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EDITORIAL COMMENTS

COVID in the case law of the CJEU: Affirming EU law orthodoxy even under extraordinary circumstances

As the immediate impacts of the loss, disruption and trauma wrought by Covid-19 recede, Europeans are asking important questions about the broader and longer-term effects of the pandemic. That exercise also falls to EU lawyers in respect of the Union legal order. Having digested many of the direct legal responses to Covid-19, we should also ask: what (if any) might be the more indirect yet lingering legacies of the pandemic – particularly for the deep structures and fundamental principles that govern the operation and implementation of Union law?

That challenge is most obvious at the political and regulatory level. After all, urgent crisis responses – for example, through the adoption of new State aid flexibilities or the collective programme of vaccine procurement – soon gave way to a range of institutional initiatives that suggest more lasting impacts on the EU legal system. Naturally, one thinks of how the vast NextGenerationEU stimulus programme – designed to underpin recovery from Covid's economic maelstrom, though linked to epochal challenges such as the climate and digital transitions – has provided the impetus for important debates about the scope and limits of Union competence, the permissible longevity and future replicability of supposedly "exceptional" measures, the changing role of funding within the Union's overall governance toolbox, and the possibilities for a more fundamental overhaul of the EU budget. Views will naturally differ about the potential long-term significance of such complex issues. But as de Witte argued in a Guest Editorial for this *Review*: while crises such as Covid-19 have called forth some striking examples of political and regulatory creativity, the latter responses do not necessarily challenge the orthodox foundations of the EU legal order as such.[1]

The task of evaluating the legacies of Covid-19 extends also to the CJEU and its case law. Indeed, when it comes to exploring the pandemic's deeper and/or longer-term impacts, the CJEU's particular institutional position, roles and responsibilities make it both relatively distinctive and particularly important in this debate. Why relatively distinctive? Because the reactive and piecemeal nature of litigation, together with the inevitable time lag between real-time events and the opportunity for a judicial response, mean that the

1. De Witte, "Guest Editorial: EU emergency law and its impact on the EU legal order", 59 CML Rev. (2022), 3.

CJEU did not labour under the same extreme pressures that fell upon the political institutions to design and deliver urgent, comprehensive or effective solutions to the pandemic's myriad problems. Instead, the CJEU's job was to reason through the legal relevance of Covid-19 for a wide array of human relationships, each more or less connected to or removed from the public health and economic challenges that formed the core of the crisis. And many of those disputes fell to be judicially resolved only after the worst of the pandemic was already over – even by the time our lives had returned largely to their normal pre-Covid patterns.[2] Why particularly important? Because those exact same characteristics – the relative luxuries of distance in both duty and time – imply that the CJEU has a special responsibility to reflect, with a cool and critical mind, on the deeper legal significance and jurisprudential legacies of the pandemic. Thence, the focus of this Editorial: is there any evidence that Covid-19 litigation before the Union courts has influenced or even changed the longer-term evolution of fundamental and well-established principles of the EU legal order? So far, the answer appears to be a resounding "no".

The CJEU has already delivered a considerable number of judgments dealing with Covid-19. In some, the pandemic lurks in the background, but is not especially relevant to either the legal issues or their resolution.[3] In others, Covid-19 is much more in the foreground as the CJEU addresses the significance of the pandemic for all manner of disputes. In that regard, we have judgments focusing on essentially procedural questions: for example, requests for an expedited judicial procedure because of Covid-19 factors;[4] the impact of public health restrictions on ordinary schedules of administration or

2. According to the Commission, the emergency stage of the Covid-19 pandemic in the EU ended on 27 April 2022 (COM(2022)190 Final); according to the WHO, the global health emergency ended on 5 May 2023 (15th Meeting of the Emergency Committee on the Covid-19 Pandemic).

3. No oral hearing before CJEU due to Covid-19, e.g. in Case C-543/19, *Jebsen & Jessen*, EU:C:2020:830. Covid-related matters raised by referring court and/or parties, but not addressed as such by the CJEU, e.g. in Case C-389/20, *TGSS*, EU:C:2022:120; Case C-519/20, *Landkreis Gifhorn,* EU:C:2022:178; Case C-328/20, *Commission* v. *Austria*, EU:C:2022:468; Case C-444/21, *Commission* v, *Ireland*, EU:C:2023:524; Case T-389/21, *Landesbank Baden-Württemberg*, EU:T:2023:827. Other cases where Covid is mentioned in legal/factual background but not treated as relevant to judicial resolution of dispute, e.g. Case C-462/20, *ASGI*, EU:C:2021:894; Case C-96/21, *CTS Eventim,* EU:C:2022:238; Case C-804/21, *C and CD*, EU:C:2022:307; Joined Cases C-14–15/21, *Sea Watch*, EU:C:2022:604; Case T-577/20, *Ryanair (Condor)*, EU:T:2022:301; Case T-158/21, *Minority SafePack*, EU:T:2022:696; Joined Cases C-363–364/21, *Ferrovienord,* EU:C:2023:563; Joined Cases C-583–586/21, *NC*, EU:C:2023:872; Case C-497/22, *Roompot Service,* EU:C:2023:873; Case T-718/20, *Wizz Air Hungary*, EU:T:2023:164.

4. E.g. Case C-156/21, *Hungary* v. *Parliament and Council*, EU:C:2022:97; Case C-157/21, *Poland* v. *Parliament and Council*, EU:C:2022:98; Joined Cases C-245 & 248/21, *Bundesrepublik Deutschland*, EU:C:2022:709; Case C-333/21, *European Superleague Company*, EU:C:2023:1011.

litigation;[5] the inadmissibility of preliminary references that questioned the legality of various national measures adopted in response to the pandemic,[6] or of direct actions against the Union institutions in respect of the latter's own Covid-related measures.[7] But the most interesting judgments are those that deal with more substantive issues arising from Covid-19: mostly concerning the interpretation of Member State or private acts in the light of Union law, or the compatibility of such acts with Union law; but also rulings dealing with judicial review challenges to the legality of Union acts as such.[8]

In fact, in only a relatively small number of such disputes has the CJEU been called on to engage directly with the core public health measures (such as restrictions on travel, or the imposition of vaccination requirements) adopted in response to the pandemic (whether by the Member States, or by the Union institutions). In such cases, the Court obviously acknowledges the extraordinary nature and effects of the pandemic. But otherwise, the flow of judicial analysis is pretty much what any EU lawyer would expect. The Court recalls that a high level of human health protection must be ensured in the definition and implementation of all Union policies and activities.[9] The Court stresses the importance of the precautionary principle: where there is uncertainty about the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent.[10] Against that background, the competent authorities should be accorded a sufficient margin of discretion, including to pursue different strategies from those adopted by their peers or counterparts.[11] But that discretion is not unlimited: it must still be exercised in accordance with the applicable Union framework of primary and secondary law; including respect for any relevant general principles of Union law and rights or freedoms as protected under the Charter.

Consider the dispute in *Roos*, concerning a requirement that any person seeking to enter the European Parliament's buildings between 3 November 2021 and 31 January 2022 was obliged to present a valid Covid certificate (in

5. E.g. Case C-18/21, *Uniqa Versicherungen,* EU:C:2022:682. Note also Case C-758/21, *Ryanair and Airport Marketing Services*, EU:C:2023:917.

6. E.g. Case C-765/21, *Azienda Ospedale-Università di Padova,* EU:C:2023:566. Similarly, cases where direct actions against Union measures were inadmissible on procedural grounds, e.g. Case T-525/21, *E. Breuninger*, EU:T:2022:835.

7. E.g. Case T-38/21, *Inivos*, EU:T:2024:100.

8. Mostly cases concerning State aid in the air transport sector, but also, e.g. Joined Cases T-710 & 722–723/21, *Roos*, EU:T:2022:262 (upheld on appeal in Case C-458/22, *Roos*, EU:C:2023:871).

9. E.g. Case C-823/21, *Commission* v. *Hungary*, EU:C:2023:504.

10. E.g. Joined Cases T-710 & 722–723/21, *Roos*.

11. E.g. Case C-128/22, *Nordic Info*, EU:C:2023:951.

accordance with the framework established by Regulation 2021/953).[12] That requirement, adopted at a time of rising infections within the European Parliament, was intended to allow the resumption of ordinary parliamentary procedures whilst safeguarding the health and life of staff and visitors. The General Court dismissed challenges to the legality of the disputed measure, *inter alia*, on grounds of lack of proper legal basis; impinging upon the freedom and independence of MEPs; breaching Union rules on the protection of personal data; and unjustified interference with the rights of private life, equality and non-discrimination.[13] Union lawyers will find little in the reasoning or outcome of the judgment that is not familiar and predictable, reasonable and persuasive. The bulk of the heavy lifting required to balance competing rights and interests is done by established doctrines such as the precautionary principle and an assessment of appropriateness and necessity under the proportionality test. The General Court evidently felt no need to invoke any more novel or controversial legal doctrines, say, about crisis management or emergency powers. And we see the same approach at work in other judicial review cases also concerning the Union institutions' own public health restrictions: for example, when the General Court points out that the ordinary legislative procedure must be followed in those cases where the Treaties prescribe it, however cumbersome that might seem in the midst of a public health crisis;[14] or dismisses any notion that the pandemic can somehow justify the exercise of "emergency powers" to act in a manner contrary to the ordinary hierarchy of Union law norms.[15]

Consider also the dispute in *Nordic Info*, concerning the compatibility with Union law of national restrictions on the right of free movement to and from Belgium in respect of non-essential travel involving Member States classified as "high risk" for the purposes of the Covid pandemic.[16] Here, the Court conducted its analysis primarily within the framework of the substantive conditions and procedural safeguards provided for under Directive 2004/38 in respect of restrictions justified on grounds of public health.[17] In that context, the judgment relied on standard interpretative techniques to address minor ambiguities in the legislative drafting; reasoned through the broader requirements of legal certainty, good administration and effective judicial

12. O.J. 2021, L 211/1. I.e. a certificate attesting either to having been vaccinated against Covid-19; or to having undergone a recognized Covid-19 test; or to having recovered from infection after previously testing positive for Covid-19.

13. Joined Cases T-710 & 722–723/21, *Roos* (upheld on appeal in Case C-458/22, *Roos*).

14. E.g. Case T-486/21, *OE*, EU:T:2022:517.

15. E.g. Case T-39/21, *PP*, EU:T:2023:204. Consider also, e.g. Case T-524/21, *Saure*, EU:T:2022:632.

16. Case C-128/22, *Nordic Info*.

17. O.J. 2004, L 158/77.

protection that derive, as normal, from the general principles of Union law and the Charter of Fundamental Rights; and provided guidance on how the domestic court should assess the proportionality of the Belgian rules, having regard to the Member State's margin of discretion in accordance with the precautionary principle.[18] The story is similar when it came to assessing the checks and controls introduced by Belgium, for the purposes of enforcing its travel restrictions, for their compatibility with the Schengen Borders Code.[19] For example, the Court compensated for the inconvenient fact that the Code does not recognize threats to public health as a valid justification for the temporary reintroduction of border controls, by pointing out that the Covid-19 pandemic was of such a scale and significance (e.g. in terms of threatening the survival of an entire part of the population as well as risking overwhelming the national healthcare system) that it could nevertheless qualify as a serious threat to public policy and/or internal security – and the latter were indeed listed as legitimate grounds for derogation. Yes, the pandemic constituted a grave public health crisis – but one that could be accommodated within the existing frameworks provided by Union law and that remained amenable to analysis according to established legal concepts and methods.[20]

Most of the CJEU case law involving Covid-19 engages with issues raised by the more ancillary (though still often profound) social and economic effects of or responses to the pandemic. Also in such cases, the CJEU openly acknowledges the exceptional situation created by the pandemic.[21] But again, this wider body of Covid case law is essentially grounded in the judicial affirmation of Union law's underlying legal orthodoxies.

Let us begin with disputes concerning the legality of Union action as such. Here, the standard system for controlling the exercise of Union competences appears entirely unflapped by the experience of the pandemic. For example, the numerous challenges brought against Commission decisions finding State aid compatible with the Internal Market (many applying the Temporary Framework for State aid measures to support the economy during Covid,[22] and concentrated largely in the air transport sector) conform to an orthodox standard of judicial review within the prevailing framework of Union primary

18. On those points, note also the judgment of the EFTA Court in Case E-5/23, *Criminal proceedings against LDL* (Judgment of 21 March 2024).

19. Regulation 2016/399, O.J. 2016, L 77/1.

20. See similarly: Case C-411/22, *Thermalhotel Fontana*, EU:C:2023:490. Cf. Case C-206/22, *TF*, EU:C:2023:984 (not strictly a Covid-19 case, but dealing with analogous issues).

21. E.g. Case T-657/20, *Ryanair (Finnair II)*, EU:T:2022:390; Case T-142/21, *Wizz Air Hungary*.

22. O.J. 2020, C 91I/1 (as subsequently amended).

and secondary law.[23] We see that primarily when it comes to determining whether national assistance measures falling within the prohibition under Article 107(1) TFEU might nevertheless benefit from the "natural disasters or exceptional occurrences" exemption provided for by Article 107(2)(b) TFEU.[24] But the CJEU applies the same orthodox approach (say) when considering whether the pressures of the Covid-19 crisis might justify a more lenient approach to defining and enforcing the Commission's procedural obligations;[25] or when deciding whether the exceptional context of the pandemic could justify suspending the legal effects of annulment of Commission decisions that were vitiated by a failure to provide adequate reasons.[26]

But the point is true beyond such State aid disputes and can be seen also in other judicial review cases. Where the CJEU recognizes the particular demands made on the Union institutions as they struggled to respond to the pandemic, it does so by limiting the scope for judicial review to overturning findings of manifest error, i.e. as would normally be the case in any field characterized by decisions of a particularly complex or technical nature.[27] If anything, the Covid-19 crisis sometimes seems oddly absent even from rulings where one might have expected it to play a more prominent role. One thinks here of rulings like *Hungary/Poland* v. *Council and European Parliament*.[28] In a political sense, Covid-19 undoubtedly played an important part in the negotiation and adoption of the contested Conditionality Regulation: even if the Commission's original proposal predated the pandemic, the measure soon became an integral element of the EU's wider programme for economic recovery from the pandemic via the NextGeneration-EU package.[29] Yet Covid-19 played almost no role whatsoever (at least on the public record) in the Court's reasoning as it worked through the various substantive issues raised by the dispute concerning the existence and exercise

23. E.g. Case T-657/20, *Ryanair (Finnair II)*; Joined Cases T-34 & 87/21, *Ryanair (Lufthansa)*, EU:T:2023:248.

24. E.g. Case C-320/21, *Ryanair*, EU:C:2023:712; Case C-321/21, *Ryanair*, EU:C:2023:713. Also, e.g. Case T-677/20, *Ryanair (Austrian Airlines),* EU:T:2021:465; Case T-657/20, *Ryanair (Finnair II)*; Case T-142/21, *Wizz Air Hungary*; Case T-216/21, *Ryanair (Air France),* EU:T:2023:822; Case T-494/21, *Ryanair (Air France),* EU:T:2023:831; Case T-383/21, *Banque postale*, EU:T:2023:845; Case T-146/22, *Ryanair (KLM II),* EU:T:2024:68.

25. E.g. Case C-320/21, *Ryanair*; Case C-321/21, *Ryanair*; Case C-209/21, *Ryanair*, EU:C:2023:905; Case C-210/21, *Ryanair*, EU:C:2023:908. Also, e.g. Case T-628/20, *Ryanair (Espagne)*, EU:T:2021:285; Case T-268/21, *Ryanair (Italie)*, EU:T:2023:279.

26. E.g. Case T-465/20, *Ryanair (TAP)*, EU:T:2021:284; Case T-643/20, *Ryanair (KLM)*, EU:T:2021:286; Case T-665/20, *Ryanair (Condor)*, EU:T:2021:344.

27. E.g. Case T-598/21, *Euranimi*, EU:T:2023:606; Case T-383/21, *Banque postale*.

28. Case C-156/21, *Hungary* v. *Parliament and Council*; Case C-157/21, *Poland* v. *Parliament and Council*.

29. Regulation 2020/2092, O.J. 2020, L 433I/1.

of Union competence. A crisis measure – but with no need for any novel form of crisis law.

Next, consider rulings that hinge on the interpretation and application of Union primary law vis-à-vis Member State/private action. Here, the Court insists that Member States should fully take into account the European dimension to national policymaking, in accordance with their ordinary Treaty obligations, even when acting in crisis-response mode and under the extreme pressures of the pandemic. A good example is *Xella Magyarország*.[30] In 2020, Hungary introduced a foreign investment filtering mechanism – motivated by the experience, already early into the pandemic, of serious disruption to global supply chains that in turn generated adverse repercussions for the national economy. On that basis, the Hungarian Government blocked the acquisition by one Hungarian company (that was nevertheless deemed under domestic law to be a "foreign investor" because it formed part of a group of EU companies whose ultimate parent company was based in a third country) of control over another Hungarian company (that was deemed under domestic law to be of "strategic" importance due to its role in the extraction of gravel, sand and clay and therefore for the supply of raw materials in the local construction sector). In application of longstanding Union law approaches and principles, the Court held that the Hungarian measure constituted a clear restriction on the freedom of establishment under Article 49 TFEU. Under Article 52 TFEU, such a restriction could, in principle, be justified on grounds of public policy and security. But the Member States are not free to determine those concepts on a unilateral basis: the national authorities must demonstrate that their actions address a genuine and sufficiently serious threat to a fundamental interest of society. And Hungary's concern to protect the local supply of construction materials was simply not comparable to previous examples of Member State restrictions designed to safeguard national security of supply in the event of a crisis in fields such as petroleum, telecommunications and energy.

The same lesson emerges from those rulings that hinge on the interpretation and application of Union secondary law (again vis-à-vis Member State/private action).[31] In particular, the CJEU repeatedly emphasizes the need to respect the integrity of Union-level harmonization, as regards its intended scope of application and the degree of its pre-emptive effects, notwithstanding the unusual context of the pandemic: there can be no emergency rewriting, either by or for the Member State, of its existing obligations; the national authorities

30. Case C-106/22, *Xella Magyarország*, EU:C:2023:568.

31. Including "business as usual" rulings on data protection in a Covid context, e.g. Case C-34/21, *Hauptpersonalrat der Lehrerinnen und Lehrer*, EU:C:2023:270; Case C-659/22*, Ministerstvo zdravotnictví,* EU:C:2023:745; Case C-683/21, *Nacionalinis visuomenės sveikatos centras*, EU:C:2023:949; Case C-46/23, *Újpesti Polgármesteri Hivatal*, EU:C:2024:239.

must remain within the bounds afforded by Union law's own express limitations and derogations.[32] Consider the ruling in *Bundesrepublik Deutschland* v. *MA, PB and LE*.[33] Germany sought to suspend implementation of a decision to transfer certain individuals to Italy, the latter having been identified as the Member State responsible for processing their applications for international protection, on the grounds that such implementation had become "materially impossible" due to the Covid-19 pandemic. The Court held that such a measure could not interrupt the time limit for transfer as laid down in the Dublin III Regulation.[34] Germany's action fell outside the permitted grounds for suspension, since it was not motivated by any direct link with the applicants' effective judicial protection, and the Union legislature had failed to make any wider provision for interruption or suspension of the time limit for transfer. Moreover, the situation also fell outside the cases of "material impossibility" (such as imprisonment or absconding) where the Regulation did indeed make explicit provision for extension of the time limit for transfer, such cases being of an exceptional nature and therefore to be interpreted strictly.[35]

Similarly, in a series of consumer protection cases, the Court rejected Member State and/or private party claims that derogations which simply did not exist on the face of Union law should nevertheless be implied into the relevant legislation for the sake of accommodating the pandemic. Instead, where Union law already made explicit provision to deal with the occurrence of "exceptional" or "emergency" events, the Court would analyse Covid under the terms of that dedicated regulatory regime.[36] Indeed, the Court resisted arguments that Covid somehow constituted a special category of "particularly extraordinary circumstances" capable of acting as an unwritten ground for additional exemption or enhanced derogation from binding Union law obligations.[37] Though it is worth noting that the Court does not only engage in chastisement: the fact that Member States must address and resolve problems, not simply acting alone and in isolation, but also in their capacity as Member

32. E.g. scope of harmonization and interpretation of express derogation in Case C-18/21, *Uniqa Versicherungen*. E.g. level of harmonization and no rewriting of obligations in Case C-396/21, *FTI Touristik,* EU:C:2023:10.

33. Joined Cases C-245 & 248/21, *Bundesrepublik Deutschland*.

34. Regulation 604/2013, O.J. 2013, L 180/31.

35. Consider also, e.g. Case C-823/21, *Commission* v. *Hungary*.

36. E.g. Case C-540/21, *Commission* v. *Slovakia*, EU:C:2023:450; Case C-407/21, *UFC – Que choisir*, EU:C:2023:449. Similarly, e.g. Case C-299/22, *Tez Tour*, EU:C:2024:181; Case C-584/22, *Kiwi Tours*, EU:C:2024:188.

37. E.g. Case C-49/22, *Austrian Airlines,* EU:C:2023:454; Case C-407/21, *UFC – Que choisir*.

States, also means taking advantage of the various facilities, tools and resources offered to the national authorities as a matter of Union law.[38]

Finally, consider rulings demonstrating how the ordinary principles that govern the (direct and indirect) enforcement of Union law apply notwithstanding the exceptional circumstances of the pandemic.[39] Two particular examples are worth noting from the decided case law. The first involves Member State attempts to claim *force majeure* as a defence for non-compliance, outside or beyond the permissible derogations provided for under written Union law. According to settled case law, the concept of *force majeure* refers to abnormal and unforeseeable circumstances, outside the control of the claimant, the consequences of which could not have been avoided in spite of the exercise of all due care.[40] Where a Member State has not complied with its Treaty obligations, the Court recognizes the possibility of pleading *force majeure* as a defence, in the context of enforcement proceedings brought by the Commission under Article 258 TFEU, though only for so long as is necessary to resolve the situation. In *Commission* v. *Slovak Republic*, the Court treated the Member State's claims that Covid-19 constituted a *force majeure* event entirely in accordance with its established case law. Here, Slovakia had adopted emergency measures to protect travel organizers from insolvency by exempting them from their ordinary obligations under the Package Holiday Directive – those measures going beyond the concessions in respect of "unavoidable and extraordinary circumstances" already provided for under Union law.[41] The Court accepted that a health crisis on the scale of the Covid-19 pandemic did, in principle, amount to abnormal and unforeseeable circumstances beyond the Member State's control, but nevertheless rejected Slovakia's defence of *force majeure* on the grounds (first) that its blanket exemption failed to take into account the financial situation of individual travel organizers; (second) that the threat of

38. E.g. Case C-540/21, *Commission* v. *Slovakia*; Case C-407/21, *UFC – Que choisir*.

39. Note cases where the Court rejects attempts to rely on Covid-19 disruption, in effect, to explain or excuse non-compliance with binding Union obligations on a retroactive basis, e.g. Case C-220/22, *Commission* v. *Portugal,* EU:C:2023:521; as well as claims that a failure to comply with Treaty obligations was due to generic/unspecified problems created by the pandemic, e.g. Case C-692/20, *Commission* v. *UK*, EU:C:2023:707. In a subsequent series of infringement proceedings, the Court established that (on the one hand) Covid-19 disruption cannot act as a blanket defence either to the Member State's failure to transpose a Union directive within its deadline or against the consequent imposition of financial penalties, but (on the other hand) Covid-19 disruption can legitimately act as a mitigating factor that reduces the total amount of a lump sum or periodic penalty payment: Case C-439/22, *Commission* v. *Ireland*, EU:C:2024:229; Case C-449/22, *Commission* v. *Portugal*, EU:C:2024:230; Case C-452/22, *Commission* v. *Poland*, EU:C:2024:232; Case C-454/22, *Commission* v. *Latvia*, EU:C:2024:235; Case C-457/22, *Commission* v. *Slovenia*, EU:C:2024:237.

40. E.g. Case C-804/21, *C and CD*, para 44.

41. Directive 2015/2302, O.J. 2015, L 326/1.

insolvency could have been avoided, for example through the provision of targeted State aid in full accordance with Union law; and (third) that the duration of the Slovak measures was not strictly limited to the period necessary to remedy the difficulties caused by the pandemic.[42]

Our second example involves the structural principles that govern the legal status and effects of Union law within the Member States.[43] Consider the ruling in *UFC – Que choisir*, which concerned a preliminary reference about French measures which were similar in nature to those at stake in *Commission* v. *Slovak Republic*.[44] Here, the Court reiterated that Covid-19 was to be assessed within the terms of the existing derogation in respect of "unavoidable and extraordinary circumstances" as explicitly provided for under the Package Holiday Directive. Next, the Court recalled that *force majeure* is primarily a defence to enforcement proceedings brought directly before the CJEU; it should not be assumed that the same concept can ever exempt the national courts from their duty to disapply domestic measures adopted in response to the Covid-19 pandemic that are nevertheless incompatible with directly effective provisions of Union law. The Court then addressed a final question: was it still possible that the national court might uphold the legal effects of the Member State's rules – at least in respect of past events – by limiting the temporal effects of the principle of primacy? As we know, the Court has indeed confirmed the existence of an exceptional jurisdiction under Union law to withhold the ordinary remedy of disapplication even in respect of incompatible domestic measures.[45] But here, the Court distinguished its previous case law and rejected any possibility that the French courts might exercise such exceptional powers in this case. However serious the financial consequences of Covid-19 for the package holiday sector, such a threat to the economic interests of travel organizers was not comparable to the public interests (protection of the environment, safeguarding the national energy supply) previously recognized by the Court as being capable of justifying suspension of the ordinary principle of primacy. In any event, France had acknowledged that disapplication of its incompatible national measures (or rather, their annulment in accordance with domestic procedural law) would result only in limited damage to its package travel sector – a degree of adverse

42. Case C-540/21, *Commission* v. *Slovakia*.

43. E.g. principles of direct effect and primacy in Case C-348/22, *Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:301. E.g. equivalence and effectiveness in Joined Cases C-274–275/21 and Case C-18/21, *EPIC Financial Consulting*, EU:C:2022:565. E.g. raising points of own motion in Case C-83/22, *Tuk Tuk Travel,* EU:C:2023:664.

44. Case C-407/21, *UFC – Que choisir*.

45. E.g. Case C-409/06, *Winner Wetten*, EU:C:2010:38; Case C-41/11, *Inter-Environnement Wallonie*, EU:C:2012:103; Case C-411/17, *Inter-Environnement Wallonnie*, EU:C:2019:622.

consequence that hardly made suspension of the full effects of the Directive a compelling public interest necessity.

So it would seem that the CJEU's unique institutional prerogative to reflect on the pandemic in a primarily reactive manner, and in most cases with some luxury of hindsight, has resulted in case law whereby Covid-19 is largely absorbed into the existing intellectual structures and operational principles of the Union legal system. That finding evidently resonates with de Witte's claims about the Union's political and regulatory responses to the pandemic – but in the case of the CJEU, the point is surely even more striking.

Perhaps incessant chatter about an EU in perpetual crisis leads us to underestimate the inner strengths and latent resilience of the Union legal order. But perhaps the CJEU has also benefited from a degree of good fortune. In every case so far, the applicable primary and/or secondary Union law created a framework that directly facilitated (or at least did nothing to frustrate) a judicial approach to questions of competence, validity, interpretation, compatibility and enforcement that could readily and reasonably be expressed in entirely orthodox legal terms using established and familiar legal tools. A more difficult test of the Court's adherence to orthodox principles, would be something comparable to the NextGenerationEU challenge brought before the German Federal Constitutional Court – a case that (for better or for worse) did not manage to proceed all the way to Luxembourg.[46] In other words: how might the Court have reacted to a dispute involving Union action directly and specifically linked to Covid-19, where the lawfulness of that action is also directly and specifically contingent on the exceptional context of the pandemic, in the sense that there is genuine doubt about whether (in the absence of any more orthodox means to respond) the relevant legal issues would have been addressed in the same way *but for* the existence of such a grave social and economic crisis?

Yet for now, it appears that the global health pandemic has bent to the will of European legal orthodoxy – not vice versa. As for many people whose lives were disrupted rather than ruined by the pandemic, perhaps EU lawyers – at least those of the dedicated-Court-watching persuasion – will be tempted to look back on Covid-19 as little more than a terrible memory. But while the findings presented in this Editorial may seem obvious to many, perhaps even banal to some, they do nevertheless beg further and potentially important questions. Should we simply feel relieved that, even in the face of truly extraordinary pressures, EU law possessed sufficient strength and flexibility to provide adequate answers from within its normal resources and without

46. *Act Ratifying the EU Own Resources Decision* (Judgment of 6 Dec. 2022) – a judgment that has nevertheless been interpreted as an act of partial conciliation on the part of the FCC, after the latter's highly abrasive ruling in the *PSPP* case (Judgment of 5 May 2020).

recourse to emergency or crisis doctrines? Or did an insistence on legal orthodoxy really best serve the cause of justice and fairness, in each and every case where the pandemic struck? Whose interests were ultimately well- or ill-served, through the very act of clinging to the black-letter of existing texts and sticking to the logic of familiar principles? Should the Court instead have been prompted by the world-shaking events of the global health crisis, to explore the possibilities for greater creativity in the interpretation, application and enforcement of (at least certain measures of) Union law? And how far does the judicial adherence to orthodoxy in the face of Covid-19 compare to, or contrast with, the Court's reaction to other major crises – from the financial crash and Eurozone turmoil, to Brexit or the Russian invasion of Ukraine – such that we can build a more comprehensive picture of "EU crisis law", or at least of "EU law under crisis conditions"?