

Perspectives of Solidarity within the EU Legal Order in the Time of the Covid-19 Pandemic

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1 Introduction

In the last two years, the Covid-19 pandemic has put the single national structures and models to the test and, at the same time, has revealed the need for urgent as well as long-lasting political, health and economic strategic choices at the supranational level. As for the EU, the health emergency has brought to light new challenges for its future in terms of internal structural strategies and vision when dealing with situations of crisis.

The EU legal framework, although not devoid of shortcomings, is perceived as a *unicum* in the field of disasters' response since it is characterised by several, but complementary, instruments which enable the Union as an international organisation and its Member States to react in the event of serious disasters. Moreover, one may remark that the increasing awareness in emergency circumstances requires more intense cooperation and support based on solidarity arguments. Indeed, it is essential to stress that the entry into force of the Lisbon revision has given new impetus to solidarity as an autonomous concept gaining a more substantial role in shaping the EU legal order, especially with regard to emergency situations. The expression "in a spirit of solidarity" as the main trait of the action of the EU institutions and the Member States have been embodied in a number of EU primary law provisions regulating different areas of integration.¹ Moreover, demands for solidarity have been included among the general objectives of the Union enshrined in art. 3 of the Treaty of the EU (TEU).² Besides representing a significant step towards the crystallisation of solidarity within the EU legal order, the need to guarantee

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1 For further details, see *ex multis*, Chahira Boutayeb (ed), *La solidarité dans l'Union européenne. Éléments constitutionnels et matériels* (Daloz 2012); Peter Hilpold, 'Understanding solidarity within EU law: an analysis of the "Islands of Solidarity" with particular regard to Monetary Union' (2015) 34 *Yearbook of European Law*, 257–285.

2 Anne Levaed, 'La valeur constitutionnelle du principe de solidarité' in Boutayeb (n 1) 36; Esin Küçük, 'Solidarity in EU law: an elusive political statement or a legal principle with substance?' in Andrea Biondi, Eglé Dagilyté, Esin Küçük (eds), *Solidarity in EU Law. Legal Principle in the Making* (Edward Elgar 2018) 38.

suitable solidarity-proof outcomes aligns with the teleological character of the EU integration project. Indeed, the founding Treaties are imbued with a purpose-driven functionalism, and generally, the objectives embodied therein have played an important role in the legal process of integration, above all due to the interpretation employed by the Court of Justice of the EU (CJEU) aimed at ensuring the greatest practical effectiveness of EU law.³ Hence, the labelling of solidarity as an objective in a short- and long-term perspective contributes to fuelling the teleological reading of the Treaties, which should also guide the EU institutions and the Member States when facing situations of emergency.

Against this background, the occurrence of the Covid-19 pandemic represented a tragic occasion that shook the identification of a common understanding of solidarity. In effect, the references to this notion have rapidly multiplied in different institutional forums and related documents, from those adopted by the European Commission, to the declarations within the European Council and the resolutions of the European Parliament.⁴ On the basis of this evidence, the present article intends to offer an appraisal of the EU response to the Covid-19 pandemic by assessing the substantial practical and theoretical role of solidarity in shaping the main legal instruments for responding to this emergency. For this purpose, it will be proposed a special insight on the relevance of solidarity in situations of emergency according to the letter of the Treaties (para. 2). Then, some selected instruments used during the health emergency will be illustrated and evaluated under the lens of solidarity arguments (para. 3). By underlining that the focus will be just limited to the EU territory and to the instruments deployed in favour of the Member States, specific attention will be devoted to the effectiveness of the Union Civil Protection Mechanism as catalyst of in-kind assistance (para. 3.1), the Joint Procurement Agreement as a first step towards the creation of a

3 CJEU, Case C-8/57, *Groupement des hauts fourneaux et aciéries belges v. High Authority* (21 June 1958) para. 232; CJEU, Case C-6/62, *Europemballage Corporation e Continental Can Company v. Commission* (21 February 1973) para. 25; CJEU, Case C-36/74, *Charmasson c. Ministre de l'économie et des finances* (10 December 1974) para. 23.

4 For general insights on the EU reaction to the Covid-19 pandemic under the lens of solidarity, see *ex multis*, Jacques Ziller, 'Europa, Coronavirus e Italia' (Federalismi.it, 24 March 2020); Jean Paul Jacqué, 'L'Union à l'épreuve de la pandémie' (2020) 56 *Revue trimestrelle de droit européen*, 175–180; 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' [2020/3] *Eurojus*, 60; Charlotte Beaucillon, 'International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: Why European Solidarity Is Not Dead and What We Need to Make It both Happen and Last' (2020) 5/1 *European Papers*, 387–401; Stefano Bastianon, 'Solidarity and the EU at the time of Covid-19: the opportunity to build a stronger social and economic Europe' (*Eurojus.it*, 8 May 2020).

common procurement system in case of major health emergencies (para. 3.2) and, finally, the Emergency Support Instrument as a financial instrument providing assistance to EU Member States in emergency scenarios (para. 3.3). The article will also leave space to reflect on the missed opportunity to invoke the solidarity clause (para. 4) and will conclude with a general assessment of the role played by solidarity during the health emergency with a view to future perspectives (para. 5).

2 Managing Emergency Situations within the EU in a “Spirit of Solidarity”

Emergency management has always been perceived as a prerogative and responsibility of the States. Indeed, when a disaster strikes, national authorities may rely on different intervention instruments at the national and local levels to provide useful assistance to the population in the case of an emergency. This notwithstanding, it has become increasingly clear that transboundary threats demand transboundary crisis management capacities.

The growing distress among the EU Members concerning the trans-national effects of major emergencies has convinced them that more cooperative operational arrangements regarding disasters are a necessary prerequisite and an added value for efficient crisis management at the national level. Moreover, the individual Member States may not always be able to properly respond to serious disasters and take care of the victims due to shortages of in-kind assets. Hence, during the integration process Member States have progressively conferred to the EU some competences related to disaster response.⁵ Since the mid-1990s, in a trend which has accelerated since 2000, specific arrangements and strategies aimed at effectively responding to emergencies occurring both within and outside the Union’s territory have been created, and the role of the European Union as a crisis manager has strengthened. The Lisbon Treaty has then consolidated and multiplied the references to the management of emergency situations by giving the EU institutions new responsibilities both at an

5 Marco Gestri, ‘EU Disaster Response Law: Principles and Instruments’ in Andrea De Guttry, Marco Gestri and Gabriella Venturini (eds), *International Disaster Response Law* (Springer 2012) 105; Arjen Boin, Magnus Ekengren and Mark Rhinard (eds), *The European Union as Crisis Manager: Patterns and Prospects* (CUP 2013); Inge Govaere and Sara Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill 2014).

external and internal level that have allowed the adoption of different kinds of instruments to respond to serious catastrophes and emergencies.⁶

As for the external projection, it is essential to recall that art. 21 TEU requires the Union to define and pursue common policies and actions in order ‘to assist populations, countries and regions confronting natural or man-made disasters’. Such a provision can easily be connected to the EU’s humanitarian aid policy governed by art. 214 of the Treaty on the Functioning of the EU (TFEU), aimed at granting ‘*ad hoc* assistance and relief and protection for people in third countries who are victims of natural and man-made disasters, in order to meet the humanitarian needs resulting from these different situations’.⁷ Hence, the joint reading of art. 21 TEU and art. 214 TFEU could report the ambition of the Union as a whole not only to progressively establish itself as an independent humanitarian donor, but also to ‘Europeanise’ Member States’ activities in this area by making the Union a facilitator and coordinator of aid and relief provision in emergency situations.

With regard to the internal dimension, art. 122(2) TFEU constitutes a crucial rule regarding the possibility of enhancing a Member State in need by the EU or other Member States. Indeed, conceived as an emergency clause for temporary measures, it allows the Council to take a decision on measures to offer financial assistance during ‘exceptional occurrences’ or ‘natural disasters’ that may affect Member States.⁸ Alongside *ad hoc* financial assistance, the Treaties

6 According to the widely accepted definition, the notion of ‘disaster’ in EU law is quite broad and comprises ‘[...] all kinds of natural and man-made disasters, including the consequences of acts of terrorism, technological, radiological or environmental disasters, marine pollution, hydrogeological instability and acute health emergencies, occurring inside or outside the Union’ (Regulation (EU) 2021/836 of the European Parliament and of the Council of 20 May 2021 amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism [2021] OJ L 185/1).

7 The main instrument (still) regulating humanitarian aid in third countries is Council Regulation No. 1257/96 of 20 June 1996 concerning humanitarian aid [1996] OJ L 163/1. In addition, in December 2007, the European Commission, the European Parliament, the Council and the Member States jointly adopted the European Consensus on Humanitarian Aid thus adding a solid political character to the legal framework upon which the instrument is based. For insights, Federico Casolari, ‘The External Dimension of the EU Disaster Response’ in De Guttry, Gestri and Venturini (n 5) 129 ff.; Peter Van Elsuwege and Jan Orbie, ‘The EU’s Humanitarian Aid Policy after Lisbon: Implications of a New Treaty Basis’, in Govaere and Poli (n 5) 21 ff.

8 For comments, see Jean-Victor Louis, ‘Solidarité budgétaire et financière dans l’Union Européenne’, in Boutayeb (n 1) 107 ff.; Ilaria Anrò, ‘Le procedure decisionali d’urgenza dell’Unione europea in tempi di crisi’ (Eurojus.it, 13 July 2017); Leo Flynn, ‘Article 122 TFEU’ in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), Commentary on the EU

confirm the relevance of the operational and in-kind support in art. 196 TFEU that has introduced an explicit legal basis on civil protection. While the Union has only a supporting competence in this sector, it is intended to encourage major cooperation between Member States under the coordination of the EU in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters.⁹ Moreover, for the purposes of the present work, the provision that assigns the EU with a significant mandate to act on health risk and crisis management cannot be neglected, as long as the principles of subsidiarity and proportionality are respected. In this respect, art. 168 TFEU introduces new powers for the EU to take monitoring and early warning measures that complement the Member States' national health policies for protecting and improving human health and, particularly, tackling major cross-border health emergencies.¹⁰

In order to complete this overview, it is essential to reference a specific provision dedicated to solidarity in the event of a disaster, that is art. 222 TFEU, also known as the 'solidarity clause'.¹¹ This provision imposes an explicit and general obligation upon the Union and its Member States to act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. Moreover, it requires the Union to mobilise all the instruments at its disposal and for the Member States to coordinate between themselves in the Council. Given its normative impact, as stressed by the Special Rapporteur Valencia-Ospina, 'this hard-law provision sets the Union apart from other regional coordination schemes'.¹² Indeed, the introduction of the solidarity clause represents the attempted focus on the need to codify "solidarization" in the management of emergencies occurring

Treaties and the Charter of Fundamental Rights (OUP 2019) 1282; Albrecht Weber and Stefan Pilz, 'Article 122 [Solidarity]', in Springer Commentaries on International and European Law (Springer 2021) 1.

- 9 Teresa Åhman, *The Treaty of Lisbon and Civil Protection in the European Union* (Swedish Defence Research Agency 2009); Florika Fink-Hooijer, 'The EU's Competence in the Field of Civil Protection (Article 196, Paragraph 1, a–c TFEU)' in Govaere and Poli (n 5) 137 ff.
- 10 Anne-Laure Beaussier and Lydie Cabane, 'Strengthening the EU's Response Capacity to Health Emergencies: Insights from EU Crisis Management Mechanisms' (2020) 11/4 *European Journal of Risk Regulation*, 808–820.
- 11 The implementation of the solidarity clause follows Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause [2014] OJ L 192/53.
- 12 ILC, 'Sixth report on the protection of persons in the event of disasters' (2013) UN Doc A/CN.4/662, para. 103. The work of the ILC has been commented by a number of authors in Giulio Bartolini, Dug Cubie, Marlies Hesselman and Jacqueline Peel (eds), 'Thematic Section: The Draft Articles of the International Law Commission on the "Protection of Persons in the Event of Disasters"' (2018) 1 *Yearbook of International Disaster Law*.

in the Union's territory, thus meeting the requirements of solidarity deriving from the integration process.¹³

By moving from these consolidated primary law provisions, the EU institutions have progressively shaped a so-called "EU disaster response law" according to a significant and ambitious plan by endowing it with new legal instruments and improving the existing ones to respond more adequately to severe emergencies occurring within the EU territory. According to a theoretical perspective, the measures adopted and the multiplicity of levels activated in the event of a disaster should allow solidarity to express its character by combining policies and goals of very different, but interacting, natures. Against this background, the next section is dedicated to verifying how the layered combination of financial and in-kind instruments established at the EU level has been activated (and improved) in order to ensure the effectiveness of solidarity during the Covid-19 pandemic.

3 The Activation of Solidarity Instruments during the Covid-19 Pandemic

The Covid-19 pandemic has reignited the public discourse on solidarity in the EU political narrative to achieve the ambitious objectives set by decision-makers. However, in the early stages of the health emergency, when its magnitude was not clear yet, the EU was actually caught by a variety of confusing reactions. On the one hand, the EU institutions were absent or shallow in assessing the ongoing situation (just think of the initial European Central Bank (ECB) President's declarations),¹⁴ on the other one, a series of events raised many doubts about the ability of Member States to show solidarity

13 In this regard, it is essential to note that the specific content of the solidarity clause is still characterised by a general and very vague scope that especially the Member States are reluctant to clarify. Such an orientation is made evident by the fact that, despite the overall positive theoretical value of art. 222 TFEU, so far the solidarity clause has never been activated. For deeper and critical insights on the 'solidarity clause', see *ex multis*, Marco Gestri, 'La clausola di solidarietà europea in caso di attacchi terroristici e calamità (art. 222 TFUE)' in Studi in onore di Luigi Costato (Jovene Editore 2014) 537; Steven Blockmans, 'L'union fait la Force: Making the Most of the Solidarity Clause (Article 222 TFEU)' in Govaere and Poli (n 5) 111 ff.; Peter Hilpold, 'Filling a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU' (2015) 42 Legal Issues of Economic Integration, 209–232.

14 On 12 March 2020, the ECB's President Christine Lagarde in press conference affirmed: 'We are not here to close spreads. This is not the function or the mission of the ECB. There are other tools for that, and there are other actors to actually deal with those

for withstanding the shock of the emergency.¹⁵ In this regard, one could first recall Italy's unanswered appeal for help addressed to the other Member States in order to obtain personal protection equipment and other supporting material.¹⁶ On the contrary, once the scale of the emergency was realised, some Member States – namely France, Germany, the Czech Republic and Poland – took steps to ban or limit the export of medical equipment, such as masks, or medicines.¹⁷ Just later, the opportunity for a collective response and in-kind assistance resulted in (sporadic) bilateral and *ad hoc* interventions based on the classical interaction between request and acceptance.¹⁸ Hence, at the beginning of the health emergency, not only the national health systems but also the concept of solidarity as conceived in the Treaties was seriously put under pressure.

The approach changed once it was evident that the health emergency was not only exogenous but also symmetric and extended to the whole EU. Hence, the necessity to tackle it according to a 'one voice' strategy pushed the EU to become a hub of coordination and cooperation. Even if long overdue, existing structures were mobilised, and new instruments of response to direct support to public health and research, as well as to economic and social consequences of the emergency, were created.¹⁹

issues', available at <<https://www.ecb.europa.eu/press/pressconf/2020/html/ecb.is200312~f857a21b6c.en.html>> last accessed (as any subsequent URL) on 13 June 2022.

- 15 For comments, Federico Casolari, 'Prime considerazioni sull'azione dell'Unione ai tempi del Coronavirus' [2020/1] *Eurojus*, 95–106; Charlotte Beaucillon, 'International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: Why European Solidarity Is Not Dead and What We Need to Make It both Happen and Last' (2020) 5 *European Papers*, 387–401; Alberto Alemanno, 'The European Response to Covid-19: From Regulatory Emulation to Regulatory Coordination?' (2020) 11/2 *European Journal of Risk Regulation*, 307–316.
- 16 Maurizio Massari, 'Italian ambassador to the EU: Italy needs Europe's help', at <www.politico.eu/article/coronavirus-italy-needs-europe-help/>.
- 17 Mauro Gatti, 'La risposta europea all'emergenza da COVID-19', in Pietro Manzini and Michele Vellano (eds), *Unione europea 2020 (CEDAM 2021)* 40. In this regard, the European Commission intervened in mid-March by issuing Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorization [2021] OJ L 771/1 then replaced by Implementing Regulation (EU) 2020/426 of 19 March 2020 amending Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorization [2021] OJ L 841/1.
- 18 For example, Spain and Italy received 10,000 protective suits from the Czech Republic and 7 tons of medical equipment and material including 300 ventilators in total from Germany through the NATO-EADRCC assistance.
- 19 For an exhaustive list of the measures adopted that it is not possible to mention in this article, see European Commission, 'Coronavirus Global Response', at <global-response

3.1 *Fostering In-Kind Assistance through the Union Civil Protection Mechanism*

During the first stages of the collective reaction to the Covid-19 pandemic, in-kind assistance was mainly delivered through the Union Civil Protection Mechanism (UCPM). Originally set up in 2001, the UCPM has been institutionalised by Decision 1313/2013,²⁰ and further reinforced by Decision 2019/420.²¹ Based on Article 196 TFEU, it represents the attempt to reorganise the previous variegated and heterogeneous legal regimes and move toward a pre-planned, predictable, and coordinated response to natural and man-made disasters through a specific operational instrument. The current Mechanism consists of three different layers of intervention aimed at guaranteeing coordination and faster response in the operations of civil protection on occasion of disasters and serious emergencies occurring within or outside the EU by mobilising the assets and personnel (including, for example, search and rescue teams, medical teams, means of transport, and equipment). The first layer is based on the simple coordination of the assistance provided by the participating States via the Emergency Response Coordination Centre, which is active 7 days a week, 24 hours a day. The second one consists of the so-called European Civil Protection Pool (ECPP), a voluntary pool of resources pre-committed by Member States to be deployed immediately within or outside the Union for ensuring a rapid, effective and coordinated assistance to the affected populations.²² Finally, the third layer provides for a dedicated reserve of response capacities under the control of the Union, to be known as rescEU,

.europa.eu>. For comments, Emanuel Castellarin, 'The European Union's Financial Contribution to the Response to the Covid-19 Crisis: An Overview of Existing Mechanisms, Proposals Under Discussion and Open Issue' (2020) 5 *European Papers*, 1021.

20 Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism [2013] OJ L 347/924. Moreover, the Commission adopted the Implementing Decision 2014/762/EU of 16 October 2014 laying down rules for the implementation of Decision No. 1313/2013/EU [2014] OJ L 320/1. For comments, Claudia Morsut, 'The EU's Community Mechanism for Civil Protection: Analysing Its Development' (2014) 22 *Journal of Contingencies and Crisis Management*, 143–149; Charles Parker, Thomas Persson and Sten Widmalm, 'The Effectiveness of National and EU-Level Civil Protection Systems: Evidence from 17 Member States' (2019) 26 *Journal of European Public Policy*, 1312–1334; Federico Casolari, 'Europe' (2021) 2 *Yearbook of International Disaster Law*, 413–420.

21 Decision (EU) 2019/420 of the European Parliament and of the Council of 13 March 2019 amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism [2019] OJ L 771/1.

22 *Ibid.*, art. 11.

introduced by the 2019 revision.²³ The rescEU capacities are intended to provide assistance in overwhelming situations where overall existing capacities at the national level and those of the ECPP are not able to ensure an effective response to the disaster. Those capacities shall be acquired, rented or leased by the Member States with the financial support of the European Commission or procured directly by the Commission on behalf of the Member States.²⁴ The decision on the deployment of rescEU capacities is taken by the Commission in close coordination with the involved Member States, but the direction of the response operations is up to the Member State on the territory in which rescEU capacities are deployed.²⁵ As rescEU is conceived as a “last resort tool”, the initial composition of the capacities set in the implementing Decision 2019/570²⁶ was limited to aerial forest fire fighting, then amended to include emergency medical response.²⁷

The outbreak of the Covid-19 pandemic has pushed multiple States to activate the UCPM to receive and provide in-kind assistance. At the very beginning, episodes of repatriation of EU citizens via the UCPM have represented the first main intervention.²⁸ Since the beginning of the pandemic, over 408 repatriation flights were facilitated and co-financed by the Mechanism, and approximately 90,000 EU citizens have been brought home.²⁹ These operations have shown the clearly increasing demand to prepare the necessary measures for prevention, and the evacuation of groups of EU citizens in third countries and in need of protection in an emergency situation. Moreover, they

23 *Ibid.*, art. 12. As for the background of this specific instruments, see European Commission, ‘Strengthening EU Disaster Management: rescEU Solidarity with Responsibility’, COM (2017) 773 final.

24 *Ibid.*, art. 12(5).

25 *Ibid.*, art. 12(6).

26 Commission Implementing Decision (EU) 2019/570 of 8 April 2019 laying down rules for the implementation of Decision No 1313/2013/EU of the European Parliament and of the Council as regards rescEU capacities and amending Commission Implementing Decision 2014/762/EU [2019] OJ L 99/41.

27 Implementing Decision (EU) 2019/1930 of 18 November 2019 amending Implementing Decision (EU) 2019/570 as regards rescEU capacities [2019] OJ L 299/55. It provides for two different types of medical-evacuation (medevac) capacities, respectively for disaster victims with highly infectious diseases and other disaster victims with non-infectious diseases.

28 European Parliament Research Service, ‘Repatriation of EU citizens during the COVID-19 crisis. The role of the EU Civil Protection Mechanism’ (1 April 2020). For a comment, see Anastasia Iliopoulou-Penot, ‘Rapatriements en situation d’urgence lors de la pandémie de COVID-19: la solidarité européenne hors sol européen’ (2020) 5 *European Papers*, 469–477.

29 European Commission, Press Release, IP/20/142, 28 January 2020.

proved to be in line with Directive 2015/637 relating to measures of coordination and cooperation to facilitate the consular protection of Union citizens,³⁰ thus ensuring that “vertical solidarity” among the EU and its citizens embodied in the concept of EU citizenship.

In the second place, upon the request of the affected Member States, the European Civil Protection Pool allowed the deployment of pre-committed civil protection assets from Member States, including rescue or medical teams, experts, specialised equipment or transportation, under the coordination of the EU’s Emergency Response Coordination Centre. In particular, Austria delivered over 3.360 litres of medical disinfectant to Italy, gloves and disinfectant to Croatia, Bosnia and Herzegovina, North Macedonia, Montenegro, Albania, and Moldova. Moreover, doctors and nurses from Romania and Norway were dispatched to Italy, being deployed through, and financed by, the EU Medical Corps, set up in response to the acute shortage of trained medical teams during the Ebola crisis in West Africa in 2014.³¹

Thirdly, the Commission decided to rely on rescEU. However, the existing rescEU capacities for aerial medical evacuation of disaster victims and an emergency medical team could not be sufficient for facing the effects of the pandemic. Hence, after having received the approval of the Member States, in March 2020, the Commission adopted an additional Implementing Decision for adding medical stockpiling capacities to rescEU³² that has allowed the creation of a rescEU reserve, including ventilators and reusable masks, therapeutics, and laboratory supplies. The Commission has financed 100% of the storage and transport of the assets initially stocked in Germany and Romania and then in Belgium, Denmark, Greece, Netherlands, Slovenia, Sweden and

30 Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC [2015] OJ L 106/1, art. 13(4). For a detailed overview of the repatriation flights, <https://commission.europa.eu/document/703d70b6-0d02-409c-ac6c-ddba749e5bfi_en>.

31 European Commission, Daily News, (7 April 2020) <https://ec.europa.eu/commission/presscorner/detail/en/mex_20_617>. To date, 11 States party to the Mechanism have committed emergency medical teams and their equipment to the European Medical Corps: Belgium, Estonia, the Czech Republic, Italy, France, Germany, Norway, Portugal, Slovakia, Spain, and Sweden.

32 European Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities [2020] OJ L 82I/1. In addition, it is appropriate to report the adoption of Implementing Decision (EU) 2021/88 amends Implementing Decision (EU) 2019/570, that has extended the scope of the rescEU capacities in the decontamination from CBRN agents of infrastructure, buildings, vehicles, equipment and critical evidence, but also affected persons including fatalities.

Hungary.³³ During these operations, President Von der Leyen stated: ‘With the first ever common European reserve of emergency medical equipment we put EU solidarity into action. It will benefit all our Member States and all our citizens. Helping one another is the only way forward’.³⁴

In light of this evidence, the dual system of response capacity at the basis of the UCPM has not only guaranteed major coordination among the States but also underlined the increasing need for a supranational mechanism of civil protection able to compensate national deficiencies, especially in situations of symmetric emergency. In effect, such a massive intervention has represented a concrete way to put EU solidarity into action, especially in favour of the Member States and those living in the EU.³⁵ Moreover, it has been the occasion to reflect on the necessity to envisage a further enhancement of the UCPM, enabling the Commission to directly procure emergency capacities in cases of urgency where national capacities are overwhelmed. These overall considerations arising from the effects of the pandemic have pushed the Commission to present a proposal for the reform of the UCPM that has led to the adoption of amending Regulation 2021/836,³⁶ upgrading the rescEU system. Despite the amendments of the Council and the European Parliament to the initial proposal,³⁷ the final version introduces the noteworthy possibility for the Commission to directly procure rescEU capacities in duly justified cases of urgency where national capacities are overwhelmed.

Moreover, in the area of transport and logistics, rescEU capacities may be rented, leased or otherwise contracted by the Commission. The relevance of the UCPM as a whole has been made evident also by the increased allocated budget for civil protection interventions. Indeed, under Regulation 2021/836, the funding has increased substantially for 2021–2027, with an allocation of €1,26 billion in addition to an amount of up to €2,06 billion for the

33 Essential medical supplies were delivered to Croatia, Czechia, France, Italy, Lithuania, Spain, Montenegro, North Macedonia, and Serbia. See, European Commission Press Release, ‘Coronavirus: rescEU medical stockpile expands in four Member States’, IP/21/45.

34 European Commission, ‘COVID-19: Commission creates first ever rescEU stockpile of medical equipment’ (19 March 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_476>.

35 European Commission, Daily News 19 March 2020, <https://ec.europa.eu/commission/presscorner/detail/fr/mex_20_489>.

36 Regulation (EU) 2021/836 (n 6).

37 Proposal for a Decision of the European Parliament and of the Council amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism, COM/2020/220 final, 2 June 2020.

civil-protection-related measures addressing the impact of the Covid-19 crisis envisaged in the EU Recovery Instrument.³⁸

Ultimately, during the response to the first stages of the Covid-19 pandemic, the UCPM has confirmed its effectiveness in progressively avoiding *ad hoc* interventions while creating pre-planned structures and modules of assistance. Besides ensuring to respond more effectively and rapidly to wide-ranging disasters, its activation and improvement have also proven to be a manifestation of that spirit of solidarity under which all the EU Member States should act in situations of emergency.

3.2 *The Joint Procurement of Medical Countermeasures*

The EU in-kind solidarity intended to foster the pooling and sharing of strategic assets via the UCPM has been matched with the coordination of the procurement procedures for the acquisition of appropriate medical devices as well as medicines and virus-testing kits via the EU Joint Procurement Agreement (JPA).

The JPA was introduced in 2014 in order to improve Member States' purchasing power for vaccines and medications in preparation for and during serious cross-border health crises. Indeed, in the aftermath of the H1N1 pandemic, the European Council had requested the Commission to commence the preparations for conducting centralised procurement actions, focusing on the procurement of vaccines in the context of a future pandemic.³⁹ The concrete opportunity of a joint procurement procedure is expressly envisaged in art. 5 of Decision 1082/2013⁴⁰ on serious cross-border threats to health adopted on the basis of art. 168(5) TFEU.⁴¹ Not conceived as an international

38 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 [2020] OJ L 433/23. For comments, Jonatan Echebarria Fernández, 'A Critical Analysis on the European Union's Measures to Overcome the Economic Impact of the COVID-19 Pandemic' (2020) 5/3 European Papers, 1399–1423; Bruno De Witte, 'The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift' (2021) 58/3 Common Market Law Review, 635–682.

39 See Natasha Azzopardi-Muscat, Peter Schroder-Bäck, Helmut Brand, 'The European Union Joint Procurement Agreement for cross-border health threats: what is the potential for this new mechanism of health system collaboration?' (2017) 12/1 Health Economics, Policy and Law, 43–59.

40 Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC [2013] OJ L 293/1.

41 Art. 168(5) TFEU allows for the adoption of 'incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious

agreement,⁴² JPA is a collaborative mechanism aimed at securing high-quality public medical services and goods, while ensuring the efficient use of public finances in preparation for and during instances of cross-border health crises.⁴³ In the view of the Commission, thus, the JPA does not entail the exercise of ‘the public law powers related to health policy conferred under Article 168 TFEU’, but an arrangement having executive functions. In support of this argument, it is appropriate to underline that this instrument empowers the Commission only to determine and manage the conclusion of aggregated medical supplies and medical countermeasures contracts, streamlining the procedure and generating buying power. Indeed, participating Member States are effectively assisted in accessing high-quality, in-demand medicines and medical supplies by organising procurement at the regional level.⁴⁴ Furthermore, JPA is based on voluntary considerations and is complementary to national procurement procedures, thus making the JPA somewhat exemplary of the EU’s supporting role in the health field. In this regard, it has to be noted that the JPA is not used to purchase the supplies on behalf of the participating Member States, but that it is a centralised and quick procurement mechanism that facilitates the purchasing competition.⁴⁵ Then, it is up to the participating

cross-border threats to health’. For insights, Francesco Saverio Mennini, Nicola Dimitri, Lara Gitto, Francois Lichere and Gustavo Piga, ‘Joint procurement and the EU perspective’ in Gustavo Piga and Tunde Tátrai (eds), *Law and Economics of Public Procurement Reforms* (Routledge 2017) 119.

- 42 European Commission, ‘Considerations on the legal basis and the legal nature of the Joint Procurement’ (no date) <ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_legal_nature_en.pdf>; ‘Explanatory Note on the Joint Procurement Mechanism’ (December 2015), <ec.europa.eu/health/sites/default/files/preparedness_response/docs/jpa_explanatory_en.pdf>.
- 43 The term “cross-border health crisis” is defined in art. 3, lett. g) of Decision No 1082/2013/EU as ‘a life-threatening or otherwise serious hazard to health of biological, chemical, environmental or unknown origin which spreads or entails a significant risk of spreading across the national borders of Member States, and which may necessitate coordination at Union level in order to ensure a high level of human health protection’.
- 44 In this regard, it is necessary to mention that the EU Member States, European Economic Area (EEA) countries and candidate countries have joined the JPA. European Commission, Press Release, ‘Signing ceremonies for Joint Procurement Agreement’, <https://ec.europa.eu/health/health-security-and-infectious-diseases/preparedness-and-response/signing-ceremonies-joint-procurement-agreement_en>.
- 45 For insights on the benefits of the use of the JPA, 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*, 851–863; Gloria Sdanganelli, ‘Il modello europeo degli acquisti congiunti nella gestione degli eventi rischiosi per la salute pubblica’ (2020) 2 *DPCE Online*, 2323–2346.

States⁴⁶ to purchase from the concluded contracts, thus confirming the voluntary nature of the mechanism.

In the context of the Covid-19 pandemic, the Commission recognised that it required swift and smart solutions and agility in dealing with an immense increase of demand for similar goods and services while certain supply chains were disrupted. Hence, it decided to quickly provide an official guidance on how Member States can best secure urgent medical supplies by offering clarity on the use of accelerated urgent national public procurement procedures.⁴⁷ Moreover, the guidance made clarity on the use of accelerated urgent national public procurement procedures, but also encouraged Member States to participate in joint procurement actions.⁴⁸ However, because the guidelines are not binding, it was immediately clear that it was not sufficient to tackle the purchasing power yielded by individual Member States. As a result, the Commission issued the Communication on the Global EU response to Covid-19 highlighting the intention to activate the JPA for the purchase of medical equipment.⁴⁹ Starting from February 2020, the Commission has published six procurement competitions for personal protective equipment, fans, laboratory equipment, and medicinal products used in intensive care units. These efforts have been appreciated by Member States, and those initially reluctant (such as Poland and Sweden). Also, the number of signatories to the JPA has increased from six to thirty-seven since its adoption in 2014, including the EU Member States, the European Economic Area (EEA) countries and candidate countries.⁵⁰

46 In addition, it is noteworthy that the Communication on the Global EU response to Covid-19 also highlighted the intention to invite Western Balkans countries to join the EU's Joint Procurement Agreement to enable them to participate in EU joint procurement processes for medical equipment. See, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Communication on the Global EU response to COVID-19 (8 April 2020) JOIN/2020/11 final.

47 European Commission, 'Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis' [2020] OJ C108I/1. For comments, Roberto Baratta, 'EU Soft Law Instruments as a Tool to Tackle the COVID-19 Crisis: Looking at the "Guidance" on Public Procurement through the Prism of Solidarity' (2020) 5/1 European Papers, 365–373; McEvoy and Ferri (n 45); Louise Van Schaik, Knud Erik Jørgensen and Remco Van de Pas, 'Loyal at Once? The EU's Global Health Awakening in the Covid-19 Pandemic' (2020) 42/8 Journal of European Integration, 1145–1160; Albert Sánchez-Graells, 'Procurement in the time of COVID-19' (2020) 71/1 Northern Ireland Legal Quarterly, 81–87.

48 European Commission (n 47) 1.

49 Communication on the Global EU response to COVID-19 (n 46).

50 The intervention made through the JPA has allowed to cover around 537 million people, including all EU and EEA populations, the UK, as well as almost all candidate Countries and potential Candidates.

The activation of the JPA during the pandemic has renewed the interest in the need to ensure EU-wide solidarity in access to medicines and fostered the centralized EU procurement of emergency goods. Indeed, it has not only facilitated a collaborative approach but also guaranteed proximity and solidarity to the EU citizens. However, it is not just a matter of securing equitable access to medical supplies at a reasonable price for participating countries; it also provides for an equitable distribution of scarce medical supplies on a needs basis.⁵¹ In the end, even if an extended JPA remains voluntary, and hence fully dependent on the political will of the Member States, the potential occurrence of future health emergencies could prompt the Member States to prepare in advance and enhance their coordination and rely on a centralised procurement system. According to a broader view, the JPA can then be seen as another way to support a more collaborative pan-European system of healthcare resulting in an accessible and inclusive European Health Union.⁵²

3.3 *The EU Vaccine Strategy: Solidarity within and beyond the EU Borders*

Following the Joint European Roadmap towards lifting Covid-19 containment measures⁵³ aimed at addressing the public health emergency and supporting the healthcare sector of the EU Member States, on 2 April 2020, the Commission adopted a proposal to mobilise the Emergency Support Instrument (ESI).

Set up by Regulation 2016/369 for the management of the 2015 refugee crisis,⁵⁴ this instrument has a much broader scope and is conceived to address

51 European Commission (n 42) 24.

52 In November 2020, the European Commission adopted the Health Union package to increase resilience to cross-border health threats, in particular with the establishment of the Health Emergency Response Authority, which extends the scope of cooperation in health emergencies. Among the different proposals, the Commission has included the adoption of a regulation amending Decision 1082/2013 for establishing a stronger and more comprehensive legal framework within which the Union can prepare for and respond to health crises (European Commission Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision 1082/2013/EU under the ordinary legislative procedure (11 November 2020) COM(2020)727). See Tamara Hervey and Anniek de Ruijter, 'The Dynamic Potential of European Union Health Law' (2020) 11/4 *European Journal of Risk Regulation*, 726–735; Scott Greer, Anniek de Ruijter, 'EU Health Law and Policy in and after the COVID-19 Crisis' (2020) 30 *European Journal of Public Health*, 623–624.

53 European Commission, 'Joint European Roadmap towards lifting COVID-19 containment measures' (17 April 2020) 2020/C 126/01.

54 Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union [2016] OJ L 70/1. For insights, see Federico Casolari, 'Lo «strano caso» del regolamento 2016/369, ovvero della fornitura di sostegno di emergenza

the severe wide-ranging needs of affected people through the direct involvement of non-governmental and independent organisations. Regulation 2016/369 has been adopted by taking up as a legal basis art. 122(1) TFEU that grants the Council – according to a proposal from the Commission – ‘in a spirit of solidarity between Member States’, the power to adopt measures appropriate to the economic situation aimed at coping with emergency situations that the States are not capable of facing individually. The ESI can only be activated by the Council upon request from the European Commission for a specific duration, in case of natural or man-made disaster situations of exceptional scale and likely to cause severe wide-ranging humanitarian consequences in one or several Member States. According to Article 1(2) of Regulation 2016/369, the emergency support to be provided must intervene in favour, and be complementary to, the actions of the affected Member State. Actions shall therefore be implemented in close cooperation and consultation with that Member State.

Moreover, considering that ESI-funded actions are implemented by NGOs, international organisations and UN agencies and these organisations might, in turn, work with several local implementing partners. The coordination between all the involved organisations is also key for the effective, efficient and coherent implementation of the humanitarian actions. Even though, at first, the ESI was established to provide assistance to those Member States coping with the refugee crisis, such an instrument has a more general scope. Indeed, the ESI can be perceived as an expression of solidarity that should be kept on stand-by as a tool to rapidly support one or more Member States in response to the humanitarian consequences of any crisis of exceptional scale within their territory. In other words, at the internal level, it is the specular instrument to the humanitarian aid instrument devoted to providing assistance to third countries.

In the context of the Covid-19 pandemic, the ESI has been suitable to be applied given the severe humanitarian consequences and the scope of the social, economic, and financial impact of the health emergency. Upon the proposal of the Commission, the Council adopted the Regulation activating the instrument on 14 April 2020,⁵⁵ thereby allowing the EU to deploy measures preventing and mitigating severe consequences in one or more Member States

all'interno dell'Unione ai tempi della crisi' in *Dialoghi con Ugo Villani* (Cacucci Editore 2017) 519; Alberto Miglio, 'The Regulation on the Provision of Emergency Support Within the Union: Humanitarian Assistance and Financial Solidarity in the Refugee Crisis' (2016) 1/3 *European Papers*, 1171–1182.

55 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 COVID-19 outbreak [2020] OJ L 117/3.

and addressing in a coordinated manner the needs relating to the Covid-19 pandemic. In particular, since contracting authorities from Member States have been facing considerable legal and practical difficulties in purchasing supplies or services, the ESI has been activated to provide financing to cover urgent needs to fund medical equipment and materials, such as respiratory ventilators and protective gear, chemical supplies for tests, as well as covering the costs for the development, production and distribution of medication, and other supplies and materials.⁵⁶ Between April and September 2020, the ESI provided financial support for a total of €150 million to 18 Member States plus the UK, for the transport of essential medical items, including life-saving personal protective equipment, medicines, and medical equipment.

Besides financing the purchase of antiviral drugs or antigen tests, the ESI has been activated for the development and purchase of vaccines. Indeed, the ‘race to vaccines’ started when the pharmaceutical companies announced the first valuable tests on their efficacy and stressed the limited production in the near future. Within the EU, the risk of unequal access to vaccines among Member States was immediately apparent. While some of them had already started negotiating with pharmaceutical companies to purchase vaccines in an autonomous way in April 2020, the smaller or less economically strong ones risked not being able to gain sufficient access to vaccines. Aware of its limited competence in the field of health protection, the Commission tried and was able to persuade the Member States to adopt a common vaccine strategy based on the negotiation of contracts by the Commission itself for the procurement of vaccines on behalf of all the Member States.⁵⁷ Hence, in June 2020, the Commission and the Member States reached an agreement granting the former the power to negotiate Advance Purchase Agreements⁵⁸ with the pharmaceutical companies, while the States remain responsible for their direct purchase and administration of the national vaccination programmes.⁵⁹ The Advance Purchase Agreements contained a provision on the equal distribution of vaccine doses to Member States, which has ensured that each country receives doses based on a pro-rata population distribution key.

56 *Ibid.*, art. 3.

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

58 European Commission, Decision approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedures (18 June 2020) C (2020) 4192 final.

59 For comments on the critical issues linked to the advance purchase of vaccines, see Gatti (n 17) 53–56.

The intervention of the Commission in respect of the vaccination process has not stopped with the purchase. On 15 October 2020, the European Commission published a Communication on preparedness for Covid-19 vaccination that included key actions to be considered for national vaccination strategies in order to guarantee coordination among the Member States also in this phase.⁶⁰ Among the most interesting actions, one can recall the necessity to prepare adequate infrastructures for the deployment of vaccines, the update of the data included in the Immunisation Information Systems and the vaccination registers in collaboration with the European Centre for Disease Prevention and Control (ECDC), and the coordination of the national responses within the Health Security Committee established by art. 7 of Decision 1082/2013 for supporting the exchange of information between the Member States and the Commission on cross-border threats to health. Moreover, transport and logistical support have been conceived as a significant section of the public procurement and deployment of the large Covid-19 vaccine portfolio. These practical measures and the soft law instruments concerning the vaccination procedures can be placed among the tools intended to advance the value of EU solidarity grounded on the awareness of a common interest and of a mutual connection and interdependence of peoples.⁶¹

The initial “vaccine race” has demonstrated that even the alleged absence of “moral hazard” due to the symmetric nature of the health emergency has had an impact on the existing structural imbalance that makes some lastingly stronger than others. Hence, it emerged the need for a supranational intervention that was complementary to the national one and, as far as possible, partially autonomous from States’ willingness. Indeed, without the intervention of the Commission, not always free of objections, just some privileged Member States would have the opportunity to access a significant and safe number of medical devices and vaccines.

60 European Commission, Communication to the European Parliament and the Council, ‘Preparedness for COVID-19 vaccination strategies and vaccine deployment’ (15 October 2020) COM/2020/680 final.

61 In this regard, it is necessary to stress that the EU has intervened also for securing the procurement of vaccines to third countries. After a first hesitation, the EU has not only mobilised €853 million in support of the campaign COVAX but has also set up an EU vaccine sharing mechanism by acting as a single point for request and securing 2,3 billion doses to be distributed to third countries in need. See, European Commission, Communication to the European Parliament, the European Council and the Council, ‘A united front to beat COVID-19’ (19 January 2021) COM/2021/35 final.

4 The Lost Opportunity of Invoking the Solidarity Clause

The previous sections have underlined the noteworthy role of the EU institutions in dealing with the health emergency; however, in the picture of triggered instruments, the solidarity clause is extraordinarily missing. In this regard, it is noteworthy that on 28 January 2020, the Croatian Presidency decided to activate the so-called EU Integrated Political Crisis Response (IPCR) arrangements⁶² in information sharing mode in order to facilitate the development of a common understanding of the situation among Member States and the EU institutions. Considering the deteriorating situation and the different sectors affected, on 2 March 2020, the EU presidency strengthened the activation of the IPCR mechanism to “full mode”.⁶³ This allowed for the organisation of weekly presidency-led round-table meetings to facilitate the exchange of information and coordination of crisis response with the participation of the Commission, the EEAS, the office of the President of the European Council, affected Member States, relevant EU agencies, and experts. Although the IPCR arrangements are designed to work independently, they also form the basis of the support for the implementation of the solidarity clause as set out in Decision 2014/415.⁶⁴ This notwithstanding, the activation of the solidarity clause was not even discussed during the pandemic.

It could appear curious that the solidarity clause – despite its acclaimed value – has not been triggered and, thus, no obligation of intervention upon the EU and the Member States according to the constraints set in Article 222 TFEU has been invoked. Indeed, its trigger would have been crucial for rebalancing the inadequate response to the first appeals for help by resulting in the immediate and mandatory deployment of all the instruments at the disposal not only of the EU but also of the Member States.⁶⁵ In particular, those Member States that did not answer the first requests for assistance from the

62 The IPCR arrangements were approved by the Council on 25 June 2013 and then codified in Council Implementing Decision 2018/1993 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements (17 December 2018) OJ L 320/28. They consist of the supporting elements that are essential to ensuring informed decision-making and effective high-level political coordination when a serious crisis occurs. For insights, Pierre Minard, ‘The IPCR arrangements: a joined-up approach in crisis response?’, European Union Institute for Security Studies, 2015.

63 Croatian Presidency activates EU’s Integrated Crisis Response in relation to Coronavirus, at <<https://eu2020.hr/Home/OneNews?id=160>>.

64 Implementing Decision 2014/415, art. 5.

65 As for the definition of the instruments to be mobilised, art. 222 TFEU *per se* is quite vague with regard to what exact kind of mechanisms may be activated but explicitly refers to some relevant instruments that could be used, including the UCPM.

affected States or did not put sufficient resources at their disposal could be potentially obliged to intervene in different ways within the framework of activation of the solidarity clause.⁶⁶ Indeed, art. 222(1) TFEU requires Member States to act jointly with the Union, thus merging all the instruments at disposal at national and supranational levels when another EU Member is in serious difficulty. This implies that, even though the Member States may also act independently from the Union, once it has mobilised instruments that expect States' contributions, they are forced to act, mainly when an effective mobilisation of the Union depends on the resources made available by the Member States themselves. Therefore, the Union's obligation to intervene necessarily becomes intertwined with the States' duties according to the principle of sincere cooperation. In concrete terms, the solidarity clause could set the duty to provide for assistance when the crisis clearly needed a stronger intervention, thus overcoming, for example, the voluntary nature at the basic level of the functioning of the UCPM.

Moreover, art. 222(2) TFEU reinforces the role of the Member States as autonomous subjects from the EU institutions by prescribing that they shall make assistance available to another State in the case its political authorities request the activation of the clause. The remarkable obligation to render assistance as prescribed by art. 222 TFEU is then complemented by the request that they coordinate between themselves within the Council, thus contributing to the creation of a specific framework on States' obligations in disaster response. Once invoked, the Member States should thus comply with these duties, and, since the solidarity clause is covered by the jurisdiction of the CJEU, their behaviour could be subject to the possibility of judicial scrutiny. Despite the most favourable premises for the activation of the solidarity clause, the negative outcome, however, should not be a surprise.

In the first place, one must recall that, according to Article 4 of Decision 2014/415, the solidarity clause can be invoked by the affected State only after having exploited all the possibilities offered by existing means and tools at a national and Union level. Hence, the clause may be activated just once the State is unable to cope with the scale of a disaster by resorting to its own response capacities supplemented by any other tool or resource available at the EU level. The result is that the solidarity clause is conceived as a last resort mechanism which makes the Union's intervention compulsory as an *extrema ratio*. Moreover, as explicitly set in Decision 2014/415, the Union should be

66 For insights, see my more detailed analysis in Susanna Villani, *The Concept of Solidarity within EU Disaster Response Law. A Legal Assessment* (Bononia University Press 2021) 199 ff.

limited and intended to avoid the adoption of additional resources to the existing instruments. As previously illustrated, in the context of the Covid-19 pandemic, the EU institutions have widely mobilised and even reinforced the existing instruments of support in favour of the affected States. The results then, combined with the national efforts, have demonstrated to be successful in coping with the impact of the health emergency. Therefore, the invocation of an obligation of intervention upon the Union would have been not only redundant but also undue according to the specifications set by the implementing decision, especially with reference to the nature of the solidarity clause as a last resort tool.

In the second place, one should not neglect the implications for the Member States both outside and within the EU institutional framework. In effect, the effective invocation of autonomous duties upon the States would have met the concrete limit of the unclear substantive nature of art. 222 TFEU. Indeed, while the latter prescribes the duty to assist and that to coordinate, such a mandatory tone is yet mitigated by the softer language used in Declaration n. 37 attached to the Lisbon Treaty.⁶⁷ That sets the right of each Member State to choose the most appropriate and favourable response instruments, thus recognising the procedural autonomy in establishing how to provide assistance to the affected State. This Declaration also confirms that the concrete implementation of the solidarity clause by Member States somehow remains a hostage of an uncertain balance between the rights and duties of the States. Furthermore, despite the above reasoning concerning the joint intervention within the EU institutions, one should also recognise the objective difficulty in demanding the performance of a duty to provide assistance to Member States *vis-à-vis* a situation of symmetric emergency where not just some, but all the Member States are affected.

In any case, the fact that no Member State requested the activation of Article 222 TFEU clearly demonstrates the existing fear of opening Pandora's box on the structural limits of this clause. However, the umpteenth non-activation of the solidarity clause puts a question mark on the substantive role as a

67 Declaration n. 37 on art. 222 TFEU: 'Without prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State'. For a comment, see Marco Gestri, 'La risposta alle catastrofi nell'Unione europea: protezione civile e clausola di solidarietà' in Marco Gestri (ed), *Disastri, protezione civile e diritto: nuove prospettive nell'Unione Europea e in ambito penale* (Giuffrè Editore 2016) 37.

principle of the EU legal order. Indeed, it has confirmed that the expectations arising from the multiple references to solidarity in the Treaties must confront the Member States' inclination to preserve their prerogatives and avoid unfair or opportunistic behaviours. Moreover, it has indirectly corroborated the still existing unwillingness to overcome the principle of State sovereignty in favour of major solidarity even in situations of serious emergency. In effect, the legal dimension of solidarity essentially suffers from the fact that it is also a politically loaded concept. Thus, it is often a frictional element in the latent and evident conflicts among Member States on the opportunity to show or not major solidarity also in exceptional situations. Indeed, while sovereignty and solidarity are not *per se* opposite concepts, when the freedom to decide whether and how to show solidarity results in a significant shortage of assistance, solidarity may suffer from an over-compromise among different interests and priorities. Ultimately, the activation of the solidarity clause would have set a precedent in shaping and then scrutinising solidarity duties incumbent on the Member States that are not acceptable yet.

5 Concluding Remarks

The occurrence of the Covid-19 pandemic has highlighted the weaknesses and strengths of the EU legal order by putting to the test the definition of a common understanding of solidarity as one of the main concepts that animate the integration process. However, although with some delay, solidarity has been demonstrated to be the essential starting point of the process of activating the instruments of assistance, and this outcome represents an extraordinary result which suggests a change of paradigm of the concept of solidarity within the EU. Without the decisive intervention of the EU institutions (even if not resulting from a duty of solidarity), maybe the Member States would continue to have just a national-oriented approach resulting in limited (and voluntary) offers of assistance. Starting from these limitations regarding the States' conduct, the account of the different stages of management of the pandemic crisis has made evident the need for a "multilevel solidarity" capable of intervening both in the most critical phases of the emergency.

The findings illustrated in the present article have also illustrated the increasing autonomous stance of the EU from the Member States in areas of intervention like that concerning disaster response. However, not a harmonised and monolithic field of action, the instruments at the basis of the so-called EU disaster law framework have been useful to give practical substance to solidarity during the health emergency and, potentially, future situations of crisis. In

particular, while following different logics and, therefore, parallel levels, they have demonstrated to be complementary and consistent, thus guaranteeing full effectiveness of the interventions and, ultimately, the concept of solidarity. Within the framework of a coordinated and complementary response to the Covid-19 pandemic outbreak, the EU has not only encouraged major inter-State cooperation but also ensured that all the affected individuals had equitable access to high-quality and affordable healthcare according to a collective spirit of solidarity. The layered combination of instruments for responding to different disaster scenarios has also been matched with the improvement of the existing instruments, especially in the field of civil protection and cross-border health emergencies. The EU disaster management system is, hence, the result of mechanisms operating in different moments and on the basis of different needs, as well as capable of establishing a coherent “system of solidarity” able to comply with the solidarity requirements enshrined both in EU primary and secondary law.

Ultimately, the current health emergency has allowed us to better understand the nature of solidarity within the EU legal order in times of emergency. One could say that solidarity is a concept operating in situations that risk creating distortive effects and/or fuelling the existing structural asymmetries for the Union as a whole or for just one Member State. Therefore, it is not only a pivotal political aspiration but also a principle which inspires the elaboration of a complex and structural system of assistance mechanisms entailing a common responsibility of solidarity. Accordingly, the effectiveness of solidarity can be sought through a way that is made by those instruments leading to overall results of *de facto* solidarity and to a “European solidarity in action”, as stressed by the President of the European Commission on occasion of the State of the Union 2020.⁶⁸ This notwithstanding, room for improvement exists in clarifying the expressed duties of solidarity enshrined in art. 222 TFEU and the legal implications of this principle. Indeed, it is exactly in times of emergency that solidarity must progressively express its capacity to result in conducts of solidarity, to establish clear obligations on the actors as well as to be the grounds for judicial interpretation of the EU law norms and review of the emergency measures incompatible with EU law. Thus, it remains only to evaluate whether the lessons learned during this emergency will result in further developments in EU disaster response law as well as clearer legal contours of solidarity in the EU legal order.

68 State of the Union Address by President von der Leyen at the European Parliament Plenary, ‘Building the world we want to live in: A Union of vitality in a world of fragility’, 16 September 2020.