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Title:

European Union Border Law during the COVID-19 Pandemic

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Abstract:

The COVID-19 pandemic challenged the European Union's border law, testing its fundamental principle of free movement against the imperative of public health protection. This article examines how the Union managed tensions between these values from March 2020 to June 2023, highlighting the evolving dynamics of internal and external border controls. The analysis identifies four key themes which remain an EU law legacy from the pandemic: reinterpretation of the rule/exception structure to integrate health concerns; deployment of selective mobility across geopolitical and individual dimensions; strategic use of soft law instruments to guide national measures; and reliance on technocratic governance to steer coordinated responses. By exploring these themes across distinct pandemic phases, the article demonstrates how Union COVID-19 border law exemplifies the integration of public health as a value and underscores the need to reconcile this with the Union's legal framework on free movement.

1. Introduction

When asked to identify, from 11 possible options, the most positive achievements of the European Union ('Union'), more than half of respondents choose 'freedom of movement of people, goods and services within the Union'. Freedom to move even ranks slightly above 'peace between European nations': the Union's historical *raison-d'être*.¹ High valuing of free movement applies across all demographic groups: young and old, different socio-economic classes, genders, education and types of employment.² When people are asked what they personally have gained from the Union, the numbers are even stronger: around three-quarters identify freedom of movement as so important that the Union 'would not be worth having' without it.³ Moving across borders is a highly valuable and valued aspect of Union law.

The COVID-19 pandemic resulted in significant incursion on freedom. Stay-at-home orders, mandatory closure of schools and workplaces, and numerous other public health responses drastically restricted people's ability to move around freely. Most such measures were adopted by Member States: the Union has no competence in such matters. But the Union does have

¹ See Standard Eurobarometer 95 (Eurobarometer 2021), p. 21; see also Standard Eurobarometer 89 (Eurobarometer 2018).

² Standard Eurobarometer 95 (Eurobarometer 2021), p. 23.

³ Timothy Garton Ash, Antonia Zimmermann, and Catherine Snow, *What Europeans Want from the EU* (Eupinions Brief, 26 January 2021).

competence (shared with its Member States⁴) in matters of border control. The central importance of free movement to its citizens and residents – not to mention the ‘European project’ as a whole⁵ – sits alongside the Union’s obligation to protect population health in all its policies and actions.⁶ Our overall research agenda is to explore how Union border law managed the tensions inherent in that position.

1.1 Union Border Law

The Union’s border law is highly complex.⁷ Its underlying idea is relatively simple: to secure open borders⁸ within the Union; and a single external Union border, with common rules. For goods and to a large extent services, this latter has been achieved: the Union’s common commercial policy establishes a single set of customs duties, applicable wherever a product crosses the Union’s external borders,⁹ and much internal Union law on goods and services has the effect of preventing goods or services from outside the Union accessing the internal market, unless they meet the Union’s regulatory standards.¹⁰

However, for Union border law applying to people, the underlying idea may be similar, but the legal detail is not. Instead, a complex set of Union-determined border rules intersect with national and international rules and practices, changing significantly over time, and differentiated both by Member State, and the specific situation of the person who seeks to cross the Union’s internal or external borders.

An understanding of Union border law thus requires distinguishing between several legal categories. First, Union law makes very important distinctions between internal and external borders. Crossing an internal border of the Union¹¹ includes crossing a land, river or lake border between two Member States (e.g., crossing from Poland to Germany at the pedestrian border crossing at Blankensee-Buk); or crossing a border by air on a flight from one Member State to another (e.g., flying from Schiphol in the Netherlands to Athens in Greece); or taking a boat over a sea, lake or river from one Member State to another (e.g., the ferry from Stockholm to Tallinn). The Union’s external borders are defined (for people) as any Union land, river or lake border, or

⁴ Art 5 TEU; arts 2, 4, 21, 46, 48, 67, 77, 78, 114 TFEU.

⁵ Schuman Declaration (9 May 1950) describes free movement as ‘a first step in the federation of Europe’.

⁶ Art 9 TFEU.

⁷ See, e.g., Daniel Thym, *European Migration Law* (OUP, 2023) 1–4, 7, 278; Niamh Nic Shuibhne, Introduction: Revisiting EU Law on the Free Movement of Persons in Niamh Nic Shuibhne (ed), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (OUP 2023) 2–4.

⁸ Art 3(2) TEU and art 26(2) TFEU.

⁹ Arts 28 and 31 TFEU; art 207 TFEU; Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (UCC) [2013] OJ L269/1; Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) 952/2013 [2015] OJ L343/558. See, e.g., Laurence W Gormley, *EU Law of Free Movement of Goods and Customs Union* (OUP 2009); Mads Andenas and Wulf-Henning Roth, *Services and Free Movement in EU Law* (OUP 2003).

¹⁰ Anu Bradford, *The Brussels Effect* (OUP 2020).

¹¹ See the definition of ‘internal EU borders’ in 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) [2016] OJ L77/1, art 2(1)(a)–(c).

river, lake or seaport, or airport, that is not an internal border.¹² An airport within the Union may thus contain both an internal and an external Union border.

Second, Union law articulates many categories of people in terms of their rights to cross internal and external Union borders, in both Treaty provisions and legislation.¹³ Citizens of the Union (EUCs), who are or have been economically active or are self-sufficient, have the widest entitlements,¹⁴ followed by their family members¹⁵ irrespective of nationality.¹⁶ Other legal categories include students and researchers (both EUCs¹⁷ and third-country nationals (TCNs)¹⁸); job-seekers, or others who may need to rely on a host state's welfare system;¹⁹ TCN long-term

¹² Schengen Borders Code (n 11), art 2(2).

¹³ Relevant legal basis provisions are art 21(2) TFEU; arts 46, 48 and 50 TFEU; art 77(1)(a), (2)(c) and (e); and art 77(1)(b) and (c), (2)(a), (b) and (d).

¹⁴ Art 21 TFEU.

¹⁵ As defined by Directive 2004/38/EC of the European Parliament and of 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 [2004] OJ L158/77, art 2 (2), delimiting a category of people that does not include everyone with whom someone might live in a familial relationship.

¹⁶ See arts 20 and 21 TFEU; Dir 2004/38/EC (n 15). The scholarship on Union citizenship law is extensive; see, e.g., Michael Dougan, 'The constitutional dimension to the case law on Union citizenship' (2006) 31 *European Law Review* 613; Rainer Neuvonen, 'EU citizenship and its "very specific" essence' (2017) 54 *Common Market Law Review* 1201; Síofra O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer 1996); Dominique Ritleng, 'The relationship between Union citizenship and nationality' (2023) 60 *Common Market Law Review* 1055; Sandra Seubert, Jakob Eberl and Frans van Waarden (eds), *Reconsidering EU Citizenship* (Edward Elgar 2018); Jo Shaw, 'EU Citizenship and Political Rights in an Evolving European Union' (2007) 75 *Fordham Law Review* 2549; Jo Shaw, *EU Citizenship: Still a Fundamental Status?* (RSCAS Research Paper 2018/14, March 2018) <https://ssrn.com/abstract=3157556> accessed 24 October 2024; Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *Common Market Law Review* 13; Francesca Strumia, 'Supranational Citizenship' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 669. It should be noted here that from 1 January 2021, British citizens no longer fell within the category of Union citizens (EUCs) but were divided into two groups. Those who were legally residing in an EU Member State before 31 December 2020 were covered by the Withdrawal Agreement and retained certain rights, including residence and limited travel rights (see Agreement on the Withdrawal of the United Kingdom from the European Union [2020] OJ C384 I/1, art 13). However, British citizens who were not resident in the EU by that date became third-country nationals as of 1 January 2021 and were subject to general Schengen visa and entry restrictions during the COVID-19 pandemic.

¹⁷ See Dir 2004/38/EC (n 15), art 7(1)(c). See also Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458; Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, EU:C:2005:169.

¹⁸ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L132/21.

¹⁹ See Dir 2004/38/EC (n 15), arts 14(4)(b), 17 and 23; See also Case C-292/89, *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, EU:C:1991:80; Case C-138/02, *Collins v Secretary of State for Work and Pensions*, EU:C:2004:172; Case C-67/14, *Alimanovic*, EU:C:2015:597; Victoria Hooton, *Free Movement and Welfare Access in the European Union* (Hart 2024); Charlotte O'Brien, *Unity in Adversity* (Hart, 2017); Ann-Pieter Van der Mei, *Free Movement of Persons within the European Community* (Hart 2003).

residents;²⁰ highly qualified workers;²¹ posted workers;²² inter-corporate workers;²³ seasonal workers;²⁴ asylum seekers and refugees.²⁵ As we will see, during the COVID-19 pandemic, another legal category – ‘essential workers’ – also became important.

Third, Union border law is found in overlapping and intersecting legal orders. One intersection is between Union and national law. Internal Union border law falls within the Union’s internal market competence,²⁶ but also competence provisions on citizenship,²⁷ free movement of workers,²⁸ services,²⁹ and freedom of establishment.³⁰ Transport services are covered by the common transport policy.³¹ All of these are matters of shared competence.³² If the Union institutions have not exercised their powers, national law remains applicable.³³ Furthermore, subject to proportionality control, the interactions between national and Union law, especially through the preliminary reference procedure,³⁴ leave significant discretion to national authorities in interpreting and applying Union border law.³⁵ That discretion is even stronger in the area of external border law, where differences in administrative procedures abound.³⁶

However, in both internal and external border law, the Union and national authorities are constrained by the Union’s respect for fundamental human rights. The relevant human rights

²⁰ Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44.

²¹ Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L382/1.

²² Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1; see Sacha Garben, ‘Posted Workers are Persons Too! Posting and the Constitutional Democratic Question of Fair Mobility in the European Union’ in Nic Shuibhne (n 7) 39-86.

²³ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1.

²⁴ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375.

²⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9; Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III) [2013] OJ L180/31.

²⁶ Art 114 TFEU.

²⁷ Arts 18 and 21(2) TFEU.

²⁸ Art 46 TFEU.

²⁹ Art 59 TFEU.

³⁰ Art 50 TFEU.

³¹ Arts 58(1), 90-100 TFEU.

³² Art 4 TFEU.

³³ Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd*, EU:C:2009:519, para 57.

³⁴ Art 267 TFEU; Anthony Arnall, *The European Union and its Court of Justice* (2nd edn, OUP 2006) 95–137; Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (OUP 2010).

³⁵ See, e.g. Jan Zgliniski, *Europe’s Passive Virtues: Deference to National Authorities in EU Free Movement Law* (OUP 2020).

³⁶ See Thym (n 7) 6.

instruments are found in Union law;³⁷ and in Council of Europe, and public international law instruments, such as the Geneva Convention 1951, with which Union common asylum policy must be ‘in accordance’.³⁸ Union border law must be understood in its relations with other regional and international law.

A third intersection is between Union law and Schengen law.³⁹ The Schengen *acquis* has now been essentially incorporated into Union law.⁴⁰ The initial Schengen instruments acknowledged the primacy of Union law over Schengen law.⁴¹ But the process of bringing Union immigration law into the mainstream of Union free movement law remains incomplete.⁴² Ireland retains the power to opt out from several aspects of Union border law. Denmark has a different opt-out arrangement. Both participate in much relevant law.⁴³ Not all Member States are members of Schengen:⁴⁴ during the time period covered by this article (March 2020-June 2023, see further below), Cyprus, Ireland, Bulgaria and Romania⁴⁵ were not members, and Croatia fully joined on 1 January 2023.⁴⁶ For movements involving non-Schengen Member States, Union law applies, but not Schengen law.

A fourth intersection is with EEA law. Particularly for goods⁴⁷ and services,⁴⁸ but also for people,⁴⁹ access to the Union market is available for producers/entities from the EFTA States of Norway, Iceland and Liechtenstein. Relevant Union law (which does not include customs union law) is adopted into EEA law by a bespoke procedure.⁵⁰ Furthermore, the Union’s relationship with Switzerland, encapsulated in multiple and regularly-changing bilateral arrangements, also covers borders. The European Commission uses the phrase ‘Schengen Associated States’ to mean Norway, Iceland, Liechtenstein and Switzerland.⁵¹

³⁷ Charter of Fundamental Rights of the European Union [2000] OJ C 364/1, art 45.

³⁸ Art 78(1) TFEU.

³⁹ Agreement on the Gradual Abolition of Checks at their Common Borders (14 June 1985) OJ 2000 L 239/13; the Convention Implementing the Schengen Agreement of 14 June 1985 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 (19 June 1990) OJ 2000 L 239/19.

⁴⁰ Art 3(2) TEU.

⁴¹ Convention Implementing the Schengen Agreement (n 39) arts 134 and 140.

⁴² Thym (n 7) 28; see also Neil Walker (ed), *Europe’s Area of Freedom, Security and Justice* (OUP 2004); Steve Peers, *EU Asylum and Immigration Law*, vol 1 of *EU Justice and Home Affairs Law* (5th edn, OUP 2024).

⁴³ For detail, see Peers (n 42) 25–35.

⁴⁴ And some non-EU states are, that is, Iceland, Liechtenstein, Norway and Switzerland.

⁴⁵ Air and sea internal border controls were lifted between Bulgaria and Romania and the Schengen states on 30 December 2023, and from 31 March 2024, both Bulgaria and Romania fully apply the Schengen *acquis*. Council Decision (EU) 2024/210 of 30 December 2023 on the full application of the provisions of the Schengen *acquis* in the Republic of Bulgaria and Romania OJ 2024 L 210/1.

⁴⁶ Council Decision (EU) 2022/2451 of 8 December 2022 on the full application of the provisions of the Schengen *acquis* in the Republic of Croatia OJ 2022 L 320/41.

⁴⁷ Arts 8–16 and 23 EEA Agreement.

⁴⁸ Arts 36–39 EEA Agreement.

⁴⁹ Arts 22–28 EEA Agreement.

⁵⁰ Arts 98–99 and 102–104 EEA Agreement.

⁵¹ The earliest reference we can find, using a Eur-lex search, to a legal text using this phrase to mean – implicitly – those four states is Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen

Finally, as a matter of practical reality, although some services may cross borders without a person moving with them,⁵² cross-border service provision often involves personal mobility, particularly in sectors such as healthcare,⁵³ legal services,⁵⁴ or tourism⁵⁵ where the physical presence of either the provider or the recipient or both is required. Similarly, goods only cross a border because at least one human being is involved in their transportation, whether through logistics networks, retail supply chains, or individual imports.⁵⁶ So Union border law on goods and services in practice also affects movement of some people, in particular those in transport services.

In practice, therefore, aspects of movement over a Union border may be covered by rules emanating from not only a potentially bewildering array of different legal texts, but also by texts emanating from different legal systems, in non-hierarchical relations with one another. To make the analysis below manageable, we simplify this complexity to a considerable extent, focusing our discussion mainly on Schengen Union Member States. We acknowledge the consequent limitations.

1.2 Key legal instruments

We base our analysis on key Treaty provisions and Union legislation. Article 9 TFEU requires the Union to take into account requirements to promote a ‘high level of health’ in all its policies and activities. Articles 3(2) TEU and 26(2) TFEU set out the Union’s legal commitment to the internal market and area of freedom, security and justice. Both are based on the removal of barriers at the Union’s internal borders and on developing a coordinated or unified Union approach to external border security. ‘Legal basis’ provisions, such as Articles 21 and 77 TFEU, set the parameters of Union legislative competence on border regulation.⁵⁷ Directly effective provisions of Treaty law, such as Articles 45 and 49 TFEU, grant individuals enforceable rights to cross internal Union borders.

The main legal instruments are the Citizens Directive⁵⁸ and the Schengen Borders Code.⁵⁹ These provide a baseline against which the legality of restrictions on freedom of movement – such as those imposed during the COVID-19 pandemic – is assessed. They are complemented by many

[2013] OJ L 295/27 (no longer in force). This Regulation does not define the phrase. The original ‘Schengen Associated States’ were Iceland and Norway; see Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter’s association with the implementation, application and development of the Schengen acquis [1999] OJ L 176/36 (‘Schengen Association Agreement’).

⁵² So called ‘Mode 1’ in WTO law.

⁵³ Miek Peeters, ‘Free Movement of Patients: Directive 2011/24 on the Application of Patients’ Rights in Cross-Border Healthcare’ (2012) 19 *European Journal of Health Law* 29.

⁵⁴ Irina Katsirea and Anne Ruff, ‘Free Movement of Law Students and Lawyers in the EU: A Comparison of English, German and Greek Legislation’ (2005) 12(3) *International Journal of the Legal Profession* 367.

⁵⁵ Eleni Chatzopoulou, ‘Labour Mobility and Tourism: Challenges and Opportunities for Decent and Sustainable Work in the Tourism Sector. The Case of Greece’ in Vicky Katsoni and George Cassar (eds), *Recent Advancements in Tourism Business, Technology and Social Sciences* (Springer 2023) 245.

⁵⁶ We discount here the relatively novel technology of cross-border drone delivery of goods. See, e.g., Tom Cassauwers, ‘Sky high – Europe’s first drone cargo airline gets ready to take off’ (*Horizon Magazine*, 20 September 2024) <https://projects.research-and-innovation.ec.europa.eu/en/horizon-magazine/sky-high-europes-first-drone-cargo-airline-gets-ready-take> accessed 24 October 2024.

⁵⁷ See n 26-33.

⁵⁸ Dir 2004/38/EC (n 15).

⁵⁹ Schengen Borders Code (n 11).

specific pieces of Union (delegated) legislation and soft law instruments, which we elaborate in detail below.

The Citizens Directive delineates conditions under which EUCs and their family members may exit,⁶⁰ enter⁶¹ and reside in⁶² Member States, with minimal and Union-defined formalities, reflecting in detailed, binding and enforceable law the Union's commitment to free movement. The Directive determines the procedural and substantive scope of permitted restrictions on such movement, on grounds of public policy, public security or public health,⁶³ in response to diseases with epidemic potential, as defined by the World Health Organization, or other serious infectious diseases.⁶⁴ Restrictions on movement must be transparent, justified and open to legal challenge, communicated in writing, with reasons, and with a right to appeal.⁶⁵

The Schengen Borders Code has a wider personal scope, covering 'any person crossing the internal or external border of Member States'.⁶⁶ In principle, internal borders may be crossed without checks.⁶⁷ However, in response to 'a serious threat to public policy or internal security',⁶⁸ border controls may 'temporarily' be introduced (for up to 30 days, 'for the foreseeable duration of the serious threat if its duration exceeds 30 days', extendable 'in extraordinary circumstances' to two years⁶⁹), if substantive and procedural requirements are followed. The Code describes the reintroduction of border controls as 'a last resort', 'exceptional', and limited in extent to what is 'strictly necessary to respond to the serious threat'.⁷⁰ Schengen States must assess the effectiveness of border controls in remedying the threat, and the impact on free movement within the Schengen Area.⁷¹ Schengen States must notify the European Commission and other Schengen States if they reintroduce border controls. Notification should take place at least four weeks before the planned reintroduction of border controls; sooner if the threat emerges unexpectedly;⁷² or, in urgent situations, 'at the same time' as immediate re-introduction of border controls.⁷³

For external borders, the Schengen Borders Code provides that TCNs crossing the Union's external borders must not pose a threat to public health, internal security, or public policy.⁷⁴ 'Thorough' checks on entry⁷⁵ and exit⁷⁶ from the Union's external borders must confirm this. The

⁶⁰ Dir 2004/38/EC (n 15) art 4.

⁶¹ Dir 2004/38/EC (n 15) art 5.

⁶² Dir 2004/38/EC (n 15) arts 6, 7, 16.

⁶³ Dir 2004/38/EC (n 15) arts 27-33.

⁶⁴ Dir 2004/38/EC (n 15) art 29.

⁶⁵ Dir 2004/38/EC (n 15) arts 30, 31.

⁶⁶ Schengen Borders Code (n 11) art 3.

⁶⁷ Schengen Borders Code (n 11) art 22. However, in fact, one or more Member States frequently make use of the option to reintroduce internal borders, often exceeding the limits of EU law; see, e.g. Thym (n 7) 320–322.

⁶⁸ Schengen Borders Code (n 11) art 25.

⁶⁹ Schengen Borders Code (n 11) arts 25(1) and (3) and 29.

⁷⁰ Schengen Borders Code (n 11) arts 25(1) and (3) and 29.

⁷¹ Schengen Borders Code (n 11) art 26.

⁷² Schengen Borders Code (n 11) art 27. On the application of art 27 see, e.g., Joined Cases C-368/20 and C-369/20, *NW v Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, EU:C:2022:298, paras 91-94.

⁷³ Schengen Borders Code (n 11) art 28(2).

⁷⁴ Schengen Borders Code (n 11) art 6(1)(e).

⁷⁵ Schengen Borders Code (n 11) art 8(3)(a)(vi).

⁷⁶ Schengen Borders Code (n 11) art 8(3)(g)(iii).

Code requires cooperation between Member States, and information exchange between Member States and with the European Commission.⁷⁷

1.3 Scope and methods

This article considers Union law on border control from March 2020 to June 2023. Our temporal scope is determined by World Health Organization (WHO) declarations, officially recognizing COVID-19 as a pandemic,⁷⁸ and formally declaring an end to COVID-19 as a global health emergency on 5 May 2023.⁷⁹ The Union's legal responses were closely coordinated with these WHO acts. Our timeline analysis (2) ends in June 2023, when key pieces of Union legislation ceased to apply, but we include the 2024 revision of the Schengen Borders Code in our discussion (3).⁸⁰

Our material scope centres Union law on borders from various sources. Given the nature of the Union's shared competence, we also consider national responses, implementing that Union law and in contradiction to it. Here we cannot be exhaustive, but report on a selection of examples from across the Union, and on significant examples of non- or contested compliance. Because much of the specific detail was articulated through guidelines and similar measures, we cover key Union soft law, while acknowledging its limited nature in terms of mandatory legal obligations.

Our methods are those of standard legal analysis: we consider legal texts and their meanings and effects. The first section of the article considers Union law as it unfolded in time. We organise this analysis into four phases, while recognising that the dynamic nature of the pandemic means that each phase has continuities with others. The initial response phase is March to summer 2020 (2.1); the second phase covers summer 2020 to winter 2020/21 (2.2); the third phase is from winter 2020/21 to winter 2021/2 (2.3); and the final phase covers winter 2022 to June 2023 (2.4).

The following section (3) draws out four themes of the Union's COVID-19 border law. First, we consider the *rule/exception structure* of Union free movement law, in the context of public health protection in the internal market and Schengen area, and analyse the extent to which Member States acted lawfully in their border restrictions. Here we draw a distinction between procedural and substantive obligations, and discuss a connected theme: the enforcement of hard law. Which obligations were enforced, and which were not? (3.1). Second, we explain the theme of *selective mobility* (3.2). We show how, far from adopting a uniform approach, restricting all cross-border movements in response to COVID-19, Union law protected mobility for certain individuals and situations. A third theme involves *interactions between hard and soft law*: did non-

⁷⁷ Schengen Borders Code (n 11) arts 17, 39 and 42.

⁷⁸ WHO Director-General, 'WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020' <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-11-march-2020> accessed 24 October 2024.

⁷⁹ World Health Organization, 'Statement on the fifteenth meeting of the IHR (2005) Emergency Committee on the COVID-19 pandemic' [https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic) accessed 24 October 2024.

⁸⁰ Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders [2024] OJ L 1717/1.

binding measures nonetheless contribute to a sense of ‘soft obligation’? How did formally non-binding law have binding effects in practice? (3.3). Finally, we consider the roles of scientific or *technocratic governance* in the Union’s legal responses to the COVID-19 pandemic involving border controls (3.4).

We conclude with some brief observations on the symbolic nature of borders in Union law, and on the relationships between free movement and public health protection as Union values.

2. Timeline

2.1 Phase 1: The initial response (March-summer 2020)

In February 2020, the Union’s response to COVID-19 was marked by ambiguity. The Council proposed stronger coordination among Member States, potentially including travel measures, yet also upholding the principle of free movement within the Union.⁸¹ Commission President von der Leyen and European Council President Michel criticised the USA’s unilateral travel ban on people from Europe. Union leaders emphasized that a global pandemic demanded collaborative efforts rather than isolated actions.⁸² Despite this criticism, the European Commission adopted a similar restrictive approach for its external borders, effectively implementing measures akin to those it had previously criticized in the US. This was done through three key soft law instruments: a Communication; a set of Guidelines (both 16 March 2020); and the ‘Joint Road Map’ (15 April 2020).

The Commission Communication on a ‘Temporary Restriction on Non-Essential Travel to the EU’ called for Member States to implement temporary external border controls.⁸³ The Communication exempted travel restrictions for Union and Schengen States’ citizens, their family members, and long-term residents returning home, implicitly deeming this travel ‘essential’. ‘Non-essential travel’ was not formally defined, but the Communication’s scope excluded ‘other travellers with an essential function or need’,⁸⁴ including healthcare professionals, passengers in transit; and transport personnel. The latter exemption was crucial for movement of products into the Union, given the global supply chains on which the Union relies for industrial and consumer products. Such products included those needed to fight the pandemic, especially personal protective equipment (PPE) such as facemasks. Reinforced health checks were advised for all individuals permitted entry into the Union and Schengen area, to protect public health despite the exemptions. The Communication called for a uniform application of restrictions, highlighting the ineffectiveness of unilateral decisions, and emphasizing a collective approach. The next day, 17

⁸¹ Council of the European Union, ‘Council Conclusions on COVID-19’ 6038/20 (13 February 2020).

⁸² European Commission, ‘Joint Statement by President von der Leyen and President Michel on the US travel ban’ 20/449 (12 March 2020).

⁸³ European Commission, Communication to the European Parliament, the European Council and the Council, *COVID-19: Temporary Restriction on Non-Essential Travel to the EU in view of COVID-19*, COM (2020) 115 final (‘the 16 March 2020 Communication’). The Commission provided further guidance on implementing the travel restrictions; see EC, Communication from the Commission, *COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy* [2020] OJ C 102/3.

⁸⁴ See further below, section 3.1.

March 2020, Union leaders agreed to implement these restrictions.⁸⁵ The initial 30-day external border controls underwent several extensions,⁸⁶ continuing until end June 2020.

Alongside the Communication, the Commission⁸⁷ issued Guidelines for internal and external border management.⁸⁸ The 16 March 2020 Guidelines were in effect a Commission interpretation of the relevant hard legal obligations,⁸⁹ applicable in the unfolding circumstances. Anyone crossing an external Schengen border was already subject to systematic checks; the Guidelines pointed out that these may include health checks, and Member States are entitled to refuse entry to non-resident TCNs considered to be a threat to public health. Evidence included symptoms of COVID-19 or having been ‘particularly exposed’ to infection,⁹⁰ subject to the proportionality principle. Isolation or quarantine could be – but implicitly need not be – an alternative to refusal of entry.

For internal borders, the Guidelines recognized that Member States could lawfully reimpose controls ‘in an extremely critical situation’⁹¹ as a response to COVID-19.⁹² Member States were advised to apply controls proportionately, and ‘with due regard to the health of the individuals concerned’.⁹³ Refusing entry to ‘persons who are clearly sick’ was not appropriate:⁹⁴ instead, Member States were reminded that such people should have access to nationally-provided healthcare. Healthcare systems are coordinated in Union law, providing access to necessary healthcare for those covered by a healthcare system of one Member State in another Member State which they are visiting.⁹⁵ The first sentence of the Guidelines underscored the challenge: balancing the need to protect public health with the primary principle of free movement.

The 16 March 2020 Guidelines also urged Member States to secure ongoing supply of all, not only essential, goods and services. To ensure this, the Guidelines stated that all transport workers ‘should be able to circulate across borders as needed’.⁹⁶ To support ongoing essential

⁸⁵ European Council President, ‘Conclusions following the video conference with members of the European Council on COVID-19’ <https://www.consilium.europa.eu/en/press/press-releases/2020/03/17/conclusions-by-the-president-of-the-european-council-following-the-video-conference-with-members-of-the-european-council-on-covid-19/> accessed 27 March 2024.

⁸⁶ Through Communications such as EC, *Commission Communications on a Temporary restriction on Non-Essential Travel to the EU in view of COVID-19*, COM (2020) 148 final; EC, *Communication on the second assessment of the application of the temporary restriction on non-essential travel to the EU*, COM (2020) 222 final; EC, *Communication on the third assessment of the application of the temporary restriction on non-essential travel to the EU* COM (2020) 399 final.

⁸⁷ The author of the Guidelines is not, in fact, apparent from the face of the document.

⁸⁸ *European Commission, COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services (16 March 2020) C (2020) 1753 final* (‘the 16 March 2020 Guidelines’).

⁸⁹ See below, sections 3.2 and 3.3.

⁹⁰ The 16 March 2020 Guidelines, (n 88) para 15. Not further defined.

⁹¹ The 16 March 2020 Guidelines, (n 88) para 18.

⁹² European Court of Auditors, *Special Report 13/2022: Free movement in the EU during the COVID-19 pandemic – Limited scrutiny of internal border controls, and uncoordinated actions by Member States* [2022] OJ C 231/16, 15 June 2022, 29 <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=61240> accessed 5 November 2024.

⁹³ The 16 March 2020 Guidelines, (n 88) para 19.

⁹⁴ The 16 March 2020 Guidelines, (n 88) para 11.

⁹⁵ Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1, art 20.

⁹⁶ The 16 March 2020 Guidelines, (n 88) para 8.

travel, in May 2020, the European Centre for Disease Control (ECDC) and the Union Aviation Safety Agency adopted Guidance on testing and quarantine for air travel.⁹⁷ The ECDC also advised on the shipping and rail sectors.⁹⁸

Most goods continued to circulate freely between Member States during this initial phase, as required by the TFEU and relevant legislation.⁹⁹ However, some eight Member States implemented unilateral export bans on certain goods. In one case, this involved 1324 products, including paracetamol,¹⁰⁰ a policy considered disproportionate and therefore unlawful by the European Parliament,¹⁰¹ and by the European Commission, because it does not, in itself, ‘ensure that the products will reach the persons who need them most’ and ‘would therefore prove unsuitable to reach the objective of protecting the health of people living in Europe’.¹⁰² At the same time, the Commission adopted two Implementing Regulations to the Regulation on common rules for export,¹⁰³ which temporarily required an export authorization for exporting certain goods (including PPE and face masks) to third countries.¹⁰⁴

⁹⁷ European Centre for Disease Prevention and Control and European Union Aviation Safety Agency, *COVID-19 Aviation Health Safety Protocol: Guidance for the management of airline passengers in relation to the COVID-19 pandemic* (21 May 2020).

⁹⁸ European Centre for Disease Prevention and Control, *Considerations for travel-related measures to reduce spread of COVID-19 in the EU/EEA* (26 May 2020).

⁹⁹ See arts 28–30 and 34–36 TFEU; Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [2013] OJ L 269/1; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36; and Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State [2019] OJ L 91/1.

¹⁰⁰ See European Commission, *Communication to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup — Coordinated economic response to the COVID-19 Outbreak*, COM (2020) 112 final, 3–4. For discussion, see Benedikt Pirker, ‘Rethinking Solidarity in View of the Wanting Internal and External EU Law Framework concerning Trade Measures in the Context of the COVID-19 Crisis’ (2020) 5 *European Papers* 573.

¹⁰¹ European Parliament, *Medicine Shortage in the EU During the Novel Coronavirus Outbreak*, Policy Department for Economic, Scientific and Quality of Life Policies, PE 652.709 (May 2020) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652709/IPOL_BRI\(2020\)652709_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652709/IPOL_BRI(2020)652709_EN.pdf) accessed 28 October 2024.

¹⁰² Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation [2020] OJ L 77I/1; Commission Implementing Regulation (EU) 2020/568 of 23 April 2020 making the exportation of certain products subject to the production of an export authorisation [2020] OJ L 129/7.

¹⁰³ Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports [2015] OJ L 83/34.

¹⁰⁴ Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation [2020] OJ L 77I/1; Commission Implementing Regulation (EU) 2020/568 of 23 April 2020 making the exportation of certain products subject to the production of an export authorisation [2020] OJ L 129/7. See Luis Arroyo Jiménez and Mariolina Eliantonio, ‘Masks, Gloves, Export Licences and Composite Procedures: Implementing Regulation 2020/402 and the Limelight of Accountability’ (2020) 11 *European Journal of Risk Regulation* 382; Tomislav Sokol, ‘Public Health Emergencies and Export Restrictions’ (2020) 57 *Common Market Law Review* 1819.

The 15 April 2020 Joint European Roadmap towards lifting COVID-19 containment measures¹⁰⁵ – in retrospect highly optimistically – anticipated a gradual easing of restrictions within the Union, and suggested a cautious approach towards reopening of external borders.

2.2 Phase 2: Managing a longer pandemic (summer 2020-winter 2020/21)

After several extensions of temporary measures, summer 2020 marked a shift in the Union’s internal and external border management. A more permanent legal structure was based on three elements: respecting national competences; fostering coordination; and securing the internal market for a longer period of time.

Three key legal instruments applied to external border control. First, a new Recommendation aimed to standardize temporary restrictions on non-essential travel into the Union.¹⁰⁶ The strategy centred a coordinated list of third countries whose residents would be exempt from travel restrictions. The 30 June 2020 Recommendation stressed that affected neither obligations nor prerogatives of Member States under the Schengen Borders Code.¹⁰⁷ Member States retained power to assess, on a case-by-case basis, whether a third-country national posed a public health threat. But the Recommendation asserted that cooperation and coordination between border authorities and transport providers across Member States were necessary, because of the interconnected nature of the Schengen area. The list of countries exempt from restrictions was subsequently updated to reflect the changing epidemiological landscape.¹⁰⁸ Stressing coordination here too,¹⁰⁹ the 30 June 2020 Recommendation also introduced a framework – in retrospect, like the April 2020 Joint Roadmap, unduly optimistic – for gradual easing of restrictions.¹¹⁰

Second, the 30 June 2020 Recommendation was supported by the Commission’s implementing Communication of 28 October 2020.¹¹¹ Emphasizing coordinated, flexible, and non-discriminatory national implementation, this Communication further specified categories of persons exempted from travel restrictions, providing detailed guidance to ensure that essential travel continued. Furthermore, it outlined the documentation necessary to prove eligibility for exemption.

¹⁰⁵ Joint European Roadmap towards lifting COVID-19 containment measures [2020] OJ C 126/1 (‘the April 2020 Joint Roadmap’).

¹⁰⁶ Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2020] OJ L 208I/1 (‘the 30 June 2020 Recommendation’).

¹⁰⁷ Schengen Borders Code (n 11) art 6.

¹⁰⁸ See Council Recommendation (EU) 2020/1052 [2020] OJ L 223/1; Council Recommendation (EU) 2020/1144 [2020] OJ L 249/4; Council Recommendation (EU) 2020/1186 [2020] OJ L 262/7; Council Recommendation (EU) 2020/1551 of 22 October 2020 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2020] OJ L 350/1 (‘the 22 October 2020 Recommendation’).

¹⁰⁹ The 30 June 2020 Recommendation (n 106) para 6.

¹¹⁰ Council Recommendation on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2020] OJ C 168I/1.

¹¹¹ European Commission, *COVID-19 Guidance on persons exempted from the temporary restriction on non-essential travel to the EU as regards the implementation of Council Recommendation 2020/912 of 30 June 2020*, COM (2020) 686 final (28 October 2020) (‘the October 2020 Guidance’).

Third, the 22 December 2020 Commission Recommendation responded to the emergence of a new, more readily transmissible, SARS-CoV-2 variant in the United Kingdom.¹¹² The Recommendation reinforced the need for Member States to swiftly implement coordinated border management measures, ensuring continued safeguarding of public health while maintaining the integrity of the internal market, in a fast-changing epidemiological situation.

The key act defining the Union's internal borders approach during this phase was Council Recommendation 2020/1475.¹¹³ Its underlying premise was that restrictions on freedom of movement within the Union were a tool of last resort. Only strictly necessary and non-discriminatory restrictions should apply and only to persons coming from specific regions particularly affected by COVID-19, rather than a Member State's entire territory. To determine risk, the Recommendation facilitated the implementation of common criteria and thresholds for restrictions, supported by a risk-mapping of COVID-19 using an agreed colour code. The European Centre for Disease Prevention and Control (ECDC) was tasked with publishing an online map, by regions, classified into green, orange, red, and grey zones based on the level of COVID-19 risk. The map was first published on 16 October 2020, and weekly thereafter. This categorization sought to guide the application of travel restrictions more precisely, and became fundamental to internal border management in Union law for the remainder of the pandemic.

2.3 Phase 3: Vaccine rollout (winter 2020/21-winter 2021/22)

The Union's approach to managing external and internal borders underwent significant modifications following the introduction of COVID-19 vaccinations, beginning in December 2020. This change in strategy acknowledged the role of vaccination in inhibiting COVID-19 transmission and shifted the trajectory of border control measures towards an individual-focused approach. By the end of this phase, movement rights were mainly determined by verified vaccination, testing or recovery status of an individual. The new approach aimed to balance public health concerns with the need to facilitate travel, with an explicit view to promoting economic recovery.

The Union remained cautious with external borders. The Council adopted a Recommendation on the temporary restriction on non-essential travel into the Union,¹¹⁴ updating criteria and thresholds for assessing safety of non-essential travel from third countries. The February 2021 Recommendation incorporated detection of variants of concern, the 14-day cumulative COVID-19 case notification rate, testing rates, and test positivity rates. It continued to discourage all non-essential travel into the Union, especially from high-risk areas, maintaining measures like testing and quarantine, particularly for travellers from areas with a higher incidence of new variants.

¹¹² Commission Recommendation (EU) 2020/2243 of 22 December 2020 on a coordinated approach to travel and transport in response to the SARS-CoV-2 variant observed in the United Kingdom [2020] OJ L 436/72 ('the December 2020 Recommendation').

¹¹³ Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2020] OJ L 337/3 ('the 13 October 2020 Recommendation').

¹¹⁴ Council Recommendation (EU) 2021/132 of 2 February 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2021] OJ L 41/1, ('the 2 February 2021 Recommendation').

Three months later, a further amendment to the June 2020 Recommendation, Council Recommendation 2021/816/EU¹¹⁵ reflected increasing COVID-19 vaccine uptake in the Union and globally. The May 2021 Recommendation suggested that restrictions on travel into the Union could be waived for people fully vaccinated with a vaccine authorized in the Union, or by the WHO Emergency Use authorization. As before, the Recommendation stressed a coordinated Union-wide response, while respecting national competence. The Recommendation introduced an ‘emergency brake’ to quickly react to the emergence of concerning variants, allowing Member States to adopt urgent measures to prevent their spread.

In mid-June 2021, two important hard law measures were adopted: Regulations 2021/953/EU and 2021/954/EU concerning the EU Digital COVID Certificate.¹¹⁶ These Regulations significantly impacted border control within the Union.¹¹⁷ Two measures were necessary: one based on Article 21(2) TFEU applying to EUCs, and another based on Article 77(2)(c) applying to TCNs lawfully staying or resident within the Union ‘and who are entitled to travel to other EU Member States in accordance with Union law’. The latter Regulation simply extended the personal scope of the former,¹¹⁸ and made special provision for Ireland.¹¹⁹ The Regulations thus cover internal Union and Schengen borders only.

Regulation 2021/953/EU provided a standardized framework for issue, verification, and acceptance of certificates for vaccination, testing, and recovery across all Member States, ensuring interoperability and mutual recognition. Each certificate featured a QR code and digital signature for secure verification through a Union-wide digital platform.¹²⁰ The Regulation deemed use of the Digital COVID Certificate to be compliant with the General Data Protection Regulation.¹²¹ Certificates were to be issued free of charge.¹²² Designed as a temporary measure, the Regulation aimed to prevent discrimination¹²³ by allowing movement for vaccinated, tested, or recovered

¹¹⁵ Council Recommendation (EU) 2021/816 of 20 May 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2021] OJ L 182/1, (‘the May 2021 Recommendation’).

¹¹⁶ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, testing, and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic [2021] OJ L 211; Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination certificates [2021] OJ L 211/24. Editorial, ‘Charting deeper and wider dimensions of (free) movement in EU law’ (2021) 58 *Common Market Law Review* 969.

¹¹⁷ European Court of Auditors, *Special Report 01/2023: Tools facilitating travel within the EU during the COVID-19 pandemic – Relevant initiatives with impact ranging from success to limited use* [2023] OJ C 10/05, 27–29 <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=62947> accessed 28 October 2024.

¹¹⁸ Regulation (EU) 2021/953 (n 116) art 1.

¹¹⁹ Regulation (EU) 2021/953 (n 116) art 2.

¹²⁰ European Commission, *EU Digital COVID Certificate: Secure EU infrastructure, interoperability and open source at the heart of the EU Gateway* (1 June 2021) Directorate-General for Digital Services https://commission.europa.eu/news/eu-digital-covid-certificate-secure-eu-infrastructure-interoperability-and-open-source-heart-eu-2021-06-01_en accessed 28 October 2024.

¹²¹ 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) [2016] OJ L 119/1, art 1.

¹²² Regulation (EU) 2021/953 (n 116) art 3(4).

¹²³ Regulation (EU) 2021/953 (n 116) recitals 6, 7, 11 and 14.

individuals, streamlining border checks and supporting the Union's efforts to reinstate free movement as soon as feasible.

Building upon this framework, Council Recommendation 2021/961/EU,¹²⁴ adopted on the same day, provided an updated, coordinated strategy for COVID-19 travel restrictions. Six and 11 months later, in January and December 2022, Council Recommendations 2022/107/EU¹²⁵ and 2022/2547/EU¹²⁶ continued the trajectory, reflecting developments in vaccine uptake and the widespread use of the EU Digital COVID Certificate. These three Recommendations completed the shift in focus from regional to individual assessments of COVID-19 status. Travellers' vaccination, testing, or recovery status, as evidenced by an EU Digital COVID Certificate, became the key determinant for travel within the Union.

The Recommendations specified that holders of the EU Digital COVID Certificate should be exempt from additional travel-related restrictions, such as quarantine or testing, unless necessitated by severe epidemiological conditions. This applied to vaccination certificates (with a booster dose not subject to an acceptance period), test certificates (72 hours before arrival for NAAT,¹²⁷ 24 hours for RAT¹²⁸), and recovery certificates (valid for 180 days). These measures sought to ensure that vaccinated, tested, or recovered individuals could move freely within the Union without facing inconsistent national requirements. Provisions on exempt travellers were updated, to include provisions for minors, essential travellers, and residents of border regions. For instance, children under 12 were to be exempt from travel-related testing and minors travelling with vaccinated or recovered adults should not be quarantined. Certain people, such as transport workers, were exempt from the requirement to hold an EU Digital COVID Certificate. Member States were encouraged to use the common Digital Passenger Locator Form and join the Passenger Locator Form Exchange Platform, to improve tracking of potential COVID-19 cases through cross-border contact tracing capabilities.

The Recommendations updated criteria for categorizing regions within the Union based on COVID-19 risk levels (green, orange, red, dark red). New indicators, such as vaccine uptake and prevalence of variants of concern, allowed for a more nuanced approach to travel restrictions.

An emergency brake mechanism continued to apply. Member States were asked to provide clear, comprehensive, and timely information about restrictions to free movement and accompanying requirements. This information was to be published on the 'Re-open EU' web platform, designed to ensure transparency and consistency.

¹²⁴ Council Recommendation (EU) 2021/961 of 14 June 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2021] OJ L 213/1 ('the 14 June 2021 Recommendation').

¹²⁵ Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475 [2022] OJ L 18/110 ('the 25 January 2022 Recommendation').

¹²⁶ Council Recommendation (EU) 2022/2547 of 13 December 2022 amending Recommendation (EU) 2022/107 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic [2022] OJ L 328/68 ('the 13 December 2022 Recommendation').

¹²⁷ Molecular nucleic acid amplification test.

¹²⁸ Rapid antigen test.

The opening of external Union borders came much later. The May 2021 Recommendation¹²⁹ cautiously considered vaccination progress in third countries when assessing their epidemiological situation and the use of third-country vaccination certificates within the Union. Likewise, Regulation 953/2021/EU (June 2021) permitted – but did not oblige – Member States to recognise third country vaccination certificates, for COVID-19 vaccines authorized in the Union.¹³⁰ The Regulation also empowered the Commission to deem such certificates equivalent to those recognised under the Regulation.¹³¹ Implementing Regulations were adopted for Switzerland,¹³² San Marino,¹³³ and Vatican City¹³⁴ in July 2021, and dozens more in the following months.¹³⁵

Eventually, following October 2021 Council Conclusions,¹³⁶ Council Recommendation 2022/290/EU revised the earlier guidelines concerning non-essential travel into the Union.¹³⁷ The 22 February 2022 Recommendation updated criteria for allowing travel based on higher COVID-19 case thresholds and improved testing rates, extended the validity period for vaccination certificates to 270 days, and integrated the EU Digital COVID Certificate to streamline travel processes. The Recommendation also allowed entry for those recovered from COVID-19 within 180 days, with valid recovery certificates, and provided for children and travellers vaccinated with WHO-listed vaccines.

2.4 Phase 4: Reopening (winter 2022-June 2023)

Marking a noticeable shift, Council Recommendation 2022/2547/EU and Council Recommendation 2022/2548/EU, both of 13 December 2022,¹³⁸ initiated the full-reopening phase. These Recommendations acknowledged the evolving epidemiological situation, particularly the

¹²⁹ The May 2021 Recommendation, (n 115).

¹³⁰ Regulation (EU) 2021/953 (n 116) art 8(1).

¹³¹ Regulation (EU) 2021/953 (n 116) art 8(2).

¹³² Commission Implementing Decision (EU) 2021/1126 of 8 July 2021 establishing the equivalence of COVID-19 certificates issued by Switzerland to the certificates issued in accordance with Regulation (EU) 2021/953 of the European Parliament and of the Council [2021] OJ L 243/49.

¹³³ Commission Implementing Decision (EU) 2021/1273 of 30 July 2021 establishing the equivalence, for the purpose of facilitating the right of free movement within the Union, of COVID-19 certificates issued by San Marino to the certificates issued in accordance with Regulation (EU) 2021/953 of the European Parliament and of the Council [2021] OJ L 277/151.

¹³⁴ Commission Implementing Decision (EU) 2021/1272 of 30 July 2021 establishing the equivalence, for the purpose of facilitating the right of free movement within the Union, of COVID-19 certificates issued by the Vatican City State to the certificates issued in accordance with Regulation (EU) 2021/953 of the European Parliament and of the Council [2021] OJ L 277/148.

¹³⁵ For example Commission Implementing Decision (EU) 2021/1895 of 28 October 2021 establishing the equivalence, for the purpose of facilitating the right of free movement within the Union, of COVID-19 certificates issued by the United Kingdom of Great Britain and Northern Ireland to the certificates issued in accordance with Regulation (EU) 2021/953 of the European Parliament and of the Council [2021] OJ L 384/112.

¹³⁶ European Council, *European Council conclusions, 21–22 October 2021* <https://www.consilium.europa.eu/media/52622/20211022-euco-conclusions-en.pdf> accessed 28 October 2024.

¹³⁷ Council Recommendation (EU) 2022/290 of 22 February 2022 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2022] OJ L 55/1 (‘the 22 February 2022 Recommendation’).

¹³⁸ The 13 December 2022 Recommendation (n 126); Council Recommendation (EU) 2022/2548 of 13 December 2022 on a coordinated approach to travel to the Union during the COVID-19 pandemic and replacing Council Recommendation (EU) 2020/912 [2022] OJ L 328/146 (‘the external border 13 December 2022 Recommendation’).

dominance of the less severe Omicron variant and the high levels of protection from vaccination and previous infections. Recommendation 2022/2547/EU provided that Member States should, in principle, not impose any restrictions on free movement for public health reasons related to COVID-19. A reversion to the pre-March 2020 position in Union law concerning internal movement of people was thus recommended. The 13 October 2022 Recommendation emphasized that any reintroduction of restrictions on internal movement should be limited to severe epidemiological deterioration, considering strain on healthcare systems and severity of circulating variants. Even in such cases, travellers with valid EU Digital COVID Certificates should not be subject to quarantine or additional testing.

This Recommendation also discontinued the traffic light map, no longer adequate to reflect current epidemiological reality. Coordination was to continue through the emergency brake and the Integrated Political Crisis Response network. Member States were requested to continue to use common tools for contact tracing and to provide information to the public via the ‘Re-open EU’ platform.

In Recommendation 2022/2548/EU, the Commission advised the removal of restrictions on travel into the Union, noting that all countries to which the Schengen *aquis* applies had already done so over summer 2022.¹³⁹ The Annex to the 30 June 2020 Recommendation, listing countries from which the restriction on non-essential travel could be lifted, was no longer necessary, so was repealed.

The WHO declared an end to COVID-19 as a public health emergency of international concern on 5 May 2023.¹⁴⁰ A few weeks later, on 30 June 2023, the EU Digital COVID Certificate Regulation, and the Council’s 25 January 2022 Recommendation¹⁴¹ concerning intra-Union travel, ceased to be applicable. The Union joined the WHO’s global digital health certification network, and recommended that Member States do so.¹⁴² The Union had reverted to its pre-March 2020 internal border law.

However, the external border 13 December 2022 Recommendation, covering travel into the Union from third countries, remained in effect. This Recommendation includes precautionary measures designed for potential worsening of the epidemiological situation or emergence of new concerning variants, for an unspecified time into the future. The Union continues to have in place, to this date, a soft law list of ‘categories of persons travelling in the exercise of an essential function or need’, comprising

‘healthcare professionals, health researchers and elderly care professionals; frontier workers; transport personnel; diplomats, staff of international organisations and people invited by international organisations, military personnel and humanitarian aid workers and

¹³⁹ Recital 3.

¹⁴⁰ UN News, ‘WHO chief declares end to COVID-19 as a global health emergency’ (5 May 2023) <https://news.un.org/en/story/2023/05/1136367> accessed 28 October 2024.

¹⁴¹ As amended by the 13 December 2022 Recommendation, (n 126).

¹⁴² Council Recommendation (EU) 2023/1339 of 27 June 2023 on joining the global digital health certification network established by the World Health Organization and on temporary arrangements to facilitate international travel in view of the expiry of Regulation (EU) 2021/953 of the European Parliament and of the Council [2023] OJ L 166/177.

civil protection personnel; passengers in transit; passengers travelling for imperative family or medical reasons; seafarers; persons working on critical or otherwise essential infrastructures; persons in need of international protection or other humanitarian reasons’.

This provision constitutes part of the Union’s future legal preparedness package,¹⁴³ in case of another global pandemic.

3. Discussion

Four overlapping themes emerge from the history of Union border law during the COVID-19 pandemic. Each illustrates a facet of how the Union managed the tensions between free movement and protection of human health. These themes are: the place of health in the rule/exception structure of Union border law; the concept of selective mobility; the interactions between Union soft and hard law; and scientific or technocratic governance. We examine each in turn.

3.1 Re-interpreted rule/exception structure of Union border law

As noted above (1.2), Union internal border law establishes a rule of free movement, while allowing for exceptions in substantively and procedurally specified circumstances, including the protection of human health. In traditional conceptions of Union law, exceptions, which are narrowly construed in accordance with a strict version of proportionality,¹⁴⁴ are understood as secondary Union values or principles, compared to the ‘constitutionally prior’ imperative of internal free movement.¹⁴⁵ The COVID-19 pandemic presented a fundamental challenge to that conceptualization, as Union border law faced unilateral imposition of restrictions on free movement by Member States¹⁴⁶ in response to an unprecedented emergency of exceptional gravity. From the outset, the Union sought to maintain internal free movement as much as possible and simultaneously to acknowledge the necessity of restrictions to protect human health. The complexity of this challenge was heightened by the role of national constitutions, which

¹⁴³ Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision 1082/2013/EU [2022] OJ L 314/26; see, on legal preparedness, e.g., Stefania Negri et al, ‘Strengthening Legal Preparedness and Response within the Global Health Emergency Framework’ (2024) 1(1) *Journal of Global Health Law* 88; Jeffrey D Sachs et al, ‘The Lancet Commission on Lessons for the Future from the COVID-19 Pandemic’ (2022) 400 *The Lancet*.

¹⁴⁴ See, e.g., Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis, *Exceptions from EU Free Movement Law* (Bloomsbury 2016); Case C-265/95, *Commission v France (Spanish Strawberries)*, EU:C:1997:595.

¹⁴⁵ See, e.g., Koutrakos, Nic Shuibhne and Syrpis (n 144); Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP 2022); Peter Oliver and Wulf-Henning Roth, ‘Internal Market and the Four Freedoms’ (2004) 41 *Common Market Law Review* 407; Wolf Sauter and Harm Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts* (CUP 2009); Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law* (OUP 2013); Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU’s Internal Market* (Edward Elgar 2017); Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017); Sacha Garben and Inge Govaere (eds), *The Internal Market 2.0* (Bloomsbury 2020).

¹⁴⁶ European Court of Auditors (n 92); Sergio Carrera and Ngo Chun Luk, *In the Name of COVID-19: An Assessment of the EU Border Controls and Travel Restrictions in the EU*, Study requested by the LIBE Committee, European Parliament (2020).

determined the legal limits of nationally-adopted emergency measures,¹⁴⁷ making a fully harmonized response across the Union very difficult.

The Schengen Borders Code and Citizens Directive contain both procedural and substantive obligations (1.2). The Code establishes explicit procedural requirements for reintroducing internal border controls. The Directive requires factually-grounded, reasoned and individuated decision-making. Procedurally, the onus is on Member States to prove that there are no better alternatives to border controls/refusing entry and that such measures are justified as a last resort. When internal border controls are reintroduced, Member States are required to notify the Commission, providing timely and comprehensive information necessary for the Commission's assessment.¹⁴⁸

As the virus initially spread, the prevailing belief across Member States was that border closures were essential, not necessarily epidemiologically (diseases do not respect borders), but rather as a critical aspect of national sovereignty and a symbol of state authority.¹⁴⁹ These reasons are not the proportional, scientifically justified or individuated reasons envisaged in the Schengen Borders Code, or the Citizens Directive. That said, in the first phase of the pandemic, it was not possible to determine a proportionate approach, given the paucity of data about which measures would be most effective against the novel pathogen.¹⁵⁰ While border closures were inconsistent with traditional Union law standards, they reflected broader uncertainties and political pressures shaping the crisis response.

Eight Member States (Greece, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Netherlands, and Slovenia) introduced border controls without notification.¹⁵¹ Procedurally, this constitutes a breach of Union border law.

¹⁴⁷ For instance, in Germany, the Federal Constitutional Court (*Bundesverfassungsgericht*) ruled that restrictions on movement and assembly had to be proportionate and consistent with the Basic Law (*Grundgesetz*), leading to judicial challenges to lockdown measures (see *BVerfG*, Order of 15 April 2021 – 1 BvR 781/21). In France, the Constitutional Council (*Conseil constitutionnel*) reviewed emergency legislation and ruled on the proportionality of restrictions (see Decision No 2020-800 DC of 11 May 2020). In Spain, the Constitutional Court (*Tribunal Constitucional*) declared that parts of the lockdown imposed under the state of alarm were unconstitutional (see Judgment STC 148/2021, 14 July 2021). In Romania, the Constitutional Court (*Curtea Constituțională*) assessed the legality of emergency measures (see Decision No 157 of 13 May 2020). These cases illustrate how constitutional principles, particularly fundamental rights and proportionality, shaped national responses to the pandemic.

¹⁴⁸ Schengen Borders Code (n 11) art 27.

¹⁴⁹ Stefan Salomon and Jorrit Rijpma, 'A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship' (2023) 24 *German Law Journal* 282, 283; Sarah Wolff, Ariadna Ripoll Servent and Agathe Piquet, 'Framing Immobility: Schengen Governance in Times of Pandemics' (2020) 42 *Journal of European Integration* 1127.

¹⁵⁰ European Centre for Disease Prevention and Control, *Considerations Relating to Social Distancing Measures in Response to COVID-19 – Second Update* (23 March 2020), highlighting the lack of conclusive evidence regarding the effectiveness of border closures in pandemic response. See also World Health Organization, *COVID-19 Strategy Update* (14 April 2020), acknowledging the uncertainty in selecting optimal policy measures during the early phase of the crisis.

¹⁵¹ See European Commission, *Full list of Member States notifications pursuant to Article 25 of the Schengen Borders Code* https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en accessed 19 October 2024; European Parliament, *The Impact of Coronavirus on Schengen Borders* [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649347/EPRS_BRI\(2020\)649347_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649347/EPRS_BRI(2020)649347_EN.pdf); Carrera and

By April 2020, 14 Member States had implemented notified internal Union border controls,¹⁵² and 17 did so overall during the pandemic.¹⁵³ Substantively, of the 150 notifications of border controls received by the European Commission from March 2020-June 2021, fewer than 10% provided detailed reasoning, supported by statistical evidence and comparative analysis of alternatives to border controls, and none showed that border controls were necessary as a last resort, as required by the traditional understanding of the proportionality principle.¹⁵⁴ An egregious example is the Czech Republic's notification of 1 April 2020, which states only, '[i]n connection with the spread of COVID-19 caused by the new coronavirus SARS-CoV-2, a serious threat to public order and internal security of the Czech Republic has been identified'.¹⁵⁵ Lithuania and Poland gave similar very cursory reasons.¹⁵⁶

The lack of justification is also demonstrated by the logical incoherence of border controls. The fact that border measures can often be circumvented through alternative routes is not a new phenomenon. However, in the context of the COVID-19 pandemic, this further undermined the effectiveness of unilateral border closures as a public health measure. For example, from 16 March-6 April 2020, Germany closed its land border with Luxembourg, but kept borders open with Belgium. Because the Belgium/Luxembourg border was also open, it was possible for people to bypass the Germany/Luxembourg border closure by moving from Luxembourg to Germany via Belgium.¹⁵⁷ The same applies to the closure of the Germany/Czechia border on 14 February 2021, in response to new COVID-19 variants, when the Germany/Poland and Poland/Czechia borders were open.¹⁵⁸

At the same time, in contrast all other Member States, Sweden imposed no border controls. This approach must also be understood in light of Sweden's geographical and demographic characteristics, which differ significantly from more densely populated countries such as Italy or Spain. With a lower population density and fewer high-traffic border crossings, Sweden faced a different set of public health considerations when assessing the necessity of border measures. Sweden's legal framework, specifically the Communicable Diseases Act of 2004, does not support the imposition of general quarantines or lockdown measures. Instead, the Act focuses on

Luk (n 146); 'All flights to and from northern Italy suspended' <https://www.ekathimerini.com/news/250404/all-flights-to-and-from-northern-italy-suspended/> accessed 19 October 2024; 'COVID-19 travel restrictions' <https://www.lexology.com/library/detail.aspx?g=45eca8a7-76ed-4779-bc59-21dcdaf265ec> accessed 19 October 2024; The Guardian, 'Coronavirus travel updates: which countries have restrictions and FCO warnings in place' <https://www.theguardian.com/travel/2020/mar/24/coronavirus-travel-updates-which-countries-have-restrictions-and-fco-warnings-in-place> accessed 19 October 2024.

¹⁵² European Court of Auditors (n 92) 11.

¹⁵³ Austria, Belgium, Czechia, Denmark, Estonia, Finland, France, Germany, Hungary, Lithuania, Poland, Portugal, Slovakia, Spain; Iceland, Norway, Switzerland, see European Commission, (n 151).

¹⁵⁴ European Court of Auditors, (n 92) 20; see also Carrera and Luk (n 146) 68–70. On the legality of these measures, see, eg, Gareth Davies, 'Does Evidence-Based EU Law Survive the Covid-19 Pandemic? Considering the Status in EU Law of Lockdown Measures Which Affect Free Movement' (2020) 2 *Frontiers in Human Dynamics*; Iris Goldner Lang, 'Laws of Fear in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19' (2023) 14(1) *European Journal of Risk Regulation*; Daniel Thym and Jonas Bornemann, 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics' (2020) 5 *European Papers* 1143, 1162–69

¹⁵⁵ Carrera and Luk (n 146) 68.

¹⁵⁶ Carrera and Luk (n 146) 68.

¹⁵⁷ European Court of Auditors (n 92) 34.

¹⁵⁸ European Court of Auditors (n 92) 34.

individual-level interventions, such as contact tracing, individual quarantine, and compulsory treatment if necessary. Sweden’s approach to border control was thus part of its broader pandemic strategy, which relied heavily on individual responsibility and voluntary measures.¹⁵⁹ This emphasis on personal responsibility also reflects broader cultural factors, including Sweden’s long-standing trust in public institutions and a social norm of reduced physical contact in everyday interactions compared to some Southern European countries. The existence of Sweden’s alternative approach strengthens the argument – under the ‘traditional’ understanding of Union border law – that other Member States had not sufficiently justified their border closures.

The Schengen Borders Code requires the Commission to request additional information, if a notification lacks sufficient details.¹⁶⁰ It is important to acknowledge that the climate of uncertainty and urgency in early 2020 may not be fully appreciated in retrospect. Decisions were taken under extreme time pressure and with limited data, which helps explain why Member States resorted to restrictive measures, despite their inconsistency with the established legal framework. As it is still contested in epidemiological science whether border controls are *ever* an appropriate or proportionate response to a communicable disease threat,¹⁶¹ and border controls are even less likely to be effective once a disease has entered a country,¹⁶² it is doubtful that any Member State could have provided the justification required by the traditional rule/exception concept of Union law, with the strictest of proportionality tests. In March 2020, little was known about the nature of COVID-19, making such strict evidence-based justification even less likely. If the Commission questions the proportionality or necessity of a measure, it must issue an opinion.¹⁶³ The Commission issued no such opinions, nor did it challenge re-introduction of border controls, even where notifications were completely absent. One possibility is that the Commission was overwhelmed by the volume of notifications and urgency of the situation. But an alternative is that the Union’s internal border law should instead be understood as revealing a more complex interaction between the rule and its health exception than is traditionally assumed. This alternative reading is found in three instances.

¹⁵⁹ Titti Mattsson, Ana Nordberg, Martina Axmin, Yana Litins’ka, ‘Sweden’, *Lex-Atlas: COVID-19* <https://lexatlas-c19.org/sweden/> accessed 5 November 2024.

¹⁶⁰ Schengen Borders Code (n 11) art 27(1).

¹⁶¹ Kelley Lee, Julianne Piper and Jeniffer Fang, ‘Advancing a Risk-Based Approach to Border Management during Public Health Emergencies of International Concern: Lessons from the COVID-19 Pandemic’ in Colleen Flood et al (eds), *Pandemics, Public Health, and the Regulation of Borders: Lessons from COVID-19* (Routledge 2024) 36; Timothy Germann et al, ‘Mitigation Strategies for Pandemic Influenza in the United States’ (2006) 103(15) *Proceedings of the National Academy of Sciences* 5935; Lawrence Gostin and Rebecca Katz, ‘The International Health Regulations: The Governing Framework for Global Health Security’ (2016) 94(2) *Milbank Quarterly* 264.

¹⁶² See, eg, Germann et al (n 161); ALP Mateus et al, ‘Effectiveness of Travel Restrictions in Rapid Containment of Human Influenza: A Systematic Review’ (2014) 92(12) *Bulletin of the World Health Organization* 868, cited in Carrera and Luk (n 146) 69; World Health Organization, *Policy and Technical Considerations for Implementing a Risk-Based Approach to International Travel in the Context of COVID-19* <https://www.who.int/news-room/articles-detail/policy-and-technical-considerations-for-implementing-a-risk-based-approach-to-international-travel-in-the-context-of-covid-19> accessed 11 October 2022; European Centre for Disease Prevention and Control, *Considerations for Travel-Related Measures to Reduce Spread of COVID-19 in the EU/EEA* (2020) <https://www.ecdc.europa.eu/en/publications-data/considerations-travel-related-measures-reduce-spread-covid-19-eueea> accessed 11 October 2022.

¹⁶³ Schengen Borders Code (n 11) art 27(4).

First, the literal text of the Schengen Borders Code, which did not explicitly list health as a justification for re-introducing controls,¹⁶⁴ was interpreted generously. When France reinstated border controls on 1 May 2020, it referred to ‘the continuous terrorist threat and the risk of terrorists using the vulnerability of States due to the COVID-19 pandemic, as well as support for measures aimed at containing the spread of the virus’.¹⁶⁵ The European Commission quickly acknowledged that protecting public health could be seen as an aspect of public policy or internal security, thus justifying border reintroduction.¹⁶⁶ This interpretation permitted Member States to lawfully reimpose border controls based on public health protection, provided they adhered to the Code’s procedural conditions. The interpretation was later confirmed by the Court of Justice of the European Union in the *Nordic Info* judgment.¹⁶⁷ It has now been embodied in legislation: the revised Schengen Borders Code incorporates a definition of a large-scale public health emergency.¹⁶⁸

Second, it is true that the European Commission’s impetus to preserve free movement as much as possible, and encouraging Member States to lift restrictions, evident (in retrospect, hopelessly optimistically) even from April 2020,¹⁶⁹ conceived prohibiting internal cross-border movement only as a tool of last resort.¹⁷⁰ For internal borders (but not external ones), the Union’s soft law balanced the interests of free movement and health protection by recommending not that people be refused entry, but that quarantines, and also providing healthcare for people moving within the Union, would be more appropriate.¹⁷¹

Yet this interpretation of Union hard law was tempered by consistent acknowledgement that Member States needed to re-introduce internal border controls, reflected in multiple soft law measures across all phases of the Union’s COVID-19 response.¹⁷² Even the December 2022 Recommendation, which in effect reverted to the pre-March 2020 position, acknowledges that internal border controls may be needed to protect public health. This Recommendation states that, in principle, restrictions on internal movement are no longer permitted based on COVID-19, but

¹⁶⁴ Schengen Borders Code (n 11) arts 25 and 29 refer only to ‘public policy or internal security’.

¹⁶⁵ European Commission, *Member States’ Notifications of the Temporary Reintroduction of Border Control at Internal Borders Pursuant to Articles 25 and 28 et seq. of the Schengen Borders Code* https://home-affairs.ec.europa.eu/document/download/11934a69-6a45-4842-af94-18400fd274b7_en?filename=Full-list-of-MS-notifications_en_0.pdf accessed 11.11.2024, 23; Hanneke van Eijken and Jorrit Rijpma, ‘Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona’ (2021) 17(3) *Utrecht Law Review* 40.

¹⁶⁶ The 16 March 2020 Guidelines, (n 88) point 18.

¹⁶⁷ Judgment of 5 December 2023, *Nordic Info BV v. Belgische Staat*, C-128/22, EU:C:2023:951, para 127. See Editorial Comments, ‘COVID in the Case Law of the CJEU: Affirming EU Law Orthodoxy Even Under Extraordinary Circumstances’ (2024) 61 *Common Market Law Review* 581; Editorial Comments, ‘Disease and Recovery in (COVID-afflicted) Europe’ (2020) 57 *Common Market Law Review* 619.

¹⁶⁸ Schengen Borders Code, (n 11) as amended in July 2024, art 2(27) new art 21a, art 25, new art 27a and art 28.

¹⁶⁹ See, e.g., the April 2020 Joint Roadmap (n 105); European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tourism and Transport in 2020 and Beyond*, COM (2020) 550 final (13 May 2020); European Commission, *Guidelines Concerning the Exercise of the Free Movement of Workers During the COVID-19 Outbreak* [2020] OJ C 102I/12 (‘Guidelines on the Free Movement of Workers’); the 13 October 2020 Recommendation, (n 113).

¹⁷⁰ See, e.g., the 13 October 2020 Recommendation, (n 113).

¹⁷¹ See the December 2020 Recommendation, (n 112).

¹⁷² The 16 March 2020 Guidelines, (n 88) paras 18–19; the 13 October 2020 Recommendation, (n 113) recital 16; the 14 June 2021 Recommendation, (n 124) recital 28 and point 12; the external border 13 December 2022 Recommendation (n 138).

the *reason* it gives is that the less virulent Omicron variant and high levels of protection from vaccination and prior infection are an altered position from that in earlier phases of the pandemic. The logical corollary is that such restrictions *were* justified, and presumably that they would be again in a future pandemic.

Third, despite both substantive and procedural requirements surrounding border control, the European Commission did not fully utilize all available tools in overseeing the process of reinstating internal Union border controls.¹⁷³ The Commission did not use its prerogatives to question the necessity or specific modalities of border controls, nor did it initiate legal proceedings. This latter could be understood as a failure to enforce Union law.¹⁷⁴ However, it could also be explained as a continuation of the process, already begun,¹⁷⁵ whereby the protection of human health is conceptualized not as a simple exception to the fundamental principle of free movement, to be reluctantly applied only under exceptional circumstances, but as an independent aim, principle or value woven into the Union's legal order. This, in our view, is a better interpretation of how Union border law managed the inherent tension between free movement and health protection: it conceives of the internal market and Schengen areas as areas in which public health must be protected by the Union and not only by its Member States.

3.2 Selective mobility

A second underpinning concept that emerged early on, and runs throughout Union COVID-19 border law, to reconcile the apparently competing objectives of public health protection and free movement, is *selective mobility*.¹⁷⁶ The earliest incidences were in the Commission's Guidelines¹⁷⁷ and Communication¹⁷⁸ of 16 March 2020. The very titles of these instruments noted that movement would be restricted to protect public health, but that this restriction would not be absolute. Selective mobility has two dimensions: geopolitical and individual.

3.2.1 Geopolitical selective mobility

¹⁷³ European Court of Auditors (n 92) 17–24.

¹⁷⁴ On lack of enforcement in crisis times, see e.g., Kari Waters, 'The EU Commission: Supplying Enforcement and Demanding Compliance' (2024) 25(2) *European Union Politics* 396; Joshua C Fijeshtul and Clifford Carrubba, 'The Politics of International Oversight: Strategic Monitoring and Legal Compliance in the European Union' (2018) 112 *American Political Science Review* 429; R Daniel Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 75 *World Politics* 779; Sivaram Chevru, 'When Does the European Commission Pursue Non-Compliance?' (2023) 23 *European Union Politics* 375.

¹⁷⁵ Many examples of this idea are found in Tamara Hervey and Jean McHale, *European Union Health Law* (CUP 2015); see also Mark Flear, Anne-Maree Farrell, Tamara Hervey and Therese Murphy (eds), *European Law and New Health Technologies* (OUP 2013); Anniek de Ruijter, *EU Health Law and Policy* (OUP 2019); Markus Frischhut, *The Ethical Spirit of EU Values* (Springer 2022); Goldner Lang (n 154). Zglinski (n 35) makes the argument in a broader way.

¹⁷⁶ See also Sophie Robin-Olivier, 'Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility' (2020) 5 *European Papers* 613; Goldner Lang (n 154), refers to 'restrictive mobility rules' at 142.

¹⁷⁷ The 16 March 2020 Guidelines (n 88).

¹⁷⁸ The 16 March 2020 Communication (n 83).

Geopolitically speaking, the Union's COVID-19 border law distinguishes between mobility across Union internal and external borders. This is epidemiologically illogical, but it is another feature of Union law that allows for management of the free movement/health protection tension, taking into account the totemic imperative of the Union's internal market/area of freedom, security and justice. In several important respects, Union law on internal borders was quite different to that on external borders.

First, by contrast to the uncoordinated approach to internal borders (3.1), from the beginning, Union hard and soft law made it clear that entry to the Union could lawfully be refused at external borders on the basis of the pandemic. Soft law – such as the 16 March 2020 Recommendation – confirmed the applicability of the Schengen Borders Code provisions on screening travellers entering the Union for potential health risks.¹⁷⁹ Member States quickly reached a common strategy to significantly restrict entry into the Schengen area from outside, agreeing a ban on non-essential travel.¹⁸⁰ Member States were recommended to 'drastically reduce'¹⁸¹ flows of people into the Union, even while the Commission acknowledged that the WHO does not generally see travel restrictions as the most effective way to counter a pandemic.

The recommendations about movement across borders within the Union were trickier. The 16 March 2020 Guidelines acknowledged that Member States could be justified in closing internal borders to protect public health (or, more precisely, 'public policy or internal security'¹⁸²), but at the same time sought to recommend 'an integrated approach to effective border management to protect health while preserving the integrity of the Single Market',¹⁸³ and upholding 'the principle of solidarity between Member States'.¹⁸⁴ The Guidelines thus deploy selective mobility in recognition of the nature of the internal market, by stressing the need for Member States to facilitate transit through their territories for resident citizens of other Member States returning home;¹⁸⁵ unobstructed transport of goods, especially (but not only) critical goods like medicines and food, acknowledging the integrated and borderless nature of European supply chains;¹⁸⁶ and unimpeded circulation of transport workers.¹⁸⁷ These considerations were repeated in subsequent measures.¹⁸⁸ Since June 2024,¹⁸⁹ they have been embodied in the Schengen Borders Code.¹⁹⁰

¹⁷⁹ Schengen Borders Code (n 11) arts 6 and 8.

¹⁸⁰ See (n 85).

¹⁸¹ The 16 March 2020 Communication (n 83) paras 2, 4.

¹⁸² Schengen Borders Code (n 11) art 25(1); see the 16 March 2020 Guidelines (n 88) point 18.

¹⁸³ The 16 March 2020 Guidelines (n 88) preamble para 5; paras 18–24.

¹⁸⁴ The 16 March 2020 Guidelines (n 88) para 1.

¹⁸⁵ The 16 March 2020 Guidelines (n 88) point 21.

¹⁸⁶ The 16 March 2020 Guidelines (n 88) points 2, 6, 7, 9.

¹⁸⁷ The 16 March 2020 Guidelines (n 88) points 3, 9.

¹⁸⁸ See, e.g., the April 2020 Joint Roadmap (n 105) section 4 'Principles' and section 6 'Recommendations', point 6; the 13 October 2020 Recommendation (n 113) point 19; European Commission, *Communication from the Commission to the European Parliament, the European Council, and the Council: Upgrading the Transport Green Lanes to Keep the Economy Going During the COVID-19 Pandemic Resurgence*, COM (2020) 685 final, Brussels, 28 October 2020, section III; the December 2020 Recommendation (n 112) points 2, 3, 4 and 6; Council Recommendation (EU) 2021/119 of 1 February 2021 amending Recommendation (EU) 2020/1475 [2021] OJ L 36I/1 recitals 19 and 20, point 6; Council Recommendation (EU) 2021/1170 of 15 July 2021 amending Recommendation (EU) 2020/912 [2021] OJ L 255/3.

¹⁸⁹ See Reg (EU) 2024/1717 (n 80).

¹⁹⁰ Schengen Borders Code (n 11) arts 3(28), 21a(4) and (5), Annex XI, as per Reg (EU) 2024/1717 (n 80).

A sense of shared obligations for the health and welfare of Union citizens/residents is fostered by the recommendation that Member States should coordinate approaches to entry and exit screening, and agree the location of isolation, quarantine and healthcare, either in the country of arrival or country of departure,¹⁹¹ and, as noted above (2.1), that ‘persons who are clearly sick should not be refused entry’, but ‘given access to appropriate healthcare’.¹⁹² This is quite different from recommendations involving the Union’s external borders, where there is no similar obligation to care for relevant individuals.

During the period March 2020-June 2023, internal Union border control moved from being focused at national level (restrictions on travel based on public health and public policy/security exemptions in the relevant instruments), to regional level (based on the colour-coded ECDC risk mapping), to individual level (based on the EU Digital COVID Certificate). This approach followed the logic of Union internal market/Schengen law. After all, ‘Why should a journey from Berlin to Frankfurt be permitted, while travelling from Luxembourg to Frankfurt is not, even though both destinations currently constitute high-risk areas?’¹⁹³ By contrast, the approach to external border control remained at third country level only, right up to the Union’s Implementing Regulations recognizing third country vaccination/test/recovery certificates in June 2021,¹⁹⁴ and at least arguably the external border December 2022 Recommendation that remains in force to date.¹⁹⁵

3.2.2 Individual selective mobility

Selective mobility also refers to the Union institutions recommending that certain categories of individuals be permitted to travel across borders, while imposing restrictions on all others. These categories remained stable throughout the relevant period, but the specific detail of who was considered to be in each category changed slightly over time, ending up with the list noted above (2.4), and now embodied in hard law.

Selection is based on three different concepts: the ‘essential’ nature of someone’s movement (‘essential travel’); someone’s role in a critical sector (‘essential workers’); and taking into account the relative risk of a traveller having the virus, for example the place from which they had travelled or the fact of being vaccinated or having evidence of recovery/immunity (‘evidenced reduced likelihood of harm’). Mandatory testing, quarantine or isolation periods were permitted for cases of essential travel, but not necessarily for essential workers crossing internal borders,¹⁹⁶ or those with evidence of reduced likelihood of harm, particularly of vaccination.

In terms of ‘essential travel’, the Union’s (soft) law was mainly uncontroversial, although not necessarily followed by the Member States.¹⁹⁷ Both internal and external border law relied on a concept of ‘essential travel’, but the definitions were not consistent. Some of these

¹⁹¹ The 16 March 2020 Guidelines (n 88) points 12 and 25.

¹⁹² The 16 March 2020 Guidelines (n 88) points 19 and 11.

¹⁹³ Thym and Bornemann (n 154) 1168; Carrera and Luk (n 146); Goldner Lang (n 154); Davies (n 154).

¹⁹⁴ See (n 116).

¹⁹⁵ The external border 13 December 2022 Recommendation (n 138).

¹⁹⁶ The 13 October 2020 Recommendation (n 113) recital 18 and point 19.

¹⁹⁷ See, e.g., Carrera and Luk (n 146) 24–33.

inconsistencies are probably due to the difficulties of legislative drafting in haste at the relevant time, with legal staff working remotely. Others may have more significance.

The 16 March 2020 Communication recommended that passengers already in transit into the Union be excluded from the ban. This category seems no longer necessary after the first stage of the pandemic, as passengers in transit would have reached their destinations,¹⁹⁸ yet it continued to be included in relevant measures, presumably in contemplation of a sudden reintroduction of more stringent border controls.¹⁹⁹ The Guidelines of the same date do not mention passengers in transit explicitly, but they stress that all EUCs and TCNs resident in any Member State should be permitted to return home.²⁰⁰ Periods of self-isolation may be justified in those circumstances, but nationals of other Member States should not be discriminated against on grounds of nationality in this respect. Similarly, the ban on travel into the Union excluded EUCs, their families, long-term residents under Directive 2003/109/EC,²⁰¹ or under other measures of Union or national law, who were travelling for the purposes of returning to their homes.²⁰²

Travel for ‘imperative family reasons’ was also permitted, to allow family welfare during the pandemic, for example to care for isolated and vulnerable elderly relatives.²⁰³ It was not possible to establish an agreed Union-level list or definition of such reasons. The Commission instead recommended that the category be ‘interpreted broadly and assessed on an individual basis’. Possible examples include ‘travel for custodial or visiting rights for a child’, ‘school attendance of a child’, ‘wedding of the travelling person or of a close family member’ and ‘birth or funeral of a family member’.²⁰⁴ This exemption was later extended to include ‘travelling to receive essential medical care’²⁰⁵ and later still ‘medical reasons’.

Curiously, TCNs ‘travelling for the purpose of study’ were included in the list of essential travel in June 2020.²⁰⁶ No specific motivation is mentioned for this extension, other than the general socio-economic effects of the pandemic. They were not included in later iterations.

Ensuring that individuals seeking asylum or in need of humanitarian aid could continue to travel was consistent with the Union’s commitment to human rights and humanitarian protection. Persons displaced from their countries, because of well-founded fear of persecution by reasons of their membership of a particular group, following war, civil unrest, or other circumstances which have seriously disturbed public order, under the Geneva Convention 1951 and other relevant

¹⁹⁸ The 16 March 2020 Communication (n 83) para 12.

¹⁹⁹ See, e.g., the 30 June 2020 Recommendation (n 106) annex II, vi.

²⁰⁰ The 16 March 2020 Guidelines (n 88) point 21.

²⁰¹ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44.

²⁰² The 16 March 2020 Communication (n 83) para 11.

²⁰³ The 16 March 2020 Communication (n 83) para 11..

²⁰⁴ European Commission, *COVID-19 Guidance on Persons Exempted from the Temporary Restriction on Non-Essential Travel to the EU as Regards the Implementation of Council Recommendation 2020/912 of 30 June 2020*, COM(2020) 686 final, Brussels, 28 October 2020 (‘the 28 October 2020 Guidance’), part III point 7.

²⁰⁵ The 28 October 2020 Guidance (n 204) part III point 9.

²⁰⁶ European Commission, *Third Assessment of the Application of the Temporary Restriction on Non-Essential Travel to the EU*, COM(2020) 399 final, part VII ‘Conclusions’ para 5(b) (‘the 11 June 2020 Recommendation’); the 30 June 2020 Recommendation, (n 106) annex II point x.

measures of international law, are also protected in Union law.²⁰⁷ This category of recommended permitted travel remained consistent in Union (soft) law throughout the pandemic, and thereafter.²⁰⁸ Relevant duties in Union law could not be mitigated solely by reason of COVID-19.²⁰⁹

The Commission's overall aim was to secure uniformity across the Union concerning what constituted 'essential travel'. The references to EUCs in the relevant provisions were not strictly necessary, as the same effect could have been achieved by referring only to residence in the Union. Presumably the Commission refers to citizenship to strengthen its claim to competence, and to signal the Union territory as 'home', but it does not go so far as to encompass all EUCs, only those whose 'home' is in the Union. 'Home' is not defined anywhere in the 16 March 2020 Communication, or subsequent soft or hard law, leaving this as a matter for Member States to determine.

When it comes to ensuring selective mobility for essential workers, the Union's aims were to support national healthcare systems, maintain supply chains, ensure continuation of essential services, and of international cooperation. The recommended exempted roles were vital in addressing the immediate challenges of the pandemic and mitigating its broader and longer-term impacts.

Flowing from the nature of the internal market, frontier workers were to be exempted from border closures, 'in particular but not only'²¹⁰ those working in essential services like healthcare, child or elder care or supply of essential goods. Frontier workers were defined consistently with Union (hard) law, as 'workers who have to cross the border of an EU Member State but who return on a daily basis, or at least once a week, to a third country in which they reside and of which they are nationals'.²¹¹ For frontier workers working across internal borders, Member States should not only 'permit' but also 'facilitate' their continued movement.²¹² Frontier workers working across the Union's external border were recommended to be exempted from the travel ban in March 2020,²¹³ and this recommendation continued until the 2023 measures,²¹⁴ and to date.²¹⁵

National compliance with this recommendation was incomplete.²¹⁶ For example, Polish farmers working across the Polish-Lithuanian border were unable to access their fields in

²⁰⁷ For example, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12; see also Dir 2011/95 and Reg 604/2013 (n 25).

²⁰⁸ Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 [2024] OJ L1356/22, art 12; Maarten den Heijer, 'The Pitfalls of Border Procedures' (2022) 59 *Common Market Law Review* 641.

²⁰⁹ Joined Cases C-245/21 & C-248/21, *Germany v. MA and Others*, EU:C:2022:709.

²¹⁰ The 16 March 2020 Guidelines (n 88) point 23.

²¹¹ The 28 October 2020 Guidance (n 204) part III point 2.

²¹² The 16 March 2020 Guidelines (n 88) point 23.

²¹³ The 16 March 2020 Communication (n 83) para 12.

²¹⁴ *Guidelines on the Free Movement of Workers* (n 169); the 13 October 2020 Recommendation (n 113); the 25 January 2022 Recommendation (n 125); the 13 December 2022 Recommendation (n 126).

²¹⁵ Schengen Borders Code (n 11) annex XI A(2).

²¹⁶ Wolff, Ripoll Servent and Piquet, (n 149).

Lithuania.²¹⁷ These farmers had only a short time window to sow their crops, to avoid losing a whole year's harvest, so the border closure severely threatened their livelihoods. Despite efforts from local authorities and diplomatic interventions, Lithuania insisted on applying its two-week quarantine period on entry to the country. Even less understandably, selective mobility did not apply in practice to the 'Euregio'²¹⁸ arrangements for cross-border hospital collaboration on the Spanish-French border; shared community health facilities on the German-French border; or to shared intensive care units in the Aachen-Maastricht-Liege region.²¹⁹

In recognition of their essential economic and/or social roles, 'those working in health care and food sector, and other essential services (e.g., child care, elderly care, critical staff for utilities)' were to be exempt from internal border closures;²²⁰ and 'healthcare professionals, health researchers, and elderly care professionals', along with 'transport personnel engaged in haulage of goods and other transport staff to the extent necessary', although not staff necessary for critical utilities, were among the 'travellers with an essential function' exempt from the external border travel ban.²²¹

The category of transport workers was simplified to 'transport personnel' by June 2020,²²² and further specified in October 2020 to include drivers of almost all road vehicle types, including motorcycles, buses, trams and ambulances, not just trucks or haulage vehicles; cabin crew and maintenance personnel for aeroplanes, as well as pilots; train drivers and on-board train staff, but also all other logistics and maintenance personnel necessary for effective running of rail transport; and all maritime workers not covered by the category 'seafarers'.²²³ Here, the provisions on selective mobility aligned strongly with the Union's commitment to secure supply of products and services.

Other categories added were 'seasonal workers in agriculture';²²⁴ seafarers;²²⁵ and 'persons working in critical or otherwise essential infrastructures', e.g. in the oil and gas industries. 'Highly qualified third-country workers if their employment is necessary from an economic perspective and the work cannot be postponed or performed abroad' were added in June 2020,²²⁶ but disappeared again in December 2022;²²⁷ as was also the case for 'journalists, when performing their duties', added in October 2020.²²⁸

²¹⁷ 'Wciąż poważne komplikacje na zamkniętych granicach' (*Ongoing Serious Complications at Closed Borders*), *Prawo.pl* <https://www.prawo.pl/prawo/zamkniete-granice-panstwa-problem-dla-mieszkanow-i-powracajacych,499564.html> accessed 5 November 2024.

²¹⁸ See Helmut Brand, Alfons Holleederer, Urlike Wolf and Angela Brand, 'Cross-Border Health Activities in the Euregios: Good Practice for Better Health' (2008) 86(2–3) *Health Policy* 245.

²¹⁹ David Townend et al, 'What Is the Role of the European Union in the COVID-19 Pandemic?' (2020) 39(2) *Medicine and Law* 255.

²²⁰ The 16 March 2020 Guidelines (n 88) point 23.

²²¹ The 16 March 2020 Communication (n 83) para 12.

²²² The 30 June 2020 Recommendation, (n 106) annex II point iv.

²²³ The 28 October 2020 Guidance (n 204) part III point 4.

²²⁴ The 30 June 2020 Recommendation (n 106) annex II point iii.

²²⁵ The 30 June 2020 Recommendation (n 106) annex II point viii.

²²⁶ The 11 June 2020 Recommendation (n 206) part VII 'Conclusions' para 5(b).

²²⁷ The external border 13 December 2022 Recommendation, (n 138) annex.

²²⁸ The 13 October 2020 Recommendation (n 113) point 19(i).

These categories were further specified and clarified in October 2020. Those working in the health and care sector were to include: ‘health professionals including paramedical professionals; personal care workers in health services, including care workers for children, persons with disabilities and the elderly; scientists in health-related industries; workers in pharmaceutical and medical devices industry; and workers involved in the supply of goods, in particular for the supply chain of medicines, medical supplies, medical devices and personal protective equipment, including in their installation and maintenance’.²²⁹ Seasonal workers in agriculture were defined consistently with Union (hard) law as ‘third-country nationals who maintain their principal place of residence in a third country and stay legally and temporarily in the territory of an EU Member State to carry out agricultural or aquaculture work, under a work contract concluded directly between that third-country national and the employer established in that EU Member State’.²³⁰

The final explicitly named category of essential workers first identified in March 2020 was ‘diplomats, staff of international organisations, military personnel and humanitarian aid workers’.²³¹ None of these were mentioned in the March 2020 Guidelines. In June 2020, this category was modified to include ‘people invited by international organisations whose physical presence is required for the well-functioning of these organisations’.²³² Originally the exemption was only ‘in the exercise of their functions’; but this clause was removed in December 2022,²³³ presumably to also permit travel home after the exercise of their functions.

By June 2020, a third category of grounds for selective mobility appeared in the Union’s COVID-19 border (soft) law: circumstances where there was evidence of a reduced likelihood of harm consequent upon someone crossing a border.²³⁴ Two new Recommendations on travel into the Union reflected the selective mobility approach by recommending adjusting national rules according to the epidemiological landscape. The 11 June 2020 Recommendation was the beginning of development of a list of third countries²³⁵ deemed sufficiently ‘safe’ that travel from those countries could be progressively exempted from travel restrictions, but on a coordinated basis, not haphazardly by individual Member States. The initial list was ‘neighbour’ or ‘partner’ countries: Albania; Bosnia and Herzegovina; Kosovo; Montenegro; North Macedonia; and Serbia, reflecting the Union’s external relations and enlargement policies more than its pandemic response, but by the end of the month,²³⁶ the list was much more epidemiologically driven, including countries like Australia and New Zealand, Canada, Uruguay, Thailand, Japan and China, and only including Serbia and Montenegro from the original list.

This approach was underscored in the 13 October 2020 Recommendation,²³⁷ and continued in the implementing 28 October 2020 Guidance.²³⁸ The former recommended that restrictions

²²⁹ The 28 October 2020 Guidance (n 204) part III point 1.

²³⁰ The 28 October 2020 Guidance (n 204) part III, point 3.

²³¹ The 16 March 2020 Communication (n 83) para 12.

²³² The 30 June 2020 Recommendation (n 106) annex II point v.

²³³ The external border 13 December 2022 Recommendation (n 138) annex.

²³⁴ The 30 June 2020 Recommendation (n 106).

²³⁵ The 11 June 2020 Recommendation (n 206) part VII ‘Conclusions’ para 4.

²³⁶ The 30 June 2020 Recommendation (n 106) annex I.

²³⁷ The 13 October 2020 Recommendation (n 113).

²³⁸ The 28 October 2020 Guidance (n 204).

should never be based on nationality, but only on the location of the individual during the 14 days prior to crossing the border. New rules for determining which countries should be included as less risky were developed in February 2021,²³⁹ as noted above, taking into account the 14-day cumulative COVID-19 case notification rate, the trend of new cases, the testing rate in the population, and whether new COVID-19 variants of concern had been detected. Whether a new variant was ‘of concern’ was to be determined by the ECDC, not at national (or WHO) level.

Again, not all Member States complied with the Union’s recommendations. For example, from 1 September 2020, Hungary banned the entry of foreign nationals, including EUCs, except citizens of the Visegrad Group (Czechia, Poland, Slovakia) who could present a negative COVID-19 test.²⁴⁰ This group was also exempt from the mandatory quarantine introduced by Hungary on 1 October 2020.²⁴¹

As vaccination campaigns gained momentum from early 2021, the criteria for selective mobility shifted again. Vaccination status and the possession of the EU Digital COVID Certificate became the new determinants for travel exemptions and reduced restrictions. This aspect of selective mobility evolved significantly with the May 2021 Council Recommendation²⁴² which sought to integrate vaccination status into the guidelines for travel into the Union. The Recommendation suggested that Member States could waive restrictions on travel into the Union for individuals who had received the last recommended dose of a COVID-19 vaccine authorized by the Union or one that had completed the WHO Emergency Use Listing process.²⁴³ As proof of vaccination, Member States could accept third country certificates, provided they contained a minimum set of data, and could be validated or authenticated, but only for EMA-authorized/WHO emergency-use-list vaccines. Member States were encouraged to consider ‘reciprocity granted to the EU+ area’ when deciding to lift restrictions on vaccinated travellers.

The introduction of the EU Digital COVID Certificate, formalized in Regulations 2021/953/EU²⁴⁴ and 2021/954/EU²⁴⁵ on 14 June 2021, further institutionalized this new approach, based on certified individuals. These Regulations provided a standardized framework for issuing, verifying, and accepting digital or paper certificates for vaccination, testing, and recovery across all Member States. The certificates, featuring a QR code and digital signature for secure verification, facilitated free movement by exempting holders from additional travel-related restrictions, such as quarantine or testing.

On one level, the Union’s selective mobility approach failed to achieve the desired Union-level coordination. Individual Member States implemented varied and often conflicting entry restrictions, including mandatory quarantine on arrival, compulsory testing, and outright entry

²³⁹ The 2 February 2021 Recommendation (n 114).

²⁴⁰ ‘V4 Citizens Allowed into Hungary Even After Sept 1 – Here Are the Conditions’, *Daily News Hungary* <https://dailynewshungary.com/v4-citizens-allowed-into-hungary-even-after-sept-1-here-are-the-conditions/> accessed 6 November 2024.

²⁴¹ ‘Hungary Amends Travel Restrictions for V4 Countries’, *Schengen News* <https://schengen.news/hungary-amends-travel-restrictions-for-v4-countries/> accessed 6 November 2024.

²⁴² The May 2021 Recommendation (n 115).

²⁴³ The May 2021 Recommendation (n 115) point 4, adding new point 6a.

²⁴⁴ Reg (EU) 2021/953 (n 116).

²⁴⁵ Reg (EU) 2021/954 (n 116).

bans, at different times.²⁴⁶ Some Member States relied on ECDC maps to inform their policies on ‘green zoning’ (permitting movement of people between two regions – not nations – based on disease prevalence);²⁴⁷ others did not.²⁴⁸ This disparate national activity led to a fragmented approach across the Union, with significant discrepancies in how restrictions were applied.²⁴⁹

However, on another level, over time, the Union’s selective mobility provisions gained a certain acceptance. The ‘reduced likelihood of harm’ category has now in effect been embedded in Union soft law that interprets the Citizenship Directive and Schengen Borders Code. The concepts of ‘essential travel’ and ‘essential work’ have been specified through a process of iteration in successive soft law measures, into a settlement that can be drawn on in the future.

The strategy of individual selective mobility sought to balance the need for public health protection with the principle of free movement within the Union, to avoid a total and indiscriminate closure of all national borders to all travellers, an approach which some other jurisdictions, notably New Zealand,²⁵⁰ came significantly closer to adopting. The idea of selective mobility was also adopted for the external borders of the Union to seek to ensure comprehensive and consistent mobility management during the pandemic, recognising that the Union could not afford to – and could not in practice – close itself off entirely from the rest of the world.

3.3 Interactions between hard and soft law

The vast majority of Union COVID-19 border law is soft law. The use of soft law in the Union’s legal response to COVID-19 flows in part from the scope of its competences in health, a domain where the Union holds limited formal authority.²⁵¹ Consequently, the Union’s general public health response to the pandemic largely involved adopting guidance and coordination measures, emphasizing the benefits of (often non-mandatory) information sharing, scientific advice, and collaboration.²⁵²

²⁴⁶ Carrera and Luk (n 146).

²⁴⁷ France, Luxembourg, the Netherlands, and Sweden opened their external borders for non-essential travel to residents of Australia, Canada, Georgia, Japan, New Zealand, Rwanda, South Korea, Thailand, Tunisia and Uruguay, following Council Recommendation (EU) 2020/912, see Carrera and Luk (n 146) 42–43. Croatia, Czechia, Finland, Lithuania, the Netherlands and Spain followed the ECDC classification for their national and international travel ‘green zone’ policies; see Miquel Oliu-Barton and Bary SR Pradelski, ‘Green Zoning: An Effective Policy Tool to Tackle the Covid-19 Pandemic’ (2021) 125(8) *Health Policy* 983; ‘The EU’s Disease Prevention Action: A Year Later’, *Euranet Plus Inside* <https://euranetplus-inside.eu/the-eus-disease-prevention-action-a-year-later/> accessed 6 November 2024.

²⁴⁸ Oliu-Barton and Pradelski (n 247) 983.

²⁴⁹ Carrera and Luk (n 146); Stefano Montaldo, ‘The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste’ (2020) 5 *European Papers* 523; Alberto Alemanno, ‘The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?’ (2020) 11(2) *European Journal of Risk Regulation* 307.

²⁵⁰ Dean Knight, ‘New Zealand’, *Lex-Atlas: Covid-19* <https://lexatlas-c19.org/new-zealand/> accessed 10 November 2024.

²⁵¹ Art 168 TFEU. On broader questions of how we understand Union competence post-pandemic, see Michael Dougan, ‘EU Competences in an Age of Complexity and Crisis: Challenges and Tensions in the System of Attributed Powers’ (2024) 61 *Common Market Law Review* 93.

²⁵² Vincent Delhomme and Tamara Hervey, ‘The European Union’s Response to the Covid-19 Crisis and (the Legitimacy of) the Union’s Legal Order’ (2022) 41 *Yearbook of European Law* 48–82, 50–51.

But the Union also used soft law within the realm of border law, an area in which the Union shares competence with its Member States.²⁵³ Rather than using hard law modes of enforcement of the existing legal framework, the Union institutions chose instead to complement and refine it through soft law instruments. Some Member States chose to follow Union recommendations, for example, opening external borders consistently with the 30 June 2020 Recommendation,²⁵⁴ or using the ECDC's colour coded maps.²⁵⁵ But Member States were not *obliged* in Union law to do so, and, in fact, in many instances they did not, resulting in significant inconsistency and incoherence across the Schengen area.²⁵⁶

However, the apparent weakness of soft law is tempered by the following.²⁵⁷ The distinction between soft and hard law is not as bright-line as it might appear, for two main reasons. Some relevant soft law at least purports to be a (non-binding) interpretation of hard law obligations; a call for a coordinated use of national competences within Union border law; or even an encouragement to use the flexibilities offered by hard law to their full potential. Soft law measures may take on a 'harder' quality when they interact with provisions of hard law. Interactions between hard and soft law thus provided a third mechanism through which the Union could manage the broader consequences of the pandemic, while maintaining a commitment to free movement.

Using soft law to propose interpretations and applications of hard law is seen, for example, in the 16 March 2020 Guidelines and the 30 June 2020 Recommendation. These provisions, while stressing that it remains for Member States to assess public health threats at the Union's external borders under the Schengen Borders Code, also point out that, under the Code, Member States could lawfully refuse entry at the Union's external borders to non-resident TCNs who present relevant symptoms or have been particularly exposed to the risk of infection. The Commission here goes further than pointing out that Member States *may* refuse entry: soft law is used to imply that Member States *ought to do so*.²⁵⁸ Soft law thus plays a role in not only coordinating, but also seeking to steer, national action, where Member States retain competence.

On internal borders, soft law was less successful in the initial phases of the Union's pandemic response. Analysis by the European Court of Auditors reveals a wide range of different approaches to internal border control between Member States,²⁵⁹ despite significant non-binding guidance from Union institutions.²⁶⁰ Even in June 2021, many Member States were still enforcing

²⁵³ See (n 4).

²⁵⁴ Carrera and Luk (n 146) 42–43; Oliu-Barton and Pradelski (n 247) 983.

²⁵⁵ Oliu-Barton and Pradelski (n 247) 983; 'The EU's Disease Prevention Action: A Year Later', *Euranet Plus Inside* <https://euranetplus-inside.eu/the-eus-disease-prevention-action-a-year-later/> accessed 6 November 2024.

²⁵⁶ See e.g. Carrera and Luk (n 146).

²⁵⁷ See, more generally, on the roles of soft law in Union governance, Joanne Scott and David Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *European Law Journal* 1; Oana Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International 2012); Fabien Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law' (2015) 21(1) *European Law Journal* 68.

²⁵⁸ Alemanno (n 249) 315.

²⁵⁹ European Court of Auditors (n 92) 35–36.

²⁶⁰ The 16 March 2020 Guidelines (n 88); Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services [2020] OJ C96 I/1; *Guidelines on the Free Movement of Workers* (n 169); Communication from

travel restrictions independently, including PCR tests, quarantine mandates, and entry bans, without reference to the Union’s recommendations.²⁶¹

However, the initial lack of coordination of internal border controls was eventually addressed with the rollout of the EU Digital COVID Certificate in July 2021. Before its introduction, travel restrictions were largely determined by the health risks in the region from which individuals were travelling. Thereafter, the focus shifted to whether individuals held a valid certificate.²⁶² The EU Digital COVID Certificate itself is grounded in binding legislation.²⁶³ Supplementary non-binding guidelines encouraged Member States to harmonize their recognition of vaccination, testing, and recovery certificates. For instance, the European Union Aviation Safety Agency and the ECDC issued updated Aviation Health Safety Protocols,²⁶⁴ which included risk-based recommendations for health-safe air travel. These Guidelines were aligned with the EU Digital COVID Certificate framework, to facilitate harmonized procedures across Member States and to prevent the unnecessary duplication of checks that could lead to inefficiencies and crowding at airports. The emphasis was on ensuring that the verification of certificates was streamlined and conducted in a manner that minimized disruption to travel, while maintaining health and safety standards. As a matter of practical reality, the Guidelines, coupled with the hard law-mandated certificate framework, incentivized Member States to adopt uniform measures that aligned with the ECDC’s recommended approach.²⁶⁵

Another example is the alignment of national vaccination policies under the EU Digital COVID Certificate, which incentivized Member States to adhere to EMA-approved vaccines. The hard law position is that Member States may authorize vaccines at national level in emergency circumstances.²⁶⁶ Hungary relied on this provision to authorize the Russian Sputnik V vaccine, which was neither EMA- nor WHO-approved, and used Sputnik V in its national vaccination programme.²⁶⁷ But the consequence of Hungary’s divergence from Union recommendations was further complications for Hungarian citizens who wished to travel within the Union, as the status of travellers vaccinated with Sputnik V was not uniformly recognized across other Member States.

the Commission, ‘Towards a Phased and Coordinated Approach for Restoring Freedom of Movement and Lifting Internal Border Controls — COVID-19’ [2020] OJ C169/30.

²⁶¹ European Court of Auditors (n 92) 37.

²⁶² European Court of Auditors (n 92) 28–29.

²⁶³ Reg (EU) 2021/953 (n 116).

²⁶⁴ EASA and ECDC, ‘Update on Air Travel Guidelines to Complement the EU Digital COVID Certificates’ (17 June 2021) https://transport.ec.europa.eu/news-events/news/easa-and-ecdc-update-air-travel-guidelines-complement-eu-digital-covid-certificates-2021-06-17_en accessed 5 November 2024.

²⁶⁵ See e.g. Henry T Greely, ‘COVID-19 Immunity Certificates: Science, Ethics, Policy, and Law’ (2020) 7 *Journal of Law and the Biosciences*; Alberto Alemanno and Luiza Bialasiewicz, ‘Certifying Health: The Unequal Legal Geographies of COVID-19 Certificates’ (2021) 12 *European Journal of Risk Regulation* 273; Sarah Ganty, ‘The Veil of the COVID-19 Vaccination Certificates: Ignorance of Poverty, Injustice towards the Poor’ (2021) 12 *European Journal of Risk Regulation* 343; Mark A Hall and David M Studdert, ‘“Vaccine Passport” Certification—Policy and Ethical Considerations’ (2021) 385 *New England Journal of Medicine* 32; Iris Goldner Lang, ‘EU COVID-19 Certificates: A Critical Analysis’ (2021) 12 *European Journal of Risk Regulation* 298.

²⁶⁶ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L311/67, art 5(2).

²⁶⁷ ‘Hungarian Drug Regulator Approves Sputnik V Vaccine’, *Reuters* <https://www.reuters.com/business/healthcare-pharmaceuticals/hungarian-drug-regulator-approves-sputnik-v-vaccine-website-2021-01-20/> accessed 5 November 2024.

This consequence probably explains the position in Slovakia. Slovakia also granted a national emergency authorisation to the Sputnik V vaccine, and purchased many doses. However, it seems that the economic, political and practical pressure from the adoption of uniform travel procedures based on the mutual recognition of the EU Digital COVID Certificate led Slovakia to decide against more than minimal use of the Sputnik V vaccine,²⁶⁸ preferring the convenience of EMA-authorized vaccines for its population. The EU COVID-19 Digital Certificate framework did not directly mandate use of EMA-approved vaccines only, but its effect, when interacting with soft law, created a strong incentive to do so.

A comparison between the effects of the EU Digital COVID Certificate framework and other technological solutions for facilitating travel within the Union during the pandemic,²⁶⁹ such as the Contract Tracing Gateway, Passenger Locator Forms and Exchange of Passenger Locator Forms Platform, suggests that an interaction with hard law significantly enhanced the effects of soft law. Member States were much less willing to implement Union-led recommendations without the intervening force of hard law.²⁷⁰ For example, only 11 Member States were using passenger locator forms in August 2020.²⁷¹

Thus, the use of soft law also played an important role in steering a course between the competing objectives of openness and health protection in Union COVID-19 border law. When combined with hard law, soft law had the effect of creating a coordinated response, persuading Member States to follow Union recommendations or guidelines, without imposing formal legal obligations, or stepping beyond the Union's constrained competences.

3.4 Scientific/technocratic governance

Our final theme, in considering how the Union managed the inherent tensions between free movement and health protection, is the Union's use of scientific or technocratic governance. Especially when it comes to the regulation of risk, Union law- and policy-making must draw on the best available scientific evidence.²⁷² The strengths, and limitations, of the Union's reliance on scientific or technocratic governance are well-known. Technocratic authority appears neutral²⁷³ and so minimizes scope for democratic contestation, thus allowing dense legal forms of integration between Member States, even where the Union's competence is limited, such as in health policy. However, at the same time, technocratic governance reduces democratic legitimacy.²⁷⁴

²⁶⁸ 'Slovakia's Experiment with Sputnik V Vaccine Ends in Failure', *Politico* <https://www.politico.eu/article/slovakia-experiment-sputnik-coronavirus-vaccine-ends/> accessed 14 August 2024.

²⁶⁹ European Court of Auditors (n 92) 10.

²⁷⁰ European Court of Auditors (n 92) 25, 30.

²⁷¹ Carrera and Luk (n 146).

²⁷² See e.g. arts 191(3), 114(3) TFEU; Case T-13/99, *Pfizer*, ECLI:EU:T:2002:209; European Commission, *Better Regulation Guidelines* (Staff Working Document) SWD(2021) 305 final, 6.

²⁷³ On the non-neutrality of 'science' in this context, see, seminally, Sheila Jasanoff, *Designs on Nature* (Princeton University Press 2007).

²⁷⁴ See, among a significant literature, Giandomenico Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77; Giandomenico Majone, 'The Regulatory State and Its Legitimacy Problems' (1999) 22 *West European Politics* 1; Giandomenico Majone (ed), *Regulating Europe* (Routledge 1996); Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 *Journal of Public Policy* 139; Christian Joerges, 'Sound Science in the European and Global Market: Karl Polanyi

Given the Union's general approach, we might therefore expect that such technocratic governance would strongly characterize the Union's COVID-19 law. In general, this is the case.²⁷⁵ The Union relied strongly on the available science – and indeed produced its own scientific analysis and dissemination – in steering its Member States' COVID-19 responses. The April 2020 Joint Roadmap is a case in point: it recommends that, when Member States lift domestic containment measures, decisions should be based on available scientific evidence as far as possible and should be adjusted as more scientific evidence becomes available. The expectation is that Member States will be incentivized to draw on available scientific evidence collected, evaluated and disseminated by the ECDC, a process of soft law 'steering' that characterizes Union health policy more generally and not only during a pandemic.²⁷⁶ The ECDC provided technical guidance on a wide range of non-pharmaceutical countermeasures during the COVID-19 pandemic, covering, for example, isolation and quarantine periods; facemask use; and testing.²⁷⁷ Member State responses were divergent: many Member States chose not to follow ECDC guidance.²⁷⁸ But the Union approach was to deploy science-led (soft) law or governance.

However, when it comes to COVID-19 *border law*, in some respects, the contrary is the case.

As noted above,²⁷⁹ border closures are not a clear-cut 'science-led' response to a pandemic, especially once the virus is already present within a state. This was the case from before the start of the Union's COVID-19 border law: COVID-19 was first detected in the Union in early February 2020, in Italy. The ECDC consistently pointed out that a virus such as COVID-19 'cannot be controlled by means of border closures'.²⁸⁰ Yet the Union's soft law equally consistently recommended a coordinated Union approach *involving border closures*, especially the external Schengen area border.

in Geneva' in Ellen Vos and Michelle Everson (eds), *Uncertain Risks Regulated* (Routledge-Cavendish 2009); Joseph HH Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 *International Journal of Constitutional Law* 94; Marjolein van Asselt and Ellen Vos, 'EU Risk Regulation: The Role of Science in Political and Judicial Decision-Making' in Hans Micklitz and Takis Tridimas (eds), *Risk and EU Law* (Edward Elgar 2015); Mark Dawson, 'Better Regulation and the Future of EU Regulatory Law and Politics' (2016) 53 *Common Market Law Review* 1209; Maria Weimer and Anniek de Ruijter (eds), *Regulating Risks in the European Union* (Hart Publishing 2017); Maria Weimer, *Risk Regulation in the Internal Market* (OUP 2019).

²⁷⁵ Delhomme and Hervey (n 252) 74–77, 81–82.

²⁷⁶ See e.g. Anniek de Ruijter and Tamara Hervey, 'Healthcare and the Lisbon Agenda' in Paul Copeland and Dimitris Papadimitriou (eds), *The EU's Lisbon Strategy* (Palgrave 2012) 130–148.

²⁷⁷ For details, see European Centre for Disease Prevention and Control, 'Strategies and Guidelines' <https://www.ecdc.europa.eu/en/infectious-disease-topics/covid-19/strategies-and-guidelines> accessed 6 November 2024.

²⁷⁸ Marie Gontariuk et al, 'The European Union and Public Health Emergencies: Expert Opinions on the Management of the First Wave of the COVID-19 Pandemic and Suggestions for Future Emergencies' (2021) 9 *Frontiers in Public Health*; Lorenzo Lionello et al, 'Non-Pharmaceutical Interventions in Response to the COVID-19 Pandemic in 30 European Countries: The ECDC–JRC Response Measures Database' (2022) 27(41) *Euro Surveillance*.

²⁷⁹ See (n 161) (n 162).

²⁸⁰ ECDC, 'Rapid Risk Assessment: Coronavirus Disease 2019 (COVID-19) in the EU/EEA and the UK – Eleventh Update: Resurgence of Cases' (2020), cited in Thibaud Deruelle and Isabelle Engeli, 'The COVID-19 Crisis and the Rise of the European Centre for Disease Prevention and Control (ECDC)' (2021) 44(5-6) *West European Politics* 1376.

Within those (non-scientific) parameters, however, the Union response did draw on technocratic governance. For example, in the first phase (2.1), the list of countries exempt from restrictions on entry into the Schengen area was based on the available epidemiological data.²⁸¹ Technocratic governance also characterized the Union's move from state to regional to individual classification of COVID-19 risk. The 13 October 2020 Recommendation (2.2) and the 14 June 2021, 25 January 2022 and 13 December 2022 Recommendations (2.3) relied on the region-based ECDC-generated colour-coded map, enhanced and expanded to take into account new variants and vaccination status, determining risk level on a regional basis, which permits more precision than country-wide data. This data supported recommendations for 'green zoning', where movement not only within a state, but also between states, is based on relative risk levels between *regions*. This Recommendation therefore changed the focus for internal Schengen movements away from national borders, and this shifted focus endured.

In phase 3, the move to individual-based risk classification (2.3; 3.2.1) relied heavily on technocratic governance. Union hard law determined, following the usual risk assessment procedures, which COVID-19 tests, and vaccines, would be mutually recognized across the Union. The Union-level technology-supported standardization of certification of both testing and vaccination status was crucial to mutual recognition, a legal concept that underpins free movement in Union law. The 14 June 2021, 25 January 2022 and 13 December 2022 Recommendations all relied on individual certification in recommending that those holding relevant certificates should be exempt from travel restrictions such as quarantine or testing. The parameters for the tests – 72 hours before arrival for NAAT, 24 hours for RAT – were also determined by Union scientific governance. This applies also to the recommended 180 day validity of recovery certificates.

Some aspects of the Union's technocratic approach to COVID-19 border governance were less successful. As noted above (3.3), despite the Union's emphasis on vaccines authorized by the European Medicines Agency (EMA) or listed by the WHO, some Union Member States opted to use the Russian Sputnik V vaccine. Hungary began using Sputnik V to vaccinate its citizens under a national emergency approval,²⁸² while Slovakia also received doses of Sputnik V, although the actual use of these doses faced regulatory delays and controversy within the country, and in the end, Slovakia sold the Sputnik V vaccines to Balkan states. Despite the non-recognition of the Sputnik V vaccine, the Union recognized vaccination certificates from San Marino,²⁸³ which also used Sputnik V.²⁸⁴

Technological platforms such as the common Digital Passenger Locator Form, the Passenger Locator Form Exchange Platform, and 'Re-open EU', to secure transparency especially when Member States deployed 'emergency brakes', were not enthusiastically embraced by Member States.²⁸⁵

²⁸¹ See Council Recommendations (EU) 2020/1052, 2020/1144, 2020/1186, and the 22 October 2020 Recommendation, all (n 108).

²⁸² 'Hungarian Drug Regulator Approves Sputnik V Vaccine' (n 267).

²⁸³ Decision (EU) 2021/1273 (n 133).

²⁸⁴ 'San Marino, the Micronation within Italy, Stokes Envy with Speedy Russian-Supplied Vaccine Campaign', *The Washington Post* <https://www.washingtonpost.com/world/interactive/2021/sanmarino-covid-vaccine-sputnik/> accessed 6 November 2024.

²⁸⁵ European Court of Auditors (n 117).

Overall, the Union relied on science-based decision-making to seek to ‘neutralize’ and justify its commitments to coordinated approaches to internal borders (having them as open as possible) and external borders (closing them, though also selectively). Yet this technocratic governance approach was not complete. In practice, the Union remained open to a widely divergent, and indeed incoherent, from a scientific point of view, range of ways in which Member States chose to deploy border controls in response to the pandemic. Technocratic governance was only partially used to manage the tension inherent in the Union’s commitment to the value of free movement, and the need to protect population health in the context of a deadly pandemic. Political and social pressures, from Member States and their (understandably) fearful populations, to provide the (unfounded) reassurance that flows from a closed border,²⁸⁶ also had to be accommodated in Union COVID-19 border law.

4 Conclusions

Writing in June 2020, the Editors of the Common Market Law Review observed that the COVID-19 pandemic ‘tested [the Union] to its limits’. The internal market ‘is not set up to withstand a quasi-general suspension of the rules, in *key domains*, and in relation to *most* Member States *at the same time*’.²⁸⁷ We have shown how the Union ‘passed the test’: how it managed the mismatch between the imperative to reduce human mobility in order to manage the pandemic, with its epidemiological but also social, political and cultural dimensions; and the profound commitment to free movement (of people, but also of products and services) embedded in Union border law. The key features of the Union’s approach were to reinterpret the rule/exception structure of Union border law for public health protection (3.1); to deploy selective mobility in several dimensions (3.2); a significant use of soft law, even where hard law would have been available (3.3); and a weaker than usual reliance on technocratic governance (3.4). The Union’s approach evolved over time, but each of these strategies played an important role in each phase of the Union’s response.

The Union deployed a consistent *narrative* of the permissibility of border closures – especially for external borders. Actually Union borders were never closed. The concept of selective mobility, allowing for essential travel and travel by essential workers, and – over time – travel for those for whom there was an evidenced reduced risk – was a critical feature of Union COVID-19 border law. Selective mobility is now embedded in Union hard²⁸⁸ and soft law,²⁸⁹ leaving a legacy on which the Union can draw in a future scenario that threatens the ‘fundamental principle’ in Union law of free movement. A significant amount of discretion remained with Member States in the granular details of selective mobility, for example how key concepts such as ‘imperative family reasons’, or ‘home’, were to be interpreted. This facet of the relationship between Union and national law is one feature of Union COVID-19 border law that is likely to stand the test of time.

Perhaps we can draw from the COVID-19 border law experience that some more recent legal responses are less likely to be effective in the future. If the Union Member States were willing

²⁸⁶ Delhomme and Hervey (n 252) 30; Sweta Chakraborty, ‘How Risk Perceptions, Not Evidence, Have Driven Harmful Policies on COVID-19’ (2020) 11 *European Journal of Risk Regulation* 236.

²⁸⁷ Editorial Comments, ‘Disease and Recovery in (COVID-Afflicted) Europe’ (2020) 57 *Common Market Law Review* 624 (italics in original).

²⁸⁸ See e.g. the amended Schengen Borders Code (n 189).

²⁸⁹ See e.g. the ways that ‘essential travel’ and ‘essential work’ were interpreted through relevant instruments, *supra* s 3.2.2.

to be non-compliant with Union law during the COVID-19 pandemic, it is difficult to see what difference a legislative list of ‘prohibited acts’ at a time of a declared ‘internal market emergency’ would make in a future similar situation. The Internal Market Emergency and Resilience Regulation 2024/2747²⁹⁰ purports to reassert the dominance of free movement and open borders in Union law: its list of such ‘prohibited acts’ is probably insufficiently attentive to national constitutional, political, cultural and demographic differences between Member States, and the need for sufficient flexibility within Union law to respond to those differences. The nuances of the European Commission’s Contingency Plan for Transport²⁹¹ in the context of crisis are probably much better suited for the task. The Contingency Plan acknowledges the flexibilities of Union transport, state aids and public procurement law as much as it points out instances of enforcement of hard Union border law (such as passenger rights in the air transport industry²⁹²) and indeed the lack of coordination of Member State action in many respects.²⁹³ Amendments to Union transport law to allow for greater flexibility to respond to future crises,²⁹⁴ such as foreseen by the Plan, are similarly appropriate. That said, the Plan remains committed to several features of the COVID-19 border response that were less successful than hoped-for, in particular information-sharing through platforms such as the Exchange of Passenger Locator Forms Platform.

The symbolic nature of borders undoubtedly played a role in the Union’s COVID-19 border law, as did the Union’s ‘mythology’ of freedom.²⁹⁵ Phenomena that had not been seen for decades within the Union, such as trucks queueing to cross internal borders, returned. The pandemic may have presented as a profound challenge to the Union project as a whole, giving the centrality of free movement as a highly valued – and valuable – achievement of European integration. But our analysis suggests that the Union’s response does not represent a *rupture*²⁹⁶ in Union values. Instead, a better view is to understand Union COVID-19 border law as an *adjusted or reinterpreted* paradigm for free movement, reliant on embedding public health protection within the internal market’s rules; on selective mobility; on judicious use of soft law; and on only weak science-led law and policy-making in a context where political and social imperatives for exercise of state sovereignty were strong. In this light, the Union’s COVID-19 border law also serves as a nuanced example of the Union’s commitment to its obligation to ensure a high level of human health protection across all Union policies and activities. Here, the integration of public health considerations into the realization of free movement within Union border law illustrates how these values coalesce to inform a response. If we perceive Union values as intersubjectively shared preferences that describe qualities and conditions deemed desirable for shaping political

²⁹⁰ Regulation (EU) 2024/2747 of the European Parliament and of the Council of 13 March 2024 on the Internal Market Emergency and Resilience [2024] OJ L77/1, art 21.

²⁹¹ Communication from the Commission, ‘Contingency Plan for Transport in Times of Crisis’ COM(2022) 211 final, 23 May 2022.

²⁹² Commission Contingency Plan (n 291) point 2.3.

²⁹³ Commission Contingency Plan (n 291) points 2.3; 2.4.

²⁹⁴ See, for example, the provisions of Regulation (EU) 2024/1679 of the European Parliament and of the Council of 13 June 2024 on Union Guidelines for the Development of the Trans-European Transport Network [2024] OJ L1679, recital 79; Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the Framework for the Deployment of Intelligent Transport Systems in the Field of Road Transport and for Interfaces with Other Modes of Transport [2010] OJ L207/1, art 7a.

²⁹⁵ Delhomme and Hervey (n 252) 230; Thym and Bornemann (n 154); Wolff, Ripoll Servent and Piquet (n 149).

²⁹⁶ Wolff, Ripoll Servent and Piquet (n 149) 1128, 1141.

programmes or legal actions,²⁹⁷ public health emerges as one of the values of the Union. Union COVID-19 border law serves as an example of how public health as a value is taken into account, and how, therefore, ways must be found to reconcile this value with the Union's legal framework on free movement.

²⁹⁷ Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2010) 256; Tomasz Koncewicz, 'Values' in Sacha Garben and Laurence Gormley (eds) *OUP Online Encyclopaedia of EU Law* (OUP, 2023).