



HELLENIC REPUBLIC

**National and Kapodistrian
University of Athens**

— EST. 1837 —

LAW SCHOOL

POSTGRADUATE PROGRAM: LL.M in International and European Law

SPECIALIZATION: European Union Law

ACADEMIC YEAR: 2022-2023

**POSTGRADUATE THESIS
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**Restriction to free movement of
persons
in times of health crisis**

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Athens, 02/01/2024

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ACKNOWLEDGEMENTS

At the start of this thesis, I want to recognize the significant contribution of Associate Professor Manolis Perakis. As my supervisor, his expertise and guidance were crucial in navigating the challenges I faced in my research. His feedback, both constructive and motivating, aided in refining my work and approach. I appreciate the trust he placed in me and the supportive environment he created. I'm genuinely thankful for the time and effort he dedicated to helping me throughout this research. Also, I would like to thank Associate Professor Rebecca-Emmanuela Papadopoulou for the valuable insights she provided throughout the academic year regarding the difficult process of conducting proper academic research.

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INTRODUCTION

The primary aim of this thesis is to undertake a comprehensive analysis of how the European Union has managed to balance the principle of free movement of persons with the necessity of protecting public health, especially in the context of health crises. This complex balancing act serves as the focal point of the study, which is deeply rooted in the broader framework of EU law, governance, and public policy. The dissertation aims to dissect the intricate relationship between these elements, offering a nuanced understanding that could be invaluable for both academic discourse and practical policy considerations.

One of the specific objectives is to scrutinize the EU's legal and regulatory mechanisms that come into play during health crises. This involves a detailed examination of key EU laws, regulations, directives, and court judgments that have been either invoked or amended to address health emergencies. The study will delve into how these legal instruments have been employed to either uphold or restrict the principle of free movement of persons, and what implications these actions have had on the broader legal and social fabric of the Union.

Another critical aspect of the dissertation is to explore the political landscape that potentially influences the EU's decision-making processes. This includes an analysis of the role played by various EU institutions, such as the European Commission, the European Parliament, and the Council of the European Union, as well as the influence of member states' individual policies and political climates. The study aims to understand how these political dynamics may have shaped the EU's approach to balancing free movement and public health, particularly in times of crisis.

The scope of the dissertation is designed to offer a holistic view of the subject matter. It will encompass historical case studies, including past health crises like SARS and H1N1, as well as a thorough examination of the ongoing COVID-19 pandemic. By doing so, the dissertation seeks to provide a temporal dimension to the analysis, allowing for a more robust understanding of how the EU's approach to this delicate balance has evolved over time.

In summary, this thesis endeavors to provide a comprehensive and nuanced understanding of the EU's approach to balancing the principle of free movement of persons with public health imperatives through imposing (or not imposing) restrictions during health crises. Through a multi-faceted analysis that incorporates legal, political, and historical perspectives, the study aims to contribute meaningfully to the academic literature on EU law and policy, while also offering actionable insights for policymakers, legal practitioners, and the general public.

PART I: Freedom of movement of persons in the pre-COVID-19 European Union

1.1 Historical Overview of the freedom of movement of persons in the EU

The legal journey of free movement within the European Union began with the Treaty of Rome, which initially laid the foundation for the free movement of persons but was primarily focused on economic aspects. The legal bases for this right were primarily found in Article 14 of the EU Treaty, which aimed to create an internal market without barriers, and in Articles 18 and 39. Article 18 (ex 8 A) and Article 39 (ex 48) specifically sanctioned the right for every EU citizen to move and reside freely within the EU territory. However, the implementation of these articles faced several resistances and took place progressively.

By 1951, Article 69 of the European Coal and Steel Community (ECSC)¹ had already introduced some basic measures aimed at permitting the free movement of workers. However, these measures were limited to qualified workers in specific sectors like coal and steel. The European Economic Community, established in 1957, brought a significant change. Article 39 (ex 48) of the EC Treaty expanded the right to include all workers, allowing them to accept offers of employment in another member state, move freely within the community, and reside and remain

¹ It is widely recognized that the legal foundation of European integration is based on four foundational Treaties:

- The Treaty establishing the European Coal and Steel Community (ECSC), inked on April 18th, 1951 in Paris, became effective on July 23rd, 1952, and expired on July 23rd, 2002;
- The Treaty establishing the European Economic Community (EEC), also known as the Treaty of Rome;
- The Treaty establishing the European Atomic Energy Community (EAEC), concurrently signed with the EEC Treaty in Rome on March 25th, 1957, and enacted on January 1st, 1958.
- The Treaty on the European Union, concluded in Maastricht on February 7th, 1992, and came into effect on November 1st, 1993. The Maastricht Treaty renamed the European Economic Community to the European Community and initiated new collaborative frameworks between member states, such as in defense and the 'Justice and home affairs' sector.

Additionally, these Treaties have undergone numerous amendments, such as the inclusion of new member states in 1973 (Denmark, Ireland, United Kingdom), in 1981 (Greece), in 1986 (Spain, Portugal), and in 1995 (Austria, Finland, Sweden). Furthermore, extensive reforms that brought about substantial institutional modifications and expanded the jurisdictions of European institutions have been executed:

- The Merger Treaty, also known as the Brussels Treaty, signed on April 18th, 1965, and operational from July 1st, 1967, consolidated a Single Council of the then three European Communities;
 - The Single European Act (SEA), concluded in Luxembourg and The Hague, became operative on July 1st, 1987, facilitating modifications essential for realizing the internal market;
 - The Treaty of Amsterdam, inked on October 2nd, 1997, and effective from May 1st, 1999, revised the EU and EC Treaties and implemented a numeration system for the EU Treaty articles (formerly identified with letters).
 - The Treaty of Nice, concluded on February 26th, 2001, and effective from February 1st, 2003, further altered the EU and EC Treaties by implementing operational modifications and establishing the majority vote as a standard procedure, replacing the unanimity vote, which is qualified in many sectors in the EU's decision-making process.
- For more details, refer to [www.http://europa.eu.int/abc/treaties_en.htm](http://europa.eu.int/abc/treaties_en.htm).

in another member state after employment. Such rights are constrained by restrictions that are rationalized on the grounds of public policy, public security, or public health, and they do not pertain to roles within public service². Only the latter restriction appears to diverge, albeit minimally, from a strictly economic viewpoint. Additionally, the article imposes two implicit restrictions of significant importance: firstly, it generally pertains to ‘workers of member states’ but excludes individuals who are not ‘nationals of member states’; secondly, it is contingent upon the existence of an employment opportunity, hence it is not applicable to those who are not employed.

Moreover, Article 39 of the EC Treaty promotes the eradication of any discrimination based on nationality among workers of member states regarding employment, compensation, and other employment conditions. As has been repeatedly asserted by the Court of Justice³, this article, with its encompassing influence, takes precedence over all domestic regulations and offers no discretion in its enforcement to member states. Articles 43-48 (ex 52-58) and 49-55 (ex 59-66) of the EC Treaty extend analogous rights (with identical restrictions) to self-employed individuals and service providers⁴, respectively.

In essence, the original version of the Treaty portrays the individual predominantly as an economic entity, bestowing rights due to the individual’s engagement in the production process. Given the construction of the single market, Community law appeared to perceive individuals more as elements of production rather than as persons in their own right. Furthermore, at the time of the Treaty’s conclusion, economic growth propelled the extensive migration of workers, primarily from Southern Europe to Northern and Central European nations. In this scenario, while acknowledging the freedom of movement for workers, governments have established the dual aim of allowing the geographical distribution of workers and aiding companies in their hiring

² The European Court of Justice was called upon to clarify the somewhat vague notion of ‘public service jobs’, aiming to provide a Community-wide definition separate from individual national legislation interpretations. To be considered under the exception outlined in Article 39, those in public service should be involved, even if indirectly, in carrying out duties conferred by public law. Their roles should safeguard the broader interests of the state or local authorities, as seen in Case 149/79, *Commission v. Belgium* [1980] ECR 3881. Acknowledging the intricacies in deciphering these definitions, the Commission released a Communication on March 18th, 1988. It sought to categorize public service roles into two groups: ‘distinct public authority activities’ and ‘activities pertaining to public service tasks.’ The first category unequivocally encompasses roles like the military, police, judiciary, tax and diplomatic administration under Article 39’s employment scope. In contrast, the second category includes sectors like commercial services, health, education, and scientific research. For these sectors, Article 39 applies in rare cases.

³ In particular, see Case 41/74, *Van Duyn* [1974] ECR 1337.

⁴ As Elspeth Guild has noted, ‘the right to move for service provision includes both the right to move where an individual is employed by an enterprise and sent to provide services for the employer in another member state and the self-employed individual who goes to another member state to provide services on his or her own behalf’, Guild E. (2000), *European Community Law from a Migrant’s Perspective*, Katholieke Universiteit Nijmegen.

processes. The humanitarian grounds for allowing individuals to traverse borders, as in the cases of asylum seekers, refugees, and displaced persons, were absent in the original Treaty and were subsequently incorporated through the Amsterdam Treaty.

The requisite steps for the gradual realization of the free movement of workers, as outlined in Article 40 of the EC Treaty, only began to materialize towards the late 1960s. Europeans aspiring to work in another member state, akin to all other foreign workers, were subject to the prevailing national immigration laws and were obligated to apply for work and residence permits, to which states could selectively withhold approval. This *modus operandi* remained in effect until 1968. Subsequently, matters pertaining to admission, residence, equal treatment, and the right to reside in a different member state became the focal points of extensive secondary legislative endeavors. Community law and the Court of Justice have progressively broadened the spectrum of fundamental rights enshrined in the Treaty, accentuating and safeguarding the individual scope of mobility.

Preceding this, Council Directive 64/221, dated February 25th, 1964, pertaining to the “coordination of special measures concerning the movement and residence of foreigners, justified on grounds of public policy, public security, and public health”, saw the Council aptly act to curtail the discretionary authority of member states by defining the boundaries of free movement⁵. The incremental realization of the rights anchored in Article 39 (ex 48) was actualized through Council Regulation 1612/68⁶ (October 15th, 1968) related to the free movement of workers and Council Directive 68/360 (October 15th, 1968) addressing the abolition of restrictions on movement and residence for member state workers and their families across the Community. These regulations marked the cessation of the transitional regime under Art. 39 and established the prerequisites for the effective enactment of the free movement of workers, thereby marking a pivotal moment in this domain.

Specifically, Regulation 1612/68 prohibits any discrimination between workers of member states on the grounds of nationality concerning conditions of employment, compensation, termination, professional reintegration, or during instances of unemployment, reinstatement (Art. 7, n. 1). It also enforces the right of the worker to attain equivalent social and tax benefits as

⁵ Although Directive 64/221 does not offer a definitive community-wide explanation for “public order” and “public security,” it does clarify certain aspects. For instance, economic reasons cannot be used as grounds for these terms (Art. 2, n. 2). Merely having prior criminal records doesn't automatically allow for the use of these measures (Art. 3, n. 2). Any actions taken should solely be based on the individual's behavior (Art. 3, n. 1). Concerning public order motives, the Court, in *Bouchereau* (Case 30/77 [1977] ECR 1999), stated that they must pose a genuine and significant risk to society's core values. Regarding public health reasons, Directive 64/221 lists specific diseases that can be cited, such as those requiring quarantine like tuberculosis, syphilis, etc.

⁶ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, 19.10.1968, OJ L 257, p. 2–12

national workers, to access vocational training (Art. 7, n. 2 and n. 3, respectively), and to avail all rights and privileges related to housing, inclusive of ownership (Art. 9, n. 1).

Articles 10 and 11 of the Regulation broaden the personal scope of free movement to encompass the family members of the worker⁷, allowing them the opportunity to reside with the worker and to engage in any form of subordinate activity in the host country. This provision applies even to family members who are not EC nationals, meaning those who do not hold citizenship of a member state. While the rights of the family are derivative, stemming from their relationship with the worker, an expansive perspective is embraced, focusing on the integration of individual migrants and their families into the society of their residence.

It has been emphasized that the principle of equal treatment, articulated in the EC Treaty and in Regulation 1612/68, prohibits all forms of discrimination, whether overt or covert, based on nationality⁸. However, the Court of Justice sometimes justifies the latter, more elusive form of discrimination on objective grounds, specifically citing the differences in situations between residents and non-residents⁹.

Directive 68/360 significantly streamlines the administrative processes related to movement within the EU, acknowledging the rights of workers and their families to enter a different member state by merely presenting an identity card or a valid passport, eliminating the need for a visa or equivalent documentation (Art. 2 and 3)¹⁰. As articulated in Article 4, the right of residence is validated by the issuance of a ‘residence permit’, featuring a minimum validity of five years with provisions for automatic renewal. To acquire this residence permit, a confirmation of engagement or employment certification must be submitted. However, for short-term workers, these provisions are relaxed; individuals engaged in employment for three months or less do not require a residence permit, provided their presence is reported to the relevant authorities. The residence permit cannot be denied to a worker even if they fail to meet the host country’s welfare and health standards¹¹. Additionally, it remains intact in instances of involuntary unemployment

⁷ Family members of the worker are defined in Art. 10 (n. 2) of the regulation as the spouse, and his/her descendants who are under the age of 21 or are dependants, as well as dependants on the ascending line of the worker and his/her spouse.

⁸ Specifically, the Court has noted that the equality principle, as outlined in both the Treaty and Regulation 1612/68, prohibits not just explicit discrimination based on citizenship. It also bans any covert discrimination which, even if based on different grounds, leads to the same outcome. (Case 152/73, Sotgiu [1974] ECR 153).

⁹ The Court of Justice has examined several cases of indirect discrimination. For instance, the Court called ‘indirect discrimination’ the refusal to evaluate the work periods in the public service of a different member state of a EU citizen participating in a competition for a university job in Italy. See Case 419/92, Scholz [1994] ECR I-505.

¹⁰ Except for family members who are not citizens of a member state.

¹¹ Case 363/89, Roux [1991] ECR I-273.

due to illness or accident. The absence of a residence permit does not warrant expulsion from the host country¹².

Between 1973 and 1975, the legislations on free movement were expanded to include self-employed workers. However, the nuanced status of posted workers, who undertake temporary assignments in another member state¹³, was only elucidated twenty years later, with Council Directive 96/71 of 16th December 1996, which pertains to the posting of workers in the context of service provision. This directive ensures a foundational layer of mandatory protective legislation for posted workers, including minimum paid annual holidays and minimum rates of pay, to mitigate the potential for abuse and exploitation¹⁴.

Since the 1970s, the European Court of Justice has been instrumental in expanding the scope of free movement, progressively transitioning its emphasis from the free movement of workers to the free movement of persons. Owing to the inputs of European citizens, the Court has been able to interpret Art. 39 and Regulation 1612/68 more expansively, highlighting the social and individual aspects of free movement, which is no longer perceived merely as a tool for constructing a common market. The right to equal treatment necessitates comprehensive integration, encompassing not just the job market, but also the broader societal, cultural, and educational facets of the lives of workers and their families¹⁵.

According to the Courts' perspective¹⁶, the definition of a worker has been broadened to encompass individuals who engage or intend to engage in even subordinate activities for a limited duration and who receive or could receive compensation even below the minimum guaranteed in the relevant sector¹⁷, as well as individuals who undertake paid apprenticeships¹⁸, those who enroll

¹² Case 48/75, Royer [1976] ECR 497.

¹³ Posted workers are workers who are temporarily sent to another member state to perform services there and who return to their country of origin after completion of their work.

¹⁴ This relates to workers from non-member countries as well. Consider an entrepreneur who, under the right to provide services (Articles 49 and 50 of the EC Treaty), dispatches their employees from non-member countries to work in another member state. If the employer had to meet all conditions for admitting a non-member country worker, it would put them at a disadvantage compared to local employers. The Court has consistently ruled that national laws demanding additional authorization for these non-member country employees are at odds with Articles 49 and 50 of the Treaty.

¹⁵ O'Keefe, D. (1998), Freedom of Movement for Workers in Community Law, in Carlier J.Y., Verwilghen M. (Eds.), Thirty Years of Free Movement of Workers in Europe. Proceedings of the Conference Brussels, 17 to 19 December 1998, European Commission, Brussels. pp20-25.

¹⁶ Carlier, J.Y., 'Proportionality and Citizenship in relation to the Free Movement of Persons', in Carlier, J.Y., Verwilghen, M. (eds.), Thirty Years of Free Movement of Workers in Europe. Proceedings of the Conference Brussels, 17 to 19 December 1998, European Commission, Brussels pp.65-66.

¹⁷ Case 53/81 Levin [1982] ECR 1035. See also Case 139/85 Kempf [1986] ECR 1741.

¹⁸ Case 66/85 Lawrie-Blum [1986] ECR 2121. According to the judgment in the Lawrie-Blum case 'the essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration'.

in a university in a member state different from their own post-employment¹⁹, and seasonal workers²⁰.

Following extensive discussions on the universalization of the right of residence, three directives—90/366, 90/365, 90/364 of June 28, 1990—were instituted to ensure the freedom of movement and residence for individuals or groups who are not economically active, including their families: students, retirees, and the unemployed (essentially, those who previously did not benefit from freedom of movement). The first directive has been superseded by 93/96 of October 29, 1993.

Specifically, Directive 90/364 extends the right of residence to all member state citizens who do not avail of this right under other provisions. Directive 90/365 broadens this right to include wage-earning and self-employed workers who have ceased their professional activities (retired workers), and Directive 93/96 is explicitly applicable to students, assuring them freedom of residence throughout their academic pursuits. However, it's noteworthy that these directives, despite representing substantial progress, impose two conditions not applicable to workers: students, retirees, and the unemployed must possess adequate resources to prevent becoming a strain on the host member state's social assistance system and must have comprehensive health insurance in the host country.

The implementation of the Single European Act on 1st July 1987, establishing a market defined as an 'area without internal frontiers wherein the free movement of goods, persons, services, and capital is ensured in accordance with the Treaty,' marks another significant advancement in this domain.

The Treaty on the European Union (Treaty of Maastricht), effective from 1st November 1993, aspires to 'amplify the protection of the rights and interests of the nationals of its member states' and introduces the concept of citizenship of the European Union²¹. This European Union citizenship, complementing but not supplanting national citizenship, is defined by a series of rights and responsibilities designed to fortify the connection between the citizen and Europe and to cultivate a European political identity.

The rights that characterize this institution (arts. 17-22 EC Consolidated Version) include:

- The right to move and reside freely within the territories of the member states (Art. 18);

¹⁹ Case 197/86 Lair [1988] ECR 3161.

²⁰ Case 357/89 Raulin [1992] ECR I-1027.

²¹ A person's status as a Community citizen is directly tied to citizenship granted by a member state. Each member state has the autonomy to set its own criteria for granting citizenship. Consequently, the relationship between a Community citizen and the European Union is indirect, as it is based on the connection between that citizen and their respective member state.

- The right to vote and to be a candidate in the European Parliament elections and in municipal elections in the Member State of residence, under the same conditions as nationals of that State (art. 19);
- The right to protection by the diplomatic or consular authorities of another Member State in a third country where the individual's country is not represented, under the same conditions as the nationals of that State (art. 20);
- The right to petition the European Parliament and the right to approach the ombudsman (Art. 21).

Regarding free movement, the Treaty of Maastricht fundamentally proclaims the transcendence of a limited perspective of movers perceived merely as economic actors (i.e., providers of work and services), advocating instead a more encompassing view of the individual as a bona fide citizen of Europe. With the Treaty of Maastricht, entry, external border crossing, residence, and broader immigration and asylum policies became 'matters of common interest' and subjects of inter-governmental collaboration between member states (Title VI, Justice and Home Affairs pillar, also known as the Third Pillar).

In 1996, the Commission established the High Level Panel on Free Movement for Persons, led by Simone Veil, to identify and assess persisting issues in this domain and to suggest resolutions. The group's report, unveiled on March 18th, 1997, comprised around 80 recommendations to actualize and uphold the right of free movement, focusing on:

- Enhanced information dissemination to EU citizens regarding their rights;
- A more adaptable interpretation by the member states of the residence right rules (e.g., in cases of de facto couples and divorced spouses from third countries);
- Easier access to employment in other member states;
- The enhancement of the EURES (European Employment Service)²² network;
- A more precise delineation of public-service roles designated for nationals;
- A reassessment of social security rights;
- The formulation of more adaptable rules to streamline family reunifications;
- An intensified focus on language learning and cultural exchanges;
- A heightened uniformity in tax treatment;
- The amelioration of the status of third-country citizens legally residing in a member state;

²² Initiated in 1994 by the Commission, the EURES network comprises two databases. One focuses on job listings and opportunities across participating countries, and the other provides information on living and working conditions in member states. This setup aims to enhance worker mobility and ease their integration.

- The introduction of new remedial measures for individuals encountering difficulties in exercising their rights and improved access to existing remedial avenues.

Even with the augmented set of recommendations contained in the report, the group has determined that, barring a few exceptions, the legislative framework to enable free movement is already established, and the bulk of the issues can be addressed without alterations to the current legislation. However, it emphasizes the need to amplify cooperation between the member states, particularly in border areas, to enhance the training of their officials, and to allocate more focus to the safeguarding of individual rights.

In response to such recommendations, the Commission initiated a Plan of Action (Action Plan for Free Movement for Workers) in 1997. The primary objectives of this Plan of Action are to develop a clearer and updated legal framework, integrating the insights from the Court's case law, and to establish a more effective job market in Europe through the deployment of the EURES network. Additionally, in July 1998, the Commission submitted a report to the European Parliament and the Council, detailing the progress on the high-level group's recommendations on free movement led by Simone Veil. The report underscores the need to enhance information provided to EU citizens, especially regarding entry and residence rights.

Several recommendations from the 1997 final report of the High Level Panel on Free Movement for Persons significantly shaped the subsequent proposal of the European Parliament and the Council directive of April 23, 2001. This proposal is aimed at securing the 'right of European Union citizens and their families to move and reside freely within the territory of the member states'. Through this proposal, the Commission seeks to consolidate all legislations pertaining to entry and residence rights into a unified legislative text²³. The Commission intends to streamline the realization of the said right through this consolidation, simplify administrative procedures, clarify the status of workers' families more precisely, and narrow the conditions under which the right of residence can be denied and revoked (due to reasons of public order, public security, and public health).

The individuals entitled to the right of free movement are citizens of the EU member states. Indeed, Community law grants entry and residence freedom to third-country citizens solely if they are family members of European Union nationals²⁴ or, to a certain extent, by virtue of international

²³ The new directive proposes to abrogate Articles 10 and 11 of Regulation 1612/68, Directive 64/221, Directive 68/360, Directive 72/194, Directive 73/148, Directive 75/34, Directive 75/35, Directive 90/364, Directive 90/365, and Directive 93/96.

²⁴ It's noted that the opportunity for individuals to reunite with their family members, even if those members are from non-member countries, aligns with Community guidelines that promote the mobility of member state citizens.

agreements between the European Union and third countries²⁵. Additionally, as previously noted, there exists another group of individuals who possess rights to movement and at least short-term residence rights: third-country nationals who are employees of a Community-based enterprise delivering services in another member state. This right is maintained by the enterprise—a right to dispatch its personnel to another member state—to advance its economic interests regardless of the individual's nationality²⁶.

The Treaty of Amsterdam, signed on October 2, 1997, which amends the institutional Treaties of the European Community and those on the European Union²⁷, has endowed new authorities to the European Union. It officially acknowledges the statuses of third-country nationals by not only introducing a set of norms focusing on visas, asylum, and immigration policies but also by integrating the Schengen agreements into community law through the protocol associated with the incorporation of the Schengen acquis into the European Union Treaty.

Specifically, regarding the first point, the Treaty of Amsterdam incorporates issues governed by the Third Pillar, denoted as Title VI (Justice and Home Affairs) of the Treaty of Maastricht into the new Title IV of the EC Treaty (visas, asylum, immigration, and other policies connected to free movement - arts. 61-69). This new Title lays the foundation for the complete abolition of person controls at the internal borders within five consecutive years, regardless of their

²⁵ In line with Articles 300 and 310 (ex 228 and 238) of the CE Treaty, several agreements have been inked with third countries to ease the mobility of their citizens within the Community. Such agreements encompass the European Economic Area Agreement with the EC and countries like Iceland, Liechtenstein, and Norway. Nationals from these countries can move and stay in any member state for economic activities, akin to member state nationals. This also includes the EC-Turkey Agreement and agreements drawn between 1991 and 1999 with the EC and the Central and Eastern European countries, Baltic states, and Slovenia.

Separate agreements with Algeria, Morocco, and Tunisia ensure the equal treatment of workers in terms of work environment, termination, wages, and social protection. However, these don't grant entrance or employment rights. For nations on the path to membership, specific transition setups have been outlined, not applicable to Cyprus and Malta. These arrangements consist of:

-An initial two-year span during which current member states implement national actions to new member states.

Labor market accessibility is dictated by the stringency of the individual nation's laws.

-After this phase, there are review sessions: an automatic one before the close of the second year and another upon the new member state's request. This process involves a report from the Commission but ultimately leaves the decision on applying the acquis to the member states.

-Post five years, the transition phase should conclude. Yet, if there are significant disruptions in the job market, it could be extended for an additional two years. Special provisions might be used by member states until the seventh year's end. The transition also has a 'standstill' clause, meaning current member state labor markets cannot become more restrictive than at the agreement's signing time. Moreover, current member states should prioritize nationals from the acceding country over third-country nationals for job positions.

²⁶ This interpretation of the right of service provision was given by the Court in the Case 43/93 Vander Elst [1994] ECR I-3803.

²⁷ The Treaty of Amsterdam is essentially made up of four different Treaties: the Treaty on European Union and the European Community (EC), ECSC and EAEC Treaties. The latter form the Titles II, III and IV of the consolidated Treaty on the European Union (Treaty of Amsterdam) respectively. Title I is called Common provisions, Title V is called Common foreign and security policy, and Title VI is called Police judicial co-operation in criminal matters.

nationalities, aiming to establish a 'space of freedom, security, and justice'. Concurrently, it seeks to secure the adoption of unified norms for managing the external borders of the European Union, visas, asylum, and immigration.

Following the transitional five-year period, the Council will make decisions based on the Commission's proposal, and subsequently, the co-decision procedure and qualified majority voting will be implemented. The Court of Justice will then hold competence for issues stipulated by the new Title IV.

Furthermore, with the enactment of the Treaty of Amsterdam, the Schengen acquis²⁸ has been (partially) 'communitarized' and broadened to the member states, excluding the United Kingdom and Ireland, which continue to have the advantage of 'opts out', and Denmark²⁹.

Currently, a unified European immigration policy does not exist, and the subject continues to fall under the jurisdiction of the national legislations of the member states. Nevertheless, the Council has established some shared principles concerning the introduction of a standardized model of residence permit, voluntary return, family reunification, and the repatriation of unauthorized immigrants and long-term residents. Third-country citizens continue to undergo controls by each member state at the Community's internal borders. Their rights to enter and reside in member states are governed by national regulations. An effort to harmonize these has been initiated with Regulation 574/1999 of March 12, 1999, which enumerates 101 third countries whose citizens must hold a visa when traversing the external borders of the member states.

²⁸ The Schengen agreement, signed on June 14th, 1985 by Germany, Belgium, France, Luxembourg, and the Netherlands, had the objective of gradually eliminating controls at shared borders, thus ensuring freedom of movement. This agreement, which was made outside the traditional community framework, was later supplemented by the Convention of Schengen on June 19th, 1990. This Convention outlined the application conditions and the protections tied to the realization of free movement and was signed by the initial participating states. Subsequent additions to these foundational countries included Italy in 1990, Spain and Portugal in 1991, Greece in 1992, Austria in 1995, and Sweden, Finland, and Denmark in 1996. Furthermore, two non-member countries, Iceland and Norway, also became part of the Convention. The entirety of the agreement, Convention, accession protocols, and decisions made by the Schengen area's executive committee constitute the "acquis of Schengen." The inclusion of the acquis of Schengen into the broader European Union framework also led to institutional integration. The European Union's Council succeeded the executive committee, and the Schengen secretariat was integrated into the general secretariat of the Council.

²⁹ Specifically, according to Protocol B3 linked to the Treaty, the United Kingdom retains the right to conduct border controls on individuals as it sees fit for specific reasons. This includes measures that protect the Common Travel Area with Ireland. In turn, other member states have the same right with respect to English and Irish citizens attempting to enter their borders. Protocol B4 offers a full exemption for these nations from the provisions in Title IV. However, it also provides them the choice to adopt certain measures if they wish. Lastly, Protocol B5, which addresses Denmark's stance, grants Denmark a full exemption from Title IV.

Member states retain the discretion to grant or deny visas to third-country citizens who are not included in the list, as well as to stateless individuals and those with refugee status³⁰.

The ongoing developments in the legal landscape are also influenced by broader political and economic contexts. For instance, the economic crisis of 2008 led to increased scrutiny of free movement rights, with some member states implementing temporary restrictions on the movement of workers from newer EU countries. However, these were largely lifted as economic conditions improved, reaffirming the EU's commitment to the principle of free movement.

The Brexit referendum in the United Kingdom also had implications for free movement, as it led to the UK's exit from the EU and consequently, the end of free movement rights between the UK and EU member states. This has necessitated complex negotiations and arrangements to protect the rights of EU citizens residing in the UK and vice versa. The Withdrawal Agreement and the subsequent EU-UK Trade and Cooperation Agreement have provisions that aim to safeguard these rights to some extent, although they do not replicate the full range of rights that existed under EU law.

In the face of these challenges and changes, the European Commission has taken proactive steps to improve the functioning of free movement rights. Initiatives such as the "Your Europe" portal provide information and assistance to EU citizens and businesses to understand their rights and obligations. Moreover, the SOLVIT network aims to resolve problems that EU citizens or businesses face with the public administration of another EU country, particularly in cases where there is a misapplication of EU law.

In summary, the legal evolution of free movement within the European Union has been a complex journey, marked by significant milestones in the form of treaties, regulations, directives, and court rulings. While the scope has expanded from merely covering workers to including almost all EU citizens and their family members, several challenges remain, including social security coordination, recognition of professional qualifications, and political resistance. The European Court of Justice continues to play a pivotal role in shaping the legal landscape, ensuring that the right to free movement is upheld and expanded where necessary. As of now, the legal framework governing free movement within the European Union remains a dynamic and evolving field. It is influenced by a multitude of factors, including legislative changes, judicial interpretations, and broader socio-political developments. While the principle of free movement has been largely successful in facilitating cross-border mobility, efforts are ongoing to address the remaining challenges and to adapt the legal framework to new realities. This brings us to the current state of

³⁰ Regulation 574/99 has been subsequently replaced by Regulation 539/2001, more recently modified by Regulation 2414/2001.

the legal-historical evolution of free movement within the European Union. The journey has been marked by both achievements and challenges, and it continues to be a subject of active legislative and judicial activity.

1.2 Major pre-COVID health crises: SARS, H1N1, and their impact on the EU

1.2.1 SARS (2002-2004)

The SARS outbreak that spanned from 2002 to 2004 was a global health crisis that originated in Guangdong Province in southern China. Initially, the cases were reported in November 2002³¹, but it wasn't until February 2003 that the World Health Organization (WHO) issued a global alert. The virus responsible for the outbreak was a coronavirus known as SARS-CoV, a relative of the common cold virus but with far more severe implications. Early theories suggested that the virus might have originated from exotic animals like civet cats sold in wet markets, although the exact origins remain a subject of debate. The symptoms of SARS included high fever, cough, and difficulty breathing³². In more severe cases, these symptoms could escalate into pneumonia and even result in death. The virus was primarily transmitted through respiratory droplets, much like the flu, which made it highly contagious. Health care settings proved to be particularly vulnerable, with numerous healthcare workers falling ill after treating SARS patients.

As the virus spread, international travel played a significant role in its global dissemination. By March 2003, the virus had reached Hong Kong, from where it spread to other parts of Asia, North America, and eventually Europe. Airports started implementing temperature checks, and quarantine measures were put in place, but the virus continued to spread.

The European Union was not spared. The first case in the EU was reported in France in March 2003. A medical doctor who had been in Asia was hospitalized in Paris, marking the beginning of the virus's presence in Europe. Following this, several other cases were reported in countries like Germany, Romania, and Sweden. However, stringent public health measures, including isolation of patients and quarantine of contacts, helped contain the spread within the EU. The European Centre for Disease Prevention and Control (ECDC) worked closely with WHO to monitor the situation and provide guidelines for containment.

³¹ For details on first cases of the virus, as well as the number of cases by country, as reported by the WHO, visit <https://www.who.int/publications/m/item/summary-of-probable-sars-cases-with-onset-of-illness-from-1-november-2002-to-31-july-2003> .

³²For more information on the symptoms, visit: <https://www.mayoclinic.org/diseases-conditions/sars/symptoms-causes/syc-20351765> (Accessed 19/09/2023).

The economic impact of the SARS outbreak was also significant. Tourism and travel-related industries suffered immensely, and global stock markets experienced volatility. The outbreak led to a renewed focus on public health preparedness and the importance of rapid information sharing between countries. By July 2003, WHO declared that the global outbreak of SARS had been contained, although isolated cases continued to appear until May 2004. In total, over 8,000 people were infected, and nearly 800 died due to the virus. The outbreak served as a wake-up call for the international community, highlighting the need for preparedness and cooperation in the face of global health emergencies.

During the SARS outbreak of 2002-2004, the European Union displayed a marked reluctance to impose restrictions on the freedom of movement of persons. This hesitance can be attributed to several key factors, including the EU's governance structure, its foundational principles, and its economic considerations. The Commission's answer to a written question³³ showcases the reasoning behind the EU reluctance at the time, making three main points:

Firstly, the governance structure of the EU inherently leans towards a decentralized approach to health policy. While there was a call for a unified prevention and control plan, the EU emphasized that health protection measures primarily fall under the jurisdiction of individual member states. This decentralized framework allows for a coordinated but flexible response, which in turn made the imposition of blanket restrictions on movement less likely.

Secondly, the EU has a foundational commitment to the principle of free movement, which is deeply ingrained in its identity. The text indicated that while there were provisions for controls at external borders, there was no perceived need for new control measures specifically for the outbreak. The EU considered the existing provisions sufficient to guarantee an adequate level of safety, thereby avoiding the need to impose additional restrictions that could undermine the principle of free movement.

Thirdly, economic considerations played a significant role in the EU's cautious approach. The Union has robust trade relations with countries around the world, including those directly affected by the SARS outbreak. The text highlighted the close trade relations and constant influx of immigrants from affected countries as factors that needed to be considered. Imposing restrictions on movement could have had far-reaching economic implications, including potential disruptions in trade and commerce.

Furthermore, the EU was actively engaged in other forms of response, such as rapid detection of suspect cases, effective isolation measures, and standardized screening of passengers

³³ Written Question E-1547/03 by Mario Borghezio (NI) to the Commission. *Adoption in Europe of joint measures to combat SARS*, 21/11/2003 OJ E 280.

from affected areas. The focus was more on these proactive measures rather than on restricting movement.

Following the outbreak, the Health Council requested the Commission to report on the measures undertaken by the Member States. The report³⁴ was prepared based on a questionnaire sent to all national authorities, and it reflects the results of this survey, endorsed by the Network for the Epidemiological Surveillance and Control of Communicable Diseases in the Community. The report reveals that as of 28 May, 27 countries, including 15 Member States, had responded to the Commission's request to report on the measures implemented to control the outbreak of SARS. The measures implemented by the countries were consistent and in line with the recommendations of the World Health Organization (WHO). They included enhanced surveillance activities, routine reporting at local and central levels, complete and timely reporting to the national authority, identification and investigation of contacts (contact tracing), and isolation measures of probable SARS cases. All respondent countries activated a specific surveillance system, including case definition and reporting procedures. These measures were crucial in preventing the spread among health professionals and into the Community.

In addition to the surveillance and reporting measures, all countries that responded to the Commission's request implemented isolation measures for probable and suspect SARS cases and provided guidance and information to health care workers, including primary care workers, general practitioners, and hospital staff. The provision of information and guidance was recognized as the most important action for the protection of health care staff, and adherence to personal protection procedures was essential to impede the spread of the infection in hospital settings.

Guidance and information were also provided to the general public, using various media and channels, with content varying throughout the Community. Almost all countries collaborated with the media to disseminate relevant information, and more than two-thirds developed a dedicated website and opened a telephone hotline. The information provided included the description of SARS symptoms, measures to be undertaken if a patient requires assistance, and clear orientation on how to seek medical assistance.

Travel advice to affected areas was another significant measure affecting the freedom of movement. The main message for international travelers was to be aware of the areas where local transmission of SARS occurs, the main symptoms of SARS, and what actions to take should they develop these symptoms. Some countries instituted visa restrictions for persons coming from affected areas, and measures to inform, collect traceability information, and screen arriving

³⁴ European Commission (2003) 'Measures Undertaken by Member States and Accession Countries to Control the Outbreak of SARS', SANCO - Public Health Directorate. Available at: https://ec.europa.eu/health/ph_threats/com/sars/sars_measures_en.pdf (Accessed: 19/09/2023).

passengers were implemented, although they were heterogeneous and lacked consistency. The report also mentions that several countries included quarantine obligatory measures in their national framework, and some others modified their legislation to address the SARS outbreak. These legal frameworks and quarantine measures were crucial in controlling the movement of people and preventing the spread of the disease.

The report concludes with recommendations for future actions, emphasizing the need for scientific collaboration, public health surveillance and response, international collaboration, and media engagement. It also outlines planned actions in areas such as research, humanitarian assistance, actions addressed to vulnerable communities, mass gathering, import/export of goods, and the legal framework. The report underscores the importance of consistency, coordination, and evaluation of these measures at the EU level to effectively control the outbreak and spread of communicable diseases like SARS. This extensive and multifaceted approach by the EU Member States during the SARS health crisis was pivotal in managing the outbreak and ensuring public health and safety while impacting the freedom of movement to mitigate the spread of the virus.

1.2.2 H1N1 VIRUS

The H1N1 virus of 2009, colloquially known as "swine flu," emerged as a novel and potent influenza virus, initially identified in southern California, USA, where two children exhibited febrile respiratory illnesses without any apparent contact with pigs³⁵. The virus's genome was predominantly composed of swine influenza genes, which led to its initial labels such as "swine-origin influenza A (H1N1) virus (S-OIV)" or more commonly "swine flu." Despite these labels, it became evident that there was no direct link between most of the cases and pigs³⁶, and various titles like "pandemic (H1N1) 2009," "2009 influenza A (H1N1) pandemic," and "2009 pandemic influenza A (H1N1)" were accepted and used interchangeably in different documents.

The initial alert regarding the 2009 pandemic was disseminated through a publication from the United States Centers for Disease Control and Prevention (CDC Atlanta) on 21 April 2009. The first cases were observed around week 16/2009 (mid-April), predominantly in travelers returning from Mexico or their direct contacts³⁷. On 27 April 2009, Spain officially reported³⁸ the first

³⁵ Centers for Disease Control and Prevention (CDC). *Swine Influenza A (H1N1) Infection in Two Children---Southern California*, March--April 2009.

³⁶ N Engl J Med, (2009) *Novel swine-origin influenza A(H1N1) virus investigation team. Emergence of a novel swine-origin influenza in humans.*

³⁷ Centers for Disease Control and Prevention (CDC). *Outbreak of swine-origin influenza A (H1N1) virus infection - Mexico*, March-April 2009.

³⁸ Surveillance Group for New Influenza A(H1N1) Virus Investigation and Control in Spain, *New influenza*

laboratory-confirmed case of the new influenza A(H1N1) virus infection in the EU/EEA, involving a traveler returning from Mexico. Later that same day, the first two confirmed United Kingdom cases of new influenza A(H1N1) virus infection were reported in Scotland in a couple also returning from visiting Mexico³⁹.

The 2009 H1N1 virus was characterized by its rapid transmission across populations, prompting a global response to manage and mitigate its spread. It was notably different from the then-circulating human interpandemic A(H1N1) and was assumed that most humans had little immunity against the 2009 pandemic strain⁴⁰. The virus was responsible for the global pandemic in 2009, affecting numerous countries and leading to widespread illness and disruptions.

The virus reached Europe and began transmission around week 16/2009, following its emergence in North America. The virus met the previously determined criteria for a pandemic in Europe, as it did elsewhere. Surveillance suitable for the pandemic was rapidly developed and agreed upon by ECDC and the EU/EEA Member States (MS), with input from the World Health Organization (WHO) and countries already affected from outside Europe. The pandemic virus displaced the previously dominant interpandemic influenza A viruses in Europe, though influenza B viruses still appeared at a low level late in the season.

In most countries, the autumn/winter wave of infection was sharp in shape, lasting approximately 14 weeks, and was accompanied by a similar wave of hospitalizations and deaths. However, there was heterogeneity in the severity of disease as it varied from place to place, even within countries. In all, 2900 official deaths were reported by EU/EEA countries in the first 12 months during which the MS made extra efforts to collect these data. However, it is recognized this will be only a proportion of the true burden of deaths due to the pandemic. An excess of all-cause deaths in school-aged children was detected. The pandemic tested the flexibility of existing plans and occurred at a time when diagnostic tests were made quickly available, as were preventive pharmaceutical countermeasures like antivirals and appropriate vaccines that were developed quicker than ever before. The strategies and responses were adapted as the situation evolved, reflecting the challenges and complexities faced by the EU/EEA countries in managing the pandemic.

Interestingly, many older people in Europe appeared to have some level of immunity to the virus, likely due to exposure to a similar virus before the mid-1950s. This resulted in lower overall

A(H1N1) virus infections in Spain, April-May 2009, Euro Surveill. Available online:

<http://www.eurosurveillance.org/ViewArticle.aspx?ArticleId=19209> (Accessed: 19/09/2023)

³⁹ Health Protection Agency and Health Protection Scotland new influenza A(H1N1) investigation teams, *Epidemiology of new influenza A(H1N1) in the United Kingdom*, April – May 2009. Available online:

<http://www.eurosurveillance.org/ViewArticle.aspx?ArticleId=1921> (Accessed: 19/09/2023)

⁴⁰ Morens DM, Taubenberger JK, Fauci AS. *The Persistent Legacy of the 1918 Influenza Virus*, 2009.

mortality but a higher relative burden of illness and fatality rates among young people. Those older individuals who were not protected showed the highest case fatality rates of any age group. The pandemic virus quickly became the dominant influenza A virus in Europe, displacing previously circulating interpandemic influenza A viruses. However, influenza B viruses still appeared at a low level late in the season. Resistance to antiviral medications like oseltamivir was low, and very few resistant viruses seemed capable of human-to-human transmission. The pandemic also posed challenges to healthcare systems. Cases of acute respiratory distress syndrome (ARDS), a condition rarely seen with interpandemic influenza, were reported, putting stress on intensive care units. Young children experienced the highest rates of disease, and the highest rates of infection were observed in school-aged children. This put particular burdens on primary healthcare services, hospital pediatric services, and intensive-care units in some localities.

Despite the challenges, the pandemic was less severe than initially feared. Diagnostic tests were quickly made available, as were antiviral medications and vaccines. However, each of these developments brought their own set of challenges and surprises. For example, the rapid development of vaccines was unprecedented, but it also led to issues related to distribution and public acceptance.

The 2009 A(H1N1) pandemic served as a critical juncture in the European Union's approach to public health emergencies, particularly in highlighting the necessity for a coordinated response among its Member States. This need for coordination was not just a logistical or administrative matter; it had significant legal implications that touched on the very core of the EU's institutional framework and the division of powers between the EU and its Member States. As previously mentioned, public health has been a traditionally national competence, meaning that each Member State has its own set of laws, regulations, and agencies responsible for public health matters. However, the transnational nature of the pandemic, which did not respect borders, raised urgent questions about the legal basis for EU-wide public health measures. Could the EU mandate certain actions across all Member States? If so, under what legal provisions could this be done? These questions were not merely academic; they had immediate, real-world implications for how the EU and its Member States could respond to the crisis.

The role of the European Centre for Disease Prevention and Control (ECDC) came under particular scrutiny. Established to strengthen Europe's defenses against infectious diseases, the ECDC's mandate and powers were examined to see if they were sufficient for coordinating a response to a pandemic of this scale. Could the ECDC, for example, mandate the reporting of infection rates or the implementation of specific public health measures across the EU? What would be the legal ramifications if a Member State failed to comply with such mandates?

Similarly, the role of the European Medicines Agency (EMA) was also examined. Responsible for the scientific evaluation, supervision, and safety monitoring of medicines in the EU, the EMA had a crucial role in the fast-tracking of vaccine approvals and the dissemination of antiviral medications⁴¹. However, this raised legal questions about the balance between expedited approval processes and the rigorous safety and efficacy standards that are the cornerstone of pharmaceutical regulation in the EU⁴².

The pandemic also led to discussions⁴³ about the activation of the 'solidarity clause'⁴⁴ in the Treaty on the Functioning of the European Union (TFEU), which allows the EU and its Member States to act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. While the clause is generally associated with security threats, its potential activation in a public health emergency became a subject of legal and political debate.

Moreover, the outbreak prompted a reevaluation of existing EU legislation related to cross-border health threats. It led to questions about whether the EU needed new legislative tools to deal with such threats more effectively. Could existing laws be adapted to provide a more robust framework for action, or was new legislation required?

In summary, the 2009 A(H1N1) pandemic exposed gaps and ambiguities in the EU's legal framework for dealing with public health emergencies. It led to intense discussions about the division of competences between the EU and its Member States, the legal basis for EU-wide public health measures, and the roles and powers of EU agencies like the ECDC and EMA. These discussions were not just theoretical but had immediate implications for how the EU and its Member States could and should respond to public health crises, both then and in the future.

During the H1N1 health crisis that swept across the globe, the European Union stood steadfast in its commitment to the principle of the free movement of persons. While the pandemic posed an unprecedented challenge to public health systems and triggered a wide array of emergency responses, the EU chose not to compromise on this foundational aspect of its union. Instead, the focus was channeled into other avenues of pandemic management, such as enhancing

⁴¹ European Medicines Agency (EMA). Press Release: European Medicines Agency reaffirms efficacy and safety of H1N1 pandemic vaccines. EMEA/748707/2009. London, 20 November 2009. Available from: <http://www.ema.europa.eu/pdfs/human/press/pr/74870709en.pdf> (Accessed: 19/09/2023).

⁴² Regulation (EC) No 726/2004

⁴³ Report - A7-0035/2011 European Parliament

⁴⁴ The Solidarity clause, introduced by Article 222 of the Treaty on the Functioning of the European Union (TFEU), provides the option for the EU and EU countries to act jointly, to prevent the terrorist threat in the territory of an EU country, to provide assistance to another EU country which is the victim of a natural or man-made disaster.

pandemic preparedness, fortifying business continuity strategies, and implementing a range of public health measures aimed at containing the spread of the virus.

The EU's decision to maintain the free movement of persons was not merely a passive stance but an active policy choice. It was a reflection of the EU's broader philosophy that sees the free movement of individuals as not just an economic asset but also a social and cultural one. By not imposing travel restrictions within its member states, the EU sent a clear message about its priorities and values, even in the face of a public health emergency that had global ramifications. This approach was complemented by a robust coordination mechanism for public health measures across the EU. Agencies and bodies like the European Centre for Disease Prevention and Control (ECDC) and the European Medicines Agency (EMA) played pivotal roles in this regard. They focused on streamlining communication systems among member states, disseminating timely and accurate information, and coordinating the availability and distribution of medical countermeasures like vaccines and antiviral medications.

Consequently, the actions of the European Union and its Member States during the H1N1 outbreak were multifaceted and aimed at mitigating the impact of the pandemic on public health, society, and economies within the EU⁴⁵. The EU was better prepared to tackle cross-border and global health threats, and Member States and the Commission had legal and operational provisions in place to authorise pandemic vaccines and anti-viral medication. The EU emphasized the need for closer coordination across sectors and Member States at Community, national, regional, or local levels to mitigate the societal impact of an influenza pandemic. The main objective was the protection of public health by ensuring the best possible protection of citizens against the pandemic. The EU aimed to present key issues on the public health coordination on pandemic (H1N1) 2009 at the EU level and internationally in a single document, highlighting the cross-sectoral dimension of this pandemic.

Community action in the field of public health complemented national policies and was directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. The aim was to tackle major health scourges by promoting research into their causes, their transmission, and their prevention and to provide health information and education. The EU worked to foster cooperation with third countries and competent international organisations in the sphere of public health.

⁴⁵ COM(2009) 481 final. Commission of the European Communities (2009) 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Pandemic (H1N1) 2009'. Available at: https://ec.europa.eu/health/ph_threats/com/Influenza/docs/com481_2009_en.pdf (Accessed: 19/09/2023).

A coordinated and supportive EU-level approach to public health measures between the EU Member States provided substantial benefits. Member States could draw on the scientific advice and guidance of the European Centre for Disease Prevention and Control, ensuring that national resources for scientific assessments were allocated more efficiently. Coherent and agreed approaches between Member States on issues such as travel advice or school closures contributed to better public understanding and trust in public health measures.

The EU also focused on vaccination as one of the most effective public health mitigation responses in a pandemic, and anti-viral medication remained a key option for treatment. The availability of vaccines and access to anti-viral drugs was determined at the national level, and Member States took preparatory action in this respect. The Commission worked with the EU Health Security Committee to support Member States with fewer financial resources or adequate capacities for procurement of vaccines.

In the aviation sector, a specific meeting with the Civil Aviation Authorities was organised, and it was agreed to activate the network of national contact points for health issues, allowing the exchange and sharing of relevant information on all air transport issues linked to the Pandemic (H1N1) 2009 between EU Member States. The EU did not recommend travel restrictions, including air transport, in line with WHO recommendations, and Member States were advised to take all appropriate measures in the air transport sector that were proportionate, non-discriminatory, and strictly limited to meet the health risks.

The European Union Solidarity Fund could be called upon by Member States in case of major natural disasters for the reimbursement of certain costs to repair damage, but public health crises and expenditure for buying vaccines did not fall within the scope of the Solidarity Fund.

In summary, the European Union's handling of the H1N1 health crisis was marked by a nuanced approach that managed to uphold the principle of free movement while also taking effective steps to control the spread of the virus. This strategy showcased the EU's ability to navigate complex challenges without compromising on its foundational principles, serving as a testament to the resilience and adaptability of the Union in times of crisis.

1.3 Legal Landscape in the Pre-COVID-19 era

The provision in Article 3(2) of the Treaty on European Union⁴⁶ sets forth the EU's ambition to offer its citizens an integrated area defined by freedom, security, and justice, all while

⁴⁶ European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, 26/10/2012, OJ C 326, p. 47–390.

eliminating internal borders. This foundational goal serves as the ideological backdrop for the EU's comprehensive approach to the free movement of persons. The commitment to a borderless internal space is a transformative aim, designed to remove both physical and administrative obstacles, thereby facilitating seamless mobility for EU citizens across the Member States.

This article also weaves the concept of free movement into a broader tapestry that includes other key Union objectives such as security and justice. This integrated approach suggests that the EU is equally focused on ensuring that increased mobility does not compromise the safety and legal integrity of the Union. Therefore, the article provides the aspirational framework that informs more detailed legislation and policy measures aimed at making free movement a practical reality for EU citizens.

Article 21 of the Treaty on the Functioning of the European Union (TFEU)⁴⁷ is a pivotal legal provision that directly addresses the right of every citizen of the Union to move and reside freely within the territory of the Member States. Unlike Article 3(2) of the Treaty on European Union, which sets the broader vision, Article 21 provides a more explicit guarantee of this right to EU citizens. It serves as the operational clause that puts the concept of free movement into actionable terms. The article specifies that the right to move and reside freely is subject to the limitations and conditions laid down by the Treaties and the measures adopted to give them effect. This means that while the right is fundamental, it is not absolute. It can be subject to restrictions based on public policy, public security, or public health, as outlined in other legislative acts and judicial interpretations. This nuanced approach ensures that the right to free movement is balanced against other important considerations, such as the welfare and safety of the host Member State. Furthermore, Article 21 extends the right of free movement beyond just workers to include every citizen of the Union. This is a significant expansion that encompasses students, retirees, and other non-working individuals, thereby making the freedom of movement more inclusive. It recognizes that the benefits of a borderless Europe should be accessible to all citizens, irrespective of their employment status. The article also serves as the legal basis for various secondary legislative measures, such as directives and regulations, aimed at implementing the right to free movement. These include procedural aspects like the issuance of residence cards, recognition of professional qualifications, and access to social benefits in the host Member State. By doing so, Article 21 provides the groundwork for a more detailed and comprehensive framework that facilitates the practical exercise of free movement rights.

⁴⁷ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* 13/12/2007, *OJ C* 306, , pp 1 - 271.

Titles IV and V of the Treaty on the Functioning of the European Union (TFEU) are dedicated sections that delve into the specifics of the Union's policies concerning the free movement of persons, services, and capital, as well as the area of freedom, security, and justice. These Titles serve as the operational backbone that translates the broader principles and objectives set forth in other articles into concrete legislative and policy measures. Title IV focuses on the free movement of persons, services, and capital. It provides the legal basis for a range of EU actions aimed at facilitating the seamless flow of people and services across Member States. This includes not just the free movement of workers, but also the freedom of establishment for self-employed persons and the freedom to provide and receive services across borders. The Title outlines the conditions under which these freedoms can be exercised and the limitations that may be imposed, such as public policy or public security concerns. It also addresses the coordination of social security systems among Member States, a crucial aspect for individuals who move across borders for work or other reasons.

Title V, on the other hand, deals with the area of freedom, security, and justice. This Title aims to ensure that the internal area of the EU is not just a zone of free movement but also one where citizens are secure and their rights are protected. It covers a wide range of issues, from border checks and immigration to judicial cooperation in civil and criminal matters. One of its key features is the emphasis on mutual recognition of judicial decisions, which facilitates cross-border legal processes and enhances the effectiveness of the EU's judicial area. Title V also addresses matters related to police cooperation, combating serious crime, and establishing a common asylum and immigration policy.

Both Titles IV and V are instrumental in shaping the legislative landscape that governs the freedom of movement within the EU. They provide the detailed framework that allows for the practical implementation of the principles enshrined in Articles like 21 of the TFEU and Article 3(2) of the TEU. Through a series of articles, these Titles lay down the rules, conditions, and mechanisms that ensure the freedom of movement is a functional and secure reality for EU citizens.

Article 45 of the Charter of Fundamental Rights of the European Union⁴⁸ specifically addresses the freedom of movement and residence within the territory of the EU Member States. While other legal texts like the TFEU focus on the legislative and policy aspects, the Charter elevates the freedom of movement to the level of a fundamental human right. This distinction is crucial because it underscores the intrinsic value of this freedom, not just as an economic or social policy, but as a core element of human dignity and individual autonomy.

⁴⁸ European Union, *Charter of Fundamental Rights of the European Union*, 26/10/2012, OJ C 326, p. 391–407.

The first clause of Article 45 of the Charter of Fundamental Rights of the European Union is a foundational element that establishes the right to move and reside freely as a universal entitlement for every EU citizen. This universality means that the right is not limited to any specific group, such as workers or students, but is applicable to all citizens of the Union, regardless of their employment status, age, or other criteria. The clause also specifies that this right extends across the territories of all Member States, allowing for both temporary activities like tourism and permanent activities like residence. Importantly, the clause is comprehensive in its scope, covering both the ability to move and the ability to reside, thereby encompassing a wide range of freedoms from border crossing to choosing a place of work and residence in another Member State.

The second clause adds a layer of complexity by opening the door to the extension of these freedoms to nationals of third countries who are legally resident in a Member State. Unlike the universal guarantee provided to EU citizens in the first clause, the second clause introduces a conditional possibility. It specifies that the extension of this right to third-country nationals would be in accordance with existing Treaties, implying that additional legislative measures might be needed. Moreover, it restricts this potential extension to those who are already legally resident in an EU Member State, which could include long-term residents, family members of EU citizens, or individuals with specific types of work permits.

Article 45 of the Treaty on the Functioning of the European Union (TFEU) serves as one of the foundational legal provisions for the freedom of movement for workers within the European Union. This article is not just a statement of intent or a guiding principle; it is a legally binding provision that has direct implications for the legislative and judicial systems of the EU Member States. It explicitly mandates the abolition of any discrimination based on nationality between workers of the Member States, thereby ensuring that nationals from one EU country are treated the same as nationals from another when it comes to employment opportunities and conditions. The significance of the article extends beyond mere employment and touches upon broader social and economic aspects. By eliminating barriers to labor mobility, it aims to create a more integrated and efficient labor market across the EU. This is particularly important for addressing regional disparities in employment rates and economic development. For instance, a worker from a country with high unemployment can seek and take up employment in another EU country where there are more opportunities, without being subject to discriminatory practices based on their nationality.

The article also has a profound impact on the rights of family members of workers who exercise this freedom. Under the framework established by Article 45, family reunification and the right to reside in the host Member State are facilitated, thereby enhancing the social dimension of labor mobility. This is crucial for the well-being of workers and their families, as it allows them to live together and access social benefits in the host country. However, it's important to note that

the freedom of movement under Article 45 is not absolute. The article allows for certain restrictions on grounds of public policy, public security, or public health. These limitations are not to be applied arbitrarily but must be based on a careful assessment of the individual circumstances. This ensures that while Member States have the ability to protect their national interests, they cannot do so in a manner that undermines the fundamental principle of free movement.

Directive 2004/38/EC⁴⁹, commonly referred to as the "Citizens' Rights Directive," serves as a comprehensive legal instrument that consolidates and elaborates on the rights of European Union citizens and their family members to move and reside freely within the territory of the Member States. This directive goes beyond the scope of employment-related movement, covered by Article 45 of the TFEU, to include students, retirees, and self-employed individuals⁵⁰, thereby broadening the categories of people who can benefit from the freedom of movement.

One of the key features of this directive is its focus on procedural safeguards. It lays down the conditions under which EU citizens and their family members can enter and reside in another Member State, specifying the types of documentation required⁵¹, such as passports or identity cards. It also outlines the procedures for obtaining a residence card, thereby providing a clear and standardized process for exercising the right to free movement and residence⁵².

The directive also addresses the rights of family members⁵³, including spouses, registered partners, direct descendants under 21, and dependent relatives. It ensures that these family members can accompany or join the EU citizen in the host Member State, even if the family members themselves are not EU nationals. This is a significant aspect as it recognizes the importance of family unity in the context of free movement and aims to mitigate the social costs that could arise from family separation. While the directive provides a robust framework for the exercise of free movement rights, it also incorporates provisions for limitations⁵⁴ on these rights. Similar to Article 45 of the TFEU, Directive 2004/38/EC allows Member States to restrict freedom of movement and residence on grounds of public policy, public security, or public health.

⁴⁹ European Union, *Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 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 1612/68 and repealing Directives 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, 30/4/2004, OJ L 158, p. 77–123.*

⁵⁰ Articles 2 and 3 define who is considered an EU citizen and a family member for the purposes of the directive.

⁵¹ Articles 5 and 6 specify the conditions under which EU citizens and their family members can enter and reside in another Member State, including the types of documentation required.

⁵² Articles 9 to 11 outline the procedures for obtaining a residence card.

⁵³ Articles 2 and 3, as well as Articles 7 and 12 to 15, address the rights of family members to accompany or join the EU citizen in the host Member State.

⁵⁴ Articles 27 to 33 allow Member States to restrict freedom of movement and residence on grounds of public policy, public security, or public health.

However, any such restrictions must be proportionate and based on individual assessments, ensuring that they are not applied in a blanket or discriminatory manner.

Another noteworthy aspect is the directive's focus on the principle of equal treatment⁵⁵. It stipulates that EU citizens and their family members residing in another Member State should be treated equally to nationals of that State, particularly in matters of employment, education, and social benefits. This reinforces the non-discrimination principle and ensures that individuals exercising their right to free movement can fully integrate into the host society.

Directive 2014/54/EU⁵⁶ is a specialized legal instrument designed to facilitate the practical implementation of the rights enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU). While Article 45 and Directive 2004/38/EC lay the foundational principles for the freedom of movement, Directive 2014/54/EU focuses on the more practical details that ensure these principles are effectively translated into everyday practice. It serves as a mechanism to bridge the gap between high-level legal provisions and the real-world experiences of EU citizens who exercise their right to work in another Member State. A standout feature of this directive is its emphasis on combating discrimination based on nationality⁵⁷. While the principle of non-discrimination is inherent in the broader legal framework of the EU, this directive takes a more targeted approach. It outlines specific measures that Member States must implement to eliminate obstacles that EU citizens might face when seeking employment in another country. This includes ensuring that job postings, recruitment processes, and employment conditions are free from any form of nationality-based discrimination.

The directive also mandates Member States to set up 'contact points'⁵⁸ equipped to provide information and assistance to individuals facing issues related to free movement and residence. These contact points serve as a valuable resource for EU citizens, offering guidance on administrative procedures, recognition of qualifications, and access to social benefits. By doing so, the directive aims to make the process of moving and working across borders as seamless as possible.

⁵⁵ Article 24 focuses on the principle of equal treatment, ensuring that EU citizens and their family members should be treated equally to nationals of the host Member State.

⁵⁶ European Union, Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers Text with EEA relevance, , 30/4/2014, *OJ L 128*, p. 8–14

⁵⁷ This is supported by the directive's preamble and Article 3, which focus on the importance of non-discrimination based on nationality. The directive aims to ensure equal treatment for all Union citizens in the context of employment and social advantages.

⁵⁸ Article 4 mandates Member States to designate one or more contact points to provide information and assistance to Union workers and their family members. These contact points are intended to offer guidance on administrative procedures, recognition of qualifications, and access to social benefits.

It is also important to note that the directive prioritizes enforcement mechanisms⁵⁹. It requires Member States to establish effective, proportionate, and dissuasive penalties for violations of the non-discrimination principle. This ensures that the directive is not just a paper tiger but has real teeth to enforce its provisions. It also provides a legal basis for individuals to seek redress⁶⁰ in national courts if they believe their rights under Article 45 have been infringed upon. While the directive does not introduce new categories of individuals who can benefit from free movement, it significantly enhances the quality of that movement for workers. It recognizes that the mere existence of legal rights is insufficient; these rights must be accessible and enforceable to have any meaningful impact⁶¹. Therefore, the directive serves as a toolkit that empowers EU citizens to fully realize the benefits of one of the Union's cornerstone freedoms.

One of the ECJ's most significant contributions to the freedom of movement is its ability to clarify ambiguities in the law. For example, the term "worker" as used in Article 45 of the TFEU is not explicitly defined, leaving room for interpretation. The ECJ has stepped in to provide a more nuanced understanding, ensuring that the term encompasses part-time workers, seasonal workers, and even those in irregular employment, as long as the work is "genuine and effective."

Landmark cases such as *Bosman (C-415/93)*⁶² have had a transformative impact on the freedom of movement. In the case, Jean-Marc Bosman, a Belgian footballer, sought to move from RFC Liège in Belgium to Dunkerque in France. However, the transfer was blocked due to the existing transfer fee system, which required the buying club to pay a fee to the selling club even when the player's contract had expired. Bosman took the case to the Court, arguing that this system was a violation of Article 45 of the TFEU, which prohibits restrictions on the freedom of movement for workers. The Court ruled in Bosman's favor, stating that the transfer fee system was indeed a restraint on the free movement of workers. This judgment had a profound impact, leading to the abolition of the transfer fee system for out-of-contract players moving between clubs in

⁵⁹ Article 7 requires Member States to lay down rules on penalties applicable to infringements of the provisions of this directive. This aligns with the previous point about the directive giving practical solutions to enforce its provisions.

⁶⁰ Articles 6 and 8 provide for judicial and administrative procedures for legal redress, ensuring that Union workers have avenues for seeking justice if they believe their rights have been infringed upon.

⁶¹ Article 9 focuses on the importance of making information available to Union citizens about their rights under this directive. This is in line with my previous point about the directive aiming to make the process of moving and working across borders as seamless as possible.

Article 5 and Article 10 emphasize the need for cooperation between designated bodies and existing information and support tools at the Union level, such as Your Europe, SOLVIT, and EURES.

Article 4(4) and Article 5(2) specify that designated bodies should provide independent assistance, including legal advice and information about complaint procedures, to Union workers and their family members.

⁶² C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, 15/12/1998

different EU Member States. The ruling not only changed the dynamics of European football but also set a precedent that extended the scope of Article 45 to sectors beyond traditional employment.

The Carpenter case (C-60/00)⁶³ is another milestone, as it extended the scope of free movement to include the right to family life. The case involved a British citizen, Michael Carpenter, who provided advertising services across the EU. His wife, a Philippine national, was denied the right to reside in the UK. The ECJ was asked to consider whether the UK's refusal to grant Mrs. Carpenter a residence permit was contrary to Mr. Carpenter's right to free movement as established under EU law. The court ruled that the right to free movement also implied the right to lead a normal family life. In this context, the Court stated that a refusal to grant a residence permit to a family member could discourage the worker from effectively exercising their rights to free movement. This case was groundbreaking because it extended the scope of free movement rights to include considerations of family life, thereby adding a social dimension to what had previously been viewed primarily as an economic right.

The European Court also plays a crucial role in ensuring that Member States comply with EU law. It has the authority to issue sanctions against countries that fail to implement directives related to free movement or that enact policies contradicting the principles of non-discrimination. This enforcement capability makes the ECJ a key player in maintaining the integrity of the freedom of movement within the EU. Moreover, the court's judgments often have a ripple effect, influencing not just national legislation but also administrative practices. For instance, rulings related to the recognition of professional qualifications across Member States have led to administrative changes, making it easier for workers to have their skills and credentials acknowledged when moving to a different country.

Finally, the Schengen Borders Code (SBC)⁶⁴, officially known as Regulation (EU) 2016/399, outlines the regulations for conducting checks on individuals at external borders and sets the criteria for temporary reinstatement of border controls within the Schengen Area. The SBC defines internal borders as the shared land borders, including those along rivers and lakes, among Member States, as well as their airports for domestic flights and ports for regular internal ferry services.

Articles 25, 28, and 29 of the SBC grant Member States the authority to temporarily reestablish border controls at internal borders if there is a significant risk to public policy or internal security. While the regulation doesn't explicitly mention public health, it is broadly

⁶³ Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, 11/07/2002.

⁶⁴ 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) (codification), 23.3.2016, OJ L 77, p. 1–52.

interpreted under the term "public policy." Therefore, in a pandemic situation, the rationale for reinstating border controls between Member States is to mitigate immediate or future threats to public health. However, this action must be a last resort and adhere to the principles of proportionality and necessity. While the European Commission can offer an opinion on the necessity and proportionality of the measure, it doesn't have the power to veto a decision made by a Member State.

Member States have employed different strategies in using border control, opting for either Article 25 or Article 28 of the SBC. These articles differ in terms of when they come into effect, the duration, and the notification requirements. Specifically, Article 25 is applicable for anticipated events that pose serious threats to public policy or internal security. This article allows for the reintroduction of border control for up to 30 days, extendable for additional 30-day periods, with a maximum limit of six months. The text of Article 25 states:

"1. Where, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days and if it persists beyond the period t may prolong border control at its internal borders for renewable periods of up to 30 days. 4. The total period shall not exceed six months. Where there are exceptional circumstances as referred to in Article 29, that total period may be extended to a maximum length of two years."

On the other hand, Article 28 is designed for situations that require immediate action due to a significant threat to public policy or internal security. This article allows for the immediate reintroduction of border control for up to 10 days, extendable for additional 20-day periods, with a maximum limit of two months. The text of Article 28 states:

"1. Where a serious threat to public policy or internal security in a Member State requires immediate action to be taken, the Member State concerned may, on an exceptional basis, immediately reintroduce border control at internal borders, for a limited period of up to ten days. 3. If the serious threat to public policy or internal security persists beyond the period provided for to prolong the border control at internal borders for renewable periods of up to 20 days."

Another key difference is the notification requirement. According to Article 25, Member States must notify the Commission and other Member States at least four weeks before the planned reintroduction of border control. However, Article 28, due to its immediate nature, does not require prior notification; instead, the Commission and Member States must be informed as soon as the measure is implemented.

1.4 The economic and political climate during major health crises

During the SARS outbreak that spanned from 2002 to 2004, the European Union's political climate was shaped by a multifaceted array of factors that collectively contributed to its reluctance to impose restrictions on the freedom of movement of persons. One of the most salient factors was the EU's governance structure. The European Union operates on a principle of subsidiarity⁶⁵, which means that decisions are made as closely as possible to the citizen. In practical terms, this means that health policy is largely a national competency. The EU's role is more of a coordinating body that facilitates dialogue and action among member states rather than imposing unilateral directives. This decentralized approach allows for a more flexible response to public health crises, tailored to the specific needs and circumstances of individual countries. However, it also means that the EU was cautious about overstepping its jurisdictional boundaries, focusing instead on facilitating a coordinated response among member states rather than imposing a one-size-fits-all solution.

Economic considerations played a pivotal role in shaping the European Union's cautious approach to imposing restrictions on the freedom of movement during the SARS outbreak of 2002-2004. The EU, as one of the world's most significant trading blocs, has a complex and interdependent economic relationship with countries across the globe. This includes nations that were directly impacted by the SARS outbreak, such as China and Canada. The intricate web of trade agreements, import-export dynamics, and multinational business operations that the EU is part of made the decision to restrict movement a highly consequential one, fraught with economic risks and uncertainties. The EU's trade relations are not just about the exchange of goods; they are deeply intertwined with the freedom of movement. Business travel, for instance, is a crucial aspect of these economic relationships. Executives, salespeople, and technicians regularly travel between the EU and countries like China for negotiations, inspections, and various other business activities.

⁶⁵ The principle of subsidiarity aims to ensure that lower authorities have a certain level of autonomy from higher bodies or local entities from central government. This principle encourages the distribution of powers across multiple authority tiers, serving as the foundational concept for federal systems. In the EU's context, the subsidiarity principle dictates when the Union should exercise its non-exclusive powers. The Union should only intervene if an issue cannot be adequately addressed by Member States at the central, regional, or local levels. The Union's involvement is warranted only if the objectives cannot be met effectively by Member States and if there's a clear benefit from the Union's involvement. According to Article 5(3) of the TEU, for the Union institutions to intervene based on the subsidiarity principle, three conditions must be met: (a) the matter doesn't fall under the Union's exclusive rights but rather its shared rights; (b) the goals of the proposed action can't be met sufficiently by Member States alone, highlighting the need; (c) the action, because of its magnitude or impact, can be better executed by the Union, emphasizing its unique value.

Any restrictions on this kind of movement could have immediate repercussions on deals, contracts, and ongoing business operations, potentially leading to financial losses and strained relations between trading partners.

Moreover, the EU's economy is intricately linked to global supply chains. Industries such as automotive manufacturing, technology, and pharmaceuticals often rely on components or raw materials sourced from different parts of the world, including countries affected by the SARS outbreak. Imposing travel restrictions could disrupt these supply chains, leading to delays, increased costs, and a potential loss of competitiveness for European industries. For example, if travel restrictions prevented quality control inspectors from visiting suppliers in affected countries, this could lead to delays in shipments, triggering a domino effect of setbacks and financial losses across multiple sectors.

The potential impact on the labor market was another economic consideration. The EU is home to a diverse workforce, including many non-EU nationals. Restrictions on movement could affect the availability of labor, particularly in sectors that rely on skilled or seasonal workers from outside the EU. This could lead to labor shortages, increased costs for employers, and ultimately, higher prices for consumers. Given these multifaceted economic stakes, the EU had to weigh the potential public health benefits of travel restrictions against the likely economic costs. The calculus was complex and fraught with uncertainties. On one hand, there was the imperative to protect public health; on the other, there was the risk of triggering a cascade of economic disruptions that could undermine the stability and prosperity of the Union.

In summary, the EU's hesitation to impose restrictions on the freedom of movement during the SARS outbreak was not merely a matter of principle or governance; it was a calculated decision influenced by a myriad of economic considerations. The potential for ripple effects across trade relations, supply chains, business operations, and labor markets made the decision exceptionally complex. Given the high economic stakes, the EU opted for a cautious approach, focusing on other preventive measures while keeping the channels of trade and movement as open as possible.

Furthermore, the role of public sentiment and political momentum within the European Union during the SARS outbreak cannot be overstated when examining the Union's reluctance to impose travel restrictions. Unlike other crises where public outcry or political activism might compel swift and decisive action, the atmosphere within the EU during this period was notably subdued in terms of calls for limiting the freedom of movement. This lack of pressure from both the populace and political institutions provided the EU with greater latitude to explore alternative avenues for disease control and prevention. In many instances, the media serves as a barometer for public opinion, and during the SARS outbreak, media outlets within the EU were more inclined to

cover aspects other than travel restrictions. Stories and reports often centered around the rapid identification of SARS cases, the effectiveness of quarantine measures, and the protocols for screening incoming passengers at airports and other points of entry. This media focus, in turn, shaped public discourse, steering conversations away from the topic of restricting movement and towards other preventive strategies.

Political entities, including parties, parliamentarians, and policymakers, also seemed to mirror this public sentiment. There were no significant lobbying efforts or legislative pushes aimed at enforcing travel restrictions. Instead, the political discourse was aligned with the broader public focus on alternative preventive measures. This could be attributed to a variety of reasons, including a desire to avoid the economic and social repercussions of travel restrictions, or perhaps a belief in the efficacy of other measures that were less disruptive to the lives of EU citizens. The absence of a strong call for travel restrictions from influential opinion-makers, such as thought leaders, academics, and public intellectuals, further contributed to the EU's freedom to consider other options. Often, these individuals have the power to shape public opinion and influence political action, but during the SARS outbreak, there was no concerted effort from these quarters to advocate for limiting the freedom of movement.

Moreover, various civil society organizations⁶⁶, which often serve as advocates for public health measures, were also not vocally advocating for travel restrictions. Their campaigns and informational efforts were largely aligned with the prevailing focus on early detection, effective quarantine, and thorough screening procedures⁶⁷. This collective lack of advocacy for travel restrictions across multiple societal sectors—media, politics, thought leaders, and civil society—essentially provided the EU with a broader range of options for managing the crisis. Without the pressure to conform to public or political demands for immediate and restrictive action, the EU had the flexibility to adopt a more nuanced, multi-faceted approach to controlling the spread of SARS.

⁶⁶ Civil Society Organizations (CSOs) are independent, volunteer-driven entities that typically operate on a nonprofit basis. They are established and managed by ordinary citizens with the aim of advocating for the shared interests and concerns of their members, specific target groups, or the broader public. CSOs determine their governance structures and activities without substantial government control or representation. CSOs primarily focus on delivering services, particularly in terms of ensuring access, quality, and accountability. They play pivotal roles in sustaining democratic governance systems and actively participate in social, economic, and cultural endeavors. CSOs come in various forms, each serving a vital role in society. Examples include community-based organizations, village associations, environmental advocacy groups, agricultural cooperatives, faith-based groups, labor unions, and co-operatives.

⁶⁷Centers for Disease Control and Prevention,(2005), *Public Health Guidance for Community-Level Preparedness and Response to Severe Acute Respiratory Syndrome (SARS)*, Available online: <https://www.cdc.gov/sars/guidance/core/keymeasures.html> (Accessed 19/09/2023)

The European Union's dedication to working in harmony with global entities⁶⁸ significantly influenced its cautious stance on imposing travel restrictions during the SARS outbreak. This commitment to international cooperation is a hallmark of the EU's approach to global challenges, and it was particularly evident in how the Union navigated the complexities of the SARS crisis. The EU's collaboration with global health bodies, most notably the World Health Organization (WHO), played a pivotal role in shaping its response to the outbreak.

The EU's approach to international collaboration is rooted in a broader philosophy that global challenges require global solutions. In the context of a public health crisis like SARS, this meant that unilateral actions, such as imposing travel restrictions without international consultation, were viewed as less desirable. Such actions could potentially undermine global efforts to control the spread of the disease and could lead to diplomatic tensions with other countries and international organizations.

The EU's alignment with WHO guidelines⁶⁹ during the SARS outbreak is a case in point. The WHO serves as a global authority on public health issues, providing evidence-based guidelines and recommendations. By closely aligning its actions with WHO guidelines, the EU was not only adhering to internationally recognized best practices but also contributing to a unified global response to the crisis. This alignment had the added benefit of lending credibility to the EU's actions, both domestically and internationally, as they were backed by the expertise and authority of a respected global health body.

Moreover, the EU's commitment to international collaboration extended beyond its relationship with the WHO. The Union engaged in dialogue and shared information with other international partners, including countries that were directly affected by the outbreak and other regional organizations. This collaborative approach allowed for a more comprehensive understanding of the crisis, enabling the EU to make more informed decisions. It also facilitated the pooling of resources and expertise, which is crucial in tackling a complex and rapidly evolving public health crisis.

This focus on international collaboration also had implications for the EU's internal decision-making processes. It served as a moderating influence against any internal pressures or tendencies to take unilateral actions that could disrupt a coordinated global response. In essence, the EU's commitment to international collaboration acted as a form of checks and balances within

⁶⁸ Mainly with WHO, but also with the UN, the Center for Disease Control and Prevention (CDC), China, Hong Kong, Taiwan etc.

⁶⁹ World Health Organisation, (2004), *WHO guidelines for the global surveillance of severe acute respiratory syndrome (SARS) Updated recommendations October 2004*, Available online: https://cdn.who.int/media/docs/default-source/documents/health-topics/who-cds-csr-aro-2004-18fcdaab9-a1ca-42f7-adaf-d5c624b54b76.pdf?sfvrsn=949080c3_1&download=true (Accessed 19/09/2023).

its own decision-making framework, ensuring that any actions taken were carefully considered and aligned with broader global efforts.

In summary, the European Union's strong commitment to international collaboration was a defining factor in its cautious and balanced approach to the SARS outbreak. By prioritizing alignment with global health guidelines and fostering cooperation with international partners, the EU contributed to a coordinated global response to the crisis. This internationalist approach not only influenced the specific actions taken by the EU but also reinforced its overarching philosophy that complex global challenges are best addressed through collective action.

The European Union's handling of the H1N1 pandemic, juxtaposed against its approach during the SARS outbreak, offers a fascinating insight into the political dynamics at play. As was said before the principle of subsidiarity was taken heavily into consideration in both health crises. However, during the H1N1 pandemic, the EU's role as a harmonizing force among member states became even more pronounced. The rapid global spread of H1N1 demanded a higher degree of coordination, ensuring that nations were pooling resources, sharing vital information, and learning from each other's experiences.

Economic implications always loom large in such decisions, and the H1N1 scenario was no exception. The EU's deep economic entanglements globally meant that movement restrictions could have had severe repercussions. The memory of the SARS outbreak, where economic and health concerns had to be delicately balanced, undoubtedly influenced the EU's strategy during H1N1. The vast web of trade, labor, and business travel that stitches the EU together with the world meant that any movement restrictions could ripple out, affecting various sectors of the economy.

Public reaction and sentiment are crucial in shaping policy decisions. The H1N1 pandemic, given its rapid spread, understandably evoked a heightened sense of concern among the public. However, the EU, having navigated the SARS outbreak, was wary of making decisions driven by panic. Instead, there was a concerted effort to base actions on scientific evidence and expert consultations, ensuring that the public's health and safety were prioritized without causing undue alarm.

Lastly, the EU's commitment to working in tandem with global entities, especially health organizations like the WHO, shone brightly during the H1N1 crisis. The pandemic's global nature underscored the need for nations to come together, share best practices, and strategize collectively. The EU's actions, therefore, were not just about its internal decision-making but were also about being a responsible player on the global stage.

An evaluation report⁷⁰ of the EU-wide response to the H1N1 pandemic was made in order to examine the EU's actions during the first four months. The objectives encompassed evaluating pandemic response plans, business continuity plans, communication systems, coordination of public health measures, media response, and the utilization of vaccines and anti-viral medicines. The methodology involved a web-based survey with 22 member state responses and interviews with ECDC, EMA, and DG SANCO personnel. The primary purpose was to glean lessons from the early stages of the crisis to guide ongoing and future public health responses within the EU. Emphasis was placed on the interoperability of member state pandemic plans, business continuity, communication tools, coordination, public health measures, media messaging, and the availability of vaccines and medicines. The overarching message highlighted the importance of preparedness, effective communication, and coordination among member states and agencies, with a recommendation for ongoing evaluation and strategy refinement.

The report highlights the need for the European Union and its Member States to enhance their preparedness and response strategies for influenza pandemics. It advocates for a revision of prevention plans to ensure they are effective, coherent, and can be swiftly adapted based on current information. There's a call for clarity on the roles and responsibilities of key EU entities, such as the European Commission, ECDC, and EMA, in managing medical threats, with an emphasis on making this information public. The Commission's efforts to strengthen the legal foundation of the Health Security Committee are acknowledged. The importance of inter-sectoral preparation and enhanced cooperation between Member States, especially in the early stages of an outbreak, is emphasized. The report also suggests reinforcing the Committee of Public Health's mandate and urges the World Health Organization to reconsider its definition of a "pandemic" to account for severity, not just spread. Health professionals' involvement in pandemic strategies, increased investment in research, and continued support for national surveillance centers are deemed crucial. The report approves of group purchasing of vaccines and medicines by Member States and emphasizes manufacturers' responsibility for product quality and safety. Lastly, it proposes considering easier vaccine access for developing nations during pandemics.

To sum it up, the EU's response to the H1N1 pandemic, when contrasted with its actions during the SARS outbreak, was a blend of lessons learned, economic pragmatism, societal considerations, and global collaboration. It's a testament to the EU's adaptability and its unwavering commitment to the well-being of its citizens and the broader global community.

⁷⁰European Parliament, 2012, *European Parliament resolution of 8 March 2011 on evaluation of the management of H1N1 influenza in 2009-2010 in the EU*, 7/7/2012 OJ C 199E, p. 7–15.

Part II: The COVID Era - Unprecedented Challenges and Responses

1.1 The immediate impact of COVID-19 on the EU

In the annals of contemporary history, the COVID-19 pandemic emerged as an unforeseen and transformative event that deeply affected the foundational legal philosophies within the European Union. This monumental health crisis confronted the European Union with an intricate conundrum: harmonizing the imperative of safeguarding public health with the esteemed principle of freedom of movement of persons. Compelled to respond expeditiously within a limited temporal framework, the European Union found itself necessitated to recalibrate its approach to address the altered circumstances. This recalibration was indispensable not merely from a legal standpoint, but also to ensure the preservation and resilience of its broader socio-political fabric, economic stability, and overarching institutional integrity.

On the last day of the year 2019, specifically on December 31st, the World Health Organization (WHO) received alarming reports about a mysterious outbreak of pneumonia cases in Wuhan City, located in the Hubei Province of China. At this initial stage, medical experts and authorities were in the dark about the nature of the virus causing these illnesses. The situation was shrouded in uncertainty, and the global community was largely unaware of the impending health crisis that would soon grip the world.

Fast forward to January 7, 2020, a significant development occurred. Chinese health authorities were able to identify the mysterious pathogen as a novel coronavirus. They officially named it the "COVID-19 virus," marking it as the causative agent behind the pneumonia cases that had been perplexing medical professionals. This identification was a critical milestone, but it was just the tip of the iceberg in understanding the complexity and the potential severity of the virus.

As the days passed, the situation escalated at an alarming rate. Recognizing the gravity of the unfolding events, Dr. Tedros Adhanom Ghebreyesus, the Director-General of the WHO, took a decisive step. On January 30, 2020, he declared the outbreak a "Public Health Emergency of International Concern" (PHEIC)⁷¹. This designation was intended to mobilize international resources and attention. However, despite this high-level alert, the virus continued its relentless spread across borders. By early March 2020, the crisis had escalated to such an extent that a global

⁷¹ According to WHO documentation, since the introduction of PHEIC regulation in 2009, the declaration had only been issued on five other occasions: the 2009 H1N1 pandemic, the 2014 Polio declaration, the 2014 outbreak of Ebola in Western Africa, the 2015-16 Zika virus epidemic, and the 2018-20 Kivu Ebola epidemic

pandemic state of emergency was declared⁷². Europe, in particular, emerged as the new epicenter of the health crisis⁷³, grappling with an overwhelming number of cases and healthcare challenges. In the early stages of the outbreak, the WHO had issued its first set of recommendations on January 10, 2020. These guidelines primarily focused on international travel and entry control measures for countries. Interestingly, the initial recommendations did not advocate for any travel restrictions to and from the affected regions in China. However, the WHO quickly realized the need for more stringent measures. By January 20, the organization revised its guidelines, now endorsing "measures to limit the risk of exportation or importation of the disease." The revised guidelines also emphasized the need for "temperature control and data collection"⁷⁴ at international entry points. The WHO urged member states to collaborate closely and share the results of their analyses and findings on the virus. The first case of COVID-19 in the European region was confirmed in France on January 25, 2020. This event signaled the beginning of a new chapter in the pandemic, one that would see Europe becoming a focal point of the global health emergency.

As the COVID-19 pandemic continued to evolve, the World Health Organization (WHO) found it necessary to adapt its guidelines to better align with the actions being taken by various countries. On February 11, 2020, the WHO made another significant update to its recommendations. This time, the organization acknowledged the need for more stringent "travel measures that significantly interfere with international traffic for more than 24 hours." This was a marked shift from its earlier stance, which had been more cautious about imposing travel restrictions. The WHO made it clear that these drastic measures could be justified if they were in the interest of safeguarding public health.

However, the WHO also took the opportunity to remind member states of their legal obligations under international law. Specifically, the organization pointed to Article 43 of the International Health Regulations (2005), which mandates that States Parties must promptly inform the WHO about any additional health measures that could significantly disrupt international travel. This was a crucial point, emphasizing the need for transparency and cooperation among nations, especially when implementing measures that could have a global impact.

Despite these updated guidelines, the situation continued to deteriorate at an alarming rate. Countries around the world began to introduce increasingly strict travel restrictions in an attempt

⁷² The WHO Director General issued the "pandemic" declaration on March 11, 2020.

⁷³ As reported by WHO, in mid-March 2020, 40% of global cases were confirmed in the European region, which at the end of April displayed 63% of global mortality rate due to COVID-19.

⁷⁴ World Health Organization, 2020, *Updated WHO advice for international traffic in relation to the outbreak of the novel coronavirus 2019-nCoV*. Available online: <https://www.who.int/news-room/articles-detail/updated-who-advice-for-international-traffic-in-relation-to-the-outbreak-of-the-novel-coronavirus-2019-ncov-24-jan/> (Accessed: 23 September 2023).

to contain the spread of the virus. By February 27, 2020, the WHO released a report that painted a sobering picture of the global landscape. According to the organization, since the declaration of the Public Health Emergency of International Concern (PHEIC) related to COVID-19, a total of 38 countries had reported implementing additional health measures that significantly interfered with international traffic. These measures varied widely, ranging from outright denial of entry to passengers from affected areas, to imposing visa restrictions, and even mandating quarantine protocols for returning travelers.

1.2 Shifts in Legal Paradigms

1.2.1 Introduction of new regulations and amendments in response to COVID-19

As previously mentioned, the Schengen Agreement serves as a cornerstone for the free movement of people, goods, and services across 27 countries. This agreement is not just a symbol of European unity but also a practical framework that allows for the seamless crossing of internal borders by nationals of member countries. However, the freedom of movement within the European Union (EU) is not absolute. It is subject to certain limitations and requirements, which are outlined in European regulations as well as the Schengen Acquis⁷⁵, a set of rules and legislation that govern the Schengen Area. The Schengen Agreement includes provisions that allow for the temporary reintroduction of border controls in specific internal areas, particularly in cases where public policy or national security is at stake. This flexibility is crucial, especially in times of crisis, as it enables individual states to take necessary actions to protect their citizens while still adhering to the broader principles of the agreement.

In addition to the Schengen Agreement, the EU has established two distinct legal frameworks designed to address cross-border public health threats. The first is Decision No. 1082/2013/EU⁷⁶, which focuses on serious cross-border threats to health. The second is Decision No. 1313/2013/EU⁷⁷, which establishes a Union Civil Protection Mechanism (UCPM) specifically for health emergencies. These legal tools underscore the shared responsibility among member

⁷⁵ The Schengen acquis - *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, 22/9/2000, OJ L 239, p. 13–18

⁷⁶ Decision No 1082/2013/EU of the European Parliament and of the Council, of October 22, 2013, on serious cross-border threats to health and repealing Decision No 2119/98/EC. OJ L 293/1, of November 5, 2013 (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D1082>). Accessed: 17/09/2023

⁷⁷ Decision No 1313/2013/EU of the European Parliament and of the Council, of 17 December 2013 on a Union Civil Protection Mechanism. OJ L347/924, of 20 December 2013 (available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0924:0947:EN:PDF>). Accessed: 17/09/2023).

states to manage public health crises. While each state retains primary responsibility for handling health emergencies within its borders, these frameworks emphasize that uncoordinated actions can be detrimental not only to individual member states but also to the Union as a whole.

The EU's approach to managing public health crises is rooted in the principle of coordination. The overarching goal is to ensure that any measures taken at the national level are proportionate to the public health risks posed by serious cross-border threats. Moreover, these measures must not conflict with other obligations and rights established under the Treaty on the Functioning of the European Union (TFEU). This includes restrictions related to travel and trade, which are integral components of the Schengen Agreement and the broader European project.

The COVID-19 pandemic presented an unprecedented challenge for Europe, a continent that has long prided itself on the principles of unity and free movement. As the pandemic's numbers soared, causing widespread alarm, the governments of individual member states found themselves in a quandary. Faced with the urgent need to take decisive action, many began to make autonomous decisions, often bypassing the established frameworks for collective action within the European Union (EU).

Italy was among the first to act, initially isolating several municipalities⁷⁸ before extending the lockdown measures to encompass the entire nation⁷⁹. France followed suit, ordering the closure of all its internal borders. Austria took the drastic step of sealing its land border with Italy. As the crisis deepened, other European countries⁸⁰ also began to impose a variety of restrictions on the freedom of movement within their national territories. Spain, for instance, declared a "state of alarm" on March 14, 2020⁸¹. This declaration not only limited the freedom of movement but also

⁷⁸ Decreto-Legge 23 febbraio 2020, n. 6 Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19 (Available at: <https://www.gazzettaufficiale.it/eli/id/2020/02/23/20G00020/sg>). Accessed: 17/09/2023).

⁷⁹ Decreto-Legge 9 marzo 2020, n. 14 Disposizioni urgenti per il potenziamento del Servizio sanitario nazionale in relazione all'emergenza COVID-19 (Available at: <https://www.gazzettaufficiale.it/eli/id/2020/03/09/20G00030/sg>). Accessed: 17/09/2023).

⁸⁰ The complete list of Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28ff. of the Schengen Borders Code is available at: https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control.pdf. Accessed: 17/09/2023.

⁸¹ Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19 (RD 463/2020). BOE, Núm. 67, de 14 de marzo de 2020. About the RD and its legality in relation to ECHR regulations, see: J. Bonet Pérez, "El estado de alarma en España y la cláusula derogatoria del Convenio Europeo para la Protección de los Derechos Humanos y las Libertades Fundamentales", *Revista de Derecho Comunitario Europeo* (2020), 67, pp. 873-919. As late as July 14, 2021, the Constitutional Court of Spain declared the unconstitutionality of the restrictions to the freedom of circulation under the RD 463/2020. See:

https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2021_072/NOTA%20INFORMATIVA%20N%C2%BA%2072-2021.pdf.

included provisions to ensure the uninterrupted supply of essential goods and services⁸². In an extraordinary move, the Spanish government even authorized the temporary occupation of various industries, factories, laboratories, and health facilities, including those in the private sector, to bolster public health efforts.

While national governments seemed to be navigating the crisis in isolation, the EU institutions recognized the urgent need for a unified response. The situation called for unity and coordination in all possible areas, from public health measures to economic interventions. The EU began to actively address this need, advocating for a return to the cooperative paradigm that had been the cornerstone of the Union. Over time, it became increasingly clear that a coordinated approach was not just preferable but essential. The most effective responses to the COVID-19 crisis have come from efforts that leveraged the collective strength and resources of the EU member states.

The early stages of the COVID-19 pandemic revealed the limitations of uncoordinated actions by individual countries, particularly when it came to restricting travel and closing borders. Such measures had a ripple effect on the globalized world, disrupting supply chains and trade flows. The United Nations System highlighted the severe consequences of these disruptions, noting that they compromised the availability and delivery of essential products like food and medicine⁸³. This, in turn, undermined the capacity of countries to effectively respond to the pandemic and initiate sustainable recovery efforts.

Recognizing the need for a coordinated approach, the European Union (EU) took proactive steps early on. Under the Croatian presidency, the EU activated its Integrated Political Crisis Response mechanism (IPCR) in "information sharing mode" on January 28, 2020. This was later escalated to "full mode" on March 2. The first tangible coordinated action came shortly thereafter, on January 31 and February 2, 2020, with the repatriation of European nationals stranded in Wuhan City, China. This operation was conducted in line with the activation of the EU's civil protection mechanism⁸⁴, demonstrating the Union's commitment to collective action.

On February 13, the European Council convened a meeting to discuss the ongoing crisis. The Council's conclusions emphasized the need for continued and increased cooperation at the European level. It stated unequivocally that the EU and its Member States should continue to act

⁸² Art. 7 RD 463/2020. This is one of the provisions affected by the July 14 constitutional ruling mentioned above.

⁸³ Joint Statement by UN system entities on the Contribution of international trade and supply chains to a sustainable socio-economic recovery in COVID-19 times, 16/09/2020, Available online: <https://www.cepal.org/en/notes/joint-statement-contribution-international-trade-and-supply-chains-sustainable-socioeconomic> (Accessed 20/10/2023).

⁸⁴ <https://www.diplomatie.gouv.fr/fr/le-ministere-et-son-reseau/actualites-du-ministere/informations-coronavirus-covid-19/coronavirus-declarations-et-communiqués/article/coronavirus-2019-ncovoperations-de-retour-par-voie-aerienne-directe-organisees>.

decisively in coordination to tackle the threat caused by COVID-19 and to prevent further transmission of the 2019-nCoV virus. Member states were reminded of their obligations to coordinate and cooperate closely in the realm of health security⁸⁵, as outlined in Decision No. 1082/2013/EU and Decision No. 1313/2013/EU.

The Council went further to urge Member States to not only act in concert with European institutions but also to take "necessary and appropriate measures to ensure the protection of public health." Special attention was called to international travel, with the Council advocating for "close and enhanced coordination between Member States to ensure the effectiveness of all measures." This included potential travel-related measures, but always with an eye toward safeguarding the principle of free movement within the EU. The ultimate goal was to optimize the protection of public health while raising the general public's awareness of COVID-19.

On March 16, 2020, in response to the escalating COVID-19 crisis, the European Commission issued a comprehensive set of Guidelines for border management⁸⁶. These guidelines aimed to strike a delicate balance between safeguarding public health and maintaining the integrity of the Single Market, a cornerstone of the European Union (EU). The guidelines laid out specific directives for Member States, urging them to prioritize several key areas:

1. **Emergency Transport Services:** Member States were called upon to give precedence to emergency transport services within their transportation systems.
2. **Unobstructed Transportation of Goods:** The guidelines emphasized the need to ensure a smooth flow of goods, particularly those deemed essential such as food supplies, livestock, and critical medical and protective equipment.
3. **Professional Travel:** The guidelines also advocated for facilitating the movement of transport workers, both across internal and external borders, to ensure the uninterrupted transport of goods and services.

The guidelines allowed for restrictions on the transportation of goods but stipulated that such restrictions must meet certain conditions to ensure their proportionality⁸⁷. In parallel, the World Trade Organization (WTO) was informed of these trade and trade-related measures at the EU level.

⁸⁵ Council Conclusions on COVID-19, adopted by the Council at its 3751st meeting held on February 13, 2020, Council Conclusions on COVID-19, 6038/20, Brussels, February 13, 2020.

⁸⁶ Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 2020/C 86 I/01, OJ C86 I/01, of 16 March 2020. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0316%2803%29> .Last visited: 19/09/2023

⁸⁷ The restrictions permitted under the Guidelines should, in any case be: a) transparent; b) duly motivated by science-based conclusions supported by the WHO and the ECDC; c) proportionate; d) relevant and mode specific; and e) non-discriminatory by any ground.

For external borders, the guidelines mandated systematic checks for all individuals, regardless of whether they were EU or non-EU nationals. Member States were given the discretion to deny entry to non-residents from third countries, provided they adhered to principles of proportionality and non-discrimination. As for internal borders, temporary controls could be reintroduced, but these had to be justified on grounds of public policy or internal security and had to comply with the Schengen Borders Code and the Free Movement Directive.

Despite the comprehensive nature of these guidelines, their implementation was far from uniform across Member States. This led to a perception of a lack of coordination among EU citizens. Some countries chose to reinstate internal borders and ban flights from specific European nations, while others opted to prohibit all non-essential travel outside their borders⁸⁸. The European Commission subsequently issued another set of recommendations focusing on the free movement of workers⁸⁹. However, the prevailing sentiment among EU citizens remained one of disarray and a lack of cohesive action.

In the wake of the initial challenges and varying responses to the COVID-19 pandemic, the European Union (EU) continued to advocate for a unified approach among its Member States. In April 2020, the President of the European Commission and the President of the European Council issued a Joint European Roadmap⁹⁰ aimed at lifting COVID-19 containment measures. This was followed in May by a Commission Communication titled "Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – COVID-19."⁹¹ The primary objective of this communication was to guide Member States in the gradual reopening of unrestricted cross-border movement within the Union.

The coordinated reopening strategy was designed to consider three key factors: (1) epidemiological criteria to assess the spread and impact of the virus; (2) the capacity of health systems to manage and contain outbreaks; and (3) the ability to monitor and track the spread of the disease effectively. During June and July 2020, significant efforts were made to keep EU

⁸⁸ European Centre for Disease Prevention and Control, (2022), Data on country response measures to COVID-19, Available online: <https://www.ecdc.europa.eu/en/publications-data/download-data-response-measures-covid-19> (Accessed 20/10/2023)

⁸⁹ Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 102 I/03). OJ C 102/12, of March 30, 2020 (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0330%2803%29>). Last visited: 19/09/2023.

⁹⁰ Joint European Roadmap towards lifting COVID-19 containment measures 2020/C 126/01. OJ C 126/1, of April 17, 2020 (available at: <https://op.europa.eu/es/publication-detail/-/publication/14188cd6-809f-11ea-bf12-01aa75ed71a1/language-en>). Last visited: 19/09/2023.

⁹¹ Communication from the Commission: Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – COVID-19 (2020/C 169/03). OJ C 169/30, of May 15, 2020 (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0515%2805%29>). Last visited: 19/09/2023.

citizens informed about the evolving situation. On June 15, 2020, the European Commission launched the Re-Open EU initiative, a platform providing travelers with up-to-date information on border regulations, transport options, travel restrictions, and public health and safety measures in individual Member States⁹².

However, by the end of the first "pandemic summer" in 2020, a complete lifting of internal border restrictions had not yet been achieved. Member States once again reinforced internal border closures and imposed limitations on freedom of movement within their national territories. Juan Fernando López Aguilar, the Chair of the Civil Liberties Committee, noted that while the lifting of some internal border restrictions was a positive development, the manner in which it was done left much to be desired. He emphasized that a full return to the Schengen Area's functionality was crucial for the EU's recovery and that core values like free movement, non-discrimination, mutual trust, and solidarity remained paramount⁹³.

On October 13, 2020, EU Member States adopted a Council Recommendation for a coordinated approach to restricting free movement in response to the COVID-19 pandemic⁹⁴. This Recommendation was subsequently updated on February 1⁹⁵ and June 14, 2021⁹⁶, to reflect changes in the epidemiological landscape and the commencement of vaccination campaigns in January 2021.

The Council Recommendation issued in October 2020 (Council Recommendation 2020/1475) acknowledged the challenges posed by unilateral measures, which had the potential to create significant disruptions for businesses and citizens due to rapidly changing and divergent rules. To address this, the Recommendation emphasized the need for increased coordination among Member States to ensure that any restrictions were both strictly necessary and non-discriminatory.

⁹² See <https://reopen.europa.eu/en>. Last visited; 19/09/2023.

⁹³ European Union Agency for Fundamental Rights, "The Coronavirus Pandemic and Fundamental Rights: a Year in Review", 2021, 44 p. (available at: <https://op.europa.eu/en/publication-detail/-/publication/c203efef-c995-11eb-84ce-01aa75ed71a1>). Last visited:19/09/2023.

⁹⁴ Council Recommendation (EU) 2020/1475, of October 13, 2020, on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 337/3, of October 14, 2020, Available online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32020H1475>, (Accessed: 19/09/2023).

⁹⁵ Council Recommendation (EU) 2021/119 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic. OJ L 36I, of February 2, 2021 (available at: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32021H0119>). Last visited: 19/09/2023.

⁹⁶ Council Recommendation (EU) 2021/961 of June 14, 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic. OJ L 213 I/1, of June 16, 2021 (available at: <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:-32021H0961>). Last visited: 19/09/2023.

To facilitate this coordination, the EU outlined a set of general principles and common criteria to guide Member States considering the reintroduction of limitations on freedom of movement. These principles were fivefold:

1. Protection of Public Health: Any restrictions must align with the general principles of Union law, particularly those of proportionality and non-discrimination.
2. Regular Assessment: Member States are obligated to regularly assess the epidemiological situation within their territories.
3. Admission of Nationals: Member States must always admit their own nationals as well as Union citizens and their family members residing in their territory.
4. Attention to Specific Regions: Special consideration must be given to cross-border regions, outermost regions, exclaves, and geographically isolated areas, with a focus on local and regional cooperation.
5. Information Exchange: Member States are required to regularly exchange information related to the principles outlined in the October Recommendation.

The Recommendation also introduced scientific criteria for assessing the epidemiological situation in each Member State. The European Center for Disease Prevention and Control was tasked with classifying European regions into four categories: green⁹⁷, orange⁹⁸, red⁹⁹, and grey¹⁰⁰. Movement between green regions was not restricted, while other options like self-quarantine or COVID-19 testing were considered for people coming from orange, red, or grey regions.

Despite these coordination efforts, the evolving nature of the pandemic, including the benefits of vaccination campaigns and the emergence of new virus variants, necessitated further updates to the regulations. The first such update was published on February 1, 2021, as Council Recommendation (EU) 2021/119. This update confirmed limitations on non-essential travel and maintained restrictions for infected individuals, introducing testing and quarantine measures for travelers from areas with higher incidences of new variants. It also discouraged the general reintroduction of internal border controls and blanket travel bans. Additionally, the classification

⁹⁷ Areas where the 14-day cumulative COVID-19 case notification rate is less than 25 and the test positivity rate of tests for COVID-19 infection is less than 4%.

⁹⁸ Areas where the 14-day cumulative COVID-19 case notification rate is less than 50 but the test positivity rate of tests for COVID-19 infection is 4% or more, or, if the 14 day cumulative COVID-19 case notification rate ranges from 25 to 150 but the test positivity rate of tests for COVID-19 infection is less than 4%.

⁹⁹ Areas where the 14-day cumulative COVID-19 case notification rate is 50 or more and the test positivity rate of tests for COVID-19 infection is 4% or more, or if the 14-day cumulative COVID-19 case notification rate is more than 150 per-100 000 population.

¹⁰⁰ Areas where not sufficient information is available to assess the criteria or if the testing rate is 300 or less COVID-19 tests for infection per-100000 population.

system was updated¹⁰¹ to include a new category: "dark red" regions¹⁰², indicating areas with particularly high rates of infection.

In June 2021, the Council Recommendation was updated for the second time, reflecting the significant changes in the epidemiological landscape. By this point, a large percentage of EU citizens had been vaccinated, and the global situation had generally improved. The updated Recommendation, known as 2021/961, aimed to adapt the existing framework to these new realities, particularly in anticipation of the summer of 2021. One of the most notable developments was the rapid implementation of the EU Digital COVID Certificate¹⁰³, which necessitated an update that would consider not just local conditions but also the evolving scientific criteria that underpinned these new regulations.

Two new criteria were introduced in this update. First, the vaccination rate within specific areas was considered, acknowledging the growing importance of vaccination as a tool for managing the pandemic. Second, the prevalence of COVID-19 variants in specific regions was also taken into account, given their potential to alter the course of the pandemic significantly.

The updated Recommendation continued to classify regions as green, orange, or red but introduced new thresholds and what has been termed an "emergency brake" mechanism. This mechanism allows Member States to impose additional measures like testing, quarantine, or self-isolation on holders of vaccination or recovery certificates if the epidemiological situation in a particular state or region worsens rapidly. This adaptive approach provides Member States with the flexibility to respond to sudden changes in the pandemic's trajectory while maintaining a coordinated EU-wide strategy. Moreover, the Recommendation advises Member States to avoid imposing testing and quarantine requirements on individuals holding vaccination passports, thereby facilitating easier movement across borders for vaccinated individuals. This reflects a broader shift towards recognizing vaccination as a key factor in restoring normalcy, both within Member States and across the EU as a whole.

As of August 2021, every Member State adheres to the guidelines outlined in Recommendation 2021/961. This not only promotes vaccination but also advances a unified strategy towards pandemic risk evaluation and management. This united front has bolstered the trust of European

¹⁰¹ For Recommendation (EU) 2021/119, "red regions" would be areas where the 14-day cumulative COVID-19 case notification rate ranged from 50 to 150 and the test positivity rate of tests for COVID-19 infection was 4 % or more, or if the 14-day cumulative COVID-19 case notification rate was more than 150 but less than 500.

¹⁰² Areas where not sufficient information is available to assess the criteria or if the testing rate is 300 or less COVID-19 tests for infection per-100000 population.

¹⁰³ Regulation (EU) 2021/953 of the European Parliament and of the Council of June 14, 2021 on a framework for the issuance, verification, and acceptance of interoperable COVID 19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID 19 pandemic. OJ L 211, of June 14, 2021.

citizens. They have shown appreciation for the measures introduced in their nations, designed to remedy the challenges faced in the pandemic's early days when they felt isolated. The actions of the European institutions highlight the power of a collective response to crisis management. This approach has elevated the Union's global reputation during the COVID-19 situation¹⁰⁴. It's become evident that every Member State should have a voice in decisions that touch the heart of the Union's principles. Only through this collaborative spirit can the European Union truly remain united.

1.2.2 Case Law in the New Normal

The landmark case arising from COVID-related restrictions, Case 128/22

Even though there have not been many definitive court decisions concerning the restriction on the freedom of movement of persons within the European Union, there is an exceptional case (C-128/22¹⁰⁵) that sheds light on this matter. The Advocate General has already presented her opinion on the case and, very recently¹⁰⁶, a judgement has been passed.

In this case, the plaintiff (NORDIC INFO) argues that the defendant (Belgische Staat) made mistakes in implementing a ban on non-essential travel to combat the COVID-19 pandemic. This ban used the color-coded system based on epidemiological data to categorize countries. The plaintiff, a travel organization, is seeking damages for the losses incurred due to the introduction and subsequent changes to this color-coded system. The court in question aims to determine if a broad national action that restricts the movement of Union citizens, based on the color-coded system, aligns with specific Articles from Directive 2004/38/EC and Regulation (EC) No 562/2006. These Articles pertain to the rights of Union citizens and their families to freely move and reside within Member States and the rules for crossing borders.

Preliminary Questions for Judicial Review

1. Should Articles 2, 4, 5, 27, and 29 of the Citizenship Directive 2004/38, which enact Articles 20 and 21 of the TFEU, be understood as not ruling out a Member State's regulations (in this case, originating from Articles 18 and 22 of the Ministerial Decree of 30 June 2020 aimed at curbing the spread of COVID-19) that generally restrict movement?

¹⁰⁴ R.A. Montenegro, "Viral Pandemic in Solidarity: The need for a convention on emergencies and a single UN agency to face disasters", GC Human Rights Preparedness, 28 June 2021, Available online: <https://gchumanrights.org/gc-preparedness/preparedness-human-rights-defenders/article-detail/viral-pandemic-in-solidarity-the-need-for-a-convention-on-emergencies-and-a-single-un-agency-to-face-disasters-4924.html> (Accessed 19/09/2023)

¹⁰⁵ Case C-128/22, Request for a preliminary ruling from the Nederlandstalige rechtbank van eerste aanleg Brussel (Belgium) lodged on 23 February 2022 — NORDIC INFO v Belgische Staat,

¹⁰⁶ On 05/12/2023.

2. Should Articles 1, 3, and 22 of the Schengen Borders Code be interpreted as not excluding Member State regulations that not only impose a ban on non-essential exits and entries but also allow for these bans to be enforced by the Minister, mayor, and police commander?

Referenced European Union Legal Frameworks

The case relies on the following EU legal texts:

- Directive 2004/38/EC, specifically Articles 2, 4, 5, 27, and 29, which focus on the free movement and residence rights of Union citizens and their families.
- Regulation (EC) No 562/2006, or the Schengen Borders Code, particularly Articles 1, 3, and 22, which establish rules for the movement of individuals across borders.
- European Commission's COVID-19 Guidelines¹⁰⁷ dated 16 March 2020 for managing borders to safeguard health and essential services.
- A proposal by the European Commission¹⁰⁸ dated 14 December 2021 to amend Regulation (EU) 2016/399 concerning rules for cross-border movement.
- Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU).

Cited National Legal Provisions

The case refers to the Ministerial Decree of 30 June 2020¹⁰⁹, which was later amended by another decree on 10 July 2020¹¹⁰. This national legislation includes urgent measures to control the spread of COVID-19 and specifically cites Articles 18 and 22.

Facts of the Case

To urgently mitigate the spread of COVID-19, the defendant enacted a prohibition on non-essential travel to and from Belgium. Effective from July 12, this ban employed a color-coding system that sorted countries into green, orange, or red categories based on their public health data. A green status permitted unrestricted travel, an orange status advised against travel and suggested optional quarantine and testing upon return, and a red status forbade travel and required mandatory quarantine and testing for returnees. In case of non-compliance, the law authorized enforcement actions, which could be initiated by the Minister of the Interior, local mayors, and police commanders.

The plaintiff offered various travel packages, including trips to Sweden. When Sweden was categorized as 'red' on July 12, 2020, the agency had no choice but to cancel all its upcoming

¹⁰⁷ Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 86 I/01, 16.3.2020, OJ C 86I p. 1–4.

¹⁰⁸ Proposal for a Regulation Of The European Parliament And Of The Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM/2021/891 final.

¹⁰⁹ Ministerieel besluit houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken, 30/6/2020.

¹¹⁰ Ministerieel besluit houdende wijziging van het ministerieel besluit van 30 juni 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken, 10/07/2020.

summer trips from Belgium to Sweden. They also provided support to travelers who were already in Sweden. On July 15, 2020, Sweden's color status was updated to 'orange,' thus reopening the opportunity for travel to the country.

The plaintiff argued that the defendant made errors in the formulation of the travel restrictions and is petitioning the court for compensation for the financial losses they alleged to have incurred due to the initiation and subsequent modifications of the color-coded system.

Essential arguments of the parties to the main proceedings

The plaintiff contended that the defendant made mistakes in implementing a broad, non-specific measure that hindered the movement of Union citizens. The plaintiff's arguments are based on multiple legal points, two of which are grounded in European Union law.

Firstly, the plaintiff asserted that the travel restrictions conflict with Directive 2004/38. Specifically, they argued that the ban on exiting the country for Union citizens and their families contradicts this directive. Additionally, they claimed that the general entry ban on non-Belgian Union citizens, without individual assessment, goes against Articles 27 to 31 of the same directive. Secondly, the plaintiff argued that the measures introduced by the defendant violate the criteria set forth in Articles 25 to 30 of the Schengen Borders Code. They claimed that public health is not listed as a valid reason for temporarily reinstating border controls in the code. Furthermore, they argued that the proposed border control, executed through police power, effectively serves as a border check, which, as they claimed, breaches Article 23(a) of the Schengen Borders Code.

In response, the defendant argued that the freedom of movement is not an absolute right and can be limited for public health reasons. They cited long-standing practices and various international laws and guidelines to support their case. Specifically, for exit restrictions, they referred to Articles from the Fourth Protocol to the European Convention on Human Rights and the International Covenant on Civil and Political Rights¹¹¹, which they claim allow for such limitations to protect public health. For entry restrictions, they cited Court of Justice case law and Articles 27 and 29 of Directive 2004/38 as providing a legal basis for such general limitations.

Regarding the second point, the defendant admits that while public health is not explicitly mentioned in the Schengen Borders Code, it is an implicit objective. They believe their actions are justified based on the precautionary principle and the need to maintain public policy and internal security, a stance they claim is supported by Court of Justice case law and European Commission guidelines¹¹².

¹¹¹ Articles 2.2 and 2.3 of the Fourth Protocol to the European Convention on Human Rights (ECHR) and Articles 12.2 and 12.3 of the International Covenant on Civil and Political Rights.

¹¹² Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 16/3/2020, *OJ C 861*, p. 1–4.

It is important to note that the Advocate General's opinion, which always precedes the official judgement, serves as a significant indicator of the direction the Court might take. Advocate General opinions are often closely considered by the Court and can be highly influential in shaping the final judgment. In this specific case, the AG's detailed analysis of the balance between public health and individual freedoms, the relevance of EU law, and the need for evidence-based policy provides a comprehensive framework that the Court is likely to consider. Therefore, even though the opinion is not binding, it offers valuable insights into the legal reasoning and principles that could underpin the Court's eventual decision.

Advocate general Emiliou's opinion

In her opinion, Advocate General Emiliou starts by setting the stage with a comprehensive overview of the global and European situation during the pandemic. She emphasizes that the world was grappling with an unprecedented health crisis, and governments were scrambling to find effective ways to contain the spread of the virus. In this chaotic environment, international travel restrictions became one of the most commonly employed strategies. These restrictions were not just arbitrary decisions but were part of a broader, coordinated effort to mitigate the impact of the pandemic.

Within the European Union, the situation was even more complicated due to the principle of free movement, a cornerstone of EU law. The Advocate General notes that the EU found itself in a unique predicament, having to balance the free movement of people against the imperative to protect public health. Initially, many EU countries, including Belgium, imposed strict travel restrictions. However, as the situation began to stabilize, most of these restrictions were lifted by the end of June 2020.

This is where AG Emiliou raises a critical question: Was it necessary for Belgium to continue enforcing certain travel restrictions even after many other Member States had lifted theirs? She points out that the continued enforcement of these measures by Belgium raises questions about their necessity and proportionality, especially in light of evolving circumstances such as the rollout of vaccines.

Furthermore, she suggests that while the initial imposition of travel restrictions could be justified as a necessary response to an emergency situation, the continued application of these measures requires a more stringent justification. She implies that governments should not rely on the initial conditions that warranted the restrictions but should continually reassess the situation. This is particularly important given that the landscape of the pandemic has been continually changing, with new variants emerging and vaccines becoming widely available.

Advocate General Emiliou takes great care to outline the legal landscape that governs the issue at hand. She specifically mentions Directive 2004/38/EC, commonly known as the

Citizenship Directive, and the Schengen Borders Code. Both of these pieces of legislation are foundational to the European Union's principles of free movement and border control. The Citizenship Directive outlines the rights of EU citizens to move and reside freely within the Member States, while the Schengen Borders Code provides the common rules governing the movement of people across the Schengen Area.. Her focus here is not merely to list these laws but to examine how they interact with Belgium's national measures. She raises the question of whether Belgium's restrictions on 'non-essential' travel and the quarantine and testing requirements for returning residents are in conflict with these EU laws. This is a critical point because EU law generally takes precedence over national law in cases of conflict.

The Advocate General specifically refers to Directive 2004/38/EC, commonly known as the Citizenship Directive, and the Schengen Borders Code as the primary legal frameworks governing the issue. Within the Citizenship Directive, Article 27 is particularly relevant. This article allows Member States to restrict the freedom of movement and residence of EU citizens and their family members on grounds of "public policy, public security or public health." However, these restrictions must comply with the principle of proportionality and be based on the personal conduct of the individual concerned.

Similarly, the Schengen Borders Code also has provisions that allow for restrictions on free movement. Article 6 outlines the entry conditions for third-country nationals, and Article 7 deals with the duration of short stays in the Schengen Area. While these articles primarily focus on third-country nationals, they also set the general tone for what kinds of restrictions are permissible under EU law.

She further scrutinizes these specific articles to evaluate whether Belgium's measures—such as the ban on 'non-essential' travel and quarantine and testing requirements for returning residents—are in line with EU law. She raises the question of whether these national measures conflict with the allowances and limitations set forth by these specific articles in EU legislation. AG Emiliou underscores the unprecedented nature of the situation, emphasizing that the Court has never before had to weigh these competing interests in the context of a pandemic. This is a crucial point because it highlights the novelty and complexity of the legal questions at hand. The Court's decision in this case could set a precedent for how similar situations are handled in the future, making the case highly significant not just for Belgium but for the European Union as a whole. She further expresses that she is keenly aware of the tension between the collective need to protect public health and the individual rights that could be compromised by such protective measures. She suggests that this tension is not merely a theoretical or academic issue but has real-world implications. For example, travel restrictions can have a profound impact on individuals' lives, affecting their ability to work, study, or even be with their families. Therefore, any limitations on these freedoms need to be carefully justified.

She also brings into focus the ethical dimensions of this balance. While public health is undoubtedly a critical concern, especially during a pandemic, it cannot be used as a blanket justification for all kinds of restrictions. The Advocate General argues that the measures must be proportionate to the threat and should be the least restrictive means to achieve the desired public health outcomes. This is where the concept of proportionality becomes crucial. Any infringement on individual freedoms must be balanced against the severity of the public health crisis and the effectiveness of the measures in mitigating it.

The opinion delves into the specific situation of NORDIC INFO BV, a tour operator based in Belgium. This company specializes in organizing trips to Nordic countries, particularly Sweden. Due to the Belgian government's travel restrictions, all scheduled trips to Sweden for the summer of 2020 had to be canceled, leading to significant financial losses.

This example serves to bring the broader legal and ethical questions into sharp focus. While the case revolves around complex issues of EU law and public health policy, it also has very tangible consequences for businesses and individuals. NORDIC INFO BV acts as a case study that illustrates the practical implications of government measures, adding a layer of urgency to the legal questions at hand.

The situation of the company raises several important points. First, it highlights the economic impact of travel restrictions, not just on individual travelers but also on businesses that depend on the free movement of people. Second, it brings attention to the question of whether the Belgian government's measures were proportionate and necessary, given their significant economic repercussions. The examination of NORDIC INFO BV's circumstances serves to humanize the broader legal debate. It reminds the Court—and by extension, the public—that the decisions made in this case will have real-world consequences. The measures in question are not just abstract legal or policy issues; they affect the livelihoods of people and the viability of businesses.

The opinion scrutinizes whether the Belgian measures are proportionate to the objective of protecting public health. This is a critical aspect because any limitations on free movement within the European Union must be proportionate to the goal they aim to achieve. The concept of proportionality here is multi-faceted; it involves assessing not just the necessity of the measures but also whether they are the least restrictive means to achieve the desired outcome. It is expressed that while the measures may have been necessary at the onset of the pandemic, their continued enforcement needs to be justified, especially given the evolving nature of the COVID-19 situation and the availability of vaccines.

Another critical aspect discussed is the issue of discrimination. The opinion examines whether the Belgian measures unfairly discriminate against certain groups of people, particularly those who wish to travel for what are deemed 'non-essential' reasons. The conclusion is that the measures do not appear to be discriminatory in nature, as they apply uniformly to all travelers, regardless of their nationality or the purpose of their travel. This is an important point because any form of discrimination would be contrary to EU law and could invalidate the measures.

The opinion emphasizes that while Member States have the discretion to take measures to protect public health, such measures must be based on solid scientific evidence. This is a crucial point because it sets a standard for the kind of justification that a government must provide when imposing restrictions that affect fundamental freedoms. The opinion further suggests that blanket bans or restrictions are not justifiable unless they are continually assessed and adapted based on current data. This emphasis on scientific evidence serves as a reminder that public health measures should not be arbitrary or driven by political considerations. Instead, they should be the result of a careful analysis of the current state of scientific knowledge about the virus, its transmission, and the effectiveness of various interventions. It is argued that the Belgian government should continually assess the situation and adapt its measures accordingly, rather than maintaining blanket bans or restrictions.

Moreover, the opinion suggests that the Court should rule that Member States have the right to impose restrictions on free movement for the purpose of protecting public health. However, it also emphasizes that such restrictions must meet stringent criteria. Specifically, they must be proportionate to the objective they aim to achieve, non-discriminatory, and based on current and reliable scientific data.

These recommendations serve as a synthesis of the various points discussed throughout the opinion. They encapsulate the complex interplay between public health, individual freedoms, and the principles of EU law. The opinion suggests that while Member States have the latitude to enact measures to protect public health, this latitude is not unlimited. It is constrained by the need to respect the fundamental principles of the European Union, such as the free movement of people and non-discrimination.

In essence, the recommendations aim to provide a balanced approach that respects both the sovereignty of Member States and the rights of individuals. They set the stage for the Court's final judgment, which will have significant implications not only for Belgium but also for the European Union as a whole, especially in the context of future public health emergencies.

The Court's Judgment

This European Court of Justice ruling addresses two main questions regarding the restrictions imposed by Belgium during the COVID-19 pandemic.

The First Question relates to the interpretation of Articles 27 and 29 of Directive 2004/38 in the context of Belgium's public health measures. These measures included a ban on non-essential travel to high-risk zones and mandatory screening and quarantine for certain travelers. The Court found that such measures do not contravene the Directive, provided they adhere to the stipulated conditions and safeguards. This includes respecting the fundamental rights and principles enshrined in the Charter, particularly non-discrimination and proportionality. The Court emphasized the importance of the measures being appropriate, necessary, and proportionate to the public health objective. It recognized Member States' discretion in determining their level of public health protection and the measures to achieve it, especially under uncertain risks to human health.

The Second Question examined Articles 22, 23, and 25 of the Schengen Borders Code concerning Belgium's control of internal borders. The Court concluded that such measures are not precluded by the Code, provided they are part of the exercise of police powers without equivalent effect to border checks, or if they constitute border controls, they comply with the conditions for temporary reintroduction of such controls under the Code. The Court recognized a pandemic like COVID-19 as a serious threat to public policy or internal security, which could justify temporary reintroduction of border controls. However, this must be strictly necessary, proportionate, and in compliance with the Code's procedural framework.

In summary, the Court upheld Belgium's measures during the COVID-19 pandemic under certain conditions, emphasizing the balance between public health protection and fundamental rights and freedoms.

Other cases that were deemed inadmissible

It is important to underscore the legal and procedural intricacies surrounding the actions for annulment of Regulation (EU) 2021/953. Despite the various legal avenues that were explored and the multiplicity of arguments that were presented in an attempt to invalidate or annul this particular piece of European Union legislation, it is noteworthy to mention that such actions have been officially deemed inadmissible by the competent judicial authorities.

This determination of inadmissibility is not merely a cursory or superficial decision; rather, it is a substantive legal conclusion that has been arrived at after a thorough examination of the merits and demerits of the case, as well as a comprehensive review of the applicable legal frameworks and precedents. The ruling effectively signifies that the actions brought forth to annul Regulation (EU) 2021/953 did not meet the requisite legal criteria or standards that would warrant a full judicial review or the initiation of annulment proceedings.

One such case is T-503/21¹¹³: the case involves an action for annulment filed by Lagardère, unité médico-sociale, a Belgian entity, against the European Commission. The action was officially lodged on August 15, 2021, and the primary objective of the action was to request the General Court to declare Regulation (EU) 2021/953 null and void. This regulation is concerned with the issuance, verification, and acceptance of interoperable COVID-19 vaccination, test, and recovery certificates, commonly referred to as the EU Digital COVID Certificate.

Lagardère presented three main pleas in law to substantiate their action. The first plea alleged an infringement of Article 9(1) of Regulation (EU) 2016/679¹¹⁴, also known as the General Data Protection Regulation (GDPR). The applicant contended that the contested measure did not adhere to the prohibition on the processing of personal health data of natural persons. The second plea cited an infringement of Article 21(1) of the Treaty on the Functioning of the European Union (TFEU), which grants EU citizens the right to move and reside freely within the territory of the Member States. The third plea claimed violations of Articles 168 and 169 TFEU, as well as Articles 3, 35, and 38 of the Charter of Fundamental Rights of the European Union.

However, the General Court issued an order on February 14, 2022, dismissing the action as inadmissible. The court pointed out that the action was expressly directed against the European Commission and was based on Article 263 TFEU. The court's operative part of the order stated that the action was inadmissible, and there was no longer any need to adjudicate on the applications to intervene submitted by the European Parliament and the Council of the European Union. As a result, Lagardère was ordered to pay the costs, while the Parliament and the Council were to bear their own costs relating to their application to intervene. This decision effectively deemed the attempts to annul Regulation (EU) 2021/953 as legally inadmissible, thereby upholding the regulation's standing.

1.3 Political Dynamics and Goals

1.3.1 The evolving political landscape during the pandemic

The evolving political landscape in the European Union concerning the restriction of freedom of movement during the COVID-19 pandemic is a subject of intricate complexity,

¹¹³ Case T-503/21: Action brought on 15 August 2021 — Lagardère, unité médico-sociale v Commission, 18/10/2021, *OJ C* 422, p. 23–23.

¹¹⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 4/5/2016, *OJ L* 119, p. 1–88.

influenced by a myriad of factors ranging from public sentiment to geopolitical shifts¹¹⁵. The pandemic has accelerated existing trends and introduced new dynamics into the European political arena, compelling a reevaluation of long-standing assumptions and frameworks¹¹⁶.

The European Union's evolving political landscape during the COVID-19 pandemic has been significantly influenced by the tension between its traditional reliance on a rule-based international order and the emerging realities of great power competition. Historically, the EU has been a staunch advocate of a rule-based system characterized by multilateralism, open markets, and the promotion of democratic values¹¹⁷. This approach has not only been the cornerstone of the EU's foreign policy but has also shaped its internal governance structures, including the Schengen Area, which allows for the free movement of people across most EU countries¹¹⁸. The rule-based order has been perceived as a stabilizing force that fosters cooperation, mitigates conflicts, and promotes economic growth¹¹⁹.

However, the global landscape is undergoing a seismic shift with the resurgence of great power competition, notably between the United States and China¹²⁰. This rivalry extends beyond military and economic domains to include ideological, technological, and even normative spheres¹²¹. The EU finds itself in a precarious position as it navigates this complex and often antagonistic geopolitical environment¹²². The rise of unilateralism and the erosion of multilateral institutions pose a direct challenge to the EU's rule-based approach¹²³. This tension has direct implications for the freedom of movement within the EU. On the one hand, the EU aims to uphold its foundational principles, including the Schengen Agreement. On the other hand, the geopolitical

¹¹⁵ Borisas Melnikas, 2011. *The European Union in the Context of Global Transformations*. European Scientific Journal, 21(3), pp.45-54

¹¹⁶ European Council on Foreign Relations, 2020. *How the coronavirus threatens a geopolitical Europe*, Available online: https://ecfr.eu/article/commentary_how_the_coronavirus_threatens_a_geopolitical_europe/ (Accessed 19/10/2023)

¹¹⁷ Bickerton, C., 2021. *European Integration: From Nation-States to Member States*. Oxford University Press.

¹¹⁸ European Commission, 2021. *Schengen Area*. Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en (Accessed 23/10/2023)

¹¹⁹ International Monetary Fund, 2020. *World Economic Outlook, October 2020: A Long and Difficult Ascent*. Available at: <https://www.imf.org/en/Publications/WEO/Issues/2020/09/30/world-economic-outlook-october-2020> (Accessed 23/10/2023).

¹²⁰ Mearsheimer, J., 2019. *The Great Delusion: Liberal Dreams and International Realities*. Yale University Press.

¹²¹ Walt, S., 2019. *The Hell of Good Intentions: America's Foreign Policy Elite and the Decline of U.S. Primacy*. Farrar, Straus and Giroux.

¹²² European Parliament, 2021. *The EU in a changing global environment: A more connected, contested and complex world*. Available at: https://eucivcap.files.wordpress.com/2017/03/20150625-european_union_changing_global_environment-more_connected_contested_complex_world.pdf [Accessed 23/10/2023]

¹²³ United Nations, 2020. *Shared Responsibility, Global Solidarity: Responding to the socio-economic impacts of COVID-19*. [online] Available at: <https://unsdg.un.org/resources/shared-responsibility-global-solidarity-responding-socio-economic-impacts-covid-19> [Accessed 23/10/2023].

shifts have led to a more fragmented and inward-looking Europe, where national interests often supersede collective European goals.

This tension manifests in the form of unilateral actions by member states to close borders and impose travel restrictions, often without adequate consultation or coordination with EU institutions. The challenge for the EU lies in reconciling its commitment to a rule-based order with the pragmatic realities of great power politics. The unilateral actions by member states not only undermine the EU's foundational principles but also expose it to geopolitical vulnerabilities. For instance, the lack of a coordinated European response to the pandemic has been exploited by external actors, such as Russia and China, to sow discord and undermine European unity.

As the EU grapples with these challenges, the future of the rule-based order hangs in the balance. Will the EU double down on its commitment to multilateralism and democratic values, or will it adapt to a more *realpolitik*¹²⁴ approach that prioritizes national interests and security concerns¹²⁵? The answer to this question will have far-reaching implications, not just for the freedom of movement within the EU, but also for the broader trajectory of European integration and the EU's role in the global order¹²⁶. The interplay between geopolitical shifts and the rule-based order is shaping the EU's evolving political landscape in profound ways. The COVID-19 pandemic has accelerated these trends, forcing the EU to confront uncomfortable truths about its vulnerabilities and the limitations of its existing frameworks. As the EU navigates this complex terrain, the tension between upholding its foundational principles and adapting to new geopolitical realities will continue to define its political discourse and policy choices.

The philosophical and geographical shocks that have reverberated through the European Union during the COVID-19 pandemic are both a reflection and a catalyst of deeper transformations affecting the Union's political landscape. Philosophically, the pandemic has raised questions about the EU's commitment to multilateralism and a rule-based order¹²⁷. These questions manifest in the form of nationalistic tendencies, as countries prioritize their own interests over collective European action¹²⁸. This inward-looking approach has led to a patchwork of travel restrictions and border controls, which in turn undermines the EU's foundational principles of free movement and open borders. The philosophical shock is not merely an abstract concept; it has

¹²⁴ *Realpolitik* is a German term that translates to "realistic politics." It emphasizes making political decisions based on practical considerations and the current situation rather than on ideological beliefs or moral principles. This approach aligns with the philosophies of realism and pragmatism in politics.

¹²⁵ Mearsheimer, J., 2019. *The Great Delusion: Liberal Dreams and International Realities*. Yale University Press, p.82.

¹²⁶ Walt, S., 2019. *The Hell of Good Intentions: America's Foreign Policy Elite and the Decline of U.S. Primacy*. Farrar, Straus and Giroux, ch.8

¹²⁷ Bickerton, C., 2021. *European Integration: From Nation-States to Member States*. Oxford University Press, ch.4.

¹²⁸ European Council on Foreign Relations, 2020. *How the coronavirus threatens a geopolitical Europe*, para.8.

tangible implications for how the EU navigates the complex issue of restricting freedom of movement while maintaining its geopolitical standing.

Geographically, the pandemic has also relegated Europe to the periphery of global geopolitics. As the world's focus shifts to the rising powers in Asia and the ongoing rivalry between the United States and China, Europe finds itself in a more vulnerable position. This geographical shock has made the EU more susceptible to external pressures, including from Russia and Turkey, which could further complicate the Union's ability to maintain a unified stance on freedom of movement. The geographical shift is not just a matter of global attention but also impacts the EU's internal dynamics. It forces the EU to reconsider its role on the global stage and how it engages with its immediate neighbors, especially in matters related to border control and migration.

The philosophical and geographical shocks are interconnected and mutually reinforcing. The questioning of multilateralism and the rule-based order is both a cause and a consequence of Europe's changing geographical standing. The EU finds itself at a crossroads, having to navigate these complex philosophical and geographical terrains as it formulates its response to the pandemic and its broader strategy for the future. The unilateral actions by member states in restricting freedom of movement are symptomatic of these deeper shocks and represent a challenge to the EU's identity and cohesion.

Germany's role within the European Union and its relationship with the United States, commonly referred to as the transatlantic relationship, have been pivotal factors in shaping the EU's evolving political landscape, especially in the context of the COVID-19 pandemic. Germany, often considered the linchpin of European unity, finds itself at a crossroads. The country's traditional focus on economic prowess and rule-based governance is being tested by the philosophical and geopolitical crises that have emerged during the pandemic. Germany's position is further complicated by its role as the EU's largest economy and its historical commitment to European integration, both of which have implications for the Union's approach to freedom of movement.

The transatlantic relationship, particularly with the United States, also plays a crucial role in this evolving landscape. The United States' shifting focus towards Asia and its ambivalence towards European security have left the EU in a precarious position. This shift has implications for how the EU, and by extension Germany, navigates the complex issue of restricting freedom of movement while maintaining its geopolitical standing. The U.S.'s changing priorities have led to questions about the future of NATO and the security umbrella it provides to Europe, which in turn affects the EU's internal dynamics and its ability to present a unified front on various issues, including border controls and travel restrictions.

Germany's role and the transatlantic relationship are not isolated factors but are deeply interconnected with the broader challenges facing the EU. Germany's influence within the EU makes it a key player in shaping the Union's response to these challenges, while the transatlantic relationship serves as a barometer for the EU's global standing. The complexities of this relationship are magnified by the current geopolitical shifts and the rise of great power competition, which place additional pressures on the EU's governance structures and its approach to freedom of movement. The global ramifications of the pandemic were deeply consequential, leading to widespread economic disruptions and necessitating immediate and substantial interventions in macroeconomic policies. The strategies that were meticulously implemented to curb the spread of the virus, such as disruptions in international trade and the imposition of lockdowns, precipitated what is considered the most severe economic recession witnessed since the Second World War¹²⁹. In contrast to previous crises where the European Central Bank (ECB) predominantly resorted to a relaxed monetary policy, the multifaceted response to the COVID-19 crisis involved a harmonious combination of monetary and fiscal stimuli¹³⁰. The European Union (EU) demonstrated adaptability by modifying existing economic tools and introducing innovative ones to navigate through the crisis effectively.

During March and April 2020, a series of economic measures were swiftly enacted. These included the activation of the general escape clause of the Stability and Growth Pact, a significant expansion of the European Stability Mechanism's lending capacity, and the establishment of the Support to mitigate Unemployment Risks in an Emergency (SURE) to assist member states in sustaining employment levels. These comprehensive measures amounted to approximately €40 billion and were primarily structured in the form of loans. Subsequently, in July 2020, the Next Generation EU funding programme was launched, incorporating €60 billion in loans and €90 billion in grants. This initiative symbolized a strengthened European economic solidarity and showcased a collective commitment to economic recovery¹³¹¹³².

The pandemic's influence extended significantly into the realm of EU politics. Previous crises had already led to the politicization of EU institutions and policies, resulting in domestic

¹²⁹ The World Bank in the European Union, 2021, <https://www.worldbank.org/en/country/eu/overview>, [Accessed 23/09/2023].

¹³⁰ Buti, M., & Messori, M. (2021). *The search for a congruent euro area policy mix: Vertical coordination matters* (Vox EU - CEPR Policy Insight 113, October 2021). VoxEU CEPR. <https://voxeu.org/article/search-congruent-euro-area-policy-mix>, [Accessed 23/09/2023].

¹³¹ Armingeon, K., de la Porte, C., Heins, E., & Sacchi, S. (2022). Voices from the past: Economic and political vulnerabilities in the making of next generation EU. *Comparative European Politics*, 20(2), 144–165.

¹³² Buti, M., & Fabbrini, S. (2022). *Keynes in Brussels? 'next generation EU' and the changes in the European Economic Governance*, *Journal of European Public Policy*.

political disputes and transnational conflicts that challenged the unity and coherence of the union¹³³¹³⁴. The emergence and rise of populism and sovereignty, coupled with looming threats to liberal democracy, especially in Central and Eastern Europe, posed formidable challenges to the liberal political and economic international order¹³⁵. The pandemic witnessed varying responses from populist and sovereignist entities, with collective mobilization and the organization of protests in several countries, reflecting the diverse political landscapes and sentiments¹³⁶.

As the pandemic transitions from an acute phase to a more enduring endemic stage, it brings forth new challenges and uncertainties. These include sustaining support for vaccination initiatives to maintain public health, managing ongoing worker shortages that impact various sectors, and addressing supply-chain disruptions that affect the availability of goods and services. Additionally, the emergence of unrelated crises, such as the conflict in Ukraine and the uncertainties surrounding inflation trends in 2021 and 2022, present new dimensions of challenges that require adept handling and resolution¹³⁷.

However, it is crucial to note that the major policy decisions enacted by the EU were made without substantial public debate. While this is understandable given the urgency and the unprecedented nature of the crisis, it inevitably raises pertinent questions regarding the perceived legitimacy of the measures taken. The absence of extensive public discourse on such significant policy shifts may lead to reflections on democratic values and principles in policy formulation and implementation.

1.3.2 Analysis of how political agendas influenced, or were influenced by, legal decisions during this period.

During the COVID-19 pandemic, the relationship between political agendas and legal decisions within the European Union has been marked by a dynamic interplay, revealing the complexities of governance in times of crisis. Political agendas have both influenced and been

¹³³ Hutter, S., & Kriesi, H. (2019). Politicizing Europe in times of crisis. *Journal of European Public Policy*, 26(7), 996–1017.

¹³⁴ Schmidt, V. A. (2019). Politicization in the EU: Between national politics and EU political dynamics. *Journal of European Public Policy*, 26(7), 1018–1036.

¹³⁵ Lake, D. A., Martin, L. L., & Risse, T. (2021). Challenges to the liberal international order: International organization at 75. *International Organization*, 75(2), 225–664.

¹³⁶ Kriesi, H.-P., & Oana, I.-E. (2023). Protest in unlikely times: Dynamics of collective mobilization in the COVID-19 crisis. *Journal of European Public Policy*, 30(4), 740–765.

¹³⁷ Anghel, V., & Jones, E. (2023). Is Europe really forged through crisis? Pandemic EU and the Russia–Ukraine war. *Journal of European Public Policy*, 30(4), 766–786.

influenced by legal decisions, creating a feedback loop that has shaped the EU's response to the pandemic.

For instance, the imposition of travel restrictions and border controls was initially driven by political agendas focused on public health and national security. However, these measures had to be reconciled with existing EU laws and regulations, such as the Schengen Borders Code and the EU Charter of Fundamental Rights. The legal scrutiny of these emergency measures led to modifications in policy implementation, revealing how political agendas were constrained and refined by legal frameworks.

Conversely, legal decisions have also influenced political agendas. Court rulings on the proportionality and legality of lockdown measures, for example, have forced governments to reassess their strategies and make adjustments that align with legal standards. In some cases, these legal decisions have even served as catalysts for political change, prompting debates on civil liberties and the balance of power between the executive and judiciary branches of government.

Moreover, the pandemic has exposed gaps and ambiguities in existing legal frameworks, prompting a reevaluation of laws related to public health emergencies, data privacy, and civil liberties. This has created an opportunity for political actors to push for legal reforms that align with their agendas, whether it be strengthening state powers for future emergencies or enhancing protections for individual freedoms.

The role of supranational institutions like the European Court of Justice (ECJ) has been particularly noteworthy. The ECJ's interpretations of EU law have had a cascading effect on national legal systems and, by extension, on the political agendas of member states. This has led to a recalibration of national policies to ensure compliance with EU law, thereby influencing the trajectory of political agendas at both the national and supranational levels.

In summary, the COVID-19 pandemic has highlighted the intricate relationship between political agendas and legal decisions within the EU. This relationship is characterized by a dynamic interplay, where each influences the other in shaping the Union's response to the crisis. The pandemic has not only tested the resilience and adaptability of existing legal frameworks but has also provided a window into the complexities of governance in times of unprecedented challenges. As the EU continues to navigate the ongoing crisis, the interaction between political agendas and legal decisions will remain a critical factor in determining the European Union's path forward.

Conclusions

The European Union, as a unique and ambitious experiment in supranational governance, has seen its evolution marked by constant interplay between the aspirations for broader integration and the respect for national idiosyncrasies. This dynamic tension is not just theoretical but has been pronouncedly manifested during specific junctures, such as the SARS and H1N1 health crises, when the EU's foundational principles were put to the test. As these health crises loomed, threatening not just individual member states but the collective body, the European Union was faced with a profound conundrum. While the notion of exerting its legislative muscle to draft and enforce binding laws restricting personal movement was available, the Union opted instead for a softer approach, promulgating guidelines and recommendations for its member states.

To an external observer, this decision might have seemed an abdication of the EU's role, particularly during a time when strong, cohesive action seemed paramount. However, this perspective fails to grasp the broader complexities underpinning the Union's decision-making mechanisms. At the heart of this mechanism is a profound recognition of the dual imperatives that the EU serves – the need to foster a unified, integrated European space, while concurrently respecting and preserving the historical, cultural, and political diversities of its member nations. Central to this conversation is the principle of the freedom of movement, a cherished right, and privilege for European citizens. This freedom does more than just enable travel; it symbolizes the erasure of historical borders, facilitates cultural exchange, empowers economic integration, and fosters a sense of shared European identity. The significance of this freedom extends beyond the personal realm and is intricately woven into the fabric of the EU's economic structure. The single market, an ambitious project of the European Union, is not just a mere trading bloc. Instead, it represents a sophisticated network wherein goods, services, capital, and notably, people, flow with minimal hindrance, creating a robust and interconnected economic system. Thus, any interruption, even one rooted in public health concerns, could send shockwaves through this delicately balanced system. Businesses relying on cross-border employees could face challenges, inter-state trade could experience bottlenecks, and the daily life and rhythms of countless citizens could be disrupted.

The nexus between economic dynamism and the unfettered freedom of movement within the European Union is profoundly intricate. Economically, the principle of free movement is not merely a symbolic gesture of European unity but serves as the lifeblood of a vast and intertwined market system. This system's efficiency, and thereby the prosperity of the Union, hinges upon the seamless interchange of commodities, services, and human resources across national frontiers. In the contemporary globalized age, numerous businesses, ranging from multinational corporations to local enterprises, rely heavily on the free transit of both labor and services across

borders. For instance, a tech company in Estonia might depend on specialist developers from Portugal, or a vineyard in France might require seasonal workers from Poland. Any impediment in this flow, whether due to policy constraints or health emergencies, could engender significant operational disruptions. The ramifications are not confined merely to businesses but ripple outward into broader economic structures. The tourism industry, which stands as a monumental pillar for several EU economies—from the sun-kissed shores of Greece to the historical enclaves of Italy—relies immensely on the allure of effortless travel. Restricting movement could potentially dissuade potential tourists, leading to downturns in interconnected sectors such as hospitality, aviation, and even local retail.

Yet, the intricate mosaic of the European economy means that disruptions are seldom localized. The economies of member states are not isolated entities but are threads in a vast tapestry. An economic tremor in one can resonate across others, creating a domino effect. Such interconnected vulnerabilities could amplify localized disruptions into regional crises, bringing with them broader economic uncertainties and challenges.

Shifting the lens to the political spectrum, the calculus becomes equally, if not more, intricate. The European Union, while a unified entity, is a congregation of sovereign nations, each with its rich tapestry of history, culture, and national pride. The principle of national sovereignty remains paramount, and any perceived infringement, especially one as fundamental as restricting movement, could be viewed as a transgression of the Union's mandate. It is against this backdrop of delicate political equilibrium that the EU's preference for non-binding guidelines during health crises must be viewed. Far from being a passive stance, this approach underscores a nuanced understanding of the diverse political landscapes of member states.

However, this approach also highlights the challenges that arise in a union of sovereign nations. The absence of a unified directive can lead to a patchwork of policies across the continent, potentially leading to confusion or even conflicts among states. But, in the face of such global health crises as SARS and H1N1, the EU's strategy underscored its commitment to preserving both the integrity of the single market and the sovereignty of its member states, even if it meant treading a path of caution and deference.

The outbreak of the COVID-19 pandemic sent ripples through every corner of the globe, testing the very fabric of public health infrastructures, shaking economic foundations, and challenging prevailing sociopolitical norms. In the throes of this tumult, regional blocs and international coalitions found themselves grappling with decisions of profound consequence. The European Union, an emblem of transnational cooperation and integration, stood at the precipice of such monumental decisions.

Historically, the European Union, with its myriad of cultures, languages, and histories, has held aloft the principle of free movement as a beacon of its shared values. This commitment wasn't merely symbolic; it was an operational ethos, emphasizing the seamless flow of people across its member states. However, previous health crises, notably SARS and H1N1, saw the EU opting for a stance that leaned heavily towards decentralization, allowing individual member states to tailor their responses, while the Union itself remained content with offering guidelines and recommendations.

The onslaught of the COVID-19 pandemic, however, demanded a departure from previous templates. As the virulence and velocity of the virus's spread became apparent, and with it, the devastating human and socioeconomic toll, the European Union faced a moment of reckoning. The stakes were no longer about merely preserving an ideal; they pertained to the immediate survival and long-term welfare of its citizens. In this cauldron of urgency, the EU made the audacious choice to enforce European Union legislation that would directly limit the revered principle of free movement across its domains.

This decision was emblematic of a broader recalibration in the EU's crisis-response machinery. The Union, often seen as a cautious behemoth, displayed agility and resolve. The choice to curtail individual freedoms, even temporarily, was fraught with complexities, both from economic and political lenses. Economically, restricting movement threatened to disrupt the intricate web of inter-state commerce, trade, and labor mobility, which could potentially exacerbate the already looming recession. Politically, such a directive ran the risk of being perceived as an overreach, especially by member states zealously guarding their sovereign rights.

Yet, the EU's decision emanated from a broader vision. It was a reflection of a deep-seated belief that in moments of unparalleled crisis, collective action, even if it demands short-term sacrifices, can be a panacea. By prioritizing the health and safety of its citizens en masse, the European Union hoped that its united stance would act as a bulwark against the pandemic's ravages, potentially paving the way for a swifter recovery and a reaffirmation of its foundational ideals in the post-pandemic world.

In the annals of legal thought, decisions made in times of crisis often illuminate deeper jurisprudential underpinnings that guide legislative and executive actions. The European Union's response to the COVID-19 pandemic provides a vivid canvas for such examination, particularly when viewed through the prism of the principle of proportionality, a cornerstone in European legal doctrine. The concept of proportionality, deeply entrenched in European jurisprudence, mandates a careful balancing act. It necessitates that measures adopted by a public authority should not exceed the limits of what is appropriate and necessary to achieve the objectives legitimately

pursued by the legislation in question. When confronted with the pandemic, this principle became a guiding light for the European Union's deliberations. Two core values stood in juxtaposition: the cherished freedom of movement, a hallmark of European integration, and the pressing imperative to safeguard public health in the face of an unprecedented threat. The Union's decision, while weighty, was imbued with a nuanced understanding of this balance. Foremost, the EU underscored the transitory nature of the restrictions. This was not a blanket revocation of a foundational right but a temporary suspension, a pause if you will, dictated by the exigencies of the moment. This emphasis on temporality was pivotal, signaling the EU's commitment to its foundational ideals while acknowledging the need for exceptional measures in exceptional times.

Additionally, the granularity with which the restrictions were instituted bore the hallmark of proportionality. The EU did not adopt a one-size-fits-all approach. Instead, the stringency of measures was modulated in tandem with the pandemic's trajectory. By ensuring that the restrictions were neither indiscriminate nor overreaching, but were finely tuned to the evolving landscape, the Union manifested a commitment to ensure that its actions, while extraordinary, remained within the bounds of legal propriety.

The aftermath of this legal and policy maneuver provides compelling insights into its wisdom. As the storm clouds of the pandemic began to dissipate, a clearer picture emerged, one that underscored the sagacity of the EU's centralized response. The European continent, when juxtaposed with other global regions, showcased a comparatively tempered impact, particularly in terms of human casualties. This outcome was not mere serendipity but a testament to a system that, when tested, demonstrated the dexterity to adapt, to reorient its compass in turbulent waters, and reaffirmed its commitment to the paramountcy of human life and welfare.

Epilogue

In the intricate tapestry of international law and regional cooperation, the European Union (EU) stands as a paradigm of interconnectedness and interdependence. This unique political and economic union has been periodically confronted with challenges, not the least of which have been health crises. Historical scrutiny reveals that the EU's reactions to such challenges have not been monolithic; they have evolved over time, adapting to the context and severity of the situation.

It's enlightening to observe that in earlier health crises, the European Union demonstrated a certain hesitance in its approach. This was often due to a multiplicity of reasons, from respect for the principle of subsidiarity—whereby decisions are taken as closely as possible to the citizen—to concerns over impinging upon the sovereign rights of member states. Such reluctance was not

unwarranted; after all, the EU's foundational principles hinge upon the balance between unified action and respect for the distinctiveness of its member nations.

However, the trajectory of EU's response to health crises began to undergo a discernible shift as the gravity and immediacy of certain threats became more pronounced. The COVID-19 pandemic serves as a salient example in this regard. The virulence and rapid spread of the virus catapulted public health to the forefront of global concern, pressing the need for a coordinated and decisive response. And the EU, recognizing the urgency of the moment, adapted its approach. During the initial waves of the COVID-19 crisis, the European Union faced a herculean challenge: how to reconcile its foundational principle of the freedom of movement of persons—a cornerstone of the Single Market—with the pressing imperative to protect the lives of its citizens. The magnitude of the pandemic demanded an immediate response, and in doing so, the EU made a marked departure from its erstwhile cautiousness. It implemented restrictions on movement, not as a repudiation of its principles, but as a temporary measure to ensure public health and safety. It's worth emphasizing that these restrictions, though profound, were not arbitrary. They were underpinned by a commitment to safeguarding the public while also preserving the essence of the Union's tenets. The legal orders that were promulgated during this period exemplify the EU's capability to recalibrate its stance, making it more pragmatic without compromising its core values.

In conclusion, the European Union's responses to health crises, both past and present, underscore a broader narrative: that of an institution capable of introspection and adaptation. The challenges brought about by such crises have spotlighted potential lacunae in the EU's legal order. Yet, rather than being overwhelmed, the EU has leveraged these instances as catalysts for change, refining its strategies to ensure that it remains robust and resilient in the face of any challenge.

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15. Case T-503/21, Lagardère, unité médico-sociale v Commission, 18.10.2021, OJ C 422, p. 23–23.

16. Case 128/22, Request for a preliminary ruling from the Nederlandstalige rechtbank van eerste aanleg Brussel (Belgium) lodged on 23 February 2022 — NORDIC INFO v Belgische Staat.