

What can we expect from the EU legal framework in a pandemic outbreak?

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1. Introduction

The arrival of a new form of Coronavirus at the end of 2019 and its subsequent expansion to multiple countries has already caused severe consequences whose final extent we are unfortunately still far from seeing. In our geographical context, Italy has been particularly affected by this threat. In such circumstances, it is worth asking what the EU could do to help any of its Member States (MS) to cope with such a situation. This paper will try to answer it. To this end, we will focus on the most important legal instrument: the so-called, "Solidarity Clause" and the most relevant political tool, the Integrated Political Crisis Response arrangements (IPCRs).

2. The solidarity clause

The Solidarity Clause was created by article 222 of the Treaty on the Functioning of the European Union (TFEU). It includes three main obligations to all EU Member States and to the EU Institutions:

1) The obligation on Member States to «act jointly in a spirit of solidarity», which necessarily leads to the promotion of cooperation between them and the European institutions (Fuchs-Drapier, 2011).

2) The obligation of the EU to distribute all the means at its disposal, without excluding those military means that have been provided by the States. Consequently, the EU must make its facilities, infrastructure and any means offered by third Member States available in the fight to eradicate any crisis.

3) An obligation on Member States to proactively provide assistance to each other when they have suffered a serious natural adverse event or when the adverse event has been caused, voluntarily or involuntarily, by human activity alone.

In the light of the above, the clause is, *ab initio*, an excellent tool for achieving a coordinated functioning of the EU institutions and its Member States in the event of CBRNE crises, such as the one we are currently experiencing. It is now enough for a state affected by a crisis such as CoViD-19 to activate the clause so that the EU and other states have a legal obligation to intervene¹. However, its practical application includes some limitations, which we should highlight.

¹ J. BROKENSHIRE, *House of Lords European Union Committee Declaration, Civil Protection and Crisis Management in the European Union*, 6th Report of Session 2008–09, Ordered to be printed 3 March 2009 and

published 11 March 2009. Available at: <https://bit.ly/2yuQ4K7>, point 7, 230 (Last accessed: 20 May, 2020).

2.1 The term “solidarity” as a common background

“Solidarity” is a word that allows multiple different meanings. The concrete notion of solidarity included in article 222 is based on a strong belief: MS are supposed to make their best efforts to be prepared for any crisis and it is only in those cases when they feel overwhelmed by the dimension of the catastrophe that they could ask for everyone else’s help. In our opinion, under the circumstances posed by the Coronavirus crisis, it is hard to accuse any of the MS to have broken the compromise of preparedness surrounding the solidarity clause. Indeed, none of them seems ready to face a situation that might challenge all health care systems in the EU arena.

2.2 The scope of the clause

An extremely important issue regarding Article 222 refers to its concrete scope, mainly, the type of crisis that might trigger the legal obligations involved in the clause and its territorial application. Regarding the geographical scope, article 2 of the Council Decision mentions that the Clause applies (a) within the territory of Member States to which the Treaties apply, meaning land area, internal waters, territorial sea and airspace, and (b) when affecting infrastructure (such as offshore oil and gas installations) situated in the territorial sea, the exclusive economic zone or the continental shelf of a Member State. However, it would be absurd to limit the action of the EU in cases when the threat to our population is placed outside our borders (think about Chernobyl). Thus, a creative interpretation of the literacy of the Clause can be extremely convenient if circumstances recommend it.

² M. RHINARD, N. YLANDER, *The migration crisis and the question of solidarity*, *Transcrisis LSE*, 2015.

The same type of issue arises when we concentrate on the types of crises that Article 222 is focusing on. At a first glance, the text of the Clause seems quite clear. It was designed to help Member States to provide an adequate answer to natural or man-made disasters. Thus, a wide interpretation of expressions such as “terrorist threat” seems recommendable. The same could be said about “natural or man-made disasters”. In our opinion, the migration crisis, for instance, could fit in perfectly with the scope of the Clause, since the Decision defines these types of situations as «any situation which has or may have a severe impact on people, the environment or property, including cultural heritage». Therefore, the Solidarity Clause could be invoked under the current circumstances².

2.3 The obligations. The assistance to be provided

What is the level of commitment that the invocation of the Clause must provoke? The answer to this question is quite disappointing. First, it is crystal clear now that the Clause does not oblige the EU institutions to create new tools or mobilise new resources, no matter that Article 222.1 states that «the Union shall mobilise all the instruments at its disposal». As the Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause states, «The implementation of the solidarity clause by the Union should rely on existing instruments to the extent possible, should increase effectiveness by enhancing coordination and avoiding duplication, should function on the basis of no additional resources, should provide a simple and clear interface at Union level to Member States, and should respect the

competences conferred upon each Union institution and service» (recital 4).

Therefore, an invocation of the Clause would mobilize several EU instruments, such as the European Union Internal Security Strategy, the European Union Civil Protection Mechanism established by Decision No 1313/2013/EU of the European Parliament and the Council (the Union Mechanism), Decision No 1082/2013/EU of the European Parliament and of the Council and the structures developed in the framework of the Common Security and Defence Policy (CSDP), but not necessarily any others.

Regarding the commitments of the Member States, the situation is also quite disappointing, since it is the non-affected Member State who decides on the resources to be provided, according to the Declaration (No 37) of Article 222 of the Treaty on the Functioning of the European Union. Therefore, it will always be the non-affected State who decides on the level of the resources involved, usually organized in “modules”. Moreover, the non-affected State will keep control over the modules deployed, even if local authorities are responsible for the response to the crisis. And what if a Member State directly refuses to send any kind of help with no further justification? Could it be sanctioned? That is quite difficult to say. Fuchs-Drapier wrote that «in practice, the ECJ has rather limited scope to scrutinize a Member State’s compliance with the Solidarity Clause for legal reason, as well as lack of political will»³ Indeed, since the European Court of Justice has no jurisdiction with respect

to defence implications, the police and military operations carried out under the application of the Solidarity Clause would never be controlled by this institution. Keeping this in mind, one has to conclude that a country unwilling to comply with the obligations coming from an invocation of the Clause would feel pressured more by political reasons than by purely legal concerns, since sanctions would be hardly applicable.

3. The implementation of the Clause: the IPCRs

3.1. Introduction

There are two ways to appeal to the Solidarity Clause. First, A Member State can ask another Member State for help. In this case, Article 222 states that both countries «shall coordinate between themselves in the European Council»⁴. However, this does not seem to be a binding condition for Member States. The second way implies a more prescribed involvement of the EU. In this case, there is a quite complex formal procedure designed to guarantee a successful activation of the Clause. First, the affected Member State must notify its intentions to both the Member State holding the rotating Presidency (who will immediately inform the President of the European Council and the President of the European Parliament) and to the President of the Commission through the Emergency Response and Coordination Centre (ERCC)⁵. After receiving this requirement, the EU Integrated Political Crisis Response arrangements (IPCR Arrangements, approved by the General Affairs Council (GAC) 25

³ M. FUCHS-DRAPIER, *The European Union’s Solidarity Clause in the Event of a Terrorist Attack: Towards Solidarity or Maintaining Sovereignty?* in *Journal of Contingencies and Crisis Management*, 19, 4, 4 December 2011, 184-197 (184).

⁴ P. HILPOLD, *Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular*

Regard to Monetary Union, in *Yearbook of European Law*, 34, 1, 2015, 257-285.

⁵ G. BONACQUISTI, *The solidarity clause: one of the most unacknowledged innovations of the Lisbon Treaty. The European Parliament debates its implementation but also its ambiguities*, in *Blogactiv*, 2015. Available at: <https://bit.ly/2ANFxdO> (Last accessed: 20 May, 2020).

June 2013, updating the CCA) are automatically activated.

At the same time, the Commission and the High Representative have to mobilize a number of EU institutions (such as DG ECHO, HOME, SANCO, TAXUD, among others) or EU decentralized agencies (FRONTEX, ECDC, EUROPOL, EMSA, EFSA, EMA etc.) depending on the type and dimension of the threat. The most important of all of these is the Commission's Emergency Response Coordination Centre (ERCC), which has a 24/7 monitoring capacity that allows instant reactions to emergencies. This body has its own personnel and a sufficient budget to play its essential role, to coordinate the operational response and produce joint situation assessment reports if no other EU institution is proven to be more adequate to play that role⁶.

3.2. Main characters of the IPCRs

The scope of the IPCRs is very wide. They refer to crisis and crisis situations such as: «major emergencies or crises, whether inside or outside the EU, of such a wide-ranging impact or political significance, that they require timely policy coordination and response at EU political level. This could result from a number of affected or involved Member States, or the cross-sectoral nature of the crises, the imminence thereof, or from time constraints, or combination of these factors» (pursuant to the Paragraph 1 of the Annex, Council of the European Union Document 10708/13, references to “crisis” or ‘crisis situations’ throughout this document cover crises as indicated in this paragraph).

From an organisational point of view, the IPCRs make it possible to coordinate the action of actors such as the Member States, the General

Secretariat of the Council, the Commission, the European External Action Service (EEAS), among others, since they all participate in the response process, regardless of the activation formula launched by the IPCRs.

From the perspective of new technological capabilities, it is worth mentioning the Integrated Situational Awareness and Analysis (ISAA), a tool designed by the Commission and the SEAE on the basis of the existing resources that supports decision making by the Presidency and the Council. It is also important to highlight that the IPCR includes the development of a new virtual platform, ruled by the Council, which is permanently available, even though access is restricted to authorized participants. It gathers information provided by the Member States, the Commission, the EEAS, and various EU agencies. The IPCR states that in times of crisis, one or more crisis pages can be generated, depending on the situation and policy needs. Its main task is to provide all participants with an overview of the situation, as well as its possible evolution and consequences after the activation of IPCR.

Conceptually, the IPCRs are based on a process of progressivity, which gives them significant flexibility in their operation. Depending on the characteristics and intensity of each crisis, it will be possible to determine which levels of the relevant institutions will be involved. This means that the final responsibility for major crisis management could be assumed by the Council (i.e. The Council of Ministers of the EU) or even by the European Council, if the gravity of the situation indicates that it would be advisable to proceed in this way.

Finally, we would like to point out that the IPCR's founding charter includes as one of its

<https://www.iss.europa.eu/content/upgrading-union%E2%80%99s-response-disasters> (Last accessed: 20 May, 2020).

⁶ A. NIMARK, P. PAWLAK, *Upgrading the Union's Response To Disaster, Brief Issue*, in *European Union Institute for Security Studies*, 45, 2013. Available at:

fundamental objectives the support for the solidarity clause, ensuring a coherent, efficient and timely response at EU policy level in the event of activation (one set of agreements to deal with crises). Indeed, the link between the IPCR and the solidarity clause has been strengthened after the Council adopted a decision on the 24th June 2014 concerning the arrangements for the implementation by the Union of the solidarity clause (2014/415/EU). The IPCR is explicitly mentioned in Articles 1 and 5. Article 1 states that the IPCR agreements will serve as the appropriate tool to be used by the Council to coordinate at

the political level the response to the invocation of the solidarity clause. Article 5 states that the IPCR is the means by which the Council Presidency will ensure the political and strategic direction of the Union's response to the invocation of the solidarity clause, taking full account of the Commission's human resources responsibilities. It must therefore be concluded that, in line with the new legal framework, the IPCR has a key role to play in the implementation of the solidarity clause⁷.

(20 May 2020)

Forum

⁷ For further readings see: E. ATIENZA MACÍAS, *Incidenca de una crisis sanitaria global en el Derecho Deportivo. De la cancelación de unos Juegos Olímpicos al auge de los e-Sports, Las respuestas del Derecho a las crisis de Salud Pública*, E. ATIENZA MACÍAS, E., J. F RODRÍGUEZ AYUSO, (Dirs.), Madrid, 2020, 309-329. I. DE MIGUEL BERIAIN, *Triaje en tiempos de pandemia: un análisis a partir de las limitaciones del marco jurídico español, Las respuestas del Derecho a las*

crisis de Salud Pública, E. ATIENZA MACÍAS, J.F RODRÍGUEZ AYUSO, (Dirs.), Madrid, 2020, . 229-241; I. DE MIGUEL BERIAIN, E. ATIENZA MACÍAS, E. ARMAZA ARMAZA, *The European Union Integrated Political Crisis Response Arrangements: Improving the European Union's Major Crisis Response Coordination Capacities*, in *Disaster Medicine and Public Health Preparedness*, 3, 9, Cambridge, June 2015, 234-238.

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