

FACING REALITY: A NEED TO CHANGE THE LEGAL FRAMEWORK OF THE EU PUBLIC HEALTH POLICY AND THE INFLUENCE OF THE PANDEMIC OF COVID-19 ON THE PERCEPTION OF IDENTITY AND THE ROLE OF THE EU

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ABSTRACT

The main aim of this article is to highlight two interconnected issues raised in the context of the COVID-19 pandemic. The first one concerns a need to change the EU Health Policy legal framework, particularly the founding treaties (TEU and TFEU), while the second one relates to the issue of the very perception of the identity of the European Union.

The possible adequate solution for the situation created by the unprecedented nature of the COVID-19 pandemic and unprecedented measures that followed, was to proclaim state of emergency, which was largely avoided. It seems that it should be considered whether there is a need for amendments of the European Union founding treaties and/or the Charter on Fundamental Rights by providing the possibility of the state of emergency proclamation in the case of “the threats of the life” of the EU.

The European Union is not entrusted with the competencies, powers, and responsibilities in health matters such as a pandemic, however founding treaties, functioning institutions as well as procedures seem sufficient for an effective response to health crises such as the one caused by the COVID-19 pandemic. However, having in mind experience with the COVID-19 pandemic it seems that there is a need to strengthen the EU legal framework concerning the issues of pandemic and similar threats, not by altering the nature of the EU competence regarding health issues, but by identifying the threats such as pandemic in the founding treaties that should contain basic regulations concerning European Centre for Disease Prevention and Control. In that manner the efficient response would be in a form of an institutionalized mechanism at the core of the European Union instead of being fully dependent on the variable political will. At the same time there is an urgent need to identify those Health Policy issues that should be an adequate subject of judicial scrutiny.

The COVID-19 pandemic also proved that Member States and the European Union should be more realistic regarding the perception of the role and identity of the European Union. The author argues that the identity of the European Union is blurred with a variety of considerations and that its content and features should be more determined, not only in academic literature but also in political practice, especially when it comes to the issue of self-determination of the European Union. The world is not the same as it was before the pandemic, and it seems that the European Union, in order to be prepared to face new challenges, must build its identity in realistic parameters and act in one voice “if it wants to make itself heard and play its proper rôle in the world”, as it was declared in the 1973 Declaration on the European Identity.

Keywords: COVID-19, EU identity, European Union, Pandemic, Shared Competencies

1. INTRODUCTION

The COVID-19 pandemic caught the whole world by surprise and the European Union was not an exception. The common experience is that the European Union failed with the pandemic, particularly in its “early stages”. However, from the pandemic, still ongoing in the spring of 2022, the bitter experience emerged and was supplemented with the new phase of the Ukrainian crisis with still inconceivable consequences. Every country in the world and every international organization (including the United Nations and the World Health Organization) encountered serious problems facing the pandemic of coronavirus.¹ Now, when the pandemic is hopefully near to its end,² the long two years created the reservoir of experience upon which the European Union might base its awareness necessary to deal with the future crisis.

The main aim of this article is to highlight two interconnected issues raised in the context of the COVID-19 pandemic. The first one concerns a need to change the European Union Health Policy legal framework, particularly founding treaties

¹ Haass, R., “*The UN Unhappy Birthday*”, Project Syndicate, 10 September 2020, available at: [<https://www.cfr.org/article/uns-unhappy-birthday>] Accessed 24 March 2020. Haass observed that “[t]he result is that the major powers get the UN they want, not the one the world needs” See: Gajić, A., *Remarks on Challenges of International Law in the Contemporary International Society Faced with the Pandemic of COVID-19*, in Izazovi međunarodnog prava, International Criminal Law Association, Tara 2021, pp. 85-93

² Ghebreyesus T. A. (Director-General of the World Health Organization), “*2021 has been tumultuous but we know how to end the pandemic and promote health for all in 2022*”, World Health Organization, 30. December 2021 [<https://www.who.int/news-room/commentaries/detail/2021-has-been-tumultuous-but-we-know-how-to-end-the-pandemic-and-promote-health-for-all-in-2022>.], Accessed 10 April 2022. Director-General urged particularly on the “need to build a stronger global framework for global health security”. See also Yadav R.; Dr Moon S., Opinion: Is the pandemic ending soon?, 11 March 2022, available at: [<https://www.who.int/philippines/news/detail/11-03-2022-opinion-is-the-pandemic-ending-soon>], Accessed 10 April 2022

(TEU and TFEU), while the second one relates to the issue of the very perception of the identity of the European Union.

Firstly, we will focus on the unprecedented nature of the COVID-19 pandemic, particularly to the fact that situation created by the pandemic does not have clear solutions in the existing international treaties including the EU law. The solution that seems to be adequate having in mind the nature of the COVID-19 pandemic, to proclaim state of emergency, was largely avoided. It seems that it should be considered whether there is a need for amendments of the EU founding treaties and/or the Charter on Fundamental Rights of the European Union by providing possibility of the state of emergency proclamation in the case of “the threats of the life” of the European Union.

We will argue that there is a need to strengthen the EU legal framework concerning pandemic and similar threats, not by altering the nature of the EU competence in health issues, but by identifying the threats and providing a clear and efficient mechanism for cooperation in response to challenges surrounding pandemic. In particular, we will point out to the need for strengthening the early warning system by amending the founding treaties. At the same time, there is a need for the identification of issues that should be the subject of juridical scrutiny of the Court of Justice of the European Union.

The issue of the identity of the European Union is a long standing one, and it seems that experience from the pandemic clearly shows that Member States and the European Union should be more realistic when it comes to the perception of the role and identity of the European Union. We equally argue that the identity of the European Union is blurred with a variety of considerations and that its content and features should be more determined focused, not only in academic literature but also in political practice, especially when it comes to the issue of self-determination of the European Union. It seems that the proper basis for the determination of the identity of the European Union was established a long time ago in the Document on the European Identity published by the Nine Foreign Ministers on the 14th of December 1973, in Copenhagen. The world is not the same as it was before the pandemic, and it seems that the European Union, in order to be prepared to face new challenges, must build its identity in realistic parameters and act in one voice “if it wants to make itself heard and play its proper rôle in the world”, as it was declared in the 1973 Declaration on the European Identity.

2. UNPRECEDENTED NATURE OF THE COVID-19 PANDEMIC AND THE „STATE OF EMERGENCY“

The nature of the COVID-19 pandemic and the state of affairs that followed is unprecedented and was not predicted in any international treaty, nor in the founding treaties of the EU also are not an exception. Even the core human rights treaties (International Covenant on Civil and Political Rights and European Convention on Human Rights and Fundamental Freedoms) and corresponding authoritative commentaries³ cannot be used to provide full legal ‘support’ when it comes to the measures imposed in order to fight against the COVID-19 pandemic. The same goes for other very important international treaties whose rules form part of international customary law⁴ as they do not contain clear solutions for situations such as a pandemic, and measures imposed in order to contain the spread of COVID-19 created difficulties in the early phases of the pandemic. The EU legal framework is not an exception, and in this article, we are particularly concerned with the EU legal framework, however, some general remarks need to be pointed out at the outset.

The law does not provide answers to every challenge. The term “challenge” has a variety of meanings; however, it seems that a common meaning is that of finding a solution to a problem. In this case, the law is not under challenge, but political actors who are entrusted with the authority to deal with the crisis,⁵ and in the final instance to influence “the development” of the law.

No international treaty or well-established customary international law provides solutions to numerous problems caused by the COVID-19 pandemic nor does it contain measures taken to fight against it. The aforementioned mechanism of declarations under core human rights treaties (International Covenant on Civil and Political Rights, European Convention on the Human Rights and Fundamental Freedoms) regarding the state of emergency in a situation threatening “the life of

³ See in particular Guide on Article 15 of the European Convention on Human Rights, Derogation in time of emergency, 31 December 2019, [https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf], Accessed 10 April 2022

⁴ Such as the Vienna Convention on Diplomatic Relations and Vienna Convention on the Law of Treaties. Vienna Convention on Diplomatic Relations does not contain solutions for situations such as pandemic and in the early stages of the pandemic of COVID-19, it was problematic whether certain measures (obligatory PCR tests, quarantine, restriction of freedom of movement etc.) are in line with this convention

⁵ It shall be remembered that the situation around the very proclamation of the pandemic was faced with the main political difficulties

the nation”⁶ was largely avoided. Even though all European States applied almost the same measures in the context of the pandemic, only a minor number of States from the Council of Europe and just two EU Member States (Estonia and Romania) declared a state of emergency because of the COVID-19 pandemic.⁷ The States which made those declarations withdrew them during 2020 while almost the same measures as the ones imposed during the “state of emergency” remained in force.⁸ The question that remained without an answer is whether measures taken during the pandemic derogated certain human rights, and was there a need to declare a state of emergency in the context of human rights treaties.

Does that mean that unprecedented measures were of such a nature that they are inherent limitations of human rights recognized in Europe? However, at least since the proclamation of the pandemic, which affected the whole Europe, it was not a “state of emergency” that solely touched upon the human rights recognized in Europe, but almost all of the policies (and legal fields) were heavily affected by the measures imposed to prevent the spread or to combat against COVID-19.

The Charter on Fundamental Rights of the European Union⁹ does not contain references to “extraordinary situation” and “state of emergency.” However, it “reaffirms...the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms...”¹⁰ Article 52 (3) stipulates that “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning, and scope of those rights shall be the same as those laid down by the said Convention...” It is the matter of interpretation whether the Charter on Fundamental Rights of the European Union recognizes the “the state of emergency” based on the “threat of the life of the nation.” The Charter does not expressly recognize “the threats of the life of the European Union.”

⁶ See *Guide on Article 15 of the European Convention on Human Rights*, Derogation in time of emergency, 31 December 2021, [https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf] Accessed 15 April 2022

⁷ *Factsheet – Derogation in time of emergency*, Press Unit of the European Court on Human Rights, February 2022. [https://www.echr.coe.int/documents/fs_derogation_eng.pdf], Accessed 15 April 2022

⁸ Facing the measures to stop spreading the COVID-19, only Albania, Armenia, Estonia, Georgia, Latvia, Moldova, Romania, San Marino and Serbia made notifications under Article 15 of the Convention in the context of the COVID-19 pandemic and during the 2020 while most of the measures were still in force, the declarations were withdrawn

⁹ Charter on Fundamental Rights of the European Union [2012] OJ C326/391

¹⁰ *Ibid.*, Preamble

It is our opinion the Charter and founding treaties should be amended in order to recognize situations (such as those similar to the pandemic of COVID-19) that might be the cause for the proclamation of a state of emergency. In that case, the legality of certain measures such as, for example, restriction of movement, quarantine, obligatory PCR testing, derogations from the Schengen *acquis*, and requests for vaccine certificates for variety of purposes, would not be questioned.

3. IS THERE A NEED TO CHANGE THE LEGAL FRAMEWORK OF THE EUROPEAN UNION IN ORDER TO BETTER DEAL WITH PANDEMIC?

The legal framework of the “EU health policy” seems well developed having in mind that public health is not an exclusive competence of the European Union, and that the main responsibility is on the Member States.¹¹ The European Union is not entrusted with the competencies, powers, and responsibilities in health matters such as a pandemic, however founding treaties and established institutions and procedures seem sufficient to provide an effective response to health crises such as the one caused by the COVID-19 pandemic. The legal framework is not only limited to founding treaties, but it encompasses secondary legislation. However, the EU has limited competence to adopt directives and regulations in health matters.¹²

The European Union has certain responsibilities in health matters but there are not responsibilities in the strict legal sense. Its responsibility is more political, depending on both the efficiency of institutions created under the European Union umbrella (*via* secondary legislation) and the political will and ability of Member States to cooperate in accordance with the well-established principle of solidarity. In other words, the European Union’s responsibility in pandemic health matters is of particular political importance and is heavily dependent on the strength and ability of the European Union bodies and political attitudes of the Member States.

¹¹ Geer, S. L.; Fahy, N.; Elliott, H. A., Wismar, M.; Jarman H.; Palm, W., *Everything you always wanted to know about European Union health policies but were afraid to ask*, European Observatory on Health Systems and Policies, World Health Organization, Copenhagen 2014

See also Hervey, T.; Vonhercke, B., *Health care and the EU: the law and policy patchwork*, in *Health Systems Governance in Europe: The Role of European Union Law and Policy*, Cambridge University Press, 2010, pp. 84-133. The argument is that “While national health care policy tends to be the domain of national (political or administrative) ‘health’ experts, in the EU context most legal measures and policies that have implications for health care are adopted within institutional structures and procedures that were developed for quite different policy domains. Furthermore, EU-level health care law and policy occupies a highly contested space in the EU’s current constitutional settlement.” *Ibid.*, p. 86

¹² *Ibid.*, p. 88

The pandemic is a global matter of particular concern to the World Health Organization empowered by the International Health Regulations (2005)¹³ to proclaim a Public Health Emergency of International Concern and also a pandemic.¹⁴ All Member States of the EU are also members of the World Health Organization and the European Union has well-established relations with the World Health Organization.¹⁵ The legal framework of the European Union cannot be analyzed ‘in clinical isolation’ from the global legal framework that provides significant powers to the World Health Organization and envisages certain obligations to the States. However, as Bergner and others noted, “before the COVID-19 pandemic, the European Union was neither a strong promoter of global health nor a strong supporter of the World Health Organization. The Global Health Council Conclusions from 2010 [Council conclusions on the EU role in Global Health]¹⁶ were never comprehensively implemented and quickly forgotten”.¹⁷ The initial phase of the pandemic (and particularly the period that preceded the proclamation of the pandemic by the World Health Organization) provides support for the conclusion that there was unreadiness of the EU (and also other States) to cope with the pandemic.

Experience with the COVID-19 pandemic inevitably requires discussions concerning the legal framework of the EU Health Policy and it will probably be on the agenda as one of the main issues, particularly when the time comes for the revision of the Lisbon Treaty. As noted by Brooks and Geyer: “early calls for treaty revision, to increase the EU’s formal health powers, were quickly rejected as both

¹³ World Health Organization, *The International Health Regulations* adopted by the 58th World Health Assembly on May 2005 by resolution WHA56.29. [<https://www.paho.org/en/international-health-regulations-ihp>]. Accessed 16 April 2022

¹⁴ Von Bogdandy, A.; Pedro A. V., *International Law on Pandemic Response: A First Stocking in Light of the Coronavirus Crisis*, MPIL Research Paper Series, No. 7, 2020.; Pedro A. V., *Pandemic Declarations of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions Between Legitimacies*, Göttingen Journal of International Law, Vol. 7, No. 1, 2016, pp. 97-129

¹⁵ Technical cooperation has taken place since 1970s. Contemporary relations between the WHO and the EU are based on an exchange of letters dated 14 December 2001. For the comprehensive overview of the EU and the World Health Organization see: EU and WHO: partners for global health, World Health Organization Regional Office for Europe, [<https://www.euro.who.int/en/about-us/partners/the-european-union-and-its-institutions>]. However, opinion expressed on the official website of the World Health Organization seems not to be well accepted

¹⁶ Council conclusions on the EU role in Global Health, 3011th Foreign Affairs Council meeting, Brussels, 10 May 2010, Council of the EU, [https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/114352.pdf], Accessed 10 April 2022

¹⁷ Bergner, S.; Van de Pas, R.; Van Schik, L.; Voss, M., *Upholding the World Health Organization: Next Steps for the EU*, SWP Comment No. 47, October 2020, German Institute for International and Security Affairs, p. 1

infeasible and unnecessary” adding that “[c]onsensus among academic layers is that, though patchy, the EU’s legal basis for the health already permits considerable action *where this is supported by political will*.”¹⁸

Fully supporting previously- quoted opinion, and taking into account other problems that the EU was facing even before the pandemic¹⁹, it seems that there is a need to strengthen the EU legal framework concerning the issues of pandemic and similar threats, not by altering the nature of the EU competence in health issues, but by identifying the threats such as pandemic and providing a clear and efficient mechanism of cooperation in response to challenges that surround the pandemic.

Health Policy (“common safety concerns in public health matters for the aspects defined” in the Treaty on European Union) is an area of the shared competencies between the EU and the Member States.²⁰ In accordance with Article 6 of the Treaty on European Union “The Union shall have the competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at the European level, be (a) protection and improvement of human health...”²¹

“Health in all policies” has its basis in Article 9 of the Treaty on European Union stating that “[i]n defining and implementing its policies and actions, the Union shall take into account requirements linked to the promotion of,” inter alia, “protection of human health.”²² Title XIV of the Treaty on the Functioning of the European Union (Public Health) containing single Article 168 in paragraph 1 stipulates that “A high level of human health protection shall be ensured in the definition and implementation of all of the Union’s policies and activities.” The

¹⁸ Brooks, E.; Geyer, R., *The development of the EU health policy and the Covid-19 pandemic: trend and implications*, Journal of European Integration, Vol. 42, No. 8, 2020, p. 1060 (emphasis in original)

¹⁹ See L. Greer, S. L.; Laible, L (eds), *The European Union after Brexit*, Manchester University Press, 2020; Anagnostopoulou, D; Papadopolous, I.; Papadopoulos, L., *The EU at a Crossroads: Challenges and Perspectives*, Cambridge Scholars Publishing, 2017

²⁰ In accordance with the Art. 4 of the Treaty on European Union, “2. Shared competence between the Union and the Member States applies in the following principal areas: ... (k) common safety concerns in public health matters for the aspects defined in this treaty”

²¹ See also Art. 9 of the Consolidated version of the Treaty on the Functioning of the European Union

²² The particular area that might come on the agenda concerns approximation of laws (Article 114 of the TEU), and powers and responsibilities of the European Parliament and the Council to adopt the measures “for the approximation of the provisions laid down by the law, regulation or administrative action in the Member States which have as their object establishment and functioning of the internal market”. Particularly, “When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonization measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.”

same wording is contained in Article 35 of the Charter of Fundamental Rights of the European Union.”²³

At the time of the creation of the Lisbon Treaty and the Charter of Fundamental Rights of the European Union, it seems that situations and challenges such as the one caused by the COVID-19 pandemic was not even perceived. If perceived, it might have been regulated in a separate article dealing with the pandemic (as a specific threat to health much different and perhaps more far-reaching than those particularly mentioned – tobacco and abuse of alcohol).

A pandemic, such as the COVID-19 pandemic seems to be one of the most “serious cross-border threats to health.” However, even though the contemporary legal framework through interpretation and various actions taken at the level of the EU seems to be sufficient to face the pandemic, there is a need to create a clearer legal framework to raise the level of awareness, emphasize the urgency and to achieve efficiency of possible responses to a pandemic.

Article 169 of the Treaty on the Functioning of the European Union (together with the institutions created by secondary legislation)²⁴ seems to be also sufficient in terms of the power of the European Union and responsibilities of the Member States, but insufficiently clear when it comes to determining the very need of the European Union to act in a timely manner in relation to a pandemic.

While the pandemic is not the word expressly used in Article 168, it is encompassed by the determination of the “major cross-border health scourge” and reveals the great potential of the European Union for a prompt reaction in health matters. Some of those potentials are already expressed in the Decision of 22 October 2013 on serious cross-border threats to health,²⁵ with the aim “to support cooperation and coordination between the Member States to improve the prevention and control of the spread of severe human diseases across the borders of the Member States, and to combat other serious cross-border threats to health in order to contribute to a high level of public health protection in the Union.”²⁶ However, it is estimated that the structure and mechanisms established by this Decision “showed limitations in allowing a timely common EU-level response, co-ordinate

²³ Charter of Fundamental Rights of the European Union [2012] OJ C326/391

²⁴ Such as the European Centre for Disease Prevention and Control, the European Medical Agency, the European Food Safety Authority, the European Environmental Agency, the European Monitoring Centre for Drugs and Drug Addiction, the European Agency for Safety and Health at Work all have at least some cooperation with the World Health Organization

²⁵ Decision No. 1082/2013 of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health replacing Decision No. 2119/98/EC [2013] OJ L293/1 (Decision)

²⁶ Art. 1 of the Decision, see note 34

the crucial aspects of risk communication, or ensure solidarity among the Member States” and there is a current proposal “to provide a strengthened framework for health crisis preparedness and response at EU level by addressing the weakness exposed by the pandemic.”²⁷

Lessons learnt during the COVID-19 pandemic motivated an initiative for the creation of “the European Health Union” in order “to better protect the health of the European Union citizens, equip the European Union and its Member States to better prevent and address future pandemics and to improve the resilience of Europe’s health systems.”²⁸ However, the question remains how to “ensure solidarity among Member States” and their willingness and ability to work together facing future pandemics?

Health Policy in situations such as pandemics cannot be efficient without an early warning system that is already established through the creation of the mechanisms under the umbrella of the World Health Organization and the European Center for Diseases Prevention and Control established in 2005.²⁹ Further studies need to identify a catalog of tools to implement the “Health in All Policies” principle, particularly in an extraordinary situation such as the pandemic.³⁰ The COVID-19 pandemic is a “perfect” situation for such an action because it provides a great experience when it comes to the nature of possible consequences caused by delayed or inadequate response to the pandemic. It seems that it should be emphasized that all policy decisions are decisions of political nature, even based on scientific data or opinions, but also that the early warning and prevention must be based on mechanisms that would be, as far as possible, objective considerations divorced from politics.

The TEU and the TFEU provide only a basis for the creation of a comprehensive legal framework to fight against infectious diseases and their pandemic. Even the main responsibility in health matters is on the Member States, agencies such as European Centre for Disease Prevention and Control need to act with full accountability, but all Member States and the bodies and institutions of the Eu-

²⁷ Proposal for a Regulation on serious cross-border threats to health, European Commission COM (2020) 727

²⁸ *European Health Union, Protecting the health of Europeans and collectively responding to cross-border health crisis*, European Commission [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/european-health-union_en], Accessed 10 April 2022

²⁹ European Centre for Disease Prevention and Control is an agency of the European Union

³⁰ Bartlett, O.; Naumann, A., *Reinterpreting the health in all policies obligation in Article 168 TFEU: the first step towards making enforcement a realistic prospect*, Health Economics, Policy and Law, 2020, p. 1

ropean Union could rely on its early warnings, scientific analysis, opinions, and recommendations.

The EU already has institutions created as a response or based on the experience from preceding pandemics. However, those institutions must be better equipped, particularly with the early warning capabilities, in order to avoid what had occurred in January 2020 when the European Centre for Disease Prevention and Control announced that “[e]ven if there are still many things unknown about 2019-nCoV, European countries have the necessary capacities to prevent and control an outbreak as soon as cases are detected.”³¹ Only five days after this statement, on 30 January 2020, the World Health Organization declared the Public Health Emergency of International Concern³². On 11 March 2020, the World Health Organization declared a pandemic of COVID-19. However, when the WHO declared a pandemic, all of the Europe found itself in trouble,³³ and most of the EU countries were already faced with insufficient capacities to prevent and control the COVID-19. Therefore, the assessment of the ECDC was not reliable.³⁴ It seems that the pandemic of COVID-19 is a clear example that serious cross-border threats should not be underestimated or neglected. The issue is not about the lack of adequate legal framework, but the awareness of the threat.

The Regulation establishing the European Center for Diseases Prevention and Control defines its mission and tasks in a precise and comprehensive manner.³⁵ It is obvious that at the very beginning of the pandemic something went wrong not because of the legal framework insufficiencies. Even before the COVID-19 pandemic, “despite the EU’s political and legal commitment to [Health in all Policies] as a policymaking strategy... the use of [Health in all Policies] tools and

³¹ *Novel coronavirus: three cases reported in France*, European Centre for Disease Prevention and Control, [<https://www.ecdc.europa.eu/en/news-events/novel-coronavirus-three-cases-reported-france>], Accessed 10 April 2022

³² *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, 30 January 2020, [[https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))], Accessed 10 April 2022

³³ See van Eijken, H., Rijpma, J. J., *Stopping a Virus from Moving Freely Border Controls and Travel Restrictions in the Times of Corona*, Utrecht Law Review, Vol. 17, No. 3, 2021 p. 34

³⁴ See, for example Griffin, G., *Covid-19 pandemic - why was the ECDC so ineffective?*, 2021, [<https://euobserver.com/opinion/152036>], Accessed 10 April 2022

³⁵ See Art. 3 of the Regulation (EC) No 851/2004 of the European Parliament and of the Council establishing a European Centre for disease prevention and control [2004] OJ L142/1

implementation of its principles has been intermittent, and not always effective” as it was noted by Brant and Naumann.³⁶

It seems that further reforms of the TEU and the TFEU need to take more account of the health policy, in particular when it comes to the estimation of what threats and the mechanism to cope with them should be raised on the level of founding treaties. For example, if the regulation concerning European Center for Disease Prevention and Control finds its place in the founding treaties of the European Union, its activities and probably the efficiency would not depend on the variable political will but would be an institutionalized EU mechanism at the core of the European Union.

4. THE QUESTION OF JUSTICIABILITY

The European Union Health Policy was never intended to be the subject of such a legal obligation that would be subjected to judicial control.³⁷ While it is still doubted whether it is the policy end or policy tool (as argued by Bartlett and Naumann) not all of the areas of EU activities should be the subject of judicial review.

The drafters of the founding treaties of the European Union (now TEU and TFEU) seem to be aware of the nature of health risks and the great uncertainty of this area depending on both scientific knowledge and political will.³⁸ At the time when the decision needs to be made and action to be taken, scientific facts might be insufficient, contradictory, or its reliability might be under the shadow of the doubt.

³⁶ Bartlett; Naumann, *op. cit.*, note 30, p. 2. In this context, it seems that it should be emphasized that there was no lack of legal framework, but of its effectiveness. The legal framework already established provided that “An independent external evaluation should be undertaken to assess the impact of the Centre on the prevention and control of human disease and the possible need to extend the scope of the Centre’s mission to other relevant Community-level activities in public health, in particular to health monitoring.” The Centre (ECDC) is empowered to issue scientific opinions necessary for taking actions in the fight against the pandemic. Scientific opinion is not a matter of judicial scrutiny, however the method of obtaining information and respect for other operative procedures are or should be a matter of judicial activity

³⁷ Compare with Bartlett and Naumann, which stated that “HiAP itself was never intended to be the subject of legal obligations.” However, included in the TEU and the TFEU (as quoted above) Health policy is a part of the legal framework of the EU involving certain legal obligations. Cooperation, harmonization, supplemental action etc. are all legal obligations of the EU institutions. However, the question of justiciability is another one

³⁸ While in Art. 114 of the TFEU dealing with the approximation of law new developments and scientific facts are criteria that should be taken into account, health policy, particularly in the area of pandemic, depends on the scientific knowledge that is not always achievable at the time when the decision needs to be taken

Not all of the actions and inactions of the European Union institutions are eligible to be the subject of the jurisdiction of the Court of Justice of the European Union. The legal framework in the Health Policy of the European Union might provide a certain basis for the judicial action (upon satisfaction of the admissibility thresholds requirements). Prolonged “brainstorming” when it comes to the issues stemming from this area is of little practical effect when there is a need for a prompt reaction such as the one created with the spread of COVID-19. However, this cannot be understood as a position against justiciability. On the contrary. There is an urgent need for the development of the EU legal framework in the area of Health Policy and the identification of those issues that should be the subject of judicial scrutiny. In this development, it should be noted that judicial tools cannot be a substitute for policy tools and judges cannot be perceived as actors that can replace political decision-makers.

5. THE IDENTITY OF THE EUROPEAN UNION AND THE PANDEMIC OF COVID-19

It seems that the pandemic of COVID-19 makes it clearer that all States and actors in the European arena should be more realistic in their perception of the role and the very identity of the European Union (not only in health matters). The pandemic revealed that the role of the State in the time of crisis is unavoidable and that the membership in the European Union cannot serve as an excuse when it comes to matters concerning pandemics. On the other hand, the European Union cannot free itself of the responsibility in providing appropriate answer to the threats such as pandemic. Events surrounding the COVID-19 pandemic revealed the role of States in the time of crisis while on the other hand, it also revealed the need for a stronger European Union. The question of the European identity during the COVID-19 is at stake.

The European Union is confronted with the question of its own perception. While it is undoubtful that it is an international organization (however unusual), from the standpoint of the Member States it is not a classical international organization and for some it is not even an international organization.³⁹ There is a need to highlight greater unity between the Member States, as well as, unlike most international organizations, that the EU is a supranational entity with its own and

³⁹ Von Bogdandy, A., *Neither an International Organization Nor a Nation State: The EU as a Supranational Federation*, The Oxford Handbook on the European Union, 2012, [<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199546282.001.0001/oxfordhb-9780199546282-e-53>], Accessed 10 April 2022

well-developed legal and political system based on values such as democracy, rule of law and human rights.

While the issue of the identity of the European Union is blurred with a variety of considerations, particularly in the field of democracy⁴⁰, the rule of law, and the protection of human rights, it seems that the focus should be (not only in academic literature but also in political practice) on the issue of self-determination of the European Union and its perception from the outside. While there are many discussions about national self-determination within the European Union,⁴¹ (as far as we are aware of) there are no analysis regarding the self-determination of the European Union and neither regarding the perception that the European Union has a clear right to self-determination.

The Europeans or citizens of the European Union, the people of the European Union, have the right to self-determination. It seems that self-determination is a key to the identity of the EU. By virtue of self-determination, the EU can “freely determine /its/ political status and freely pursue /its/ economic, social and cultural development.”⁴²

In this context, the EU is composed of Member States, but also of their citizens, whose citizenship of the European Union has already been legally established. However, self-determination is not a static notion. Quite the contrary, it is a process, and in the case of the EU, it is determined in Article 1 of the TEU: “[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.”

The proper basis for the determination of the European Union was established a long time ago in the Document on The European Identity published by the Nine

⁴⁰ “The fact that the European institutions and the academic community are unable to identify the nature of the EU does not mean that the Union should not exist. There is no point indenting reality in the name of theory! It is neither feasible to organise an ambitious and time demanding conference on the future of the EU, if there is no theoretical foundation for the functioning of the Union. To put it simply: the European Union cannot solve its existential problems by ignoring them.” Hoeksma, J., *The Identity of the EU*, The Federal Trust 2020, [<https://fedtrust.co.uk/the-identity-of-the-eu/>], Accessed 14 April 2020

⁴¹ See for example Levrat, N., *The Right to National Self-determination within the EU: a Legal Investigation*, Euborders Working Paper 08, 2017; Ushakovska, M., *European Union Integration and National Self-Determination*, New England, Journal of Public Policy, Vol. 31, No. 2, 2019, pp. 1-21

⁴² See Art. 1 of the International Covenant on Civil and Political Rights [1966] United Nations Treaty Series, Vol. 999

Foreign Ministers on 14 December 1973, in Copenhagen.⁴³ Today, it seems that the very substance of the document determines also the identity of the contemporary European Union. Basic elements of the identity of then European Economic Communities and today's European Union are set in an adequate manner, even less enthusiastic.

In the part of the Document, which deserves to be quoted *in extenso*, it is clearly stated:

“The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society that measures up to the needs of the individual, they are determined to defend the principles of representative democracy, the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights. All of these are fundamental elements of the European Identity. The Nine believe that this enterprise corresponds to the deepest aspirations of their people who should participate in its realization, particularly through their elected representatives.

The Nine have the political will to succeed in the construction of a united Europe. Based on the Treaties of Paris and Rome setting up the European Communities and subsequent decisions, they have created a common market, based on a customs union, and have established institutions, common policies, and machinery for cooperation. All these are an essential part of the European Identity.”

The nowadays European Union needs a similar document on its identity. Basic elements are set almost 50 years ago and need to be reaffirmed today when the membership grew/fell to 27 States. Only an update to the existing legal text is needed in order to reflect developments from the founding treaties to the European Union's well-established policies.

More than 50 years ago, the Document was clear that “[a]lthough in the past the European countries were individually able to play a major role on the international scene, present international problems are difficult for any of the Nine to solve alone. International developments and the growing concentration of power and responsibility in the hands of a very small number of great powers mean that Europe must unite and speak increasingly with one voice if it wants to make itself

⁴³ Declaration on European Identity, Bulletin of the European Communities [1973], Office for official publications of the European Communities, pp. 118-122, [https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf], Accessed 16 April 2022

heard and play its proper rôle in the world.”⁴⁴ Today, when faced with the COVID-19 pandemic, this statement has a great value and emphasizes the urging need to promote cooperation of Member States based on the principle of solidarity.

The identity of the European Union inevitably concerns the issue of “the European Identity in Relation to the World” and the following formulation from the Document on the European Identity needs to be reaffirmed and implemented: “European unification is not directed against anyone, nor is it inspired by a desire for power. On the contrary, the Nine are convinced that their union will benefit the whole international community since it will constitute an element of equilibrium and a basis for co-operation with all countries, whatever their size, culture or social system.”⁴⁵

Inevitably, due to the COVID-19 pandemic, activities but also inactions of the European Union found a prominent place in the very perception of the identity of the European Union. The identity of the European Union cannot be based only on its exclusive competencies. Even in the case of highly centralized unitary states (not to mention federations) not all of the competencies are on the central government, and that fact does not undermine its unity and its identity.

It seems that in the area of health, the European Union does not have a particular international identity. It has to be built, and the first steps are taken through the creation of the initiative of the European Commission on the European Health Union⁴⁶. In our perception, this is not a creation of the novel Union, that is an attempt to strengthen cooperation and achieve solidarity in the already existing legal environment. In this context, certain improvements of the founding treaties seem to be necessary.⁴⁷

⁴⁴ *Ibid.*, par. 6

⁴⁵ Since 1973, many things have changed, and the EU has now established a Common Foreign and Security Policy through which the European Union can act on behalf of all Member States. Now, the foreign policy of the European Union is one of its key elements in the perception of the European identity. In order to strengthen the European Union, the main political course of the European Union should be clearly formulated and also implemented in practice

⁴⁶ See: European Health Union, Protecting the health of Europeans and collectively responding to cross-border health crises, available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/european-health-union_en], Accessed 14 April 2022

⁴⁷ What the EU makes a single entity is not only its supranational powers to issue binding decisions, but also the coordinating and directing mechanism that makes the European Union and its Member States capable to respond to challenges and to speak in one voice. In this context Regulation 2021/522 of 24 March 2021 establishing the Programme for Union’s action in the field of health (‘EU4Health Programme’) for the period 2021-2027 [2021] OJ L107, and repealing Regulation (EU) No. 282/2014 [2014] L 86/2 OJ makes significant improvements in the field of the EU health policy. However, even this document makes some improvements of the EU legal framework of the EU health policy

6. *IN LIEU OF A CONCLUSION*

What has to be done in order to strengthen the ability of the EU to respond to the new challenges? The reality is that the world is not the same as before the COVID-19 pandemic. While the challenges are more demanding, and not all of them are covered with this article, it seems that one of those challenges concerns the readiness of the European Union and its Member States to face the future threats of pandemics or similar causes. The development of the legal framework (already on the European Union agenda under the name of the European Health Union) shall not be struck only in declarations and secondary legislation. Issues such as pandemics are unexpected and prompt. Experience with the COVID-19 pandemic, which is unprecedented in recent history, taught us a lesson that the European Union needs to establish a reliable mechanism for the prompt identification of the threat and to provide timely (or more precisely - prompt) reaction.

Besides significant improvements of the European Union legal framework with secondary legislation during the COVID-19 pandemic, it seems that it should be reconsidered whether there is a need to amend founding treaties by adding provisions concerning the state of emergency in situations such as pandemic when the threat to the life of the European Union is identified, identification of the pandemic as the “major cross-border health scourge” as well as provisions that will define competencies and responsibility of the European Centre for Disease Prevention and Control. In that manner, its activities and probably the efficiency would not depend on the variable political will but would be an institutionalized mechanism at the core of the European Union.

The COVID-19 pandemic saliently raised the issue of the European Union’s identity since that was (or still is) a crisis of unprecedented magnitude testing the ability of the European Union to confront it and its role in the crisis on the one hand, and the solidarity of its Member States, on the other. The experience that resulted from the COVID-19 pandemic, even the failures of the EU to react in the early phases of the pandemic, provides plenty of “opportunities in crisis” to build a stronger identity of the European Union. The world is not the same, and it seems that the European Union, in order to face new challenges, must build its identity in realistic parameters and act in one voice, as it was declared in the Declaration of 1973.

with the significant budget (See Article 5 of this Regulation). It is just a step, as stated in regulation, “The Program therefore should support the development, implementation and enforcement of Union health legislation and, in conjunction with relevant bodies such as EMA and ECDC, should provide high-quality, comparable and reliable data, including real-world healthcare data, to support policy-making and monitoring, set targets and develop tools to measure progress.”; See, the Preamble, par. 32

At the very beginning of the pandemic, Henry Kissinger, one of the most prominent geopolitical analysts and the ex-US Secretary of State and National Security Advisor, wrote: “When the Covid-19 pandemic is over, many countries’ institutions will be perceived as having failed. Whether this judgment is objectively fair is irrelevant. The reality is the world will never be the same after the coronavirus. To argue now about the past only makes it harder to do what has to be done.”⁴⁸ Richard Haas, actual president of the US Council on Foreign Relations, at the beginning of the pandemic pointed out that “the pandemic will accelerate history rather than reshape it” arguing that “not every crisis is a turning point.”⁴⁹ Those two prognoses are not in contradiction and both of them were realized. In this “new world” the European Union needs to find its place and to build its own identity exercising its own right to self-determination. The culmination of the Ukrainian crisis,⁵⁰ that is contemporaneous with the pandemic, has a great potential to blur the perception of the consequences of the coronavirus pandemic. Bitter experience of the COVID-19 pandemic should not be forgotten and need to find its proper place in the founding treaties of the European Union.

⁴⁸ Kissinger, H., *The Coronavirus Pandemic Will Forever Alter the World Order*, 2020, [<https://www.wsj.com/articles/the-coronavirus-pandemic-will-forever-alter-the-world-order-11585953005>], Accessed 16 April 2022. However, Richard Haas (the actual president of the Council on Foreign Relations) put the thesis that the pandemic will accelerate history rather than reshape it- not every crisis is a turning point (Haass, R., *The Pandemic Will Accelerate History Rather Than Reshape It Not Every Crisis Is a Turning Point*, Foreign Affairs 2020). Wang, C., *To Cope with a New Coronavirus Pandemic: How Life May be Changed*, Chinese Journal of International Law, 2020, pp. 221-228. „One of the most important ways in which the coronavirus pandemic is changing the world is through its impact on every aspect of the life of every individual in society, including the way we work, live and learn, from the macro economy to household income, and from social security to individual human rights....“, *Ibid.*, p. 222

⁴⁹ Haas, *op. cit.*, note 1

⁵⁰ It seems that at least in the footnote it should be observed that in order to face challenges, an objective analysis and facing the problems are more than necessary. However, as noted by Pascu and Nunweiller-Balanescu, it is also important not to neglect the possibility that the authorities in one country or another, faced with an inability to manage the pandemic domestically, will knowingly cause an international crisis in order to divert attention from the mismanagement of the pandemic towards an “external threat”. Furthermore, in the absence of an outside enemy, in some countries the narrative has aimed to reconstruct a state-based threat by linking the origin of the virus to a foreign country (Tardy 2020, 14), which can have serious consequences for the stability of the international order. Pascu, I.; Nunweiller-Balanescu A, *Implications of the COVID-19 Pandemic*, *Europolity*, Vol. 14, No. 2, 2020, p. 43

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