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**THE EUROPEAN UNION AND THE NEGOTIATION OF THE  
INTERNATIONAL PANDEMIC TREATY: INTERESTS AT STAKE  
AND POTENTIAL CONTRIBUTION**

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On 1 December 2021, the World Health Assembly (WHA) adopted a decision establishing an Intergovernmental Negotiating Body (INB) in view of the negotiation and adoption of an international instrument on pandemic prevention, preparedness and response (commonly known as the International Pandemic Treaty).<sup>1</sup> While the legal nature and the content of this instrument are still unknown, stakeholders should start assessing the opportunities provided by this negotiation and the contribution they can make to the final outcome.

The European Union (EU) has a distinguishing position in this debate. As one of the promoters of this negotiation, the EU has a strong interest in the adoption of an International Pandemic Treaty, an interest that is also driven by its unsatisfactory status in the International Health Regulations (IHR). The International Pandemic Treaty thus constitutes an opportunity to strengthen the role of the EU in the global fight against cross-border health threats (1). Moreover, as a regional organization, the EU has a strong expertise in coordinating national positions to prevent and respond to cross-border health threats, and can thus positively contribute to the negotiation of an International Pandemic Treaty. Hence, the participation of the EU in this procedure could contribute to a strong and effective international instrument (2).

## 1. THE INTERNATIONAL PANDEMIC TREATY AS AN OPPORTUNITY FOR THE EUROPEAN UNION

The European Union has strong interests in the negotiation of the International Pandemic Treaty. The EU has been advocating for global cooperation to fight against COVID-19 since the origin of this outbreak, and it has been the promoter of the negotiation of the International Pandemic Treaty (a). The potential influence of the EU in the negotiation and implementation of the International Pandemic Treaty will largely depend upon the legal nature of this instrument (b).

### A. THE INTERNATIONAL PANDEMIC TREATY: THE SUCCESS OF MULTILATERALISM

The European Union has traditionally been a strong promoter of multilateralism. This distinctive feature has been apparent in the fight against COVID-19. The Union has used formal and informal institutions to fight against the pandemic, as illustrated by the following examples.

#### The EU and the COVAX initiative

The EU has been a key actor in the promotion of the Access to COVID-19 Tools Accelerator (ACT-Accelerator) and the COVAX initiative associated to it.<sup>2</sup> The COVAX Initiative is an innovative framework of global governance to secure vaccines and preserve global solidarity.<sup>3</sup> The European Commission and France participated in the launch of this mechanism, together with the World Health Organization (WHO) and the Bill & Melinda Gates Foundation.<sup>4</sup> With \$ 3.9 billion in pledges by November 2021, team Europe (the EU and its Member States) constitutes the largest donor to this instrument.<sup>5</sup> Yet, the success of COVAX is mitigated, as wealthy States have essentially purchased vaccines via unilateral agreements

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<sup>1</sup> WHO, The World Together: Establishment of an intergovernmental negotiating body to strengthen pandemic prevention, preparedness and response, 1 December 2021, SSA2/SR/5.

<sup>2</sup> ACT-Accelerator is composed by four pillars of work: diagnostics, treatment, vaccines and health system strengthening; COVAX constitutes the vaccines pillar of this mechanism.

<sup>3</sup> Armin VON BOGDANDY and Pedro A. VILLAREAL, 'The Role of International Law in Vaccinating Against COVID-19: Appraising the COVAX Initiative' (2021) 81 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 89.

<sup>4</sup> World Health Organization, What is the ACT-Accelerator, available at <https://www.who.int/initiatives/act-accelerator/about>.

<sup>5</sup> Gavi, COVAX AMC donors table, 6 August 2021, available at <https://www.gavi.org/sites/default/files/covid/covax/COVAX-AMC-Donors-Table.pdf>. The EU has repeatedly reiterated its commitment to COVAX; see European Council, Conclusions, 25 June 2021, EUCO 7/21, para. 3; European Council, Statement of the Members of the European Council, 26 February 2021, SN 2/21, para. 5.



instead of buying them through the COVAX facility,<sup>6</sup> and COVAX has been unable to distribute the expected amount of vaccines to funded countries.<sup>7</sup>

### The EU, the WTO and COVID-19

The EU has been strongly criticised for its position towards the India/South Africa TRIPS waiver proposal at the WTO.<sup>8</sup> Such proposal aims at waiving certain TRIPS obligations in relation to health products and technologies for the prevention, treatment and containment of COVID-19.<sup>9</sup> Positions on the TRIPS waiver proposal strongly diverge among WTO parties. The United States support the proposal but only as applied to vaccines,<sup>10</sup> whereas China is rather positive about the measure although it is neither a proponent nor a co-sponsor of it.<sup>11</sup> Switzerland, which initially rejected the proposal, has recently admitted that it is open to compromise, although it will not support a full waiver of TRIPS rights.<sup>12</sup> The EU does not support the waiver proposal, although there are diverging interests among its Member States and between the Council and the European Parliament.<sup>13</sup> As an alternative, the EU has made a counter-proposal calling for limiting export restrictions, supporting the expansion of production, and facilitating the use of compulsory licensing provisions under the TRIPS Agreement.<sup>14</sup> The opposing views among WTO members have resulted in the inability to adopt any formal decision at the TRIPS Council.<sup>15</sup> Discussion were to be followed at the WTO 12th Ministerial Conference but the latter was reported due to travel restrictions.<sup>16</sup> Despite its rigid position, the EU has repeatedly underlined its aim of finding multilateral solutions to trade concerns posed by COVID-19.<sup>17</sup>

Considering the previous examples, the EU willingness to negotiate an International Pandemic Treaty comes as no surprise. In November 2020, the President of the European Council raised the need to

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<sup>6</sup> See, for the EU, European Commission, EU Strategy for COVID-19 vaccines, 17 June 2020, COM(2020) 245 final.

<sup>7</sup> Jamie DUCHARME, 'COVAX Was a Great Idea, But Is Now 500 Million Doses Short of Its Vaccine Distribution Goals. What Exactly Went Wrong?', *Time*, 9 September 2021, available at <https://time.com/6096172/covax-vaccines-what-went-wrong/>; Michèle GEMÜNDEN and Jan THIEL, 'COVAX Needs a Political Future', *Policy Perspectives*, Center for Security Studies – ETH Zürich, March 2021, available at [https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/PP9-4\\_2021-EN.pdf](https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/PP9-4_2021-EN.pdf).

<sup>8</sup> WTO, Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19 – Communication from India and South Africa, 2 October 2020, IP/C/W/669. This proposal has been sponsored by Kenya, Eswatini, Pakistan, Mozambique, Bolivia, Venezuela, Mongolia, Zimbabwe, Egypt, the African group, the LDC Group, Maldives, Fiji, Namibia, Indonesia, Vanuatu and Jordan by December 2021. A revised version of the proposal was presented in May 2021 (IP/C/W/669/Rev.1).

<sup>9</sup> Health products and technologies include diagnostics, therapeutics, vaccines, medical devices, personal protective equipment, their materials or components, and their methods and means of manufacture.

<sup>10</sup> Office of the United States Trade Representative, Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver, 5 May 2021, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver>.

<sup>11</sup> Peter K. YU, 'China, the TRIPS Waiver and the Global Pandemic' in Madhavi Sunder and Sun Haochen (eds), *Intellectual Property, COVID-19, and the Next Pandemic: Diagnosing Problems, Developing Cures* (forthcoming 2022).

<sup>12</sup> Emma FARGE, 'Switzerland says it is open to compromise in COVID vaccine talks at WTO', 25 November 2021, available at <https://www.reuters.com/world/europe/switzerland-says-it-is-open-compromise-covid-vaccine-talks-wto-2021-11-25/>.

<sup>13</sup> European Parliament, World Trade Organization TRIPS waiver to tackle coronavirus, September 2021, available at [https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690649/EPRS\\_ATA\(2021\)690649\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690649/EPRS_ATA(2021)690649_EN.pdf).

<sup>14</sup> WTO, COVID-19 and beyond: Trade and Health – Communication from Australia, Brazil, Canada, Chile, the European Union, Japan, Kenya, Republic of Korea, Mexico, New Zealand, Norway, Singapore and Switzerland, 24 November 2020, WT/GC/223; WTO, Urgent trade policy responses to the COVID-19 crisis – Communication from the European Union to the WTO General Council, 4 June 2021, WT/GC/231.

<sup>15</sup> WTO, Members to continue discussion on a common COVID-19 IP response up until MC12, 18 November 2021, available at [https://www.wto.org/english/news\\_e/news21\\_e/trip\\_18nov21\\_e.htm](https://www.wto.org/english/news_e/news21_e/trip_18nov21_e.htm).

<sup>16</sup> WTO, Twelfth WTO Ministerial Conference, available at [https://www.wto.org/english/thewto\\_e/minist\\_e/mc12\\_e/mc12\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm).

<sup>17</sup> WTO, Communication from Australia, Canada, Chile, European Union, Japan, Korea, New Zealand, Norway, Singapore, Switzerland – Covid-19: Transparency of trade-related measures, 24 July 2020, available at [https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc\\_158904.pdf](https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc_158904.pdf).

negotiate a new multilateral agreement on pandemic preparedness and response.<sup>18</sup> This idea was subsequently promoted at the global level and sponsored by the WHO.<sup>19</sup> The decision to open negotiations on an International Pandemic Treaty thus constitutes a success for the multilateral ambitions of the EU.

## B. THE INTERNATIONAL PANDEMIC... TREATY, CONVENTION, OR SOMETHING ELSE?

While the negotiation of an International Pandemic Treaty provides an opportunity for all parties concerned to influence future global rules on pandemic preparedness and response, the EU is in a particular position on this matter. The opportunities provided by the International Pandemic Treaty largely depend on the nature of the legal instrument that is adopted.

The WHO Constitution provides three possible instruments:

- Recommendations (Article 23 WHO Constitution)
- Regulations (Article 21 WHO Constitution)
- Conventions (Article 19 WHO Constitution)

Each of those instruments has different consequences for the European Union:

### Recommendations

Recommendations are not legally binding and, hence, do not require ratification. Examples of soft law instruments in the WHO system are the Code of Practice for the Recruitment of International Personnel or the Global Action Plan on Antimicrobial Resistance. The non-legally binding force of recommendations weakens their effectiveness. However, the informal adoption procedure provides the opportunity to the EU, despite its observer status at the WHO, to influence the negotiations. For example, the EU played a strong role in the adoption of the Global Action Plan on Antimicrobial Resistance.<sup>20</sup>

### Regulations

Regulations are adopted by the World Health Assembly and come into force for all WHO members except for those that notify their rejection or that make reservations.<sup>21</sup> This legal instrument was used for the adoption of the International Health Regulations.

As a general rule, only WHO members may become contracting parties to a regulation. Exceptionally, States that are not members of the WHO but that notify their acceptance may also become contracting parties to a regulation.<sup>22</sup> The EU is neither a member of the WHO nor a State, and thus cannot become a contracting party to WHO regulations. Hence, the EU has never been able to ratify the IHR.<sup>23</sup> While it was eventually allowed to participate in their negotiation,<sup>24</sup> its role was essentially one of facilitation and

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<sup>18</sup> European Council, "Towards a world better prepared for shocks" – Speech by President Charles Michel at the Paris Peace Forum, 12 November 2020, available at <https://www.consilium.europa.eu/en/press/press-releases/2020/11/12/intervention-du-president-charles-michel-au-forum-de-paris-sur-la-paix/>.

<sup>19</sup> European Council, Press release by President Charles Michel on an international Treaty on Pandemics, 3 December 2020, available at <https://www.consilium.europa.eu/en/press/press-releases/2020/12/03/press-release-by-president-charles-michel-on-an-international-treaty-on-pandemics/>; World Health Organization. Global leaders unite in urgent call for international pandemic treaty, 30 March 2021, available at <https://www.who.int/news/item/30-03-2021-global-leaders-unite-in-urgent-call-for-international-pandemic-treaty>.

<sup>20</sup> Elisabet RUIZ CAIRÓ, *The Promotion of Public Health in EU External Relations* (Studies in European Law No 35, Schulthess, 2021), p. 200.

<sup>21</sup> Article 22 WHO Constitution, read in conjunction with Article 21.

<sup>22</sup> Article 64 (1) IHR.

<sup>23</sup> While the European Union did not ratify the IHR, it has autonomously declared to fully implement this international agreement and the IHR are regularly mentioned in EU legislation; see, for example, Recital 6 Decision No 1082/2013; Recital 8 and Articles 2 and 11 Proposal for a Regulation on cross-border health threats, 11 November 2020, COM(2020) 727 final.

<sup>24</sup> World Health Assembly, Revision of the International Health Regulations, 28 March 2003, Resolution WHA56.28 (Resolution WHA56.28), para. 2(2).

coordination among EU Member States, rather than a leadership one.<sup>25</sup> The EU therefore played a weak role and its influence in the final text of the IHR was limited. WHO regulations thus significantly reduce the ability of the EU to influence negotiations in accordance with EU positions.

### Conventions

WHO conventions have two characteristics that distinguish them from regulations. First, they can incorporate a Regional Economic Integration Organization clause (REIO clause), allowing regional organizations to become contracting parties. Second, they can cover any matter that the parties wish to include.<sup>26</sup> The Framework Convention on Tobacco Control (FCTC) is the only legal instrument adopted under Article 19 of the WHO Constitution so far.

Conventions enable a stronger role for the EU, as illustrated by the FCTC. The FCTC incorporates a REIO clause, which allowed the EU to ratify this international agreement.<sup>27</sup> The role of the EU in the negotiation and implementation of the FCTC has been considered an example of EU leadership in global health.<sup>28</sup> That success story suggests that the EU should promote the adoption of public health conventions in other areas. The fight against pandemics provides the perfect opportunity for ensuring the *effet utile* of the WHO treaty-making powers and strengthening the EU role in the field of cross-border health threats. This legal instrument is indeed favoured by the EU, as underlined in the decisions adopted so far.<sup>29</sup>

Moreover, an International Pandemic Treaty should be broader in scope than the IHR and cover topics that could hardly be considered within the scope of Article 21.<sup>30</sup> Thus, a convention under Article 19 constitutes a more appropriate legal instrument for the negotiation of the International Pandemic Treaty.

## C. SUMMARY

The opening of negotiations on an International Pandemic Treaty is a success for the European Union, as one of the promoters of this initiative. The International Pandemic Treaty would underline the necessity to find multilateral solutions to common problems, an aim that is actively pursued by the EU.

Although the legal nature of the instrument to be negotiated is still unclear, current documents argue in favour of a convention. The EU should strongly fight for such instrument if it wishes to secure a meaningful contribution in the negotiations. A convention would indeed allow the EU to fully participate in the negotiation and to become a contracting party to the international agreement. A convention would also allow the Union to push for the inclusion of preparedness and response measures that go beyond public health.

<sup>25</sup> Didier HOUSSIN, 'The EU's Role in the International Health Regulations and the Pandemic Influenza Preparedness Framework Agreement' in Thea EMMERLING, Ilona KICKBUSCH and Michaela TOLD (eds), *The European Union as a Global Health Actor* (World Scientific Publishing, 2016), p. 275.

<sup>26</sup> Regulations can only be adopted for the limited number of concerns provided for under Article 21 of the WHO Constitution. The list includes rules to prevent the international spread of disease, which constituted the legal basis for the IHR.

<sup>27</sup> Council Decision 2004/513/EC of 2 June 2004 concerning the conclusion of the WHO Framework Convention on Tobacco Control, OJ L 213 of 15 June 2004, p. 8; Article 35 FCTC.

<sup>28</sup> Elisabet RUIZ CAIRO, 'Follow the leader! The EU as a global health actor after the negotiation of the Framework Convention on Tobacco Control' (2017) 2 *Geneva Jean Monnet Working Papers* 1.

<sup>29</sup> Council Decision (EU) 2021/1101 of 20 May 2021 on the position to be taken on behalf of the European Union in the seventy-fourth session of the World Health Assembly, OJ L 238 of 6 July 2021, p. 79.

<sup>30</sup> See *infra*, section 2.

## 2. The European Union as an opportunity for the International Pandemic Treaty

The COVID-19 pandemic has revealed the narrow scope of application of the IHR and the need to adopt a more encompassing framework to fight against pandemics. The preparedness and response to pandemics should not only be based on public health measures. Pandemics affect the whole functioning of society and have devastating social, economic and trade consequences. All these concerns should thus be addressed by an International Pandemic Treaty.<sup>31</sup> As a regional and supra-national organisation, the EU has extensive legislation in many of the areas that should be covered by the International Pandemic Treaty.<sup>32</sup> These areas will be reviewed in turn.<sup>33</sup>

### A. TRADE CONCERNS

Current discussions highlight the need to agree on trade mechanisms to ensure the production and equitable access to protective equipment, medicines, treatments, and vaccines against pandemics. The management of supply chains, the conditions under which export restrictions can be applied, the need to adapt custom duties on essential products or the adequacy of a waiver on intellectual property rights are some of the elements that should be discussed during the negotiations.

#### How can the European Union contribute to this area?

The EU follows two different approaches with regard to trade matters, depending on whether it relates to trade among Member States or trade with third countries.

Trade among Member States follows free movement rules, due to the existence of an internal market in the EU. The internal market means that goods, persons, services and capitals can move freely from one Member State to the other. During COVID-19, the EU has adopted measures to ensure the availability of essential goods and services within the Union.<sup>34</sup> It has also enabled the purchase of vaccines at Union level to ensure an equitable access in all EU Member States.<sup>35</sup> Considering shortages in the EU internal market, the European Commission has also proposed a regulation to ensure the supply of medical countermeasures in the event of a public health emergency.<sup>36</sup> It has also established a new authority, the Health Emergency preparedness and Response Authority (HERA), in charge of monitoring and ensuring

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<sup>31</sup> European Commission, Recommendation for a Council Decision authorizing the opening of negotiations on behalf of the European Union for the conclusion of an international agreement on pandemic preparedness and response as well as for the negotiations of complementary amendments to the International Health Regulations (2005), 1 December 2021, COM(2021) 766 final, p. 3; WHO, Report of the Member States Working Group on Strengthening WHO preparedness and Response to Health Emergencies to the special session of the World Health Assembly, 23 November 2021, SSA2/3; WHO, COVID-19 shows why united action is needed for more robust international health architecture, 30 March 2021, available at <https://www.who.int/news-room/commentaries/detail/op-ed---covid-19-shows-why-united-action-is-needed-for-more-robust-international-health-architecture>.

<sup>32</sup> European Commission, Proposal for a Council Decision on the position to be taken on behalf of the European Union in the seventy-fourth session of the World Health Assembly, 3 May 2021, COM(2021) 233 final; European Commission, Recommendation for a Council Decision authorizing the opening of negotiations on behalf of the European Union for the conclusion of an international agreement on pandemic preparedness and response as well as for the negotiations of complementary amendments to the International Health Regulations (2005), 1 December 2021, COM(2021) 766 final.

<sup>33</sup> See the Annex for a summary of all examined areas.

<sup>34</sup> European Commission, COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 16 March 2020, C(2020) 1753 final; European Commission, Communication from the Commission on the implementation of Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 24 March 2020, C(2020) 1897 final.

<sup>35</sup> This grouped purchase of vaccines has been reached through Advance Purchase Agreements; see European Commission, EU Strategy for COVID-19 vaccines, 17 June 2020, COM(2020) 245 final.

<sup>36</sup> European Commission, Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, 16 September 2021, COM(2021) 577 final. On this topic, see also European Commission, EU Strategy on COVID-19 therapeutics, 6 May 2021, COM(2021) 355 final; European Council, Statement of the Members of the European Council, 26 February 2021, SN 2/21, paras. 8-9.

the availability of medical countermeasures in the EU.<sup>37</sup> Considering the lack of cooperation among States to ensure an equitable access to medical countermeasures, the establishment of a global organism similar to HERA could be useful to fight against pandemics.

Trade between the EU and third countries is regulated under the Common Commercial Policy. The EU trade competence has been extensively exercised during the pandemic. The EU has adopted an export authorization scheme for protective equipment and vaccines,<sup>38</sup> it has removed custom duties for the import of essential products,<sup>39</sup> and it is an active member at the WTO regarding the debate on a TRIPS waiver for COVID-related products and vaccines.<sup>40</sup> All these are topics that should be negotiated in an International Pandemic Treaty, so the EU has a strong role to play. However, the EU must take due account of global solidarity and human rights in such negotiations. The level of solidarity that has been experienced within the EU should be reproduced at the global level.

The EU therefore has extensive legislation to facilitate the trade of essential products, the availability of medical countermeasures, and the movement of health workers in case of a pandemic. All these rules could be promoted at the global level. The most problematic issue in trade matters concerns intellectual property rights, as the EU position conflicts that of many other parties, especially in the global South. It is therefore essential that a compromise is found on that topic.

## B. TRAVEL RESTRICTIONS

One of the most frequently adopted measures to fight against pandemics is the restriction of movement across borders, and so despite several calls from the WHO arguing against such response measure. An International Pandemic Treaty should thus address this question in an effective manner.

### How can the European Union contribute to this area?

The EU has adopted extensive rules on the free movement of persons within the Union, based on its internal market powers.<sup>41</sup> Such rules aimed at ensuring the movement of health workers despite border closures implemented by Member States;<sup>42</sup> limiting restrictions to the free movement of persons;<sup>43</sup> and

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<sup>37</sup> European Commission, Commission Decision of 16 September 2021 establishing the Health Emergency Preparedness and Response Authority, C(2021) 6712 final; Thibaud DERUELLE and Elisabet RUIZ CAIRÓ, 'The EU Health Emergency Response and Preparedness Authority (HERA): Institutional Impact', 11 November 2021, EU Law Live, available at <https://eulawlive.com/analysis-the-eu-health-emergency-response-and-preparedness-authority-hera-institutional-impact-by-thibaud-deruelle-and-elisabet-ruiz-cairo/>.

<sup>38</sup> See Commission Implementing Regulation (EU) 2021/111 of 29 January 2021 making the exportation of certain products subject to the production of an export authorization, OJ L 211 of 30 January 2021, p. 1; see also Commission Implementing Regulation (EU) 2021/521 of 24 March 2021 making specific arrangements to the mechanism making the exportation of certain products subject to the production of an export authorization, OJ L 104 of 25 March 2021, p. 52 and its subsequent amendments. The latest amendment is of 29 September 2021 and extends the restriction until 31 December 2021. The export authorization scheme has now been transformed into a surveillance scheme; see Commission Implementing Regulation (EU) 2021/2071 of 25 November 2021 subjecting certain vaccines and active substances used for the manufacture of such vaccines to export surveillance, OJ L 421 of 26 November 2021, p. 52.

<sup>39</sup> Commission Decision (EU) 2020/491 of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020, OJ L 103I of 3 April 2020, p. 1.

<sup>40</sup> European Parliament, World Trade Organization TRIPS waiver to tackle coronavirus, September 2021, available at [https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690649/EPRS\\_ATA\(2021\)690649\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690649/EPRS_ATA(2021)690649_EN.pdf). The EU has also proposed a number of internal measures to address intellectual property rights of vaccines; see European Commission, Pharmaceutical Strategy for Europe, 25 November 2020, COM(2020) 761 final.

<sup>41</sup> Hanneke VAN EIJKEN and Jorit RIJPMAN, 'Stopping a Virus from Moving Freely: Border and Travel Restrictions in Times of Corona' (2021) 17(3) *Utrecht Law Review* 34.

<sup>42</sup> European Commission, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, 30 March 2020, C(2020) 2051 final.

<sup>43</sup> Council Recommendation of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 337 of 14 October 2020, p. 3. A proposal to modify this recommendation has been adopted by the European Commission; see Proposal for a Council Recommendation on a coordinated approach to facilitate safe free



facilitating intra-EU travel through a common COVID certificate.<sup>44</sup> The approach towards external borders was much more restrictive, with the imposition of travel bans and strict conditions to qualify as a 'safe third country'.<sup>45</sup> Considering the ineffectiveness of travel bans to fight against pandemics, the EU should instead promote its internal rules in the negotiation of an International Pandemic Treaty, by favouring the adoption of common standards for health certificates and common rules on travel restrictions.

### C. HUMAN RIGHTS

The International Pandemic Treaty should address the impact of pandemic response measures on human rights.<sup>46</sup> Social distancing, tracing apps, lockdowns, curfews, isolation, and quarantines have an impact on human rights.<sup>47</sup> These measures limit the right to liberty, the right to education, the freedom to conduct a business, the freedom of religion or the right to data protection, amongst others. Although States can restrict certain human rights to protect public health, limitations need to be necessary, proportionate, non-discriminatory, and subject to review.<sup>48</sup> Parties to the International Pandemic Treaty should assess the potential interference between public health measures and human rights, and determine to what extent parties can derogate from human rights obligations.

#### How can the European Union contribute to this area?

The EU adopted the Charter of Fundamental Rights of the European Union (the Charter) in 2000, an instrument that has a legally binding force since 2009.<sup>49</sup> The Charter incorporates provisions on all the above-mentioned human rights. The interference between pandemic preparedness and response measures and human rights is therefore a matter of EU law. For example, an EU measure advising against traveling might affect the freedom of movement within the EU,<sup>50</sup> whereas the obligation to provide a COVID certificate might restrict the right to data protection.<sup>51</sup> The EU Fundamental Rights Agency published an exhaustive report on restrictions to human rights during the pandemic in the EU.<sup>52</sup>

The EU has adopted several instruments to ensure the proportionality of restrictions to human rights. For example, the European Commission adopted guidance to ensure full data protection standards of apps fighting the pandemic.<sup>53</sup> Similarly, the Council adopted a recommendation to ensure that restrictions to

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movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475, 25 November 2021, COM(2021) 749 final.

<sup>44</sup> Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, OJ L 211 of 15 June 2021, p. 1.

<sup>45</sup> Council Recommendation (EU) 2021/2150 of 2 December 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, OJ L 434 of 6 December 2021, p. 8; Hanneke VAN EIJKEN and Jorit RIJPMAN, 'Stopping a Virus from Moving Freely: Border and Travel Restrictions in Times of Corona' (2021) 17(3) *Utrecht Law Review* 34, p. 36.

<sup>46</sup> Sara (Meg) DAVIES, 'An International Pandemic Treaty must centre on human rights', 10 May 2021, *The British Medical Journal*, available at <https://blogs.bmj.com/bmj/2021/05/10/an-international-pandemic-treaty-must-centre-on-human-rights/>.

<sup>47</sup> For a parallelism with the response to the swine flu outbreak in 2009-2010, see Anniek DE RUIJTER, *EU Health Law & Policy: The Expansion of EU Power in Public Health and Health Care* (Oxford University Press, 2019), pp. 141-149.

<sup>48</sup> Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984).

<sup>49</sup> Article 6 TEU.

<sup>50</sup> Article 45 Charter.

<sup>51</sup> Articles 7-8 Charter; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119 of 4 May 2016, p. 1.

<sup>52</sup> Fundamental Rights Agency, *The Coronavirus Pandemic and Fundamental Rights: A Year in Review, 2021*, available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2021-fundamental-rights-report-2021-focus\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-fundamental-rights-report-2021-focus_en.pdf).

<sup>53</sup> European Commission, *Guidance on apps supporting the fight against COVID-19 pandemic in relation to data protection*, OJ C 124I of 17 April 2020, p. 1.

free movement were based on defined and well-known criteria and adopted for a limited duration.<sup>54</sup> These constitute examples of coordinating measures that could be brought to the negotiation of an International Pandemic Treaty.

#### D. ENVIRONMENTAL CONCERNS

Considering the increase of zoonotic diseases, negotiations should also concentrate on the links between pandemics and environmental concerns. The loss of biodiversity, climate change, and gaps in food legislation are some of the causes that can lead to increased zoonotic diseases.

##### How can the European Union contribute to this area?

The EU has adopted extensive legislation in environmental matters, covering pollution, biodiversity, chemical products or food safety, amongst others.<sup>55</sup> The existence of such a large body of legislation justified the participation of the EU in the negotiation of the IHR back in 2005.<sup>56</sup> Legislation has kept increasing since then, as evidenced by the most recently adopted strategies.<sup>57</sup> Moreover, the EU fully embraces the 'one health' approach, which addresses health threats in the human, animal and environmental interface in an integrated manner.<sup>58</sup>

The EU aims at promoting its environmental rules at the global level. It was, for example, one of the promoters of the Global Action Plan against Antimicrobial Resistance, it regularly includes provisions on food safety and biodiversity in its Free Trade Agreements,<sup>59</sup> and it has incorporated a dialogue on antimicrobial resistance in the EU-Mercosur Free Trade Agreement. Both the internal legislation and the provisions included in bilateral or multilateral instruments could be proposed in multilateral negotiations on an International Pandemic Treaty.

#### E. CIVIL PROTECTION AND SOLIDARITY

COVID-19 has revealed the lack of cooperation among States. Although the IHR require State parties to assist each other, this obligation has hardly been followed. The International Pandemic Treaty should provide stronger rules on global cooperation and assistance, notably regarding equitable access to treatments, medicines and vaccines. While the COVAX initiative is commendable, more permanent rules and a more institutionalised framework could be established in an International Pandemic Treaty.<sup>60</sup> Cooperation obligations could include a global financial mechanism to provide funds to States for the

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<sup>54</sup> Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 337 of 14 October 2020, p. 3.

<sup>55</sup> For example, the European Commission highlights that an International Pandemic Treaty could affect Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 61 of 3 March 1997, p. 1 or Regulation (EU) No 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union, OJ L 150 of 20 May 2014, p. 59; see European Commission, Proposal for a Council Decision on the position to be taken on behalf of the European Union in the seventy-fourth World Health Assembly, 3 May 2021, COM(2021) 233 final.

<sup>56</sup> European Commission, Communication from the Commission to the Council on the revision of the International Health Regulations under the framework of the World Health Organization, 19 September 2003, COM(2003) 545 final.

<sup>57</sup> Notably the From Farm to Fork strategy of 2020, the Biodiversity strategy for 2030 of 2020, and the European Green Deal of 2019.

<sup>58</sup> See, for example, European Commission, A European One Health Action Plan against Antimicrobial Resistance, 2017, available at [https://ec.europa.eu/health/sites/default/files/antimicrobial\\_resistance/docs/amr\\_2017\\_action-plan.pdf](https://ec.europa.eu/health/sites/default/files/antimicrobial_resistance/docs/amr_2017_action-plan.pdf).

<sup>59</sup> For example, CETA contains a chapter on sanitary and phytosanitary measures that concerns food safety; the agreement in principle between the EU and Mercosur contains a provision on trade and biodiversity.

<sup>60</sup> Tessa Jager, 'Investing, Contracting, Buying: How WHOVAX Will Enhance Equity for the Next Pandemic', *The Netherlands-America Foundation*, December 2021, available at [https://www.canva.com/design/DAEwqinrwjU/3OaLowDaoAx4AVSPKlp0rg/view?utm\\_content=DAEwqinrwjU&utm\\_campaign=designshare&utm\\_medium=link&utm\\_source=sharebutton#1](https://www.canva.com/design/DAEwqinrwjU/3OaLowDaoAx4AVSPKlp0rg/view?utm_content=DAEwqinrwjU&utm_campaign=designshare&utm_medium=link&utm_source=sharebutton#1), p. 16.

response to pandemics but also, eventually, to compensate the losses incurred by pharmaceutical licence holders if a waiver of intellectual property rights was introduced.<sup>61</sup>

### How can the European Union contribute to this area?

The EU has a strong development and cooperation policy, which has been thoroughly used in the response to cross-border health threats. The EU Civil Protection Mechanism plays a particularly relevant role in this regard.<sup>62</sup> It was used during the Ebola outbreak to deploy emergency supplies and experts in the countries concerned, whereas during COVID-19 it was used within and outside the Union to repatriate EU citizens and assist affected countries.<sup>63</sup>

The EU has also developed financial cooperation mechanisms to fight against public health emergencies. The EU Solidarity Fund constitutes a financial instrument to support Member States or accession countries stricken by a natural disaster; its scope was extended in 2020 to cover COVID-19.<sup>64</sup> The EU also has an emergency support mechanism that can be activated in case of an ongoing or potential disaster occurring within the Union, such as a public health emergency.<sup>65</sup> The EU recovery instrument, Next Generation EU, could also serve as a useful example of a financial support mechanism that can be put in place in case of a pandemic.<sup>66</sup>

## F. SUMMARY

The EU has adopted a whole range of measures to prevent and respond to the COVID-19 pandemic. These measures cover many of the areas that should be included in an International Pandemic Treaty and can serve as a model during the negotiation of the future international instrument. As a regional organization, the EU has had to coordinate national positions and find creative solutions allowing an effective response to the pandemic without necessarily disturbing travel and trade. The EU has also been in a position to develop instruments that have increased solidarity and cooperation among its Member States. This expertise should now be promoted at the global level to ensure that the solidarity that has been witnessed within the EU is now extended to the global level.

<sup>61</sup> Such mechanism already exists under other international agreements; for example, the Montreal Protocol established an 'Ozon Fund' whereas the UNFCCC has a 'Green Climate Fund'; see Haik NIKOGOSIAN, 'A guide to a pandemic treaty: Things you must know to help you make a decision on a pandemic treaty', Global Health Centre – The Graduate Institute Geneva, 2021, available at <https://www.graduateinstitute.ch/sites/internet/files/2021-09/guide-pandemic-treaty.pdf>, p. 14.

<sup>62</sup> 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 of 20 December 2013, p. 924.

<sup>63</sup> Elisabet Ruiz Cairó, *The Promotion of Public Health in EU External Relations* (Studies in European Law, Schulthess, 2021), pp. 157-158.

<sup>64</sup> Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund, OJ L 311 of 14 November 2002, p. 3; European Commission, COVID-19 – EU Solidarity Fund, available at [https://ec.europa.eu/regional\\_policy/en/funding/solidarity-fund/covid-19](https://ec.europa.eu/regional_policy/en/funding/solidarity-fund/covid-19).

<sup>65</sup> Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70 of 16 March 2016, p. 1. The proposal for a regulation to ensure the supply of medical countermeasures adopted in September 2021 explicitly refers to this instrument; see Article 13 of the Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, 16 September 2021, COM(2021) 577 final.

<sup>66</sup> Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I of 22 December 2020, p. 23.

### 3. CONCLUSION

An International Pandemic Treaty should involve a paradigm shift in the way we prepare and respond to cross-border health threats. While the IHR focus on public health measures, COVID-19 reveals that pandemics require more encompassing rules. A specific instrument is thus needed for public health emergencies that reach the pandemic level and the International Pandemic Treaty responds to that necessity.

The ability of the EU to contribute to the negotiations and influence the wording of the future international instrument will largely depend on the legal nature of the instrument adopted. The role of the EU in the coming months will thus be determinant for its potential leadership at a later stage. However, the involvement of the EU is of great relevance in this negotiating procedure. The EU has a strong expertise in the coordination of national actions and the development of cooperation mechanisms among its Member States. This expertise could prove useful during the negotiation of the International Pandemic Treaty, as many of the mechanisms established at the regional level could easily be exported at the global level. The EU should therefore assume that leadership role and make a significant contribution to the International Pandemic Treaty.



## Annex: EU powers and legislation in areas potentially covered by an International Pandemic Treaty

Area	Legal basis in EU law	Competence	EU legislation and instruments that could be promoted at the global level
Public health	168 TFEU	Coordinating	<p><b>Hard law</b></p> <p>Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027, and repealing Regulation (EU) No 282/2014, OJ L 107 of 26 March 2021, p.1</p> <p>Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC, OJ L 293 of 5 November 2013, p. 1</p>
			<p><b>Soft law</b></p> <p>Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013/EU, 11 November 2020, COM(2020) 727 final</p>
Internal market	114 TFEU	Shared	<p><b>Hard law</b></p> <p>Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, OJ L 211 of 15 June 2021, p. 1</p>

			<p><b>Soft law</b></p> <p>Council Recommendation (EU) 2021/2150 of 2 December 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, OJ L 208I of 1 July 2020, p. 1</p> <p>Proposal for a Council Recommendation on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475, 25 November 2021, COM(2021) 749 final</p> <p>Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, 16 September 2021, COM(2021) 577 final</p> <p>EU Strategy on COVID-19 therapeutics, 6 May 2021, COM(2021) 355 final</p> <p>Pharmaceutical Strategy for Europe, 25 November 2020, COM(2020) 761 final</p> <p>Council Recommendation of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 337 of 14 October 2020, p. 3</p> <p>EU Strategy for COVID-19 vaccines, 17 June 2020, COM(2020) 245 final</p> <p>Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, 30 March 2020, C(2020) 2051 final</p> <p>Communication from the Commission on the implementation of Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 24 March 2020, C(2020) 1897 final</p> <p>COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 16 March 2020, C(2020) 1753 final</p>
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<b>Trade</b>	207 TFEU	Exclusive	<p><b>Hard law</b></p> <p>Commission Implementing Regulation (EU) 2021/2071 of 25 November 2021 subjecting certain vaccines and active substances used for the manufacture of such vaccines to export surveillance, OJ L 421 of 26 November 2021, p. 52</p> <p>Commission Implementing Regulation (EU) 2021/521 of 24 March 2021 making specific arrangements to the mechanism making the exportation of certain products subject to the production of an export authorization, OJ L 104 of 25 March 2021, p. 52</p> <p>Commission Implementing Regulation (EU) 2021/111 of 29 January 2021 making the exportation of certain products subject to the production of an export authorization, OJ L 211 of 30 January 2021, p. 1</p> <p>Commission Decision (EU) 2020/491 of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020, OJ L 103I of 3 April 2020, p. 1</p>
<b>Human Rights</b>	6 TEU Charter	N/A	<p><b>Hard law</b></p> <p>Charter of Fundamental Rights of the European Union, OJ C 326 of 26 October 2012, p. 391</p> <p>Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119 of 4 May 2016, p. 1</p> <p><b>Soft law</b></p> <p>Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 337 of 14 October 2020, p. 3</p> <p>Guidance on apps supporting the fight against COVID-19 pandemic in relation to data protection, OJ C 124I of 17 April 2020, p. 1</p>
<b>Environment</b>	192 TFEU	Shared	<p><b>Hard law</b></p> <p>Regulation (EU) No 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union, OJ L 150 of 20 May 2014, p. 59</p> <p>Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 61 of 3 March 1997, p. 1</p>

			<p><b>Soft law</b></p> <p>A Farm to Fork strategy for a fair, healthy and environmentally-friendly food system, 20 May 2020, COM(2020) 381 final</p> <p>EU Biodiversity Strategy for 2030 – Brining nature back into our lives, 20 May 2020, COM(2020) 380 final</p> <p>The European Green Deal, 11 December 2019, COM(2019) 640 final</p> <p>A European One Health Action Plan against Antimicrobial Resistance, 2017</p>
<b>Civil Protection</b>	196 TFEU	Coordinating	<p><b>Hard law</b></p> <p>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 of 20 December 2013, p. 924</p>
<b>Financial assistance</b>	122 TFEU 175 TFEU	Coordinating	<p><b>Hard law</b></p> <p>Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I of 22 December 2020, p. 23</p> <p>Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70 of 16 March 2016, p. 1</p> <p>Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund, OJ L 311 of 14 November 2002, p. 3</p> <p><b>Soft law</b></p> <p>Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, 16 September 2021, COM(2021) 577 final</p>





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