European Parliament
2019-2024

Committee on Constitutional Affairs

6.5.2021

WORKING DOCUMENT

on institutional reforms in the face of the COVID-19 crisis and other potential future crises: A Health Union and new emerging social needs, crisis preparedness

Committee on Constitutional Affairs

Rapporteurs: Damian Boeselager, Helmut Scholz

A. Overview of the legal framework relevant to the Union's crisis preparedness, with particular regard to health and social policy, and Parliament's position concerning these policy fields in the COVID-19 crisis

Introduction

This working document deals with the institutional limits to effective action at Union level to address the COVID-19 crisis and its consequences. The initial reaction to the pandemic was characterised by a lack of coordination between Member States and the Commission. The spread of the virus represents a cross-border threat and, as such, can only be addressed by a Europe-wide response, notably in the fields of health, social and economic policy. Prior to the launch of the Conference on the Future of Europe, the need for such a common approach was also expressed by EU citizens in a recent survey[1], in which two thirds of the respondents agreed that the EU should have more competences to deal with crises such as the COVID-19 pandemic. On the issue of the policy areas on which respondents would like the EU budget to be spent, public health topped the list, followed by economic recovery. The current crisis has demonstrated the need for a more general look at the Union's institutional preparedness to react to potential future crises arising from other sources.

Legal framework

The Treaty on the Functioning of the European Union (TFEU) confers only limited competences on the Union in health and social policy, so that the main responsibilities in these fields lie with Member States. This is also the case in several other areas which are relevant in terms of crisis preparedness, such as economic, employment and educational policy, where the Union essentially plays a supervisory, coordinating or supporting role.

In health policy, Article 168 of the TFEU assigns competences to the Union, which mostly consist of carrying out actions to support, coordinate or supplement the actions of Member States. After stating that Union action complements national policies, it stipulates that the Union encourages cooperation between Member States in the areas referred to in the Article. It further allows the Union to adopt certain measures, inter alia, concerning monitoring, early warning of and combating serious cross-border health threats. With regard to common safety concerns in public health matters, it also provides, to a limited and defined extent, for shared competence with Member States, in accordance with Art. 4(2)(k) of the TFEU. However, it stresses that Union action must respect the responsibilities of Member States for the definition of their health policy and the organisation of health services.

In social policy, Articles 151 to 161 of the TFEU also focus on the complementary role played by the Union. Article 153 of the TFEU enables the Union, in view of the objectives set out in Article 151 of the TFEU, to support and complement the activities of Member States in certain fields, such as social security and social protection of workers. To this end, it allows the Union, in all listed fields, to adopt measures to encourage cooperation between Member States, and, in most listed fields, to adopt directives with minimum requirements for gradual implementation. However, it stipulates that the adopted measures must not affect the right of Member States to define the fundamental principles of their social security systems and must

[1] European Parliament, Directorate-General for Communication, Public Opinion Monitoring Unit, *Uncertainty/EU/Hope: Public Opinion in Times of COVID-19* (Third Round), November 2020.

not significantly affect the financial equilibrium thereof.

In these policy fields, which are relevant to crisis preparedness, the Union's ability to act decisively is therefore limited. Union action may also be based on Article 352 of the TFEU, if it proves necessary to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers. Moreover, Article 122 of the TFEU contains a solidarity clause, according to which the Council may decide upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, or to grant Union financial assistance to a Member State in difficulties or seriously threatened with severe difficulties beyond its control. In the latter case, the President of the Council must inform the European Parliament of the decision taken.

With a view to overcoming institutional obstacles to effective action at Union level, the Treaty on European Union (TEU) provides for two possibilities. Whereas conferral of further competences on the Union requires an ordinary Treaty revision in line with Article 48(2 to 5) of the TEU, the Union's capacity to decide can be strengthened through the application of *passerelle* clauses. Article 48(7) of the TEU introduces two general *passerelle* clauses which allow a shift from unanimity to qualified majority voting in the Council and from a special to the ordinary legislative procedure. These clauses require a unanimous decision by the European Council and the consent of the European Parliament, with no national Parliament making known its opposition, in order to be activated. Article 153(2) of the TFEU contains a special *passerelle* clause for certain fields of social policy.

Existing infrastructure

For its responsiveness to health crises, the Union relies on several agencies and instruments. The European Centre for Disease Prevention and Control (ECDC) and the European Medicines Agency (EMA) play a crucial role in this context. An important instrument for dealing with serious cross-border health threats is Decision No 1082/2013/EU[2] which supports cooperation and coordination between Member States by setting up a Health Security Committee and an early warning and response system. On 11 November 2020, the Commission put forward legislative proposals aimed at upgrading Decision No 1082/2013/EU, at strengthening the mandate of the ECDC and at extending the mandate of the EMA[3]. A mechanism for responding to crises in a wider sense stems from Decision No 1313/2013/EU on a Union Civil Protection Mechanism (UCPM)[4], which is currently under revision. It strengthens cooperation between the Union and the Member States in the field of civil protection in order to improve the effectiveness of preventing, preparing for and responding to disasters. As a response to the socio-economic consequences of the current pandemic, Council Regulation (EU) 2020/672[5] establishes a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE). It lays down the conditions enabling the Union to provide financial assistance to a Member State faced with a

[2] Decision No 1082/2013/EU of the European Parliament and of the Council of 23 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC, OJ L 293, 5.11.2013, p. 1.
[3] COM(2020)0724; COM(2020)0725; COM(2020)0726; COM(2020)0727.
[4] Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, OJ L 347, 20.12.2013, p. 924.
[5] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L 159, 20.5.2020, p. 1.

severe economic disturbance caused by the COVID-19 outbreak. On 26 January 2021, the Commission announced the creation of a permanent 'bio-defence preparedness programme' based on a public-private partnership.

Position of the European Parliament

Parliament has adopted several resolutions during the pandemic relating to health, social and economic policy[6]. In the area of health, it has called for EU institutions and Member States to draw the right lessons from the COVID-19 crisis and engage in far stronger cooperation. It has therefore asked for a number of measures to create a European Health Union. It considers it necessary to substantially strengthen the competences, budget and staff of the ECDC and of the EMA, as well as to replace Decision No 1082/2013/EU by a new regulation. On the social effects of the pandemic, it believes that Member States must ensure that all workers, including the self-employed, are shielded from income loss. It has welcomed the SURE proposal in this context and has advocated the launch of a permanent European Unemployment Reinsurance Scheme. It has also called for the prioritising of aid for the most vulnerable citizens and people at risk of poverty or social exclusion. Furthermore, it has encouraged Member States to better coordinate social and fiscal legislation in order to avoid ramifications in terms of social security and fiscal systems for cross-border workers and labour migrants as a result of emergency measures. It considers it crucial that the recovery efforts have a strong social dimension and that they be aligned with the objectives of the European Pillar of Social Rights. Parliament has also previously pointed out that the limits for social policy harmonisation still give some unused leeway to the Union legislator to adopt measures in the area of social policy[7].

On the Union's institutional preparedness to react, Parliament believes that the pandemic has revealed the limits of the Union's capacity to act decisively. It therefore considers it necessary to activate the general *passerelle* clause to ease decision-making in all relevant matters in the current health and economic crisis. Already in the context of earlier crises such as the financial crisis, Parliament pointed to the limits of the Union's institutional tools to respond effectively and quickly[8]. It further underlined that the incapacity to achieve unanimity in the European Council had led to the adoption of intergovernmental instruments outside the EU legal framework such as the European Stability Mechanism. It also deplored the fact that bypassing the Union method contributes to a growing lack of transparency, democratic accountability and control. Parliament therefore advocated a complete switch from unanimity to qualified majority voting wherever this is possible under the Treaties. In the present crisis, Parliament has called on the EU institutions and the Member States to make immediate use of all relevant Treaty provisions, which it considers largely underutilised in the area of public health. It has also suggested that this strategy could include proposing greater powers for the Union to act in the case of cross-border health threats. In general, Parliament has stressed that

[6] European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences, Texts adopted, P9_TA(2020)0054; European Parliament resolution of 15 May 2020 on the new multiannual financial framework, own resources and the recovery plan, Texts adopted, P9_TA(2020)0124; European Parliament resolution of 10 July 2020 on the EU's public health strategy post-COVID-19, Texts adopted, P9_TA(2020)0205.

[7] European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, OJ C 252, 18.7.2018, p. 215.

[8] European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, OJ C 252, 18.7.2018, p. 201.

the Union must reflect on how to become more effective and democratic, for which it believes the Conference on the Future of Europe to be the appropriate forum.

B. Observations and avenues to be further explored

Observations:

The need for swift reaction in unforeseeable situations

By definition, crises require swift reactions, which in turn require adequate competences, resources and effective decision-making procedures. In the context of the Union, this applies when a crisis affects one Member State and solidarity measures are needed from the other Member States. However, it is even more true in the context of a crisis that spans borders, affecting several or all Member States. Such crises simply cannot be tackled by national measures alone.

The current pandemic and the ensuing policy responses have demonstrated the limits of the Union's resilience. In order to learn from this crisis, the institutional factors underlying the lack of a coordinated response need to be tackled, as future crises might again test the Union's cohesion.

The pandemic has highlighted once more that the full implementation of the United Nations' 2030 Agenda for Sustainable Development is crucial to strengthen resilience and to be prepared for future shocks. Situated at the heart of EU policymaking, the 17 Sustainable Development Goals (SDGs) therefore have to be integrated fully into the Health Union.

The ability to act immediately and consistently is, of course, not only essential for tackling health-related crises, but also for responding to any form of financial, geopolitical, environmental, social and digital crises.

The need to be better prepared: building resilient societies

The current pandemic has revealed major disparities in the 27 EU Member States' health systems, capacities and policies. It has also shown that these disparities are a European problem. The difficulties encountered by Member States with more fragile hospital facilities and weaker medical infrastructure in controlling the spread of the virus obviously represented a problem in itself because the population was heavily affected in some regions and solidarity mechanisms took too long to be put in place. This also caused a problem at EU level, as the incapacity of part of the EU's territory to control a pandemic obviously created a problem in terms of controlling the pandemic in all other Member States.

The pandemic has thus demonstrated the need for coordinated EU-level action to respond to health emergencies. It has revealed gaps in institutional preparedness and response tools. A Health Union is therefore needed to prepare the EU better for serious cross-border health threats, by enabling the rapid availability of, access to and distribution of countermeasures. While comprising a sensible approach overall, the European Vaccine Strategy has demonstrated the limits of the current approach of the ad hoc delegation of tasks owing to lack of clarity about responsibility and democratic accountability.

It has become evident that the capacity of the Union to react to such a crisis is heavily dependent on the level of previous national investment in the medical and public health sectors, in social security and in production capacities (whether for medical equipment, protective supplies or other essential products). The resilience of our societies therefore relies on the **solidity of our collective systems, on the rules that protect our public services and on our capacity to channel resources into solidarity mechanisms.**

New emerging social needs

The current pandemic has dramatically increased poverty rates and exacerbated pre-existing inequalities, especially in Member States that were badly hit by the economic and financial crisis throughout the preceding decade. The health crisis has had a major effect on the economy, the labour market and social cohesion. Noticeable impacts on the labour market are the rise in unemployment[9], the freeze on private sector recruitment and the reduction of working hours of those in employment. This trend is likely to continue to worsen in the years to come.

Existing healthcare systems throughout the EU – not least those in Member States that were affected by austerity-driven policies and cuts to public spending in the previous decade – were unable to respond effectively to the immense pressure that the pandemic caused. This crisis has highlighted the deficiencies in health systems across Europe and the need to shift our approach to health as a public good.

Moreover, the pandemic has revealed that many people do not have access to public health information or essential healthcare. It has also revealed that older persons, LGBTI persons and persons with disabilities are still not being protected against discrimination related to their access to healthcare and social protection.

The gender dimension of the crisis

Women constitute the vast majority of the working personnel in the care sector. They are also more affected by the social crisis created by the health crisis. In fact, women are not paid equal wages for work of equal value and at the same time shoulder most of the burden of looking after their families and acting as caregivers, resulting in more unremunerated and unrecognised work.

As a result, women have lost revenues and jobs during the crisis to a greater extent than men, they have carried out more household chores, have suffered more from the rise in gender-based violence, as well as from the additional difficulties in accessing reproductive healthcare and abortion during the crisis, and are now on average more likely to face poverty.

<u>Avenues to be explored:</u>

Improving our legal framework

[9] Eurostat figures show a clear impact on unemployment rates in the EU as a result of the pandemic. The EU unemployment rate was 7.6 % in October 2020, up from 6.6 % in November 2019. For young people the situation is even worse, with unemployment having risen from 14.9 % to 17.7 % between November 2019 and November 2020.

While examining existing provisions that need to be improved, particular attention should be paid to competition and State aid rules, the legal framework on controlling exports, supply chains, the intellectual property (IP) rights pertaining to vaccines, and the right to health and the Union's obligation to enshrine it in law.

- An **independent European research centre** should be created in order to fund and carry out research into medicines and vaccines. One objective for the centre could be the development of new medicines, as well as public research into the comparative effectiveness of different pharmaceutical treatment options.

- Our **IP regime** needs to be reformed in a way that ensures that the costs of research and development are decoupled from the price of pharmaceuticals. Moreover, the distribution of IP rights between the public and private sector should reflect the public contribution (through funding or publicly funded research) to the development of medicines.

- The definition of **essential goods and essential sectors**, and the specific provisions associated with them, including public procurement legislation, should be updated. Healthcare, medicines and vaccines should not be treated like any other good, and the companies producing them should not operate in the same way as any other economic actor on the market. They should be bound by specific requirements. For example, in the health sector, no company should enjoy a monopoly over supply. The Joint Procurement Agreement should be extended and strengthened in order to benefit from Europe's scale when it comes to the purchase of strategic medical products and medicines.

- The Treaties need to be revised in order to include the **European Pillar of Social Rights and, in particular, its principle 16** which states that everyone has the right to timely access to high quality, affordable, preventive and curative healthcare. The revision should furthermore establish the goal of harmonising social standards, in particular on gender equality with a view to adopting a directive on the gender pay gap, provisions on parental leave and minimum standards for the childcare sector.

- The **EMA** should be given a reinforced role and an increased capacity to mitigate shortages of medicines and medical devices across the EU. The role of the **ECDC** should be extended to addressing surveillance, preparedness, early warning and response under a strengthened EU health security framework. The **Health Emergency Preparedness and Response Authority (HERA)** should strengthen coordination between Member States by developing strategic investments for research, development, manufacturing, deployment, distribution and use of medical countermeasures. Based on the lessons of the pandemic, the creation of an EU medical emergency unit should be considered.

- **Democratic scrutiny of the European semester** needs to be established. Given that country-specific recommendations play a major role in national fiscal policies and in the ability of Member States to provide public services and social protection, the European Pillar of Social Rights should be closely integrated into the economic governance framework of the EU.

- When it comes to the gender dimension of the crisis and other sectoral initiatives including, but not limited to, the **directive on the gender pay gap, provisions on parental leave and minimum standards for the childcare sector,** a gender mainstreaming strategy should be enforced at EU level to promote gender equality in all sectors.

Funding

The pandemic has highlighted the lack of rapid response funding structures in the EU. It has also illustrated divergences in the state of Member States' healthcare systems that need to be addressed in order to prepare Europe adequately for future health crises.

- Improving flexibility in terms of the volume and allocation of funds is certainly to be **considered** in times of crisis.

- The funding goals of programmes need to be redirected or beefed up to support a common regional **primary** care system between regions in order to facilitate satisfying the high demand for healthcare services and cross-border cooperation between them.

- More transparency is required on the issue of public investment in the development and testing of **medicines**, especially in the case of public-private partnerships.

Competences

Healthcare is complex as many different levels (municipalities, regional, national, EU) and systems work and cooperate in this field. EU action in this area always needs to be fully transparent. The COVID-19 crisis has clearly highlighted the problem of the EU's missing competences in the field of health policy. While Member States are responsible for organising and delivering healthcare, the pandemic has demonstrated that joint health action and coordination at EU level can be a real game-changer for European patients. The call for more competences for the Union in this area has been widely echoed by governments and citizens alike during the crisis. However, this is not a new demand, since, in a Eurobarometer survey for the European Parliament conducted in 2018, over two thirds of respondents expressed support for increased EU action on health and social security.

There is therefore a strong call to rethink and re-create healthcare provisions, taking forward research and translating innovative solutions into practice in order to support patients and health professionals equally. The same reasoning applies to social policies. While the health crisis has resulted in a social crisis, the EU still has only limited competences on social issues.

A first step would be to examine to what extent Article 352 of the TFEU could be used to allow the EU to adopt the legal acts necessary to control the pandemic and protect EU citizens' health. In a second step, the relevant Treaty provisions on competences need to be reformed so as to make health a shared competence between the EU and Member States with regard to cross-border health threats. This would give the EU the legal basis to adopt directives and regulations in the field of health, for example a framework directive on patient transfers or a regulation on information sharing, to decide on protective measures when a health crisis has a cross-border effect, etc. Any such Treaty reform should also include the

introduction of competences on social issues that would allow the EU to encourage Member States to cooperate in this field.

Decision-making procedure

As has been stated on different occasions, the crisis has shown once more how the incomplete institutional set-up of the Union can have detrimental effects on the public's well-being, in particular as a result of the unanimity rule allowing national vetoes to block urgent EU decisions. It is therefore extremely important to make full use of *passerelle* clauses and to get rid of unanimity decision-making in social and fiscal policies, which leads to delayed and unambitious decisions.

Establishing an EU emergency mechanism

The crisis has shown that the EU was not able to respond rapidly to the emerging health crisis or to other cross-border crises for that matter.

While Article 122 of the TFEU sets out a kind of emergency mechanism, this tool has not been used, despite calls for its application. In the context of shortages in the vaccine supply, recourse to Article 122 of the TFEU was explored by some legal experts and mentioned by the President of the European Council, Charles Michel, as a possible solution to step up the rapid deployment of vaccines to citizens. According to some legal experts, this could give the EU and Member States the legal means to ensure effective vaccine production and supply for our population by adopting appropriate urgency measures. However, discussions about the applicability of Article 122 of the TFEU in the current situation remain, as it is limited to certain specific situations. Regrettably, Parliament only plays a very minor role in Article 122 of the TFEU as it currently stands.

Therefore, incorporating a horizontal emergency provision into primary law should be considered, which, when triggered, would provide the Union with the necessary competences to face a crisis head on and would allow certain derogations to certain legislative provisions, along similar lines to what Member States can do when they declare a state of emergency. Any such clause should clearly define the decision-making procedure for triggering it, the scope of actions that may be taken during its period of activation, the division of responsibilities, the democratic guarantees accompanying it and the procedure to ensure the necessary scrutiny. Including such a mechanism in the Treaties would ensure both that the Union method remains at the core of crisis management and that an adequate control mechanism over the emergency measures is put in place.

Conclusion

The Conference on the Future of Europe should explore how to improve the existing legal framework and certain funding structures in order to strengthen the crisis preparedness of the Union. It should also discuss how the Union's competences in the fields of health and social policy could be increased, and how an emergency mechanism could be developed in order to make the Union more fit to tackle future crises.

C. Summary of discussions in the Committee on Constitutional Affairs

This working document was discussed by the Committee on Constitutional Affairs on 17 March 2021[10]. One of the co-rapporteurs gave an overview of its contents, mentioning the limited competences of the Union in health and social policy, the existing infrastructure for dealing with crises, the new emerging social needs and the gender dimension of the crisis. He then referred to the various proposals made in order to reinforce the resilience of the EU, such as the improvement of the legal framework, the increase in competences, the activation of the general *passerelle* clause and the setting up of an emergency mechanism. The ensuing debate revealed broad support for the establishment of a Health Union and for stronger competences for the EU in situations such as the pandemic. In this context, two Members pointed to a recent Eurobarometer survey in order to underline citizens' expectations of more EU action on health issues. One Member pointed out that the full potential of the Treaties had not yet been used in this area. Another Member raised the issue of Article 168 of the TFEU providing a possible legal basis for common standards within the Union. Several Members voiced their agreement with different specific points dealt with in the working document. One Member drew attention to the fact that the working document contains elements that move away from purely institutional and constitutional aspects, thereby touching on aspects for which other committees are competent. The other co-rapporteur concluded the discussion by stressing that lessons must be learnt from the current health crisis in order to be better prepared for future crises and that the current institutional shortcomings should be addressed by the Conference on the Future of Europe.

[10] During the debate, apart from the co-rapporteurs Damian Boeselager and Helmut Scholz, the following Members spoke: Danuta Hübner – EPP, Victor Negrescu – S&D, Charles Goerens (on behalf of Maite Pagazaurtundúa) – Renew, Domènec Ruiz Devesa – S&D.