“Whatever is necessary… will be done”
- Solidarity in Europe and the Covid-19 Crisis

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The authors analyse the role of EU law in the context of the Covid-19 crisis to assess to which degree European solidarity is present/lacking, under the assumption that activity/passivity respectively can be considered as indicators thereof. Importantly, they take a bird’s eye view and focus on three of the most pertinent, ultimately interrelated, themes, namely the health dimension; the economic dimension; and the rule of law dimension. They conclude that a lot of hope can, after all, be put into the EU as a model of society, as it has, within the prevailing limits, done quite well already. The start may have been slow and thus with extremely tragic consequences in some of the Member States, often in a piecemeal manner, and severely troubled by certain legal powers likely to being far too limited for the needs as well as the existence of rather opposing views as to the way forward. Nevertheless, to the authors it does not seem fair to say that solidarity expressed in the shape of action is not there at all. However, only time will show whether the steps taken are sufficient.

1. Introduction

"Tedious were it to recount, how among neighbors was scarce found any that showed fellow-feeling for another, how kinsfolk held aloof, and never met, or but rarely; enough that this sore affliction entered so deep into the minds of men and women, that in the horror thereof brother was forsaken by brother, nephew by uncle, brother by sister, and oftentimes husband by wife; nay, what is more, and scarcely to be believed, fathers and mothers were found to abandon their own children, untended, unvisited, to their fate, as if they had been strangers.” ¹

In this quotation from The Decameron, Boccaccio in his frightening description of the state of the stricken city, Florence, during the times of the extremely deadly pestilence rampaging in the 14th century, painfully explains how solidarity among the inhabitants had completely vanished; everyone thinking of only herself under the most sorrowful conditions. The flaws of human nature during crises such as pandemics is thus not something new, as it instinctively prescribes a large amount of selfishness to rule. Somehow confirming such a depiction, we have in Europe during the present Covid-19 crisis, on the one hand, for instance, already witnessed individuals’ hoarding of food

and thefts from hospitals of essential protective means. At the same time, we have e.g. experienced nearly unsuccessful pleas for exports of doctors and ventilators from the more privileged countries to the most wounded ones, as well as nearly resultless requests to take Covid-19 patients from the latter kinds of Member States to those countries estimated to have a higher capacity in the health sector. In addition, we have witnessed unsympathetic “competition” between Member States to buy, for instance, ventilators and personal protective equipment such as masks, and Member States’ surprising confiscations and export bans of such items, etc. At a more abstract level, the EU has continuously been critisised for its lack of action, and generally, solidarity amongst Member States has been called for, as rather the Nation State has appeared as strengthened severely at the cost of the EU.

However, the picture that Boccaccio describes may well be too bleak to compare to the current situation, as we on the other hand also see how individuals both physically and mentally support each other: from Corona couriers in New York and free grocery delivery services in Europe; to citizens going to their balconies to applaud those risking their health to help others, using banners displaying expressions of thanks or giving free concerts from their homes or balconies. Within the EU we have little by little also, for example, observed how Member States with a higher IC capacity, particularly Germany, take Covid-19 patients from other Member States, and Member States sending at least some spare ventilators to those Member States in need thereof. Little by little, we have also witnessed some action taking place at the EU level.

Nevertheless, especially in the start of the outburst of the crisis the increase in the preservation of self-interests appeared as rather shocking. However, undoubtedly the law can to a large extent compensate for selfish human and state behavior, and solidarity has for a long time served both as a profound value of and a dominant aim to be pursued by the EU. Thus, criticism of the EU in that regard is indeed quite severe, as solidarity among the Member States has been viewed as a kind of binding glue from the very beginning, playing a fundamental role in defining the identity of the EU. The principle of sincere cooperation, as enshrined in Article 4(3) TEU, and which entails solidarity, to which the Commission refers, constitutes, together with the principle of unity, the cornerstone of European integration; or the ‘pillar of our Union’, according to the letter sent by the President of the European Council, Mr. Charles Michel, to the Italian President, Sergio Mattarella, on 20 March 2020. In consequence, solidarity is viewed as a special and important value and virtue of what Europe – including both the EU as such and the individual Member States – is about; something which apparently is viewed as positively distinguishing it from other continents.

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2 As expressed in Articles 2 and 3 TEU.
Yet, how to transform the general visions of solidarity into concrete action has always been the Achilles heel of the EU, and therefore it is easily an object for criticism. For instance, in recent years the EU has been perceived as appearing quite hopeless in relation to policies requiring a kind of “implementation” of the solidarity principle (such as the EU asylum policy, e.g. through an EU system of relocation of asylum seekers throughout the EU, has been particularly difficult if not impossible). In the present Covid-19 crisis, the EU has once again proven to appear as very fragile in this regard. However, if it fails in this regard, Euro-scepticism would be likely to rise further, and the entire project would be severely endangered.

Unsurprisingly, solidarity – and the claimed presence thereof - has therefore now become one of the most profound themes presently discussed at all levels in Europe, among others things exposing deep divisions in Europe. Most significantly, the initially most affected states, Italy and Spain, have accused the much more privileged, northern nations - led by Germany and the Netherlands - of not doing enough. Peculiarly, the European institutions, with the European Commission as their frontrunner, keeps on - again and again and in some contrast - to an almost exaggerated degree reassuring everyone that solidarity does indeed prevail.

The purpose of the following, therefore, is to reflect upon the role of EU law in the context of the Covid-19 crisis, ultimately aiming at - in a balanced manner - analysing to which degree solidarity may have been present/lacking, under the

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4 See for instance the Facebook group, “#EUsolidarity Now”, which describes itself as aiming at: “We want a union of people helping one another to face today’s challenges” and states: “Invite your friends to this group… let’s show our governments that we want more solidarity now.” It was established only by the end of March 2020, and already on 8 April 2020 it had 64,897 members. Also see e.g. article by Heiko Maas, Federal Minister of Foreign Affairs, and Olaf Scholz, Federal Minister of Finance, “A response to the corona crisis in Europe based on solidarity”, Published April 6th, 2020, in different language versions in Les Echos (France), La Stampa (Italy), El País (Spain), Público (Portugal) and Ta Nea (Greece), <auswaertiges-amt.de/en/newsroom/news/maas-scholz-corona/2330904?utm_source=POLITICO.EU&utm_campaign=a1f43744b0-EMAIL_CAMPAIGN_2020_04_06_05_10&utm_medium=email&utm_term=0_10959edeb5-a1f43744b0-189679041> (last accessed on 20 April 2020), who state that: “We EU member states have to act together to this end, in a spirit of European solidarity and with combined forces, in order to strengthen the European Union.” Finally, it is worth mentioning that Pope Francis on 12 April 2020 (Easter) in his live-streamed speech, <politico.com/news/2020/04/12/pope-francis-future-of-eu-depends-on-coronavirus-response-180903> (last accessed on 20 April 2020), rather unusually also pleaded for solidarity within the EU as he said that: “Today, the EU finds itself faced with an epochal challenge, on which not only its future but also that of the entire world will depend. Let us not miss the opportunity to demonstrate, once again, solidarity, even by resorting to innovative solutions.” Also, “…he called for the EU to unite in its response to the outbreak, just as it did after World War II, when the continent rose thanks to a concrete spirit of solidarity which allowed it to overcome the rivalries of the past.”


6 The European Commission has e.g. established a webpage entitled: “Coronavirus: European Solidarity in action” at <ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/coronavirus-european-solidarity-action_en> (last accessed on 20 April 2020), inter alia stating: “Across the European Union, countries, regions and cities are stretching out a helping hand to neighbors, helping those most in need. This is European solidarity in action.”
assumption that activity/passivity respectively can be considered as indicators thereof.\textsuperscript{7} In other words, as referred to in the title of the present paper, it is our intention to analyse to which degree, it is detectable that whatever is necessary to support Europeans and the European economy will be done, as it has been promised by EU President, Ms. Ursula von der Leyen\textsuperscript{8}, and that “… the truth is… that Europe has now become the world's beating heart of solidarity.” \textsuperscript{9} More precisely, we will take a bird’s eye view and focus on three of the most pertinent, ultimately interrelated, dimensions, namely the presence of solidarity with regard to: 1. The health dimension; 2. The economic dimension; and 3. The rule of law dimension. In other words, this choice of focus reflects that the handling of the present crisis essentially takes place in three rather different respects, namely the saving of lives, the saving of economies, and the saving of essential democratic values and rights. Although taking a bird’s eye view, within these three focal points we self-evidently at times have to limit ourselves to those elements of the most significant interest.

2. The Health Dimension

The most immediate concern of the present crisis is, of course, the protection of people’s health against the impact of Covid-19. It is thus not truly surprising that, once the risks of the Corona virus became clear, the EU Member States quite rapidly took all necessary measures to protect the health of their citizens. At first, they adopted different strategies and measures to contain the spread of the Corona virus, which led many to wonder why there was not a common or at least a more coordinated EU response. The originally poor status of European cooperation to deal with the Corona crisis can to a large extent be explained by the relatively weak legislative powers of the EU in the field of public health, which appears to make the development of a substantive and targeted approach to Covid-19 difficult.\textsuperscript{10}

Whereas paragraph 1 of Article 168 TFEU reiterates that a high level of health protection shall be ensured in the definition and implementation of all Union policies and activities, paragraphs 5 and 7 stipulate that harmonisation of national laws to protect and improve human health is excluded, and that management, organisation

\textsuperscript{7} As a delimitation, we are neither analysing global solidarity, nor acts of solidarity provided from either Member States or the EU to non-member states. For a general overview of worldwide government responses to the Covid-19, see “Oxford COVID-19 Government Response Tracker” <covidtracker.ox.ac.uk> (last accessed on 20 April 2020).


and delivery of medical care and health services are a matter and responsibility for the Member States. In other words, according to Article 6 TFEU, the protection and improvement of human health belongs to the EU’s supplementary competences.11

Meanwhile some Member States closed their borders, others sought to restrict the exportation of protective clothes, mouth caps and gloves, or to requisition these goods. The fundamental four freedoms, particularly the free movement of goods and persons, constituting the cornerstone of the EU internal market, have been severely restricted.12 With respect to the free movement of persons fifteen Schengen countries decided to derogate from the Schengen internal border controls free area and reintroduce border checks on persons, i.e.: Austria, Belgium, Czech Republic, Denmark, Estonia, France, Finland, Germany, Hungary, Lithuania, Norway, Poland, Portugal, Spain and Switzerland.13 Together with restrictions on various modes of transportation one can but only imagine the impact these measures have had on the free movement of workers and persons within the EU.14

Furthermore, the European Commission on 16 March 2020 recommended to Member States to apply a temporary 30 days coordinated restriction of non-essential travel from third countries into the EU.15 On 8 April 2020, the European Commission invited Member States and non-EU Schengen countries to extend the temporary restrictions on non-essential travel to the EU until 15 May 2020.16 These measures, of course, have serious repercussions for third country nationals as well as refugees. There are exceptions for nationals of EU Member States seeking to return home as well as travelers with an essential function or need, like health professions or frontier workers.


12 See with regard to the free movement of persons e.g. Sergio Carrera & Ngo Chun Luk, “Love Thy Neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area”, CEPS, 3 April 2020, <ceps.eu/ceps-publications/love-thy-neighbour/> (last accessed 21 April 2020).


14 Ibid.


Without really knowing whether the rapid closing of borders would actually work, the instinct turning inwards and resurge to national egotism\textsuperscript{17} is not only legally questionable\textsuperscript{18} but has also in this context put the solidarity principle and thereby the European integration process seriously to the test.

Yet Member States have considerable leeway in protecting the health of their citizens within the framework of the internal market, which has been long-standing case law of the European Court of Justice. According to one of the classical judgments of the Court, \textit{De Peijper}, the interest of public health ranks first amongst the interests mentioned in Article 36 TFEU: ”Health and life of humans rank first among the property or interests protected by Article 36 and it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure [...]”. \textsuperscript{19} That public health takes a prominent place in EU law is furthermore emphasized by \textit{inter alia} Article 35 of the EU Charter which states that ”everyone has a right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices”. Furthermore, it says that “a high level of health protection shall be ensured in the definition and implementation of all Union policies and activities”. This “public health integration requirement” can also be found in Articles 168(1) TFEU, which constitutes the legal basis for health measures, and Article 114(3) TFEU, which is the internal market legal basis.

Importantly, Article 36 TFEU constitutes the Treaty exception for national measures restricting the free movement of goods, which are prohibited on the basis of the fundamental internal market provisions of Articles 34 or 35 TFEU. Article 35 TFEU prohibits export restrictions by Member States but the Court in its case law has provided for a more restrictive interpretation than Article 34 TFEU on imports. National measures which actual effects are “none the less greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of the Member State” are prohibited by Article 35 TFEU.\textsuperscript{20} This appears to be the case where Member States - for reasons of security of supply - prohibit or restrict the exportation of essential protective equipment and medical instruments like ventilators.

Despite the importance of the public health exception in Article 36 TFEU and the restrictive reading of Article 35 TFEU, Member States do not have a ‘carte blanche’ in shielding their national market with a view to protect the health of its own population. There are conditions that need to be fulfilled to prevent that the internal

\textsuperscript{19} Case C-104/75, \textit{De Peijper} ECLI:EU:C:1976:67, para 15.
\textsuperscript{20} Case C-205/07, \textit{Gysbrechts} ECLI:EU:C:2008:730, para. 43.
market is too much disrupted – although these conditions in times of crisis can be considerably relaxed – and that the health and well-being of all citizens is endangered at the same time. The European Commission as guardian of the Treaties needs to act as a tightrope walker by engaging in a dialogue with Member States and businesses (industry) and by urging mutual solidarity.\(^{21}\) It has meanwhile sought to reinforce national restrictive measures for the benefit of public health on the one hand and mitigate their effects on free movement where possible on the other. Examples are border management measures to protect health and to ensure the availability of goods and essential services at the same time, as well as guidelines on so-called ‘green lanes’ to ensure speedy and continuous flow of goods across the EU and to avoid bottlenecks as key internal border crossing points.\(^{22}\)

Nevertheless, the Covid-19 crisis reveals that the project of the internal market, which even Euro-sceptic politicians still seem to cherish, and its foundational principles are much less solid and more fragile than we previously thought. The picture is, however, not as bleak as Boccacio’s grim description of Florence. Because the internal market also constitutes the avenue, the breeding ground for the EU and its Member States to address at least part of the health crisis and economic disruption, despite the limited powers of the EU in the field of public health on the basis of Article 168 TFEU.\(^{23}\) Next to the measures mentioned above, proposals have been made to boost the resilience of Europe by converging fair working conditions in Europe, \textit{inter alia}, for health professions so that the brain drain and export of nurses from some Member States can be curtailed and by facilitating the free movement of doctors, nurses and other health professionals.\(^{24}\) Other, internal market related, measures concern the setting-up of a voluntary joint public procurement scheme between Member States for the purchase of medical equipment.\(^{25}\)


\(^{24}\) Compare e.g. Claire Dhéret & Simona Guagliardo, “Boosting Europe’s resilience with better health systems: Lessons from the COVID-19 crisis, EPC, <epc.eu/en/Publications/Boosting-Europes-resilience-3160a0> (last accessed 21 April 2020).

In conclusion, despite the different containment strategies of the Member States with their unprecedented disruptive effects on the functioning of the EU Single Market, in the course of the Corona crisis we can increasingly discern acts of solidarity within the EU. The Commission and EU legislator have furthermore adopted a whole range of measures which seek to endorse Member States’ efforts to protect the health of their citizens. The EU Single Market may thereby constitute a perfect breeding ground to, albeit within limits, to strengthen the health face of the EU.

3. The Economic Dimension

Beyond any doubt, the saving of lives currently is – and must be - the absolute top priority. However, the observed wounded state of the European economies, which is already considered being at a tremendous level due to the lockdowns of societies and the financing of the heavily increased costs in the health sectors, is also of huge importance. The responses to this challenge have already taken place both at the national and the EU levels. In what follows, these two aspects will therefore be considered.

Regarding the responses at the Member State level, these have most significantly taken place in the shape of different national aid programmes aiming at preserving jobs and undertakings and eventually facilitating a sound economy of the Member State in question. Already by now, impressive sums of money have in many Member States been canalised into the systems either as loans or as direct aid, however in principle largely of relevance only to the Member State in question itself (rather than serving as transnational solidarity shaped as direct help to other Member States).26

Elements in such aid programmes are, in principle, often in need of approval by the EU, namely under the regime of state aid law. In that regard, the European Commission has seemingly worked quickly and flexibly to decide whether such concrete national measures constitute lawful state aid measures or not. One tool of relevance is Article 107(2)(b) TFEU, which is applicable, when Member States are in need of compensating specific companies or specific sectors for the damages directly

26 See for an overview of national measures by country: European Commission, “Policy measures taken against the spread and impact of the coronavirus”, 6 April 2020 <ec.europa.eu/info/sites/info/files/coronavirus-policy-measures-6-april_en_1.pdf> (last accessed on 21 April 2020). Also, according to Council of the EU: “Report on the comprehensive economic policy response to the COVID-19 pandemic”, Press Release 223/20, 9 April 2020, <consilium.europa.eu/da/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic> (last accessed on 20 April 2020), Paras. 5-6: “To date, the aggregate amount of Member States’ discretionary fiscal measures amounts to 3% of EU GDP, a threefold increase since 16 March, on top of the significant impact of automatic stabilisers. Furthermore, Member States have so far committed to provide liquidity support for sectors facing disruptions and companies facing liquidity shortages, consisting of public guarantee schemes and deferred tax payments, which are now estimated at 16% of EU GDP, up from 10% on 16 March.”
caused by exceptional occurrences, precisely as currently being witnessed. The first approval took place already on 12 March 2020, where the European Commission announced that it within 24 hours from notification had greenlighted a Danish aid scheme of €12 million to compensate organisers for the damage suffered due to the cancellation of large events or of events targeted at risk groups due to the Covid-19 outbreak.27

Also, a temporary framework for approval has been adopted by the European Commission already on 19 March 2020 to enable Member States to use the full flexibility foreseen under State aid rules to support their economy and help overcome the extremely difficult situation triggered by the Corona-virus outbreak.28 It is based on Article 107(3)(b) TFEU. It distinguishes between the following five categories of national aid: 1. Aid in form of direct grants, repayable advances or tax advantages; 2. Aid in the form of guarantees on loans; 3. Aid in the form of subsidised interest rates for loans; 4. Aid in the form of guarantees and loans channelled through credit institutions or other financial institutions; and 5. Short-term export credit insurance.29

Thus, the general flexibility demonstrated and the fastness in the handling cases, which so far has been the response to the current emergency situation with regard to state aid, appears as rather appropriate.

The responses at the EU level to the economic crisis are, after all, of much larger importance for the analytical perspective taken here. Demonstrations of solidarity in that context is - at the end of the day - a matter of more than an expression of emotional sympathy, as it essentially is a matter of a willingness to transfer money from some Member States to others. In the context of the Economic and Monetary Union (EMU) and the problems it has previously faced, among others due to a lack of solidarity among Eurozone countries, the famous, Nobel prize-winning economist, Stiglitz, has crucially pointed out that:

“When a group of countries shares a common currency, success requires more than just good institutions … For reforms to work, decisions have to be made, and those decisions will reflect the understandings

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and values of the decision-makers. There have to be common understandings and values of the decision-makers of what makes for a successful economy and a minimal level of ‘solidarity’, or social cohesion, where countries that are in a strong position help those that are in need. Today, there is no such understanding, no real sense of social cohesion. Germany says repeatedly that the Eurozone is not a ‘transfer union’ – that is, an economic grouping in which one country transfers resources to another, even temporarily in a time of need.” 30

The critique here appears as widely acknowledged, and in relation to the present Covid-19 crisis the difficulties referred to have once again shown their ugly face as the core of the problems. It has appeared to be challenging to reach consensus as to whether solidarity in the sense of explicit obligations of the stronger Member States to help those in need by transfers of economic resources should eventually prevail.

Despite the opposing views as to the depth of trans-national solidarity, already by now certain responses to the crisis have taken place. The considerations behind seemingly have been manifold, among other things including questions such as whether the help should be provided within the EU, i.e. involving all Member States, or only taking place within the Eurozone; whether the Member States in need for economic aid should get it unconditionally as grants or rather e.g. in the shape of loans with conditions connected with them; and whether the idea of “Eurobonds”, now in new disguises and often referred to as “Coronabonds” or “Recoverybonds”, should be revitalised and realised, which could have the potential of becoming a construction based on a new version solidarity.31 In what follows, we will elaborate further on the actual steps already taken or envisaged.

At the absolutely general level, it has (as also referred to in the title of the paper and briefly mentioned in Section 1) been pronounced by EU President, Ms. Ursula von der Leyen, that whatever is necessary to support Europeans and the European economy will be done.32 She has also expressed that the EU’s next long-term budget should be a key instrument in the recovery plan to confront the huge economic consequences of the Covid-19 crisis, and has in that context made reference to an EU Marshall Plan to be laid under the Multiannual Financial Framework (MFF), i.e. the

31 According to Markus K. Brunnermeier, Harold James & Jean-Pierre Landau, “The Euro and the Battle of Ideas” (Princeton University Press, 2016) p. 111, already during the euro crisis, a debate about Eurobonds emerged: “However, the introduction of Eurobonds was not linked with a budgetary transition of power to Brussels. Eurobonds without the transition of budgetary power would have undermined the two-pillar strategy of the Maastricht Treaty and Stability Growth Pact: first, market discipline through credible enforcement of the no-bailout rule should (1) through interest rate responses provide member states the right incentives to contain public debt levels and (2) further rules to limit budget deficit and debt levels.” These authors make it clear (at p. 224 et seq) that Eurobonds have over the years been proposed in many different forms, but essentially their introduction would include some kind of debt mutualization with joint liability, by many considered too risky. Simply speaking, the idea could be said to be that the Eurozone-countries would borrow money together, which would then be directed to those countries in need thereof.
EU’s long-term budget. This has, however, not yet been laid, but the European Commission is planning to present an updated proposal by the end of April 2020. It is intended to be playing a central role in the economic recovery.

At the more concrete level, many responses have already been launched; at times under the yoke of challenging negotiations. Most significantly, a critical moment occurred just before Easter. Thus, on 7 April 2020 an important teleconference of the Eurozone finance ministers (the Eurogroup) took place. However, although lasting until the next day, it was on that occasion not possible to reach an agreement as to the next economic package. The difficulties of reaching an agreement could be seen as a sign of the hesitance of some Euro-States to exercise genuine solidarity with and trust in others being more in need, but not necessarily so. It could also be a demonstration of economic accountability despite the prevailing times of despair and panic.

Anyways, on the evening of 9 April 2020, the EU finance ministers finally reached agreement on a €540 billion package to support Member States, companies and workers. The press release on the matter uses direct references to solidarity, as it in the introductory part is stated that “[w]e are committed to do everything necessary to meet this challenge in a spirit of solidarity”, and in the concluding part is pronounced that “[w]e will act together in solidarity and we will deliver.” The package includes

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more specifically thus a massive safety net of €540 billion for Eurozone Member States via the ESM (about 2% of the Eurozone’s GDP (€240 billion) will be available), for companies in all EU Member States through the EIB, and for workers in all EU Member States via the European Commission’s new instrument SURE.40

This last-minute package was unsurprisingly received with both compliments and critiques. Under all circumstances, the European Central Bank has assessed that there would be a need of up to €1.5 trillion this year to tackle the economic crisis caused by the pandemic, which is a strong indication that more is needed (as the agreement reached only constitutes one third thereof).41 It is thus of importance to note that further steps are already being considered. Among these, focus for the leaders seem to be to discuss the recovery plan to relaunch the economy once the pandemic starts receding, and the possibility of reaching agreement as to issuing the before-mentioned, politically extremely sensitive “Coronabonds”.42 Already much expected, the members of the European Council will take this work forward in a videoconference on 23 April 2020.43

By now, then, many different responses have already been launched. According to the European Commission the following economic measures, besides state aid, are the essential ones:44

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41 See e.g. Francesco Guarascio, “ECB urges measures worth 1.5 trillion euros this year to tackle virus crisis – sources”, Reuters, 8 April 2020, <uk.reuters.com/article/uk-health-coronavirus-eurozone/ecb-urges-measures-worth-1-5-trillion-euros-this-year-to-tackle-virus-crisis-sources-idUKKBN21QO99> (last accessed on 20 April 2020).

42 Jorge Valero, “Eurogroup agrees on €540 billion corona-package”, Euractiv, 10 April 2020, <euractiv.com/section/economy-jobs/news/eurogroup-agrees-on-e540-billion-corona-package/?utm_source=EURACTIV&utm_campaign=56a2383599-RSS_EMAIL_EN_Daily_Update&utm_medium=email&utm_term=0_c59e2fd7a9-56a2383599-114776123> (last accessed on 20 April 2020). It is regarding these bonds explained by Daniel Gros, “EU solidarity in exceptional times. Corona transfers instead of corona bonds”, CEPS in Brief, <ceps.eu/eu-solidarity-in-exceptional-times/> (last accessed on 20 April 2020) that: “The simplest way would be for the EU to issue ‘eurobonds’ and then make a large transfer to Italy or other countries in need. But that is not possible because the Treaty stipulates (Art. 310.1) that the EU budget has to be in balance. This is why a number of proposals have been made to find a way around this prohibition of a deficit via guarantee schemes, sometimes involving the ESM.” Also see e.g. Matthias Goldmann, “The Case for Corona Bonds. A Proposal by a group of European Lawyers”, Verfassungsblog, 5 April 2020, <verfassungsblog.de/the-case-for-corona-bonds/> or <economist.com/europe/2020/04/09/european-finance-ministers-ponder-coronabonds>.


a) Mobilisation of the EU budget and the European Investment Bank to save people's jobs and to support companies hit by the crisis:
   o The Commission’s SURE instrument, which protects jobs and people at work (“The Commission put forward Temporary Support to mitigate Unemployment Risks in an Emergency – SURE – to help people keep their job during the crisis. SURE provides funding to Member States of up to €100 billion by covering part of the costs related to the creation or extension of national short-time work schemes.”)
   o Liquidity measures to help hard-hit SMEs (“The EIB Group will aim to create an additional €20 billion of investment in small and medium-sized businesses, partly using its own capital and partly backed by the EU budget. The Commission will make available €1 billion in an EU budget guarantee to the European Investment Fund (EIF), so it can provide liquidity to SMEs, mobilising €8 billion in all to help at least 100,000 companies.”)45

b) The Coronavirus Response Investment Initiative (“The Commission tabled an investment initiative to provide Member States with immediate liquidity. It consists of unspent cohesion policy funds. The initiative also includes: A 100% financing rate by the EU for measures to fight the crisis, so Member States don’t have to frontload money. New methods under the Fund for European Aid to the Most Deprived to reach the most vulnerable, such as home deliveries and the use of electronic vouchers to reduce the risk of contamination. Flexibility to redirect funding between programmes and regions to fund corona-related actions. Support to fishermen and farmers.”)

c) EU Solidarity Fund (“The EU Solidarity Fund can provide support to Member States affected by public health crises like the one caused by the coronavirus.”)

d) Flexibility of the European fiscal framework (“The European Commission has triggered the 'escape clause' to allow exceptional fiscal support. This will allow applying the maximum flexibility to our budgetary rules to help national governments financially support healthcare systems and businesses, and to keep people in employment during the crisis.” 46

45 According to the European Commission at <ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/economy_en#decisive-actions-by-the-european-central-bank-and-the-european-investment-bank> (last accessed on 20 April 2020): “This will go towards bridging loans, credit holidays and other measures designed to alleviate liquidity and working capital constraints for SMEs and mid-caps. The European Investment Bank Group, including the European Investment Fund, which specialises in support for small and medium-sized enterprises, will work through financial intermediaries in the Member States and in partnership with national promotional banks. The proposed financing package consists of: Dedicated guarantee schemes to banks based on existing programmes for immediate deployment, mobilising up to €20 billion of financing; Dedicated liquidity lines to banks to ensure additional working capital support for small and medium-sized enterprises and mid-caps of €10 billion; Dedicated asset-backed securities purchasing programmes to allow banks to transfer risk on portfolios of small and medium-sized enterprise loans, mobilising another €10 billion of support.”

46 This step is intended to enable national governments to better support the national economies as the budgetary rules have been significantly relaxed; see <ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/economy_en> (last accessed on 20 April 2020). In other words, the activation should take place, so as to enable “a coordinated and orderly temporary deviation from the normal requirements for all Member States in
e) European Central Bank response to coronavirus emergency (“The Commission’s economic measures will complement the European Central Bank’s €750 billion Pandemic Emergency Purchase Programme of private and public securities during the crisis, in addition to the €120 billion programme decided earlier.”)47

f) Screening of foreign direct investment (“On 25 March, the Commission issued guidelines to help Member States screen foreign direct investments and acquisitions of control or influence. The aim is to protect critical European assets and technology in the current crisis.”)

It is finally worth mentioning that on 17 April 2020, the European Parliament voted in favour of a rapid implementation of a number of Commission proposals to tackle the coronavirus crisis.48

The responses so far are therefore, in principle, many and manifold.49 In general, they are more than simply an expression of solidarity, namely in fact a demonstration of a certain degree of genuine transnational solidarity.

In sum, the many reactions both nationally and at the EU level ultimately to save the European economies from an immediate economic disaster appear to us already by


47 Also see European Central Bank, “ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)”, Press Release, 18 March 2020, <ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html> (last accessed on 20 April 2020); and Dionyssis G. Dimitrakopoulos & Georgette Lalis, “Covid-19: how has the EU reacted so far?, LSE Blog, 3 April 2020, <blogs.lse.ac.uk/brexit/2020/04/03/covid-19-how-has-the-eu-reacted-so-far/> (last accessed on 20 April 2020).

48 European Commission, “Coronavirus: Commission welcomes Parliament’s quick green light for proposed new resources to protect lives and livelihoods”, Press Release, 17 April 2020, <ec.europa.eu/commission/presscorner/detail/en/IP_20_685> (last accessed on 20 April 2020). It is stated that: “The votes today allow for: unprecedented redirection of cohesion policy funds to address the effects of the public health crisis (CRII+ Initiative); an additional €3.08 billion of EU funds for healthcare (the Emergency Support Instrument) and emergency medical capacity (resEU); additional funding for the European Centre for Disease Prevention and Control; and a number of other support measures. The Parliament’s green light follows the swift approval by EU Member States in the Council for the majority of these initiatives; the CRII+ Initiative and the postponing of the Medical Devices Regulation still require approval by the Council.”

now as quite impressive and being quite in contrast to anything ever experienced before. The national responses are, however, in general obviously only of interest internally in a given Member State and thus do not serve as a demonstration of transnational solidarity, but it is still of interest here, that the European Commission has reacted very quickly and flexibly within the area of state aid law. Also worth stressing is that certain limitations in the room of maneuver at the EU level are caused by an unwillingness of some Member States to transfer the needed competences – as well as money.\(^{50}\) However, whether the initiatives were initiated sufficiently quickly, are enough and are the best of all available choices is still too early to assess, but a spirit of solidarity with respect to the economic dimension is definitely detectable.

4. The Rule of Law Dimension

As Professor of Political Science and Law, R. Daniel Kelemen, has tweeted: “The pandemic will eventually end; the economy will eventually recover. But democracy, once lost, may never come back. And we’re much closer to losing our democracy than many people realize.”\(^{51}\) The sad relevance of this reflection is that legal steps in many Member States have been taken in the shades of the Covid-19 crisis, which challenge the prevailing rule of law ideals in Europe. According to Article 2 TEU, the Union is, inter alia, founded on the values for democracy, the rule of law and fundamental rights. In a number of pivotal judgments the Court of Justice of the European Union has emphasized that Member States under the principle of loyal cooperation, of which solidarity is a concrete expression, have the obligation to comply with the value of the rule of law as enshrined in Article 2 TEU. In the ASJP case, for instance, the CJEU held that Article 19 TEU “gives concrete expression to the value of the rule of law” enshrined in Article 2 TEU. This latter provision directly produces obligations for Member States on account of the principle of sincere cooperation as enshrined in Article 4(3) TEU.\(^{52}\)

But fundamental rights such as the right to move freely, the right of equal access to health services, the right of respect for private life, the right to family life, the freedom of assembly and of association, data protection (apps controlling the movements of citizens), etc. have been severely limited since Covid-19 has spread over Europe. The containment measures have had a huge impact on the daily life of EU

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\(^{50}\) Fundamentally, the design with regard to the distribution of competences contains strong tensions as monetary policy for the Eurozone Member States is the exclusive competence of the EU, whereas the national economic policies can only be co-ordinated by the EU, as these as a point of departure are in principle the responsibility of the Member States.

\(^{51}\) R. Daniel Kelemen: twitter.com/rdanielkelemen/status/1248591730502504448> (last accessed on 20 April 2020).

\(^{52}\) Case C-64/16, Associação Sindical dos Juízes Portugueses ECLI:EU:C:2018:117, para 34; see also Case C-619/18, Commission v Poland ECLI:EU:C:2019:531.
citizens and their right to movement. Most severe have been the measures impacting the elderly, who have to stay in their homes or are confined to care homes, and may not receive visitors. Furthermore, national parliaments have reduced their meetings as well as the number of parliamentarians allowed in the parliamentary premises. Courts have been closed down for most hearings. And most significantly, in an increasing number of states across the globe and the EU, governments have been granted emergency powers to address the Corona crisis and combat Covid-19, which, such as is the case in Hungary, may even last for an indefinite period of time. With respect to these emergency powers the European Commission in a statement by EU President, Ms. Ursula von der Leyen, on the one hand recognizes the need for necessary tools to act rapidly and effectively to protect the health of citizens, but on the other hand also emphasizes the fundamental values and principles that cannot be set aside just like that. This is particularly so where the freedom of the media and freedom of expression are undermined and measures are not limited, necessary or strictly proportionate.

To closely monitor the situation, as the European Commission says it does, will in the end not at all be sufficient. Strikingly, the European Commission avoids mentioning specific Member States, particularly Hungary, and neither did the 13 Member States in a joint letter expressing their concern about the impact of emergency measures on the rule of law. Once the Covid-19 crisis has come over its peak, we will have to wait and see whether the legal tools, including the Article 7 TEU procedure, will and can be used to enforce democracy and rule of law values as enshrined by Article 2 TEU. Meanwhile the Secretary General of the Council of Europe, Ms. Marija Pejčinović Burić, presented a toolkit for respecting human rights, democracy and the rule of law during the Covid-19 crisis.

57 “Statement by Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden”, 1 April 2020, <government.nl/documents/diplomatic-statements/2020/04/01/statement-by-belgium-denmark-finland-france-germany-greece-ireland-italy-luxembourg-the-netherlands-portugal-spain-sweden> (last accessed on 21 April 2020).
As a matter of fact, the presumed conflict between the protection of public health on one hand and other fundamental rights and public interests on the other is an apparent contradiction. If we take the WHO’s definition of public health as our starting point, which stipulates “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”, the protection of the rule of law and fundamental rights should be important values in the fight against Covid-19 as well.

Other fundamental rights concerns have been raised about the possible use of apps, which in exchange of data, track the spread of the virus, ultimately with a view to understand its course and to contain it. Some individual Member States call in tech companies to ask directly for data, with little public clarity on what exactly is being provided. Some governments even rushed out apps that apply individual-level location tracking to enforce quarantine measures.\(^{59}\) Despite their potentially positive effects, using these apps may constitute important drawbacks, particularly where the protection of personal data is concerned. An app is not a “wand”, which could combat an epidemic just like that, as data may not always be reliable and conclusions may well be wrong.\(^{60}\) Important legal safeguards should be introduced as well as scientific reliability should be guaranteed with a view to protect the value of the rule of law.

Meanwhile the European Commission published a recommendation on 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 anonymised mobile data”.\(^{61}\) According to the recommendation, the European Commission’s approach aims “to uphold the integrity of the single market and protect fundamental rights and freedoms, particularly the rights to privacy and protection of personal data.” Its purpose is to set up a process for developing a common approach, i.e. a Toolbox, to use digital means to address the crisis. But throughout the recommendation much emphasis is laid on justification and proportionality to address data protection and privacy concerns. Also here Member States are under the obligation to cooperate loyaly, to show solidarity, in finding an approach that balances health protection, free movement and other fundamental rights, like the protection of personal data and privacy.


5. Conclusions

To conclude – inevitably at this stage only on a preliminary basis - many minds are currently evaluating the ability of different models of society to cope with the crisis. In that “competition”, the citizens in rich and sophisticated welfare states appear to be the winners - all parameters included - as they are living in the most responsible and safe societies, in which solidarity internally is present through law almost into the tiniest detail, including universal health care systems, social safety nets and help packages to economic actors, and where democratic guarantees and the respect of fundamental rights are capable of surviving.

We would, however, also put a lot of hope into the EU as a model of society, as it has, after all, within the prevailing limits done quite well already. The reactions were at first far too slow to become initiated, which had extremely tragic consequences in some of the Member States, which are likely to could have been avoided. In fact, we are all forever left with terrifying images of the times when Covid-19 arrived in Northern Italy, and of the despair and far too many deaths that followed.62 Later on, the reactions came little by little and often in a piecemeal manner, and severely troubled by certain legal powers likely to being far too limited for the needs as well as the existence of rather opposing views as to the way forward.

Nevertheless, to us it does not seem fair to say that solidarity in the shape of action is not there at all. Some of the explanation, as it has been explained, is to be found in the fact that Member States in previous times have not been willing to transfer the needed competences. That framework will undoubtedly eventually have to be reconsidered, but would often require fundamental Treaty amendments. However, we must all learn, being as we are in a kind of a social experiment - constituting probably the largest challenge to the EU since its foundation - no one has ever experienced before, where human wisdom, responsibility and solidarity is to be so strongly called for.

Improvements are to be expected, as there still is a long road ahead of us, but it did after all not begin too badly considering the frightening and almost paralyzing circumstances.

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62 Accordingly, the EU offered Italy an apology; see European Commission, “Speech by President von der Leyen at the European Parliament Plenary on the EU coordinated action to combat the coronavirus pandemic and its consequences”, 16 April 2020 <ec.europa.eu/commission/presscorner/detail/en/speech_20_675> (last accessed on 20 April 2020), in which it was said: You cannot overcome a pandemic of this speed or this scale without the truth. The truth about everything: the numbers, the science, the outlook – but also about our own actions. Yes, it is true that no one was really ready for this. It is also true that too many were not there on time when Italy a needed a helping hand at the very beginning. And yes, for that, it is right that Europe as a whole offers a heartfelt apology. But saying sorry only counts for something if it changes behaviour. The truth is that it did not take long before everyone realised that we must protect each other to protect ourselves.” Also see the regret expressed by European Council President, Mr. Charles Michel, voicing “…that Europe’s way of working, also evident during the coronavirus crisis, is ‘too slow’ and called for more solidarity with countries that have been hard-hit by the pandemic, like Italy and Spain.” See e.g. “Michel: EU’s way of working is ‘too slow’”, Euractiv, 20 April 2020, <euractiv.com/section/future-eu/news/michel-eus-way-of-working-is-too-slow/> (last accessed 21 April 2020).
at the time of the outbreak of the pandemics. However, only time will show whether the steps taken are sufficient. Despite much being under significant change and huge challenges prevailing, we would as our final statement simply refer to the following words of Albert Camus as a request to all of us: "[W]e should go forward, groping our way through the darkness, stumbling perhaps at times, and try to do what good lay in our power." 63