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## **The role of the EU during the pandemic concerning social issues**

### Summary

Examining the EU's performance in the pandemic crisis requires a comparison with two milestones in the trajectory of European integration: the 1973 oil crisis and the 2008 financial crisis. The EU has been more effective in this moment than in the one immediately preceding it. This was not difficult. But if one examines the dynamism of post-1973 and measures it against the burden of the current European Council, optimism fades. However, the financial muscle, then as the European Social Fund, now updated, is still in excellent shape.

**Keywords:** EU Law, Covid-19, SURE, Free movement of workers, EU Funds

### **1. The difficulties of the intergovernmental method**

In recent decades, few people have done more to merit admission to the dome of the Immortals where the Fathers of Europe sit than Jacques Delors. At the age of 96, long retired from public life, he assessed the current situation with his implacable eye in a statement published on the website of his Institute and sent to AFP after the European Council of 27 March 2020: "Le climat qui semble régner entre les chefs d'État et de gouvernement et le manque de solidarité européenne font courir un danger mortel à l'Union européenne". Delors' words should not be overlooked. Someone who fought with Margaret Thatcher and managed to steer the European Economic Community to the Maastricht Treaty is highly qualified to make the diagnosis. His verdict was aimed at the heads of state and government, the European Council<sup>1</sup>.

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<sup>1</sup> On this body and its role concerning Labour Law, Miranda Boto, 2009

A paradox of history, the European Council was born in the 1970s and was a central element in the management of the oil crisis, giving birth to the 1974 Social Action Programme. Its growing political importance, haloed by the *Imperium* rather than the sometimes-scant *Auctoritas* of its members, cannot hide the fact that it represents a defeat for the integration method as opposed to simple inter-state cooperation, the triumph of the open method of (dis)coordination over harmonization.

Let us recall its complete absence from the articles of the Treaty on the Functioning of the European Union, being present only in some of its Protocols on specific matters and, of course, in the Treaty on European Union. Article 15 TEU describes its functions as follows: “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions”.

A year and a half into the pandemic, it seems clear that the European Council has not fulfilled any of the tasks entrusted to it by the Treaties. “Impetus” has been conspicuous by its absence and the orientations and priorities could be summed up in the “*chacun pour soi, le ciel pour tous*” that Meyerbeer immortalized in *Les Huguenots*.

It cannot be overlooked that the debate is not new and has to be placed in the framework of the perennial discussion on the EU budget. Before the outbreak of the crisis, four of the governments that were most opposed to joint action during the pandemic, the “Frugal Four”, had already expressed in the *Financial Times* their opposition to a continuation of the existing spending policy, stating that “we must also truly contain administrative spending by aligning it to national realities”<sup>2</sup>. What has happened, therefore, should come as no surprise. The backdrop remains the volume of the EU’s own resources. Without own resources, there is no own policy.

There is one positive note, however, in the balance. Following the presentation on 27 May 2020 of the European Commission’s “Next Generation EU”<sup>3</sup> proposal, the European Council of 17–21 July 2020 approved, after intense discussion, the launch of a powerful economic instrument, to which we will return later.

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<sup>2</sup> <https://www.ft.com/content/7faae690-4e65-11ea-95a0-43d18ec715f5>

<sup>3</sup> COM (2020) 456

If one were to summarize what has happened at the European Council in recent months, it could be said that it has been nothing more than a sounding board for the tensions plaguing the European Union. Other issues, such as respect for the rule of law in certain member states or refugees, have re-emerged in this framework and have been used as negotiating tools, perhaps in a distorted way. The informal discussion tool dreamt of by Helmut Schmidt is beginning to look chillingly like the 18th century Sejm that awakened François Mitterrand's nightmares.

## **2. Instead of law, facts: financial support measures**

If the European Council loses out compared to its predecessors, the Union's new financial mechanisms seem to have been worthy heirs to the European Social Fund. The pandemic has not led to the search for new legislative formulas<sup>4</sup>, as might have been the case with the 1974 Social Action Programme. Perhaps that will come in the recovery. Times of crisis have been times when the Commission has opted to support national action and to try to show a strong financial apparatus, making good Cicero's saying that infinite money is the sinew of war.

Very early on, on 13 March 2020, the European Commission presented its "Coordinated economic response to the COVID-19 Outbreak"<sup>5</sup>. At this early stage, the Commission already noted that "only with solidarity and Europe-wide coordinated solutions, we will be able to effectively manage this public health emergency". Reminiscent of Joseph Gallieni's proclamation on 3 September 1914, "the Commission will fully use all the tools at its disposal to weather this storm".

Such a statement went nearly unnoticed, as is well known. The Communication contained proposals on liquidity, transport, and other matters. On the social side, it noted that "short-time work schemes have proven effective in a number of Member States, allowing for tem-

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<sup>4</sup> Rodríguez-Piñero y Bravo-Ferrer and Casas Baamonde, 2020, 10–11: "Estas normas de emergencia no han respondido, como algunas reformas laborales recientes, a criterios de política económica dictados desde Bruselas, se han inspirado en medidas paralelas que se han adoptado en países próximos, particularmente en Italia, en Francia o en Alemania".

<sup>5</sup> COM (2020) 112

porary reduction of working hours whilst supporting the income of the workers. Currently, 17 Member States have some form of such a scheme in place". These schemes were already being heralded at that early time as the most appropriate national measure, without EU law having done anything to harmonize them. A strategy for action was already being sketched out.

The Communication contained the proposal for a "Coronavirus Response Investment Initiative" (CRII<sup>6</sup>), a new financial muscle of the Union that would realign the use of existing funds, such as cohesion funds or the Solidarity Fund. It was intended to support health systems, provide liquidity to businesses and "to temporarily support national short time working schemes which help cushion the impact of the shock, in combination with up-skilling and reskilling measures".

The Commission also outlined a proposal for support measures, including wage subsidies or the suspension of social security contributions. The most important aspect of this suggestion was the indication that they would not be considered as state aid and would allow for a simpler procedure. Article 103.3.b TFEU would be the umbrella for this, considering the situation – only the Italian one at that time – as "a serious disturbance to the economy of a Member State". It is easy to see that, at this point, the Commission was seeking to remove obstacles to state action. With regard to state aid, a temporary framework was adopted which made it considerably more flexible and was renewed periodically, although without direct impact on the social field<sup>7</sup>.

The European Parliament approved, almost unanimously, the proposal and on 30 March the Council in turn ratified it, with Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilize investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative). Thirty-seven billion, an amount that would soon become minuscule with the entry into force of new mechanisms.

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<sup>6</sup> "Coronavirus Response Investment Initiative"

<sup>7</sup> C(2020) 1863

The following day, the Commission proposed a new reinforced package, the CRII+, which envisaged a relaxation of the procedural rules and greater flexibility in the use of European funds, to which the Fund for European Aid to the Most Deprived (FEAD) and the EU Maritime, Fisheries and Aquaculture Fund (EMFF) were added.

A week after the first proposal, the Communication on the activation of the general escape clause of the Stability and Growth Pact<sup>8</sup> reflected the relentless progress of the pandemic. In it, the Commission considered that “the Commission considers that the conditions to activate the general escape clause are met, for the first time since its inception in 2011, and asks the Council to endorse this conclusion to provide clarity to Member States”. On 23 March 2020, the Council gave its approval to this measure.

By virtue of this measure, Article 9.1 of Regulation (EC) No 1466/97, in its last paragraph, states that “in the case of an unusual event outside the control of the Member State concerned, which has a major impact on the financial position of the general government or in periods of severe economic downturn for the euro area or the Union as a whole, Member States may be allowed temporarily to depart from the adjustment path towards the medium-term budgetary objective referred to in the third subparagraph, provided that this does not endanger fiscal sustainability in the medium term”.

One year after the onset of the crisis, the Commission in a new Communication<sup>9</sup> could not fail to note the uncertainty about the duration of this measure. At the time of this paper going to press, the discussion on whether it will end in 2021 or 2022 is still open. In addition, the European Union has implemented other measures, which will not be described here as they are aimed at areas other than employment.

### **3. Measures on free movement and cross-border work**

The natural field of action for the Commission was, of course, the internal labour market. The most remarkable actions, without of course entering the legislative field, have taken place here. They show, as

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<sup>8</sup> COM(2020) 123

<sup>9</sup> COM(2021) 105

a balance, some of the problems that have not yet been solved in the integration of labour markets.

On 30 March 2020, the Commission published a new Communication<sup>10</sup>, in this case dedicated to a much more concrete and earthly aspect, “Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak”. These responded to the request made by the European Council in its Joint Declaration of 26 March and were a development of the previous “Guidelines for border management measures to protect health and ensure the availability of goods and essential services”<sup>11</sup>.

These, in paragraph 23, had stated that “Member States should permit and facilitate the crossing of frontier workers, in particular but not only those working in the health care and food sector, and other essential services (e.g. child care, elderly care, critical staff for utilities) to ensure continued professional activity”.

These practical guidelines contained, firstly, a list of “Workers exercising critical occupations”, who should be allowed unrestricted freedom of movement<sup>12</sup>. They also included, among other provisions, pro-

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<sup>10</sup> C(2020) 2051

<sup>11</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0316\(03\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0316(03))

<sup>12</sup> “Health professionals including paramedical professionals; Personal care workers in health services, including care workers for children, persons with disabilities and the elderly; Scientists in health-related industries; Workers in pharmaceutical and medical devices industry; Workers involved in the supply of goods, in particular for the supply chain of medicines, medical supplies, medical devices and personal protective equipment, including in their installation and maintenance; Information and Communications Technology Professionals; Information and Communications Technicians and other technicians for essential maintenance of the equipment; Engineering professionals such as energy technicians, engineers and electrical engineering technicians; Persons working on critical or otherwise essential infrastructures; Science and engineering associate professionals (includes water plant technicians); Protective services workers; Firefighters/Police Officers/Prison Guards/Security Guards/Civil Protection Personnel; Food manufacturing and processing and related trades and maintenance workers; Food and related products machine operators (includes food production operator); Transport workers, in particular: Car, Van and Motorcycle Drivers<sup>9</sup>, Heavy Truck and Bus Drivers (includes Bus and tram drivers) and ambulance drivers, including those drivers who transport assistance offered under the Union Civil Protection Mechanism and those transporting repatriated EU citizens from another Member State to their place or origin; Airline pilots; Train drivers; wagon inspectors, maintenance workshops’ staff as well as the infrastructure managers’ staff involved in traffic management and capacity allocation; Maritime and inland navigation workers; Fishermen; Staff of public institutions, including international organisations, in critical function”.

posals for border traffic and health checks to allow such movements, and specific provisions for seasonal workers.

Without being exhaustive, it should also be mentioned that the Guidelines contained a reference to Article 16 of Regulation (EC) No 883/2004, which allows Member States to derogate from the applicable social security law. The Commission invited its use to keep the situation intact, at the request of the employer concerned.

It should be recalled that, for example, Article 13 of the Regulation regulates situations of multiple employment in two or more Member States, a scenario that could be altered in the case of a worker who can no longer work in one of them, with a possible change in the applicable law<sup>13</sup>. Similarly, the regulation in Article 65 of the Regulation, concerning unemployed persons residing in a Member State other than the competent Member State, states in the specific case of frontier workers that in the case of partial unemployment (resulting from a suspension of the employment contract or a reduction of working hours), the competent State remains the State of employment, but that in the case of total unemployment (resulting from termination), competence would be transferred to the State of residence<sup>14</sup>.

As Member States began their de-escalation processes, the Commission again tried to take control of the Internal Market. On 13 May, it presented its comprehensive strategy for the recovery of tourism and transport by 2020 and beyond<sup>15</sup>, a common approach to restore free movement and lift restrictions at the EU's internal borders in a phased and coordinated manner<sup>16</sup>, and a framework to support the gradual restoration of transport, ensuring the safety of passengers and staff<sup>17</sup>, among other measures.

All three documents stressed the importance of the tourism sector as a key part of the European economy and the need for its revival with appropriate health guarantees. All of them also pointed out the importance of employment in the sector, highlighting how the mechanisms described in that paper could have a decisive influence in helping it.

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<sup>13</sup> On these issues, Maneiro Vázquez, 2017.

<sup>14</sup> On this issue, Pazó Argibay, 2021.

<sup>15</sup> COM(2020) 550

<sup>16</sup> C(2020) 3250

<sup>17</sup> C(2020) 3139

One area that received particular attention from the Commission was seasonal work, which by its very nature has an added interest in transnational terms. On 16 July 2020, it presented specific Guidelines<sup>18</sup>, which stressed the importance of this type of work in the tourism and agri-food sectors. The message to member states was clear. In times of pandemic, it was necessary to tighten controls on working, living and, in particular, accommodation conditions. In terms of social security, the text insisted on the need for workers to be in possession of the A1 document. The most interesting part of the Guidelines, however, is the wide-ranging catalogue of future initiatives that the Commission put forward, that have not been developed yet.

It was not until after the summer, however, that the European Union adopted a stronger text than the above-mentioned Communications. It was not until 13 October 2020 that Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 was adopted.

This is a text that considers free movement in general, as a citizen, and in which labour aspects only occupy a minimal part. This fact should not be overlooked, as it perfectly reflects the transformation of an economic freedom into a right for all European citizens. Hence the insistence on the need for proportionality in restrictions, the absence of any discrimination on grounds of nationality and the attention due to cross-border regions.

The central idea in the area of labour was reflected in Recital 18 and was a continuation of what the Commission had been advocating since March 2020: “To limit the disruption to the internal market and family life while the pandemic is ongoing, travellers with an essential function or need, such as workers or self-employed persons exercising critical occupations, cross-border workers, transport workers or transport service providers, seafarers, and persons travelling for imperative business or family reason, including members of cross-border families travelling on a regular basis, should not be required to undergo quarantine”. This list was taken up, with little variation, in the point 19 of the Recommendation, which is evidence of the deterioration of the EU’s regulatory technique, which insists on repeating literature. Note, in any case, that the only measure proposed was the quarantine

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<sup>18</sup> C(2020) 4813



exemption. It seems modest, but no other intervention was conceivable at the moment.

#### **4. The SURE Regulation and its implementation**

On 2 April 2020, the Commission took on a political role which until then had been, as we have tried to explain, a technical one, centred on administering what already existed.

Indeed, the Communication of 2 April<sup>19</sup> contained the proposal for a Council Regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak. With minimal changes, it was approved by COREPER on 15 May and formally adopted by the Council on 19 May and published the following day in the Official Journal of the European Union, under the name of Council Regulation (EU) 2020/672<sup>20</sup>.

Before beginning the analysis of the substance of the Regulation, it is necessary to ascertain its legal basis in the Treaty on the Functioning of the European Union. It is not to be found in Titles IX or X; it does not deal with Employment or Social Policy. It is to be found in Title VIII, “Economic and Monetary Policy”, and specifically in Article 122 TFEU<sup>21</sup>.

The double reference, in the Commission’s view, points to the voluntary source of financing, based on solidarity, which would derive from the first paragraph; and to the organization and management, based on the second. This article 122.2 TFEU, it should be recalled, has already been used to provide loans to Ireland and Portugal and a line of financing to Greece, the so-called European Stability Mechanism (ESM).

It should also be noted that the act chosen was, among the “appropriate measures” permitted by the provision, a regulation, the most

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<sup>19</sup> COM (2020) 139

<sup>20</sup> OJ L 159, 20.5.2020, p. 1/7

<sup>21</sup> This possibility has already been pointed out by Pérez del Prado, 2017, pp.199–200: “Así, mientras que la prestación genuina tiene como objetivo asegurar frente a las contingencias derivadas del desempleo, la prestación equivalente muestra un perfil más macroeconómico, pues trata de estabilizar los presupuestos nacionales en tiempos de crisis”.

powerful form of intervention by the European Union, and that the Council is the only institution with decision-making powers in this case, as it is a special legislative procedure. The voting rule for its adoption, being a Commission proposal, was qualified majority, as regulated in Article 238(3) TFEU: “A qualified majority shall be defined as at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States”.

The Instrument is intended to complement, on a temporary basis, national measures and will seek to raise an amount of EUR 100 billion (expressed with all zeros in the proposal, to avoid controversial translations of the English “billion”) on the international capital markets. This fund will be made available to member states with extraordinary needs on favourable terms, depending largely on what the Commission has been able to negotiate.

Most of the articles are procedural, dealing with how the mechanism is implemented and the actions to be taken by the Member States and the European institutions. It is worth noting that the European Parliament’s only role is limited to receiving the Commission’s reports on the implementation of the Regulation. The Regulation contains, incidentally, a limitation of 60% of the total as a threshold for the joint lending of the three Member States that request the most<sup>22</sup>.

The social element at the heart of the document is the destination of the funding received. According to Articles 1(2) and 1(2) of the Regulation, it must be used to support “short-time work schemes”<sup>23</sup> or similar measures. The main objective was clearly to avoid unnecessary redundancies in an attempt to cushion the shock.

This aim was joined, during the Council discussion, by a secondary one: “the financing, as an ancillary, of some health-related measures,

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<sup>22</sup> Total expenditure on unemployment benefits in Spain in 2010, the highest on record, was 32.237.915 million euros. At a first glance, European aid should cover the total short-time works-schemes and free up a good part of domestic resources for other needs.

<sup>23</sup> According to the Q&A of the European Commission, “short-time work schemes are programmes that under certain circumstances allow firms experiencing economic difficulties to temporarily reduce the hours worked by their employees, which are provided with public income support for the hours not worked. Similar schemes apply for income replacement for the self-employed”.

in particular in the workplace". This was the only major change in the Commission's proposal, apart from the reorganization of the terms of Article 1.1, the political significance of which is beyond the scope of this commentator.

The SURE mechanism, in short, differs from other sources of funding in that it is finalist and unalterable by the Member States. The Commission has further noted that "The SURE instrument is the emergency operationalisation of the European Unemployment Reinsurance Scheme and is designed specifically to respond immediately to the challenges presented by coronavirus pandemic. It in no way precludes the establishment of a future permanent unemployment reinsurance scheme". The European Trade Union Confederation welcomed the proposal, insisting that the Troika situations that occurred in previous situations should be avoided. It also declared its support for the future permanent regime hinted at by the Commission. In contrast, BusinessEurope, in its letter of 23 April to the European Council, expressed tempered support for the initiative, insisting on the need for its temporariness and making clear its rejection of the institution of a European unemployment reinsurance.

On 24 August 2020, the Commission presented to the Council its proposal to distribute more than 81 billion euros among member states. Of this, 21 billion was earmarked for Spain. One month later, on 25 September, the Council gave its approval to the catalogue of implementing decisions that ensured the economic survival of the unemployment systems of the fifteen Member States that applied for this aid.

On 27 October, the first "social bonds" were launched on the Luxembourg Stock Exchange, 10 billion for 10 years and 7 billion for 20 years. The response was overwhelming, with 13 times the amount on offer being requested. The market thus quietly but unmistakably lent its support to the SURE. Once the first issue was consolidated, subsequent issues followed one after the other without incident.

## **5. The EU's role in reconstruction**

In the rhetoric of war of these days, the Marshall Plan made, of course, its appearance, forgetting that the funding then came from the United

States and its nature was that of the Cold War, in the framework of the Truman Doctrine. All of this is overlooked in order to emphasize the need for a powerful economic tool for reconstruction. As a curiosity, the Plan had a budget of \$12 billion, equivalent to \$120 billion today. In other words, it is an amount equivalent to that managed for the SURE, but with an active rather than a passive protection purpose.

In mid-May 2020, Germany and France jointly presented a new proposal for a recovery fund<sup>24</sup>. Its four main axes were a European health strategy, the establishment of an ambitious Recovery Fund, the acceleration of the digital and green transitions and the enhancement of the EU's economic and industrial resilience and sovereignty, to give a new impetus to the Single Market.

The Commission presented, without it being possible to assert a causal link that would reduce the independence of the EU institution to junk bond status, on 27 May its aforementioned proposal for a recovery plan: Next Generation EU. The text included a major alteration of the budgetary conditions, which would allow the Commission to have up to 750 billion euros at its disposal<sup>25</sup>.

Alongside the green and digital strategies, one of the main axes of the document was a fair and inclusive recovery. Under this heading, the Commission put forward a series of ideas aimed directly at preserving jobs, especially in small and medium-sized enterprises. But it also stressed the importance of equal pay and pay transparency, the adequacy of minimum wages, youth employment and the social economy.

Beyond these proposals, which are mainly economic<sup>26</sup>, what role can EU law, and no longer its financial muscle, play in this uncertain post-pandemic scenario? There is no need to be creative<sup>27</sup>. Just dust off

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<sup>24</sup> <https://www.bundesregierung.de/resource/blob/975226/1753772/414a4b5a-1ca91d4f7146eeb2b39ee72b/2020-05-18-deutsch-franzoesischer-erklaerung-eng-data.pdf?download=1>

<sup>25</sup> On this issue, M. Sánchez, 2021

<sup>26</sup> M. Pérez and R. Iniesta, 2020, p. 53: "la Unión Europea como tal ha venido dando una respuesta tardía, insuficiente y deficiente a la tragedia humana, social y económica que planteada por la pandemia del COVID-19. Por ello, es necesario profundizar en la construcción de una verdadera Europa Social de los derechos y de las libertades fundamentales".

<sup>27</sup> Rodríguez-Piñero y Bravo-Ferrer, Valdés Dal-Ré and Casas Baamonde, 2020, p. 1026: "La sanidad y la salud no pueden ser ajenas a las competencias de la Unión,

the 1974 Social Action Programme and review what was left undone then. There is no need to change house in times of trouble, it is enough not to forget that without a Social Europe, the Europe of the merchants cannot survive.

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siendo necesario construir una Europa de la salud que ayude a los Estados y a sus sistemas sanitarios a prevenir y a enfrentarse con pandemias como la del COVID-19, que es posible sean sistémicas".

## **Le rôle de l'Union européenne dans des questions sociales pendant la pandémie**

### Résumé

L'analyse de la performance de l'Union européenne lors de la crise pandémique nécessite une comparaison avec deux événements marquants sur la trajectoire de la progression de l'intégration européenne: la crise pétrolière de 1973 et la crise financière de 2008. L'UE s'est avérée plus efficace à ces moments-là que dans la période immédiatement précédente. Ce n'était pas difficile. Cependant, si nous regardons la dynamique après 1973 et la comparons aux problèmes auxquels le Conseil européen est confronté aujourd'hui, l'optimisme s'estompe. Néanmoins, le garant de la sécurité financière, le Fonds social européen existant, actuellement en cours de modernisation, est toujours en excellent état.

**Mots-clés:** droit de l'UE, Covid-19, SURE, libre circulation des travailleurs, fonds de l'UE

## **Rola Unii Europejskiej w kwestiach społecznych podczas pandemii**

### Streszczenie

Analiza kondycji Unii Europejskiej w kryzysie pandemicznym wymaga porównania z dwoma przełomowymi wydarzeniami na trajektorii postępującej integracji europejskiej: kryzysem naftowym w 1973 r. i kryzysem finansowym w 2008 r. UE okazała się bardziej skuteczna w tych momentach niż w okresie bezpośrednio poprzedzającym. Nie było to trudne. Jednak jeśli przyjrzymy się dynamice po 1973 roku i porównamy ją z problemami, z jakimi Rada Europejska zmagają się obecnie, optymizm zanika. Tym niemniej gwarant bezpieczeństwa finansowego, czyli dotychczasowy Europejski Fundusz Społeczny, obecnie poddawany modernizacji, jest nadal w doskonałej kondycji.

**Słowa kluczowe:** prawo unijne, Covid-19, SURE, swobodne przemieszczanie się pracowników, fundusze unijne