

International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events

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Towards an All-Hazards Approach

Edited by

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Federico Ferri

1 Introduction: The Applicable Legal Framework

Until now, the European Union has not developed a clear and consistent set of obligations dedicated to naturally occurring CBRN events. Behind this lacuna are some ‘constitutional’ constraints that hinder the possibility for the EU to take comprehensive initiatives in this sector.¹ Accordingly, to complete the present analysis, it is necessary to dig into some EU secondary law acts. Three target areas are addressed in this chapter.

First, the main rules are contained in the legal framework governing the Union Civil Protection Mechanism (UCPM), currently regulated by Decision 2013/1313/EU,² as amended by Decision (EU) 2019/420³ (implemented – in particular – through Commission implementing Decision 2014/762/EU)⁴ and Regulation (EU) 2021/836.⁵

¹ See ch 6 by Casolari.

² 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 L347/924. For a thorough analysis of the mechanism, see, *inter alia*, M Gestri, ‘EU Disaster Response Law: Principles and Instruments’ in A de Guttery, M Gestri and G Venturini (eds), *International Disaster Response Law*, (Springer 2012) 105–128.

³ 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 77/1.

⁴ Commission Implementing Decision 2014/762/EU of 16 October 2014 laying down rules for the implementation of Decision No 1313/2013/EU of the European Parliament and of the Council on a Union Civil Protection Mechanism and repealing Commission Decisions 2004/277/EC, Euratom and 2007/606/EC, Euratom [2014] OJ L 320/1.

⁵ 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.

There is no doubt that this set of rules applies also to naturally occurring CBRN events,⁶ even if it is no mystery that the 2017 Action Plan on CBRN risk preparedness⁷ places a major emphasis on man-made disasters and terrorist attacks.⁸ Article 4(1) of Decision 2013/1313 determines that the UCPM covers, among other things, ‘disasters’, that is to say, ‘any situation which has or may have a severe impact on people, the environment, or property, including cultural heritage’.

As a matter of interest, while chemical and biological events do not raise particular issues (*ie* the UCPM is entirely applicable to them), with respect to nuclear and radiological events, the UCPM is ‘without prejudice to the adoption of legally binding acts under the Treaty Establishing the European Atomic Energy Community, setting out specific emergency measures in case of nuclear or radiological disasters’.⁹ Furthermore, for consequences of radiological disasters, the UCPM may cover only preparedness and response actions.¹⁰

Now, despite the growing importance of the UCPM, some gaps were detected even after the 2013 reform, as the mechanism was not considered to be a sufficient tool to face transboundary threats and crises.¹¹ And, as regards practice, it can be said that, although the UCPM was activated multiple times, until 2019, assistance between Member States was generally provided bilaterally.¹² Only in 2020, the number of activations has increased considerably; more precisely,

6 See, in particular, R Roffey, ‘The EU as an Actor?’, in D O’Mathuna and I de Miguel Beriain (eds), *Ethics and Law for Chemical, Biological, Radiological, Nuclear & Explosive Crises* (Springer 2019) 26.

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan to enhance preparedness against chemical, biological, radiological and nuclear security risks, COM/2017/0610 final.

8 Issues concerning CBRN terrorism at the EU level will not be discussed here. See ch 10 by Villani.

9 Decision 2013/1313 (n 2), recital 28. For more information on nuclear safety and security in Europe, see ch 15 by Balboni.

10 Ibid recital 3.

11 European Commission, Interim evaluation of the Union Civil Protection Mechanism, 2014–2016: Final Report, August 2017. Indeed, the overall cooperation framework has long been fragmented, primarily due to differences in the organisation of national civil protection systems. C Parker, T Persson and S Widmalm, ‘The Effectiveness of National and EU-level Civil Protection Systems: Evidence from 17 Member States’ (2017) 26(9) *Journal of European Public Policy* 1312.

12 C 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, 391.

in the period 2007–2019, there were 284 cases of activations, while in 2020 the UCPM was triggered 102 times by Member States and third countries (with 85 activations due to the COVID-19 pandemic).¹³

The second target area is represented by the so called ‘EU solidarity clause’ enshrined in Article 222 TFEU. Council Decision 2014/415 concerning the implementation of the EU solidarity clause¹⁴ is thus of much importance with respect to this chapter, even if, so far, this clause has never been activated.¹⁵

Decision 2014/415 has effect on the territory of Member States to which the Treaties apply¹⁶ and it seems that it primarily applies to CBRN-related issues connected to terrorist attacks.¹⁷ However, the rules established by the Decision also apply to natural disasters, pursuant to the definition provided by Decision 2013/1313.¹⁸ Furthermore and not by chance, the UCPM might well overlap with secondary law acts adopted to enhance the effectiveness of the solidarity clause.¹⁹ This remains true despite the fact that, as pointed out in recital 1, this act concerns only the implementation ‘by the Union’ of the solidarity clause.²⁰

In addition, the Decision implementing the EU solidarity clause tackles ‘crises’, which means disasters (or terrorist attacks) of such a wide-ranging impact or political significance that they require ‘timely policy coordination and response at Union political level’.²¹ Therefore – if conditions permit – Council Decision 2014/415 could be applied to naturally occurring CBRN events.

Finally, the framework analysed in the present chapter is enriched by Decision 2013/1082 on serious cross-border threats to health,²² by means

13 See <<https://www.consilium.europa.eu/en/infographics/civil-protection/>>.

14 Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause [2013] OJ L192/53. See also recital 5, highlighting the links between this act and the UCPM.

15 See ch 6 by Casolari.

16 Council Decision 2014/415 (n 14), art 2, which adds that the Decision applies also when the terrorist attack or the disaster affects infrastructures situated in the territorial sea, the exclusive economic zone or the continental shelf of a Member State.

17 Ibid recital 7.

18 Ibid art 3(a).

19 Although some argued (at least for some time) that Article 222 TFEU provided the potential for a rather more robust system of solidarity compared to the UCPM. N Von Ondarza and R Parkes, ‘The EU in the Face of Disaster, Implementing the Lisbon Treaty’s Solidarity Clause’ (SWP comments, 9 April 2010) 2.

20 On the contrary, the implementation of the solidarity clause by Member States pursuant to Article 222(2) TFEU does not fall within the scope of this Decision.

21 Council Decision 2014/415 (n 14), art 3(c).

22 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 L193/1.

of which the list of dangerous sources was expanded to include, alongside communicable diseases, also biological and chemical events (together with environmental events, or events of unknown origin) that may pose a risk to EU citizens across the entire Union.²³ Consequently, this Decision is meant to cover, at least in part, naturally occurring CBRN events.

Overall, before the COVID-19 pandemic, the mechanisms and structures established under this act proved to operate effectively and up to the quality level required to deal with a serious cross-border threat to health, in particular, during the Ebola outbreak, the Middle East Respiratory Syndrome caused by coronavirus (MERS CoV) and the poliomyelitis threat.²⁴

Furthermore, Decision 2013/1082 and Decision 2013/1313 are intertwined²⁵ and have enabled the evolution of a coherent and unitary approach²⁶ which also acknowledges the need to take into account the relevant international law legal framework.

In light of the above, the analysis will be carried out by delving into all these Decisions, in an attempt to find out if and to what extent the EU institutions/bodies and the Member States are subject to *ex ante* and *ex post* obligations in relation to naturally occurring CBRN events.

2 Obligations of Prevention

The point of departure is to identify and assess prevention obligations stemming from the UCPM.

To start with, it must be pointed out that *ex ante* obligations (including also those referring to preparedness) are quite underdeveloped in this framework. Although the legal basis under which the UCPM was adopted – Article 196 TFEU – also refers to the need to prevent disasters, the UCPM was designed, in principle, to operate in post-incident scenarios.²⁷ Nevertheless, the UCPM has gradually been underpinned by a general policy framework for supranational

23 Ibid recital 3 and art 2(1).

24 Report from the Commission to the European Parliament and the Council, Report on the implementation of 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, COM(2015) 617 final.

25 There are also connections between Decision 2013/1082 (n 22) and Decision 2014/415 (n 14); see for instance recital 5 of the latter).

26 F Casolari, 'Prime considerazioni sull'azione dell'Unione ai tempi del Coronavirus' (2020) 7(1) Eurojus 95, 101.

27 European Parliament – Policy Department for Citizen's Rights and Constitutional Affairs (2018), EU Civil Protection Responding to EU CBRN Incidents and Attacks. In-depth Analysis, 28.

actions on disaster risk prevention, also with a view to fostering a culture of prevention.²⁸ In addition, the reforms brought about through the adoption of Decision (EU) 2019/420 and Regulation (EU) 2021/836 seem to be justified also by the need to strengthen the efficiency of *ex ante* activities belonging to the overall disaster management cycle.²⁹

The pillars of prevention consist of the sharing of information on risks and risk management capabilities. The main prevention obligations in this domain can be found in Articles 5 and 6 of Decision 2013/1313.³⁰

Article 5 provides for a list of rather generic duties/powers belonging to the European Commission exclusively. The aim of this article is to foster the production of, access to and sharing of knowledge, in particular, as regards the identification, assessment, mapping and management of risks. In the EU legislator's mind, the Commission should not act only as a mere facilitator; it is required to take some decisive initiatives, such as establishing and regularly updating a cross-sectoral overview and map of disaster risks the Union may face; compiling and disseminating the information made available by Member States; and promoting the use of various EU funds to support sustainable disaster prevention.

Article 6 provides for activities that became mandatory with the 2013 Decision. This provision was significantly changed in particular by Decision (EU) 2019/420; however, and even after the adoption of Regulation (EU) 2021/836, the major amendments do not concern general obligations, thereby falling outside the scope of this contribution. It should not be overlooked that Article 6(1) refers to obligations of a hybrid nature, in the sense that they entail both prevention and preparedness initiatives to be performed, in the first place, by Member States.

Nevertheless, the current version of Article 6 is also characterised by the lack of clear requirements and indicators. This means that Member States keep enjoying a broad margin of manoeuvre. As evidence of that, Member States are asked to 'further' develop, either at national or appropriate sub-national level, core activities, such as risk assessments, the assessment of risk management capability and disaster risk management planning. However, it is not specified with accuracy what Member States are actually expected to deliver and to what extent the European Commission can exercise control powers. The only

28 Decision 2013/1313 (n 2), recital 8. See also Communication from the Commission to the European Parliament and the Council, A Community approach on the prevention of natural and man-made disasters, COM(2009) 82 final.

29 See, in particular, Decision 2019/420 (n 3), recitals 5 and 6, and Regulation 2021/836 (n 5), recitals 5 and 7.

30 These provisions were amended by *ibid* arts 1(3) and 1(4).

thing that appears to be beyond any doubt is that now Member States' disaster prevention activities must go beyond the standards reached before 2019.

Therefore, the clearest obligation on preventing (natural) disasters – which is actually halfway between prevention and preparedness – is laid down in the new Article 6(1)(d), which requires Member States to produce a summary of the relevant elements of their assessments concerning risks and risk management capabilities.³¹ This document must be consistent with new guidelines drafted by the Commission in cooperation with Member States³² and it was due by 31 December 2020.³³

3 Obligations of Preparedness

Starting with civil protection issues, preparedness rests on the joint work of the Commission and Member States to improve cross-sectoral disaster risk management planning, as provided by Article 10 of Decision 2013/1313.³⁴ In general terms, the prerogatives enshrined in the most relevant provisions may be seen as powers and obligations at the same time; therefore, the EU legislator decided to call them 'actions'.

Article 8 of said Decision refers to the Commission's general actions. In particular, the Commission is tasked with multiple functions, such as: ensuring coordination between national contact points, which are to be established to comply with the legal framework on civil protection, and the two pillars of the Union Mechanism, namely the Emergency Response Coordination Centre (ERCC)³⁵ and the Common Emergency Communication and Information

31 Decision 2013/1313 (n 2), art 6(1)(d) – as amended by Decision 2019/420 (n 3), art 1(4) – now adds that, for key risks having cross-border impacts (and, where appropriate, for low probability risks with a high impact), Member States shall describe priority prevention and preparedness measures.

32 Reporting Guidelines on Disaster Risk Management, art 6(1)d of Decision 1313/2013/EU [2019] C428/9.

33 Then, it shall be submitted every three years thereafter (and whenever there are important changes).

34 According to Article 10(1), as amended by Regulation 2021/836 (n 5), art 1(8), the Commission and the Member States shall work together and that planning shall include scenario-building at Union level for disaster prevention, preparedness and response, taking into account the work carried out in relation to the Union disaster resilience goals.

35 The ERCC's main function is to coordinate the delivery of assistance in case of disasters by operating 24/7. See Decision 2013/1313 (n 2), art 7. After the amendments to the UCPM legal framework, the ERCC has become crucial to guarantee operational and logistical support. Furthermore, the strengthening of the ERCC witnesses the Commission's intention to ensure close coordination between civil protection and humanitarian aid. See

System (CECIS);³⁶ establishing and managing the capability to mobilise and dispatch expert teams to provide assistance either to the Member States or to the ERCC; working with Member States to improve transnational detection and early warning systems, maintain and further develop situational awareness and analysis capability, and provide advice on scientific knowledge about disasters and climate change impacts on the basis of joint monitoring activities; facilitating host nation support, which also includes the development and update of guidelines based on operational experience; developing and maintaining a network of trained experts from the Member States, who can assist the ERCC with monitoring information and facilitating coordination.

Article 9 sets out some general preparedness actions to be taken by Member States. So that they are properly prepared to respond to possible disasters, Member States shall – in advance and on a voluntary basis – develop modules and identify experts within their competent services, in particular, within their civil protection or other emergency services.³⁷ Article 9(1) states that other response capacities shall also be identified; however, according to Article 9(4) Member States shall simply ‘consider providing’ those additional capacities, and only where necessary. To increase the degree of coordination between national and supranational levels, Member States are required to submit to the Commission information on the modules, experts and other response capacities made available in the framework of the Union Mechanism. Apart from that, Member States shall designate contact points tasked with communication and sharing of information with the ERCC. More generally, Member States are asked to take the appropriate preparedness actions to facilitate host nation support.

It is clear that the Chapter on preparedness of the UCPM was particularly targeted for amendment by Decision (EU) 2019/420. However, those amendments are largely linked to the response phase. The two primary innovations are the ‘European Civil Protection Pool’ (ECPP) and ‘rescEU’.

S Villani *The Concept of Solidarity Within EU Disaster Response Law: A Legal Assessment* (forthcoming), 177–178.

36 CECIS is a web-based application for alert and notification enabling real time exchange of information.

37 Commission implementing Decision 2014/762 (n 4) establishes specific requirements for the capacity, functioning and self-sufficiency of the modules. In this framework, the Member States and the Commission must cooperate to develop quality criteria and a certification process for the different teams, with a view to achieving high quality and interoperable standards.

The ECPP was introduced by Article 1(6) of the 2019 Decision, thereby amending Article 11 of Decision 2013/1313. It is ‘a pool of voluntarily pre-committed response capacities of the Member States and include modules, other response capacities and categories of experts’. In a nutshell, the European Civil Protection Pool is the new version of the former European Emergency Response Capacity (EERC).

rescEU is a last-resort set of capacities aimed at assisting any State participating in the Union Mechanism that faces an overwhelming situation where overall existing capacities at national level and those under the ECPP are not sufficient to ensure an effective response. Chemical, biological, radiological and nuclear incidents are expressly referred to in Article 1(10) of Regulation (EU) 2021/836.

Initially, the composition of rescEU consisted of aerial forest firefighting capacities,³⁸ medical aerial evacuation capacities and emergency medical team capacities.³⁹ After the outbreak of COVID-19, rescEU reserves were expanded to also include medical team and medical stockpiling capacities⁴⁰ and capacities established to respond to low probability risks with a high impact,⁴¹ with the idea being to turn rescEU into a more appropriate tool for tackling large-scale disasters (including naturally occurring CBRN events), as well as more localised events.

As a rule, rescEU capacities shall be acquired, rented or leased by Member States, but according to Article 1(10) of Regulation (EU) 2021/836 the same may be done by Commission to the extent necessary to address the gaps in the area of transport and logistics or, more in general, in duly justified cases of urgency.

The voluntary dimension of the ECPP and rescEU should be neither forgotten nor underestimated. Member States are free to decide how to contribute to both reserves. However, while ECPP capacities remain available for national purposes at all times and it is up to the Member States concerned to take the

38 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 L99/41.

39 Commission Implementing Decision (EU) 2019/1930 of 18 November 2019 amending Implementing Decision (EU) 2019/570 as regards rescEU capacities [2019] OJ L299/55.

40 Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities [2020] OJ L821/1.

41 Commission Implementing Decision (EU) 2020/452 of 26 March 2020 amending Implementing Decision (EU) 2019/570 as regards capacities established to respond to low probability risks with a high impact [2020] OJ L941/1.

ultimate decision on their deployment,⁴² rescEU capacities may only be used for national purposes 'if not being used or needed for response operations under the Union Mechanism'⁴³ and can be deployed and demobilised pursuant to a Commission's decision.⁴⁴

In any case, clear preparedness obligations behind the ECPP and rescEU are not easy to detect, especially where Member States are considered. The most relevant provisions from the preparedness standpoint are those addressing the Commission and they only imply prerogative powers that are of limited scope, at least compared to the original intention of the Commission.⁴⁵ At most, the Commission defines the 'capacity goals'⁴⁶ (and with regard to this aspect Decision (EU) 2019/420 indicates that CBRN events constitute a priority area) and response capacities and it establishes the key requirements these resources must have under the ECPP and rescEU.⁴⁷ The Commission recently established the rules governing both reserves by means of an implementing act.⁴⁸

Member States are responsible for ensuring the quality of their response capacities where they decide to contribute to the ECPP. Moreover, Member States that have acquired, rented or leased rescEU capacities must ensure

42 Decision 2013/1313 (n 2), arts 11(5) and 11(7).

43 Ibid new art 12(5), as amended by Decision 2019/420 (n 3), art 1(7).

44 This decision is taken in close coordination with the requesting Member State and the Member State owning, renting or leasing the capacity, according to ibid new art 12(6), as amended by Decision 2019/420 (n 3), art 1(7).

45 For example, the proposal leading to Decision 2019/420 (n 3) was highly criticised by certain Member States, since it assigned the Commission a meaningful role for the management of rescEU capacities, in particular, with reference to their acquisition and in terms of command and control over the Member States: see European Commission, 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(2017) 772. See on this point F Casolari, 'Europe (2018)' (2018) 1 Yearbook of International Disaster Law 346, 347–349.

46 This expression refers to the types and the number of key response capacities required for the European Civil Protection Pool: Regulation 2021/836 (n 5), art 1(9).

47 Decision 2013/1313 (n 2), art 11(3–4) and (new) art 12(4). The Commission has to rely on international standards that may apply to establish qualitative requirements and, in case of rescEU capacities, those requirements are set forth in consultation with the Member States. Only in respect to the ECPP, the Commission shall establish and manage a process for certification and registration of the response capacities made available by the Member States. As for the Member States, they are responsible for ensuring the quality of their response capacities where they decide to contribute to the ECPP. Moreover, Member States that have acquired, rented or leased rescEU capacities must host them accordingly.

48 Commission implementing decision (EU) 2019/1310 of 31 July 2019 laying down rules on the operation of the European Civil Protection Pool and rescEU [2019] OJ L204/94.

they are properly maintained⁴⁹ and ensure their availability for deployment in UCPM operations. In sum, Member States are subject to a sort of custody duty over rescEU capacities in order to properly comply with preparedness obligations.

Finally, activities in the field of training, exercises, lessons learnt and knowledge dissemination must be carried out by the new UCPM Network.⁵⁰

It is worth noting that a preparedness obligation may also be spotted in Decision implementing the EU solidarity clause. By virtue of Article 8 of Decision 2014/415, the European Council may request reports on specified threats from, depending on the case, the Commission, the High Representative of the Union for Foreign Affairs and Security Policy, and/or Union agencies. However, unless the European Council decides otherwise, this does not imply that the relevant institutions have to search for additional information beyond that which is compiled as standard; according to Article 8(2), 'any such reports shall be based solely on available assessments of threats compiled by relevant Union institutions, bodies and agencies under existing arrangements, and on information provided voluntarily by the Member States'.⁵¹

A few preparedness obligations are established also by Decision 1082/2013 on serious cross-border threats to health. In fact, even though the aim was to cover both the *ex ante* phases (plus, of course, the response phase) this Decision appears to focus more on preparedness than prevention.⁵² In this framework, Member States first have to designate national authorities and representatives responsible for certain key activities to be carried out to comply with preparedness and response obligations under the Decision.⁵³ Apart from that, preparedness obligations in the context of Decision 1082/2013 mainly relate to information exchanges and communications.⁵⁴

49 They also have to register those capacities in the CECIS.

50 Decision 2013/1313 (n 2), art 13, as amended by Decision 2019/420 (n 3) and Regulation 2021/836 (n 5).

51 In any case, 'in accordance with point (a) of Article 346(1) TFEU, no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security'.

52 European Commission (Health and Food Safety Directorate-General), Annex – Policy expectations for a Joint Action to Strengthen Health Preparedness and Response to Biological and Chemical Terror Attacks, Ref. Ares(2019)3071424; COM(2015) 617 (n 24).

53 Decision 1082/2013 (n 22), art 15.

54 It should also be mentioned that, in light of *ibid* art 5, the institutions of the Union and various Member States agreed to engage in a joint procurement procedure for the purchase of medical countermeasures for serious cross-border threats to health. The agreement at stake could be concluded on a voluntary basis but once in force it became the source of multiple obligations (more details can be found here <<https://ec.europa>

In this respect, Article 4 of the Decision prescribes that consultations must be regularly held among the Commission and Member States within the Health Security Committee (HSC) – established by Article 17 of the Decision⁵⁵ – to coordinate their efforts aimed at developing, strengthening and maintaining their capacities for the monitoring, early warning, assessment of, and response to, serious cross-border threats to health. In particular, Member States have to provide the Commission with all relevant information indicated in Article 4(2). This information contributes to illustrating the evolution of the situation with regard to preparedness and response planning at national level; in general, reporting obligations become more urgent when a Member State substantially revises national preparedness planning, as specified by Article 4(3).⁵⁶

According to a report issued by the Commission,⁵⁷ by late October 2015, 26 Member States and one EEA Country had provided the requested information via a dedicated website (while Member States that failed to supply this information were just ‘reminded’ to proceed). It was also noted that, in general, the overall communication in the HSC was ‘reasonably effective’ and that there were important lessons learned from the process, especially during the peak of the Ebola outbreak.

4 Obligations of Response

Obligations concerning the management cycle of naturally occurring disasters mainly refer to the response phase. At the same time, recovery obligations almost do not exist.

In the framework of the UCPM, the first response obligation is provided in Article 14(1) of Decision 2013/1313 and must be fulfilled by the Member State in case of an actual or imminent disaster ‘which causes or is capable of causing

.eu/health/preparedness_response/joint_procurement/jpa_signature_en>). Increasing preparedness of Member States for cross-border threats to health via joint procurement of medical countermeasures was also encouraged by the Commission in the 2017 Action Plan on CBRN (p. 9).

55 According to this provision, the Health Security Committee is composed of representatives of the Member States and chaired by a representative of the Commission. It serves to facilitate the coordination of the response in the event of serious cross-border health threats. Decision 1082/2013 (n 22), art 17 seeks to respond to the need for formalisation of this group and clarification of its role (see recital 4).

56 The information referred to by Article 4 (paras 2 and 3) is particularly sensitive, to the extent that Member States are requested to apply national security regulations to anyone handling it.

57 COM(2015) 617 final (n 24) 5.

trans-boundary effects or affects or is capable of affecting other Member States'. In these situations, the Member State concerned shall, without delay, notify the potentially affected Member States, while the Commission shall be notified only if the effects are potentially significant.⁵⁸ Thus, in the event of calamities, including naturally occurring CBRN disasters, response obligations are primarily aimed at avoiding negative effects outside the Member State (initially) affected.

Where the (actual or potential) disaster lacks the abovementioned trans-boundary nature, the Member State wishing to be assisted under the UCPM has the burden of submitting a specific request, especially to the ERCC. However, asking for assistance when a disaster occurs – regardless of its effects – does not seem to constitute an obligation and nothing in the 2013 Decision appears to suggest that the EU legislator adopted a different approach.⁵⁹

The Commission is also subject to some obligations. Article 15(3) of Decision 2013/1313 provides that as soon as a request for assistance has been received by a Member State, the Commission shall, 'as appropriate and without delay', forward the request to the contact points of other Member States and facilitate the coordination of the response, in particular, by ensuring an efficient circulation of relevant information. The Commission cannot exercise decisional powers *vis à vis* the other Member States but is required to make recommendations (in consultation with the requesting Member State) for the provision of assistance through the UCPM.

If UCPM assistance is required for disasters taking place or likely to occur outside the Union, the Union coordination 'shall be fully integrated with the overall coordination provided by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), and shall respect its leading role'.⁶⁰ Hence, the Commission becomes subject to additional obligations, especially

58 Furthermore, according to art 14(2), '(i)n the event of a disaster within the Union, or of an imminent disaster, which is likely to result in a call for assistance from one or more Member States, the Member State in which the disaster occurs or is likely to occur shall, without delay, notify the Commission that a possible request for assistance through the ERCC can be expected, in order to enable the Commission, as appropriate, to inform the other Member States and to activate its competent services'.

59 However, it was also suggested that interpreting Decision 2013/1313 (n 2), art 15, in light of EU general principles and fundamental rights aimed at protecting some rights that could be put at serious risk in such situations (especially the right to life) might well lead to a different conclusion. M Gatti, 'L'obbligo di proteggere le persone dalle calamità nell'Unione europea' in A Spagnolo and S Saluzzo (eds), *La responsabilità degli Stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento* (Ledizioni, 2017) 127, 134–135.

60 Decision 2019/420 (n 3), art 1(10), amending Decision 2013/1313 (n 2), art 16(2).

in order to guarantee consistency in the delivery of the assistance and to respect the ‘imperative for an immediate operational response’ through the UCPM.⁶¹ The European External Action Service shall also be informed and the competent Union delegation may be required to provide logistical support.⁶² It has to be pointed out that maybe the only exception to the lack of recovery obligations is represented by Article 16(3)(e), according to which the Commission shall ensure a certain degree of consistency also in the closing phase of the assistance intervention under the Union Mechanism, to facilitate a ‘smooth handover’.⁶³

Besides that, the Commission provides financial assistance, which usually covers more than half of the costs and, under certain circumstances, may cover all the costs deriving from the activation of the UCPM, especially where rescEU capacities are used.⁶⁴

There is also an obligation incumbent on the Member States that are in the position to provide assistance when the UCPM is activated. This obligation is quite controversial, at least as far as its scope of application is concerned and – as will be explained later in this section – due to possible links between the UCPM and the solidarity clause.

In principle, it seems safe to state that the only actual obligation for the Member State(s) eventually required to intervene is to decide what to do in a timely fashion and to make the Member State affected by the disaster aware of that decision through the CECIS.⁶⁵ That practically serves to secure proper organisation and management of response activities. Furthermore, the Member State rendering assistance must observe the general guidelines laid

61 Decision 2013/1313 (n 2), art 16(3). However, pursuant to art 16(10), ‘(t)he role of the Commission referred to in this Article shall not affect the Member States’ competences and responsibility for their teams, modules and other support, including military capacities. In particular, the support offered by the Commission shall not entail command and control over Member States’ teams, modules and other support, which shall be deployed on a voluntary basis in accordance with the coordination at headquarters level and on site’.

62 Ibid arts 16(4) and 16(5).

63 European Court of Auditors, *Union Civil Protection Mechanism: the coordination of responses to disasters outside the EU* has been broadly effective (Special report 2016) 24.

64 Decision 2013/1313 (n 2) arts 19–21; Decision 2019/420 (n 3) arts 1(12)–1(14); Regulation 2021/836 (n 5), art 1(19).

65 Decision 2013/1313 (n 2) art 15(4). As established by Commission implementing Decision 2014/762/EU (n 4), art 35(9), the deadline ‘shall be based on the nature of the disaster and shall in any case not be less than two hours’.

down by the requesting Member State,⁶⁶ which is also responsible for the coordination on site.

It can be argued that when a Member State chooses to make response capacities available, as a general rule, it cannot then prevent those resources from being used when a disaster occurs and the assistance of this voluntary pool is required.⁶⁷ Such interpretation of Article 11(7) of Decision 2013/1313 appears to be the most logical outcome of the application of the loyal cooperation and *effet utile* principles, although it is hard to argue that if the Member State fails to comply with this requirement, the Commission would be enabled to trigger an infringement procedure.

Similar considerations apply if rescEU is activated, except that, while the ultimate decision to deploy ECPP response capacities is taken by the Member States which registered them, rescEU capacities are deployed and demobilised on the basis of a Commission decision (to be taken in close coordination with the Member States concerned).⁶⁸

However, there are also important differences concerning the legal regimes applicable to the deployment of ECPP and rescEU response capacities. Pursuant to Article 11(8), a Member State does not have to make ECPP capacities available for a specific disaster in the event that it is itself affected by domestic emergencies, force majeure or, in 'exceptional cases', cannot do so for 'other serious reasons'; however, the same does not go for the provision of capacities under rescEU. At the same time, the ECPP response capacities (once deployed) remain under the command and control of the Member State that made them available; on the contrary, rescEU response capacities are subject to more intensive powers of the Commission.⁶⁹

Finally, assistance under the UCPM can be requested by virtue of Article 11(4) of Decision 1082/2013 on serious cross-border threats to health, but only when such a threat overwhelms the response capacities of the requesting Member State. So, the UCPM and the mechanism applicable to serious cross-border threats to health are connected, but the latter is, in principle, characterised by autonomous rules concerning the response phase, including response obligations.

Also, in the framework of Decision 1082/2013, the first obligation incumbent on the Member State concerned is notifying an alert of the emergence

66 Ibid art 15(5). However, this provision adds that it is up to the person in charge, appointed by the Member State rendering assistance, to decide the details of the execution of those tasks.

67 Villani (n 35) 191.

68 Decision 2019/420, (n 3) art 1(7).

69 Ibid.

or development of a serious cross-border threat to health fulfilling the criteria listed in Article 9(1) of the Decision.⁷⁰ The Commission also has the same obligation to notify an alert where it becomes aware of such a threat. The alert notification must comprise all relevant and available information that may be useful for coordinating the response⁷¹ and it has to be submitted in the Early Warning and Response System (EWRS). This mechanism, established by Article 8, was designed to enable the Commission and the national competent authorities to be in permanent communication for managing the events tackled by Decision 1082/2013.

With respect to the majority of threats covered by Decision 1082/2013, following an alert, all Member States must fulfil ad hoc monitoring obligations. Article 7 clarifies that these activities mainly involve the transmission of relevant information, such as any change in geographical distribution, spread and severity of the threat concerned, as well as information on the means of detection being used, if available.

To complete the regime guiding the response after the notification of an alert, Article 10 of Decision 1082/2013 provides for a possible additional obligation for the Commission: to make available through the EWRS a risk assessment of the potential severity of the threat to public health, including possible public health measures. Two aspects deserve to be further explained. First, this risk assessment does not have to be automatically produced when the early warning is raised; basically, it is up to the HSC to decide on the matter 'where necessary for the coordination of the response at Union level'.⁷² Second, according to Article 10, the Commission is a sort of 'driver', while the risk assessment is formally carried out by relevant Union agencies in lieu of the Commission.

Following the transmission of the information indicated in Articles 7 and 9 and, potentially, the risk assessment mentioned in Article 10, Member States are free to decide upon the national measures to take. That said, under Article 11, the Member States still have to comply with an obligation of consultation. To

70 The alert must be notified when the following criteria exist which characterise a threat to health: 'a) it is unusual or unexpected for the given place and time, or it causes or may cause significant morbidity or mortality in humans, or it grows rapidly or may grow rapidly in scale, or it exceeds or may exceed national response capacity; and (b) it affects or may affect more than one Member State; and (c) it requires or may require a coordinated response at Union level'.

71 See Decision 1082/2013 (n 22), art 9(3).

72 The Commission can provide the risk assessment on its own initiative but, should that be the case, this would no longer be an obligation.

put it briefly, Member States must consult each other within the HSC and in liaison with the Commission, with a view to coordinating national responses to the serious cross-border threat to health, as well as providing risk and crisis communications. In particular, consultations should refer to the nature, purpose and scope of response measures; if the need to protect public health is so urgent that the immediate adoption of the measures is necessary, the Member State concerned shall inform the other Member States and the Commission on these aspects.

A last-resort response instrument that may be triggered in the event of a disaster, including a naturally occurring disaster, is the solidarity clause. For the purposes of this analysis, reference must be made to Council Decision 2014/415, in order to highlight the obligations to be fulfilled either by the Member States or EU institutions and bodies when a disaster (or a crisis) occurs.

The rationale behind the implementation of the solidarity clause by the Union is that response initiatives taken under it should rely on existing instruments; therefore, the idea is not to use additional resources.⁷³ But the fact remains that recital 5 of Council Decision 2014/415 also refers to the UCPM (and Decision 1082/2013), while recital 4 of Decision 2013/1313 anticipates that the UCPM should also contribute to the implementation of Article 222 TFEU, 'by making available its resources and capabilities as necessary'.⁷⁴ Therefore, the activation of the solidarity clause could undermine the Member States' discretion to deny assistance through the UCPM, thereby giving rise to a correspondent obligation when intensive interventions are necessary to face a crisis.

This interpretation may be counterbalanced by the text of Declaration 37 on Article 222 of the TFEU, according to which none of the provisions of this Article is intended to affect the right of a Member State to choose the most appropriate means to comply with its own solidarity obligation towards the Member State affected by the disaster. Probably, the solution to such conundrum is that – once again in harmony with the principles of loyal cooperation and *effet utile* – 'each Member State, in the presence of a formal request from another one, is invested with a legal obligation to provide assistance, but keeps the right to choose those measures deemed appropriate', even though '(i)n exercising this choice, the State in question is, however, obliged to act in

73 It was thus observed that, contrary to the rather open-textured formulation of Article 222 TFEU, Council Decision 2014/415 (n 14) 'takes a clear – and pronouncedly restrictive – stance'. P Hilpold, 'Filling a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU' (2020) 42(3) LIEI 209, 224.

74 For useful considerations on the interplays between the solidarity clause and the instruments of disaster response (in particular, the UCPM), see Villani (n 35) 221–224.

good faith and in a spirit of sincere cooperation as prescribed in Article 4(3) TEU.⁷⁵

At the heart of Council Decision 2014/415 are Articles 4 and 5, regulating, respectively, the invocation and the implementation *stricto sensu* of the solidarity clause. Both provisions show that, contrary to the response mechanisms construed through the UCPM and the Decision on serious cross-border threats to health, the role played by the Council is of major importance, while the Commission's powers are a little weaker.⁷⁶ That is testament to the more inter-governmental nature characterising the solidarity clause.

Article 4 points out that the Member State affected by a disaster 'may' (hence, is not obliged to) invoke the solidarity clause. However, this option can be chosen only if all the possibilities offered by existing means and tools at the national and Union levels have been exploited. Furthermore, the solidarity clause can be invoked if the Member State concerned considers that the crisis clearly overwhelms the response capabilities available to it. The invocation of the solidarity clause must be addressed to the Presidency of the Council and to the President of the European Commission through the ERCC. Thus, the ERCC performs important functions also outside the UCPM framework.⁷⁷

Article 5 sets out the main initiatives constituting the response phase, but, within this provision, the Council strived to safeguard the prerogatives of the other institutions and bodies involved. In sum, the Council 'shall ensure the political and strategic direction of the Union response [...] taking full account of the Commission's and the HR's competences'. At the same time, the Commission and the HR are mainly tasked with the identification of the resources (already available) to use and are requested to advise the Council on whether existing resources provide sufficient means to assist the affected Member State. As for the types of resources to be identified, there are no particular limitations.

On the basis of Articles 1(2) and 5 (paras 1 and 4), the overall response at Union political level shall be guided by EU Integrated Political Crisis Response (IPCR) Arrangements. This single set of arrangements was approved by the Council on 25 June 2013 to coordinate responses at the highest political level

75 S Villani, 'The EU Civil Protection Mechanism: Instrument of Response in the Event of a Disaster' (2017) 26 *Revista Universitaria Europea* 121, 140.

76 Conversely, the approach followed in the proposal leading to Council Decision 2014/415 (n 14) seemed to be the opposite. See Joint Proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity clause, JOIN(2012)39 final.

77 In particular, according to art 5(6), the ERCC shall act as the central 24/7 contact point at Union level with Member States' competent authorities and other stakeholders.

during major cross-sectoral crises,⁷⁸ even the solidarity clause is not invoked.⁷⁹ This flexible and tailor-made instrument was designed to ensure uniform, efficient and timely responses to any kind of crisis and in multiple ways: for example, through information exchange, political coordination or the adoption of decisions.

The basic rules applicable to the IPCR Arrangements are now included in Council implementing Decision (EU) 2018/1993.⁸⁰ In particular, the activation of the IPCR shall be decided by the Presidency of the Council, while the Committee of Permanent Representatives is the default level at which oversight of the implementation of the IPCR arrangements is carried out.⁸¹ However, where the solidarity clause has been invoked, the Presidency of the Council is not free to choose whether or not to activate the IPCR; this becomes an obligation and, what is more, it has to be performed 'immediately'.⁸²

5 Conclusions and Perspectives

The obligations applicable within the management cycle of naturally occurring CBRN events are indirect, short-term and rather weak in terms of enforceability. Binding provisions expressly concerning this type of event have still not been adopted, so it is necessary to refer to a set of secondary EU law norms which have evolved considerably since the entry into force of the Lisbon Treaty. In addition, the vast majority of the obligations identified do not concern prevention initiatives. Finally, failure to respect them will generally not be likely to produce any particular legal consequence.

78 More information can be found here <https://www.consilium.europa.eu/media/29699/web_ipcr.pdf>. See also A Nimark, 'Post-Lisbon Developments in EU Crisis Management: The Integrated Political Crisis Response (IPCR) Arrangements', in O'Mathuna and de Miguel Beriain (n 6) 75.

79 The ongoing COVID-19 pandemic constitutes a case in point, since, in March 2020, the then-Presidency of the Council activated the IPCR mechanism in 'full mode', although outside the solidarity clause legal framework (<<https://www.consilium.europa.eu/en/press/press-releases/2020/03/02/covid-19-outbreak-the-presidency-steps-up-eu-response-by-triggering-full-activation-mode-of-ipcr/>>. This modality was maintained by the following Presidency of the Council (<<https://www.consilium.europa.eu/en/policies/ipcr-response-to-crises/>>).

80 Council implementing Decision (EU) 2018/1993 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements [2018] OJ L320/28.

81 Ibid arts 4(1) and 6(1) of.

82 Council Decision 2014/415 (n 14), art 5(1) and ibid art 4(2).

These findings may lead one to consider the opinions of some renowned scholars who argue that the EU should be given a more robust role to properly deal with large-scale crises in general. Resorting to the flexibility clause (as for the Directive on critical infrastructures) or to an enhanced cooperation could be suitable ways to increase the Union's powers in the field of 'emergencies'. For example, the viewpoint of these authors is that a sort of 'general regulation' on disasters could be a valuable option. At the same time, the EU should be put in the position to exercise more effective urgency powers where certain serious situations occur.⁸³

Theoretically, a trend is visible which shows how the European Union is gradually trying to develop a more unitary framework characterised by a stronger supranational governance. Indeed, there is currently a very real risk that the system of mutual European solidarity may be insufficient in situations where multiple Member States are impacted by the same emergency simultaneously, thereby being unable assist each other. That, of course, applies also to naturally occurring CBRN-events.

However, on the practical level things are quite different. A case in point is the main initiative completed so far within the areas addressed above, namely, the last reform of the UCPM. Regulation (EU) 2021/836 has not produced major changes in terms of obligations, as it simply amends the existing legal framework (without substituting it) and increases the powers of the Commission only to a limited extent.

Time will tell how quick progress will be and how the reforms (already adopted or still under discussion)⁸⁴ will be implemented and/or shaped, bearing in mind the limits arising from the legal bases generally applicable in the fields considered in this chapter.

83 G Tesauro, 'Senza Europa nessun Paese andrà lontano' (2020) *Aisdue* (Dibattito 'Coronavirus e diritto dell'Unione') 10, 16.

84 For example with regard to cross-border threats to health: see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Building a European Health Union, COM(2020)724 final; Reinforcing the EU's resilience for cross-border health threats; Proposal for a Regulation of the European Parliament and of the Council on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices, COM(2020)726 final; Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 851/2004 establishing a European Centre for disease prevention and control, COM(2020)726 final; Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013, COM(2020) 727 final.

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