Editors' Note: Europe Faces COVID-19

by

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and

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As this issue of ECFR is going to press, we are all hunkering down at home, dealing with the enormous human, economic, social and political costs of the pandemic that has disrupted the world; coping with a new way of life; and wondering, with a mix of anguish and hope, when the health emergency will abate, what world we will find, and how we will work toward reconstruction. In many countries the virus has already taken a painful toll of lives and plunged the economy into a dire state. While some countries have been hit harder than others, we are bracing for the possible effects of this aggressive malady in parts of the world less equipped to contain and recover from it.

With all these uncertainties, a few things are clear: the challenge cannot be underestimated, the contagion knows no boundaries, and as all global, exogenous crises, it requires international coordination and cooperation to be effectively fought.

Crucial measures required to curb the economic and social consequences of COVID19 concern precisely the areas of interest of ECFR: emergency legislation and regulations dealing with financial markets, company law, banking, insolvency, have already been issued or are being discussed in most countries and at the EU level. ECFR is working to put together, for our issue 3/2020, a compilation of contributions examining the major responses in a comparative perspective:

Angelo Borselli (Milano) and *Ignacio Farrando* (Barcelona) will analyze recent reforms adopted by EU Member States regarding company law provisions, in particular those facilitating electronic shareholder meetings. Insolvency law, as adapted in the course of the crisis, will be tackled by *Javier Arias Varona* (Madrid) and *Stephan Madaus* (Halle) while *Christos Gortsos* (Athens) will look at the EU policy response to the crisis, in particular from a budgetary point of view. *Marieke Wyckaert* (Leuven) will describe the impact of the crisis on take

Note: The authors are the members of the ECFR Managerial Board.

over law. The impact of the crisis on financial market law will be analyzed by *Pierre-Henri Conac* (Luxemburg) and *Niamh Moloney* (London). Finally, *Luca Enriques* (Oxford) will generally assess how lawmakers should enact corporate law rules deviating from normal times corporate law.

The list of (often temporary) innovations is extensive and, in this respect, the situation is a unique “experiment” on some business law dogmas: from the relaxation of “recapitalize or liquidate” rules and wrongful trading provisions, to the suspension or postponement of insolvency procedures; from a liberalization of virtual shareholders’ meetings (with some limitations to shareholders’ voice), to bans on short selling; from the tightening of anti-takeover measures concerning the disclosure of acquisitions of relevant participations in listed corporations or golden powers of the States, to accounting issues.

The Editors, however, cannot refrain from a few brief and general comments on the impact of the pandemic, also because this crisis is affecting not only the law in our fields of research but, potentially, the very values on which your Journal is premised and our European identity. We do that with the humility imposed by a crisis that demonstrates the fragility of our world and our institutions. We are also well aware that simple solutions do not exist, and that remission is shadowed by what experts call “radical uncertainty,” to which you cannot attach a mathematical probability. In this venture, we try to avoid the all-too-common exercise of offering simplistic recipes, and we prefer instead to limit ourselves to the expression of our hopes.

ECFR was established, thrived – and hopefully will continue to grow – under the assumption that international dialogue, coordination and cooperation are essential not only for legal research, but also for the practice of law, for effective legislation, for fair and efficient adjudication of disputes: in one expression, for the law in action. Reasonable minds can disagree on what the best course of action, at the technical level, might be to address our current predicaments, but a journal with the adjective “European” in its name is inspired by our shared roots and evokes the desirability and importance of analyzing common issues with a “European” view, comparing and contrasting different approaches and solutions, but also valuing cooperation. Its Editors cannot be cavalier about a situation that might make or break the European Union.

The pandemic, once again as all major crisis, is in many ways a catalyst. In chemistry, a catalyst is a substance that increases the rate of a chemical reaction without itself undergoing permanent chemical change. One example is iron in the synthesis of ammonia.

The metaphor is apt here because while we hope and believe that the virus will be destroyed or reduced to impotence, the threat it poses might recur un-

changed; in the meanwhile, it will accelerate the evolution or involution of the EU, either contributing to a stronger Union, or seriously hindering it. Leaving aside political and macro-economic controversies that fall outside the immediate scope of our Journal and in part our competences, we need to recognize how most of the problems of the Union that were swept under the carpet during the 2008 financial crisis have been dramatically brought forward by COVID19 and can no longer be ignored, from budgetary rules to the coordination between monetary and fiscal policy.

The European response, especially at first, has been neither swift nor effective; neither coordinated nor clear and strong. These limitations are due to both structural and contingent reasons in addition to inconsistent estimates – and, unfortunately, erroneous underestimations – regarding the dangers. It must also be recognized that the effects of these inherent dangers were augmented by the human fear and the selfishness they trigger; and that in some cases hubris stifled cooperation.

To be perfectly clear, however, there is no doubt, and there should be no doubt that, despite the initial confusion, without the European Union we would all be worse off. There is extensive misinformation on this point, often exploited in the most typical political scapegoating. On the website of the EU Commission, a complete and regularly updated list of responses can be found, ranging from public health measures to borders and mobility, from economic measures (SURE, the use of MES with limited conditionality, a loosening of the Stability Pact – whose full name, let's not forget, is "Stability and *Growth* Pact" –, ECB actions, etc.; at the time of this Editorial, no consensus on Eurobonds has been reached), to support for research for a vaccine. They are significant and should not be discounted, even if many important and authoritative researches still find these measures insufficient.

In any case, there is so much more that a stronger Union, more capable to cope effectively with a multipolar international order characterized by a shifting balance of powers, could and should do in similar circumstances. The initial missteps and passivity of the EU, and the lack of inter-States coordination, have also been the consequence of the institutional design of many European institutions, ill-equipped to intervene in a resolute way vis-à-vis a similar, unprecedented, drama. In addition, some of the words and tones used (and, to be sure, manipulated) have left scars and exposed potential divisions. Ultimately, however, most of these variables are largely within our individual and collective control.

Just a couple of examples: Europe needs to have greater fiscal capacity and budgetary leeway to intervene especially when a common enemy threatens us, disrupts the common market and endangers our freedoms and economic well-being. More coordinated action and the ability to speak with a single voice are

vital (think about the acquisition of medical equipment, foreign policy, borders protection, defense, research), and the EU must be able to respond quickly when time is of the essence. As scholars in the area of business law, we are just too well aware of the complicated, not to say baroque, organization of the Union and how this reflects in the difficulties to reach consensus and harmonize company law, banking law, and financial markets regulations. If also for legal experts it is often problematic to identify the distribution of powers and competences among the different EU bodies, and to navigate the myriad of rules and regulations enacted and enforced by different authorities, it is clear that the machine suffers from a lack of transparency and an excess of bureaucratic sluggishness and inefficiency that makes the EU often incomprehensible to the layperson. This very complexity harms its legitimacy. Not surprisingly, Member States have emerged as the actors capable to react more quickly and enforce their commands: this is natural and, in many instances, even desirable, but in numerous areas greater continental coordination would have been, is and will be desirable. Within the interests of the ECFR, consider golden powers and anti-takeover measures, or provisions adopted to avoid a chain-reaction of business insolvencies: vis-à-vis the lack of hard powers of the EU, regulatory competition among single jurisdictions could easily lead to a race to the bottom.

COVID19 is a tragic wake-up call for the world and specifically for Europe. From environmental protection to global commerce and supply chains, from the role of technology to the one of the State in regulating the economy, the foreseeable future looks very different from what we could have expected just two months ago. Some of these transformations impact heavily the very areas that our journal covers, and we will address them. At a broader level, while the image of a tunnel is most frequently used, we prefer instead the metaphor of a mountain that needs to be climbed over to find ourselves in a new and different valley. We all have the responsibility, in our more or less limited roles and capacities, to ensure that the direction we take in these days will lead us upward to the pinnacle of triumph over the current challenges, and ultimately to a sunnier valley, more transparent, fair, effective, efficient and supportive.

Borrowing the words of a recent address by Frank-Walter Steinmeier, President of the Federal Republic of Germany, the pandemic emergency is «a testing bench for our humanity»: none «can overcome this crisis and remain strong and healthy if our neighbors will not also be strong and healthy».

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