

The Limited Role of the European Union in the Management and Governance of the COVID-19 Pandemic

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Abstract: Building on two global Symposia hosted by the Verfassungsblog and convened by the author, the 2020 “COVID-19 and States of Emergency” and the 2021 “Power and the COVID-19 Pandemic”, in addition to the findings of the Democracy Reporting International ‘Rule of Law Stress Test’ which surveyed EU Member States’ responses to the pandemic, this article investigates the impact of the pandemic on governance and legal systems within the EU, and evaluates the actions taken by EU institutions and national governments in response to the health crisis against the standards of the rule of law.

Keywords: European Union, coronavirus, emergency law, health policy, rule of law

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1. Introduction

On 30 January 2020 the outbreak of novel coronavirus SARS-CoV-2 (cause of COVID-19 disease) was declared to be a global health emergency by the World Health Organisation. Response to the pandemic within the EU has been primarily determined at national level, as the EU has, at most, a limited role on matters of public health policy. Particularly in the first wave, the coordination and support that the EU could offer on the basis of existing legal frameworks and provisions was hampered by lack of preparation, political will, and capacity. Member States have adopted different strategies in response to the viral outbreak, and national authorities have introduced varying levels of restrictive measures – including regional or national lockdowns, curfews, restrictions on assembly, and the long-term closures of businesses and educational institutions. The health crisis threatens to undermine both the efficacy of EU coordinated strategies and measures, but also the credibility of the solidarity of EU Member States to collectively address and manage pan-EU health emergencies. The pandemic response has exposed critical issues for the EU and its Member States from a rule of law perspective and has proven a catalyst in some Member States for further rule of law backsliding and democratic decline.

As it is not possible to examine the EU's response to the pandemic without understanding the interrelated context of the diversity and complexity of national responses, this article provides an overview of the relevant provisions and actions at national level in order to understand the relative challenges faced at coordination and support at EU level. In section 2, this article examines the existing and pre-pandemic emergency legal frameworks at national and EU levels which have since been utilised in response to the health crisis. An overview of varying forms and powers which had been available to Member States is provided. The relative strength of these provisions is then contrasted with the EU's relative lack of competence to undertake action in the field of health policy, even during a pan-European and global crisis.

Section 3 provides an analytical overview of national action taken in response to the pandemic, before examining the EU's legal and institutional responses to the health emergency. While it is not possible to analyse each country's response in detail, an overview of executive action, and legislative and judicial response is offered highlighting common trends and practices. The actions of the main EU institutions, the Commission, Parliament and Council, are considered before highlighting the work of the relevant agencies – the European Centre for Disease Control and European Medicines Agency – in the pandemic and the key measures adopted by the European Union in response to the COVID-19 pandemic, including as related

to borders and travel; medical and PPE equipment; vaccines and the ‘Green Certificate’ initiative; and the EU4Health Programme.

Section 4 concludes by highlighting rule of law concerns emerging from national and institutional responses, against the backdrop of both the EU and Member States’ commitment to the rule of law.

2. The EU and Member States’ pre-existing legal framework for emergencies and health crises

2.1 National Emergency law Frameworks

At national level, there is significant variance in the definition of what constitutes an emergency, and which powers or frameworks may be used in the event of a health emergency. Broadly, the first distinction may be made between those states which declared a state of emergency (or state of exception) under their constitutional provisions, and those states which instead relied on ordinary (typically health) legislation to provide for the authority to take action in response to the emergency. A third category may also be identified as legislative emergency frameworks, which provide for the use of emergency powers though are distinct from the declaration of a constitutional ‘state of emergency’.

In terms of constitutional states of emergency, further distinctions and categorisation in forms of design can be made as to who may declare a state of emergency; what situation constitutes an emergency; the powers of the executive during an emergency; the conditions or limitations attached to the exercise of emergency powers; and the degree and form of parliamentary or legislative oversight.¹ For instance, while the Italian constitution does not provide structured or prescriptive conditioning on models of states of emergency, allowing instead more open-ended emergency provisions for the use of decree-law by the executive. By contrast, in the constitutions of some member states (e.g., Estonia² and Spain³), there are prescriptive conditions attaching to a state of emergency or exception, including the obligation to derogate from constitutional rights and international treaties (e.g., the European Convention

¹ Arianna Vendaschi, ‘COVID-19 and Emergency Powers in Western European Democracies: Trends and Issues,’ (Verfassungsblog, 5 May 2021), <<https://verfassungsblog.de/covid-19-and-emergency-powers-in-western-european-democracies-trends-and-issues/>> (accessed 10 June 2021).

² See Rait Maruste, ‘State of Emergency in Estonia’ (Verfassungsblog, 17 May 2020) <<https://verfassungsblog.de/state-of-emergency-in-estonia/>> (accessed 10 June 2021).

³ Alicia Cebada Romero and Elvira Dominguez Redondo, ‘Spain: One Pandemic and Two Versions of the State of Alarm’ (Verfassungsblog, 26 February 2021), <<https://verfassungsblog.de/spain-one-pandemic-and-two-versions-of-the-state-of-alarm/>> (accessed 10 June 2021).

on Human Rights, and/or the International Convention on Civil and Political Rights). Many constitutions introduced tiered levels of emergency. At more ‘serious’ levels of emergency (where greater powers are delegated to restrict constitutional rights), parliamentary approval of the declaration of emergency is required while at ‘lower’ levels, the executive may declare a state of exception without such a requirement for approval. There is an expectation that these conditions can establish a higher bar for their activation, and so act as a legal or constitutional safeguard on their use. Article 19 of the Constitution of Portugal distinguishes between a ‘state of siege’ (for use in event of armed aggression or insurrection) and ‘state of emergency’ (for use in situations of calamity); the latter only allows for partial rights’ suspension, while certain rights – including the right to life and non-retrospectivity of criminal law - are non-derogable.⁴

The question of emergency power did not arise in some EU member states, as the health crisis did not constitute an emergency under the relevant legal or constitutional provisions. For example, the relevant constitutional provisions in Ireland restrict the declaration of a state of emergency to times of ‘war or armed rebellion’ (Article 28.3.3°). Therefore, the statutory basis for legal action during the pandemic in Ireland has consisted of five primary statutes empowering the Minister for Health to make regulations which can impose restrictions, and establish enforcement powers for those restrictions.⁵ By contrast, in Poland, the current health crisis could arguably have fallen within the provisions of the constitutional framework for the use of ‘extraordinary measures’,⁶ within which there are provisions for a ‘state of natural disaster’. Within the Statute expanding on the provisions for a state of natural disaster, ‘mass occurrence of infectious diseases among humans’ is one of the recognised conditions for declaring such a state. The Polish government, however, did not declare a state of emergency in response to the pandemic.

⁴ Teresa Violante and Rui T Lanceiro, ‘Coping with Covid-19 in Portugal: From Constitutional Normality to the State of Emergency’ (Verfassungsblog 12 April 2020) <<https://verfassungsblog.de/coping-with-covid-19-in-portugal-from-constitutional-normality-to-the-state-of-emergency/>> (accessed 10 June 2021).

⁵ See Alan Greene, ‘Ireland’s Response to the COVID-19 Pandemic’ (Verfassungsblog, 11 April 2020), <<https://verfassungsblog.de/irelands-response-to-the-covid-19-pandemic/>> (accessed 10 June 2021); and Oran Doyle, ‘Pandemic Response as Accentuation of Existing Characteristics: Vague Requirements and Executive Dominance in Ireland’ (Verfassungsblog, 17 March 2021), <<https://verfassungsblog.de/pandemic-response-as-accentuation-of-existing-characteristics-vague-requirements-and-executive-dominance-in-ireland/>> (accessed 10 June 2021).

⁶ Jakub Jaraczewski, ‘An Emergency By Any Other Name? Measures Against the COVID-19 Pandemic in Poland’ (Verfassungsblog, 24 April 2020), <<https://verfassungsblog.de/an-emergency-by-any-other-name-measures-against-the-covid-19-pandemic-in-poland/>> (accessed 10 June 2021).

2.2 Limited Competence: EU Legal Framework for [Health] Emergencies

The European Union does not have legal emergency mechanisms in a manner which is similar or equivalent to national constitutional frameworks such as states of emergency or states of exception, which allow for the extraordinary use of power under prescribed circumstances and conditions. There are no explicit provisions in the Treaties regulating responses to a health emergency nor crisis management during a public health emergency. The Common Security and Defence Policy under Article 43 Treaty on European Union [TEU] refers to provisions for crisis management but within the context of conflict prevention and peace-keeping operations. This provision (along with many states globally whose emergency provisions only encompass security or violence) has not been interpreted as encompassing a health crisis. At a broader level, the solidarity clause under Article 222 Treaty on the Functioning of the European Union [TFEU] provides for the EU and EU countries to act jointly to provide assistance to another EU Member State which is the victim of a natural or man-made disaster.

Health policy has long been recognised as a national competence, and scope for action at EU level is limited to complementing national policies or supporting the cooperation between Member States. The Treaties along with the EU Charter on Fundamental Rights provide for a high level of protection of human health in the implementation of Union policies and actions (Articles 9 and 168 TFEU, Article 35 EU Charter on Fundamental Rights). Article 168 TFEU provides that the Union is to complement and support national health policies, and also to encourage cooperation between Member States, in full respect of the responsibilities of Member States for the definition of their health policies and for the organisation, management and delivery of health services and medical care. This limited competence reflects the preferences of Member States,⁷ and the lack of political will to integrate in this area.⁸ As a consequence, EU health policy can be described as “a panoply of scattered regulatory

⁷ Eleanor Brooks, Anniek de Ruijter, and Scott L. Greer, ‘Covid-19 and European Union Health Policy: From Crisis to Collective Action’ in B. Vanhercke, S. Spasova and B. Fronteddu (Eds.) *Social Policy in the European Union: State of Play 2020* (European Trade Union Institute 2020); see also Eleanor Brooks and Robert Geyer, ‘The development of EU health policy and the Covid-19 pandemic: trends and implications’ (2020) 42 *Journal of European Integration* pp. 1057-1076.

⁸ Kai P. Pernhagen, Anniek de Ruijter, Mark L. Flear, Tamara Hervey and Alexia Herwig ‘More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the Covid-19 Outbreak’ (2020) *European Journal of Risk Regulation* pp. 297–306.

frameworks that have emerged over time in order to enable the Union to operate as an internal market for goods, services and workers.”⁹

However, EU policy regarding health emergencies has incrementally developed largely, if not exclusively, in reaction to earlier epidemic threats.¹⁰ The European Centre for Disease Control was established in 2005 in response to the SARS outbreak (2003), while provisions for the joint procurement of vaccines were established following Swine Flu (2009). Decision No. 1082/2013 on serious cross-border threats to health [Threats to Health Decision] brought the EU in line with the World Health Organisation’s International Health Regulations (to which all EU member states are bound), which aimed to enhance surveillance, monitoring and notification mechanisms for threats to public health, including not only communicable diseases but also biological, chemical, and environmental threats, as well as to establish a mechanism for joint procurement of medical countermeasures, and to coordinate and complement national health policies. The Decision also gave formal status to the Health Security Committee, and advisory body to the Commission and Member States’ ministers of health, while also enhancing the European Centre for Disease Control and the European Early Warning System. A final mechanism to highlight in this context, is the Civil Protection Mechanism [CPM] established in 2001. The CPM aimed to strengthen cooperation between Member States in the event of a disaster, and through this the Emergency Response Coordination centre supports mobilisation of assistance. However, while both the 2013 Decision and the CPM operated as expected in response to the pandemic, “their capacity and reach was inevitably insufficient.”¹¹

3. Responding to the COVID-19 Pandemic: Main governance and rule of law disruptions during COVID-19.

3.1 Overview of EU Member States’ Response to the COVID-19 Pandemic

The primary authority for response to a public health emergency lies with the EU Member States, as the EU has relatively few competences in the field of health.¹² Restrictive measures, including border closures, and internal restrictive measures on travel, congregation and assembly were unilaterally introduced by Member States either at national or domestic regional

⁹ Editorial, ‘Beyond COVID-19: Towards a European Health Union’ (2020) 11(4) European Journal of Risk Regulation pp. 721 – 725.

¹⁰ Brooks and Geyer, *supra* note 7.

¹¹ *Ibid.*

¹² See *supra* section 2.2.

levels, as determined by internal legal and constitutional requirements. Within the EU, a majority of Member States' executive authorities have been the primary decision-makers in determining action to be taken in response to the health emergency. As introduced above,¹³ the legal bases for the use of executive powers have varied significantly, depending on the constitutional and legal architecture (and in some cases, political environment) which is unique to each Member State.

The initial primacy of the executive in decision-making during the health crisis emergency is both unsurprising and can be justified on the basis of the need for urgent action which may not be delivered nor guaranteed by the legislature in a timely manner.¹⁴ The Italian government was the first to introduce a highly restrictive national lockdown in March 2020,¹⁵ followed quickly by other governments throughout the EU, including France,¹⁶ Spain¹⁷ and Ireland.¹⁸ Critically, from an EU perspective, this included intra-EU border closures, and restrictions on the free movement of people and goods across borders. Beyond this, Member States' responses to COVID-19 have varied significantly across the European Union, both in terms of the severity of restrictions and the forms and means by which governments and legal systems have reacted. During the October 2020 to February 2021 period (broadly aligning with the 'second wave' of COVID-19) 14 Member States adopted highly restrictive measures (e.g., border closure, curfews, closure of education and non-essential services, limitation of freedom of movement); 9 countries significantly restrictive measures (e.g. border restrictions, all public assemblies banned, education services limited, businesses limited, mandatory masks in public); and the remaining 4 adopted moderately restrictive measures (e.g. border restrictions, large-

¹³ See supra section 2.1.

¹⁴ See Gross Oren and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006); and Cormacain, Ronan, 'Keeping Covid-19 Emergency Legislation Socially Distant from Ordinary Legislation: Principles for the Structure of Emergency Legislation' (2020) *The Theory and Practice of Legislation*, DOI: 10.1080/20508840.2020.1786272.

¹⁵ See Julinda Beqiraj, 'Italy's Coronavirus Legislative Response: Adjusting Along the Way' (Verfassungsblog 8 April 2020) <<https://verfassungsblog.de/italys-coronavirus-legislative-response-adjusting-along-the-way/>> (accessed 9 June 2021).

¹⁶ Sébastien Platon, 'From One State of Emergency to Another – Emergency Powers in France' (Verfassungsblog 9 April 2020), <<https://verfassungsblog.de/from-one-state-of-emergency-to-another-emergency-powers-in-france/>> (accessed 9 June 2021).

¹⁷ Cebada Romero and Dominguez Redondo, supra note 3.

¹⁸ Doyle, supra note 5.

scale public assemblies banned [over 500+ participants], but all education services remain open).¹⁹

While the EU's Single Market is founded on the guarantee of the four freedoms of goods, people, capital and services which otherwise prohibit any restriction, particularly a mass restriction on movement based on country of origin across EU borders, it should be early noted that derogations under certain circumstances are permissible. The introduction of restrictive measures derogating from the provisions of EU free movement can be justified on the basis of the protection of public health, as provided for by the Treaties (e.g., Article 45 TFEU in the context of the free movement of workers across borders, and limitations on the rights of entry for EU citizens and their families under Directive 2004/38). Thus, the question of whether the EU would take action against Member States which closed their borders to internal movement was never at issue.

While government-led decision-making has primarily characterised the COVID-19 response among the majority of EU Member States, it is important to highlight the important role of courts and legislatures in the pandemic. As a first point, a fundamental safeguard against the abuse of power in emergencies, not to say necessary for a democratic state based on the rule of law, is the provision of oversight of government action by parliaments, as well as access to justice and judicial scrutiny through the courts. Particularly where rights have been impacted for such an extended period, these checks on power are all the more important. The experiences of Member States show the relevance and positive contributions of parliaments, even where there is limited time for parliamentary debate or wider public and stakeholder engagement due to measures limiting movement and assembly. Examples include the practice of standing committees in Finland²⁰ and specially constituted committees scrutinising action in Denmark.²¹

¹⁹ J Grogan, '[Extraordinary or extralegal responses? COVID-19 and the rule of law in Europe](https://democracy-reporting.org/dri_publications/extraordinary-or-extralegal-responses-covid-19-and-the-rule-of-law-in-the-eu/)' *Democracy Reporting International* (2021), <https://democracy-reporting.org/dri_publications/extraordinary-or-extralegal-responses-covid-19-and-the-rule-of-law-in-the-eu/> (accessed 10 June 2021).

²⁰ Martin Scheinin, 'Finland: Soft measures, respect for the rule of law, and plenty of good luck: Overview of Legal and Political Response and Adaptation to COVID-19' (Verfassungsblog 23 February 2021), <<https://verfassungsblog.de/finland-soft-measures-respect-for-the-rule-of-law-and-plenty-of-good-luck/>> (accessed 10 June 2021).

²¹ Kristian Cedervall Lauta, 'The Eternal Emergency? Denmark's Legal Response to COVID-19 in Review' (Verfassungsblog 22 March 2021) <<https://verfassungsblog.de/the-eternal-emergency-denmarks-legal-response-to-covid-19-in-review/>> (accessed 10 June 2021).

In terms of access to courts, some Member States have been challenged by the need to balance the limitation of assembly and gatherings, with the right of access to courts – particularly where there is not (yet) sufficient technology supporting remote access to hearings or domestic procedures which enable it. Measures introduced by governments have often had a consequent effect of restricting access to the courts. In the first phase of the pandemic, this has included temporarily closing courts (e.g., Bulgaria and Hungary) and/or limiting access to extremely urgent or critical cases (e.g., Denmark). While the move to increasing online hearings and submissions is positive, this can present new challenges where vulnerable suspects or witnesses may have limited access to the internet, there is lack of technological education, or an unstable environment in which to participate.

3.2 Key Measures Adopted by EU in response to the COVID-19 Pandemic

Despite the limitations outlined as regards the capacity of the European Union to institutionally respond to the global health emergency, there have nevertheless been key EU responses to the COVID-19 pandemic which should be highlighted in understanding EU institutional response. These can be grouped broadly in three categories: external border control measures; measures regarding the procurement of PPE and medical equipment; and measures regarding exit strategies. A fourth action has been the introduction of the EU4Health regulation.

3.2.1 Border Controls

In support of the initial number of Member States' decision to restrict movement, on 17 March 2020, the President of the Commission Ursula von der Leyen, with the President of the European Council Charles Michel closed the Union's external borders to non-EU nationals for an initial period of 30 days, restricting entry to a smaller category of persons including non-EU family members of EU nationals, long-term residents, healthcare workers and people transporting goods. On 13 October 2020, EU Member States adopted a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic. It called on Member States to adopt a joint strategy concerning coordinated colour-coded mapping, common criteria for the introduction of travel restrictions,

clarity on measures for travel to/from high-risk areas, and the provision of information to the public.²² As a recommendation, however, this is not legally binding on states.

An essential concern of the Internal Market has been how to ensure the guarantee of the free movement of goods across borders during the pandemic. On 23 March 2020, the Commission issued guidance on the establishment of ‘green lane’ internal border crossings, to be open for freight vehicles in an effort to minimise trade and supply chain disruption.²³ These ‘green lane’ channels would require procedures including health checks and screenings would take no more than 15 minutes.

3.2.2 Public procurement, PPE and Medical Equipment, and vaccine policy

While an EU medical stockpile had been approved in 2019,²⁴ it had not been implemented in time to serve EU Member States having difficulty in procuring essential medical and PPE equipment in 2020.²⁵ In the early pandemic, “national governments adopted border closures and bans on the export of crucial supplies, obstructing freedom of movement and exhibiting behaviour indicative of European disintegration.”²⁶ National concerns for shortages of PPE materials, led to the expectation of “an increase of these protectionist reactions as more goods become scarce with the spreading of the disease. This reflects a more general problem: asymmetric COVID-19 policies create conflicting interests that, in turn, undermine cooperation between states.”²⁷ The consequent crisis of solidarity arose when Italy triggered the Civil Protection Mechanism in March 2020 due to shortages in PPE which was unanswered by EU neighbours concerned for their own supplies.

The EU and its Member States have adopted a common strategy for the procurement of vaccines. The EU Vaccines Strategy, published by the Commission in June 2020 has resulted in the authorisation of four vaccines (BioNTech-Pfizer, Moderna, AstraZeneca, and Johnson&Johnson) and in return for the right to buy certain doses within an agreed timeframe,

²² 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.

²³ Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services, Brussels, 23.3.2020 C(2020) 1897 final.

²⁴ European Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities.

²⁵ Brooks et al, supra note 7.

²⁶ Brooks and Geyer, supra note 7.

²⁷ Alessio M. Paces and Maria Weimer, ‘From Diversity to Coordination: A European Approach to COVID-19’ (2020) 11 European Journal of Risk Regulation p.283.

the Commission has financed part of the initial costs of the producers through Advance Purchase Agreements. The objectives of the strategy underline the quality, safety and efficacy of the vaccines, while also securing timely access as well as equitable and affordable access to the vaccines as early as possible. Responding to criticism regarding the opaque export of vaccines out of the EU, the Commission introduced an export authorisation scheme in January 2021 and expiring on 30 March 2021 required such exports to be subject to national authorisation though excluded the supply of vaccines intended for the humanitarian aid or as part of the COVAX facility.

3.2.3 Exit strategies

In April 2020, the Commission published a roadmap for a coordinated EU exit strategy,²⁸ seeking to resolve the negative consequences arising from the ‘jumble’ of national strategies which had so far categorised. However, this was met with initial scepticism by Member States, and soon dropped.²⁹ In a survey of Member States between October and February 2021, experts in only four states (France, Czech Republic, Lithuania and the Netherlands) identified clear de-escalation and exit strategies.³⁰ On one view, certainly pertinent to May 2020, it is still premature to consider exit, or de-escalation strategies, where the existing situation of risk still requires them and public pressure to reduce restrictions may not be rationalised in light of the prevailing epidemiological conditions. However, seeing no clear way out of the emergency (even where timing for the reduction of measures may change) may ultimately erode the public’s willingness to follow the restrictive measures and undermine the road to recovery, giving the impression that governments are not in control of the situation, but only responding to it.

There are, however, developments in the move to facilitate free movement of people. In March 2021, the Commission introduced plans to provide for a ‘Green Certificate’ equivalent to a vaccine passport indicating that the holder has received a vaccination. While this was an effort to reopen travel within the EU, and likely also support regions otherwise devastated from the lack of tourism in 2020-2021, it has raised a host of ethical, legal, and

²⁸ European Commission, “A European Roadmap to Lifting Coronavirus Containment Measures” (Communication 15 April 2020) <https://ec.europa.eu/info/files/european-roadmap-lifting-coronavirus-containment-measures_en>.

²⁹ “Brussels Drops Lockdown Exit Plan after Anger from Capitals”, *Politico*, 7 April 2020 <<https://www.politico.eu/article/commission-to-unveil-exit-strategy-as-countries-push-to-lift-corona-measures>>.

³⁰ Grogan, supra note 19.

practical concerns.³¹ In brief, these concerns relate to the potential for discrimination between those (un)vaccinated highlighting the unequal access to vaccines across European populations (e.g. urban versus rural populations; higher vaccination rates among certain Member States), as well as the lack of EU-recognition for vaccines (e.g. the Russian Sputnik V vaccine) which have been administered in some EU Member States which means these populations may not be certified as vaccinated. Questions of data privacy and surveillance tracking have also been raised in the context of the Green Certificates. In response to such concerns, the Commission has designed a system which verifies certification without exchange or retention of personal data. The Green Certificates Regulation³² was adopted, and will come into force on 1 July 2021, with seven Member States (Bulgaria, Czechia, Denmark, Germany, Greece, Croatia and Poland) adopting it a month early.

3.2.4 EU4Health Programme

On 24 March 2021, the Commission introduced Regulation 2021/522 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the financial period 2021-2027. In the context of future preparedness, one of the programme's specific objectives is under Article 4(b):

“Specific objective: strengthening the capability of the Union for prevention of, preparedness for, and rapid response to, serious cross-border threats to health in accordance with relevant Union legislation, and improving the management of health crises, particularly through the coordination, provision and deployment of emergency healthcare capacity, supporting data gathering, information exchange, surveillance, the coordination of voluntary stress testing of national healthcare systems, and the development of quality healthcare standards at national level.”

³¹ See e.g. Alberto Alemanno and L Bialasiewicz, 'Covid-19: «Le passeport vaccinal européen, une idée au mieux prématurée, au pire irréfléchie»' (Le Monde 26 January 2021), <https://www.lemonde.fr/idees/article/2021/01/26/covid-19-le-passeport-vaccinal-europeen-une-idee-au-mieux-prematuree-au-pire-irreflechie_6067602_3232.html> (accessed 8 June 2021) ; and Oskar J. Gstrein, Dmitry V. Kochenov, and Andrej Zwitter, 'A Terrible Great Idea? COVID-19 'Vaccination Passports' in the Spotlight' *Compass Centre on Migration Policy and Society Working Paper No. 153* (March 2021).

³² Regulation of the European Parliament and Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate) COM/2021/130 final.

Further provisions concern procurement in a health emergency situation (Article 9). As the crisis underlined the challenges to the EU in terms of procurement and ensuring the supply of materials, pharmaceutical ingredients and medical products, further commitments are made to foster production, procurement, and management to mitigate risk of shortages. One positive aspect of the programme is its commitment to stakeholder engagement, including with representatives of civil society and patient organisations, as well as the exchange of best practices and an effort to increase the number of joint actions among Member States, including for the efficient and needs-driving distribution and allocation of goods and services during crisis. A positive assessment by Brooks and Geyer concludes that “if stretched to their fullest, these provisions would underpin a significant expansion in the EU’s health activity, into politically sensitive and substantively complex areas.”³³

3.3 EU Institutional Response

3.3.1 European Commission

Under EU health policy, the EU Commission is intended to play a central role in the coordination and support of EU Member States’ national policies and actions in the field, through the exchange of information, and maintenance of structures intended to operate during a health crisis. However, at nearly all points early in the Commission’s response to the crisis, this action was delayed or limited. The Commission’s advisory panel on COVID-19 was established only in mid-March 2020,³⁴ nearly two months following the declaration of a global health emergency.

“[...] the lack of coordination at the EU level became even more evident when national leaders sought to legitimise their decisions by giving voice to national experts, in the absence of multinational meta-analytical infrastructure or supranational coordination mechanisms, or even coherent systems for sharing procedures and protocols.”³⁵

Reflecting the limited nature of legal competences at EU level, the Commission has issued a series of guidelines and communications aiming to support and coordinate Member

³³ Brooks and Geyer, *supra* note 7.

³⁴ European Commission Decision of 16 March 2020 setting up the Commission's advisory panel on COVID-19.

³⁵ Jacint Jordana and Juan Carlos Trivino-Salazar, ‘Where are the ECDC and the EU-wide responses in the COVID-19 pandemic?’ (2020) *The Lancet* pp. 1611-1612.

States' actions. For example, within a short period the Commission produced the COVID-19 Guidelines for Border Management Measures to Protect Health and Ensure the Availability of Goods and Essential Services, the Guidelines on EU Emergency Assistance in Cross-Border Cooperation in Healthcare related to the COVID-19 crisis, and the Recommendation App on Contact Tracing. Further communications aimed to support other EU agencies and overall coordination strategies, for example, the Communication of Commission of 11 November 2020 entitled 'Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats'. This included actions directed at strengthening preparedness planning and response capacity at national and Union level, at reinforcing the role of the European Centre for Disease Prevention and Control (ECDC) and the European Medicines Agency (EMA), and at establishing a health emergency preparedness and response authority. The overall aim is to build capacity for responding to health crises, implementing preventive measures related to vaccination and immunisation, strengthened surveillance programmes, provision of health information, and platforms to share best practices.

3.3.2 European Parliament

As it happened at national level, the European Parliament has little involvement with emergency decision-making at EU level, reflecting the primacy of intergovernmental decision-making in times of crisis. By analogy, the relative lack of input during the 2009 Financial Crisis could be mentioned as an example. Due to pandemic restrictions, parliamentary work had been restricted and plenaries cancelled in the early stages of the viral outbreak and the European Parliament has mainly worked under the 'urgent procedure', adopting legislative texts at speed – thus raising rule of law concerns similar to those emerging with national parliaments.³⁶ However, on its own initiative, it has investigated and expressed concern over the quality of democracy in the EU as a direct consequence of the forms of decision-making and governance adopted in response to the pandemic.

In November 2020, it adopted a Resolution on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights, calling on Member States to ensure

³⁶ Nicolai von Ondarza, 'The European Parliament's Involvement in the EU Response to the Corona Pandemic: A Spectator in Times of Crisis' SWP Comment 2020/C 45 (October 2020).

compliance of their measures with the standards of the rule of law and human rights.³⁷ Wide ranging in its calls, the resolution highlights the disproportionately negative impact of both the pandemic and measures adopted in response to it, on groups including women, children, journalists, defendants, and asylum seekers, as well as concerns for the discriminatory treatment of groups including the Romani, and LGBTQ+. The Resolution calls on the Commission to commission an evaluation of Member States' measures "in order to generate lessons learned, share best practices and enhance cooperation, and to ensure that measures taken during subsequent waves of the pandemic are effective, targeted, well justified on the basis of the specific epidemiological situation, strictly necessary and proportionate, and to limit their impact on democracy, the rule of law and fundamental rights"³⁸ It does not, however, highlight further improvements which could be made to EU institutional compliance with the rule of law.

3.3.3 The Court of Justice of the European Union

Changes to the operation of the Court of Justice followed those of national judicial systems to adapt to the circumstances arising from the pandemic, and the consequences of national restrictions on travel. Since March 2020, procedures were adapted to extend time limits for submissions by one month for preliminary reference requests made to the European Court of Justice; while the capacity for video conferencing for parties unable to travel to Luxembourg was introduced along with the possibility of replacement of oral hearings with written responses. The level of preparedness of the Court has been praised,³⁹ highlighting that contingency planning had been updated as recently as December 2019 to allow for continuity of court business through videoconferencing.

3.3.4 EU Agencies: European Centre for Disease Prevention and Control

The European Centre for Disease Prevention and Control [ECDC] was established in 2004 with a mandate to monitor for the threat of communicable diseases. However, limited resourcing,

³⁷ European Parliament resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights ([2020/2790\(RSP\)](#)).

³⁸ Ibid, art 21.

³⁹ Costas Popotas, 'COVID-19 and the Courts. The Case of the Court of Justice of the European Union (CJEU)' (2021) *International Journal for Court Administration* p.4.

few allocated legal powers, and the existence of both national institutions and provisions on pandemics has arguably limited the extent to which it can function beyond an information hub.⁴⁰ In her report following an inquiry into the efficacy and actions of the ECDC, the European Ombudsman urged for new powers to be given to the agency to improve its future capacity to respond to pandemics.⁴¹ Particular criticism was levelled where the ECDC did not have autonomous competence to independently collect data and had to rely on – often unreliable or incomplete – submission of national data. The lack of transparency (and so accountability) of certain ECDC practices was also heavily criticised, where risk assessments and data underlying them, as well as communications with international partners including the WHO and the Chinese CDC were not published or made available.

3.3.5 Assessment

In response to the pandemic, the EU has been hindered by both lack of legal powers, but also (and consequently) a lack of resourcing and institutional capacity to respond in a more robust fashion to the pandemic. However, as argued by Paces and Weimer,⁴² the EU has neither legal nor ‘sufficiently strong democratic-political authority’ to take leadership of the COVID-19 response. The reality of the decentralised and uncoordinated approaches adopted among EU Member States has likely given rise to damaging consequences for not only for citizens’ public health, but also the EU economy and core values.⁴³

A contrast can be made between the EU’s initial limited response to the COVID-19 health emergency, and the EU robust response and concretised actions taken in response to the Financial Crisis in 2009. Such contrast builds on the relative strength of competences (or arguably political will which enabled the coordination and introduction of measures at EU level) in the area of banking, finance and monetary policies, on the one hand, in distinction to the relative lack of competences in the area of health policy, on the other - even one with such immediate impact on the freedom of movement, and the EU internal market. A simple explanation offered has been that “because bank failures would potentially drag down state finances and the entire economy with them, eurozone governments had little choice but to come

⁴⁰ Jordana and Trivino-Salazar, *supra* note 35.

⁴¹ European Ombudsman, Decision in strategic inquiry OI/3/2020/TE on how the ECDC gathered and communicated information during the COVID-19 crisis

⁴² Paces and Weimer, *supra* note 27.

⁴³ *Ibid.*

to their rescue”.⁴⁴ It should be noted, however, that the relative absence of the European Union from decision-making processes in response to the pandemic is not unusual: other global and transnational institutions have so-far played a limited role largely providing information and analysis, rather than directing or determining action. The measures adopted to combat COVID-19 have been bound by both national borders and the limits of political will to create transnational and coordinated solutions to the global crisis.

4. Rule of Law concerns arising from COVID-19 responses

4.1 Rule of law in the EU

The concept of the rule of law, and the expectation of its enforcement or its justiciability as a common value among EU Member States has come under increasing scrutiny in the last decade, with the observable rise of ‘rule of law backsliding’ within certain Member States, most notably, Hungary and Poland.⁴⁵ The rule of law is recognised in Article 2 TEU as one of the values “common to the Member States” upon which the EU is founded.

The rule of law has been commonly viewed as a shared political ideal; the rule of law is a legal principle of constitutional value which forms part of the common legal heritage of the Member States, as well as a foundational value of the European Union and of the Council of Europe.⁴⁶ Based on the provisions of the Treaties and building on the jurisprudence of the Court of Justice, the European Commission offered a comprehensive definition of the core components of the rule of law in 2014.⁴⁷ The European Commission has further offered a definition of the rule of law, according to which:

“public powers must be bound by constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary

⁴⁴ Frank Schimmelfennig, ‘European Integration (Theory) in Times of Crisis: A Comparison of the Euro and Schengen Crises’ (2018) *Journal of European Public Policy* pp. 969–989, at p. 982.

⁴⁵ See Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

⁴⁶ See Laurent Pech and Joelle Grogan et al, ‘Meaning and Scope of the EU Rule of law’ RECONNECT Deliverable 7.2 (April 2020), p. 60. For analysis of the principle within EU member states, see L Pech, J Grogan et al, ‘Unity and Diversity in National Understandings of the Rule of Law in the EU’ RECONNECT Deliverable No 7.1 (May 2020).

⁴⁷ European Commission, ‘Communication to the European Parliament and Council, A New Framework to strengthen the Rule of Law’ (Communication) COM(2014) 158.

exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.”⁴⁸

Prior to the health crisis, the EU was amidst the on-going and so-called ‘rule of law crisis’, reflecting inter alia the dismantling of judicial independence and targeted attacks on NGOs and independent media among other cornerstones of liberal democracy leading to the increasing autocratisation of certain Member States. In 2017, Poland became the first EU Member State to be subject to the Article 7 TEU procedure out of concern that the state was at clear risk of a serious breach of the rule of law.⁴⁹ This had followed the activation and unsuccessful application of the Rule of Law Framework⁵⁰ against Polish authorities in 2016. In 2018, Hungary was referred to the Council by the Parliament, making it the second Member State ever subject to the Article 7 process. These processes so far have shown limited success in addressing the pressing concerns for rule of law backsliding in these states. The stresses and challenges of the COVID-19 pandemic on legal systems and ordinary governance have unfortunately provided a catalyst for further rule of law backsliding and decline.⁵¹

4.2 Rule of Law concerns in EU Member States’ Responses

In examination of the compliance with the rule of law of Member States’ responses to the pandemic, three significant concerns have emerged, relating first to the questionable legal basis for certain action, second to the uncertainty of legal measures and third to the lack of accountability of executive action.

Legality goes to the foundation of a state based on the rule of law: state action must have a sound basis in law.⁵² Across the world, the restrictive national measures which are not

⁴⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2020 Rule of Law Report: the rule of law situation in the European Union*, COM/2020/580 final.

⁴⁹ European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 20 December 2017.

⁵⁰ European Commission Communication, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final, 11 March 2014.

⁵¹ See e.g., V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, March 2020; J Grogan, ‘States of Emergency: Analysing Global Use of Emergency Powers in Response to COVID-19’ [2020] EJLR 338-354.

⁵² For analysis of key rule of law issues globally, see Joelle Grogan and Julinda Beqiraj, ‘Rule of Law as a Perimeter of Legitimacy for COVID-19 Responses’ (Verfassungsblog 17 April 2021), <<https://verfassungsblog.de/rule-of-law-as-a-perimeter-of-legitimacy-for-covid-19-responses/>> (accessed 9 June 2021).

easily paralleled in contemporary history for their scale and scope – including regional or national lockdowns, curfews, restrictions on assembly, and the long-term closures of businesses and educational institutions - have been primarily introduced through executive instruments. Beyond the discretionary powers often delegated by emergency powers, one issue exposed by the pandemic in the context of pre-existing legislation is that it was often unsuitable, and necessitated reform to account for the unique challenges which arose from the pandemic, most often in the form of an amendment to grant increased powers to the executive to adopt COVID-19 specific measures. The speed of amendments in some countries however afforded extraordinarily little time for meaningful review (e.g., only 12 hours for review of amendments to the Epidemics Act in Denmark⁵³) raising concerns for the *quality* of the law. In Cyprus, the government has relied on a colonial era Quarantine Law which largely omits any parliamentary competence and oversight, delegates significant power to the executive to adopt a wide range of restrictive measures. The constitutionality of the ‘ambiguous and outdated’ law has been criticised, as well as the self-limitation of the judiciary in reviewing the action of the government.⁵⁴ The Administrative Court in particular has adopted a highly restrictive approach to its competence in COVID-19 related cases raising concerns as to the capacity for accountability of government action.

Further concerns relate to increasing executive dominance, reflecting a trend prior to the pandemic of the increasing marginalisation of the legislature, raising further concerns for the lawful use of power where there is no or little checks on executive power.⁵⁵ In Hungary, the government has empowered itself to rule by decree without judicial review and with minimal or no parliamentary scrutiny through a series of bills passed through parliament, and a constitutional amendment effectively removing parliamentary scrutiny.⁵⁶ These decrees may suspend or diverge from law, and only the prime minister determines the end to the necessity of using emergency powers. In Slovenia, the near-exclusive use of executive power to enact

⁵³ Lauta, supra note 21.

⁵⁴ Constantinos Kombos, ‘Constitutional Improvisation and Executive Omnipotence: the Cypriot Handling of the Pandemic’ (Verfassungsblog 2 March 2021), <<https://verfassungsblog.de/constitutional-improvisation-and-executive-omnipotence-the-cypriot-handling-of-the-pandemic/>> (accessed 10 June 2021).

⁵⁵ Elena Griglio, Parliamentary oversight under the Covid-19 emergency: striving against executive dominance’ (2020) *The Theory and Practice of Legislation*. For an overview of reaction within the EU, see European Parliament, ‘Adjustment of Parliamentary Activity to COVID-19 Outbreak and the Prospect of Remote Sessions and Voting’ (2020) 27 *Spotlight of Parliaments in Europe*.

⁵⁶ Kriszta Kovács, ‘Hungary and the Pandemic: A Pretext for Expanding Power’ (Verfassungsblog 11 March 2021) <<https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/>> (accessed 10 June 2021).

rules related to the health emergency has been on the basis of the interpretation of pre-pandemic legislation which has gone beyond ‘acceptable legal interpretation’ to allow for such action by government.⁵⁷ Scholars in France argued that there were sufficient legal bases for action under normal legal order, and so the creation and extension of a ‘state of health emergency’ has raised significant concerns for the appropriateness, necessity and proportionality of measures adopted by government on its basis, particularly where it concerns constitutional rights.⁵⁸ In Poland, the use of secondary legislation to limit human rights and freedoms is not permitted under constitutional law, requiring such restrictions to be introduced by parliament, not government.⁵⁹

A second issue has been the uncertainty of COVID-19 measures. Frequently changing rules and requirements, which have been inconsistently enforced or interpreted, undermines both the rules and the capacity of the population to follow them. In the Czech Republic (and far from an outlier), 65 resolutions were issued by the executive over two months in March-May 2020 containing rules, and exceptions, and exceptions to the exceptions, requiring a near impossible level of attention to legal detail by the general population.⁶⁰ Heightening confusion, the rules were also introduced with little or no notice, and sometimes with retrospective application. Similarly, little or no notice to frequently changing rules was reported in Italy,⁶¹ while the uncertainty on the meaning of legal definitions used in legislation caused uncertainty of application in Belgium.⁶² In Bulgaria, a specialised COVID-19 website was created by government. However, the website is only in Bulgarian, leaving language minority groups, including Roma and Turkish minorities, unable to access this information. Other marginalised

⁵⁷ Samo Bardutzky and Saša Zagorc ‘Slovenia: Second Wave of Challenges to Constitutionalism’ (Verfassungsblog 9 March 2021), <<https://verfassungsblog.de/slovenia-second-wave-of-challenges-to-constitutionalism/>> (accessed 10 June 2021).

⁵⁸ Marie-Laure Basilien-Gainche, ‘French Response to COVID-19 Crisis: Rolling into the Deep’ (Verfassungsblog 18 March 2021), <<https://verfassungsblog.de/french-response-to-covid-19-crisis-rolling-into-the-deep/>> (accessed 10 June 2021). See also, Platon, *supra* note 19.

⁵⁹ Jaraczewski, *supra* note 6.

⁶⁰ Nika Bačić Selanec, ‘COVID-19 and the Rule of Law in Croatia: Majoritarian or Constitutional Democracy?’ (Verfassungsblog 27 April 2021), <<https://verfassungsblog.de/covid-19-and-the-rule-of-law-in-croatia-majoritarian-or-constitutional-democracy/>> (accessed 10 June 2021).

⁶¹ Cristina Fasone, ‘Coping with Disloyal Cooperation in the Midst of a Pandemic: The Italian Response’ (Verfassungsblog 8 March 2021), <<https://verfassungsblog.de/coping-with-disloyal-cooperation-in-the-midst-of-a-pandemic-the-italian-response/>> (accessed 10 June 2021).

⁶² Maaike De Ridder, ‘Belgium’s Accordion Response to COVID-19’ (Verfassungsblog, 10 March 2021), <<https://verfassungsblog.de/belgiums-accordion-response-to-covid-19/>> (accessed 10 June 2021).

communities with limited access to the internet and low literacy rates have also struggled with access to information on COVID-19.⁶³

In terms of accountability, beyond the initial challenges that COVID-19 measures have presented in terms of access to justice, some courts too have been marked in their deference towards the decisions of government during pandemic, and declined review of either emergency measures or even the declaration of emergency for lack of competence (e.g., in the Czech Republic⁶⁴ and Romania⁶⁵). However, this deference to government decision-making in an emergency may wane, as past experience indicates that judicial scrutiny of the use of emergency powers becomes stricter over time, though beginning with an initial deference.⁶⁶

A related issue has been the limited degree of oversight by parliaments of executive action in the response to COVID-19. Such oversight acts as an essential check on power but can also improve the quality and therefore effectiveness of the measures. Initial responses to the pandemic were marked with the apparent exclusion of parliament in decision-making processes (e.g., Estonia⁶⁷).

Where there is limited capacity for parliamentary sessions, committees and equivalent can be best placed to provide fact-finding parliamentary oversight of government action through and following the emergency.⁶⁸ While the emergency situation is rapidly changing, involving complex, context-specific and rapidly evolving policy, the possibility of the normal mechanisms of stakeholder engagement may appear more challenging.⁶⁹ In the EU, 24 of 26 states surveyed by Democracy Reporting International indicated that parliaments were fully operational by October 2020, less than 40% either regularly scheduled debates on COVID-19 measures or provided for committees, commissions or groups specially constituted for providing oversight to COVID-19 measures.⁷⁰ Review of COVID-19 measures was even more

⁶³ Radosveta Vassileva, 'COVID-19 in Autocratic Bulgaria: How the Anti-Corruption Protests Temporarily Limited the Abuse of Questionable Legislation' (Verfassungsblog 5 March 2021), <<https://verfassungsblog.de/covid-19-in-autocratic-bulgaria/>> (accessed 10 June 2021).

⁶⁴ Zuzana Vikarská, 'Czechs and Balances – One Year Later' (Verfassungsblog 30 March 2021) <<https://verfassungsblog.de/czechs-and-balances-one-year-later/>> (accessed 10 June 2021).

⁶⁵ Bianca Selejan-Gutan, 'Romania: COVID-19 Response in an Electoral Year' (Verfassungsblog 26 March 2021) <<https://verfassungsblog.de/romania-covid-19-response-in-an-electoral-year/>> (accessed 10 June 2021).

⁶⁶ Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency' (2009) 28 *Yearbook of European Law* 664, pp. 693-94.

⁶⁷ See Maruste, supra note 2.

⁶⁸ Griglio, supra note 55; Malcolm Shaw, 'Parliamentary Committees: A Global Perspective' (1998) 4 *Journal of Legislative Studies* 225, p. 236.

⁶⁹ See Cormacain, supra note 14.

⁷⁰ Grogan, supra note 19.

limited, with only 31% or less of states identifying parliamentary review and/or amendment of restrictive COVID-19 measures. Spain was alone in not raising either some or significant concerns on the efficacy of judicial and legislative scrutiny from a rule of law perspective. The lack of legislative oversight relates too to the lack of public input (90% of states identified this as problematic) and transparency in decision-making.

As a final point on the rule of law and response by EU Member States, it can be observed that no one constitutional model of emergency power (or use of power during emergency) has been shown to be immune from potential instances of misuse or even abuse, nor are there clear avenues for EU intervention in the use of emergency powers within the context of a national crisis. During the first phase of the pandemic (January – August 2020), there is little by way of evidence that those states which relied exclusively on emergency powers were more likely to be abusive in their practices than those states which relied exclusively on ordinary powers.⁷¹ However, the extended reliance on emergency provisions (particularly where they attach to significantly broad and discretionary powers) over the course of a year since the declaration of the pandemic emergency has given rise to increasing criticism.⁷² The justifications for the necessity of action taken with little notice, and less oversight of parliaments, should come under increasing question – particularly where good practices are emerging as to the most effective pharmaceutical and non-pharmaceutical interventions in controlling the pandemic. In the Czech Republic, following successive declarations of states of emergency by the executive (including one found to be unconstitutional by the Chamber of Deputies), the legislative path was cleared for a ‘Pandemic Act’ bringing management and control of the pandemic under the auspices of the Parliament.⁷³ The continued centrality of executive decision-making over the extended period of the pandemic has deepened worldwide concerns for a continued trend towards ‘executive aggrandisement’ whereby government expand powers or authority at the expense of other branches of state and the protection of rights, and which can represent a permanent shift in the balance of powers.

4.3 Rule of Law concerns in EU institutional responses

⁷¹ See Grogan, *supra* note 51.

⁷² See e.g. in Denmark, Laut, *supra* note 21.

⁷³ See Vikarská, *supra* note 64.

It can be challenging to clearly assess EU institutional compliance with the rule of law in its responses to the COVID-19 pandemic where the most restrictive measures, and most concerning practices, have been adopted, implemented and applied by Member States. As examined above, the EU has had comparatively a limited role in response to the pandemic and so the same concerns for legality and legal uncertainty of actions have not arisen to the same or comparable extent. However, there are certainly still points of concern relating primarily to the transparency of EU action, and the need for further inquiry into the actions taken by EU institutions and agencies in response to the pandemic. As highlighted by the European Ombudsman in her inquiry into the ECDC, though equally applicable to all EU institutions charged with the protection of the public, “Transparency and accountability should be the bedrock of an institution that has a role in protecting public health.”⁷⁴

In terms of cases pending before the CJEU, only two coronavirus-related cases have begun in the form of applications lodged before the General Court, both relating to transparency and accountability of Commission action. In Case T-633/20, an application⁷⁵ has been lodged before the General Court on a matter related to coronavirus challenging the legality of Regulation (EU) 2020/1043 on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19), arguing inter alia for the breach of essential procedural requirement for lack of public consultation; and non-compliance with the precautionary principle and legitimate expectations, as well as the principles of subsidiarity and proportionality.⁷⁶ In Case T-151/21, the applicants seek an order to annul the Commission decision refusing them access to communications between the Commission, BioNTech and the German Federal Chancery and Minister for Health regarding the purchase of vaccines, arguing on the basis of the right of access to information under Regulation (EC) No 1049/2001, and the overriding public interest in disclosure.

5. Conclusions

⁷⁴ European Ombudsman, ‘Ombudsman calls on ECDC to be more open about its work as vaccine rollout begins’ Press Release 1/2021 (8 February 2021), <<https://www.ombudsman.europa.eu/en/press-release/en/137880>> (accessed 10 June 2021).

⁷⁵ Case T-633/20 *CNMSE and Others v. Parliament and Council*, Action brought on 9 October 2020.

⁷⁶ Regulation (EU) 2020/1043 of the European Parliament and of the Council of 15 July 2020 on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19) (OJ 2020 L 231, p. 12).

The EU can sometimes be described as a ‘good-weather project’ – in times of significant economic growth and political stability, the values of solidarity, democracy, rule of law and the protection of rights are comparatively easy, if not convenient, to espouse. However, such values are only meaningful when they are *inconvenient*. At least in the first phase of the pandemic, the nationalism and protectionism of action, coupled with a lack of response and leadership by EU institutions hampered by a lack of institutional capacity and legal authority, showed the weaknesses of the EU in ‘bad weather’. There was argument that, even prior to the current pandemic, the EU should improve its capacity to be resilient and “to be prepared for unknown risks; adaptation, learning by doing and flexibility as a way to respond to shocks, embrace change to live with rather than completely eliminate uncertainty”⁷⁷ A reality, at least in the context of health crises, is that such preparation is likely to be reactive, not pre-emptive – a point reflected globally and with startling insight just prior to the pandemic:

“[...] for too long, we have allowed a cycle of panic and neglect when it comes to pandemics: we ramp up efforts when there is a serious threat, then quickly forget about them when the threat subsides.”⁷⁸

While it is likely, and as evidenced by the EU4Health Regulation, that the COVID-19 pandemic will prove a catalyst for further development EU health policy, particularly in the context of reaction and response to pan-European health crises, there are arguably still strong points to be presented against integrating and centralising reaction to public health responses away from Member States. The complexity of the organisation of national healthcare systems, which necessarily relies on political decision-making in the allocation of scarce state resources, makes national governments (or, as in Germany and Sweden, regional governments) better placed for both the democratic accountability, but also knowledge and familiarity on how best to deliver health services to populations. Governments carry direct political responsibility for decisions made in such critical sectors health, tax and education – and such direct political and democratic accountability (or authority) is had by the European Commission.⁷⁹

⁷⁷ Ana E. Juncos, ‘Resilience as the New EU Foreign Policy Paradigm: A Pragmatist Turn?’ (2018) 26(1) *European Security* pp. 1–18.

⁷⁸ Global Preparedness Monitoring Board, “A World at Risk”, Annual report on global preparedness for health emergencies, September 2019 <https://apps.who.int/gpmb/assets/annual_report/GPMB_annualreport_2019.pdf> (accessed 10 June 2021).

⁷⁹ Paces and Weimer, supra note 27.

In reviewing how the EU states and institutions have fared in response to the COVID-19 crisis, there will be an opportunity for states and international bodies to examine and review their constitutional and legal architecture, as well as health and crisis response preparedness. In the reconstruction of emergency frameworks and drafting and reform of emergency frameworks, it can be argued that legislative drafting which invites public input can improve the quality and certainty of measures, and provide clear legal basis (and limits) for government action. Regularised and focused parliamentary scrutiny in the form of specialised committees or commissions, as well as independent review, can highlight deficiencies in need of reform. Collectively, improving the law and the use of law can encourage and bolster public trust in governance both at national and EU level which is, of itself, the single most important element in the most successful strategies in response to the pandemic.