Articles

Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics

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Abstract: Initial response to the Covid-19 pandemic capitalised on symbolism of national belonging. Against this background, borders soon took centre stage in the effort to tackle the spread of the virus during the spring of 2020 with Member States enforcing drastic restrictions to inter-state mobility, both at internal and external Schengen borders. As the second wave rolled in, restrictions gained momentum again, even though Member States by and large, did not revert to symbolically relevant border controls and travel bans. This *Article* revisits the measures taken by the Member States and EU institutions at the internal and external borders of the Schengen area until late-October 2020 and draws lessons regarding the interaction of symbolism, law and politics in times of crisis. It focuses on shifts in the perception of borders and the role of different actors in the closure and the subsequent re-opening thereof. We illustrate that the supranational institutions struggled to support the rule of law without the political support of the Member States, even though the rich case law of the Court of Justice on the internal market provides critical doctrinal arguments that can be employed in times of crises.

Keywords: Covid-19 – Schengen – internal border controls – free movement – fortress Europe – border closure.

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I. Introduction: border closures as a source of symbolic capital

It is no coincidence that borders took centre stage in the fight against the Covid-19 pandemic, even though the practical effects of border closures were limited once the virus had spread among the population. Borders have become potent symbols that governments across the world have employed repeatedly in recent years to convey a message of political power. The best-known example may be Donald Trump's rallying call to reinforce existing fences and barriers between the US and Mexico to build an "impenetrable, physical, tall, powerful, beautiful, southern border wall".[1] Such campaign slogans exploit the symbolic function of borders that is deeply enshrined in our collective cultural memory.[2] Ever since times in school, we have got familiarised ourselves with interstate borders as an organising principle of international relations in the form of fine black lines drawn to separate countries, painted in different colours on maps in school books or in the media. In times of uncertainty, government can utilise the symbolic weight of borders to stimulate a sense of structure and order.

The European Union has a long tradition of exploiting the symbolic potential of borders itself – albeit in the opposite direction of Donald Trump. In the famous White Paper on the completion of the internal market, the Commission recognised that border controls may be a mere formality for most people, hindering mobility less than heavy traffic during rush hour or construction sites on highways. Nevertheless, they should be eliminated, since they are "to the ordinary citizen the obvious manifestation of the continued division of the Community".[3] It is no coincidence that the political initiative for the abolition of border controls was taken at a Franco-German summit in May 1984, when Helmuth Kohl and François Mitterrand launched today's Schengen area without even consulting their interior ministries.[4] The Schengen cooperation had always been a beacon of European unity. The United Kingdom never joined it because it rejected, amongst others, the symbolic promise of border-free travel as a step towards an ever-closer union.[5]

[1] BBC News, *Donald Trump's Mexico wall: Who is going to pay for it?*, 6 February 2017, www.bbc.com.

[2] See W. Brown, *Walled States, Waning Sovereignty*, New York: Zone Books, 2010, p. 119 *et seq.*; and N. De Genova, *Spectacles of Migrant "Illegality". The Scene of Exclusion, the Obscene of Inclusion*, in *Journal of Ethnic and Racial Studies*, 2013, p. 1082.

[3] Commission, *Completing the Internal Market. White Paper*, COM(85) 310 final of 14 June 1985, paras 24, 47 and *passim* emphasised the double economic and political objective of eradicating physical barriers to the free movement of goods and people.

[4] Historical studies have confirmed that the German Interior Ministry learnt from the initiative through the media; see A. Siebold, *Zwischen Grenzen. Die Geschichte des Schengen-Raums aus deutschen, französischen und polnischen Perspektiven*, Paderborn: Ferdinand Schöningh, 2013, p. 40 *et seq.*; and R. Zaiotti, *Culture of Border Controls. Schengen and the Evolution of European Frontiers*, Chicago: University of Chicago Press, 2011, p. 67 *et seq.*; the initiative of the Franco-German summit built upon a decade of debate about a possible "passport union" and a "people's Europe" among the EU institutions.

[5] This symbolic reason was complemented by practical considerations of better border management of an island nation; see A. Wiener, *Forging Flexibility – The British "No" to Schengen*, in *European Journal of*

It is important to recognise the symbolic potential of borders to apprehend why the reaction to the Covid-19 pandemic may have implications ranging beyond the practical effects on inter-state travel. Times of crises are moments when our view of the world can be transformed in comparatively short periods of time. Social psychology informs us that perceptions of threat tend to reinforce a distinction between "us" and "them"; we aim for protection within our in-group when feeling vulnerable.[6] It is important, therefore, "who" protects us both against the immediate dangers to our health and the broader economic effects of the pandemic. If the European Union wants to be more than a fair-weather construction, it must ensure that its institutions, policies and rules are being upheld and reinforced during the crisis.

It is well-known that the initial reaction of the Member States and the EU institutions did not serve the European project well – as several *Insights* to a Special Focus of the European Forum amply illustrated.[7] Chaotic border closures with Romanian and Bulgarian citizens being prevented from crossing Hungary and occasional hostility towards French citizens in German border regions were a potent reminder that we cannot take the Schengen area for granted.[8] Export restrictions for health equipment upset Member States first and associated countries later, when the EU institutions managed to re-establish unhindered internal circulation by means of external closure.[9] Solidarity measures were limited to bilateral and modest supranational support initially,[10] before the EU agreed on an impressive financial support scheme under the forward-looking heading of "Next Generation EU". The positive experience with financial solidarity may possibly help explain why the initial reaction to the second wave of the COVD-19 pandemic in autumn 2020 did not result in another round of hectic border closures. Instead, Member States concentrated on quarantine requirements, which carry less symbolic weight and can be easier to justify legally.

Migration and Law, 1999, p. 441 *et seq.*; more broadly, on the discursive and symbolic cleavages of various initiatives of multiple-speeds as a precursor for Brexit, see D. THYM, *Legal Solution vs. Discursive Othering: The (Dis)Integrative Effects of Supranational Differentiation*, in *DCU Brexit Institute Working Paper*, no. 7, 2018, p. 17 *et seq*.

[6] See J.F. DOVIDIO, S.L. GAERTNER, *Intergroup Bias*, in S.T. FISKE, D.T. GILBERT, L. GARDNER (eds), *Handbook of Social Psychology*, Hoboken: Wiley, 2010, p. 1084 *et seq*.

[7] See C. BEAUCILLON (ed.), *European Solidarity in Times of Emergency: An Introduction to the Special Focus on COVID-19 and the EU*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 687 *et seq.*

[8] See S. ROBIN-OLIVIER, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 613 *et seq.*

[9] See B. PIRKER, *Rethinking Solidarity in View of the Wanting Internal and External EU Law Framework Concerning Trade Measures in the Context of the COVID-19 Crisis*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 575 *et seq*.

[10] See C. BEAUCILLON, *International and European Emergency Assistance to EU Member States in the COVID-19 Crisis*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 388 *et seq*.; and E. BROSSET, *Quand l'urgence de santé publique fait son entrée parmi les catastrophes en droit de l'UE*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 573 *et seq.*

Against this background, this *Article* will aim at a broader assessment of the measures taken by the Member States and EU institutions at the internal and external borders of the Schengen area as a response to the Covid-19 pandemic. To this end, it will revisit the period between March and October 2020, when restrictions were first frantically introduced, then discontinued or substantially eased, before the pandemic's second wave compelled recourse to stringent restrictions again. While this *Article* concentrates on the legal analysis, it highlights broader shifts in the perception of borders and the role of different actors in their closure and opening.

Our argument will proceed in three steps. While the reintroduction of internal border controls was comparatively easy to justify from a legal perspective, it holds important lessons for the role of law and the relative weight of the Member States and the EU institutions in sustaining the Schengen area (section II). The travel ban at the external borders raises important legal questions, which have not been addressed adequately so far. It also demonstrates that the European Union has embraced, towards the outside world, a conception of borders contrasting markedly with the internal narrative of the supranational taming of the nation-state (section III). Closer inspection of the dramatic restrictions to the free movement of Union citizens during the Covid-19 pandemic shows that the rich case law of the Court of Justice on the internal market provides sound doctrinal arguments that allow us to uphold the rule of law, even in the face of severe crises, with regard to both internal travel bans and quarantine requirements (section IV).

II. Reintroduction and termination of internal border controls

Initial responses to the pandemic were hectic and uncoordinated and resulted in an unprecedented level of border closures among the Member States. When analysing these measures, it must be borne in mind that border controls may be a nuisance to travellers, but they do not *per se* preclude cross-border mobility. Travel restrictions, conversely, go beyond the mere fact that the border police inspect your passport or search your luggage; a travel restriction limits or precludes the crossing of a border altogether. That is precisely what happened during the Covid-19 pandemic, when many Member States combined "simple" border controls with severe travel restrictions that almost equalled full border closures. Some Member States introduced a distinction between essential and non-essential travel. Others confined themselves to internal restrictions but introduced neither border controls nor formal travel restrictions.[11] Somewhat surprisingly, the restrictions were lifted or at least eased substantially by

[11] For an overview, see S. Carrera, N.C. Luk, *Love Thy Neighbour? Coronavirus Politics and Their Impact on EU Freedoms and Rule of Law in the Schengen Area*, in *CEPS Paper in Liberty and Security in Europe*, no. 4, 2020, p. 2 *et seq*.

most Member States during the month of June 2020.[12] Nonetheless, several Member States maintained or introduced internal border controls. Some Nordic States and Hungary did so for the purpose of combatting the spread of the virus, other Member States, such as France or Austria, resorted to reasons not related to the pandemic, such as fighting terrorism, secondary movement and "the situation at the external border".[13]

II.1. Legality of the initial suspension of border-free travel

It is important to realise that the EU's grand promise "to offer its citizens an area […] without internal frontiers",[14] does not adequately reflect the legal situation at a semantic level. It was never a viable option to internally abolish inter-state borders altogether. To cross an internal border continues to have important implications in terms of defining the legal rules applicable or regarding the competence of state institutions.[15] Art. 77 TFEU describes the situation more adequately when it presupposes the lasting existence of "internal borders", which are to be crossed, regularly, in the "absence of any controls".[16]

It is well-known that the former Schengen Implementing Convention and today's Schengen Borders Code provide for the temporary reintroduction of internal border controls when there "is a serious threat to public policy or internal security".[17] Secondary legislation also lays down complex procedures distinguishing between foreseeable threats and matters of urgency demanding immediate action. Procedural safeguards include, *inter alia*, a duty to notify the Commission and the other institutions, which may pronounce themselves on the adequacy of state measures and suggest less stringent action. The reintroduction of border control must, moreover, respect the time limits laid down in the Schengen Borders Code.[18]

On the basis of these rules, most Member States had recourse to the procedure for threats requiring immediate action to introduce border controls for recurring periods of

[12] For an illustrated timeline of events, country by country, see the works of tableau public, Mobility and Border Control in Response to the Coronavirus Outbreak, public.tableau.com.

[13] See M. De Somer, *Schengen: Quo Vadis?*, in *European Journal of Migration and Law*, 2020, p. 180, with further references to criticism regarding this argumentative practice.

[14] As is prominently proclaimed in Art. 3, para. 2, TEU.

[15] See U. Di Fabio, *Der Verfassungsstaat in der Weltgesellschaft*, Tübingen: Mohr Siebeck, 2001, p. 51 *et seq*.

[16] See Art. 77, para. 2, let. e), TFEU.

[17] Art. 25, para. 1, of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[18] See the complex distinction between different scenarios in Arts 25, 28 and 29 of the Schengen Borders Code. For a detailed analysis of the different rules, see A. Epiney, A. Egbuna-Joss, *Schengen Borders Code Regulation (EC) No 562/2006*, in K. Hailbronner, D. Thym (eds), *EU Immigration and Asylum Law. Commentary*, München, Oxford, Baden Baden: Beck, Hart, Nomos, 2016, p. 52 *et seq.*

10-20 days from early or Mid-March onwards for up-to two months.[19] Thereafter, they had to resort to a different legal basis with more stringent procedural requirements,[20] even though this modification does not seem to have influenced the practice to a noticeable extent. Closer inspection of the notifications indicating the temporary reintroduction of border controls shows that few Member States bothered to comply with their obligations to give reasons indicating "all relevant data detailing the events that constitute a serious threat".[21] Events during the Covid-19 pandemic illustrated, once again, that the limitations laid down in secondary legislation did not have a lasting effect on state practice.[22] Member States treat border controls as their quasi-sovereign domain, irrespective of whether their behaviour complies with the letter and spirit of the substantive and procedural requirements of the Schengen Borders Code.

Notwithstanding the nonchalant handling of procedural rules, the reintroduction of border controls during the pandemic arguably responded to a "serious threat to public policy or internal security", even though the EU legislature chose not to list threats to "public health" among the criteria justifying state action at the internal borders — an omission that appears to be deliberate, since the legislature had explicitly included a reference to state measures to tackle threats to public health elsewhere in the Schengen Borders Code.[23] That need not be an insurmountable hurdle, however, since the Court of Justice has traditionally defined "public policy" to refer to an "existence […] of a genuine and sufficiently serious threat […] affecting one of the fundamental interests of society".[24] It would not be difficult to maintain that the severe social, economic and health effects the pandemic caused across the Union meet that rather general threshold.[25]

To maintain that the concept of "public policy" can cover severe threats to public health in light of the ensuing social and economic repercussions does not render the distinction between "public health" and "public policy" irrelevant. Less dramatic public health threats, such as the circulation of people with contagious diseases, may justify individualised travel restrictions, discussed below, but do not authorise Member States

[19] See Art. 28 of the Schengen Borders Code.

[20] *Ibid.*, Art. 27.

[21] *Ibid.*, Art. 27, para. 1, which also applies to situations of urgency in accordance with Art. 28, para. 2, thereof; on the practice in spring 2020, see S. CARRERA, N.C. LUK, *Love Thy Neighbour?* , cit., p. 23 *et seq.*; and the European Parliament Resolution P9_TA(2020)0175 of 19 June 2020 on the situation in the Schengen area following the Covid-19 outbreak, para. 3.

[22] On previous practice, see M. DE SOMER, *Schengen and Internal Border Controls*, in P. DE BRUYCKER, M. DE SOMER, J.-L. DE BROUWER (eds), *From Tampere 20 to Tampere 2.0. Towards a New European Consensus on Migration*, European Policy Centre, 2019, www.epc.eu, p. 119 *et seq.*

[23] Contrast Arts 25, para. 1, and 28, para. 1, with Arts 6, para. 1, let. e), and 8, para. 2, let. b), of the Schengen Borders Code, as well as Arts 36, 45, para. 3, and 52, para. 1, TFEU.

[24] Court of Justice, judgment of 27 October 1977, case 30/77, *Regina v. Bouchereau*, para. 35.

[25] Similarly, albeit without a detailed argumentation, S. MONTALDO, *The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 527 *et seq*.

to reinstitute internal border controls. Even if one doubted that the wording of the Schengen Borders Code authorised border control during the Covid-19 pandemic,[26] the general scheme of primary law arguably argues for a different position justifying the temporary reintroduction of border controls.

Firstly, Art. 35 of the Charter of Fundamental Rights guarantees that "[a] high level of human health protection shall be ensured in the [...] implementation of all the Union's policies and activities".[27] It could be relied upon to interpret the Borders Code to include public health concerns to fight an imminent pandemic. Secondly, the Member States could possibly have recourse to Art. 72 TFEU to justify divergence from the rules set out in secondary legislation in line with recent Court of Justice case law.[28] It seems to us, however, that there is no need for recourse to Art. 72 TFEU, if we accept the argument put forward by several Member States and the Commission, which had initially opposed the reintroduction of border controls, that border controls may be necessary to safeguard public policy as a crisis measure.[29]

II.2. Alternatives to systematic internal border controls

The formal reintroduction of internal border controls is a measure of high symbolism, and, as such, may often appear as the most viable choice from the perspective of domestic politics. It provides politicians with an easy solution that citizens intuitively understand. That does not mean, however, that border control is the only tool at Member States' disposal under Union law. To combat the spread of Covid-19, the Commission repeatedly emphasised that there are alternatives to systematic border checks, such as targeted police checks or public health measures.[30] In practice, only quarantine requirements gained practical momentum.

The Schengen Borders Code explicitly states that the absence of internal border control does not preclude the exercise of police powers in border areas, provided that

[26] Note, in that regard, moreover, that the sixth recital states that "border controls should help [...] to prevent any threat to [...] public health", without distinguishing between internal and external borders.

[27] Art. 4 of the Schengen Borders Code confirms declaratorily that the provisions therein must comply with the Charter.

[28] Court of Justice, judgment of 2 April 2020, joined cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland (Temporary mechanism for the relocation of applicants for international protection)*, paras 143-158; for further comments, see J. Bornemann, *Mitgliedstaatliche Gestaltungsspielräume im Schengener Grenzkodex*, in *Integration*, 2018, p. 194 *et seq*.

[29] See Communication C(2020) 1753 final of 16 March 2020 from the Commission, *COVID-19. Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, para. 18 *et seq*.

[30] *Ibid.*, para. 20; and Communication C(2020) 3250 of 13 May 2020 from the Commission, *COVID-19. Towards a phased and coordinated approach for the lifting of internal border controls and restoring freedom of movement*, p. 10.

these measures do "not have an effect equivalent to border checks".[31] The Court of Justice's interpretation affords Member States an appreciable margin of manoeuvre for devising national police measures in border areas, which arguably stands uneasy with the objective enshrined in primary law about "ensuring the absence of any controls on persons [...] when crossing internal borders".[32] They may even engage in checks on persons mirroring border controls in close proximity to internal borders, as long as these checks take place at varying locations, are not systematically applied over a longer period of time and within a national legislative framework that ensures that their effects do not equal those of border checks.[33]

In their response to the pandemic's second wave, most Member States cautiously refrained from reintroducing sweeping internal border controls in the autumn of 2020. Instead, they resorted to alternative measures of combatting the pandemic, particularly the obligation to go into quarantine or to get a negative test result before departure. Even if such measures are exercised systematically, they genuinely pursue a public health objective, which may render their effects distinct from those of border controls. Whereas a quarantine requirement may be much more severe than the obligation to show your passport, that does not turn it into "border control" for the purposes of the Schengen Borders Code. Pursuant to Art. 2, para. 10, of the Schengen Borders Code, "border control" constitutes an activity "in response *exclusively* to an intention to cross [...] that border [...], consisting of border checks and border surveillance".[34] It seems to us that quarantine measures cannot be considered as such. This is not to say that quarantine orders are legally unproblematic. They restrict free movement and must be justified in light of the fundamental freedoms,[35] not as measures having equivalent effect as border controls under the Schengen Borders Code.

[31] Art. 23, let. a), of the Schengen Borders Code, which also provides a non-exhaustive list of criteria pursuant to which the effects of police measures can be distinguished from those of border checks.

[32] Art. 77, para. 1, let. a), TFEU; for critical comments, see M. WILDERSPIN, *Article 77 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford: Oxford University Press, 2019, p. 808 *et seq.*

[33] Court of Justice, judgment of 21 June 2017, case C-9/16, *A*, para. 42, the Court considered checks carried out in a railway station in the German town of Kehl, approximately 500 meters from the French-German border, to qualify as checks "within the territory" of Germany; for further comments, see J. BORNEMANN, *Mitgliedstaatliche Gestaltungsspielräume im Schengener Grenzkodex*, cit., p. 232 *et seq.*; see also Court of Justice, judgment of 19 July 2012, case C-278/12 PPU, *Adil*, paras 62-64, which accepted identity checks to verify whether a person is entitled to enter the Member State territory.

[34] Quarantine requirements mirror neither border checks nor border surveillance as defined in Arts 7, 8 and 13 of the Schengen Borders Code.

[35] See *infra*, section IV.3.

II.3. Return to normality: intergovernmental cooperation

It is not surprising that intergovernmental coordination took centre stage in times of severe crises. Emergencies require swift action which the negotiation-based institutions in Brussels were not able to deliver,[36] also considering that personal meetings were replaced by videoconferences for health reasons. The practical success of the intergovernmental approach to lifting border controls during the Covid-19 pandemic was evident. Few people would have thought in early May 2020 that many Member States would have abandoned border controls and travel restrictions completely or eased existing measures substantially by the end of June 2020. The surprisingly rapid recovery of the Schengen area was driven by clusters of Member States. Most notable were the concerted efforts between Germany, Austria, Switzerland and France (together with the Benelux countries) as well as an initial free movement "bubble" between the Baltic States.[37] These preliminary "Mini-Schengen"[38] developed a momentum of their own and included more and more countries within a few weeks. While the second wave saw some countries, such as Denmark or Slovenia, reverting to border controls and travel restriction, a relapse to sweeping border controls did not occur. In most parts of Europe, borders stayed open (often subject to quarantine requirements), even though stringent restrictions were adopted internally. As of late-October 2020, the intergovernmental momentum that breathed life into the Schengen acquis appeared to hold. To emphasise the central role of intergovernmental cooperation does not deny that (virtual) debates among ministers in the Council, the mediating role of the Commission and an *esprit de corps* of pan-European solidarity played a role in the swift return to the default situation of border-free travel during the spring of 2020. Both the Commission and the Council supported the trend towards intergovernmental cooperation, while emphasising that it would have to be integrated into a truly continental outlook in the medium run,[39] which was established to a limited extent in October 2020 when the Council rec-

[36] Generally, on the negotiation-based character of EU decision-making see M. Dani, *Rehabilitating Social Conflicts in European Public Law*, in *European Law Journal*, 2012, p. 621 *et seq*.

[37] See P. Van Elsuwege, *Lifting Travel Restrictions in the Era of COVID-19: In Search of a European Approach*, in *Verfassungsblog*, 5 June 2020, verfassungsblog.de. Daniel Thym was indirectly involved in the German debate which was driven by MPs and politicians from the border area, emphasising the significance of cross-border cooperation and the Franco-German alliance; note that the specific case of Sweden, which pursued a different policy of fighting the virus, pre-empted a uniform response of the Nordic States.

[38] The term was popularised by the former Dutch Foreign Minister Jeroen Dijsselbloem during the migration and refugee policy crisis of 2015-2016 as an idea how Schengen could be salvaged among a core group of Member States; see the Interview, *Need to Get Refugee Numbers Down*, Bloomberg, 22 January 2016, www.bloomberg.com.

[39] See Communication C(2020) 3250, cit., p. 10; and the Press Release of the Croatian Ministry of the Interior, chairing the respective Council meeting, that hailed intergovernmental coordination as "the key to success", Croatian Ministry of the Interior, *Comprehensive coordination among EU Member States – the key to success*, 28 April 2020, eu2020.hr.

ommended uniform assessment criteria on the degree of public health threats.[40] In doing so, the supranational institutions countered the danger inherent in regional arrangements in terms of creating clusters of "Mini-Schengen" with a patchwork of blocs without border controls within the European Union. The notable relaxation of the epidemiological situation across the Union and the external travel ban, discussed below, facilitated the return to the *status quo ante* instead of regional division.

From a legal perspective, there is little doubt that intergovernmental cooperation on lifting internal border controls was compatible with primary law. It corresponds to the principle of loyalty that Member States cooperate amongst each other and with the supranational institutions when activating or lifting public policy exceptions enshrined in primary law or secondary legislation.[41] Even if intergovernmental consultations do not result in formally binding agreements, they have to respect the primacy of Union law, i.e. they cannot change the obligations under the Schengen Borders Code or free movement rules in the internal market.[42] EU law allows Member States to cooperate in fulfilling their obligations under the EU Treaties provided that they abide by the requirements of supranational Union law.

While the focus on intergovernmental cooperation in lifting border controls may be counterintuitive for legal academics who tend to focus on the law and the role of the supranational institutions, it should be noted that the approach is not a novelty. The Schengen acquis was originally developed in intergovernmental fora outside the supranational Community framework, ever since the heads of state or government of France and Germany had kickstarted the move towards border free travel. Setting up Schengen depended, in other words, on intergovernmental cooperation – and it seems to us that the Covid-19 pandemic illustrated how important the political commitment on the part of the Member State continues to be. In that respect, intergovernmental cooperation between some Member States necessarily plays an ambivalent role, since it may similarly serve as an avant-garde spearheading a pan-European solution or be a seed of contention leading to rivalry and disputes, even in the case of the original Schengen cooperation.[43] It is a sign of pan-European political solidarity that this risk did not unfold in the case of the Covid-19 pandemic so far.[44]

[40] See *infra* section IV.4.

[41] See Art. 4, para. 3, TEU; and D. THYM, *Ungleichzeitigkeit und Europäisches Verfassungsrecht*, Baden-Baden: Nomos, 2004, www.ungleichzeitigkeit.de, p. 312 *et seq.*

[42] This is established case law, see Court of Justice: judgment of 27 September 1988, case 235/87, *Matteucci v. Communauté de Belgique*; judgment of 27 November 2012, case C-370/12, *Pringle*, para. 77 *et seq.*; and for informal coordination by the EU institutions, see Court of Justice, judgment of 23 February 1988, case 68/86, *United Kingdom v. Council*, para. 24.

[43] While the original Schengen arrangements are commonly remembered as a laboratory or avant-garde leading to a pan-European venture nowadays, there was a darker narrative present in the original debate, which concerned in particular the symbolically relevant exclusion of Italy, a founding member of the Communities; see S. PAOLI, *France and the Origins of Schengen. An Interpretation*, in E. CALANDRI, S. PAOLI,

II.4. Institutional implications: limited sway of legal supranationalism

There had always been a certain disconnect between the perspectives of legal studies and political science on the driving factors behind the process of EU integration. While legal academics tend to emphasise the role of the supranational institutions, including the Commission and the Court of Justice, political scientists are generally more comfortable accentuating the continued relevance of the Member States.[45] The Covid-19 pandemic provides us with another case study demonstrating that the law-based supranational integration concept exposes noticeable weaknesses in areas beyond the internal market and related policies for which it had originally been developed. It is a common feature of the economic and monetary union, the ongoing rule of law crisis and protracted difficulties of the Common European Asylum System that they expose a limited capacity of legal rules and supranational institutions to steer policy reactions to an unfolding crisis.[46]

The Covid-19 pandemic confirmed this finding in relation to the Schengen area. It was explained above that the complex procedural rules in the Schengen Borders Code, which were meant to constrain state discretion, proved to be practically irrelevant. During the first phase of the pandemic, the Commission proved unable to devise a uniform yardstick to assess existing measures "on a fully objective basis" in light of standards developed by the European Centre for Disease Prevention and Control (ECDC),[47] before Member States finally agreed on a set of standards in a recommendation of October 2020.[48] National governments employed distinct and differing criteria when deciding whether to lift border controls, abandon travel restrictions or discontinue quarantine requirements. The initial

A. Varsori (eds), *Peoples and Borders. Seventy Years of Migration in Europe, from Europe, to Europe [1945-2015]*, Baden-Baden: Nomos, 2017, p. 258 *et seq*.

[44] While the Commission generally refrained, not only in the context of the Covid-19 pandemic, from bringing infringement proceedings against the Member States for internal border controls, it acted decisively when Hungary introduced discriminatory travel restrictions in September 2020, thereby countering the danger of country-specific restrictions; see *infra* section IV.2.

[45] For a classic account combining both perspectives in terms of Member State influence on the decision-making and regarding the central role of the supranational institutions in enforcing common rules, see J.H.H. Weiler, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2403 *et seq.*

[46] For asylum policy, see D. Thym, *The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy*, in *Common Market Law Review*, 2016, p. 1554 *et seq*.; and A. José Menéndez, *The Refugee Crisis. Between Human Tragedy and Symptom of the Structural Crisis of European Integration*, in *European Law Journal*, 2016, p. 388 *et seq.*; for economic and monetary union, see N. Scicluna, *European Union Constitutionalism in Crisis*, London: Routledge, 2015, p. 120 *et seq*.; and J.C. Suntrup, *From Emergency Politics to Authoritarian Constitutionalism? The Legal and Political Costs of EU Financial Crisis Management*, in *German Law Journal*, 2018, p. 391 *et seq*.

[47] See the ideas put forward in Communication C(2020) 3250, cit., pp. 3-5 and 10 which seems to have anticipated a much longer period for lifting border controls before Member States moved comparatively quickly on their own accord.

[48] See *infra* section IV.4.

return to normality in the Schengen area was achieved by virtue of a patchwork of national strategies, methodological standards and policy decisions.

Similarly, it is quite evident that the substantive requirements in the Schengen Borders Code have not played a major role in reintroducing or lifting of border controls. Rather, governments primarily treated these as matters of political good will. Such negligence for legal rules has defined the approach towards internal border controls ever since the terrorist attacks during the 2010s and the migration and refugee policy crisis of 2015/16, when Member States started resorting to "temporary" controls for different reasons on more and more occasions.[49] As a corollary, internal border controls had become a rather permanent feature, but remained questionable from a legal perspective.[50] The Commission may have tried to influence state practice behind the scenes, but it refrained from initiating legal proceedings, even in scenarios where there may have existed sound legal reasons for doing so.

At an intermediate level of abstraction, the events sparked by the Covid-19 pandemic confirmed the absence of a "truly European governance of the Schengen area".[51] The procedural and substantive rules guiding the reintroduction of border controls do not seem to have noticeably impacted state practice and the Commission played an overly reticent institutional role as "guardian of the treaties" once again. Legal supranationalism seems to have had little sway in sustaining the Schengen area, which depended on intergovernmental political commitment among the Member States. In that respect, it is important to realise that the latter need not necessarily result in a gradual decline and disintegration of the Schengen area, as events during the 2010s and in the first phase of the Covid-19 pandemic suggested.[52] Intergovernmental support and

[49] See K. Groenendijk, *Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?*, in *European Law Journal*, 2004, p. 150 *et seq.*; G. Cornelisse, *What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders*, in *Common Market Law Review*, 2014, p. 757 *et seq.*; E. Guild, S. Carrera, L. Vosyliūtė, K. Groenendijk, E. Brouwer, D. Bigo, J. Jeandesboz, M. Martin-Mazé, *Internal Border Controls in the Schengen Area: Is Schengen Crisis-Proof?,* Study for the European Parliament, Directorate General for Internal Policies, PE 571.356, 2016, p. 38 *et seq.*; and in the years before, there had been noticeably less controls; see Commission Report COM(2010) 554 final of 13 October 2010 on the application of Title III (Internal Borders).

[50] See G. Cornelisse, *What's Wrong with Schengen?*, cit., p. 763 *et seq.*; E. Guild, S. Carrera, L. Vosyliūtė, K. Groenendijk, E. Brouwer, D. Bigo, J. Jeandesboz, M. Martin- Mazé, *Is Schengen Crisis-Proof?*, cit., p. 38 *et seq*.; M. De Somer, *Schengen and Internal Border Controls*, cit., p. 120 *et seq.*; and this negative verdict includes the practice of consecutive prolongations by shifting legal bases, which was hesitantly supported by the Commission Recommendation (EU) 2017/1804 of 3 October 2017 on the implementation of the provisions of the Schengen Borders Code on temporary reintroduction of border control at internal borders in the Schengen area, recital 2; and criticised by European Parliament Resolution P8_TA(2018)0228 of 30 May 2018 on the annual report on the functioning of the Schengen area, para. 10.

[51] European Parliament Resolution P9_TA(2020)0175, cit., para. 17.

[52] See S. Montaldo, *The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area*, cit., p. 528 *et seq.*

commitment can help to revive the promise of the EU to "offer its citizens an area of freedom, security and justice without internal frontiers".[53]

III. "A Europe that protects": closure of the external Schengen border

Unlike the reinstatement of internal border controls, the introduction of a pan-European travel ban towards the outside world at the external Schengen border was an unprecedented move, broadly restricting entry to the Schengen area in its entirety. It seems to originate in political debates at the supranational level among the Presidents of the Commission and the European Council in an attempt to head off an internal collapse of the Schengen area by means of external closure.[54] After the European Council had reached a political agreement, the external travel ban was put into practice by the Member States through parallel domestic practices that were coordinated by non-binding Commission guidance.[55] It raises important legal questions and demonstrates that the EU has embraced, towards the outside world, a conception of borders contrasting markedly with the internal narrative of border-free mobility.

III.1. "Fortress Europe" as an affirmative narrative

The political leadership in Brussels was caught off guard by the resurgence of travel restrictions. After having defended open borders during the first weeks of March, it changed course and recognised the legitimacy of border closures, both internally and externally. The external travel ban was agreed upon less than a week after a joint statement by Presidents Ursula von der Leyen and Charles Michel had "disapprove(d)" the decision of the Trump administration to dramatically restrict the entry of persons coming from much of Europe.[56] While it came as a surprise that the EU institutions directly emulated a policy

[53] Art. 3, para. 2, TEU.

[54] It was mentioned first in a video statement of the Commission President accompanying Communication COM(2020) 115 final of 16 March 2020 from the Commission, *COVID-19. Temporary Restriction on Non-Essential Travel to the EU*, which recognised that such a measure "would also enable the lifting of internal border control(s)"; the Communication covered no more than 3.5 pages and appears to have been written in extreme haste; it was politically agreed upon the next day; see the Conclusions by the President of the European Council of 17 March 2020 following the video conference with members of the European Council on COVID-19, EUCO 164/20.

[55] The original Communication COM(2020) 115, cit., was complemented by a more detailed one two weeks later; see Communication C(2020) 2050 final of 30 March 2020 from the Commission, *COVID-19. Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy*; further details were added in later documents, such as a long list of "Frequently Asked Questions", published on 8 May 2020.

[56] Joint Statement no. 20/449 by President von der Leyen and President Michel of 12 March 2020 on the U.S. travel ban.

initiative of the disliked US President, the novel emphasis on external closure did not come out of the blue. It resonates with a broader message of a "Europe that protects, empowers and defends"[57] or a Europe "that is fair, protective and ambitious" in "defending its sovereignty"[58] in the face of globalisation and transnational threats.

The EU institutions retain their commitment to international cooperation and effective multilateralism and, yet, they have increasingly embraced neo-realist accounts of autonomy and closure during the Covid-19 pandemic not differently than in external migration policies or regarding international trade and foreign policy. The new "Pact on Migration and Asylum", which the Commission proposed in September 2020 reiterated the controversial message of border controls as a means of external closure.[59] This emphasis on protection and self-interest arguably responds to a changing geopolitical environment[60] and utilises the symbolic function of borders in times of widespread uncertainties and real or perceived threats.[61] A comparatively uncontroversial element of the protective self-description was the coordinated repatriation of Union citizens from third countries during the first phase of the pandemic.[62] The external travel ban sent a more ambiguous message of closure at a time when Europe had become the global epicentre of the pandemic and could not realistically fear a massive increase of infections as a result of inward travel from countries with comparatively lower infection rates.

Like in the case of intergovernmental cooperation, the protective narrative reminds us of traditional accounts of EU integration, which the widespread focus on international cooperation and globalisation in the period after the end of the Cold War, aptly described as the "end of history"[63], often failed to recognise. The emphasis on transnational mobility, international cooperation and global values, which defined the period after 1990, signalled a Europe that presented itself as a model for global cooperation.[64] By contrast, the resurgence of protective language mirrors an account of a Europe emulating and rescuing

[57] J.C. JUNCKER, *State of the Union Address: Towards a Better Europe*, 14 September 2016, ec.europa.eu.

[58] E. MACRON, *Initiative pour l'Europe, Discours à la Sorbonne*, 26 September 2017, www.elysee.fr.

[59] See the Communication COM(2020) 609 final of 23 September 2020 from the Commission on a New Pact on Migration and Asylum.

[60] Generally, see A. SKORDAS, *The European Union as Post-National Realist Power*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, Cheltenham: Elgar, 2018, p. 394 *et seq*.

[61] See *supra*, section I; and Z. BAUMAN, *Strangers at Our Door*, Cambridge: Polity Press, 2016, p. 23 *et seq*.

[62] See A. ILIOPOULOU-PENOT, *Rapatriements en situation d'urgence lors de la pandémie de COVID-19: la solidarité européenne hors sol européen*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 469 *et seq*.

[63] See F. FUKUYAMA, *The End of History and the Last Man*, New York: Free Press, 1992.

[64] By way of example, see U. BECK, *Cosmopolitan Vision*, Cambridge, Malden: Polity Press, 2006; and J. HABERMAS, *Zur Verfassung Europas – Ein Essay*, Berlin: Suhrkamp, 2011; this position is widespread among experts of immigration and asylum law, who had hoped that Europeanisation would result in more rights for refugees and migrants.

the nation-state.[65] Taking up a slogan critics of this approach often use, one might say that the travel ban aimed at presenting a positive narrative of "fortress Europe".[66]

III.2. Individualised assessment and proportionality

From a legal perspective, the political agreement among heads of state or government on the travel ban presented us with another soft law document through which the EU institutions aimed at swiftly responding to the unfolding pandemic. Neither the political consensus among the members of the European Council nor the Commission Communication had the quality of secondary legislation that could have supplanted the statutory prescriptions in the Schengen Borders Code as a *lex specialis*. Until the end of October 2020, there was no legally binding legislative act or executive regulation underlying the external travel ban, which, rather, emanated from the administrative practices of the Member States on the basis of the Schengen Borders Code, which the Commission Communication coordinated politically.

In June 2020, the travel ban finally received an – albeit informal – legal basis via a non-binding recommendation adopted by the Council.[67] Fifteen third States were added to the initial white-list for regular travel, which the Council agreed to revisit every two weeks.[68] The decision to include or remove a third state from that list is taken by the Council, based on the average of Covid-19 cases, a stable epidemiological situation and the "overall response" to the pandemic in the third state. Whereas these vague standards afford the Council considerable room for appreciation, they are a step towards legal certainty nevertheless, despite the fact that they take the form of a non-binding recommendation.

The obvious attraction of such an approach lied in the practicality of avoiding legislative reform, including political debates with MEPs in the ordinary legislative procedure. However, this benefit comes at a price. The soft law character holds the potential of undermining legal safeguards and cannot guarantee effective and uniform application on

[65] See the classic account by A.S. Milward, *The European Rescue of the Nation State*, London: Routledge, 2000; and S. Borg, T. Diez, *Postmodern EU?*, in *Journal of Common Market Studies*, 2016, p. 136 *et seq*.

[66] The term had originally been applied to the element of external economic closure inherent in the single market programme, while it is used for border control and migration policies nowadays; see C.M. Aho, *Fortress Europe. Will the EU isolate Itself from North America and Asia?*, in *Columbia Journal of World Business*, 1994, p. 32 *et seq*.

[67] Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, which was adopted on the basis of Art. 292 TFEU without involvement of the European Parliament; it built on the Communication COM(2020) 399 final of 11 June 2020 from the Commission on the third assessment of the application of the temporary restriction on non-essential travel to the EU.

[68] See no. 4 and Annex I to Council Recommendation (EU) 2020/912, cit.

the ground by domestic authorities.[69] This may be exemplified with a view to the refusal of entry, which the initial Commission Communication on the travel ban presented as a discretionary act without a single (!) reference to the detailed rules set out in secondary legislation before another communication recognised the need to comply with statutory rules in the Schengen Borders Code two weeks later.[70] Besides procedural requirements, basic legal safeguards defining the rule of law will have to be respected.

Generally speaking, Art. 14, read in conjunction with Art. 6, para. 1, let. e), of the Schengen Borders Code, may serve as the legal basis for a refusal of entry with regard to third country nationals "considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States".[71] That does not mean, however, that Member States have *carte blanche* to refuse entry, since the Schengen Borders Code requires domestic authorities to take a formal decision in line with a standard form in the Annex of the Regulation.[72] Third country nationals have a statutory right to appeal any administrative decision refusing entry, albeit without suspensive effect.[73] We do not know whether domestic authorities followed these rules during the pandemic.

In line with general principles of Union law, any refusal of entry will, moreover, have to be proportionate, non-discriminatory and in full respect of human rights – even though we should be careful not to overstate the significance of these requirements for the travel ban, since third country nationals do not generally benefit from a human right to entry and courts tend to apply the non-discrimination guarantee generously in immigration cases.[74] For that reason, the major legal impediment will be the principle of proportionality, which the Commission considers to be met if health authorities confirmed the necessity and suitability of entry restrictions.[75] This suggests that the Commission considered a generalised travel ban to be proportionate if, prior to its adoption, the suitability of the measure was confirmed by the public health authority.

This is a low bar. In particular, it eschews the intricate legal question to what extent the refusal of entry of third country nationals can be based on a generalised propor-

[69] These drawbacks are a general character of soft law instruments, see O. STEFAN, *On the COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 667 *et seq*.

[70] Contrast the initial Communication COM(2020) 115, cit., with the subsequent Communication C(2020) 2050, cit., p. 3.

[71] Art. 2, para. 21, of the Schengen Borders Code specifies that the term should be interpreted to mean any disease with epidemic potential as defined by the International Health Regulations – a criterion the Covid-19 virus met.

[72] See Art. 14, para. 2, of the Schengen Borders Code; and the reference to these requirements in the second Communication C(2020) 2050, cit., p. 3 *et seq.*

[73] See Art. 14, para. 3, of the Schengen Borders Code.

[74] For further comments, see D. THYM, *Legal Framework for Entry and Border Controls*, in K. HAILBRONNER, D. THYM (eds), *EU Immigration and Asylum Law Commentary*, cit., p. 47 *et seq*.; and D. THYM, *Ungleichheit als Markenzeichen des Migrationsrechts*, in *Zeitschrift für Öffentliches Recht*, 2019, p. 916 *et seq*.

[75] See the Communication C(2020) 2050, cit., p. 3.

tionality assessment distinguishing categories of (il)legitimate travel. The requirement, set out in Art. 4 of the Schengen Borders Code, that any decision must be taken "on an individual basis" does not necessarily answer the question, since national authorities considered each individual case when determining whether someone qualified for legitimate entry on the basis of the standard form. Despite this, the individualised assessment was based on an abstract determination that, for instance, entry for touristic purposes should be generally prohibited, since public health concerns generally outweighed individual interests of third country nationals in entering the European Union.

It will be discussed below, in the context of free movement rules, whether, and if so, to what extent an abstract assessment can be compatible with the EU Treaties.[76] When applying these findings to the external travel ban, we should acknowledge that rules for third country nationals can be stricter than those for Union citizens. This generic conclusion may extend to the interpretation of the public health exception. In a series of cases over the past decade, the Court of Justice recognised that similar wording need not mean identical outcome.[77] In December 2019, this position was reinforced by a judgment on Art. 6, para. 1, let. e), of the Schengen Borders Code,[78] which similarly serves as the legal basis for the external travel ban. While these arguments sound abstract, they can have tangible repercussions for the implementation of the travel ban at the external border, since Member States have more leeway when applying the public health exception towards third country nationals.

III.3. Exemption of travellers with an "essential function or need"

The travel ban affected a large group of third country nationals, but it did not amount to a complete closure of the external border. Rather, the Commission proposed a list of exceptions. They include, to start with, an established principle of international law, expressed *inter alia* in Art. 3 of Additional Protocol no. 4 to the European Convention on Human Rights, that Member States cannot refuse entry to their own nationals.[79] In light of Art. 18 TFEU, Member States can be expected to similarly exempt nationals of other Member States and their family members for the purposes of returning home.[80] The same holds

[76] See *infra,* section IV.1.

[77] See in particular, in the context of the EU-Turkey Association Agreement, Court of Justice, judgment of 8 December 2011, case C-371/08, *Ziebell*.

[78] Court of Justice: judgment of 12 December 2019, case C-380/18, *E.P. (Threat to public policy)*, paras 31-43; similarly, judgment of 12 December 2019, joined cases C-381/18 and C-382/18, *G.S., V.G. (Threat to public policy)*, paras 53-55; and judgment of 4 April 2017, case C-544/15, *Fahimian* [GC], paras 40-43; on the doctrinal background, see D. THYM, *A Bird's Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases*, in *European Journal of Migration and Law*, 2019, p. 179 *et seq*.

[79] For the EU context, see Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*, para. 29.

[80] See the Communication COM(2020) 115, cit., p. 2.

true for third country nationals legally residing in the territory of a Schengen state.[81] In addition, the Commission proposed that any third country national "with an essential function or need" should equally be allowed to enter the Schengen area from abroad.

In the context of "essential travel", the Commission's guidelines remained decidedly vague regarding some of the categories that should qualify as such. It did not specify the meaning of "imperative family reasons" or whether the reference to "persons in need of international protection" would effectively exclude those arriving from an assumedly safe country.[82] Concerning the former, an interpretation of "imperative family reasons" should comprise at least situations in which Art. 8 of the European Convention on Human Rights and Art. 7 of the Charter grant a human right to family reunification, noting that the latter is recognised by the European Court of Human Rights jurisprudence only in exceptional cases.[83] With regard to "persons in need of international protection", the EU asylum acquis provides that, once an asylum application is lodged at the border, asylum seekers must be allowed to temporarily enter the territory of the Member States irrespective of whether their protection needs are real.[84]

In the Commission communications, the exemptions had originally been presented in an enumerative but non-exhaustive manner.[85] This had raised the question whether domestic authorities should accept additional grounds for entry not mentioned by the Commission. When the Council formalised the travel ban by way of a non-binding recommendation, it extended the list of categories of travellers with an essential function or need and transformed it into an exhaustive one.[86] In any case, the practical effects of abstract criteria like "imperative family reasons" stand out. Such vague formulations effectively leave the

[81] Art. 12, para. 4, of the International Covenant on Civil and Political Rights can be interpreted to cover long-term residents, see Human Rights Committee (CCPR), General Comment no. 27 on Article 12 (Freedom of Movement) of 2 November 1999, UN Doc. C/21/Rev.1/Add.9, para. 20; for a more cautious position, see Human Rights Committee (CCPR), views of 16 December 1996, communication no. 538/1993, *Stewart v. Canada*.

[82] This approach was reproduced in equally abstract language by Council Recommendation (EU) 2020/912, cit., no. 5, third indent.

[83] In addition, Art. 8 of the European Convention on Human Rights is subject to an explicit "public safety" caveat, which can include the social and economic repercussion of public health concerns; on the rather restrictive case law, see Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council* [GC], paras 59-60; C. SMYTH, *The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?*, in *European Journal of Migration and Law*, 2015, p. 70 *et seq.*; and P. CZECH, *Das Recht auf Familienzusammenführung nach Art. 8 EMRK in der Rechtsprechung des EGMR*, in *Europäische Grundrechte-Zeitschrift*, 2017, p. 229 *et seq.*

[84] See Art. 3 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). Member States may resort to a border procedure in line with Art. 43 thereof.

[85] Note that the list in Communication C(2020) 2050, cit., p. 5, began with the word "including" in the introductory paragraph.

[86] See Council Recommendation (EU) 2020/912, cit., Art. 5, third indent, which makes no reference to Member States' faculty to provide additional categories.

decision to authorise or to reject entry with individual border guards, thereby undermining the objective of uniform application of the travel ban as well as legal certainty for people concerned. A particularly sensitive question in several Member States was whether non-married partners were to be allowed entry. It is disappointing that the EU institutions shied away from addressing such pertinent legal issues in a field which is generally defined by a high degree of harmonisation enshrined in the Schengen Borders Code.

It seems to us that the model of the Council recommendation could be developed further to enhance legal certainty, institutional accountability and the rule of law. The legislature should consider conferring on the Commission – or, exceptionally, the Council[87] – the power to adopt legally binding delegated acts without the involvement of the other institutions in situations of urgency.[88] Mirroring the model of the non-binding recommendations, travel restrictions could be agreed upon by means of implementing legislation subject to a committee procedure,[89] while exceptionally urgent action could still be dealt with by domestic practices that are coordinated politically at the EU level. Thus, the opaque nature of the original travel ban, which had been based on purely political documents without legal force, would give way to measures enhancing the political accountability of the decision-making process, facilitating appeals and supporting uniform application on the ground.

IV. Restricting the free movement of Union citizens

While travel bans are a matter of executive discretion and limited judicial review elsewhere, including in the United States,[90] EU law has unearthed mobility within the single market and the Schengen area from the arcane sphere of state sovereignty.[91] Union citizens benefit from a constitutional guarantee to cross-border movement whose limitations are subject to judicial supervision. That is not to say that Member States cannot resort to extraordinary measures in exceptional crises, but they are not free to do as they please from a legal perspective. In that respect, the legal analysis of the response to the COVD-19 pandemic treads a tightrope. It must recognise, on the one hand, the degree of factual uncertainty and time-constraints put on decision-makers, while ensur-

[87] Court of Justice, judgment of 6 May 2008, case C-133/06, *Parliament v. Council* [GC], paras 45-47, confirmed, in accordance with today's Art. 291, para. 2, TFEU, that the EU legislature can entrust, in exceptional circumstances, the adoption of implementing legislation to the Council.

[88] Cf. Art. 290, para. 1, TFEU, which does not require the involvement of committees or other institutions in contrast to implementing acts under Art. 291, para. 2, TFEU; delegated acts are substantively limited to "supplement or amend non-essential elements of the legislative act".

[89] For the different options, see Arts 290 and 291 TFEU, which differ in terms of inter-institutional dialogue and, hence, typical length of procedure.

[90] Cf. US Supreme Court, judgment of 26 June 2018, *Trump v. Hawaii*.

[91] For an early overview, see E. Guild, *The Legal Elements of European Identity*, Alphen aan den Rijn: Kluwer, 2004, p. 35 *et seq*.

ing, on the other hand, compliance with legal standards. It will be demonstrated below that rich case law of the Court of Justice on the internal market allows us to do precisely this – both with regards to travel bans, which defined the first phase of the pandemic, and in relation to quarantine requirements that took centre stage later.

IV.1. The principle of proportionality: between individual cases and abstract considerations

Art. 29 of the Free Movement Directive prescribes that the public health derogation only applies to "diseases with epidemic potential".[92] It should be quite clear that Covid-19 qualified as such and that, accordingly, restrictions to free movement may be justified as a matter of principle. At closer inspection, however, the application of the public health standard is less clear-cut than it may seem at first. In practice, many Member States have restricted free movement in a generalised manner, restricting the entry of vast categories of persons. Could broad blanket restrictions be justified by virtue of Art. 29 of the Free Movement Directive?

The wording and the general scheme of the Directive support such a generous interpretation. Unlike Art. 27, para. 2, on the public policy exception, Art. 29 does not limit restrictions to a person's individual conduct or explicitly requires a proportionality assessment. It is reasonable to assume *a contrario* that the Union legislature wanted to award Member States a wider margin of discretion with a view to epidemic threats to public health, as compared to individualised threats to public policy or security.[93] Besides, the very idea of fighting "diseases with epidemic potential" suggests that restrictions to mobility may in themselves cater to the containment of an epidemic. Indeed, the Court of Justice has occasionally accepted generalised justifications in other free movement cases, in which it recognised that even though it had required an individualised assessment in other scenarios, "no such individual assessment is necessary in circumstances such as those at issue in the main proceedings".[94]

[92] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612 and repealing Directive 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[93] S. Carrera, N.C. Luk, *Love Thy Neighbour?*, cit., p. 24 considered travel restriction to contradict judgments on today's Art. 28 of the Directive 2004/38, cit., without considering the difference in wording and the legal context; similarly, S. Coutts, *Citizenship, Coronavirus and Questions of Competence*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 431.

[94] Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC], para. 59; unfortunately, the Court of Justice case law does not establish clear standards when an individualised assessment is (not) necessary; for further comments on the underlying question, see van den M. van den Brink, *Bold, but Without Justification? Tjebbes*, in *European Papers*, 2019, Vol. 4, No 1, www.europeanpapers.eu, p. 413 *et seq*.; and for an overview of the almost bewildering variations in the judicial practice, see D. Thym,

Even if we accept that the public health exception can cover generalised travel restrictions, that need not be the end of the legal analysis. The assessment of the abstract suitability of a restriction usually commands a degree of certainty about potential effects. In the context of the free movement of goods, the Court of Justice has adopted a "reasonability test" for the review of factual errors. National courts should examine "whether it may reasonably be concluded from the evidence submitted"[95] that it was possible to protect public health by virtue of the restriction.[96] In doing so, domestic authorities benefit from enhanced leeway in response to an unfolding epidemic of a previously unknown virus, on which they lack reliable scientific data.[97] Thus, the German Constitutional Court recognised the proportionality of abstract internal restrictions irrespective of the individual case during the Covid-19 pandemic.[98] Similarly, the Court of Justice accepted the adoption of emergency measures by the Commission in response to the BSE (or mad cow) disease after an independent scientific advisory body had considered that there was a "probable link" between BSE and the deadly Creutzfeldt-Jakob disease.[99] Moreover, it emphasised the precautionary principle holding that "[w]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent".[100] This seems to be a viable approach, which also implies that new findings require Member States to reassess the proportionality of any restriction anew.[101]

The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens, in *Common Market Law Review*, 2015, p. 45 *et seq*.

[95] Court of Justice: judgment of 19 October 2016, case C-148/15, *Deutsche Parkinson Vereinigung*, para. 36; similarly, judgment of 23 December 2015, case C-333/14, *Scotch Whiskey Association*, para. 56, which also required national governments to provide statistical data.

[96] The standards of review of factual error may vary depending on the field of Union law in which it is applied; see P. CRAIG, *European Administrative Law*, Oxford: Oxford University Press, 2018, p. 469 *et seq*.

[97] In such a situation, reviewing courts can normally be expected to ensure that "any relevant information, evidence or other material" has been duly considered, without, however, requiring scientific certainty where there is none; see A. WÜRDEMANN*, The Corona Crisis and the Overall Imperative of Precaution*, in *European Law Blog*, 6 April 2020, europeanlawblog.eu.

[98] See German Federal Constitutional Court, judgment of 29 April 2020, 1 BvQ 44/20, para. 14

[99] See Court of Justice, judgment of 5 May 1998, case C-180/96, *United Kingdom v. Commission*, paras 52 and 61, which, based on the advice of the committee, distinguished a "probable link" without certainty from a purely "theoretical hypothesis".

[100] Court of Justice, judgment of 5 May 1998, case C-157/96, *The Queen v. Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others*, para. 63; judges equally accepted the principle of precaution in the context of restrictions to free movement of goods; see Court of Justice, judgment of 28 January 2010, case C-333/08, *Commission v. France*, para. 93.

[101] This was recently emphasised by the German Federal Constitutional Court, judgment of 10 April 2020, 1BvQ 28/20, para. 14.

IV.2. Distinguishing different categories of free movement

An abstract proportionality assessment does not exempt Member States from balancing countervailing interests. Absolute bans on cross-border mobility are more difficult to justify than differentiated constraints that allow certain categories of Union citizens to cross inter-state borders based on abstract criteria. The same applies to quarantine measures, which can foresee exceptions for certain categories of "free movers". A first exception will usually be foreseen for Union citizens residing in a Member State of which they do not hold the nationality. In line with the basic equal treatment guarantees, Member State should allow them to return "home" in the same way as they permit nationals to enter the country.[102] The same can be said about potential restrictions on returning nationals, which were considered to be the embodiment of the coronavirus in Romania.[103] Of course, Member States can send homecoming nationals or Union citizens into quarantine, but the prohibition to return to the place of habitual residence can usually be expected to fail an abstract proportionality assessment.[104] Other Member States should facilitate the transit of Union citizens to States where they reside.[105]

In order to find a reasonable middle ground between generalised public health concerns and individual rights, the proportionality principle may equally demand recourse to other exceptions. In the view of the Commission, frontier workers should thus be exempted from travel restrictions, especially those who carry out essential jobs.[106] This exemption reiterates the central importance of the free movement of workers, which the Court has repeatedly recognised as a "fundamental principle" in relation to which exceptions have to be interpreted narrowly.[107] While such exceptions from Covid-19-related travel restrictions benefitting frontier workers are an important confirmation of core single market principles, they can similarly be said to conceptually call into question free movement as an individual right, instead reconceptualising it as the contribution of "essential" work in pursuit of the public interest.[108]

[102] See *supra*, section III.3.

[103] See S. Mantu, *EU Citizenship and Covid-19: A Crisis of Citizenship?* in *EU Law Live*, 5 May 2020, eulawlive.com.

[104] In the case of nationals returning to their home State, the fundamental freedoms apply in line with established Court of Justice case law for restrictions upon return; see Court of Justice, judgment of 12 March 2014, case C-456/12, *O.* [GC]; it is reinforced by the principles of public international law on return to home countries mentioned *supra*, section III.3.

[105] See Communication, C(2020) 2050, cit., p. 5.

[106] See 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, point 19; and Communication C(2020) 2051 final of 30 March 2020, *Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*, paras 1 and 2.

[107] See *Bouchereau*, cit., para. 33.

[108] Insightfully, see S. Robin-Olivier, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis*, cit.

It is apparent that non-discrimination on grounds of nationality serves as a central legal yardstick for any assessment of travel restrictions. While it can be legitimate to exempt nationals and Union citizens residing in another Member States from entry bans in light of previous comments, quarantine requirements should apply irrespective of nationality.[109] It seems as if domestic practices follow that requirement: entry from a high-risk area usually results in a self-isolation obligation for everyone under the same conditions. By contrast, the Hungarian government reintroduced sweeping entry restriction in September 2020, from which it exempted the citizens of the other Visegrád-4 countries later.[110] This raises serious doubts regarding the principle of non-discrimination on the ground of nationality, since the distinction did not appear to be warranted by the epidemiological situation in the region. It is to be welcomed, therefore, that the Commission countered the threat of internal division by starting infringement proceedings.

Finally, it should be remembered that Union citizens benefit from a generic guarantee to free movement pursuant to Art. 21 TFEU, even if they are economically inactive. While the interests in crossing borders for reasons of leisure or tourism may weigh less than frontier work and can thus be restricted more easily, it should be recognised that public health concerns do not automatically prevail. There may be scenarios, such as people visiting a second home, in which free movement rights should be given greater weight in the proportionality assessment.[111] Similarly, limitations on cross-border movements affect those living in border areas much more than those residing in capital cities that are often centrally located. Member States can show respect for the specific significance of free movement for people in the border-area by introducing specific exemptions from travel restrictions which facilitate local frontier traffic.[112] Such differentiated solutions are warranted to ensure that the idea enshrined in the fundamental freedoms is not lost when fighting a previously unknown virus.

IV.3. Graded approaches towards quarantine and other alternatives

Initial responses to the unfolding first wave of the pandemic were stringent and effectively threatened to do away with the fundamental freedoms altogether. It is a welcome sign of commitment to the single market that the reaction to the pandemic's second

[109] This was reconfirmed by Council Recommendation (EU) 2020/1475, cit., point 21.

[110] The Hungarian Government Decree 450/2020 exempted nationals of the Czech Republic, Poland and Slovakia from the initial restrictions under the Hungarian Government, Decree of 30 August 2020, no. 408/2020 on travel restrictions during the period of state of epidemiological preparedness, section 5 *et seq.*, which had applied equally to all nationalities.

[111] When Slovenia reintroduced entry restrictions towards Italy in late October 2020, it exempted those having property in the country.

[112] Belgium, for instance, does not require quarantine for those who stay in the country for less than 48 hours; similarly, some German regions exempt from quarantine obligations those visiting a neighbouring region for less than 24 hours.

wave shifted the focus away from border controls and entry bans, even though some countries reintroduced outright travel bans.[113] Instead, most Member States promote alternative means to limit the spread of the virus, *inter alia* through quarantine requirements or the need to get a negative test result prior to departure or after arrival, oftentimes in combination with self-isolation in the meantime.[114] It has already been noted that the requirement to go into quarantine upon arrival cannot be considered a measure equivalent to border controls in the meaning of the Schengen Borders Code.[115] Rather, quarantine obligations must be assessed in the light of free movement law, as they effectively restrict the right to move and reside freely within the European Union. Tourism, in particular, often comes to a standstill, once incoming foreigners are obliged to spend the first days of their stay isolated in a hotel room.

In October 2020, diverse practices of the Member States were the subject of an – albeit half-hearted – political coordination when the Council adopted the non-binding Recommendation (EU) 2020/1475.[116] It established a colour-based “traffic light” system, according to which regions are classified either as green, orange or red, depending on the prevalent epidemic situation. The system rests on objective parameters and will be assessed by the ECDC, relying on data provided by the Member States. Whereas travel from “green” regions should not be limited, the Recommendation authorises Member States to restrict travel from yellow or red regions with a focus on quarantine and/or testing requirements, subject to the requirements of proportionality and non-discrimination.[117] It should be noted that the Recommendation opted for a regional approach instead of classifying Member States holistically as either safe or unsafe, which, in itself, can be considered to promote compliance with the principle of proportionality.

The practical effects of the Recommendation depend on the epidemiological context. While it effectively supports free movement if many regions are “green”, the degree of harmonisation remains limited when most of Europe qualifies as “orange” or “red”. In the latter case, the Member States retain the responsible to determine which measures they deem appropriate. In that respect, the Recommendation was overtaken by events on the ground, since it was designed during the summer of 2020 when few regions were categorised “orange” or “red”. In such a context, the EU institutions could hope that the Recommendation would support travel without restrictions along “green corridors”. This changed quickly when the second wave spread across Europe in late summer and early

[113] Besides Hungary described *supra*, section IV.2, Slovenia and Denmark reinstated sweeping entry bans at the end of October 2020.

[114] For an overview of these measures, see S. Carrera, N.C. Luk, *In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU*, Study for the European Parliament's LIBE Committee, PE 659.506, 2020, p. 25 *et seq*.

[115] See *supra*, section II.2.

[116] Council Recommendation (EU) 2020/1475, cit.

[117] *Ibid*., points 17-24.

autumn. In late October 2020, only a few regions in Scandinavia or Greece were still "green". At that point, the harmonising effect of the Recommendation remained limited, since it did not prescribe a uniform response to the ensuing travel restrictions.

IV.4. Practical implications of travel restrictions

Where Member States introduce travel restrictions, this often necessitates administrative formalities such as documentation requirements which may cause considerable difficulties in practice. This may particularly apply to assessments of complex scenarios by state officials that are habitually implemented at short intervals and require swift judgment, such as decision on entry on the occasion of border controls.[118] Legal certainty ideally requires a clear set of criteria police officers can apply in a consistent and transparent manner. In practical terms, it is crucial that citizens know what kind of documentation they need to demonstrate legitimate reasons to travel.

In this respect, the Covid-19 pandemic reminded us of basic principles of free movement law, which the Court of Justice has established over the years by requiring, for instance, that, notwithstanding the need for clear standards, Union citizens should retain flexibility "that evidence may be adduced by any appropriate means".[119] The German federal police, for instance, invites people to bring written evidence, such as a work contract or marriage certificate, while not excluding other means of *prima facie* evidence. Similarly, it can be cumbersome to show a negative test result.[120] While the Council calls for the mutual recognition of test results from within the Member States, Hungary continues to insist on the use of laboratories which are accredited by domestic law, the German quarantine requirements mutually only recognise test results that are provided in either English or German.

In any case, Member States should refrain from requiring *ex ante* authorisation which would establish a *de facto* visa requirement in violation of Art. 5, para. 1, of the Free Movement Directive 2004/38/EC. In this regard, it may be noted that the Commission itself advocated for "specific burden-free and fast procedures for border crossings" for frontier workers, and, to this end, proposed "stickers recognised by neighbouring Member States to facilitate […] access to the territory of the Member State of employment".[121] Whereas this was a pragmatic solution in times of crisis, in would be highly problematic if such stickers were produced and distributed after a formal involvement

[118] On the position of administrative science, see R. Wahl, *Die Aufgabenabhängigkeit von Verwaltung und Verwaltungsrecht*, in E. Schmidt-Aßmann, W. Hoffmann-Riem, G. Folke Schuppert (eds), *Reform des Allgemeinen Verwaltungsrechts – Grundfragen, Schriften zur Reform des Verwaltungsrechts*, Baden-Baden: Nomos, 1993, p. 192.

[119] Court of Justice: judgment of 17 February 2005, case C-215/03, *Oulane*, para. 25; similarly, judgment of 5 February 1991, case C-363/89, *Roux v. Belgian State*, para. 14 *et seq.*

[120] See Council Recommendation 2020/1475, cit., point 18.

[121] Communication C(2020) 2051, cit., para. 3.

of public authorities. For these reasons, other solutions should be prioritised, such as self-declaratory statements.

IV.5. Coherence of domestic and border restrictions

EU law does not necessarily require a uniform response by all Member States. Whereas coordination may be warranted politically, the Court of Justice emphasised early on that "the particular circumstances justifying recourse to the concept of public [health] may vary from one country to another" and that it was "necessary in this matter to allow the competent national authorities an area of discretion".[122] In times of severe public disturbances, that discretion can be reinforced by the safeguard clauses in Arts 72 and 347 TFEU mentioned above.[123] Taken together with the margin of appreciation of the Member States in deciding how to respond to an unfamiliar health crisis, the legal requirement did not lay down insurmountable hurdles for Member States during a serious pandemic.

One way to indirectly control the behaviour of the Member States is the concept of policy coherence, which the Court of Justice has developed and which requires Member States to treat internal and cross-border situations in a comparable manner. When restricting the free movement of Union citizens, a Member State must "adopt with respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct".[124] On that basis, judges developed a generic concept of policy coherence in their gambling case law that prevented States from effectively laying down rules favouring their own nationals on the basis of the margin of appreciation.[125]

It seems to us that the principle of coherence can serve as a corrective mechanism to state discretion. It implies, more specifically, that Member States can restrict travel from high risk areas for as long the domestic situation is comparably safe. By contrast, it is difficult to justify severe restrictions to cross-border movement when domestic mobility remains by and large unrestricted. Why should a journey from Berlin to Frankfurt be permitted, while travelling from Luxembourg to Frankfurt is not, even though both destinations currently constitute high-risk areas? In such situations, cross-border travel restrictions would be prime examples of symbolic gesture politics, projecting a sense of security that buttresses feelings of national belonging rather than protecting public health, even though their practical impact does not differ substantially from do-

[122] Court of Justice, judgment of 4 December 1974, case 41/74, *Van Duyn v. Home Office*, para. 18.

[123] See *supra*, at footnote 287 and accompanying text.

[124] *Oulane*, cit., para. 34; similarly, see Court of Justice, judgment of 18 May 1982, joined cases 115/81 and 116/81, *Adoui and Cornuaille v. Belgian State*, para. 8.

[125] See in particular Court of Justice: judgment of 6 November 2003 case C-243/01, *Gambelli and Others*, para. 67; and judgment of 6 March 2007 joined cases C-338/04, C-359/04 and C-360/04, *Placanica, Palazzese and Sorricchio* [GC], para. 53; see also T. Kingreen, *Grundfreiheiten*, in A. von Bogdandy, J. Bast (eds), *Europäisches Verfassungsrecht*, Heidelberg: Springer, 2009, p. 718 *et seq*.

mestic travel. The principle of policy coherence allows courts to intervene in such scenarios without undoing the political decision of the Member State concerned whether it pursues a more liberal or a more restrictive policy in response to the pandemic.

If that is correct, a crisis like the Covid-19 pandemic will be subject to an evolving set of legal rules, which can differ between the Member States, but must treat internal and external scenarios in a similar way as long as the epidemiological situation is comparable. Against this background, the Council's traffic light system can serve as an empirical benchmark for the comparability of health risks. The effects of the principle of coherence would be as follows: Member States remain free whether to opt of for a "liberal" or "strict" policy regime, provided that internal and external restrictions go hand in hand. Member States cannot have one without the other, unless epidemiological reasons warrant it. If travel from domestic high-risk areas continues unabated, it is difficult to justify generalised entry bans or quarantine requirements for people coming from high-risk areas abroad with a similar infection rate. Similarly, it is difficult to justify quarantine requirements for those coming from countries with similar infection rates.[126] The ultimate expression of policy coherence may be to renounce at specific cross-border measures, once the virus has taken hold of a country. Internal restrictions apply to everyone equally. That is the line the French government has generally followed since the first wave of the pandemic.

V. Conclusion

An unfolding global pandemic may call for swift and resolute responses. Public health considerations are important when human lives are at risk and Member States benefit from a principled discretion when deciding how to fight a previously unknown virus in a situation of uncertainty. Our legal analysis should not, therefore, find restrictive measures to fall foul of the Schengen Borders Code or free movement rules single-handedly. We cannot apply existing case law without taking account of the specificities of an unprecedented health crisis. Nevertheless, Union law would lose its claim to control and constrain state behaviour if it was unable to develop appropriate legal standards in times of crises. It seems to us that the Covid-19 pandemic holds three important lessons in this respect.

Firstly, the substantive and procedural requirements in the Schengen Borders Code on the temporary reintroduction of border controls have proven, once again, unfit for purpose. Member States do not seem to be willing to accept extensive legal constraints and the supranational institutions appear unwilling or unable to exercise meaningful

[126] Germany, for instance, requires quarantine for those coming from regions abroad with a one-week infection rate of more than 50 positive test results per 100,000 inhabitants, *i.e.* quarantine can be mandatory even if the regional infection rate abroad is lower than or similar to the ratio in the German destination; by contrast, Switzerland decided in late-October 2020 to limit quarantine to those coming from countries with a significantly higher infection ratio; Italy had applied similar criteria for some time.

oversight. That does not mean that internal border controls were necessarily illegal. It indicates, however, that the survival of the Schengen area depends primarily on the political will of the Member States. In that respect, the surprisingly swift and coordinated lifting of border controls reinvigorated the political commitment to border-free travel within Europe in early summer 2020. Fewer Member States reverted to border controls when the second wave hit Europe in the autumn.

Secondly, the implementation of travel restrictions resulted in a patchwork of legal rules and administrative practices, which created much uncertainty and endangered the effective application of Union law. These differences cannot be undone on the basis of free movement case law, since courts are badly placed to correct or replace political decisions in times of crises. In order to avoid excessive discrepancies among the Member States, the EU institutions could, however, support "positive integration" by means of developing common standards on how to assess risks to public health. The Council's traffic light system to assess the degree of health risks moved in that direction even though it did not harmonise the travel restriction to which Member States may revert. In this regard, the rich case law on the single market embraces important restrictions that can be employed in novel scenarios, such as the Covid-19 pandemic. This applies, by means of example, to documentation requirements regarding the reasons of travel or the concept of policy coherence which can serve as a corrective mechanism to ensure that States generally treat domestic and transnational situations in a comparable manner.

Thirdly, the reaction to the Covid-19 pandemic showed that border controls and travel restrictions can serve important symbolic functions that transcend their practical effects. They convey a message of political determination and a sense of security when the population feels insecure and threatened. It seems to us that the initial closure of the internal Schengen borders had implications which considerably transcended the immediate effects on inter-state travel. It signalled a general distance from the European project – in the same way as the lifting of border controls coincided with a policy environment in which the Member States and the EU institutions finally agreed on a joint way forward. The unprecedented external travel ban may have supported this internal liberalisation; it resonated with broader narratives of protection against globalisation that have spread in recent years. In light of the symbolic function, free movement is much more than a technical question. Measures taken by the Member States in response to the pandemic are thermometers of the European project more broadly. Against this background, it is relevant that the second wave of the pandemic during the autumn of 2020 did not result in extensive border controls and entry bans with Member States focusing on quarantine or testing requirements instead. These restrictions to the free movements can be legally problematic, but they carry less symbolic weight. It seems as if the Schengen area will not relapse into another near-death experience.