of Changes in Work Conditions

¹⁰⁶ Joint Paper of the Trio Partners Germany, Portugal and Slovenia. Consumer protection in Europe Lessons learned from the COVID-19-pandemic (12.10.2020) [Online]. Available at: https://www.bmfv.de/SharedDocs/Downloads/DE/News/PM/161020_Joint_Trio_Paper.pdf;jsessionid=E0B61E2E3B831A3CAD5DB88467CB37A2.2_cid334?__blob=publicationFile&v=1 [Accessed: 2 April 2021]

¹⁰⁷ The issue was already addressed by the European Commission in the document labelled JOIN (2020) 8 final.

¹⁰⁸ Scams related to COVID-19. Actions of the Consumer Protection Cooperation Network (CPCN) on rogue traders during the COVID-19 outbreak. [Online]. Available at: https://ec.europa.eu/info/departments/justice-and-consumers/justice-and-consumers-funding-tenders/funding-areas/consumer-programme-cp/enforcement-consumer-protection/scams-related-covid-19_hu [Accessed: 2 April 2021]

¹⁰⁹ "Covid 19 Scams: Letter to Platforms" (March 2020).

¹¹⁰ "Covid 19 Scams: Letter to Platforms" (April 2020).

¹¹¹ Consumer Protection Cooperation Network (CPCN).

3. Procedural adoption by EU institutions of changes in work Conditions

Most EU institutions faced a serious challenge during the spring of 2020.¹¹² The procedural rules of the European Central Bank (ECB) and the European Court of Auditors (ECA) had already enabled online meetings and written decision-making well before COVID-19. Therefore, the pandemic did not seriously hinder their functioning. However, five other institutions found themselves in a more complicated situation. The European Parliament (EP) was hit most severely. Preventive distancing interfered with discussions of different views, the quintessence of the institution's function, because although decisions had to be made as quickly as possible, the EP's multi-party online meetings too often ended in chaos, with hundreds of online attendees weighing in at the same time. Thus, the EP had to restrict the length of the meetings and members' speeches,¹¹³ which infringed the principles of democracy and publicity specified by Article 15 of the TFEU. They also could not immediately find a suitable substitute for raising hands during the voting.¹¹⁴

The Council of the European Union was also not prepared to function in the virtual space. Although Article 12 of its rules of procedure¹¹⁵ enabled then to use the so-called "written procedure...on urgent matters [or in] special circumstances," the unanimous decision of either the Commission or the Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER) is needed in every single case. Travel restrictions hindered the permanent representatives and their deputies from meeting in Brussels, so the Commission decided to suspend in-person meetings for a month starting from 23 March 2020¹¹⁶ and delegate decision-making to the levels of COREPER I and II.¹¹⁷ The decision, which did not exclude the possibility of prolongation, was subject to long debate, since some saw the processes as another instance when community-level decision-making prevails over classic intergovernmental decision-making. In other words, the decision on whether the centrum of pandemic control should be in Brussels or in the 27 capitals was placed

¹¹² Herszenhorn and Wheaton, 2020

¹¹³ Bodson, 2020, p. 2.

¹¹⁴ The Rules of Procedure of the European Parliament 2019–2024 (9th parliamentary term), Article 25 (Point 9), Article 178, Article 187 (Point 1), Article 237 (Point 2). [Online]. Available at: https://www.europarl.europa.eu/doceo/document/RULES-9-2021-01-18_EN.pdf [Accessed: 2 April 2021]

¹¹⁵ Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU) (OJ L 325, 11.12.2009, p.35)

¹¹⁶ Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union. (OJ L 88I , 24.3.2020, p. 1–2)

¹¹⁷ The Legal Service of the Council had to determine the scope of application of this solution. See: Council of the European Union, 'Summary Record – Permanent Representatives Committee – 20 and 22 April 2020', 7709/20 CRS CRP 20, Brussels, 7 May 2020, 2.

in the context of sovereignty, making the legal debate a political one. To secure their right to say the last word, the governments put into writing that before the COREPER meetings, the competent ministers had to reconcile their views through an informal, preliminary video call. Furthermore, the Hungarian, Polish, and Slovenian governments attached a statement¹¹⁸ to the decision emphasizing its transitional nature.¹¹⁹

The European Council also did not modify its rules of procedure,¹²⁰ which allow only limited written decision-making under Article 7. As a further consequence of not modifying the procedural rules, based on the grammatical interpretation of Article 4 of the rules of procedure, holding negotiations and issuing concluding observations were only possible in the presence of the heads of state or governments. As a conciliatory proposal, the heads of state or governments held video calls and instead of issuing the concluding observations of the European Council, the president of the European Council issued the concluding observations. This empowered the then-president and expanded the manoeuvring room,¹²¹ which was surely not what the heads of state or governments wanted. The then-president issued his concluding observations in his own name, circumventing the long negotiations on documents' wording and message that usually preceded the concluding observations of the European Council.¹²²

On 26 March 2020 the head of states or governments issued a declaration¹²³ providing a draft on how to fight the coronavirus pandemic. The idea of using and incorporating the possibilities provided by the development of technology and telecommunications into the rules of procedure of the European Commission had emerged as early as 2010. However, this was only realized ten years later during the COVID-19 pandemic.¹²⁴ Although the written decision-making procedure had been allowed earlier, the provisions for joining through telecommunication devices were novel.

118 Ibid footnote 115, 2.

119 This chapter's author argues that both the euphoria of Benjamin Bodson and the concerns of the member states' governments were ill-grounded. The permanent representatives and their deputies were ambassadors in the sense of international law. Thus, the appointing government has the unlimited right to recall them without a reason should the government think its ambassador has failed to fully represent its interests. For details, see General Secretariat of the Council, Council's Rules of Procedure, and Comments on the Council's Rules of Procedure. 2016, p. 119. [Online]. Available at: <https://www.consilium.europa.eu/media/29824/qc0415692enn.pdf> [Accessed: 2 April 2021]

120 Rules of procedure of the council (OJ L 325, 11.12.2009, p. 36–61)

121 Charles Michel (Assumed office 1 December 2019)

122 Herszenhorn and Wheaton, 2020

123 Joint statement of the members of the European Council, 26 March 2020. [Online]. Available at: <https://www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf> [Accessed: 2 April 2021]

124 Commission Decision (EU, Euratom) 2020/555 of 22 April 2020 amending its Rules of Procedure C/2020/3000 (OJ L 127I, 22.4.2020), pp. 1–2.

The “e-Curia” system enabling the electronic submission of documents¹²⁵ was introduced in 2018.¹²⁶ However, neither the Court of Justice (CJ) nor the General Court (GC) is allowed to hold trials online. Thus, both the presentation of the advocate generals’ opinions and the trials had to be postponed. Articles 31 and 53 of the Statute of the CJEU¹²⁷ and Articles 79, 88, and 200 of the Rules of Procedure of the CJ¹²⁸ state that the abovementioned acts must be held “in open court.” Articles 109 and 118 of the Rules of Procedure of the GC¹²⁹ provide the same. Since the rules of procedure of the CJ and GC are silent on the matter of trials held via electronic communications system, they had no choice, but to postpone the abovementioned acts. Similarly, newly appointed judges and advocate generals have to be sworn in publicly, so the swearing in of the new CJ advocate general on 23 March 2020, via electronic communication raised some concerns¹³⁰ that it violated the Statutes of the CJEU and Article 4 of the CJ’s Rules of Procedure.¹³¹

4. Summary

This chapter discussed the lack of EU competencies related to pandemic management or SLOs. As a basic rule, these areas fall within the competence of the member states. However, the COVID-19 crisis re-contextualized the provisions of the founding treaties. After an initial period of hesitancy, EU institutions and organs realised if they approached the issues caused by the pandemic from the perspective of the Single Market and viewed the competencies of the EU were viewed as a “web of competencies,” they could help the Member States provide the necessary medical equipment and protect their economies from collapse. They could achieve this by coordinating the four basic freedoms at the EU level and, if necessary, by curtailing the rights of the Member States to impose restrictions on the basic freedoms. The creation of the green lanes system, recognizing the road freight traffic employees as “essential” and

125 E-Curia is a platform operated by the CJEU that provides the parties or the national courts (in cases of preliminary ruling procedures) to exchange documents electronically.

126 Decision of the Court of Justice of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia; Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia.

127 Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390): Protocol No. 3. On the Statute of the Court of Justice of the European Union. (OJ C 202., 7.6. 2016., pp. 210–229).

128 Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012, pp. 1–42).

129 Rules of procedure of the General Court (OJ L 105, 23.4.2015, pp. 1–6).

130 Court of Justice of the European Union, Press Release No. 34/20: “Entry into Office of a New Advocate General at the Court of Justice,” Luxembourg, 23 March 2020. [Online]. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-03/cp200034en.pdf> [Accessed: 2 April 2021]

131 Alemanno and Stefan, 2014

allowing their free movement, and unifying the colour-classification system of the member states also helped achieve this goal.

The chapter also discussed the issue of restricting certain basic rights with special regard to the freedom of peaceful assembly and the right to the freedom of expression. Actions to curtailing these rights must fairly balance the right of the population to the best attainable health with individual freedoms. The chapter introduced the relevant rule of law reports from the European Commission, the case law of certain member states' constitutional courts, and the reports of certain NGOs. Generally speaking, few member states succeeded in finding the golden mean among the abovementioned rights. Typically, they declared the proportional restriction of one or another right. The two most common problems were using health considerations to restrict the freedom of assembly without any differentiation and the disproportionate restriction of the right to freedom of expression. The latter was mostly related to efforts to reduce the spread of misinformation.

Finally, the chapter discussed how EU institutions and organs adapted to the situation created by the pandemic by revising their procedural rules to enable negotiations and decision-making via electronic means. The adoption went smoothly only for the ECB and the COE, whose procedural rules enabled the use of electronic telecommunication devices well before the COVID-19 pandemic. The other institutions struggled to adapt their procedures to comport with their legal guidelines and the principle of democracy. For the Council, the legal dispute over electronic meetings induced a political debate. For the EP, the issue of democratic values were called into question. The final and proper setting of these issues are still pending.

In summary, although they were initially slow to react, the EU institutions found ways to tackle the issues induced by the pandemic and to help the member states effectively by interpreting or reconceptualising the provisions of the founding treaties. Similarly, they realized the switch to electronic communication devices, although deficiencies remain.

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