

# The EU Approach towards Disaster Management

## *A Critical Appraisal in the Light of the Action Put in Place to Face the COVID-19 Pandemic*

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### 1 Introduction<sup>1</sup>

It has become a commonplace circumstance that the EU is the regional international organisation with the most elaborated toolkit in the field of disaster management.<sup>2</sup> This is not surprising *per se*, given the level of political and legal integration that the Organization has been able to reach during the decades. Such integration has indeed led to the elaboration of a cooperation platform among the Member States that facilitates effective management of disaster scenarios. A clear example of that is the establishment of an internal market where goods and persons may circulate freely on a daily basis, thus making cross-border assistance easier where needed. Also relevant in this respect is the role played by solidarity at a supranational level. Even though the legal implications flowing from that concept are still vague and in the shadow,<sup>3</sup> it is evident that the idea of a *de facto* solidarity to be reached among the Member

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2 Marco Gestri, 'EU Disaster Response Law. Principles and Instruments' in Andrea de Guttry et al. (eds), *International Disaster Law* (T.M.C. Asser Press 2012) 105. This contribution adopts the notion of 'disaster' which is contained in the Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism OJ L347, 20 December 2013, 924. Pursuant to Article 4(1) of the Decision disaster 'means any situation which has or may have a severe impact on people, the environment, or property, including cultural heritage'.

3 Andrea Biondi et al. (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar 2018). In a recent high-profile case concerning a dispute related to the planned OPAL pipeline, the EU Court of Justice has made it clear that the principle of solidarity is 'one of the fundamental principles of EU law'. Case C-848/19 P *Germany v Poland* ECLI:EU:C:2021:598, para. 38. For a commentary, see Max Münchmeyer, 'The principle of energy solidarity: *Germany v Poland*' (2022) 59 *Common Market Law Review*, 915.

States, an idea firstly evoked in the political manifesto of the European integration process – that is, the 1950 Schumann Declaration (‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity’)<sup>4</sup> – has significantly contributed to the elaboration of a specific EU disaster management toolkit.<sup>5</sup>

This said, the purpose of this contribution is neither to provide a comprehensive analysis of all legal tools elaborated in Europe to face disaster scenarios nor to review their global effectiveness.<sup>6</sup> Instead, it intends to carry out a legal assessment of the most relevant trends of EU disaster law in light of the EU reaction to the COVID-19 pandemic. Not only that reaction has represented the most powerful illustration of the EU capacities to manage disaster scenarios,<sup>7</sup> but, as stressed by some commentators, ‘[t]he pandemic has reopened old fault lines and amplified problematic trends in the Union, from economic disparities to diverging attitudes to the rule of law. Questions about cooperation, solidarity, trust, values, and thus about the fundamentals of integration and membership, are on the table.’<sup>8</sup> Looking at the way in which the EU and its Member States have faced the COVID-19 emergency gives thus the possibility to assess the impact of the supranational disaster law tools on the EU “constitutional framework”, the latter been conceived by the EU Court of Justice as a ‘structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other’.<sup>9</sup>

With this in mind, the remainder of this contribution has been divided into four further sections. Section 2 provides a summary of the impact generated by the measures adopted at the EU level to face the pandemic on the allocation

4 Available at <[https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950\\_en](https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en)> last accessed (as any subsequent URL) on 30 June 2022.

5 See Susanna Villani, *The concept of solidarity within EU disaster response law. A legal assessment* (BUP 2021) and Susanna Villani, ‘Perspectives of solidarity within the EU legal order in the time of the COVID-19 pandemic’, in this Yearbook.

6 For a general survey, see Gestri (n 1); Marcus Kotzur, ‘European Union Law on Disaster Preparedness and Response’ (2012) 55 *German Yearbook of International Law*, 253; Andrea de Guttry et al. (eds), *International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events. Towards an All-Hazards approach* (Brill 2022).

7 For a general overview of the EU’s response, see Giacomo Di Federico, ‘Stuck in the middle with you ... wondering what it is I should do. Some considerations on EU’s response to COVID-19’ (Eurojus.it, 2020) 60 and the Special Focus on COVID-19 and the EU, edited by Charlotte Beaucillon, which is hosted on the European Forum of European Papers.

8 Editorial Comments, ‘Disease and recovery in (COVID-afflicted) Europe’ (2020) 57 *Common Market Law Review*, 619.

9 Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para. 33.

of competencies among the Union and its Member States. That the divide between the EU and Member States' competencies still represents one of the most contentious issues in the evolution of the European integration process is no surprise.<sup>10</sup> Indeed, it represents one of the *leitmotivs* of that process. As it will be further clarified, the COVID-19 management by EU institutions has contributed to a (partial) shift in the legal debate surrounding the principle of conferral, which deserves to be noted. In this respect, after having illustrated the main features of that shift, the analysis will look at the prerogative powers retained by the Member States to maintain/preserve public order and national security, with a view to assess first to what extent those prerogative powers can still affect the effectiveness of the EU's action in disaster management. Then, the analysis moves to identify the underlying rationale of the approach shown by EU institutions. In the light of this, Section 3 describes the roles and responsibilities assumed by different EU institutions in dealing with the crisis, assessing their impact on the institutional framework (and balance) of the Union. Section 4 realises a general reflection on the main features and legal implications characterizing the instruments adopted by the Union in that context, with a particular emphasis on the recurrent use of soft-law acts. A summary of major outcomes is contained in Section 5.

## 2 Towards a Reshaping of the Allocation of Competences between the Union and Its Member States in Disaster Scenarios?

'In the last six months, our health systems and workers have produced miracles. Every country has worked to do its best for its citizens. And Europe has done more together than ever before. When Member States closed borders, we created green lanes for goods. When more than 600.000 European citizens were stranded all over the world, the EU brought them home. When some countries introduced export bans for critical medical goods, we stopped that and ensured that critical medical supply could go where it was needed. We worked with European industry to increase the production of masks, gloves, tests and ventilators. Our Civil Protection Mechanism ensured that doctors from Romania could treat patients in Italy or that Latvia could send masks to its

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10 See Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014); Sacha Garben and Inge Govaere (eds), *The Division of competences between the EU and the Member States. Reflection on the Past, the Present and the Future* (Hart Publishing 2020).

Baltic neighbours. *And we achieved this without having full competences*.<sup>11</sup> These words, solemnly pronounced by the President of the European Commission – Ursula von der Leyen – in front of the plenary of the European Parliament on the occasion of the 2020 State of the Union,<sup>12</sup> express better than anything else the impact of the COVID-19 emergency on the allocation of competences between the Union and the Member States.

No doubt, the Union has made significant recourse to pre-existing instruments pertaining to the so-called EU disaster law to face the COVID-19 crisis. In particular, as also mentioned by the President of the European Commission in her speech, the Union Civil Protection Mechanism – that is, the most relevant fully fledged instrument elaborated by the supranational legislature in the disaster management domain<sup>13</sup> – has been activated to: i) deploy assistance to States in need (also through the mobilization of rescEU medical reserves)<sup>14</sup> and ii) organize coordinated repatriation of EU citizens.<sup>15</sup> A relevant role has also been played by Decision No 1082/2013 on serious cross-border threats to support cooperation and coordination between the Member States to prevent and fight against the spread of the pandemic.<sup>16</sup>

Likewise, pre-existing powers for emergency support foreseen in the context of the economic, monetary and financial policies of the Union have been triggered.<sup>17</sup> Among the most relevant expressions of this course of action, one may include the decision to activate the so-called “general escape clause” of the Stability and Growth Pact;<sup>18</sup> the adoption of a temporary framework for

11 Emphasis added.

12 European Commission, State of the Union Address 2020 (16 September 2020) available at <[https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2020\\_en](https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2020_en)>.

13 Decision No 1313/2013/EU (n 1). The Decision has been amended 3 times, most recently in 2021. A consolidated version is available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013D1313-20210101>>.

14 See *infra*.

15 European Commission, ‘Coronavirus: Unique EU consular operation brought home over 500,000 EU citizens from abroad’ (Daily News, 17 April 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/mex\\_20\\_686](https://ec.europa.eu/commission/presscorner/detail/en/mex_20_686)>.

16 Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health, OJ L293, 5 November 2013, 1.

17 For a general overview see Jonatan Echebarria Fernández, ‘A critical analysis on the European Union’s measures to overcome the economic impact of the COVID-19 pandemic’ (2020) 5 European Papers. European Forum, 1399.

18 European Commission, ‘Communication on the activation of the general escape clause of the Stability and Growth Pact’ (20 March 2020) Doc COM(2020) 123 final. The clause allows Member States to depart temporarily from the adjustment path towards budgetary objectives in periods of severe economic downturn.

State aid measures to support the Member States' economy;<sup>19</sup> the decision by the European Central Bank (ECB) to adopt a non-standard monetary policy to counter serious risks to the monetary policy transmission mechanism and the outlook for the Euro area posed by the COVID-19 outbreak;<sup>20</sup> the adoption of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak;<sup>21</sup> and, last but not least, the launch of the Next Generation EU Recovery Package.<sup>22</sup>

Despite the large recourse to pre-existing powers to face the pandemic, the EU institutions have significantly reshaped their features, so as to strengthen the EU role. This is clearly visible in the measures adopted by EU institutions relying on competencies (such as those related to civil protection cooperation and health policy) which gives the Union a "soft" coordinating power, preventing the Organization from adopting harmonizing measures.<sup>23</sup> Indeed, those competencies have been exercised in a "creative" way by EU institutions, allowing the Union to effectively support the Member States. The recourse to rescEU capabilities – a European last-resort reserve of additional capacities that are acquired, rented or leased with the financial support of the European Union – leading to the creation of the first ever EU stockpile of medical equipment is particularly illustrative of such a trend.<sup>24</sup> Based on an extensive interpretation of the coordinating powers the Union may exercise in the civil protection domain, the EU legislator has shaped, first, and then strengthened

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- 19 European Commission, 'Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak' (19 March 2020) Doc C(2020) 1863 final. See also Alessandro Rosanò, 'Adapting to change: COVID-19 as a factor shaping EU state aid law' (2020) 5 *European Papers*. European Forum, 621; Andrea Biondi and Oana Stefan, 'EU Health Union and State aid policy: with great(er) power comes great responsibility' (2020) 11 *European Journal of Risk Regulation*, 894.
- 20 Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme, OJ L91, 25 March 2020, 1.
- 21 Council Regulation (EU) 2020/672 of 19 May 2020, OJ L159, 20 May 2020, 1.
- 22 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L433I, 22 December 2020, 23.
- 23 Pursuant to art. 2(5) TFEU, '[l]egally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonization of Member States' laws or regulations'. A general survey of the actions carried out by the Union in those domains is present in Mauro Gatti, 'La risposta europea all'emergenza da COVID-19' in Pietro Manzini and Michele Vellano (eds), *Unione europea 2020. I dodici mesi che hanno segnato l'integrazione europea* (CEDAM 2021) 31.
- 24 European Commission, 'COVID-19: Commission creates first ever rescEU stockpile of medical equipment' (19 March 2020) available at <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_476](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_476)>.

the prerogatives of the European Commission in defining, acquiring, renting, deploying and demobilizing rescEU capacities to provide assistance in overwhelming situations,<sup>25</sup> limiting thus the discretionary powers of Member States in similar scenarios.<sup>26</sup> Importantly, this reform is still based on the consent of Member States: the deployment of rescEU capacities is subject to the request made by the affected EU State.

Of particular relevance for present purposes is also the procedure for the joint procurement of medical countermeasures developed under Article 5 of Decision 1082/2013. This initiative arose because of the H1N1 flu pandemic of 2009, which highlighted weaknesses in the abilities of Member States to access and purchase pandemic vaccines and medications – weaknesses that have been further highlighted in the context of the COVID-19 pandemic. Quite significantly, the joint procurement mechanism is based on a Joint Procurement Agreement providing for “voluntary cooperation” which enables participating the Member States to jointly purchase medical countermeasures.<sup>27</sup> Notwithstanding the voluntary nature of the mechanism, since early 2020, up to 36 countries participated in more than 10 joint procurement procedures resulting in over 200 contracts for essential medical supplies and innovative therapeutics.<sup>28</sup> In part, such a large adherence to the joint procurement procedures is due to the lack of preparedness and planning of the health systems of several Member States. One cannot ignore, however, that the decision was adopted to use a significant part of the budget available under the Emergency Support Instrument established by Regulation (EU) 2016/369 to finance the procedures, making thus available additional funding opportunities for the Member States to face the crisis.<sup>29</sup>

25 Cf. art. 12 of the UCPM Decision.

26 Even though art. 12(6) of the UCPM Decision makes it clear that the Commission shall exercise its prerogatives ‘in close coordination with the requesting Member State and the Member State owning, renting or leasing the capacity’, it would be difficult to deny that the Commission is supposed to exercise a primarily responsibility in deploying assistance, something which, as already maintained by the present author, casts doubt on the full consistency of the rescEU machinery with the ‘soft’ nature of the EU competence in the civil protection domain: Federico Casolari, ‘Europe (2018)’ (2019) 1 Yearbook of International Disaster Law, 346, 349.

27 Text available at <[https://health.ec.europa.eu/publications/commission-decision-c2014-2258-final\\_en](https://health.ec.europa.eu/publications/commission-decision-c2014-2258-final_en)>.

28 Besides the EU States, also the EEA countries, the UK, Albania, Montenegro, North Macedonia, Serbia, Bosnia and Herzegovina and Kosovo signed the Agreement. Source: European Commission, ‘Preparedness and response planning’, <[https://health.ec.europa.eu/health-security-and-infectious-diseases/preparedness-and-response\\_en](https://health.ec.europa.eu/health-security-and-infectious-diseases/preparedness-and-response_en)>.

29 Council Regulation (EU) 2020/521 of 14 April 2020 activating the Emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the

As it is apparent from these developments, both the UCPM Decision and the Decision on serious cross-border threats have contributed to establishing an integrated platform of cooperation for managing the COVID-19 pandemic. But, even more importantly, this result has essentially been achieved without imposing any further duties upon the States. More precisely, by means of conditionality mechanisms (which are mainly based on the financial assistance of the Union), the two instruments have led to a “voluntary harmonisation” among the Member States, facilitating the prevention, preparedness and response to disasters.

Also significantly, even in contexts where the Union enjoys an exclusive competence (e.g., the monetary policy) its reaction to the COVID-19 pandemic has assumed a rather “creative” (or unconventional) character. For example, the ECB’s pandemic emergency purchase programme (PEPP) established to face the threats of COVID-19 replicates the innovative scheme adopted by the ECB during the economic and financial crisis, which led the institution to the launch of the public sector purchase programme (PSPP).<sup>30</sup>

Added to this is the large recourse to soft law instruments, also contributing – once again without imposing new duties or obligations – to strengthen the cooperation (and coordination) among the EU institutions and the Member States.<sup>31</sup>

All in all, as made it clear by Ursula von der Leyen in her address to the European Parliament, the read thread connecting all measures adopted at the EU level to face the pandemic seems to be represented by a (more) flexible

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COVID-19 outbreak [2020] OJ L117/3. The Emergency Support Instrument was originally created to give financial assistance to Greece during the refugee crisis. It is based on art. 122(1) TFEU – *i.e.*, a legal basis allowing the Council to adopt ‘the measures appropriate to economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy’. For a global assessment of EU joint procurement procedures, see Emma McEvoy and Delia Ferri, ‘The Role of the Joint Procurement Agreement during the COVID-19 Pandemic: Assessing Its Usefulness and Discussing Its Potential to Support a European Health Union’ (2020) 11 *European Journal of Risk Regulation*, 851.

30 As is well known, the consistency of the PSPP with the mandate conferred upon the European Central Bank by Member States has been subject to a difficult dialogue between the German Federal Constitutional Court and the EU Court of Justice. On 5 May 2020, the Second Senate of the German Federal Constitutional Court has declared the ECB’s decision to launch the PSPP manifestly inconsistent with the principle of proportionality (2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16), threatening in turn the implementation of the PEPP. See on this Annamaria Viterbo, ‘The PSPP judgment of the German Federal Constitutional Court: throwing sand in the wheels of the European Central Bank’ (2020) 5 *European Papers*. *European Forum*, 671.

31 See *infra*, sec. 2.2.

interpretation of the principle of conferral, as it is understood in EU primary law,<sup>32</sup> largely based on soft powers and instruments, giving the Union the possibility to assume a rather robust role in responding to the emergency even in absence of a specific mandate enshrined in the EU Treaties. Concretely, that trend has led the Union to assume strong coordinating powers vis-à-vis the emergency.<sup>33</sup>

Having identified the main features of the new approach to the allocation of competencies in disaster scenarios emerging from the response to the COVID-19 pandemic, it must now be considered, first, the extent to which the Member States are still free to exercise their sovereign prerogatives in such scenarios and, second, the reconceptualization of the principle of conferral resulting from these developments.

### 2.1 *Member States' Prerogatives under Article 4, Para. 2, TEU*

In approaching the cooperation framework that the Union and the Member States have elaborated in disaster scenarios, and, more to the point, the shift in the interpretation of the allocation of competencies in disasters settings among the Union and its Member States in the post-COVID-19 EU, one cannot ignore the elephant in the room, that is, the role played by the so-called “national identities clause”. Enshrined in Article 4, para. 2, TEU, the clause imposes upon the Union a general obligation to respect the essential functions of the Member States, as well as their exclusive competence in protecting public order and national security.<sup>34</sup> One could therefore conclude that only Member States may act in such domains. In other words, a straightforward, first reading of the clause could be interpreted as excluding any possibility for the Union to interfere with matters over which the Member States exercise sovereign prerogative powers; thus, significantly limiting (or undermining)

32 Pursuant to art. 5(2) TEU, ‘[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objective set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States’. The principle is repeatedly mentioned in the introductory articles of the Treaty on the European Union, representing thus a sort of mantra that illustrates the obsession of Member States to limit the EU’s mandate.

33 Alberto Alemanno, ‘The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination’ (2020) 11 *European Journal of Risk Regulation*, 307.

34 Cf. Beatrice Guastaferrò, ‘Sincere Cooperation and Respect for National Identities’ in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law – The European Union Legal Order*, vol. 1 (OUP 2018); Giacomo Di Federico, *L’identità nazionale degli Stati membri nel diritto dell’Unione europea* (Editoriale Scientifica 2017).



the Union's capacity to manage disaster scenarios.<sup>35</sup> It is indeed evident that some calamitous events are strictly intertwined with the security policies of the Member States while, in other cases (in particular when related to natural events), they involve the maintenance of public order – a circumstance that can be named here as “the disaster-security nexus”. Such evidence is even more relevant if we consider the widespread adoption of emergency powers by States affected by COVID-19 and their possible impact on the proper functioning of EU law, including the fundamental rights and freedoms it protects.<sup>36</sup>

Yet, on closer inspection, a different interpretation of the clause is possible. In particular, if one considers the attitude shown by the European Court of Justice (ECJ) towards Member States' reserved powers, the conclusion may be reached that those powers do not exclude *per se* the possibility for the Union to exercise its influence in the corresponding domain. The doctrine elaborated by the Luxembourg judges – also known as the “framing of powers” doctrine – imposes a general obligation upon the Member States to exercise their prerogative powers ‘having due regard to EU law’.<sup>37</sup> In practice, besides the need to respect, in any case, the fundamental values upon which the Union is based (Article 2 TEU),<sup>38</sup> the national identities clause must be read in conjunction with the other principles governing the interaction between the Union and the Member States, which are enshrined in Article 4 TEU. In particular, it is the principle of sincere cooperation (Article 4, para. 3, TEU)

35 After all, States prerogatives are the corollaries of the principle of sovereignty, which still plays a primary role in international disaster law. See in particular the draft art. 10 of the Draft Articles on the protection of persons in the event of disasters elaborated by the International Law Commission (ILC), stating that the primary responsibility for the protection of persons and relief assistance in the territory lies with the affected State. ILC, ‘Report of the International Law Commission: Sixty-Eighth Session’ (2 May–10 June and 4 July–12 August 2016) UN Doc A/71/10, 13. See also Flavia Zorzi Giustiniani, *International Law in Disaster Scenarios. Applicable Rules and Principles* (Springer 2021) 57–89.

36 See European Parliament, ‘States of emergency in response to the Coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic’ (December 2020) available at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS\\_STU\(2020\)659385\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf)>.

37 Case C-457/18 *Slovenia v Croatia* ECLI:EU:C:2019:1067, Opinion of AG Pikamäe, para. 138. Cf. Loïc Azoulai, ‘The “Retained Powers” Formula in the Case Law of the European Court of Justice: EU Law as Total Law?’ (2011) 4 *European Journal of Legal Studies*, 192; Bruno de Witte, ‘Exclusive Member States Competences – Is There Such a Thing?’ in Sacha Garben and Inge Govaere (n 10) 59; Lena Boucon, ‘EU Law and Retained Powers of Member States’ in Azoulai (n 10).

38 See, for instance, Case C-502/19 *Oriol Junqueras Vies* ECLI:EU:C:2019:1115, where the Court recognised that MEPs' immunities, which help to give concrete form to the value of democracy referred to in art. 2 TEU, shall prevail over the reaction put in place by a Member State (Spain) to preserve its territorial integrity against a secession bid.

that ensures that national identities do not amount to general reservations to the effectiveness of EU law.<sup>39</sup> The strengthening of the loyalty duties of the Member States – especially the abstention duties flowing from the loyalty clause enshrined in Article 4, para. 3, TEU – contributed to blurring the divide between EU and Member State prerogatives, leading in turn to a more flexible understanding of the principle of conferral, mentioned in Article 4, para. 1, TEU.<sup>40</sup>

The areas where such an approach has been affirmed in the case law of the ECJ are numerous: loss and acquisition of nationality,<sup>41</sup> social security,<sup>42</sup> organisation of education systems,<sup>43</sup> organisation of justice,<sup>44</sup> and direct taxation.<sup>45</sup> Quite significantly, the Court has also recognised its relevance with regard to the maintenance of public order and the safeguarding of internal security.<sup>46</sup> In particular, the Court of Justice has stated that the recognition by EU primary law of Member States' prerogatives in situations which may affect law and order or public security cannot lead to the conclusion that 'the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law'.<sup>47</sup>

Following the same reasoning, it is thus possible to maintain that even in a disaster scenario Member States cannot ignore the consequences the exercise of their prerogatives may produce over EU law.

## 2.2 *The Reconceptualization of the Principle of Conferral through the Prism of EU Loyalty*

Not only the principle of sincere cooperation may limit the way in which the Member States exercise their prerogatives in disaster settings, but it also contributes to explaining the underlying rationale of the new approach towards

39 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'. See Guastaferrò (n 34); Di Federico (n 34) 149; Federico Casolari, *Leale cooperazione tra Stati membri e Unione europea* (Editoriale Scientifica 2020) 207.

40 Casolari (n 39) 88.

41 Case C-369/90 *Micheletti* [1992] ECR I-4239, para. 10.

42 Case C-647/13 *Melchior* ECLI:EU:C:2015:54, para. 21.

43 Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] I-9161, para. 24.

44 Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531, para. 52.

45 Case C-279/93 *Schumacker* [1995] I-25, paras. 21–24.

46 Case C-265/95 *Commission v France* [1997] I-6959, paras. 33–35.

47 Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic* ECLI:EU:C:2020:257, para. 143.

the principle of conferral shown by EU institutions in the context of the response to COVID-19. Two further examples clearly illustrate how EU loyalty is shaping this course of action.

The first example is related to the action put in place to manage the circulation of goods and persons among the EU States during the pandemic. As it is well-known, the freedoms of movement of goods and persons represent two major pillars of the EU internal market, which in turn constitutes a veritable cornerstone of the European integration process. Yet, EU law recognizes the Member States' prerogative to introduce limitations and restrictions to those freedoms to safeguard, *inter alia*, public security and public health.<sup>48</sup> However, while in past emergencies Member States mainly exercised such prerogatives unilaterally, significantly undermining the functioning of the internal market,<sup>49</sup> during the COVID-19 emergency, after some initial hesitations,<sup>50</sup> the decision has been taken to introduce coordinating mechanisms to (try to) minimize the impact of Member States' unilateral decisions on the other Member States and the EU as a whole. In particular, Member States have been asked to notify each other and the Commission in due time before unilaterally introducing measures restricting (and, at a later stage, reintroducing) the free movement of goods and persons.<sup>51</sup> Moreover, the European Commission has assumed

48 See Articles 36 and 45 TFEU and the provisions concerning the temporary reintroduction of internal border control, which are enshrined in Regulation (EU) 2016/3699 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L77, 23 March 2016, 1. Cf. also Panos Koutrakos et al. (eds), *Exceptions from EU free movement law. Derogation, justification and proportionality* (Hart Publishing 2016).

49 This was particularly evident in the context of the so-called 'refugee crisis' (2015) where the great majority of Member States decided unilaterally to (temporarily) reintroduce border controls to face the unexpected migration flows, leading to a *de facto* suspension of the free movement of persons within the Schengen area. Cfr. Elspeth Guild et al., 'What is happening to the Schengen borders?' (CEPS Paper in Liberty and Security in Europe, No. 86, December 2015) available at <[https://www.ceps.eu/wp-content/uploads/2015/12/No%2086%20Schengenland\\_o.pdf](https://www.ceps.eu/wp-content/uploads/2015/12/No%2086%20Schengenland_o.pdf)>.

50 At the initial stage of the COVID-19 spread in Europe several EU countries introduced restrictions to the export of face masks: see OECD, 'The face mask global value chain the COVID-19 outbreak: Evidence and policy lessons' (4 May 2020) available at <<https://www.oecd.org/coronavirus/policy-responses/the-face-mask-global-value-chain-in-the-covid-19-outbreak-evidence-and-policy-lessons-a4df866d/>>. Limitations were also introduced to the free movement of persons in the Schengen Area: European Commission, Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to arts. 25 and 28 et seq. of the Schengen Borders Code, [https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en).

51 European Commission and European Council, 'Joint European Roadmap towards lifting COVID-19 containment measures' (15 April 2020) available at <<https://op.europa.eu/en/publication-detail/-/publication/14188cd6-809f-11ea-bf12-01aa75ed71a1/language-en>>.

an initiative to make sure that border management measures adopted by the Member States to protect health could not affect the movement of goods and essential services: it is the so-called “Green Lanes” initiative, identifying border crossings open to all freight vehicles carrying goods where any checks or health screenings should take no more than 15 minutes.<sup>52</sup>

The same rationale – that is the need to consider the strict intertwinement among the Member States within the EU internal market and their mutual interdependence<sup>53</sup> – is behind the decision to establish an EU Strategy for COVID-19 vaccines. Indeed, as stated by the European Commission in that Strategy, ‘[j]oint action at EU level is the surest, quickest and most efficient way’ of giving all 27 EU Member States access to a vaccine as early as possible.<sup>54</sup> Even if the Member States remain responsible for their health policies (including the vaccination policies), the common EU approach introduced by the Strategy has established a coordinating mechanism in the form of advance purchase agreements negotiated and concluded by the European Commission on behalf of Member States with pharmaceutical companies. Also importantly, contracts have been funded by the EU through the Emergency Support Instrument, which, as previously seen, was also activated to fund the joint procurement procedures under Decision 1082/2013.<sup>55</sup>

Exactly as in the case of measures adopted under the UCPM Decision and Decision 1082/2013, the two mentioned examples confirm that, also thanks to the acquiescence of Member States, the Union has had the opportunity to fill some gaps in its mandate by introducing new coordinating tools which have in turn extended and strengthened the pre-existing emergency instruments. Most importantly, these two examples better show the underlying rationale of this shift, that is, the need of preserving the effectiveness of some of the most

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See also Stefano Montaldo, ‘The COVID-19 emergency and the reintroduction of internal border controls in the Schengen area: never let a serious crisis go to waste’ (2020) 5 European Papers. European Forum, 523.

52 European Commission, ‘Communication on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services’ (23 March 2020) Doc C(2020) 1897 final; European Commission, ‘Communication upgrading the transport Green Lanes to keep the economy going during the COVID-19 pandemic resurgence’ (28 October 2020) Doc COM(2020)685 final.

53 See also Alessio M. Paces and Maria Weimer, ‘From diversity to coordination: a European approach to COVID-19, (2020) 11 European Journal of Risk Regulation’, 283.

54 European Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank – EU Strategy for COVID-19 vaccines’ (17 June 2020) Doc COM(2020) 245 final.

55 Above, sec. 2.

relevant achievements of the EU integration process, starting from the proper functioning of the internal market.<sup>56</sup> In this vein, the described reconceptualization of the principle of conferral echoes the ECJ's reasoning for elaborating the "frame of powers doctrine":<sup>57</sup> Member States' loyalty duties towards the Union require supranational coordination (including in cases where national prerogatives may be relevant) and impose abstention obligations when unilateral State action risks jeopardising the EU's objectives.

This also explains why the described changes in the EU institutions' attitude were possible without any revisions of the EU primary law framework and also by means of soft law instruments: those changes do represent a concretization of pre-existing loyalty duties that are directly flowing from Article 4, para. 3, TEU.

### 3 Disaster Management and Supranational Institutional Balance

The reconceptualization of the principle of conferral emerging from the EU's response to the COVID-19 emergency has inevitably modified the interaction among the EU institutions. In particular, the major innovation seems to be represented by a stronger interplay between the European Council and the European Commission. No doubt, this is not the first time that these two political institutions, representing the two "souls" of the European Union – the European Council constituting the expression of the intergovernmental dimension of the Union,<sup>58</sup> and the European Commission reflecting its supranational nature<sup>59</sup> –, play together. However, while in the past commentators stressed (and criticized) the tendency of the European Commission to act as a sort of secretariat of the European Council,<sup>60</sup> being *de facto* subordinated to the latter, the machinery put in place to respond to the COVID-19 emergency has revealed a new scenario, where the two institutions seem to operate in closer synergy, with the European Commission assuming coordinating tasks

<sup>56</sup> Cf. also Casolari (n 39) 192–202.

<sup>57</sup> Above, sec. 2.1.

<sup>58</sup> Pursuant to art. 15 TEU, the European Council gathers the Heads of State or Government of the Member States and defines the EU's political strategy, giving thus expression to the prerogative of Member States as 'Masters of the Treaties'.

<sup>59</sup> According to art. 17 TEU, the members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. They promote the general interest of the Union.

<sup>60</sup> See Lucia S. Rossi, 'A new revision of the EU Treaties after Lisbon?' in Lucia S. Rossi and Federico Casolari (eds), *The EU after Lisbon. Amending or coping with the existing Treaties?* (Springer 2014) 1, 5.

over the Member States. Also importantly, as anticipated, the strengthening of the interplay between the Commission and the European Council has been mainly carried out by means of EU soft law instruments.

Particularly illustrative of such a trend is the Joint European Roadmap towards lifting COVID-19 containment measures,<sup>61</sup> which was adopted in April 2020 by the President of the European Council and the President of the European Commission upon request of the Members of the European Council. The Roadmap sets out recommendations to the Member States, with the goal of preserving public health while gradually lifting containment measures to restart community life and economy. In doing so, it gives voice to the Member States' prerogatives without underestimating the need to coordinate their action throughout the initiatives put in place by the European Commission.

Although it is too soon to assess the impact of those developments on the institutional balance described in the EU Treaties – that balance being conceived as inherent in the institutional structure of the Union inasmuch as it 'requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions'<sup>62</sup> – one cannot ignore that such developments risk further marginalizing the role of the European Parliament (*i.e.*, the political institution directly representing EU citizens),<sup>63</sup> casting thus shadows on the transparency and legitimacy on the EU's reaction to COVID-19. Even more importantly, one cannot ignore that, according to a well-established ECJ's case law, the prerogatives conferred upon the EU institutions by the EU Treaties – as well as the institutional balance the latter establish – 'are indispensable to the preservation of the very nature of European Union law',<sup>64</sup> something which should preclude deviations from the existing institutional framework, even if dictated by emergency needs.

#### 4 EU Soft Disaster Law and the Respect of the Rule of Law

As recalled above, the fact that the Union has acted in several cases without a clear mandate conferred upon it by the Treaties has contributed to a proliferation of soft-law instruments, that have been adopted (mainly by the

61 *Supra* (n 51).

62 Case C-409/13 *Council of the European Union v European Commission* ECLI:EU:C:2015:217, para. 64.

63 Pursuant to art. 14, paras. 2-3, TEU, the European Parliament is composed of representatives of the Union's citizens, elected by direct universal suffrage.

64 Cf. Opinion 1/09 Draft agreement on the creation of a unified patent litigation system ECLI:EU:C:2011:123, para. 89.

Commission) to set out guidelines and recommendations to the Member States.<sup>65</sup> Such a trend is clearly visible in different domains of cooperation: borders management,<sup>66</sup> health cooperation,<sup>67</sup> data protection and tracing tools,<sup>68</sup> etc.

Admittedly, the recourse to soft and informal instruments in emergency scenarios has somewhat become commonplace at the EU level. A similar trend emerged in the Union's reaction to the economic and financial crises and the refugee crisis.<sup>69</sup> Also importantly, that trend does not represent a peculiar feature of EU law: a large recourse to soft-law instruments to face the COVID-19 pandemic is also documented at the international and municipal levels.<sup>70</sup>

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- 65 According to the EU Court of Justice, '[r]ecommendations, which (...) are not binding, are generally adopted by the institutions of the Community [now Union] *when they do not have the power under the Treaty to adopt binding measures* or when they consider that it is not appropriate to adopt more mandatory rules'. Case C-322/88, *Grimaldi* ECLI:EU:C:1989:646, para. 13; emphasis added.
- 66 European Commission, 'COVID-19: temporary restrictions on non-essential travel to the EU' (16 March 2020) Doc COM(2020)115 final; European Commission, 'Guidelines for border management measures to protect health and ensure the availability of goods' (16 March 2020) Doc C(2020)1753 final; European Commission, 'Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak' (30 March 2020) OJ C1102, 12; Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction (1 July 2020) OJ L208I, 1; Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (14 October 2020) OJ L337, 3; European Commission, 'Recommendation on a coordinated approach to travel and transport in response to the SARS-COV-2 variant observed in the United Kingdom' (22 December 2020) Doc C(2020)9607 final.
- 67 European Commission, 'Guidelines on EU emergency assistance in cross-border cooperation in healthcare related to COVID-19 crisis' (3 April 2020) Doc COM(2020)2153 final; European Commission, 'Guidelines on COVID-19 in vitro diagnostic tests and their performance' (15 April 2020) OJ C1122, 1; European Commission, EU Strategy for COVID-19 vaccines (n 54).
- 68 Commission Recommendation (EU) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymized mobility data (14 April 2020) OJ L114, 7; European Commission, 'Guidance on Apps supporting the fight against COVID-19 pandemic in relation to data protection' (17 April 2020) OJ C124I, 1.
- 69 Jacopo Alberti, 'Challenging the evolution of the EMU: the justiciability of soft law measures enacted by the ECB against the financial crisis before the European courts' (2018) 37 Yearbook of European Law, 626; Federico Casolari, 'The unbearable "lightness" of soft law: on the European Union's recourse to informal instruments in the fight against irregular immigration' in Francesca Ippolito et al. (eds), *Bilateral Relations in the Mediterranean. Prospects for Migration Issues* (Edward Elgar 2020) 215.
- 70 For a general overview see the contributions to the Special Issue 1/2021 on COVID-19 and Soft Law of the European Journal of Risk Regulation and Barbara Boschetti and Maria

Such an approach has both advantages and disadvantages. Supporters might claim that a soft-law approach will ensure more rapid, flexible and effective management, even in cases where the allocation of competencies between the EU and the Member States is not completely clear. Detractors claim that the downside of such a flexible approach is that it may become too flexible, thus raising doubts as to its legitimacy and transparency and preventing the possibility to establish a permanent platform of cooperation among EU actors and the Member States.<sup>71</sup> Notwithstanding the fact that ECJ case law has helped to clarify the possible legal effects of EU soft-law instruments, though not excluding the possibility of assessing their validity in light of EU primary law,<sup>72</sup> it is evident that the informality characterizing such instruments risks undermining the notion of a 'Union based on the rule of law', that is, the fundamental condition that both the EU and its Member States must respect the constitutional framework established by EU primary law (including, as already seen, the institutional balance enshrined in the Treaties).<sup>73</sup>

Even if the recourse to EU informal instruments in times of crisis does not come as a surprise, it remains that this trend is far from being unproblematic. The most relevant issues related to a massive recourse to soft-law instruments are represented by (a) the transparency and legitimacy of the corresponding action – these acts being normally adopted, as mentioned above, without the democratic control exerted by the European Parliament –, (b) the legal certainty of the legal framework they contribute to establish, and, finally, (c) their justiciability or invocation before EU and national tribunals.<sup>74</sup>

It is true that at the end of 2020, taking stock of some lessons learned during the initial stage of the pandemic, the European Commission launched a package of initiatives that should pave the way for the establishment of a strong(er) (an more formalized) European Health Union, giving the European Union the proper instruments 'to prevent, prepare for and manage health crises both at the EU and global level'.<sup>75</sup> A building block of the establishment of the European Health Union is represented by the Proposal for a Regulation on serious

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Daniela Poli, 'A Comparative Study on Soft Law: Lessons from the COVID-19 Pandemic' (2021) 23 *Cambridge Yearbook of European Legal Studies*, 20.

71 Di Federico (n 7) 77–78; Mariolina Eliantonio and Oana Stefan, 'The elusive legitimacy of EU soft law: an analysis of consultation and participation in the process of adopting COVID-19 soft law in the EU' (2021) 12 *European Journal of Risk Regulation*, 159.

72 Cf. Case C-501/18 *BT v Balgarska Narodna Banka* ECLI:EU:C:2021:249.

73 Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* ECLI:EU:C:1986:166, para. 23.

74 Oana Stefan, 'COVID-19 soft law: voluminous, effective, legitimate? A research agenda' (2020) 5 *European Papers. European Forum*, 663; Eliantonio and Stefan (n 71).

75 European Commission, 'Building a European Health Union: reinforcing the EU's resilience for cross-border health threats' (11 November 2020) Doc COM(2020)724 final, 2.



cross-border threats that should replace Decision 1082/2013.<sup>76</sup> The proposed regulation introduces a stronger and more comprehensive legal framework for health crisis preparedness and response at the EU level and enhances the Union's guidance in the adoption of common measures at the EU level to face future cross-border health threats. Particularly relevant is the choice of the instrument, a regulation, which is considered by the European Commission 'the most suitable instrument as a key element of the proposal is to establish procedures and structures for cooperation on joint, EU-level work'.<sup>77</sup> No doubt, the adoption of a regulation would represent a choice significantly reinforcing the cooperation in that domain: as it is well-known, regulations are the most powerful binding acts at disposal of EU institutions, being binding in all their elements and directly applicable in the Member States' municipal orders (Article 288 TFEU). Thanks to those features, regulations are normally used by the EU legislature to harmonize the national legislation of Member States. In this respect, however, it is at least debatable whether that choice may be considered perfectly consistent with the mandate conferred upon the Union in the context of the protection of human health, this latter being covered, as already mentioned, by a soft competence of the EU, which may only support, coordinate or supplement the actions of the Member States (Article 6 TFEU).

More generally, although relevant, the initiative launched by the European Commission simply ignores the legal implications flowing from the recourse to soft-law instruments. In the absence of an actual perspective for significant reform of the EU Treaties, leading to a more consolidated legal framework for the EU's action in these areas,<sup>78</sup> it seems to the present author that a general reflection on the proliferation of EU soft-law instruments in times of crisis – and related risks – should be as urgent as it is inevitable.

## 5 Concluding Remarks

Over the last three years, the European Union has dealt with an unprecedented disaster scenario involving, *inter alia*, the delicate question of how to balance the imperative to respect the principle of conferral and thus the allocation of competencies between the Organization and its Member States enshrined in

76 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013/EU' (11 November 2020) Doc COM(2020)727 final.

77 *Ibid.*, 4.

78 But see *infra*, sec. 5.

EU primary law and the need to elaborate an effective response, also to protect the proper functioning – if not even the existence – of the European integration process. This contribution has built upon the EU's response to COVID-19, trying to identify the major trends such response has revealed with regard to the implementation and evolution of EU disaster law. In this respect, the following conclusions may be drawn:

- 1) Not only has the EU elaborated a multifaceted course of action, relying upon its highly articulated (if not fragmented) disaster law toolkit, it has shown a flexible approach toward the allocations of competencies enshrined in EU primary law.
- 2) Such flexibility, which has been mainly built upon soft competencies and soft law instruments, has led to the identification of relevant coordination duties, which are directly stemming from the principle of sincere cooperation.
- 3) Also importantly, the principle of sincere cooperation may contribute to limiting the recourse by the Member States to the national identities clause enshrined in Article 4, para. 2, TEU, imposing a duty to consider the consequences that unilateral actions put in place by States might produce upon the other Members and the Union as well.
- 4) No doubt, such developments are particularly relevant in so far as they promote a more integrated cooperation platform for disaster scenarios at the EU level. More broadly, those developments reveal a global trend leading to the establishment of a European space of cooperation which overcomes the outer limits of the EU mandate and strengthens the mutual support and solidarity among the EU countries.<sup>79</sup>
- 5) That said, this contribution has also raised some concerns related to a similar evolution. Like it or not, softness does not mean weakness. This is particularly evident when it comes to the impact of the EU course of action over its constitutional framework: the possible threats to the institutional balance and, more broadly, to the EU rule of law, which have been highlighted above, clearly illustrate how sound those concerns are. This is the reason why the Union and its Member States should take the necessary steps to elaborate more stable solutions, also assessing whether the provisions contained in the Treaties' texts may be amended so as to ensure a stronger and rule-of-law proof supranational management of disasters. A first occasion for inclusive, high-level reflection on the following steps to be taken towards a stronger EU cooperation platform in disaster settings could be represented by the follow-up to the historical

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79 Casolari (n 39) 201–202.

decision of the European Parliament to trigger Article 48 TEU,<sup>80</sup> in order to call a Convention for the revision of the Treaties, giving thus a proper response to the outcome of the Conference on the Future for Europe.<sup>81</sup> Quite importantly, one of the reasons leading the European Parliament to adopt such a decision was represented by the need to transform 'into a new permanent institutional and policy framework' the 'innovative and common solutions' elaborated in response to the COVID-19 pandemic.<sup>82</sup>

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80 European Parliament, Resolution of 4 May 2022 on the follow-up to the conclusions of the Conference on the future of Europe, Doc Pg\_TA(2022)0141, text available at <[https://www.europarl.europa.eu/doceo/document/TA-9-2022-0141\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0141_EN.html)>.

81 Launched in March 2021 on the basis of a joint initiative by the European Parliament, the European Commission and the Council of the European Union, the Conference has represented an open forum to debate on Europe's challenges and priorities. The outcome of its work has been presented on 9 May 2022 and it is reproduced in its Final Report (available at <<https://futureu.europa.eu/pages/directory>>). Significantly, one of the proposals supported by the Conference in the health domain stresses the need to '[e]nhance the European Union Health Union using the full potential of the current framework and include health and healthcare among the shared competencies between the EU and the EU Member States by amending Article 4 TFEU', giving thus the Union the right to take precedence over Member States' action (see art. 2(2) TFEU, stating that '[t]he Member States shall exercise their competence to the extent that the Union has not exercised its [shared] competence'). Cf. Conference on the Future of Europe, 'Report on the Final Outcome' (May 2022) Proposal 10.3.

82 European Parliament resolution of 4 May 2022 (n 80) para. 8.