EU LAW IN THE 'FIRST WAVE'

The legality of national measures to tackle the COVID-19 crisis

THE GREENS/EFA
In the European Parliament

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Political Summary

The COVID-19 pandemic has created some of the most profound political and policy challenges in the European Union's history. Next to the serious health crisis, the political responses of the member state's governments has led to decisions that undoubtedly put the functionality and cohesion of the European community to the test. In a vast majority of countries, the compatibility of national Corona measures and EU legislation was stretched to its limits. In many cases, these emergency measures went beyond clear breaches of European laws and the treaties.

While we can assume that most commonly, national governments acted to the best of their knowledge to fight against the Coronavirus, others have used this extraordinary situation to modify their countries' democratic system in a strategic expansion of executive powers. In the latter case, it becomes clear that the interest of their own population was not the driving force behind emergency procedures, but the increase of national authority and the bypassing of inconvenient EU legislation.

In the middle of the second wave of the pandemic, the question arises about what we can take away from the stretches and breaches of EU law that took place during the first wave. More precisely, we have to ask ourselves as Members of the European Parliament, and therefore EU legislators, in what cases we might need to alter existing regulations, introduce new policies, or close legal loopholes so that in future (health) crises member states' governments can act within a watertight legal framework. However, we also need to identify the cases where member states intentionally broke European rules, and put pressure on the European Commission and Council to enforce Union legislations safeguarding common standards and values with all possible means.

For the Greens/EFA group in the European Parliament, this study will be a guideline for our evaluation, as well as a basis for recommendations to our MEP colleagues and other European institutions. The legal analysis looks into the four most affected areas: democracy and the rule of law, free movement of persons, asylum and refugee protection and data protection. In all of these fields, serious violations of EU standards were found.

The most substantial and serious breaches were noted around democracy and the rule of law. The dismantling of legislative power of the parliaments in Hungary and Poland, the suspension of judicial proceedings in Bulgaria or Italy or restrictions in the right to

assembly again in Hungary and Poland are some of the most prominent examples. With the violation of fundamental EU rights and values comes a danger that often goes beyond the measures themselves. If institutions and citizens' rights required to consider a system a democracy are suspended, other areas could follow. This might rapidly result in an unlawful concentration of power at the governmental level. Especially as European parliamentarians, we must protect the rights of our colleagues in the national parliaments. As until now EU infringement procedures in the area of the rule of law have focused mainly on the judiciary, more attention should be on the separation of the legislative and executive branches. The separation of powers is a non-negotiable part of a European state under the rule of law.

Closed borders became a quick reality during the first month of the pandemic. The de facto suspension of the Schengen rules temporarily led to the end of the free movement of persons inside the Union. Even today, the long term scope of the controls into Denmark are conflicting with EU laws. These sorts of actions must be proportionate and applied only in exceptional circumstances. Defined rules are needed, for example for cross-border commuters or for family reunifications, regardless of their nationality.

The pictures of the Moria refugee camp were just the tip of the iceberg when it comes to serious and wilful breaches of EU law in the area of asylum and refugee protection. The suspension of asylum procedures in the Netherlands, France, Hungary and Cyprus, overcrowded reception centres as on the Greek islands, in Spain and Italy, closed harbours as in Italy and Malta or the pushback of boats as by Cyprus, Greece and Malta are part of a shameful list of unlawful governmental actions. The fundamental rights of refugees are highly protected and all breaches by national governments need to be investigated. The right to asylum and a decent and humane asylum procedure are fundamental rights, which must not end during a health crisis.

So-called "COVID-19 apps" or "Corona apps" for digital contact tracing became a new challenge in terms of data protection. Though they offer a significant opportunity in fighting the virus, they also come with the danger of putting large amounts of personal data in the hands of state authorities. Cases in Hungary and Poland show that the use of a tracing app was made mandatory or that data was processed against the user's consent. Governments that do not comply with the existing data protection standards of the Union should face the legal consequences. Even during a health emergency, the EU must guarantee that no data will be processed against the will of its citizens.

The findings of this study and its political demands should only be the starting point for a far more comprehensive plan of policies and actions. Without doubt, the next test will come, may it be the current second wave of the COVID-19 pandemic or any other internal or external shock. As the Greens/EFA group, we will continue our fight for a strong and democratic Europe. We want this union to remain a reliable, transparent and democratic community - regardless of any challenge we might face together.

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Introduction

The COVID-19 virus has seriously challenged the capacities of European states. As a common challenge affecting all European states simultaneously, it has also carried serious impacts on the European Union. As stated by the Commission President in her SOTU address, the crisis has "showed us just how fragile our community of values really is – and how quickly it can be called into question around the world and even here in our Union".

A number of studies have begun to examine different dimensions of this challenge, from COVID's economic impacts to its effects on public health, inequality and the environment. The virus has equally, however, effected EU law. It is often the case that emergencies challenge legal structures, forcing states and international organizations to act rapidly. The use of emergency powers often lacks the democratic qualities of "normal" law-making. Emergency governance can also have more lasting effects – governments may accumulate powers to deal with emergencies that remain long after the initial crisis is dealt with.[1] At the same time, the pressure to deal with domestic emergencies may lead states to neglect international obligations or overlook the need for coordination with neighbouring states.

All of these phenomena are apparent in the European response to COVID-19. As a crisis affecting all policy areas, and requiring extensive state intervention, many European governments were forced to act rapidly to contain the virus in an environment of uncertainty. To do so, they have often relied on emergency powers not normally used within domestic law, subtly (or in some cases not so subtly) changing the balance of powers between executive, parliamentary and judicial institutions. At the same time, the instinct to protect national citizens has led to widespread intrusions on EU law obligations and, in some cases, unilateral measures drawn-up without extensive consultation with EU institutions or other European states.

This pattern of emergency governance in European states is likely to produce long-term effects. By its nature, the COVID-19 virus has a cyclical quality, meaning that states suspending EU obligations have often been slow to change course, fearful that infection numbers could once again rise. In other cases, commentators have questioned whether public health crises could be used as an opportunity to affect more permanent shifts in power towards the executive branch of government even where this would not be justified for public health reasons.[2] Studying the legality of national COVID-19 responses is therefore not just relevant today but in terms of its long-term impact on European states and their democratic and rule of law structures. More particularly, examining the legality of COVID-19

[1] D. Dyzenhaus (2006), The Constitution of law: Legality in a time of emergency, Cambridge University Press.
[2] See e.g. P. Bárd and S. Carrera (2020) "Showing true illiberal colours–Rule of law vs Orbán's pandemic politics", CEPS Policy Insights No 2020-10

response measures is important for considering how the EU institutions should deal with the COVID-19 crisis in the future (in a second, third of fourth 'wave'), and how they might respond to national non-compliance with EU obligations.

These developments suggest a need for a more detailed assessment of whether national measures responding to the COVID-19 crisis comply with EU law standards. This study's aim therefore is to examine the extent to which EU Member States breached or complied with EU law in dealing with the COVID-19 crisis, focusing on the period from the onset of the virus in Europe in February 2020 to the end of July 2020. This time period was chosen because it co-incides with the first significant spike in viral infections (prior to a significant drop-off in infections that has now begun to rise again).

The study will aim to provide a purely legal analysis, examining COVID-19 response measures across all EU states. The primary focus of the study will be on four priority areas, where initial research has suggested possible non-compliance with EU law standards – i) democracy, fundamental rights and the rule of law; ii) free movement of persons; iii) asylum protection; and iv) data protection.

In a first step (s2), the study will outline the range of national measures adopted in these areas in response to the COVID-19 crisis. This section cannot be entirely exhaustive but will point to patterns between EU states (as well as examples where certain Member States adopted more restrictive measures from an EU law perspective than the majority). In a second step (s3), the study will consider how these national measures should be assessed against standards contained in the EU Treaties and relevant EU case-law and legislation. In a final step, the study will provide some schematic recommendations on how the EU institutions, and EU Member States, might ensure better compliance with EU law when responding to future 'waves' of the COVID-19 virus.

As the study will argue, while most Member States have made significant efforts to comply with EU law standards, they have extensively relied on derogations from normal EU law in responding to the COVID-19 crisis, often stretching EU law to its limits. In doing so, they have severely interrupted common policy goals such as free movement and common standards for asylum and data protection. It is, however, in arguably the most fundamental area of law – democracy, the rule of law and fundamental rights - that the clearest departures from common legal standards can be observed. In certain states – most notably Hungary and Poland – the COVID-19 crisis has resulted in significant shifts in domestic constitutional structures towards the executive branch in violation of international and EU law standards.

In its final section, the study will lay-out some recommendations. These will focus on two elements: better implementing EU law and examining the need for new, COVID-19 related rules. Regarding the first – implementation - the European Commission should be prepared to use its infringement powers to tackle instances where Member States have foregone EU law obligations without adequate justification. In the area of asylum protection, for example, a number of Member States (such as Cyprus and Hungary) have not met their legal duties under EU asylum law by suspending the registration and processing of asylum claims. Other states (such as Spain and Greece) have detained asylum-seekers in poor and cramped conditions which (particularly in light of the risk of contagion) both violate EU law standards and pose a broader risk to human rights and public health.

For the second element - new rules - the EU institutions should consider how EU law and policy can be 'COVID-19 proofed', namely, how to adapt EU rules to ensure that some of the EU's Treaties overall goals can be maintained. In the area of democracy and the rule of law, this would include developing EU law standards on emergency rule and the transfer of authority during emergencies from the legislature to the executive branch. In the areas of free movement and data protection, it would mean starting an open political debate on the extent to which Member States may invoke public health exceptions to common EU law standards on border control and on data protection safeguards. Existing soft law measures – such as a recent Council recommendation on free movement – provide a starting point for this endeavour.

Unsurprisingly, the first Corona wave has severely unsettled EU law and the lives of thousands of citizens. At the same time, it may provide useful lessons on how the EU can equip itself for future public health emergencies. The starting point for this is an evaluation of how EU law was complied with during the crisis, as the remainder of this report will detail.

Overview of National Measures and Responses

In the following section, we summarize the national measures within the four chosen policy fields, (1) democracy the rule of law (including freedom of assembly and changes in procedures of Parliaments and Courts), (2) free movement of persons, (3) asylum protection, (4) and data protection.

The goal of this section is twofold. First, we want to identify common measures for each field. How does a typical measure (potentially restricting EU policy objectives) in the four policy fields in response to COVID-19 look? Which measures were taken by most or at least by many Member States? Second, we aim to address also unusual measures or outliers. Outliers can take two forms. Individual States might have gone further than other EU member States in their restrictions (we call these maximal measures). They can, however, also have shied away from measures that the majority of States have taken or taken these measures with much more caution or in a much more limited manner (we call these minimal measures). The level of intensity is measured in terms both of the measures' scope and its duration. In the end of each section, we give a (largely simplified and only exemplary) overview in the form of a 'traffic light' system indicating the intensity of COVID-19 measures in some of the Member States.

A. DEMOCRACY AND THE RULE OF LAW

The rule of law is one of the fundamental values of the EU and a prerequisite for the effective implementation of EU law and standards. It guarantees fundamental rights and values for EU citizens but has recently been called into question in several member States. Some have argued that the public health crisis of COVID-19 has aggravated an existing rule of law deficit in the EU. While the pandemic is not per se a rule of law crisis, it certainly had significant impacts on several facets of the rule of law in the Member States. This is particularly the case for those elements of the rule of law that are dependent on groups of persons coming together in person. This can be in the form of citizens coming together for private or political reasons (e.g. in the form of private gatherings or political assemblies) or in via the functioning of collective state organs (e.g. sessions of courts or parliaments).

Common Measures

Concerning the work of **national parliaments**, most States introduced measures in the beginning of the pandemic to reduce the physical presence of the members of Parliament. In doing so, States usually either restricted the size of the parliamentary groups (e.g. in Austria and Portugal) or digitalized their meetings (e.g. in Latvia, where an online platform

was introduced in May, and in Poland, where the statute of the Sejm was changed to allow remote meetings and voting). Some States also reduced the number of plenary meetings or decided to only deal with urgent matters (e.g. Lithuania). Similar limitations on working proximity were introduced regarding the work of the courts within the EU. Most of the member States, for instance Cyprus, Estonia and Ireland, temporarily delayed judicial proceedings. Courts typically only heard cases they considered essential or urgent.

Concerning the **freedom of assembly**, most member States directly or indirectly restricted this freedom by limiting the possibility of social gatherings. Typically, during the first wave of the pandemic, measures were stricter in the beginning of the pandemic and were loosened after a few months. However, the number of allowed people in social gathering varied significantly. In the beginning of the first wave, for instance, Malta and later also the Netherlands only allowed gatherings of up to three people while Sweden was still permitting meetings of 500. Towards summer, in Finland social gatherings (incl. assemblies) were allowed with up to 50 people as of 1 June 2020 and in Croatia outdoor assemblies were made possible again with 500 people after 27 May 2020. Measures therefore can be differentiated concerning their temporal and material scope, i.e. how many people were allowed to meet and how long these restrictions were upheld.

Maximal Measures

Concerning the work of parliaments, comparatively intensive measures were taken in France, Croatia and Hungary. The French parliament transferred a significant part of its powers to the government: the activities of the assemblée nationale were reduced to a minimum and mostly related to supervising the government in relation to its measures to combat the pandemic. Apart from that, the French parliament widely restricted its function as a supervisor of the government, e.g. the parliament's right to enquire and be informed about the activities of the government was temporarily restricted. In Croatia, a set of rights was granted to the "Civil Protection Authority", a body not democratically legitimized, but which gained extensive powers to regulate the pandemic jointly with the government and the ministry of health, thereby effectively stripping the parliament of some of its legislative powers. (The "Civil Protection Authority" was subsequently authorized by the Parliament, thereby legitimizing its actions retroactively). Similarly, in Hungary, the parliament yielded a wide range of its powers to the government in accepting (initially without time limitation) the prolongation of the state of emergency in that country. After the state of emergency was terminated in mid-June 2020, the parliament regained its usual powers.

Some states also introduced intensive measures affecting the functioning of **courts**. In

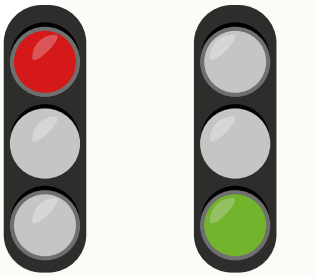
France, due to a decree of March 2020, there was an automatic prolongation of maximum length for temporary detention which essentially meant that criminal procedures could be postponed at the expense of the culprit. Furthermore, in Hungary, lower instance courts were closed even before schools were shut down. As a result, there was no court in place to check the lawfulness of many newly adopted COVID-19 measures at first instance, since the only court to continue its work was the Constitutional Court (not in a position to supervise the government as it can only check government measures if these are transferred by a lower level court). Similar effects could also be seen in Poland where administrative courts, which are essential in order to address public restrictions on citizens, suspended their activities.

With regard to the **freedom of assembly**, Italy and Cyprus implemented very strict limitations on gatherings of people, with both countries having introduced first a ban on gatherings (Italy in February, Cyprus in March) which was then superseded by a curfew which de facto also prohibited assemblies. Germany implemented a very strict policy towards social gatherings/assemblies in the beginning of the pandemic, which was gradually loosened. The federal constitutional court itself held that some measures were too restrictive concerning the freedom of assembly and hence should be amended (e.g. here).

Minimal Measures

Some States, e.g. Malta and Slovakia, introduced no apparent restrictions of parliamentary procedure. The Maltese parliament, for instance, continued to meet and only introduced measures to comply with hygiene and distancing standards. Similarly, the Slovak parliament did not reduce the number of members of parliament which attended the meetings and did not switch to online meetings but relied on measures such as wearing face masks and using hand sanitizers before the sessions. A quite minimalistic COVID-19 response could also be witnessed in Sweden, where courts generally remained open and also public gatherings were only reduced to a maximum of 500 people in early march. Moreover, in the Czech Republic, there was no general delay of judicial proceedings, but judges were given the power to remit individual deadlines in extraordinary circumstances. The crisis, particularly in its early months, affected different states in different ways, leading to divergent national responses.

VISUALIZATION



Hungary, Cyprus, France, Italy, Poland

Czech Republic, Latvia, Sweden, Slovakia

B. FREE MOVEMENT OF PERSONS

The free movement of persons is one of the four fundamental freedoms of the EU and safeguarded in Article 21 TFEU. It lied at the heart of the EU from its inception and is in some ways emblematic not only of EU's citizens' fundamental rights, but also for the European project as a whole. Building up new borders goes in many ways against the identity of the EU as a Union that understands itself largely as a community without borders. This general conviction was shaken to its core already during the Member States' early responses to the COVID-19 pandemic as the isolation of social communities through discouraging or banning travel appeared to many Member States as a promising path to contain the pandemic (by preventing its spread from community to community).

Common Measures

Our analysis shows that the adopted restrictions with regard to the free movement of persons are in many cases comparable across Member States, both in terms of their intensity and duration. The goal of such measures is in most cases to make the crossing of borders more burdensome, time-consuming or overall less attractive – but not to make it impossible. A typical restrictive measure is thus requiring (additional) border controls (e.g. Denmark, Estonia), the imposition of a mandatory COVID-19 test at the border crossing (or shortly before or after the crossing) (e.g. Lithuania – see Article 3.1.5, Poland) or a period of quarantine (usually 14 days) after the border crossing (e.g. Bulgaria, Ireland).

Maximal Measures

Some States, however, took far more maximal measures in terms of their **scope**. Austria, Bulgaria, the Czech Republic, Germany (see e.g. Rhineland-Palatine), Hungary (Regulation 45/2020 in Hungarian) or Malta enacted specific **travel bans**, partially timely limited (e.g. Austria) but also partially with an open end (Czech Republic). Often these restrictions operated in both directions, applying both to persons entering or exiting the country. Some States, like Poland or, according to some sources (see here, here and here) Slovakia, also enacted general border closures to all foreign States, including other EU States.

In some cases, the intensity of the measure is further aggravated by the fact that States only allowed for strict or unclear exceptions to travel bans. In the Czech Republic, for instance, for a period, travel was allowed only if this was in the "interest of the State". Formulations like these without further specifications create rather in-transparent executive practice and create the risk of arbitrariness or inequality. Other States enacted rules that were maximal in terms of **duration**. Lithuania, for instance declared a (several months long) state of emergency even before the first COVID-19 case

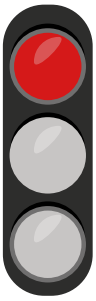
in the country was confirmed. Malta (from 9 March 2020 [first EU countries] to 1 July 2020 and 15 July 2020 for some states), Portugal (from 16 March 2020 [first EU countries] to 1 July 2020) and Hungary (17 March 2020 to 7 June 2020 for some EU states, like Germany) enacted particularly long border closures, even though some bilateral bans were then lifted step by step as, for instance was the case in Hungary. Denmark introduced new border controls early onwards for a rather extended period of time (until 12 November 2020).

Minimal Measures

Other States enacted fewer or relatively less intrusive travel restrictions. In terms of **scope**, no travel bans (targeting EU Member States) at all were issued by some Member States including the Republic of Ireland, Luxemburg, the Netherlands or Sweden during the first COVID-19 wave in 2020. Some states, while having restrictive measures, made generous exceptions, for instance with regard to the generally required quarantine when crossing the border from a risk area (e.g., generally speaking, the German regulation, or more specifically, for the German border to Austria and Czech Republic, the regulation in Bavaria) or for travelers with a "worthy purpose" (Denmark).

Some States agreed on regional free travel zones ("bubbles"); for instance, Latvia, Estonia and Lithuania established a Baltic Travel bubble in June 2020). Other states also established generous exceptions for commuters to ease the crossing of border (e.g. Portugal (for commuters from to Spain). Some States used particularly flexible listings or classifications of risk areas to restrict travel (for instance, out of many, Austria (see resolutions on "SARS-CoV-2 Risikogebiete"), Germany, Belgium, Malta or Romania. Some other States focused rather on the building up of systems of cooperation with other affected States and information sharing rather than establishing binding travel restrictions (for instance Sweden, Denmark and Finland or Luxembourg and the Netherlands. **In terms of duration**, some States enacted only very time limited border controls (to be reviewed regularly), for instance, out of many, Croatia which enacted travel bans for only 30 days on certain countries (from 19 March 2020 until 28 May 2020 for some states).

Visualization



Belgium, Bulgaria, Czech Republic, Greece, Hungary, Malta, Poland, Portugal

Denmark, Estonia, Ireland, Lithuania, Latvia, Luxembourg, Netherlands, Sweden, Slovakia

C. ASYLUM AND REFUGEE PROTECTION

EU law harmonizes many aspects of its Member States' asylum laws through its Common European Asylum System (CEAS). Under the CEAS, protection must be granted to persons fleeing persecution or serious harm in their state of origin. The EU has committed to protection standards that are higher than those in international law, in particular to fair and effective asylum procedures comparable across member States. This system includes, for instance, the Qualification Directive (establishing who must be granted international protection), the Returns Directive (clarifying common standards and procedures in Member States for returning illegally staying third-country nationals), the Asylum Procedures Directive (supposed to ensure fair and swift asylum decisions), including elevated protection for unaccompanied minors, the revised Reception Conditions Directive (supposed to guarantee dignified and safe material reception conditions and respect for the asylum seekers' fundamental rights) and the revised Dublin Regulation (allocating Member States' responsibilities for asylum-seekers and processing their applications). Asylum policy had been a hot topic in the EU long before the pandemic hit. At the latest since 2015, an erosion of the rule of law in the field of EU asylum law has been deplored by observers.

It is not therefore surprising that the COVID-19 pandemic has further challenged this regime of EU law. The pandemic poses a great challenge for the implementation and the enforcement of migrants' rights and other EU asylum provisions for several reasons. First, often camps and centres where asylum seekers have to stay temporarily are overcrowded putting persons in these centres and camps into particular danger regarding the spread of the virus. Social distancing and elevated hygienic measures can often not be observed. Second, challenges to state capacity mean that asylum procedures might also be suspended or delayed. Finally, linking this part to free movement, with many borders being closed, the distribution system under the Dublin Regulation can often not be effectively implemented.

Common Measures

Many Member States have altered or even temporarily suspended their asylum procedures. Registration of new applications continued in most Member States. A common change to asylum procedure during the crisis concerns the interview stage. Most, if not all Member States have suspended in person interviews. Some Member States have conducted remote interviews via telephone or video-conferencing tools. Dublin transfers were suspended in all EU Member States during the crisis.

Some Member States like Germany, Italy and the Czech Republic officially announced the suspension of Dublin procedures while other Member States like France, the Netherlands, Belgium and Poland de-facto suspended the procedures. Most Member States have also suspended forced returns under the Returns Directive.

Many Member States' policies consider specific vulnerabilities of asylum-seekers. Those concern the allocation reception conditions and housing. Belgium, for example, gave preference to vulnerable asylum-seekers. Even a Member State like Cyprus whose policy did not pay much attention to the needs of asylum-seekers reportedly made efforts to transfer unaccompanied children to dedicated facilities. Greece transferred older and immunocompromised persons from the island facilities to facilities where they could take preventive measures more easily. Spain made efforts to improve the situation for LGBTI residents in the Melilla center. This common attention to the vulnerable can be seen as one of the more positive aspects of the national response to asylum law during the first wave.

Maximal Measures

In the case of asylum, the state is mainly under a positive rather a negative obligation to the individuals concerned. "Maximal measures" are therefore to be understood as the maximal (most significant) omissions in ensuring the owed level of asylum protection for the purposes of this part of the study. Due to COVID-19, Member States put in place much stricter border policies, also as regards asylum-seekers. Italy and Malta declared their ports "unsafe" during the crisis in an effort to prevent the disembarkation of migrants from ships. There were reports that Cyprus used COVID-19 as a justification for pushing back migrant boats. Greece has even been accused of violently pushing back migrant boats in the context of the pandemic. Malta reportedly used a private fleet to deter migrant boats at sea. There were reports of abuse of migrants by Croatian officials at the Bosnian border.

These tougher policies have shown effect. The numbers of newly lodged applications between March and June 2020 were significantly below pre-COVID-19 levels (and continue to be significantly lower since then). Moreover, the reaction of a number of Member States to COVID-19 had implications for access to the asylum procedure, even for those who did get onto the territory of a Member State. Some

Member States, e.g. the Netherlands and France, suspended the registration of new applications. In connection with that, the Netherlands prolonged the deadlines for their administration officials to decide on asylum claims. Others, e.g. Hungary and Cyprus, suspended access to the asylum procedure.

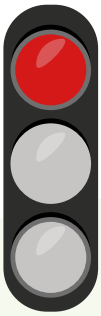
Regarding the provision of reception conditions, issues with adequate housing arose, for instance, on the Greek islands and in certain centres in Spain, Cyprus and Italy. The problem was often congestion with many reception centres experiencing overcrowding. The most dramatic example is Moria in Greece which hosted at times more than 13,000 persons even though it had originally only been designed for 3,000. Another problem was access to remote education for migrant children. In Poland, for instance, children did not have the necessary technical equipment. Regarding quarantine conditions for newly arrived asylum-seekers, Greece quarantined newly arrived asylum seekers at the point of arrival, i.e. on isolated beaches or ports, as there was a lack of adequate locations for quarantine. Some Member States heavily restricted the right of migrants in reception centers to leave the centers, even when the measures were being lifted for other parts of the population, essentially detaining these migrants. Greece, for example, imposed a lockdown on migrant camps, affecting more than 120,000 persons. Other examples of centers that were under lockdowns are the Spanish camp in Melilla and the Kokkinotrimithia center in Cyprus. Greece reportedly took no measures to address the threat of a spread of the virus in migration detention centers and did not reassess the proportionality of the detentions given extensive changes in the health situation.

Minimal Measures

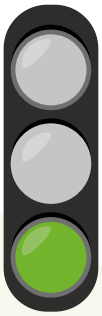
As with maximal measures in asylum, the main expectation on a State is to provide protection. A minimal measure in this category thus describes case where Member States had no or minor shortcomings in protecting and implementing the right to asylum during COVID-19. Some Member States, for instance, used the time that they had suspend the interview part of their procedures efficiently. For example, Germany moved forward with those asylum procedures for which the interview had already been conducted and were thus able to reduce their backlog from 60.000 pending asylum cases before the pandemic hit to 44.000 by the end of June. In Finland, interviews were suspended only for a short period of time, from 16 March 2020 to 14 April 2020. After that, the authorities resumed in person interviews in premises that provided sufficient protection for state agents and applicants. Protective measures included the use of plexiglas screens that protect against transmission of the virus through droplets.

Regarding reception conditions, Portugal set a good example by treating all migrants as permanent residents for a certain period of time in order to ensure that they would receive adequate reception conditions. Italy, too, took a generous approach extending reception conditions until the end of the health emergency. Spain provided LGBTTIQ applicants in the Mellila reception centre with separate rooms because of the COVID-19 pandemic. Some Member States took positive approaches towards migration detention in the context of the COVID-19 pandemic. For example, Spain and Slovenia released persons from detention. These more positive examples question the narrative that degradation of standards for asylum-seekers is an "inevitable" consequence of a broad public health crisis.

Visualization



Hungary, Cyprus, Greece, Malta



Germany, Finland, Portugal, Sweden

D. Data Protection

Data protection is a dynamic field of law that controls how personal information can be stored and used by organizations, businesses and government. European citizens enjoy large freedoms in this field, making data protection one of the areas of human rights in which Europeans are particularly protected. This includes (sensitive) personal health data and personal mobility / location data. Data protectionscompetences have been transferred largely to the European level by Member States, so data protection is a particularly "Europeanized" field of law. Most importantly, the General Data Protection Regulation (GDPR), directly binds and is applicable in all EU Member States as a regulation to guarantee comprehensive data protection and privacy everywhere in the EU. It aims to enable individuals to know, understand and consent to the storage and usage of their personal data in the EU, even if the storage or processing occurs outside of Europe's borders.

Modern technologies, such as contact tracing apps, have proved to be powerful in the fight against the COVID-19 pandemic. Accordingly, most States have relied on them in their efforts to combat COVID-19. Many of these efforts, however, easily raise concerns with regard to data protection. Often two competing values

– protection of health and the safeguard of data privacy – have to be balanced against each other. It is this act of balancing that has too often been ignored by the EU's Member States.

Common Measures

Most Member States made use of voluntary contact tracing apps (e.g. Germany, Bulgaria and Finland) in order to control the spread of COVID-19 and to retrace the occurrence of infections. The operational modus of these apps differs: The majority of operated with "digital handshakes": the devices register encounters with other devices and, if a user is tested positive and enters this information into the app, the users of the registered devices will be notified (e.g. Germany, France, Hungary, Denmark). Most apps mainly rely on Bluetooth (e.g. Austria, Denmark), while others work with Geodata (e.g. Cyprus, Bulgaria). In order to protect personal health and location data, most contact tracing apps make use of anonymized codes to process location information (e.g. France, Germany, Italy). Commonly, the data is used to identify the infected persons' contacts of the past 14 days (France, Hungary, Denmark). To ensure that data is not stored longer than necessary, most apps include so called sunset-clauses (e.g. Latvia, Spain, Finland). The majority of apps store the data in a decentralized manner (e.g. Ireland, Portugal, Malta) with most apps being exclusively operated by the national health authorities (e.g. Italy, France). The Austrian app, however, follows a Multi-Stakeholder approach, initiated by the Austrian Red Cross.

Maximal Measures

Although the basic functionality and elements of the respective applications are similar across Member States, some states took more intensive measures regarding the legal framework of the apps as well as the data collected and stored by them. While only Poland made an app mandatory for people in compulsory quarantine, a bill for a law was proposed in the Netherlands that would essentially force telecommunication service providers to collect mobile phones' meta data (location and traffic data), and send it to the *National Institute for Public Health and the Environment*, thus circumventing the citizens' ability to choose whether to install an application or not. A similar amendment of the Slovakian telecommunication law passed in March was repealed by the Slovakian Constitutional Court in May as the purpose, duration and control of the extraordinary measure had not been sufficiently defined.

Apps that are not working with "digital handshakes" do not transfer data automatically, but the user agrees to transfer location data after testing positive for COVID-19 (e.g. Cyprus, Czech Republic). The respective controller of the data then determines how to proceed and who might be notified. This is rather intrusive because real data is transferred to real persons while the common functioning of a digital handshake only transfers encrypted data without interference of real persons. For other apps, the users give daily information on the presence of symptoms and their health state so that the controller can be active even before a positive COVID-19 test result is received (e.g. Bulgaria).

Regarding the collection of data, Denmark uses an app that is not released under an open-source license, making it impossible for the public to inspect the code and get insights about how the data is collected and processed. Instead of storing the data decentralized on the devices, there are some apps with central storage (e.g. France, Hungary). On a similar note, the app used in the Czech Republic stores the collected data on Google Servers in the EU as well as in the US, thus making it harder to fully trace the data stored and to supervise whether the European data protection standard is met.

While most of the applications solely provide information to the user regarding possible contacts and suggested measures, the mandatory compulsory quarantine app in Poland prompted the user multiple times a day to take a real-time selfie at the address the user has provided to the authorities. Furthermore, the data collected by the compulsory app in Poland includes GPS and Biometrics (facial recognition) data, which may then be shared with the police, the state governors, the Centre for Information Technology, the National Centre for Healthcare Information Systems and the developer of the app. A comparable quarantine app relying on location tracking and facial recognition was launched in Slovakia. However, the Slovakian app is a voluntary alternative to state quarantine for citizens returning from abroad and can substitute the mandatory stay in quarantine centers.

Regarding the duration of the data stored, it is noteworthy that the app used in Slovakia does not include a sunset clause, implying that the data could be stored for an indefinite amount of time. In Poland, the data collected by the compulsory app is kept for 6 years after deactivation of the app, which appears a very long period. Concerning the right to request information on stored personal data, the Hungarian

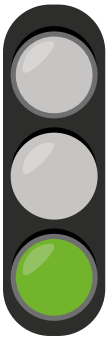
Government suspended all measures following such rights based on Articles 15 to 22 of the GDPR until the end of the state of danger caused by COVID-19. In Greece and Spain, drones were reportedly used to supervise compliance with COVID-19 regulations. The crisis has thus seen significant potential infringements of data protection and privacy.

Minimal Measures

In some Member States, no official COVID-19 tracing apps were introduced (for instance Romania, Sweden or Greece). In Romania quite intrusive tracking applications were initially planned, but the government abandoned these plans due to negative civil society reactions. Since then, the government refrained from introducing such apps, although Romanian private engineers had developed less intrusive Convid-19 contact tracing apps already in March. In Sweden, a symptom tracker app was launched by Lund University, aiming at mapping the spread of the virus across Sweden, but the national health agency paused own efforts to develop such digital tracing tools in the end of April. Greece provides an application that helps to assess the risk of being infected with COVID-19, but has not implemented a contact tracing app. In Slovakia, besides having introduced a quarantine app, no contact tracing app has been released yet, but is being developed. Luxembourg has no national COVID-19 app, but the German app can be used there.

Visualization

Bulgaria, Czech Republic, Hungary, Poland, Slovakia



Romania, Sweden

EU Law Analysis. Did States Comply?

A. DEMOCRACY AND THE RULE OF LAW

As highlighted in the introduction, emergencies often lead to restrictions on the normal process of democratic law-making. EU Member States have been forced to act rapidly to contain the virus. At the same time, restrictions – or the use of emergency powers - are limited in the European constitutional tradition: they should last no longer than the emergency itself and should guarantee basic levels of legal and political oversight (particularly) of executive activities. These limitations on emergency forms of rule have been observed by most but not all EU states during the COVID-19 crisis, as this section will highlight. We will focus on three main issues – the prerogatives of Parliaments, judicial protection and freedom of association/assembly (focusing on the legal obligations that flow from EU law in each field).

i) Parliamentary Prerogatives

There is no explicit reference in EU primary or secondary law to the prerogatives of national parliaments. However, all Member States, as well as the EU's institutions, are bound to respect and promote the values stated in Article 2 TEU, which include, inter alia, the principles of democracy and the rule of law. Although the content of these principles is not clearly codified in binding rules, the EU institutions and Court of Justice have progressively interpreted these principles in light of the constitutional traditions of the Member States and international Treaties. As confirmed by the European Commission, "the principle of the rule of law has progressively become a dominant organisational model of modern constitutional law… it makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts".[4]

An essential component of the rule of law is the principle of separation of powers, as the Court of Justice has confirmed in its case law.[5] Even though "EU law does not preclude a Member State from simultaneously exercising legislative, administrative and judicial functions", that exercise must comply with this principle, which "characterises the operation of the rule of law"[6]. Accordingly, an absolute power-shift in favour of the executive and to the detriment of the legislature cannot be reconciled with Article 2 TEU, with the consequence that certain limits to executive discretion must be maintained.

First of all, the core legislative function – to pass and amend laws - must be retained by parliament. As stressed in several cases of the ECtHR, national parliaments enjoy a special weight "in matters of general policy" as they have "direct democratic legitimation"[7] and therefore they cannot be substituted in their functions by the executive.

[3] See e.g. the Compilation of Venice Commission Opinions and Reports on States of Emergency, available here.
[4] Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, pp. 3-4.
[5] See, inter alia, Judgment of 22 December 2010, DEB, C-279/09, EU:C:2010:811, para. 58 and Judgment of 10 November 2016, Poltorak, C-452/16 PPU, EU:C:2016:858, para. 35.
[6] DEB, cit., para. 58.
[7] ECtHR, S.A.S. v. France, 1 July 2014, para. 129.

Secondly, respect for certain conditions must be ensured in order to prevent abuses in circumstances when powers are delegated. As the Court of Justice has stressed, "in a community governed by the rule of law, adherence to legality must be properly ensured".[8] Legality requires that legislative powers of the governments must be defined by (at least ordinary) law and that executive powers must be substantially circumscribed. Absent such limits, the law could not have the necessary guarantees of accessibility and foreseeability which are required to comply with the rule of law,[9] as the law's execution would be at the executive's discretion. According to the ECtHR: "it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power". Therefore, "the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference".[10]

During the management of the first phase of the COVID-19 pandemic, we can observe in several Member States a shift of powers in favour of the government, mostly through an empowerment of the Prime Minister and/or the Minister of Health.[11] However, in some cases such discretion was excessive and thus in conflict with the basic standards outlined above.

In Hungary, the "Act on the containment of coronavirus"[12] (adopted on the 30 March and in force until 17 June 2020) granted the government the power to adopt decrees suspending the application of certain laws or derogating from their provisions during the period of the state of danger. Although provided by law, those legislative functions could be exercised for a broad variety of matters ranging from protecting "life, health, person, property and rights of the citizens" to guaranteeing "the stability of the national economy", thus failing to comply with the requirement of a strict definition of the scope of the executive's extraordinary powers.

Moreover, the Act extended the applicability of government decrees beyond the two weeks limit prescribed by the Hungarian constitution (Article 53(3)), for the whole period of the state of danger and without a sunset clause for each decree. Even though the Act was subsequently repealed[13], it lasted until the government itself decided to end the state of danger. Thus, during this period, which was declared by the government itself on March 11 2020[14], the executive was the only institution able to exercise legislative authority, with the parliament (voluntarily) relegated to the role of mere auditor, enjoying a right to be informed. These measures can hardly be reconciled with the principle that the law shall clearly define the manner in which government exercises power. The Act therefore breaches the separation of powers principle.

[8] Judgment of 29 April 2004, Commission v. CAS Succhi di Frutta, C-496/99 P, EU:C:2004:236, para. 63.
[9] ECtHR, Sunday Times (No. 1), 26 April 1979, para. 49.
[10] ECtHR, Malone v. The United Kingdom, 2 August 1984, para. 68.
[11] See for instance the cases of Bulgaria, Denmark, Germany (as regards the situation of the state of Bavaria), and Ireland, where additional capacities where transferred to the Minister of Health by way of ordinary law.
[12] Act XII of 2020.
[13] Act LVII of 2020. However, on 18 June the National Assembly approved Act LVIII of 2020 that granted new exceptional powers to the government, which on the same day declared the "state of epidemiological preparedness" (Decree 283/2020), which will be in force until 18 December 2020.
[14] Government Decree 40/2020.

In Poland, the proper constitutional provision for dealing with a pandemic, the state of natural disaster (Article 232 of the constitution), was sidestepped. The constitution provides the relevant framework to manage the COVID-19 pandemic and the guarantees attached to it (i.e. temporality of the special regime (maximum 30 days) and the list of freedoms and rights that can be derogated during the emergency), which are further regulated in the 2002 Act on the state of natural disaster, which includes "epidemics" among the triggering events. Instead of declaring the state of natural disaster, the Polish response to the COVID-19 pandemic has been grounded in ordinary law. Firstly, the government declared a state of epidemic threat on 13 March.[15] Then, with the deterioration of the health situation, a state of epidemic was declared on 20 March[16] on the basis of an ordinary law, more specifically the Contagious Diseases Act of 5 December 2020 and a new COVID-19 Act passed on 2 March 2020.[17] One part of the COVID-19 Act sets rules, procedures and tasks for managing the epidemic and applied within a timeframe. However, the second part of the Act, which amended existing legislation (e.g the functioning of the health care system), introduced permanent changes.[18]

The Act also included social-distancing measures that severely impacted on fundamental rights (e.g. limitations to personal liberties, as well as prohibitions and obligations for citizens and business). The subsequent COVID-19 related legislation was issued mostly in the form of governmental decrees that covered almost every aspect of daily life. Those decrees were criticized because the measures introduced were more severe than those that would have legally permissible if a constitutional state of natural disaster had been declared. Indeed, the latter provides for higher guarantees than the state of epidemics, such as those related to limitations to freedom of association and the impossibility to hold elections during the lockdown.[19] Finally, the state of epidemic was declared without a sunset clause and it is currently in force. However, subsequent decrees were applied with a time-limit. These measures are also of concern from an EU law perspective – where Member States constitutions establish provisions regulating and limiting emergency powers, the decision to override such provisions through a separate regime once again threatens the rule of law principle.

The Court of Justice has recognised that protection against arbitrariness is a general principle of EU Law: "in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention".[20] An unfette-

[15] Ordinance of the Minister of Health of 13 March 2020, No. 433.
[16] Ordinance of the Minister of Health of 20 March 2020, No. 491.
[17] Act of 2 March 2020 on specific solutions related to the prevention and control of COVID-19, other infectious diseases and crisis situations.
[18] Helsinki Foundation for Human Rights, "Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications: Poland", 24 March 2020,| p.3, available here.
[19] T. Drinóczi; A. Bień-Kacała (2020), "COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism", The Theory and Practice of Legislation, Vol. 8, Nos. 1-2, 171-192.
[20] Judgment of 21 September 1989, Hoechst v. Commission, 46/87 and 227/88, EU:C:1989:337, para. 19.

red power of the executive – whether at EU or national levels - would result in the absence of guarantees against its intrusion in the private sphere of individuals.

In this respect, the **Hungarian** case mentioned above is relevant. One of the measures adopted by the government under the state of danger regime was Decree 46/2020 of 16 March, which was in force until the end of the state of danger (17 June 2020). That decree empowered the Minister for Innovation and Technology "to access and process any available data" (Section 10) if deemed useful to manage the pandemic. Moreover, national and local public institutions, businesses and individuals were required "to provide assistance, and data requested, to the Minister". This was especially regrettable as, since May 4, Hungary also suspended the GDPR.[21] Such a broad power in the hands of the Minister was capable of having serious repercussions in the private sphere of individuals, especially as regards the protection of personal data. It thus appears to be disproportionate to the aim of containing the pandemic set out in the "Act on the containment of coronavirus".

Another example of the government's intrusion in the sphere of private activities, this time of a legal entity, was the government's decision to put a publicly traded company (Kartonpack) under the supervision of the Hungarian State.[22] The commissioner entrusted to represent it was given broad powers by the decree, despite the lack of connection with the management of the pandemic. Shortly after the issuing of the Decree, the commissioner replaced the company's board of directors with individuals close to the governing party.[23] The Decree should have ceased its effects with the termination of the state of danger on 17 June, but the transitional rules[24] extended its application until 15 August 2020.[25] However, the decisions taken by the new commissioner are irreversible.[26] The case was also the subject of a European parliamentary question presented by the MEP Csaba Molnár. Commission Reynders answered that the Commission is aware of the situation and "will continue to closely monitor developments until all emergency measures are fully lifted". In light of the above, exceptional law-making powers of the executive must be temporary, and clearly linked to public policy objectives (such as the protection of public health) to meet the principles of proportionality and non-arbitrariness.

Several Member States have sought to limit parliamentary prerogatives through explicit constitutional means, such as a declaration of a state of emergency. Here, the diversity in state practice ranges from Member States that declared a state of emergency (either via constitutional or statutory means)[27] to those that did not adopt any special regime.[28] In-between the two there are those countries that adopted other types of emergency powers.[29]

[21] Decree 176/2020.
[22] Decree 128/2020 of 17 April 2020.
[23] See: P. Bárd Petra; Carrera Sergio (2020), cit., p.8.
[24] Section 162 of Act LVIII of 17 June 2020 on the Transitional Provisions related to the Termination of the State of Danger and on Epidemiological Preparedness
[25] European Commission 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final, p. 18, available here.
[26] Hungarian Helsinki Committee, "Update on Military supervision of private companies under COVID-19 pandemic in Hungary", 26 June 2020, p. 7, available here.
[27] Bulgaria, Czech Republic, Latvia, Lithuania, Luxembourg, Finland, Italy, Portugal, Romania, Slovakia.
[28] Austria, Belgium, Cyprus, Denmark, Germany, Greece, Ireland, Sweden, The Netherlands,
[29] Croatia ("declaration of epidemic disease"), Estonia ("emergency situation"), France ("state of health emergency"), Hungary ("state of danger"), Malta ("public health emergency"), Poland ("state of epidemic"), Slovenia "declaration of epidemic"), Spain ("state of alarm").

Independently from the nature of the regime, the reorganization of parliamentary activities also varied. The majority of Member States decided to reduce both the frequency of the plenary and number of parliamentarians participating.[30] Other countries decided instead to reduce only the former.[31] Moreover, in certain countries such as **Austria** and **Italy**, only those meetings related to the COVID-19 emergency took place.

In certain cases, voting modalities were rearranged. Here practices range from allowing remote measures only for committee meetings (usually not including deliberation and voting).[32] or also for the plenary, often including voting.[33] In several Member States, the result of the above restriction was the (at least partial) sidestepping of parliaments. Nevertheless, in general parliaments continued to exercise at least some form of control over the emergency measures adopted by governments. A relevant case is Bulgaria, where the parliament (National Assembly) suspended its regular sitting between 26 March 2020 and the end of the state of emergency (13 May 2020) with the consequence that meetings were held only when legislation concerning the state of emergency was to be discussed. However, although parliamentary scrutiny was limited to written interventions, parliamentary committees continued to work.[34]

A more alarming case is the **Hungarian** one, as already partly discussed. As a result of the declaration of the state of danger and the enactment of the Act on the containment of coronavirus, the Hungarian National Assembly essentially delegated core legislative functions to the government for the whole period of the special legal order.[35] The government had to inform the National Assembly of the measures taken, and the latter remained empowered to revoke the authorization extending the validity of government's decrees. However, these were the only elements granting control to the National Assembly, compared with the broad legislative powers enjoyed by the government.

EU law does not explicitly define the conditions to regulate the parliamentary oversight of governments activities and/or state of emergency. Member States remain sovereign in deciding how to adapt their institutional structure to an emergency. In this respect, derogations from certain obligations may be seen as necessary in extraordinary circumstances. Indeed, several international Treaties, including the ECHR (article 15) provide for the possibility to derogate.

As the Court of Justice has highlighted many times, however "powers retained by the Member States must nevertheless be exercised consistently with EU law".[36] Thus, when

[30] Austria, Bulgaria, Belgium, Croatia, Denmark, Germany, Finland, France, Greece, Ireland, Italy, Poland, Portugal, Sweden, The Netherlands. Source: IPOL Briefing, "The Impact of COVID-19 measures on Democracy, Rule of Law and Fundamental Rights in the EU", April 2020, available here.
[31] Cyprus, Czech Republic, Estonia, Slovenia. Source: Ibid.
[32] Croatia, Czech Republic, Denmark, Lithuania, Italy. Source: Ibid.
[33] Belgium, Greece, Estonia, Finland, Poland, Romania, Slovenia, Spain. Source: Ibid.
[34] EPRS Briefing, States of emergency in response to the coronavirus crisis: Situation in certain Member States II, May 2020, p. 4, available here.
[35] As illustrated above, Section 2 of the "Act on containment of coronavirus" (Act XII of 2020) provided that during the state of danger the Government could "in order to guarantee that life, health, person, property and rights of the citizens are protected, and to guarantee the stability of the national economy, by means of a decree, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures". Under Section 3 applicability of those decrees was extended "until the end of the period of state of danger".
[36] Judgment of 19 June 2014, Strojírny Prostějov, C-53/13 and C-80/13, EU:C:2014:2011, para. 23.

they trigger an emergency regime, Member States must act in compliance with EU law and in particular the values on which the EU is founded and which must be respected not only at the time of accession (Article 49 TEU) but also during membership (Articles 2 and 3 TEU). As recalled many times by the Court of Justice EU law is "based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values".[37] According to Article 11 TEU, the EU is founded on the principle of representative democracy. The Court of Justice has further confirmed that representative democracy, "gives concrete form to the value of democracy referred to in Article 2 TEU".[38] There are no obvious derogations provisions from these Articles in the EU Treaties.

Even in times of exception therefore (e.g. during a state of emergency), parliaments must be able to control the activities of the government and exercise their oversight functions in order for the separation of powers principle to respected. Indeed, during a state of emergency, parliamentary control is particularly important, given the inevitable power shift in favour of the executive. According to the Council of Europe toolkit, "parliaments must keep the power to control executive action, in particular by verifying, at reasonable intervals, whether the emergency powers of the executive are still justified, or by intervening on an ad hoc basis to modify or annul the decisions of the executive". [39]

The case-law of the Court of Justice as regards EU values requires that measures restricting those values can be justified only if they pursue by a legitimate aim and comply with the principle of proportionality.[40] Given the temporary and extraordinary nature of the health emergency, in order to comply with the principle of proportionality, emergency powers must be temporary, limited to what is necessary, circumscribed and must take into account their impact on the enjoyment of fundamental rights. This reading is in line with the standards developed in the rule of law checklist of the Venice Commission[41] and it was also confirmed by the April resolution of the European Parliament, which stressed that emergency measures "must be in line with the rule of law, strictly proportionate to the exigencies of the situation, clearly related to the ongoing health crisis, limited in time and subjected to regular scrutiny". The President of the European Commission has also recently warned that "emergency measures must be limited to what is necessary and strictly proportionate", they cannot "last indefinitely", and they must be "subject to regular scrutiny".

As stressed above, during the first phase of the COVID-19 pandemic, ten Member States declared a state of emergency or resorted to

[37] See, inter alia, Judgment of 10 December 2018, Wightman and Others, C-621/18, EU:C:2018:999, para. 63.
[38] Judgment of 19 December 2019 Oriol Junqueras Vies, C-502/19, EU:C:2019:1115, para. 63. See also, Opinion of Advocate General Sharpston in Commission v. Poland, Hungary and Czech Republic, C-715/17, C-718/17 and C-719/17, delivered on 31 October 2019, para. 141.
[39] Council of Europe, Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states, SG/Inf(2020)11, 7 April 2020, p. 4, available here.
[40] Judgment of 5 November 2019, Commission v Poland (Indépendance des juridictions de droit commun), C-192/18, EU:C:2019:924, para. 113.
[41] Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016, para. 51, available here.

other emergency powers. In all cases, the emergency regime was provided by law (either constitutional or ordinary). However, in three cases the requirement of temporality was not fulfilled. In **Croatia**, a "declaration of epidemic disease" was made by the government on 11 March. Yet, the response was handled based on the existing statutory framework, in particular the Civil Protection System Act, which was amended during the crisis. It empowered the Civil protection Authority, in the event of special circumstances endangering health, to take decisions to be implemented by civil protection units. Although the declaration of epidemic disease did not have a sunset clause, all the measures of the Civil protection Authority were introduced with a pre-defined time-limit and renewed once.[42]

In **Poland**, as illustrated above, not only is the state of epidemic still in force without a sunset clause but also certain provisions of the COVID-19 Act, as well as of the subsequent legislation and decrees, introduced permanent changes. In **Hungary**, neither the declaration of the state of danger, nor the "Act on the containment of the coronavirus" which gave broad legislative powers to the government, included a sunset clause. Moreover, the Act extended the validity of the extraordinary government decrees beyond the limit of fifteen days, and also with a retroactive effect.[43] It is true that the government subsequently repealed this measure, and that the following emergency regime, the state of pandemic preparedness, did contain a sunset clause. However, the power to repeal the state of danger, and thus the measures adopted to manage it, lied exclusively in the hands of the government. It is thereby impossible to reconcile the state of danger and the "Act on the containment of the coronavirus" with the principles of temporality and limitation illustrated above.

As we will be discussed in later sections, functioning parliamentary oversight is not only an important constitutional goal in and of itself but also a key mechanism of ensuring that EU law is complied with. The deliberative and scrutiny role of Parliaments acts as an important check on arbitrary government authority and ultimately on acts which may breach the EU's core values. In this sense, the pandemic's first wave saw a concerning shift of authority away from representative institutions.

ii) Judicial Protection and National Courts

National justice systems are of utmost importance in the EU legal order. On the one hand, they ensure the correct application of EU law and the effective judicial protection of EU law rights. On the other hand, the existence of a system of legal remedies is "of the essence of the rule of law" as a European value under Article 2 TEU.[44] Indeed, Member States are required by Article 19(1) TEU to establish a system of legal remedies which ensures effec-

[42] EPRS Briefing, States of emergency in response to the coronavirus crisis: Situation in certain Member States III, June 2020, pp. 3, 12, available here.
[43] Although the Hungarian Fundamental Law allows for an authorisation by the National Assembly to extend those decreed, the relevant provision (Article 53(3)) apparently requires an ad hoc extension of each decree and it can hardly be read as allowing a general and indefinite extension.
[44] Judgment of 27 February 2018, Associação Sindical, C-64/16, EU:C:2018:117, para 36.

tive judicial review in the fields covered by EU law.[45] Thus, they have a duty to ensure that national courts which are called to interpret or apply EU law "meet the requirements essential to effective judicial protection".[46]

In light of the separations of powers, the executive and the judiciary perform very different functions and the independence of the latter must be guaranteed vis-à-vis the former.[47] Evidently, no judicial protection can be assured if courts are closed down. Conversely, the role of the judiciary is even more important during an emergency period, as it is entrusted with ensuring that extraordinary measures adopted by governments comply with the applicable law, which also include securing respect of EU law, and the rights of individuals relying on it. Given that national courts are entrusted with the power to ask questions for preliminary ruling to the Court of Justice (Article 267 TFEU), they are necessary to ensure the full effectiveness of EU law. The main purpose of the preliminary ruling mechanism is to ensure the uniform interpretation and application of EU law, thus "serving to ensure its consistency, its full effect and its autonomy".[48] Thus, closing (certain) national courts indiscriminately would impinge the proper functioning of judicial cooperation.

Nevertheless, in the events of a serious health emergency, the temporary limitation/suspension of judicial activities can be reconciled with EU law, provided that it complies with the principle of proportionality. Indeed, as acknowledged by the CJEU when evaluating limitations to judicial independence, restrictions to effective judicial protection must be "justified by a legitimate and compelling aim which is pursued in a way compatible with the principle of proportionality".[49] Despite being a constraint to effective judicial protection, EU law does not prevent Member States from altering judicial procedure in order to deal with the consequences of the pandemic. Procedural time-limits may be postponed, and hearings become online or be suspended, especially for non-urgent cases. As a result of the coronavirus COVID-19 pandemic, even the Court of Justice had to modify its working arrangements.

However, the modification of judicial procedures should not excessively compromise the principle of effective judicial protection and, in particular, judicial independence. Extraordinary working arrangements must pursue a legitimate aim and be proportionate to it. As regards the guarantees of judicial independence, they must apply to various rules, including those concerning the composition of the jury, the appointment, rejection and dismissal of judges and must be "such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it".[50]

In this respect, not all courts are alike. During the COVID-19 pandemic, despite the different

[45] Judgment of 3 October 2013, Inuit Tapiriit, C-583/11 P, EU:C:2013:625, paras. 100-101.
[46] Associação Sindical, cit., para 40.
[47] See Judgment of 10 November 2016, Kovalkovas, C-477/16 PPU, EU:C:2016:861.
[48] Opinion of 18 December 2014, Opinion 2/13, EU:C:2014:2454, para 176.
[49] Judgment of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C-619/18, EU:C:2019:325, para. 79.
[50] Judgment of 19 September 2006, Wilson, C-506/04, EU:C:2006:587, para. 53.

modalities and delays in the justice system, in all Member States Constitutional Court functioned. In the majority of Member States, highest courts also continued to work. However, there were a few problematic exceptions.

In Hungary ordinary courts were initially closed for an indefinite period of time[51], thus preventing them from ruling on the proportionality of the extraordinary measures. However, the decree providing this closure became ineffective on 30 March 2020.[52] On 23 March **Bulgaria** passed an act that allowed, inter alia, for the suspension of judicial proceedings before civil, criminal and administrative courts for the duration of the emergency.[53] A previous decision of the Supreme Judicial Council of 15 March 2020 had already freezed most proceedings in all courts, suspended the registration of claims, and denied access to courts by citizens, even though subsequently those measures were softened. In the earliest phase of managing the pandemic (9 March-11 May), **Italy** suspended hearings, limitation periods and terms for judicial proceedings, except in urgent cases.[54] Then, in a second phase (until 30 June), the suspension was lifted but courts presidents were allowed to adopt the measures deemed appropriate for ensuring the effective management of courts (e.g. limit public access and order hearings to be conducted closed doors or remotely).[55] Starting from 1 July the Italian Justice system returned to normal mode, although certain activities are still carried out online.[56]

In light of rule of law principles, recourse to certain types of Courts are particularly important. At least last instance courts should always remain operational, while adapting their work modalities to the risks posed to citizens and staff (e.g. remote work). According to Article 267 TFEU they have a particular role under EU law as they are under a duty to refer a matter to the CJEU when they doubt the interpretation or validity of EU law. The functioning of administrative courts is also important, as they are the first venue to challenge the acts of the executive, as recognised in the case-law of the ECtHR.[57]

Finally, ensuring access to Courts is of particular significance in criminal cases. A common feature of the COVID response for example have been changes to criminal procedure, such as the abolition of time limits for prosecuting criminal cases. We already mentioned above the Italian and Bulgarian cases, but also other Member States such as Poland and Portugal generally postponed time limits except for urgent matters.[58] The Court of Justice has recognised that a limitation period "fulfils the function of ensuring legal certainty" and, "in order to fulfil that function, that period must be fixed in advance, and any application 'by analogy' of a limitation period must be sufficiently forese-

[51] Decree 45/2020 of 14 March ordered an "extraordinary court vacation".
[52] European Commission 2020 Rule of Law Report, situation in Hungary, cit., p. 8.
[53] EPRS Briefing cit., p. 4.
[54] Law Decrees no. 18/2020 and no. 23/2020.
[55] Law of 25 June 2020, no. 70.
[56] A preliminary request sent by an Italian judge currently pending before the Court of Justice (C-220/20) concerns the compatibility of the measures adopted by Italy to face the COVID-19 pandemic (declaration of a state of national health emergency and its extension) and the situation of paralysis of the civil and criminal justice with [57] EU law, in particular Articles 2, 4(3), 6(1) and 9 TEU, Articles 67(1) and (4), 81 and 82 TFEU, in conjunction with several provisions of the Charter, in so far as they undermine the independence of the referring court and infringe the principle of due process as well as several connected rights. See here for a comment.
[57] ECtHR, Kress v. France, 7 June 2001, para 69.
[58] Council of Europe, Management of the judiciary - compilation of comments and comments by country, available here (last access 23 October 2020) Judgment of 5 March 2019, Eesti Pagar AS, [58] [58] C-349/17, EU:C:2019:172, para 112.

eable by a litigant".[59] Here, we must distinguish situations where limitations periods in criminal procedures are harmonised within the EU or not. In the latter case, the issue of establishing time limits and regulating their interruption, suspension or cancellation is generally a matter for the national law of the Member States, in compliance with the principle of procedural autonomy.

There are however some situations where EU law does set rules on limitation, which the Member States are bound to observe. For instance, Regulation 2988/95 on the protection of the EU financial interests, establishes a minimum limitation period for proceedings of four years as from the time when the irregularity was committed.[60] Moreover, the Damages Directive sets a minimum limitation period of five years for bringing actions for damages for infringements of competition law.[61] A limitation period of five years is also established by the PIF Directive.[62] Member States are not therefore free to abolish limits in such areas.

Even in situations of harmonisation, the Court of Justice has accepted that Member States may enjoy discretion in setting longer limitation periods.[63] However, when exercising this discretion, Member States must "observe the general principles of EU law, in particular the principles of legal certainty and proportionality".[64] As regards the former, Member States are free to extend time-limits where the relevant offences have never become subject to limitation but must respect the principle of non-retroactivity of laws and criminal sanctions as stated in Article 49 of the Charter.[65] As regards the principle of proportionality, the application of a longer national limitation period "must not go clearly beyond what is necessary to achieve the objective" set by EU law. [66] In *Glencore Céréales France*, the Court found that a limitation period that was only one year longer than the period laid down in EU law (Regulation No 2988/95) complied with this requirement.[67]

In light of the above, a general and indefinite cancellation of limitation, which is an established component of the criminal law of the Member States,[68] could hardly be reconciled with the principle of legal certainty and the principle of proportionality. During the COVID-19 pandemic, some Member States (see the **Italian** and **Bulgarian** case mentioned above) suspended limitation periods for the period of the state of emergency or, if that was not declared, for a specific amount of time. Given the impact of uncertain limitation periods on the procedural rights of parties in criminal proceedings, Member States are obliged under EU law to suspend limitation only as a last resort, for a definite period, and to regularly review any such suspension.

[59] Judgment of 5 March 2019, Eesti Pagar AS, C-349/17, EU:C:2019:172, para 112.
[60] Regulation 2988/95 on the protection of the European Communities financial interests, Article 3.
[61] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Article 10.
[62] Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, Article 12.
[63] Judgment of 17 September 2014, Cruz & Companhia, C-341/13, EU:C:2014:2230, para. 55.
[64] Judgment of 2 March 2017, Glencore Céréales France, C-584/15, EU:C:2017:160, para. 72.
[65] Judgment of 8 September 2015, Taricco, C-105/14, EU:C:2015:555, para. 57.
[66] Cruz & Companhia, cit., para. 59.
[67] Glencore Céréales France, cit., para. 74.
[68] See the Research note of the Courts of the European Union on "Limitation rules in criminal matters", 15 May 2017, available here.

iii) Freedom of Association

According to the Court of Justice, freedom of association "constitutes one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life".[69] Freedom of association is one of the fundamental rights protected by EU law and specifically recognised in Article 12 of the Charter. Within the scope of application of the Charter, Member States are required to respect these rights.[70]

Understandably, the COVID-19 crisis has seen unprecedented levels of restrictions regarding the right of individuals to meet, organise and associate. Such restrictions generally serve an important public policy goal and one recognised in human rights law – protecting the rights and health of others. As such, freedom of association is not an absolute right and may be limited for legitimate reasons, if these limitations are provided by law, respect the essence of the right, and comply with the principle of proportionality (Article 52(1) of the Charter). As the Court of Justice held in Schmidberger: "freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued".[71] In Commission v. Hungary, the Court found that national legislation is likely to limit freedom of association if it makes "significantly more difficult the action or the operation of associations", in particular by: strengthening registration requirements; limiting their capacity to receive financial resources; making them subject to obligations of declaration and publication that create a negative image of them; or exposing them to the threat of penalties or dissolution.[72]

Article 52(1) refers to "objectives of general interest recognised by the Union" as legitimate justifications to limit fundamental rights. The Court expressly recognized that the protection of public health constitutes "an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom".[73] As the Court of Justice found in Commission v. Hungary, limitations to the freedom of association which do not meet the objectives of general interest recognised by the Union amount to a violation of Article 12 of the Charter.[74]

Limitations to freedom of association must also be provided by law. As the Court of Justice recognised in relation to Article 7 of the Charter (but the reasoning can be applied by analogy here), that requires that the legal basis of the measure limiting that right "must be sufficiently clear and precise" and also that, "it affords a measure of legal protection against any arbitrary interferences" by public

[69] Judgment of 18 June 2020, Commission v. Hungary, C 78/18, EU:C:2020:476, para. 112.
[70] Article 51(1) of the Charter as interpreted by the Court of Justice in the Fransson case. Judgment of 26 February 2013, Fransson, C-617/10, EU:C:2013:105.
[71] Judgment of 12 June 2003, Schmidberger, C-112/00, EU:C:2003:333, para 79. Emphasis added.
[72] Ibid., para. 114.
[73] Judgment of 6 September 2012, Deutsches Weintor eG, C-544/10, EU:C:2012:526, para 49 and case-law cited.
[74] Commission v. Hungary, cit., paras. 139-142.

authorities.[75] However, there is no evidence that Member States provided restrictions to the freedom of association as of yet that did not have a legal basis.

However, pursuing a general interest and being prescribed by law is not enough. Article 52(1) refers to three other elements to test a justification for restricting fundamental rights, namely: i) respecting the essence of the right; ii) compliance with the principle of proportionality; and iii) that the limitation is suitable and necessary to meets its objectives. As recognized by Peers, "these elements are difficult to separate in practice, and the case law often makes no clear attempt to separate them".[76] A general rule that might be inferred from the Court's case-law is that "the principle of proportionality (and the related aspects of the justification test) is more easily infringed where the measures concerned are unlimited", while "a more measured restriction" can instead satisfy that requirement.[77] It also follows from the case-law of the Court that the principle of proportionality requires measures limiting a fundamental right "must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued" and, "when there is a choice between several appropriate measures, recourse must be had to the least onerous among them".[78] Finally, regarding the essence of fundamental rights, "once it is established that the essence of a fundamental right has been compromised, the measure in question is incompatible with the Charter" and "this is so without it being necessary to engage in a balancing exercise of competing interests".[79] Thus, a restriction which compromises the essence of freedom of association shall be automatically considered as disproportionate.

In light of the above, a public health emergency cannot be used as a pretext to adopt measures improperly restricting freedom of association without being subject to a proportionality test. Almost all Member States adopted measures restricting freedom of association directly or indirectly (i.e. measures connected to restrictions on movement). While the vast majority of these measures were adopted out of necessity, some were poorly and broadly framed, thus leaving "some uncertainty as to what level and form of activity is permitted and what is being restricted". According to a recent study of the European Parliamentary Research Service "in the context of the coronavirus outbreak, Member State authorities have largely pursued the legitimate aim of health protection when taking measures limiting the freedom of religion", which "were seen as necessary in a democratic society in the interest of public health".[80] Nevertheless, lockdown measures raised several concerns in different countries as regards their compliance with fundamental rights. For instance, the Federal Constitutional Court of Germany found a blanket ban on gatherings to be disproportionate.[81]

[75] Judgment of 17 December 2015, WebMindLicenses Kft, C 419/14, EU:C:2015:832, para. 81
[76] S. Peers; S. Prechal (2014), "Scope and Interpretation of Rights and Principles" in S. Peers; T. Hervey; J. Kenner and A. Ward, (Eds.) The EU Charter of Fundamental Rights: A Commentary, London, Hart Publishing, 2014, 1455–1522, p. 1480.
[77] Ibid. pp. 1485-1486.
[78] Judgment of 29 April 2015, Léger, C 528/13, EU:C:2015:288, para. 58.
[79] K. Lenaerts (2019), "Limits on Limitations: The Essence of Fundamental Rights in the EU", German Law Journal, Vol. 20, No. 6, 779–793, p. 781. See also Judgment of 6 October 2015, Schrems, C 362/14, EU:C:2015:650.
[80] EPRS Briefing, Upholding human rights in Europe during the pandemic, September 2020, p. 9, available here.
[81] BVerfG, 828/20, 15 April 2020.

Two cases were significant as regards the right to assembly. In **Hungary**, since the state of danger did not have a sunset clause, decrees imposing bans on gatherings, as well as the others, did not have a temporal limitation. They ceased to have effect only with the end of the broader state of danger.[82] In **Poland** the measures adopted by the Minister of Health firstly introduced bans on mass gatherings attended by more than 50 participants. Then, on 31 March, a total ban on mass events was imposed, lasting until the end May. Those measures were criticized both for the alleged unconstitutionality of the restrictions and the harsh intervention by the police in order to dissolve assemblies. As regards the former, it must be mentioned that freedom of association is not among the fundamental rights that can be limited in a state of natural disaster beyond the ordinary limits posed by the proportionality test (Article 233(3) of the Polish Constitution. The fact that the state of natural disaster was not triggered may appear as an attempt to bypass this constitutional limitation. For some scholars, the Polish ban on assemblies "violates the essence of the right, which is clearly unconstitutional", especially in light of the electoral campaign that was due to take place during the lockdown.[83] More broadly, the use of movement restrictions in a manner that disproportionally affects political expression and demonstration would surely constitute an infringement of the relevant Charter right.

A further issue concerns discriminatory application of restrictions on freedom of assembly i.e. circumstances where governments might restrict or relax freedom of association in different ways for different groups in society. The principle of non-discrimination is not only a fundamental right entrenched in Article 21 of the Charter, but also one of the general objectives of the Union's action (Articles 2 and 3 TEU and Article 10 TFEU) and a principle recognised in EU secondary law.[84] A measure which restricts freedom of association differently for different groups in society may additionally establish a discriminatory treatment based on age (Article 21(1) of the Charter).

Yet, there might be cases where certain groups are treated differently for justified reasons. In a pandemic emergency, restrictions on freedom of association for the young for example could be read as an attempt to protect the right to health - and in the end, the right to life – of the elderly and more vulnerable population. In *Deutsches Weintor*, the Court held that a EU Regulation "designed to protect health, which is an objective recognised by Article 35 of the Charter", justified a restriction of the freedom to choose an occupation and the freedom to conduct a business.[85] Since both health and public safety are considered objectives of general interest of the Union,[86] it may be legitimate for a Member State to restrict freedom of association for individuals with a high trans-

[82] Decree 46/2020 of 16 March, Section 4(1).
[83] Drinóczi, Bień-Kacała (2020), cit., p.190
[84] See Council Directive 2000/43/EC (Race Equality Directive) and Council Directive 2000/78/EC (Equality Directive).
[85] Deutsches Weintor, cit., paras. 54-60.
[86] See answer no. 2.

mission risk due to reasons of public safety and to protect the health of others. Such measures should be prescribed by law, necessary and proportionate. If they were to entail a direct discrimination on grounds of age (e.g. by specifically targeting the young), such measures should be temporary and not go beyond what is necessary to achieve the aim.
Much more difficult is to justify a difference in treatment at the detriment of the elderly population. While this population may be more vulnerable and prone to being infected, it is more difficult to establish on what grounds a direct discrimination on grounds of age can be justified. Despite this, during the first phase of the pandemic all Member States limited the free movement and the right to association of the elderly population. All Member States but Greece prohibited visitors from accessing residential care homes, even though restrictions were progressively lifted since May.[87] A justification for this of course could be found in the need to protect other elderly people from the spread of infection and the heightened risk this imposes for them.

However, some Member States adopted particularly severe measures. In **Bulgaria** all persons over 60 found positive to COVID-19 were forced to mandatory hospitalisation unless they explicitly refused it in writing. Once discharged from hospital, they were subject to mandatory home isolation for 28 days.[88] In **Hungary** during the state of danger "the Government request[ed] persons who have attained the age of 70 years not to leave their domicile or place of residence".[89] Moreover, a subsequent decree provided that people over 65 were allowed to visit a grocery store, drugstore, market or pharmacy only between 9 a.m. and 12 a.m.[90] The measure was justified in light of "their own and their families' interest". The decree also specified that, during the above timeframe, younger people were banned from these shops, with the exception of their employees.

The principle of non-discrimination on grounds on age, now entrenched in Article 21 of the Charter, was primarily developed as a general principle of EU law. In Mangold the Court developed this principle,[91] whose effectiveness must be guaranteed by national courts by setting aside any conflicting provision of national law "even where the period prescribed for transposition of that directive has not yet expired".[92] In *Kücükdeveci* the Court further specified that the Employment Equality Directive (discussed by the Court in Mangold) gives expression to the general principle of non-discrimination on grounds of age.[93] Moreover, the Court held that the national court must disapply, even in the context of a horizontal dispute, provisions of national law contrary to the principle of non-discrimination on grounds of age.[94]

[87] FRA Bulletin no.3, "Coronavirus pandemic in the EU – fundamental rights implications: with a focus on older people", 30 June 2020, p.36, available here.
[88] Ibid. p. 39.
[89] Decree 46/2020, section 2.
[90] Decree 71/2020.
[91] Judgment of 22 November 2005, Werner Mangold v Rüdiger Helm, C-144/04, EU:C:2005:709, para 74.
[92] Ibid. para 78.
[93] Judgment of 19 January 2010, Kücükdeveci, C-555/07, EU:C:2010:21, para 21.
[94] Ibid. para. 51.

At present EU secondary law applies the prohibition of non-discrimination on grounds of age only to employment. In 2008 the Commission issued a proposal for a new directive that prohibited discrimination based on religion or belief, disability, age or sexual orientation outside the field of employment, thus completing the EU anti-discrimination legal framework.[95] However, the proposed directive was never approved and it is currently under negotiation.

However, there is no indication that the general principle of non-discrimination on grounds of age is limited to employment-related cases. The CJEU has held that the Employment Equality Directive gives specific expression to that general principle in the area of employment, thus suggesting that the general principle is broader. In the words of the Court: "it is the general principle prohibiting discrimination on grounds of age, and not the directive that gave concrete expression to that general principle in the area of employment and occupation (…) which confers on private persons a right which they may rely on as such".[96]

There remains limited case law where the CJEU directly applies the general principle of non-discrimination on grounds of age in an area falling outside employment. As the Court has stated, "for the principle of non-discrimination on grounds of age to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of European Union law".[97] Therefore, a connection with EU law must be found. Given the sensitivity of the matter of healthcare and the criticism that followed the judgments in Mangold and Kücükdeveci, the degree of linkage between measures that directly discriminate on grounds of age and EU law would likely have to be strong in order for the Court to adjudge that a violation of the Charter has taken place. Nonetheless, EU law requires that measures discriminating on grounds of age directly are limited in scope, justified and proportionate to the goals they seek to advance. The blanket nature of the Hungarian and Bulgarian restrictions on the movement of the elderly does not seem consistent with this proportionality requirement.

A final legal issue of discrimination concerns discrimination between religious and other forms of association? Freedom of religious association is protected not only by Article 12 of the Charter but also by Article 17 TFEU, according to which "the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States". Moreover, Article 10 of the Charter protects freedom of religion, which also includes the right to manifest religion in public and in community with others.

Despite the "enhanced protection" enjoyed by religious freedom under EU law, distinctions

[95] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.
[96] Judgment of 7 August 2018, Smith, C-122/17, EU:C:2018:631, para. 46, emphasis added. See also judgment of 19 April 2016, DI, C-441/14, EU:C:2016:278, para. 23.
[97] Ibid.

between religious and other forms of association cannot be made without legitimate reasons. According to the Court of Justice, Article 17 TFEU merely "expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities"[98], but it is not such as to grant religious association a special status under EU law. As stressed by AG Tanchev, Article 17 TFEU is not "some kind of meta principle of constitutional law that binds the Union to respect the status under Member State law of churches, religious associations and communities, and philosophical and non-confessional organisations, whatever the circumstances".[99] Accordingly, a different treatment for religious association must be justified by legitimate reasons.

In *Commission v. Hungary*, Advocate General Campos Sánchez-Bordona found that the exclusion of, among others, religious association, from the publication requirements imposed to organisation receiving financial support from abroad was "not particularly consistent" with the alleged aim of Hungary to control funding from abroad. Since "none of the characteristics of those exempt associations relate to the specific features of their financing which would make them unsusceptible to the risks that the receipt of funds from abroad might entail", such differential treatment cast doubt on whether the governments aims in pursuit of the NGO law were suitable.[100] This case illustrates that an arbitrary distinction between religious and other forms of association not only must be justified, but also, if not reasonable, can lead to the invalidation of reasoning utilized by a Member State to justify derogations from other principles of EU law.

The restrictions imposed on religious activities during the COVID-19 pandemic varied across the Member States. While some adopted very high restrictions (e.g. suspension of all celebration and closure of places of worship), others (a minority) allowed ceremonies with a maximum number of participants to take place and/or allowed churches to be open for private worship. In the majority of cases, the restrictions on freedom of association for the purpose of religion ran in parallel with the general limitation of all forms of gatherings. However, in some cases religious gatherings enjoyed a special treatment. In **Spain**, during the state of alarm, attendance at places of worship and civil and religious ceremonies were allowed even if conditioned by the adoption of measures of social distancing.[101] However, that was not in line with other restrictive measures adopted as regards public gathering, since the same law allowing for religious activities provided a severe limitation on freedom of movement and thus, a de facto intense limitation on the right of assembly.[102]

In **Hungary**, the government prohibited the staying "at a venue of an event, regardless of

[98] Judgment of 17 April 2018, Vera Egenberger, C 414/16, EU:C:2018:257, para. 58.
[99] Opinion of AG Tanchev in Case C 414/16, Vera Egenberger, delivered on 9 November 2017, para. 93.
[100] Opinion of Advocate General Campos Sánchez-Bordona in Case C 78/18, Commission v. Hungary (Transparency of associations), delivered on 14 January 2020, paras. 153-154.
[101] Royal Decree 463/2020 of 14 March declaring the state of alarm, Article 11.
[102] Ibid, Article 7(1).

the number of participants and the location of the event" and "at a place of an assembly".[103] However, rites of religious communities, including marriages and funerals, did not qualify as events.[104] The same measures were confirmed in subsequent decrees providing that "conclusion of marriage and funeral in close family circles" and "faith-based activities" were considered justified reasons permitting leaving the place of residence[105] and that "by way of derogation from the restrictions on holding events, rites of religious communities, conclusion of civil marriages and funerals shall be permitted", provided that the protective distance was maintained.[106] As the above legal standards demonstrate, restrictions on rights of assembly and association that treat religious assembly different from other important forms of association are difficult to justify under EU law.

In matters of freedom of association, as with the other elements dealt with this in section, EU law does not prohibit Member States from restricting key rights and values, but demands that they do so in a proportionate manner and that they regularly review the necessity of limiting the fundamental liberties of their citizens. This key demand has regularly been breached in the fight against COVID-19.

B. FREE MOVEMENT OF PERSONS

i) Border control

As already discussed in section 2, the use of border restrictions by Member States during the COVID-19 crisis was particularly common. While states around the globe used border control as a mechanism to slow or control the spread of infection, the Schengen area complicates the use of border control mechanisms, even during a public health emergency. By participating in the Schengen area, Member States inevitably delegate to the European level sovereignty over border control and agree to the sharing and coordination of risks associated with open borders. They do so in pursuit of a larger constitutional goal – the establishment of a Europe without arbitrary borders.

The Union's external borders are subject to Title II of the Schengen Borders Code (SBC). Under Article 5 of the Schengen Code, entry into the EU is only allowed at specific border crossing points. According to Article 7, border controls shall be conducted at the external borders by default and border crossing shall be subject to restrictions, including the requirement of valid travel documentation (Article 6). One ground for refusing entry from a third state is the status of travellers as a threat to public health under Article 6(1)(e). Others are listed in Article 6(1) SBC as well, including the consideration of travellers to be a threat to the public policy, or internal security of Member States.

While EU law regulates the entry conditions of single third country nationals , as well as the checks they are subject to , EU law does not regulate closures of external borders in gene-

[104] Ibid, Section 4(2).
[105] Decree 71/2020 of 27 March, Section 4.
[107] 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

ral. While the SBC contains some provisions that could allow denial of entry for certain third country nationals[108] (e.g. those coming from countries with a high infection rate), the EU and the Member States decided not to,[109] use the SBC, but to rely on a coordinated approach. In March 2020 the Commission issued a Communication recommending the Member States to introduce a temporary travel restriction to the EU.[110] The European Council of 26 March 2020 confirmed the application of a "coordinated temporary restriction of non-essential travel to the EU".[111] Following subsequent Commission's communications, all Schengen Member States extended travel restrictions until June 2020. On 30 June 2020 the Council adopted a recommendation suggesting the gradual and coordinated lifting of the travel restrictions to the EU from 1 July 2020 (a process currently ongoing).[112]

The relatively coordinated approach one can observe in relation to external borders has not been replicated to the same degree with respect to the Schengen area's internal borders. These are subject to Title III of the SBC. Unlike the external borders, internal border crossings are by default not subject to any controls.[113] Controls can only be established based on exceptions. Article 25 SBC contains the general framework for the (re-)introduction of border controls and requires a serious threat either to public policy or to internal security in a member state. Note that public health is not listed as a legitimate aim per se. Unfortunately, there is no case law interpreting either Article 25 SBC with regard to the scope of its internal security or public policy exception or whether public health falls within one of them. This is thus an area where a lack of legal certainty prevails (and where – see section 4 – future legislative action may be warranted).

The consequence of a strict systematic interpretation would be that public health is not a legitimate ground upon which exceptions under Article 25 SBC can be introduced. The almost uniform state practice among the Member States and the EU's silence on this matter might, however, allow us to see public health as an element of other exceptions under Article 25 SBC. In the context of other EU law, "internal security", i.e. the concept which justifies exceptions under Article 25 SBC, was said to be "a*ffected by, inter alia, a direct threat to the peace of mind and physical security of the population of the Member State concerned'*.[114] The survival of the population as a factor of internal security and thus as a part of public security was also upheld in other case-law where "a threat to the functioning of institutions and essential public services" of a Member State were also explicitly mentioned under this heading. Such a threat could justify measures to protect the public health system within a Member State, even if COVID-19 was no threat to the survival

[108] Articles 6 and 14 SBC; Common Visa List Regulation and Schengen Information System. Article 8(3) SBC.
[109] Communication from the Commission to the European Parliament, the European Council and the Council COVID-19: Temporary Restriction on Non-Essential
[110] Travel to the EU, COM/2020/115 final.
[111] Joint statement of the Members of the European Council, 26 March 2020.
[112] 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.
[113] See, to that effect, Judgment of 22 May 2012, I., C-348/09, P.I. v Oberbürgermeisterin der Stadt Remscheid, EU:C:2012:300, paragraph 28; Judgment of 2 May 2018, Joined Cases
[114] C-331/16, K. v Staatssecretaris van Veiligheid en Justitie and C-366/16, H.F v Belgische Staat, EU:C:2018:296, paragraph 42. Article 22 SBC.

of a Member State's population as a whole.[115] Thus, the danger the spread of Coronavirus posed could fit the notions of public policy and internal security as interpreted by the relevant case-law. This reading is confirmed by the Commission's own practice during the crisis.[116]

This does not mean, however, that Member States have unlimited discretion in imposing border controls. When controls are reintroduced, Member States have to assess the measure in light of the likely impact of the threat and the impact of the measure on freedom of movement. They may only choose border controls as a means of last resort.[117] This implies both temporal limits on border re-introduction and procedural limits.

Temporally, border controls can generally only be introduced for a limited time of 30 days or for a timespan tailored to the overall goal of the measures if the duration of the threat exceeds 30 days. The total period of border reintroduction on the basis of Article 25 SBC shall not exceed six months. The exception to these provisions lies in Article 28 SBC, which introduces a specific regime for cases where "a serious threat to public policy or internal security in a Member State requires immediate action to be taken". In that case, Member States are allowed to immediately reintroduce internal border controls, for a maximum of ten days. That period may be renewed if the threat persists, but the total period of border reintroduction shall not exceed six months. Public health is again not listed as a reason that would allow for immediate action under Article 28 SBC.

The re-introduction of border controls is also subject to procedural requirements. Notifications have to be issued to the Commission and the other Member States at least four weeks in advance to controls being implemented.[118] In circumstances where immediate action is required,[119] Member States still have to notify other Member States and the Commission of the reasons and the duration. Since border controls may already be established only under very limited circumstances, a full and indeterminate internal border closure in the sense of not allowing any travel into the country from other EU/Schengen states would not be legal under the SBC and TEU/TFEU. At all times, Member States have to notify the European Parliament and the Council of any reasons which might trigger the application of a provision that allows for the reintroduction of internal border controls. The current border controls in Denmark started only on May 12 but plan to be in place for a long period (until November 12). While outside the temporal scope of this study, Hungary introduced on 1 September 2020 a ban on travel from other EU countries.[120] The broad, undifferentiated and indeterminate nature of the Hungarian restrictions (based on a narrow list of exceptions) and the long temporal scope of the Danish controls

[116] "In an extremely critical situation, a Member State can identify a need to reintroduce border controls as a reaction to the risk posed by a contagious disease": Commission Guidelines for border management measures to protect health and ensure the availability of goods and essential services, C(2020) 1753 final, para. 18
[117] Article 26 SBC.
[118] Article 27(1) SBC.
[119] Article 28 SBC.
[120] See also the Re-open EU website, available here.

seem in conflict with the provisions of the SBC. Finally, states must administer border controls in a non-discriminatory manner. Article 7(2) SBC, which was designed for external border controls, but also applies to internal border controls pursuant to Article 32 SBC once they have been reintroduced, prohibits discrimination by the border guards against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Under the conditions laid down in Article 6(1) SBC, third-state nationals holding a residence permit, or a long-term visa can enter the EU. If they hold a residence permit or a long-term visa but do not fulfil all of the conditions laid down in Article 6(1) SBC, they may still enter the EU for transit. Non-discrimination is also relevant as regards the entry and exit of same-sex spouses. It is noteworthy that the CJEU decided in 2018that the term "spouse" is gender neutral in the context of Directive 2004/38 on Free Movement. The Court also defined "spouse" for the purposes of that directive as "a person joined to another person by the bonds of marriage".[121] In this sense, states should not make distinctions between the entry of spouses based on the gender of the other spouse.

While Member States generally complied with these procedural requirements, not all did.[122] In the case of Bulgaria an entry ban vis-à-vis travellers from various EU countries was introduced on 6 April, 2020[123] without a notification to the Commission. On 16 and 18 March 2020 Bulgaria also issued orders on border health checks, which were also not notified to the Commission.[124] Especially in the beginning of the lockdowns in March, most EU Member States fell short in notifying the Commission within the timeframes that Articles 25 and 28 SBC respectively provide. In the case of Hungary notification to the Commission was provided too late in at least one case after the initial wave of lockdowns. Given the extensive impacts of border control on free movement, the lack of notification seen in these cases breaches both the specific provisions highlighted above and the general duty of the Member States to engage in sincere cooperation in the EU context.

Finally, does EU law permit a 'regional approach' to border-control i.e. the establishment of regional corridors or bubbles? Such bubbles or travel corridors were established in a number of states, such as between **Estonia, Lithuania and Latvia**. The regime on border control measures is harmonised through the SBC. The SBC does not contain an explicit prohibition on regional approaches. Given that the rules for the reintroduction of border controls list the impact on freedom of movement as one of two factors to particularly consider,[125] the higher degree of freedom of movement within a travel bubble is a welcome effect that resonates with the overall ambition of the SBC to not have internal controls in place. The fact that the reintroduction of border controls must be a measure of last resort[126] underscores that less internal controls are favourable. Paragraph

[121] Judgment of 5 June 2018, Coman, C-673/16, EU:C:2018:385, para. 35
[122] See the List Member States' notifications of the temporary reintroduction of border control available here.
[123] Order No, РД-01-183 of 6 April 2020.
[124] Orders No. RD-01-128/16 March 2020 and No RD-01-136 of 18 March 2020.
[125] Article 26(b) SBC.
[126] Article 25(2) SBC.

25 of the preamble reads: "*The reintroduction of internal border control might exceptionally be necessary in the case of a serious threat to public policy or to internal security at the level of the area without internal border control or at national level*" and thus seems to allow measures beyond the national level. From a proportionality perspective, the benefit of a travel bubble is a higher degree of freedom of movement within, but with that probably also a higher infection risk. Safeguarding the comparability between the nations involved in a travel bubble and carefully weighing the gained degree of freedom against the increased risk of infection are thus two factors that should determine the legality of a travel bubble approach.

ii) Free Movement of Citizens, Family Members and Third Country Nationals

The regime for border control must be considered alongside broader EU free movement law i.e. even in circumstances where borders are enacted legally, any border activity must also comply with the EU's rules pertaining to citizenship and free movement of persons. The free movement of Union citizens and their family members is ensured by Article 21 TFEU and further regulated in secondary law, in particular Directive 2004/38 (the Citizens' Rights Directive, hereinafter, CRD). The general rule is that Member States must grant EU citizens and their family members (who are not EU citizens) the right to enter their territory with only a valid ID/passport.[127]

Free movements rights also apply to circumstances where states prevent the exit of their citizens or residents. Such exit restrictions were imposed at one point time by a number of EU states.[128] According to Article 4 CRD, all EU citizens (and their family members who are not EU nationals) "shall have the right to leave the territory of a Member State to travel to another Member State" without any visa requirement. The Court of Justice several times stressed that "the fundamental freedoms guaranteed by the EC Treaty would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State".[129] Similarly to restrictions on entry, restrictions on exit need to demonstrate their necessity and proportionality in order to comply with EU law standards.

Restrictions to free movement are explicitly covered by Chapter VI CRD. Article 27 CRD provides that Member States are entitled to restrict the rights of entry and residence on grounds of public policy, public security or public health provided that those restrictions do not serve economic ends. Article 29 CRD justifies restrictions on free movement for health reasons only in case of two kinds of diseases: those "with epidemic potential as defined by the relevant instruments of the World Health Organisation" and "other infectious diseases or contagious parasitic diseases". To be regarded as lawful grounds of justification

[127] Article 5 CRD.
[128] Belgium, Croatia, Czech Republic, Denmark, Finland, Latvia, Lithuania, Malta, Portugal and Romania,
[129] Judgment of 10 July 2008, Jipa, C-33/07, EU:C:2008:396, para. 18

these diseases shall be "the subject of protection provisions applying to nationals of the host Member State". It is hardly disputable that the COVID-19 outbreak fits in the first category of diseases, as it was officially declared "a pandemic" by the WHO on 11 March 2020.

However, travel restrictions for health grounds must comply with certain conditions. Firstly, the person concerned shall be informed in writing of the decision to restrict free movement and the grounds thereof.[130] Secondly, persons subject to travel bans enjoy the right to appeal the ban decision and other procedural safeguards.[131] Moreover, for restrictions to be justified for health grounds, the disease has to be "subject of protection provisions applying to nationals of the host Member State".[132] Finally, public health justifications can be invoked only to restrict the first entry to the Member State as "diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory".[133]

Unfortunately, there is no case law of the Court interpreting Article 29 CRD. However, in light of the general case-law of the CJEU, "a measure which restricts the right of freedom of movement may be justified only if it respects the principle of proportionality".[134] This means analysing whether the measure at issue "is appropriate for securing the attainment of that legitimate objective" and "goes beyond what is necessary to attain it".[135]

Moreover, the above must be coupled with the requirements not to discriminate on grounds of nationality and respect of fundamental rights.[136] Accordingly, "it is difficult to justify severe restrictions to cross-border movements, while domestic mobility continues unlimited". Moreover, in light of the special status enjoyed by workers in free movement law,[137] workers who are nationals of another Member State should be granted the same right to enter a Member State of work (and work there) as citizens.

In light of this proportionality test, certain cross-border movement should continue to be authorised during a travel ban if they are due to imperative reasons. Member States have thus established numerous exceptions to their restrictions on free movement. These exceptions have generally fallen into 5 main categories:
i) Workers association with transport and the flow of goods[138]

[130] Article 30 CRD
[131] Article 31 CRD.
[132] Article 29(1) CRD.
[133] Article 29(2) CRD.
[134] Judgment of 17 November 2011, Gaydarov, C- 430/10, EU:C:2011:749, para. 40
[135] Judgment 13 April 2010, Bressol, C-73/08, EU:C:2010:181, para. 63
[136] Judgment of 29 April 2004, Orfanopoulos and Oliveri, C-482/01 and C-493/01, EU:C:2004:262, para. 97
[137] See Article 45 TFEU and Regulation 492/2011/EU.
[138] Austria, Belgium, Croatia, Denmark, Germany, Greece, Estonia, Finland, France, Latvia, Lithuania, Malta, Portugal, Slovakia, Spain, Sweden.
[139] Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Germany, Greece, Finland, France, Hungary, Italy, Poland, Portugal, Romania, Spain, Sweden The Netherlands.
[140] Bulgaria, Croatia, Estonia, Germany, Lithuania, Romania, Slovakia, Spain, Sweden, The Netherlands.
[141] Croatia, Estonia, Germany, Poland, Romania, Slovakia, Spain.

ii) Cross-border and seasonal workers[139]
iii) Healthcare workers and those working in critical infrastructure[140]
iv) Diplomatic personnel[141]
v) Others[142]

The extensive variation between national exceptions itself of course carries significant capacity to hinder free movement. While for example a differentiated approach to exceptions may make sense for some of these categories (e.g. some states or groupings of states may have a higher number of cross-border workers), it is unclear why other categories (e.g. transport workers or diplomatic personnel) should vary between states. Significant divergences in exceptions – if maintained over time – could therefore significantly impede the integrity of free movement of persons in the EU (and could once again, be the subject of future legislative measures).[143]

Free movement rules are also important in considering instances where Member States[144] discriminate between their own citizens (in terms of border access) and citizens of other EU states, or lawfully resident third-country nationals. A majority of EU Member States made at some point during the first COVID 'wave' distinctions in terms of entry between own nationals and citizens of other EU states. On 15 March 2020 Estonia introduced a regulation that prohibited entry into Estonia for everyone but Estonian citizens. Non-nationals who wanted to enter had to fall under an exception.[145] On 16 March 2020 Spain enacted a similar rule as in Estonia, allowing persons without Spanish citizenship only exceptionally into the country. For the Baltic Travel Bubble only citizens and residents of the three participating states could move freely, while everyone else had to self-isolate for 14 days. Under the initial Polish travel restrictions of 15 March 2020 non-nationals were also not permitted to enter Poland unless a family member of a Polish citizens or had a permanent or temporary residence permit in Poland issued by Polish authorities. These examples give some indication of a concerning readiness for Member States to distinguish between own nationals and other EU citizens without regard to their obligations under EU law.

Non-discrimination on grounds of nationality is a foundational principle of EU law entrenched in Article 18 TFEU and other primary and secondary law provisions. The general rule is that Member States cannot discriminate

[139] Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Germany, Greece, Finland, France, Hungary, Italy, Poland, Portugal, Romania, Spain, Sweden, The Netherlands.
[140] Bulgaria, Croatia, Estonia, Germany, Lithuania, Romania, Slovakia, Spain, Sweden, The Netherlands.
[141] Croatia, Estonia, Germany, Poland, Romania, Slovakia, Spain.
[142] Austria (persons who have made an essential movement abroad), Denmark (job interview in DK, perform services in DK, business meetings, seafarers), Germany (seafarers), Estonia (persons coming under the framework of international military cooperation, personnel for technical maintenance, international transit services), Croatia (police officers in duty), Hungary (persons studying in Hungary), Italy (proven work reasons), Lithuania (persons serving under NATO, professional athletes under certain circumstances, artists for certain purposes, journalists with a special permission, seafarers), Romania (personnel of international organizations, military personnel), Sweden (seafarers, specialist workers, students, military and international organisations personnel), Slovakia (other aeronautical members, engine drivers, wagon engineers, train crews and rail operators).
[143] See an initial warning from the Commission from March in this regard, available here.
[144] Austria (for Italy [arguably justified], certain non-neighbouring states and risk areas, ultimately also neighbouring states in general), Belgium, Bulgaria (high-risk countries), Cyprus, Czech Republic, Denmark, Estonia, Greece (for Italy), Spain, Finland, Croatia, Hungary, Italy, Latvia, Malta, The Netherlands (only Spain and Austria), Portugal (Spain), Slovakia.
[145] Government Order of 15 March 2020, No. 78.

between own citizens and citizens of other EU states. Pursuant to Article 45(1) of the Charter of Fundamental Rights (CFR), citizens of the EU have the right to move and reside freely within the territory of the Member States. Article 45 CFR does not discriminate between nationalities. Article 21(2) CFR even specifies that discrimination based on nationality is prohibited. Although paragraph 2 only speaks of acts within the "scope of application" of the EU Treaties, the official explanation makes clear that this provision "*corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article*".[146] In consequence, discrimination based on nationality can only be justified, if that discrimination is proportionate, i.e. if it is necessary and genuinely meets objectives of general interest recognised by the Union.

While the protection of public health is a legitimate aim in the context of CFR infringements (Article 52 CFR speaks of "objectives of general interest recognised by the Union" and the protection of public health is explicitly listed as a ground for limiting freedoms under the TFEU in Article 36 TFEU), measures that distinguish between nationalities could be justified only if it is proven that nationals from certain countries pose a higher infection threat than others. Against that yardstick, a general distinction between own citizens and all other citizens would be unlawful. It is difficult, if not impossible, to see how this requirement could be met i.e. while individuals resident or present in a certain locality may be more susceptible to infection it is unclear why an *individual's nationality per se* makes them a public health risk.

The same treatment must be reserved to the EU citizen's third-country family members listed in Article 2 CRD (the spouse, the partner of a registered partnership, the direct dependant descendants and those of the spouse/partner, the dependent direct relatives in the ascending line and those of the spouse/partner). Firstly, Article 27 CRD provides that restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health must apply "irrespective of nationality". Secondly, Article 24 CRD provides that EU citizens residing in another Member State "shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty" and "the benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence". Thirdly, while third county nationals who are family members of a EU citizen enjoy the derived rights of free movement only where that citizen "has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national" this limitation has been further interpreted by the CJEU. The Court has recognised that where "during the genuine residence of the Union citizen in the host Member State (…), family life is created or

[146] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02).

strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member State of which he is a national,[147] through the grant of a derived right of residence to the family member who is a third-country national".[148]

As confirmed by the Commission's Guidelines,[149] "non-discrimination between Member States' own nationals and resident EU-citizens must be ensured" and thus "a Member State must not deny entry to EU citizens or third-country nationals residing on its territory and must facilitate transit of other EU citizens and residents that are returning home". For what concerns restrictions on the right of entry of non-resident EU citizens on grounds of public, any difference in treatment shall apply "irrespective of nationality" (Article 27 CRD). Thus, a relevant criterion to justify entry refusal in an epidemic situation could be the place of residence (or the location prior to arrival) of the EU traveller and not his/her nationality. Of course, the measure must comply with the principle of proportionality. The same non-discriminatory treatment must be ensured to family members who are not EU citizens as defined by Article 2 CRD. The gradual return of nationality discrimination in free movement is once again a concerning legacy of the first COVID wave.

iii) Quarantines and Health Checks

Can states oblige those entering their borders to submit to health checks, such as a COVID test, or to quarantine, and under what circumstances? The Member States can take measures in the area of common safety concerns in public health matters as defined in the TFEU only in cases where the EU has not adopted relevant rules, given the EU's shared competence in that area.[150] The EU adopted quarantine measures and recommended medical measures only in relation to flights serving high-risk destinations.[151] This means that in general Member States are allowed to adopt their own health measures such as quarantine and health checks.

For EU citizens (especially for workers and persons receiving or performing services) quarantine and other health checks that can impair the enjoyment of freedom of movement require justification from an EU law perspective. As discussed above, public health is an explicit ground for justification in cases of restrictions of free of movement of EU citizens,[152] and also for the specific regimes of free movement of workers[153] and freedom of movement for services.[154] In particular, Article 29(3) CRD especially authorises health checks when restricting freedom of movement on the basis of public health. According to that provision, "Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of

[147] Judgment of 15 November 2011, Dereci C-256/11, EU:C:2011:734, para. 56
[148] Judgment of 12 March 2014, O., C-456/12, EU:C:2014:135, para. 54
[149] Communication C(2020) 1753 final, para. 21.
[150] Article 4(2)(k) TFEU.
[151] EASA Safety Directive No SD-2020-01 of 13 March 2020 and following documents, available here.
[152] Articles 27 and 29 CRD.
[153] Article 45(3) TFEU.
[154] Article 52(1), 62 TFEU.

charge, a medical examination" to certify that they are not suffering from any of the diseases justifying measures restricting freedom of movement. However, "such medical examinations may not be required as a matter of routine". Like other derogations to free movement, they must be proportionate and non-discriminatory (e.g. requested only at the moment of entry in the host state and irrespective of the nationality of the traveller).

Any such rules must also conform with the subsidiarity and proportionality principles. In the case of subsidiarity, an analysis of whether Member States can sufficiently achieve a proposed EU action and if a Union action could provide a more successful solution is necessary. In case of COVID-19, a Union approach on external border controls would almost certainly be more successful than individual Member States' approaches, given that otherwise the infection risk coming with persons from third countries could not be managed properly and equally for every Member State and the EU as a whole. The same applies to uninform rules to prevent disruptions in the free movement of persons (such as health and quarantine rules), which can be better achieved at Union level.

The Commission's proposal for a Council recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic goes in this direction. As the Commission explains "a consistent approach is necessary to avoid further disruptions caused by unilateral and not sufficiently coordinated measures restricting free movement within the Union".[155] Otherwise, the effectiveness of mitigating infection risk from third countries on a Member State basis would depend on other individual Member States' rules regarding entry for third-state nationals both from outside the EU and from Member States which let third-country nationals enter.

Since there is no EU law specifically on quarantine, the EU could provide common standards for quarantine obligations, which would then have to be designed proportionately and especially consider their impact on the exercise of basic freedoms. Proportionality could be achieved by setting effective, but not overly long quarantine durations (such as 14 days), by allowing home quarantine (so that other rights, such as the right to family life can be enjoyed better), by allowing the quarantine to end upon a negative test result and by exempting certain persons enjoying basic freedoms and not only persons crucial for infrastructures from the obligation in the first place.

The proposed Council Recommendation on *a coordinated approach to the restriction of free movement* in response to the COVID-19 suggests that Member States require travellers to undergo quarantine or a test for COVID-19 infection after arrival.[156] Yet, "wherever possible, the possibility to undergo tests for COVID-19 infection instead of quarantine should be the preferred option".[157] Moreover, the Commis-

[155] See point 2 of the explanatory memorandum COM(2020) 499 final, 2020/0256 (NLE), available here
[156] 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.
[157] Ibid, para. 19

sion proposes that "travellers with an essential function or need should not be required to undergo quarantine".[158] An overview of national practice in Summer 2020 indicates that Member States do not yet conform to these guidelines, and that the range of exceptions to the quarantine regime are considerably narrower than for border entry and free movement discussed above.[159] The shift of Member States to a traffic light system for quarantine requirements – and its increasing coordination at the EU level – promises to significantly improve the patchy framework of national exceptions which currently exists (and which, like in the case of border control measures, may have the effect of restricting free movement somewhat arbitrarily).

While it is difficult to predict how future Europeans will look back on the first wave, it is hardly disputable that the first half of 2020 saw an unprecedented retreat to national borders. While border restrictions are not per se excluded by the EU's legal framework, the nature of the Schengen area is to render them an exception, placing the burden of justifying border measures not on citizens seeking to move but on states restricting free movement. Certain trends, such as the retreat to nationality discrimination and the failure to coordinate exceptions to border restrictions, place the future of free movement of persons in Europe in question. As section 4 will discuss, revisiting free movement rules in light of the COVID-19 crisis is necessary to ensure the Union copes better with future health emergencies.

C. ASYLUM AND REFUGEE PROTECTION

i) Changes to Asylum Procedure and Reception Conditions

The right to asylum is a basic legal entitlement protected by national, European and international law. It has often, however, been threatened either by political resistance or by apathy i.e. a refusal of states to give refugee protection the resources and attention it deserves. The COVID-19 crisis has seen a meeting of these two factors, with asylum protection suffering from the joint forces of a hostile political climate in many European states together with a channelling of state capacity towards public health and away from other policy challenges. In addition, states have often argued (either explicitly or implicitly) that the COVID emergency alters their legal obligations towards asylum-seekers.

Article 72 TFEU prescribes that Title V of the TFEU ("Area of Freedom, Security and Justice") "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". This provision has been used by Member States to justify derogations from their obligations under EU asylum law. In the past, Member States have thus argued that the provision was

[158] Ibid, para. 21

[159] Such exceptions include: Austria (nationals of neighbouring countries with residence permits in Austria), Belgium (EU nationals, humanitarian workers, workers in critical infrastructure), Cyprus (diplomatic personnel, persons who travelled abroad for medical reasons or professional services), Denmark (persons commercially transporting goods, persons or cargo, persons whose occupation is critical for the functioning of the public health system, public security and order, diplomatic and consular relations, functioning of the judiciary, functioning of democratic representation, government, public administration and communes as well as the functioning of the organs of the EU and of international organisations and for medicinal purposes), Estonia (asymptomatic persons with specific jobs, Baltic Travel Bubble), Spain (EU nationals), Croatia (negative test), Hungary (business trip returnees from certain countries), Italy (EU nationals), Lithuania (essential purposes, Baltic Travel Bubble), Latvia (Baltic Travel Bubble), Poland (EU nationals), Portugal (negative test).

a "clear legal basis to derogate from asylum law where emergencies raising internal security and law and order were at stake".[160]

In April 2020, the CJEU rejected this argument, holding that "it [did] not follow that such measures fall entirely outside the scope of European Union law". The Court held that:

"[t]he scope of the requirements relating to the maintenance of law and order or national security cannot therefore be determined unilaterally by each Member State, without any control by the institutions of the European Union […]. It is for the Member State which seeks to take advantage of Article 72 TFEU to prove that it is necessary to have recourse to that derogation in order to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security […]."[161]

Moreover, where relevant secondary legislation already provides for a framework to adequately address a Member State's security concerns, Article 72 TFEU cannot be relied on.[162] Even though the recent judgment by the CJEU concerned a Decision, other instruments of secondary legislation regarding common standards for international protection contain limited rules for derogating from obligations for matters of national security and public order, too. The ratio of the judgment thus applies to these instruments as well.[163] Thus, Member States cannot have recourse to Article 72 TFEU for a summary derogation from their obligations under EU asylum law.[164]
The logic of this judgment suggests that – where Member States derogate from EU asylum law - the relevant framework for doing so is primarily the applicable EU legislation, which has significantly harmonised previously national asylum standards. The Asylum Procedures Directive (APD)[165] sets common standards for the procedures by which member states determine whether an applicant is entitled to international protection, i.e. refugee status or subsidiary protection.

Article 5 APD allows Member States to "introduce or retain more favourable standards on procedures […], insofar as those standards are compatible with this directive". Recitals (12)-(14) of the APD, further, describe the "main objective" of the directive and certain consequences that follow from it:
(12)The main objective of this Directive is to further develop the standards for procedures in Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the Union.

(13)The approximation of rules on the procedures for granting and withdrawing international protection should help to limit the

[160] ECRE, Legal Note No. 6, Derogating from EU Asylum Law in the Name of "Emergencies": The Legal Limits under EU Law, June 2020, para. 5, available here. For an example of such an argument advanced by Poland and Hungary see Opinion of Advocate General Sharpston of 31 October 2019, cit., paras 172-173.
[161] Judgment of 2 April 2020, Commission v. Poland (Temporary mechanism for the relocation of applicants for international protection), C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paras. 143-147.
[162] ECRE, cit., para. 8. ECRE draws this conclusion from the CJEU judgment in Commission v. Poland quoted above. Even though the CJEU does not state this explicitly, it concludes that by including a right to refuse a relocation based on national security or public order in the Decisions in question, the Council had "duly [taken] into account the exercise of the responsibilities incumbent on Member States under Article 72 TFEU"(para. 153).
[163] Ibid., para. 9.
[164] Commission v. Poland, cit., para. 160.
[165] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive 2011/95/EU in Member States.

(14) Member States should have the power to introduce or maintain more favourable provisions for third-country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is in need of international protection within the meaning of Directive 2011/95/EU.

In this sense, the APD's goals limit the Member States' ability to alter their asylum procedures in general. The goal to reduce incentives for secondary movements of applicants between Member States is even more relevant in times of a pandemic. It is against this backdrop that provisions allowing for the temporary alteration of asylum procedures – should they exist – must generally be understood and interpreted restrictively.

The APD does not contain a clause that would explicitly allow Member States to alter their asylum procedures or temporarily suspend them due to a national or health emergency. It merely contains limited provisions on maximum time limits for examination procedures.[166] According to Article 31 (2) APD, Member States shall ensure that procedures are concluded "as soon as possible", but "without prejudice to an adequate and complete examination". Paragraph 3 subparagraph 1 then stipulates that the procedure must be concluded "within six months of the lodging of the application". Subparagraphs 2 and 3 then set out explicit grounds for prolongation, none of which applies because of the current pandemic. However, subparagraph 4 allows member states to exceed the time limit of subparagraph 1 by three months "where necessary in order to ensure an adequate and complete examination of the application for international protection", but only "[b]y way of exception" and "in duly justified circumstances". Perhaps, the pandemic constitutes such "duly justified circumstances". However, this would lead to a maximum duration for the asylum procedure of nine months from the moment the respective asylum application was lodged. The provision contains grounds on which even greater extension of deadlines is warranted, e.g. when "complex issues of fact and/or law are involved' (a provision that does not seem to apply in the COVID case).[167] In any case, Article 31 (5) APD prescribes an absolute maximum time limit of 21 months. Which time limit applies, must be decided on a case by case basis.

[166] Recital (18) clarifies that "[i]t is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out".
[167] Article 31 (3) (3) (a) APD.

As for the registration of new asylum procedures, Member State are obliged to register them "no later than three working days after the application is made".[168] This time limit can be extended to ten working days only if "simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it very difficult in practice to respect the time limit".[169]

Many Member States have altered or even temporarily suspended their asylum procedures during the COVID-19 crisis. While in most Member States, the registration of new applications continued, some Member States, e.g. the Netherlands[170] and **France**[171], suspended the registration of new applications, while others, e.g. Hungary and **Cyprus**[172] effectively suspended access to the procedure. In light of Article 6 APD, this practice is illegal. Given relatively low arrival numbers,[173] there is no possibility for states to credibly argue that an extension of the time limit for registration to ten days was necessary.

For those asylum applications that had already been registered, Member States can theoretically suspend their processing, as long as the time limits laid down in the APD are not violated. This can, however, only be assessed on a case by case basis. Suspending the procedure for the case of someone who had just arrived in a Member State before the pandemic hit is not (yet) problematic. However, if someone's procedure had already taken eight months already before the pandemic, Member States would arguably violate their obligations under the APD if they would suspend it for more than one month. One particularly interesting example here is the Netherlands. Normally, the authorities in **the Netherlands** have six months to decide a case. Due to the temporary suspension of the procedures, they were given six extra months to decide in cases that had not already been late on 20 May 2020. If the authorities actually use this extension, this would violate the regular time limits of the APD.

That being said, some Member States have used the period during which they did not conduct personal interviews for clearing their backlog of cases where the interview had already taken place.[174] **Germany** managed to reduce its backlog from 60.000 pending asylum cases to 44.000 by the end of June. Given the running time limits, this is, of course, a good way to use the time in which newer cases that still require conducting a personal interview cannot be moved forward.

Some countries decided not to issue negative decisions for certain periods, e.g. **Poland**. This is, however, only permissible when it is not used to justify violations of the time limits in the APD. Recital 18 to the APD makes clear that speedy procedures are "in the interest of both Member States and applicants". And

[168] Article 6 (1) APD.
[169] Article 6 (5) APD.
[170] The Naturalisation Service (IND) resumed its activities with interviews conducted via zoom in May 2020.
[171] AIDA, Country Report: France 2019 Update, April 2020, p. 16, available here.
[172] AIDA, Country Report: Cyprus 2019 Update, April, p. 13, available here.
[173] In April, the number of new asylum applications was low as 7.507, compared to 55.886 in February. See for the numbers the statistics of the European Asylum Support Office (EASO), available here.
[174] UNHCR, Regional Bureau for Europe, COVID-19 Emergency Response, Update #12, 1 July 2020, available here.

indeed, Member States must not disregard the emotional and psychological stress that being left in limbo means for applicants.

A common change to asylum procedure during the crisis concerns the interview stage. Most, if not all Member States have suspended in person interviews. Some Member States have conducted remote interviews via telephone or video-conferencing tools. The interview part of the asylum procedure is regulated in Articles 14-17 APD. According to Article 14 (1) APD, Member States must conduct "personal interviews". The interview may be omitted where the determining authority can take a positive decision with regard to refugee status based on available evidence or where the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control.[175] Moreover, Article 42 (2) (b) APD allows procedures conducted on the sole basis of written submissions without a personal interview only for preliminary examinations pursuant to Article 40 APD.[176] Other than that, the APD does not envisage circumstances that would allow for the omission of interviews which warrants the conclusion that in all other cases, personal interviews must be conducted.

Article 15 (2)-(3) APD set out some (rather vague) standards on the modalities for an interview, notably that confidentiality must be ensured and that the interview must be conducted under conditions "which allow applicants to present the grounds for their applications in a comprehensive manner". The CJEU does not elaborate on the requirements for the modalities of the interview, either, but merely states that: "the purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations before that decision is adopted is, inter alia, to enable that person to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content".[177]

The Court's interpretation is instructive when considering the purpose of the interview. It exclusively mentions the protective function of the interview as regards individual rights. The provision in the APD must be interpreted accordingly. This backdrop problematises the use of telephone or video interviews, suggesting at least their exceptional use. From the point of view of the applicant, the interview is about enabling her to give her view, "to tell her story". The "emotional dimension" of asylum procedures should not be neglected as it is central to effective human rights protection. Abolishing in person interviews would allow for further dehumanization of asylum seekers and alienation of the state apparatus from those subjected to its decision-maker power.

Such trends have been apparent in the political and media discourse since 2015. The COVID-19 crisis has the potential to catalyse these trends, especially when it would lead

[175] Article 14 (2) APD.
[176] Article 40 (2) APD allows Member States to conduct preliminary examinations of subsequent applications as to whether new elements or findings have arisen.
[177] Judgment of 26 July 2017, Sacko, C-348/16, EU:C:2017:591, para. 35, and case-law cited.

to distant and "sterile" asylum procedures. Ensuring in person interviews with special protective procedures, e.g. in rooms where the interviewer is separated from the applicant by a protective screen, provide a potential alternative. It is concerning that EASO in a report from June 2020 flagged remote interviewing as one measure with the "potential to be incorporated into the national asylum and reception systems on a more permanent basis" after the pandemic because of expected "efficiency gains". This is exactly the language of de-humanization that goes against the object and purpose of European Asylum Law.

A positive example here is Finland. Interviews had been suspended only for a very limited time from 16 March 2020 to 14 April 2020. After that, the authorities resumed in person interviews in premises that provided sufficient protection for state agents and applicants. Protective measures included the use of Plexiglas screens that protect against transmission of the virus through droplets. One must take into account, however, that the numbers of new applications between 19 March and 30 April were very low[178] and that Finland is a Member State with a high state capacity.

Finally, states have often postponed or altered reception procedures i.e. procedures that guarantee asylum-seekers basic social, educational and housing provision. The situation was particularly difficult for newly arrived asylum seekers in **Cyprus**,[179] who did not have the possibility to apply for reception conditions. They needed an unemployment certificate to apply for reception conditions. This certificate could only be obtained in person, however, and the competent office was closed. Moreover, access to health care and housing were particularly difficult for newly arrived persons.

The provision of reception conditions, especially adequate housing was problematic in a number of Member States. In addition to Cyprus, (congested) housing was particularly problematic on the **Greek islands**,[180] and in certain centres in **Spain**[181] and **Italy**[182]. The problem is often congestion. Many reception centres are overcrowded. The most egregious example is Moria, which hosted more than 13,000 persons even though it had originally only been designed for 3,000. Such congested reception centres are of course of even greater concern in the context of COVID-19 and the high transmission rates of the virus.

With regard to the time limits for providing applicants with information on their rights and obligations and documentation, the Reception Conditions Directive (RCD)[183] does not provide for the possibility of extension. Article 14 RCD prescribes that Member States shall grant

[178] Between 19 March and 30 April 2020, Finland received only 78 applications, see here.
[179] AIDA, Cyprus Report, cit., p. 14-15,
[180] AIDA, Country Report: Greece 2019 Update, June 2020, pp. 16-17, available here.
[181] Particularly problematic was the reception centre in Melilla. See UNHCR, Regional Bureau for Europe, COVID-19 emergency response, Update #11, 22 June 2020, pp. 2-3, available here.
[182] The reception centre in Lampedusa temporarily hosted more than 700 people while being designed for only 200, see UNHCR, Regional Bureau for Europe, COVID-19 Emergency Response, Update #13, 24 July 2020, available here.
[183] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

to minors "access to the education system under similar conditions as their own nationals". Member States may not postpone such access for more than three months from the date on which the application was lodged.[184] Article 14 RCD does not provide for derogation from these rules.

Article 17 (1) RCD stipulates that Member States shall "ensure that material reception conditions are available to applicants when they make their application for international protection". Para. 2 prescribes that these conditions must provide an "adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health". Article 18 RCD lays down the modalities for material reception conditions but does not provide for (prolonged) time limits. Thus, the obligation is immediate[185] and the directive does not provide any grounds on which Member States could derogate from the obligation. The same goes for the obligation to provide necessary health care under Article 19 RCD.

This understanding can be supported with a systematic argument based on Article 20 RCD which governs the reduction or withdrawal of material reception conditions. The provision provides for a limited set of grounds based on which Member States can reduce or "in exceptional and duly justified cases" withdraw reception conditions. None of these, however, would warrant a reduction of conditions because of a public health emergency. Article 20 (5) RCD says that decisions on reductions can only be taken for individual cases, that access to health care in accordance with Article 19 RCD can never be curtailed and that Member States must always ensure a "dignified standard of living for all applicants". The strict regime governing the reduction of reception conditions and the lack of provisions allowing for derogations from Member States' general obligations support the conclusion that postponing or temporarily suspending the provision of reception conditions for applicants because of a public health emergency is not permitted under EU asylum law.[186]

A positive example with regard to reception conditions is **Portugal**.[187] Portugal treated all migrants as permanent residents, which ensured access to public services during the pandemic. **Italy**,[188] too, took a rather "generous" approach. In **Poland**,[189] access to remote education was difficult for children in reception centres, as they did not have the necessary technical equipment. There remains therefore significant divergences in how Member States have met their obligations under the RCD.

[184] Article 14 (2) RCD.
[185] See Article 13 (1) of Directive 2003/9/EC which Article 17 (1) RCD replaces and which uses the same wording as the currently applicable provision. Judgment of 27 February 2014, Saciri and others, C-79/13, EU:C:2014:103, paras. 33-34.
[186] The CJEU's jurisprudence supports this argument. The Court held with regard to Article 13 (1) Directive 2003/9/EC: "In addition, the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive.", Saciri, cit., para. 35 (with a reference to earlier case-law).
[187] AIDA, Country Report: Portugal 2019 Update, June 2020), p. 18, available here.
[188] AIDA, Country Report: Italy 2019 Update, May 2020, pp. 14-15, available here. UNHCR, Regional Bureau for Europe, COVID-19 Emergency Response, Update #2, p. 3, available here.
[189] AIDA, Country Report: Poland 2019 Update, April 2020, p. 10, available here.

ii) Asylum and Border Control

To what extent are EU states entitled to close their borders to asylum-seekers. Article 31 (8) APD puts forward an exhaustive list of ten cases in which Member States may make use of a border procedure. The only case that could potentially justify a border procedure with regard to COVID-19 is laid down in Article 31 (8) (j) APD: "the applicant may, for serious reasons, be considered a danger to the national security of public order of the Member State". The threshold for this is very high,[190] and only those applicants that test positive for COVID-19 could potentially fall under the provision.

Moreover, given that border procedures are usually carried out in transit or similar zones that regularly involve detention,[191] the considerations regarding the heightened intensity of interferences with the rights to liberty, security and physical integrity apply.[192] Thus, if safe conditions in transit-zones cannot be ensured, the deprivation of liberty that comes with the border procedure might not be in accordance with Article 8 (2) of the Reception Conditions Directive (RCD) and Article 6 CFR which would lead to an obligation to admit asylum seekers to the territory.

Italy and Malta declared their ports "unsafe" during the crisis in an effort to prevent the disembarkation of migrants from ships. There were reports that **Cyprus** used COVID-19 as a justification for pushing back migrant boats.[193] **Greece** has even been accused of violently pushing back migrant boats.[194] Malta reportedly used a private fleet to deter migrant boats at sea. There were reports of abuse of migrants by Croatian officials at the Bosnian border. Generally, tougher policies at the EU's external borders have shown effect. The numbers of newly lodged applications between March and June were way below pre-COVID levels and continue to be significantly lower. In light of the interpretation given above, it is questionable whether policies that seek to keep asylum-seekers out of the EU because of the pandemic are legal.

In any case, Member States must comply with the prohibition of refoulement. Article 19 (2) CFR states that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment". This prohibition applies to rejections at the border.[195] The prohibition of refoulement is unconditional i.e. violations cannot be justified. This has implications for any returns Member States may wish to carry-out of asylum-seekers. According to Article 6 (1) of the Returns

[190] Cf. infra, question 6.
[191] G. Cornelisse (2016), "Territory, Procedures and Rights: Border Procedures in European Asylum Law", Refugee Survey Quarterly, Vol. 35(1), 74-90, p.82. In May 2020, the CJEU clarified that asylum-seekers who are prevented from leaving a transit zone must be considered detained under EU asylum law: Judgment of 14 May 2020, FMS, C-924/19 PPU and C-925/19 PPU, paras. 216-225. See on the requirements for legal detention of asylum seekers, infra, question 6.
[192] See infra, question 6.
[193] AIDA Cyprus Report cit., pp. 13-15,
[194] UNHCR, Update #13, cit., p. 3.
[195] ECtHR, Amuur v. France, 25 June 1996, paras. 43 and 52; ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012. According to Article 52 (3) CFR, these judgments and the interpretation of the ECtHR is relevant for the CFR: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

Directive (RD),[196] Member States shall issue return decisions to any third-country national staying illegally on their territory. Given that voluntary return was probably impossible for most persons earlier this year, states might justify postponements of returns by reference to this provision. Moreover, COVID-19 might have implications for the proportionality assessment of coercive returns under Article 8 (4) RD.

Article 9 (2) RD further allows for the postponement of returns for an appropriate period of time considering the specific circumstances of the individual case. The provision stipulates that member states shall in particular take in account the third-country national's physical state or mental capacity, and technical reasons, such as lack of transport capacity. Given the non-refoulement provision discussed above, the right of states to postpone returns could turn into an obligation if in the receiving state, adequate protection from COVID-19 cannot be guaranteed. Given that Article 9 (2) RD itself refers to health concerns and in the light of Articles 2, 3, 6 and 35 CFR as well as the principle of proportionality, one could argue that in cases where the situation in the receiving state regarding COVID-19 is particularly dire, Member States discretion under the provision is restricted.

Transfers under the Dublin III Regulation (DReg)[197] were suspended in almost all Member States during the crisis. In some countries, like **Germany** and **Austria**, Dublin procedures were officially suspended. In other countries, like **France** and **Spain**, the procedures were de-facto suspended. Very few Member States still execute forced returns of irregular migrants. An example for this is Greece which reportedly continued transfers of irregular migrants as far as aviation and other logistical means allowed them to.[198] Poland reportedly suspended returns by air and sea, but reportedly continued returns by land.[199]

A related question concerns quarantine, vaccination or other health measures demanded at border crossings. There are no rules on quarantine measures in the asylum directives. Since a mandatory quarantine constitutes a deprivation of liberty, such a measure would have to be justified in accordance with Articles 6 CFR. If a mandatory quarantine would effectively constitute a detention, however, and if it was somehow related to the asylum procedure or the person's being an applicant,[200] the rules on detention of asylum-seekers would apply.[201] EU asylum law contains no rules on mandatory vaccination, either. In fact, the only direct reference to health-related issues can be found in rules that regulate medical examina-

[196] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
[197] Regulation No. 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.
[198] At least until 30 March 2020, Greece continued to execute those transfers that were possible.
[199] AIDA Poland Report, cit., p. 10.
[200] This requirement is not explicitly laid down in the directives. However, it must be the case as otherwise applicants would enjoy a higher level of protection from deprivation of liberty than other persons, including EU citizens.
[201] See on detentions infra, answer to question 6.

tions for the purpose of assessing an applicant's claim to international protection. Moreover, vaccination cannot be made a precondition for international protection. The Qualifications Directive (QD)[202] is clear on this point: refugee status must be granted to third-country nationals or stateless persons who qualify as a refugee in accordance with chapters II and III of the QD, while subsidiary protection must be granted to third-country nationals or stateless persons eligible under chapters II and V of the QD. These provisions do not allow member states to make the granting of international protection dependent on whether an applicant is vaccinated.

The only provision one could potentially examine in this context is Article 17 (1) (d) QD which says that a person shall be excluded from subsidiary protection when "he or she constitutes a danger to the community or to the security of the Member State". Given that this provision concerns the exclusion of a person from protection that she would otherwise deserve, the danger the person poses to the community or national security would have to be considerably serious. These rules thus provide no possibility for member states to oblige applicants to get vaccinated unless such requirements are generally applicable in the receiving state.

Most states applying mandatory quarantine for asylum seekers have done so as part of a generally applicable regime, hence meeting the above standards. As stated above, quarantine rules specifically for asylum-seekers would have to be justified in accordance with EU asylum law. A particularly concerning example is **Greece**, which quarantined newly arrived asylum seekers at the point of arrival, i.e. on isolated beaches or ports, as there was a lack of adequate locations for quarantine.[203] This highlights the need for adequate conditions for lawful quarantines.

iii) Asylum and Detention

Under what conditions can member states detain asylum-seekers or their family members for public health reasons? Article 2 (h) RCD defines "detention" as "confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement". The CJEU further defined "detention" as "*une mesure coercitive qui prive ce demandeur de sa liberté de mouvement et l'isole du reste de la population, en lui imposant de demeurer en permanence dans un périmètre restreint et clos.*"[204] In its recent judgment against Hungary, the CJEU held that keeping applicants in a transit-zone at the external border constitutes a detention for the purposes of EU asylum law.

[202] 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.
[203] AIDA, Greece Report, cit., pp. 16-17. On Lesvos, however, a dedicated site for quarantines was installed on 8 May 2020.
[204] "[…] a coercive measure which deprives the affected person of her freedom of movement and isolates her from the rest of the population by forcing her to remain in a circumscribed, closed-off area.", CJEU, Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, para. 223 (own translation, no English version available).

An applicant may not be detained merely because she is an applicant.[205] She can only be detained on the grounds enumerated exhaustively in Article 8 (3) (1) RCD. According to the Explanatory Memorandum to the Proposal for the Directive which formed the basis of the RCD,[206] the exhaustive list "*ensures that detention could be allowed only in exceptional grounds prescribed under the Directive based on the Recommendation of the Committee of Ministers of the Council of Europe 'on measures of detention of asylum seekers' and UNHCR's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers of February 1999*".[207] Point 4.1 of the UNHCR guidelines mentions three grounds on which detention of applicants could be justified, i.e. "public order", "public health", "national security". Interestingly, the RCD mentions only "national security" and "public order", even though the guidelines that influenced the RCD mention "public health", and the RCD makes use of the concept in its Article 13 when it allows Member States to subject applicants to medical screenings "on public health grounds". This supports the conclusion that detention on grounds of public health is not warranted under the RCD.

One could, nevertheless, consider whether the "national security" or "public order" justifications are applicable in the context of a pandemic. The CJEU defines a "threat to national security" as "a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests".[208] The concept of "public order" entails "the existence […] of a genuine, present and sufficiently serious threat affecting of the fundamental interests of society".[209] Given that Member States can invoke these grounds to justify interferences with fundamental rights, they have to be interpreted narrowly.

While it cannot be excluded that an epidemic could pose a threat to national security or public order under the CJEU's definitions, the threshold for this is very high. Moreover, in order to warrant a detention under EU asylum law, the threat must emanate from the applicant herself. "[O]nly if the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned", is a detention justified.[210] Article 8 (2) RCD reinforces this in stating that Member States may detain applicants "only when […] necessary and on the basis of an individual assessment of each case […] if other less coercive alternative measures cannot be applied effectively". That a threat to national security

[205] Articles 26 APD, 8 (1) RCD.
[206] Judgment of 15 February 2016, J.N., C-601/15, EU:C:2016:84, para. 63.
[207] Proposal for a Directive laying down minimum standards for the reception of asylum seekers, COM(2008) 815 final. The documents referred to are: CoE Committee of Ministers, Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers, 16 April 2003, and UNHCR, Detention Guidelines, updated version of 2012, available here.
[208] J.N., cit., para. 66.
[209] Ibid., para. 65.
[210] Ibid., para. 67

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or public order emanates from an applicant is only conceivable when she herself caught the virus, or the virus is already so widespread that her catching it while being outside is almost certain. In any case, the detention would have to be in accordance with the principle of proportionality.[211]

Detentions of persons subject to a Dublin procedure are regulated by Article 28 DReg. A person may not be held in detention for the sole reason that she is subject to a Dublin procedure, but only "[w]hen there is a significant risk of absconding" and "in order to secure transfer procedures".[212] Article 28 (3) DReg defines time limits for the detention: an applicant can only be detained for a maximum of twelve weeks/three months. After this period, she would have to be released. However, one might argue that if there is no realistic prospect of transfer within that timeframe, e.g. due to a pandemic, the applicant would have to be released immediately, as the Member States could no longer argue that the person was detained "in order to secure transfer" as required by Article 28 (2) DReg.

The legality of detentions for persons illegally staying on the territory of a member state is governed by Articles 15-18 RD. According to Article 15 (1) (1) RD, member states may only detain a third-country national subject to a return procedure "in order to prepare the return and/or carry out the removal process". The detention must be as short as possible and can only be maintained as long as removal arrangements are in progress.[213] Moreover, "[w]hen it appears that a reasonable prospect of removal no longer exists for legal or other considerations […] detention ceases to be justified and the person concerned shall be released immediately".[214] By now, returns might be possible again. However, earlier this year when returns were unrealistic, detentions would not have been justified.

As for detention conditions, they are governed by Articles 9, 10 and 11 RCD (in connection with Article 28 (4) DReg) and Article 16 RD respectively. All detentions must, as a rule, take place in specialised detention facilities.[215] Moreover, as regards applicants and persons subject to Dublin Procedures, access to the detention facility must be ensured for family members, legal advisers, and persons representing relevant non-governmental organisations recognized by the respective Member States.[216] These visits shall take place "in conditions that respect privacy". The right can only be limited based on national law and when the limits are "objectively necessary for the security, public order or administrative management of the detention facility" and only if they do not severely restrict or render impossible the right of access.[217]

The directives do not address detention conditions with regard to epidemics or other diseases explicitly. However, in their interpretation and implementation of the directives,

[211] Articles 8 (2) RCD and 52 (1) CFR.
[212] Article 28 (2) DReg.
[213] Article 15 (1) (2) RD.
[214] Article 15 (4) RD.
[215] Articles 10 (1) RCD and 16 (1) RD.
[216] Articles 10 (4) RCD.
[217] Article 10 (4) RCD.

Member States must comply with the Charter. Thus, detention conditions must in any case comply with its Article 3, the right to physical integrity, and Article 35, the right to health care. The latter stipulates that "[a] high level of human health protection shall be ensured in the definition and implementation of all of the Union's policies and activities". In times of a global pandemic, the health risks posed by – potentially congested – detention centres aggravate the – already severe – interference with their rights. Moreover, as concerns detentions in reception centre, Article 18 (1) (b) RCD prescribes that accommodation guarantee an "adequate standard of living". Against the backdrop of the rights mentioned, this implies sufficient room for social distancing, for example.

Detention of asylum-seekers is one of the greatest problems in the Member States' response to the COVID-19 pandemic. Many member states have heavily restricted the right of inhabitants of reception centres to leave. Greece has imposed a lockdown on migrant camps, affecting more than 120,000 persons. During the lockdown on their island facilities, residents were not allowed to leave the centres, with the exception of one representative of each family who was allowed to leave between 7am and 7pm to go to the closest urban centre and cover their families' basic needs.[218] According to the definition given by the CJEU in its recent judgment against Hungary, such a measure constitutes a detention – at least for all other family members who cannot leave the detention centres. Moreover, there have been reports about poor hygienic conditions in camps, aggravating the problem of illegal detention.[219]

Other countries have also imposed lockdown measures on their migrant camps. In the **Spanish** camp in Melilla, for examples, over 1,600 migrants were confined for a period of several weeks.[220] In **Cyprus**, asylum-seekers were reportedly held in reception centres too. When movement restrictions for other parts of the population in a country are lifted while they remain in force for asylum seekers in reception centres, this arguably constitutes a violation of Articles 26 APD, 8 (1) RCD. As a laudable example, Finland has even closed reception facilities because they had been receiving very few new applications.

What makes matters worse is that in addition to the restriction on the asylum-seekers' ability to leave the reception centres, access to many centres for NGOs, legal counsels and UNHCR was restricted. Examples are **Croatia**,[222] **Hungary**[223] and **Malta**[224]. Greece too made access for outside persons dependent on prior authorization by centre personnel. Restricting access to the facilities must also be measured against the rules of EU asylum law and the rather restrictive regime of EU law outlined above.

[218] AIDA, Greece Report, cit., pp.16-17,
[219] Ibid.
[220] UNHCR Regional Bureau for Europe, COVID-19 Emergency Response,Update #5, 9 May 2020, p.3, available here.
[221] The lockdown on the Kokkinotrimithia camp was justified with an alleged scabies outbreak. However, there was no guidance for how to deal with the situation, UNHCR, Regional Bureau for Europe, COVID-19 Emergency Response, Update #9, 3 June 2020, p.3, available here.
[222] AIDA, Country Report: Croatia 2019 Update, April 2020, p. 14, available here.
[223] European Council on Refugees and Exiles (ECRE), Information Sheet "COVID-19 Measures Related to Asylum and Migration Across Europe", 28 May 2020, p. 15, available here.
[224] UNHCR, Update #9, cit., p. 3,

In addition to movement restrictions imposed on persons living in reception centres, there have been reports of some states disregarding those who had already been in detention, e.g. because they had been awaiting deportation of transfer under the DReg. For example, **Greece** reportedly took no measures and did not reassess the proportionality of detention.[225] Such reassessment would have been necessary under EU (asylum) law. Others, like Spain, have released those who had been in detention. **Belgium** also reportedly released 300 detainees for whom there was no prospect of return.[226] **Slovenia** too released persons from detention.[227] Such acts are laudable, as according to the RD, persons must be released immediately when there is this no realistic prospect of transfer.

All directives contain provisions on persons in need of special protection. Under Article 24 (1) APD, Member States shall assess whether an applicant is in need of special procedural guarantees. An applicant is in such need when her "ability to benefit from the rights and comply with the obligations provided for in [the asylum procedures] directive is limited due to individual circumstances".[228] Recital (29) clarifies that inter alia age, disabilities and serious illnesses can constitute such circumstances. Once a Member State has found an applicant to be in need of special procedural guarantees, the Member States has to ensure that she is provided with adequate support that allows her to benefit from the rights of the ADP throughout the duration of the asylum procedure.[229]

According to Article 21 RCD, Member States shall "take into account the specific situation of vulnerable persons such as […] disabled people, elderly people, pregnant women, […] persons with serious illnesses, persons with mental disorders […] in the national law implementing [the] Directive". Article 22 (1) RCD then stipulates that Member States must assess whether an applicant has special reception needs "[i] n order to effectively implement Article 21". Article 22 (1) (3) RCD obliges member states to "ensure that the support provided to applicants with special reception needs in accordance with [the] Directive takes into account their special reception needs throughout the duration of the asylum procedure and [to] provide for appropriate monitoring of their situation".

The application of (these provisions in) the directives must be guided by the CFR, in particular Articles 2, 3, 6, and 35 CFR. Article 35 CFR provides that "[a] high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities". Against the backdrop of these rules, and in the context of a pandemic, Member States have an obligation to provide special protection to members of risk groups in a way that enables them to adequately protect themselves from the virus, e.g. by enabling them to effectively socially distance themselves or having in place other adequate hygiene measures.

[225] AIDA, Greece Report cit., p. 17.
[226] ECRE Information Sheet, cit., pp.18-19.
[227] UNHCR, Regional Bureau for Europe, COVID-19 Emergency Response, Update #3, 27 April 2020, p.3, available here.
[228] Article 2 (d) APD.
[229] Article 24 (3) APD.

Numerous reports indicate Member States having in place policies that consider vulnerabilities. Those concern the allocation reception conditions and housing. **Belgium**, for example, gave preference to vulnerable asylum-seekers.[230] Even a Member State like **Cyprus**, whose policy has been criticised above, reportedly made efforts to transfer unaccompanied children to dedicated facilities.[231] **Greece** transferred older and immunocompromised persons from the island facilities to facilities where they could take preventive measures more easily.[232] **Spain** made efforts to improve the situation for LGBTI residents in the Mellila centre. [233] Although the efforts made to protect those forced migrants who are particularly vulnerable are not sufficient, it is positive that Member States at least made an effort to take special needs into account.

As the above has indicated, the COVID-19 crisis saw good as well as bad practice examples. This should not blind us, however, to the broad range of violations of EU asylum law conducted during the first wave, most notably through the suspension and delay of asylum procedures, the lowering of application standards (regarding personal interviews), poor reception and housing conditions and inadequate efforts to protect asylum-seekers from infection. Supporting Member States in meeting their challenges in the asylum field, and enforcing wilful breaches of asylum rules, should be further prioritised at the EU level, as section 4 will further discuss.

D. DATA PROTECTION

i) The EU Data Protection Framework

Data protection relates to the COVID 19 crisis in different ways. The expansion of digital technologies provides significant opportunities to leverage new technology and the collection of data to better fight the virus and coordinate the policy response between states. Under certain circumstances, EU member states may even have obligations to share data across national borders to tackle epidemic threats.[234] This very ability to collect and utilise data on a large scale, however, places significant discretionary power in the hands of state authorities, potentially leading to core data protection rights being undermined. The basis of the EU data protection regime is that technological advancement can be coupled with a high level of rights protection – the crisis has thus put this theory to the test.

A major tool several EU Member states have developed to combat the COVID-19 crisis is mobile applications. This includes (in order of increasing interference with data protection rights) apps to (1) inform and advise citizens and facilitate the organisation of medical follow-up of persons with symptoms, including a self-diagnosis questionnaire; (2) warning pe-

[230] AIDA, Country Report: Belgium 2019 Update, July 2020, p. 17, available here.
[231] UNHCR, Update #12, cit., p. 3.
[232] AIDA, Greece Report, cit., p.17. UNHCR, Update #12, cit., p. 4.
[233] UNHCR, Update #12, cit., p.3.
[234] Decision 1082/2013/EU.

ople who have been in proximity to an infected person in order to interrupt infection chains and preventing resurgence of infections in the reopening phase (contact tracing apps) and (3) monitoring and enforcement of quarantine of infected persons.

The EU sees digital tools, such as contact tracing apps generally as valuable tools to combat the COVID-19 pandemic,[235] while at the same time admitting the lack of robust scientific data on their usefulness.[236] To ensure that such apps confirm with EU regulation on data protection, several institutions have issued guidelines, toolboxes and recommendations, as well as monitoring member states in developing and using apps.

As to the applicable EU law, first, the general EU laws on data protection apply, especially the General Data Protection Regulation[237] (hereinafter GDPR). The European Data Protection Supervisor and the European Data Protection Board are the relevant EU institutions and should be consulted alongside national data protection authorities.[238]

Personal data is protected under the GDPR while location data is protected under Arts. 5 (1), 6, and 9 of the ePrivacy Directive.[239] Any information stored in and accessed from user's terminal equipment is protected under Article. 5 (3) of the ePrivacy Directive. The principle of data minimisation requires that only personal data that is adequate, relevant and limited to what is necessary in relation to the purpose may be processed.

According to Article. 6 GDPR, disclosure of personal data is only lawful if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the control-

[235] Communication from the Commission, Guidance in Apps supporting the fight against COVID 19 pandemic in relation to data protection, 2020/ C 124 I/01, 17 April 2020, para. 1
[236] Ibid, para. 12.
[237] 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.
[238] Commission Recommendation (EU) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data, para. 27
[239] Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

ler or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This list already establishes a distinction between personal or identifying data and meta-data. The disclosure of meta-data arguably does not fall within the scope of protected "personal data" under the GDPR, as this only relates to information about an identifiable person. Otherwise, the authorities would again need to justify the processing of the meta-data in accordance with Article. 6 GDPR. However, the disclosure of meta-data could arguably be justified under more grounds than the disclosure of personal data, e.g. under Article. 6 (e), as the disclosure of meta-data is by its nature less intrusive on the rights of the data subject than the disclosure of personal data.

Limits on the indiscriminate collection of medical data are set not only by EU law but by the law of the ECHR. In L.H. v. Latvia,[240] for example, the applicant alleged in particular that the collection of her personal medical data by a State agency without her consent had violated her right to respect for her private life. In this judgment the Court recalled the importance of the protection of medical data to a person's enjoyment of the right to respect for private life. It held that there had been a violation of Article 8 of the Convention in the applicant's case, finding that the applicable law had failed to indicate with sufficient clarity the scope of discretion conferred on competent authorities and the manner of its exercise. The Court noted in particular that Latvian law in no way limited the scope of private data that could be collected by MADEKKI, which resulted in it collecting medical data on the applicant relating to a seven-year period indiscriminately and without any prior assessment of whether such data could be potentially decisive, relevant or of importance. The judgment illustrates the importance of limiting and minimising the degree of data collection under broader European human rights law.

The European Commission has also adopted Recommendations towards a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis. It first issued a Recommendation on April 8 2020, in which it stated that a common approach to the use of digital technologies and data is necessary.[241] Following this, the Commission issued a communication on Guidance on COVID-19 Apps.[242] The key elements to ensure compliance with EU data protection legislation are: that national health authorities are the data controllers (para 3.1); the installation is voluntary (para 3.2), as well as each different app functionality should be voluntary (para 3.2); the principle of data minimisation (para. 3.4), limiting the disclosure and access of data (para 3.5.); providing for precise purposes of processing (para. 3.6.), time limitations (3.7)

[240] ECtHR, L.H. v. Latvia, 29 April 2014
[241] Commission Recommendation 2020/518, para. 3
[242] Communication 2020/C 124 I/01.

and sunset clauses (para. 3.2), ensuring the security of the data (para. 3.8.).

ii) Procedural Safeguards for Data Processing

The Commission recommendation for COVID apps and the EU law underlying it points to a number of procedural safeguards states must ensure where they store health-related information. Firstly, the purpose and means of data protection needs to be clear and specific. Any storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, about the purposes of the processing. If those data are to be shared with health authorities, they should be shared only after confirmation that the person concerned is infected with the COVID-19 and on the condition that he/she chooses to do so. Health authorities should thus provide the individuals with all necessary information related to the processing of his or her personal data and how it is likely to be used in the future (in line with Articles 12 and 13 of the GDPR and Article 5 of the ePrivacy Directive).

Secondly, the individual should be able to exercise rights under the GDPR (in particular, to access data relating to him or herself, with a view to rectifying data that is erroneous, deleting data or removing their consent). Any restriction of the rights under the GDPR and ePrivacy Directive should be in accordance with these acts and be necessary, proportionate and provided for in the applicable legislation. This right of the data subject to have meaningful control over data relating to them has a basis in the case-law of the CJEU. In Google Spain the CJEU held that processing of personal data under Article 7(f) necessitates a balancing of the opposing rights and interests concerned, in the context of which account must be taken of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter. That balancing may depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information (and as a result, may result in an obligation of a data processor to delete personal data). The Court's statement on sensitivity should be kept in mind when discussing the type of health dat[243] typically stored on Corona applications.

Thirdly, in accordance with the principle of data minimization, public health authorities and research institutions should process personal data only where relevant and necessary, and should apply appropriate safeguards such as pseudonymisation, aggregation, encryption and decentralization.[244] This principle also carries a basis in the Court's case law. In Schrems II, the CJEU stated that in order to comply with the requirement of proportionality limitations on the protection of personal data must

[243] Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 81.
[244] Commission Recommendation 2020/518, para. 25

apply only in so far as strictly necessary. Interfering legislation must lay down clear and precise rules governing the scope and application of the measure, in particular in what circumstances and under which conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary and carries minimum safeguards to protect the data subject against abuse. The need for such safeguards is all the greater where personal data is subject to automated processing.[245] Fourthly, the Commission has issued guidance on time limits,[246] derived from the principle of storage limitation.[247] This principle requires that personal data may not be kept for longer than necessary. With regards to app functionalities that only provide information, any data that is collected while installing this functionality should be deleted immediately as there is no justification for keeping it. Regarding symptom checkers and telemedicine functionalities, such data should be deleted by the health authorities after a maximum one month (reflecting COVID's likely maximum incubation period) or after the person was tested with a negative result. Regarding contact tracing and warning functionalities, proximity data should be deleted as soon as no longer necessary for the purpose of alerting individuals.

Finally, given the proportionality principle embedded in the EU's data protection regime, the apps should be deactivated at the latest when the pandemic is declared to be under control. As the Commission has argued, such deactivation should not depend on de-installation by the user and so should carry a 'sunset' provision.[248] The European Data Protection Board has also argued that the principles of necessity, proportionality and data minimisation require sunset clauses. The vast majority of contact tracing apps developed in Member States operate with sunset clauses. An exception is the **Slovakian** app, whose main tracing app did not contain such a clause.[250] All contact tracing apps (unlike, see below, quarantine apps), functioned on a voluntary basis.

iii) Data Storage

As defined in GDPR Article 4, personal data is any information relating to an identified or identifiable natural person (e.g. names, dates of birth, photographs, email addresses, IP addresses). Location data is explicitly mentioned as a potential identifier of a natural person. If location data can be related to an identified or identifiable natural person, this data is considered personal data and its processing falls under the scope of the GDPR.
Location apps can be distinguished by the way the data is stored: The most common option, used by nearly all States, is that the identifiers are stored on the device of the user (so called decentralised processing). Alternatively, these arbitrary identifiers can be stored on the server to which the health authorities have access (so called backend server solution). This solution

[245] Judgment of 16 July 2020, Schrems II, C-311/18, EU:C:2020:559, para. 176.
[246] Communication 2020/C 124 I/01, para 3.7.
[247] Article 5(1)(e), Recital (39) GDPR.
[248] Communication 2020/C 124 I/01, para 3.2.
[249] EDPB, Guidelines on the use of location data and contact tracing tools in the context of the COVID-19 outbreak, 21 April 2020, para. 35 and p. 13.
[250] European Commission, Mobile applications to support contact tracing in the EU's fight against COVID-19, Progress reporting June 2020, p.5, available here.

was used in **France, Hungary** and **Slovakia**.[251] Under EU Law, the first option is preferable, as fewer data is then controlled by the authorities (in line with the principle of data minimisation.[252] Health authorities should have access only to proximity data from the device of an infected person so that they are able to contact people at risk of infection. These data should be available to the health authorities only after the infected person (after having been tested) proactively shares this data with them. Accordingly, the Commission recommends that the data should be stored on the terminal device of the individual in an encrypted form using state-of-the art cryptographic techniques. In the case that the data is stored in a central server, the access, including the administrative access, should be logged.[253] Given the sensitivity of the personal data at hand and the purpose of data processing, the Commission is of the view that the apps should be designed in such a manner that the national health authorities (or entities carrying out task in the public interest in the field of health) are the controllers. An exception in this regard would be the tracing app of the Czech Republic, which was initially developed as a private initiative. The controllers are responsible for compliance with the GDPR (the accountability principle). Interestingly, the first contact tracing app in Lithuania was deemed to violate the GDPR, especially the accountability principle of Article 5 (2), by the national data protection inspectorate (VDAI) in May and was, as a result, subsequently suspended. Thus while central data storing is permissible under EU Law, but decentralised storing is preferable. When data is stored centrally, the national health authorities must ensure that such data is protected against unauthorised processing.

ECHR law also informs how location data may be used and stored. Ben Faiza v. France concerned surveillance measures taken against the applicant in a criminal investigation into his involvement in drug-trafficking offences.[254] The applicant alleged that these measures (both the installation of a geolocation device on his vehicle and the court order issued to a mobile telephone operator to obtain records of his calls, thus enabling the subsequent tracking of his movements) had constituted an interference with his right to respect for his private life. The Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention finding that, in the sphere of real-time geolocation measures, French law did not at the relevant time indicate with sufficient clarity to what extent and how the authorities were entitled to use their discretionary power to store and obtain data. This illustrates that the points made in section ii) above – that data subjects must be given clarity on how their data will be used and secured – also applies to the storage of personal and location data.

[251] Ibid.
[252] Article 5 (1) lit. e GDPR.
[253] Communication 2020/C 124 I/01, para 3.8.
[254] ECtHR, Ben Faiza v. France, 8 February 2018.

According to Article 3(2) GDPR, the GDPR is also applicable to processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities monitor behaviour taking place within the Union. In this case, the controller or the processor shall designate in writing a representative in the Union, in order to ensure compliance with the GDPR.[255] Any transfer of personal data which undergoes or is intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in Chapter V of the GDPR are met.[256] According to Article 45(1) such transfers may take place where the Commission has decided that an adequate level of protection is ensured (adequacy decision). In the absence of such a decision, a controller or processor may transfer personal data only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.[257] Article 49 includes general exceptions concerning the transfer of data not in compliance with Articles 45 and 46, as the explicit consent of the data subject (a) or situations where the transfer is necessary for important reasons of public interest (d). Therefore, storing the data on 3rd party servers or outside the EU can only be legal if compliance with EU Law is nevertheless ensured.

This was also at issue in the CJEU's recent Schrems II ruling where the CJEU reiterated that national competent authorities are required to comply with European Commission adequacy decisions. Concerning the US, the CJEU found the level of protection not to be sufficient and therefore invalidated the Commission's adequacy decision concerning the US EU Privacy shield, which in the view of the CJEU does not warrant a sufficient level of protection.[258] Processing data to the US can therefore only be legal if a higher level of data protection than under the US EU Privacy Shield is warranted (a potential concern regarding the collection of data on American servers discussed in section 2 above for the app of the **Czech Republic**). Finally, in light of the proportionality principle, data may only be stored as long as necessary. In the case of COVID-19, this would apply to a period of approximately 4 weeks (the maximum timespan that can be relevant to determine contacts with infected persons.)

iv) Quarantine Apps and the Principle of Consent

Is it consistent with EU law when a government demands that citizens or visitors download an app which stores health-related information as a mandatory legal requirement? This question is given renewed relevance by the existence of apps not just to enable contact tracing but to enforce certain requirements, such as those relating to testing, quarantining (or perhaps in the future, vaccination).

[255] Article 27(1, 4) GDPR.
[256] Article 44 GDPR.
[257] Article 46 GDPR.
[258] Schrems II cit., para. 181.

The processing of health-related data is generally prohibited under Article 9(1) GDPR. However, Article 9(2) provides a list of exceptions to this general rule, e.g. when such processing is necessary for reasons of public interest in the area of public health, Article 9(2) lit. i, or for health care purposes as described in Article 9(2) lit. h. The processing of special categories of personal data (Article 9(1) GDPR) may be necessary for reasons of public interest in the areas of public health without consent of the data subject. Such processing should be subject to suitable and specific measures so as to protect the rights and freedoms of natural persons.[259]

Nevertheless, as the systematic and large-scale monitoring of location and/or contacts between natural persons constitutes a grave intrusion into their privacy, the use of such apps would imply, in particular, that individuals who decide not to or cannot use such applications should not suffer from any disadvantage.[260] As stated by the ePrivacy Directive, the "storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information.. about the purposes of the processing".[261]

This provision suggests a legal requirement to unbundle different functions of applications. i.e. that various functionalities (e.g. information, symptom checker, contact tracing and warning functionalities) should not be bundled so that the individual can provide his/her consent specifically for each functionality.[262] This is also implied by case-law of the CJEU: in Schwarz v Bochum, for example, the CJEU argued that the data consent of the subject would be undermined if she did not have the opportunity to de facto object to the processing of their data.[263] Unbundling of functionalities – such that one does not automatically follow from the other – seems a key element in fulfilling this requirement.

The EU's data protection framework does give some scope for derogation from these provisions. Article 15 (1) of the e-privacy directive allows member states to adopt legislation to restrict the scope of certain data related rights, when such restrictions are necessary, appropriate and proportionate "to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system". Article 23(1) GDPR entails a comparable possibility to restrict certain rights (i.e. Article 12-22 GDPR) under the condition that the restriction respects the essence of

[259] Para. 54 GDPR.
[260] EDPB Guidelines, paras. 24 et seq.; Communication 2020/C 124 I/01, para 3.2
[261] Article 5 (3) E-privacy Directive.
[262] Communication 2020/C 124 I/01, para 3.2.
[263] Judgment of 17 October 2013, Schwarz, C-291/12, EU:C:2013:670.

the fundamental rights and freedoms and is a necessary and proportionate measure.

Hungary suspended these rights within the GDPR with respect to personal data processing with the stated purpose of understanding and detecting the coronavirus disease and impeding its further spread by Decree179/2020 of 4 May 2020. As noted by the European Data Protection Board (EDPB) at the time of this suspension, 'even in these exceptional times, the protection of personal data must be upheld in all emergency measures'. As the EDPB reminds us, the Hungarian suspension of elements of the GDPR conflicts explicitly with the GDPR's wording, which does not allow a general derogation from its provisions, but rather limitations on data protection rights provided that they are proportionate and respect the essential content of the relevant rights. In this sense, highly general and extensive restrictions of the GDPR, which are not tied to specified public policy objectives and programmes do not meet the GDPR's proportionality requirement and are unlikely to be foreseeable to individuals negatively affected by limitations on their data protection rights. As stated by the EDPB, 'the mere existence of a pandemic or any other emergency situation alone is not a sufficient reason.'

A further significant example is Poland. The Polish Home Quarantine app was mandatory for people who tested positive for COVID (except for those who are visually impaired, or those who sign a declaration confirming they do not use telecommunications networks). Data collected included GPS and Biometric data (facial recognition), the data was to be kept for 6 years and disclosed to various authorities (Police, state governors, the Centre for Information Technology, National Centre for Healthcare Information Systems) and the subcontractor. Such an apps mandatory nature already conflicts with the consent principle – the other features of the app, however i.e. the long length of storage, the degree of sharing with public authorities and the amount of data collected mean that the Polish app constitutes perhaps the most flagrant violation of EU Law regarding data protection during the first COVID wave. In its judgment on Digital Rights Ireland for example, the CJEU decided that storage of metadata on all their customers by telecoms and internet access providers for a period of up to two years for intelligence and law enforcement purposes disproportionately affected privacy and data protection rights (a period significantly less than in the Polish case).[264]

Similar concerns can be voiced against a proposed amendment in the Netherlands of their telecommunications act, which would make it mandatory for telecommunication providers to disclose location data of their customers to national authorities in times of pandemics. The bill is still being discussed, as the opposition and national data protection agencies were very critical towards the first draft. This would technically be not a mandatory application but would have the same effect and seems hardly compatible with EU Law in its current form. The same applies to a Slovakian amendment of their telecommunications law passed in the end of March allowing the Supreme State Health Authority to access mobile operators' mobile phone location data without the consent of users. This law was repealed by the Constitutional Court in May because the purpose, duration and control of the extraordinary measure have not been sufficiently defined. Public and judicial contestation of such measures may indicate that app functionalities and government decrees mandating data access and processing without consent will anyway be unsuccessful in the face of domestic resistance. Where, however, the consent principle and wider principles of EU data protection law are breached, even in an effort to tackle health emergencies, EU law should operate as a safeguard against backsliding on data protection commitments to EU citizens.

Recommendations and Outlook: Tackling the Implications of Future COVID 'Waves'

While the scope of this study is on measures introduced until the summer of 2020, many of the trends discussed in the report have continued after this period. The so-called 'second wave' of infection seems every bit as dangerous as the first and has led to equally strong national measures to counter it. Many of these measures also come into conflict with EU law: the trend, for example, towards border control and the lowering of asylum standards has continued uninterrupted since the 'first wave'. This begs an important question: how should EU law 'learn' from the first wave and the national measures adopted in that period? More specifically, how can EU law be 'COVID proofed' i.e. how can the EU legal order be altered to better cope with future waves of the virus?

As this study has shown, COVID-proofing EU law requires two separate steps. The first step concerns **enforcement**. There are many areas where the problem is not EU law per se but rather the unwillingness (or in other cases inability) of Member States to enforce it. In these cases, EU law already provides for an appropriate balance between protecting public health and safeguarding important objectives and rights contained within EU law. The fight to contain the virus, however, has often led to the second part of this balancing act to be ignored. The second step concerns **new policies and rules** i.e. those areas and 'gaps' where EU law simply did not anticipate adequately the realities of a health pandemic and may need reform to meet challenges across the four areas.

A. BETTER ENFORCING EU OBLIGATIONS

Let us start with enforcement. This challenge appears in all of the areas covered in this study but it is most pronounced in the areas where the EU's legislative framework is most developed. To begin with the field of **asylum protection**, it is incumbent upon Member States to continue to register asylum claims, as is required by the Asylum Procedures Directive and to respect the time-limits that it establishes. The conditions that drive individuals to seek asylum do not end with the onset of a public health crisis nor should the standard of protection owed to them change. Member States should thus retain key elements of the asylum procedure, such as in-person interviews while ensuring appropriate safety controls for the officials involved (such as via protective screens). Member States should also ensure access to reception conditions, including access to adequate housing.

Of particular importance is that Member States do not further add to the risks and uncertainties asylum-seekers in Europe already face. EU law imposes a duty on states to seek alternatives to detention (even in those cases where it

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would otherwise be legally permissible) where over-crowding poses a risk to the health and safety of detainees. Indeed, detention in the Dublin system should not take place where there is no realistic prospect of return to another Member States or third state taking place. Such improvements in reception conditions require of course both carrots and sticks. The Commission should not be afraid to use its enforcement powers to tackle unwillingness to maintain EU asylum standards. At the same time, improving reception conditions during a public health crisis (where resources are under strain) requires investment in the most affected states from the European and national levels. The drop in EU asylum standards during the COVID-19 crisis represents a human rights and humanitarian crisis that needs to be tackled with urgency as the pandemic further develops.

There remain, however, enforcement challenges in other areas of EU law too. In the field of **free movement**, EU law allows restrictions on movement and border controls but only where exceptional and proportionate. As a key element of doing so, those who disproportionately rely on movement across borders (such as commuters, transport workers and other travelling for work or family re-unification) should be able to continue to do so. In particular, the Commission should act where necessary to ensure non-discrimination in border control between nationals and other EU-citizens including lawfully resident third country-nationals. EU law in this sense requires an objective benchmark for restricting the entry of individuals likely to pose an additional contagion risk (such a threshold, as used in many states and as recommended by the Council, would be location within the last 14 days and not nationality).

In the field of **data protection**, proportionality (and the EU's legislative framework) also restricts the way in which Member States can use and design applications to fight COVID-19. Tracing, warning and quarantining apps must be based on the principle of consent, providing clear guidance to users on how their data will be used and stored. An enforcement priority in relation to data protection are those states (e.g. Poland and Hungary) where general data protection safeguards have been suspended and where (in the Polish case) an application in clear breach of data protection principles was made de facto mandatory for many individuals. Digital technologies remain an important to fight the COVID-19 crisis but only where trusted by the general public (and so compliant with basic rights standards).

Finally, in the area of **democracy and the rule of law**, while EU law does not provide an over-arching legislative framework, the Commission has shown its willingness to enforce basic values enshrined in the EU Treaties, particularly in the area of judicial protection.[265] In regard to other democratic and rule of law issues, however, there is an equal need for vigilance. A number of Member States

[265] See Commission Rule of Law Report 2020 – The Rule of Law Situation in the European Union, COM/2020/580 final, available here.

have introduced states of emergency to tackle the COVID-19 crisis – such a declaration, however, does not alter a state's obligations under EU law nor should it entail a permanent shift in the constitutional balance of power away from representative and towards executive institutions. This principles of separation of powers in EU law and of non-arbitrariness i.e. that executive authority should not result in unlimited discretion – requires not simply enforcement but a re-examination of the EU's legal and policy-framework.

B. WHERE DO WE NEED NEW RULES?

While therefore better enforcement of existing EU law following the initial wave of the COVID-19 crisis would do much to restore confidence in the EU legal order, it would be wrong to assume that the EU's legal regime should be left entirely as it is. Like all crises, the COVID-19 crisis has revealed deficiencies and gaps in the legal order that need to be filled for it to be effective in balancing fighting a public emergency on the one hand and respecting fundamental EU objectives and values on the other.

An important example in this regard is **free movement**. As highlighted above, the EU's free movement regime largely anticipated public security in its more traditional understanding as being the main reason for the interruption of free movement by Member States. As a result, exceptions to free movement invoked by Member States have to be justified under broad exceptions like 'internal security' that fit poorly with the specific risks that a public health emergency entail. The broader danger is that people who pose risks for no fault of their own (e.g. because they come from a region with a high infection rate) are treated as public security threats in a manner analogous to criminals, terrorists suspects or other security risks.[266] A related risk is that exceptions to border closures are excessively narrow, disrupting the livelihoods and family lives of those who lives by borders or rely on free movement more than others.

In this sense, there is a strong case for reviewing legislation such as the Schengen Borders Code in light of the COVID emergency. An explicit derogation allowing border closure for reasons of public health emergency that simultaneously limits and defines the circumstances in which Member States may close borders for this purpose would provide greater legal certainty to those that rely on borders being open. Such a review would have to include temporal limits on such closure and include guidance on the circumstances where a public health derogation can be invoked (like the Citizens Rights Directive, the guidance of the WHO could be a relevant benchmark for this purpose). Changes to free movement law should also consider an effort to harmonise exceptions to border closure that – as pointed

[266] H. Dijkstra; A. de Ruijter (2017) "The health-security nexus and the European Union: Toward a research agenda", 8 European Journal of Risk Regulation 4, 613–625.

out in the section above – vary hugely between Member States, again creating considerable confusion about who may travel where and how easily. The Council's mid-October resolution - providing advice to Member States on who may be exempted from travels restrictions – provides a useful starting point for stronger measures in this field.[267]

The challenges in the areas of **asylum and data protection** are of a different nature. Here, EU law already establishes a legal framework with a high level of protection. It also leaves sufficient policy room for Member States to tackle public health threats. The EU must ensure, however, that this high level of protection is maintained in future law-making. Two examples are of immediate relevance here: the health threats decision[268] and the proposed *force majeure regulation*, proposing change to the framework for EU asylum law.[269]

In the case of the health threats decision, the decision is of even greater importance in the current context. At the same time, the decision did not anticipate the rise in application technology and the resulting challenges associated with sharing data gathered through tracing apps. As this study has argued, a general duty of proportionality underlies EU data protection law – this duty also applies to the obligations established by the health threats decision for Member States to share health data across borders. The Decision, and its implementation by EU institutions, should therefore carefully weigh the advantages of sharing health data gathered through apps and the related risks to the privacy and rights of individuals whose data may be shared. This may necessitate certain concrete limits beyond the current 12-month limit for storing data contained in the current decision – such as an automatic duty to delete person data after the incubation period for a virus such as COVID-19 has passed.[270] More broadly, the Decision should be re-visited in light of the COVID-19 crisis and in light of recent institutional efforts such as the European Parliament's Resolution on health coordination of 17 September 2020.

In the case of the proposed force majeure regulation, this regulation allows extensive derogations from the normal provisions of EU asylum law under exceptional circumstances. The context for the proposal is both the 2015 crisis and the shadow of COVID-19, permitting the extension of time-limits for the registration of asylum-seekers, the processing of claims and the issuing of 'take-back' requests. While there is nothing per se wrong with providing Member States with leeway in situations out of their control, the proposal does very little to recognise the risks that crises, such as COVID-19, pose for asylum-seekers themselves. The

[268] 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

[268] Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health.

[269] Proposal for a Regulation of the European Parliament and the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM (2020) 613 final.

[270] See H. van Kolfschooten; A. de Ruijter, (2020) "COVID-19 and privacy in the European Union: A legal perspective on contact tracing", 41 Contemporary Security Policy, No. 3.

proposed regulation allows for example an extension of up to 8 weeks to the period in which asylum-seekers may be refused entry to the national territory (and, in effect, kept in transit zones). Such zones,[271] as the study has shown, significantly increase transmission risks for asylum-seekers as well as adding to the uncertainty they face. Deadline extensions must also be considered against the factual reality of the over-use by Member States of detention of asylum-seekers and their families (often in unsafe conditions).

More broadly, the COVID-19 epidemic has not led to a greater influx of individuals seeking asylum nor is there widespread evidence that Member States in general are unable to meet their obligations under EU asylum law under conditions of COVID where they focus efforts and resources in doing so (where non-compliance is found, it has much more to do with a lack of state capacity than with the design of asylum rules). The proposed regulation therefore should consider more explicitly how its adoption might impact the health and fundamental rights of asylum-seekers whose legal status is likely to face a longer period of uncertainty once it is adopted and introduce stronger safeguards against measures such as detention.

The most fundamental area for new rule and policy-making, however, appears to be the field of d**emocracy and the rule of law**. This is so for two reasons. The first concerns the seriousness of the breaches in these areas – whereas many restrictions in areas such as free movement may end up being temporary in nature, shifts in the balance of power between governments, parliaments and Courts are likely to have long-term corrosive consequences on public confidence in the constitutional and democratic process. The second reason is that violations of fundamental principles can often lead to violations of EU law more broadly. This study has indicated a number of examples of this. The two states – Hungary and Poland – where the report has catalogued the clearest deficiencies in this area are also the states where significant breaches of EU law have been found in other areas, such as asylum and data protection. In simple terms, observance of fundamental values domestically and observance of EU law are linked. When domestic institutions are deprived of their normal functions (e.g. of Courts to independently adjudicate rules and of legislatures to scrutinise government activity and laws), it is of little surprise that they will also lose their ability to act as a safeguard to ensure EU law obligations are also complied with.

This requires greater EU attention to two matters in particular. Much of the focus of institutional and academic attention in the last years has been on judicial independence. The

[271] Force majeure regulation, cit, p. 21.

core of this independence is ensuring a proper separation between the judiciary and the other two branches of government. The EU – particularly the CJEU – has developed important tools in recent years to ensure this separation. While this principle is of key importance, it should not detract from other elements of democracy, most particularly ensuring an appropriate separation between legislatures and the other branches of government. Just as national Courts are called upon to enforce and apply EU law, so national legislatures have a key Treaty guaranteed role both in ensuring representative democracy and in implementing EU law (particularly directives). This role is imperilled where public health crises see the erosion or even complete collapse of parliamentary oversight of the national government.

The EU institutions should therefore increasingly focus their attention on the separation of powers as a crucial ingredient of democracy and the rule of law. This includes, for example, integrating monitoring of the separation of powers into core rule of law instruments. The Commission's rule of law report provides an important overview of rule of law deficiencies across EU states but does not take the separation of powers principle, or the state of democracy more broadly, as its starting point. At the same time, parliamentary rights are not integrated into other recent initiatives at EU level, such as the discussion over rule of law conditionality vis-à-vis funding derived from the EU's budget. Existing Commission Recommendations and infringement proceedings on the rule of law have also not concerned this issue. Without tools to examine and rectify national violations of the separation of powers, a crucial ingredient for both re-enforcing representative democracy and ensuring EU law compliance in times of emergency is likely to be missed.

The second issue of concern is the use of emergency powers under EU and national constitutional law. Once again, the design of the 'emergency constitution' is largely a matter for national rather than EU law. At the same time, the decision by Member States to use or not use emergency provisions carries grave consequences for EU law and also does not remove Member States from their general duty to obey EU law. As this study has shown,

the COVID-19 crisis has demonstrated great variation in how Member States use emergency provisions from failure to use them when perhaps obliged to do so (e.g. the Polish case) to examples of over-use of emergency provisions, providing governments or agencies with high levels of discretion.

The Venice Commission of the Council of Europe has conducted extensive research on emergency powers in national constitutional law. This would provide a useful basis for EU measures seeking to lay-out common standards for the use of emergency powers, particularly when their use is likely to impact on the observance of EU law. What for example, are common European safeguards when emergency powers are invoked in terms of their intensity and duration? What procedural duties are owed to European institutions and to other Member States in terms of notification and ensuring that negative cross-border effects (in fields such as asylum and free movement) are avoided? How does the use of emergency powers relate to the values articulated in Article 2 TEU and to the guarantees of judicial independence and oversight recently strengthened by the Court of Justice? At the bare minimum, greater coordination in institutions such as the Council, and the adoption of guidelines and other soft law on the use of emergency provisions is justified given the COVID-19 experience.

COVID-19 will not be the last public health emergency to transform the European Union – its unique cross-border impacts, however, combined with the limited EU competences in the health field, illustrate the vulnerability of the EU legal order when faced with a global pandemic. Seeing the EU legal and political order through a second and third wave requires both vigilance and imagination: the vigilance to hold onto and enforce the most fundamental elements of the European constitutional order and the imagination to renew EU law to meet the changing expectations of Europe's citizens. As the first wave has shown us, EU law has been repeatedly stretched in the first wave. It still, however, provides the necessary basis to balance national efforts to tackle COVID-19 with the fundamental rights and values of Europe's people.

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