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Management of the European Union's (internal and external) borders during the Covid-19 pandemic

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1. Introduction

The European Union (EU) is a deeply integrated regional trade bloc. Most commentators agree that it is (now) more: the depth and breadth of EU integration suggest that the EU is a 'quasi-constitutionalised' entity. Some key characteristics of that entity include a profound reliance on law, and rule-based modes of operation; a commitment to economic openness, free and fair trade, including all factors of production (capital, goods, services and persons); and a significantly greater attention than in other trade blocs to the position of human beings (especially EU citizens¹) as individuals with innate dignity, not merely as economic actors.

The EU's 'quasi-constitutional' powers flow from the Treaties which create the EU, and establish its legislative, executive and judicial institutions. These institutions are empowered to make law and policy decisions in a range of delineated 'competences'. Competences not formally granted to the EU remain with the Member States. In practice, and according to EU law, many EU powers are exercised in collaboration with national institutions. The EU is thus in a heterarchical relationship with its Member States, when it comes to law and policy making/governance.

The EU's governance of borders during the Covid-19 pandemic was (and continues to be) supported by the European Centre for Disease Control (ECDC). Established in 2004, the ECDC supports EU public health governance, through information gathering, analysis and dissemination. Formally independent from the EU legislature and executive, the ECDC is the hub in a heterarchical network of national agencies concerned with communicable disease.² The ECDC's accounts of 'scientific evidence' are presented as neutral, pertaining to the EU level, and non-partisan in the sense of not following any one particular Member State. But in practice, the ECDC works closely with the World Health Organisation, as well as with national public health agencies. The Covid-19 pandemic involved such scientific uncertainty that the EU institutions also respected national scientific assessments.³

2. European Union border laws

In principle, EU law aims to secure open borders within the EU, and a single border at its edge. This 'in principle' statement hides a massively complex set of border rules and practices. EU border law continues to change significantly over time, and differs depending on what 'factor

¹ An EU citizen is a citizen of one or more EU Member States, see Article 20 TFEU. The EU does not have power to grant free-standing citizenship, see C-673/20, *EP v Préfet du Gers*.

² See Scott L Greer, ed, "The Politics of Communicable Disease Control in Europe", Special issue of the *Journal of Health Politics, Policy, and Law* (2012) 37(6).

³ See Iris Goldner Lang, "'Laws of Fear' in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of Covid-19" *European Journal of Risk Regulation* (2021) 1-24; Gareth Davies, "Does Evidence-based EU Law Survive the Covid-19 Pandemic? Considering the Status in EU Law of Lockdown Measures which Affect Free Movement" 2020 *Frontiers*: <https://www.frontiersin.org/articles/10.3389/fhumd.2020.584486/full>.

of production’ is crossing a border. This chapter focuses only on EU law concerning movement of people across borders.

In understanding EU border law, we need to distinguish between the EU’s *internal* borders (between EU Member States) and the EU’s *external* borders.

Internal EU borders include land borders between any two EU Member States, sea borders and the border involved when someone travels by air from any EU Member State to any other. EU internal border law as it applies to *people* (as opposed to products, services, or capital) flows from three main sources: the rules in the EU’s founding Treaties,⁴ rules adopted by the EU’s legislature;⁵ and court rulings interpreting these sources.⁶ The main principles behind this internal border law are to give rights to cross internal EU borders to a wide group of human beings, including EU citizens, long-term residents, and their family members, irrespective of nationality. The EU shares competence with its Member States to make law on the ‘internal market’, within which internal EU border control law falls.⁷ Public health protection formally falls within both EU and Member State competence,⁸ and is embedded in many ways by EU internal market law.⁹ Member States may restrict free movement on the basis of a narrowly defined list of exceptions, including public health, which apply through a relatively strict version of the principle of proportionality.¹⁰

EU *external* border law, as it applies to people, consists of an overlapping set of legal rules, reflecting the EU’s complex and evolving competences over human migration into the EU from the rest of the world. The key legal instrument here is the Schengen Borders Code, which governs the Schengen Area¹¹ and progressively abolishes border controls on *inter alia* people moving within the Schengen Area. Although the Schengen Borders Code is thus a measure of *internal* EU border law, it also reflects the EU’s attempt to agree a common set of rules for migration into the Schengen Area from countries outside the EU. However, the detail of external migration policy fundamentally remains a national competence.

⁴ *Treaty on the Functioning of the European Union [TFEU]*, art 20,21 (free movement of EU citizens); *TFEU* art 45 (free movement of workers); *TFEU* art 49 (freedom of establishment); *TFEU* art 56 (freedom to provide and receive services); *Charter of Fundamental Rights of the European Union*, art 45 (freedom of movement and residence).

⁵ See *Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, [2004] OJ L158/77; EC, *Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents*, [2004] OJ L 16/44.

⁶ There are literally thousands of these, both interpretations by national courts in the EU Member States, and interpretations by the EU’s Court of Justice.

⁷ *TFEU* art 4

⁸ *TFEU* art 6, 168.

⁹ For details see Tamara Hervey and Jean McHale, *European Union Health Law: Themes and Implications* (Cambridge University Press, 2015).

¹⁰ *TFEU* arts 21(1), 36, 52, 62,45(3), *Directive 2004/38/EC* supra arts 27,29; *Directive 2003/109/EC* supra, arts 6, 9(3), 17, 18.

¹¹ *Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, [2016] OJ, L77/1. Currently, 22 of the 27 EU Member States, as well as Iceland, Norway, Switzerland, and Lichtenstein are part of the Schengen Area. EU Member States that are not part of the Schengen Area are Bulgaria, Croatia, Cyprus, Ireland, and Romania.

Under the Schengen Borders Code, Schengen countries may reintroduce border controls, or restrict movement of people who would otherwise be entitled to cross the EU's external border, in response to a serious threat to public policy and internal security,¹² including the 'risk posed by a contagious disease'.¹³ If border controls are reintroduced, a notification requirement applies.¹⁴ Border checks are permitted to ensure that someone crossing an external EU border is not 'likely to jeopardise the ... public health ... of any of the Member States'.¹⁵ The EU's external border law is significantly less comprehensive, or stable, than its internal border law. For example, in response to the 'migration crisis', and the significant numbers of people from Syria seeking safety in the EU arriving through Greece, the EU had already allowed Austria, Denmark, Germany, Norway and Sweden to re-introduce temporary internal border control on people.¹⁶

The EU thus has partial competence to regulate the migration of people over its external borders, while having greater competence over internal border control. The EU's legislature has adopted key legislation, much of which is enforceable by an individual, against a violating Member State government. EU law makes provision for a 'preliminary reference', from a national court seized of a question of EU law, to the EU's Court of Justice, to determine the correct interpretation of EU law. The main aim of the legislation is to secure freedom of movement for people (and especially EU citizens and their families) within the EU.

3. European Union border laws under Covid-19

Given the centrality of free movement of people to the EU, and the depth of legal and policy integration in this field, the events of spring 2020 were perhaps a surprise.¹⁷ The EU's Member States, acting individually and in an uncoordinated way, adopted an array of border controls on people moving within and into the EU.¹⁸ Other parts of the world were also closing their borders to people moving from the EU, not always in very logical ways.

Starting from the back foot, the EU institutions began to act from quite early on. The European Commission did so drawing on data and advice provided by the ECDC. ECDC scientific guidance formed the basis of EU assessments of the travel-related risks of Covid-19

¹² *Schengen Borders Code* supra, arts 6(1)(d), 8(3)(vi), see also *Schengen Borders Code* art 25(1) about internal borders, and arts 25, 28, and 29 on procedural safeguards and temporal limitations.

¹³ *European Commission Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services* at para 18. Notably, the Schengen Borders Code itself does not expressly mention public health as a reason for the reintroduction of border controls.

¹⁴ *Schengen Borders Code*, supra, art 27.

¹⁵ *Schengen Borders Code*, supra, art 8 (3)(vi).

¹⁶ See e.g., *Council Implementing Decision (EU) 2017/818 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk* [2017] OJ L 122/73.

¹⁷ See further Vincent Delhomme and Tamara Hervey, "The European Union's response to the Covid-19 crisis and (the legitimacy of) the Union's legal order" (2023) *Yearbook of European Law*.

¹⁸ For an overview of the measures adopted, see Alberto Alemanno, "The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?" (2020) 11 *European Journal of Risk Regulation* 307; Carrera and Chun Luk, supra; Stefano Montaldo, "The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste" (2020) 5 *European Papers* 521.

transmission and when, and to whom, borders should be closed.¹⁹ The ECDC advised on quarantine and testing requirements, also in the context of the arising Covid-19 variants.²⁰ The ECDC worked with the EU Aviation Safety Agency to adopt an Aviation Health Safety Protocol which also contains guidance on testing and quarantine.²¹ The ECDC also advised on travel by ship and rail.²²

Many aspects of EU Covid-19 border governance were consistent with previous EU law and policy in crisis contexts, and with the EU's general law and policy on its borders. But some aspects of EU Covid-19 border governance were rather more unexpected, given the EU's legal competences. We outline below the key EU Covid-19 border laws, first on the EU's *internal* borders, and then on its *external* borders. The following analytical part of the chapter considers how we might assess the EU's contribution from a public health perspective.

3.1 EU internal borders

The Union's overall approach is illustrated well by the *Joint European Roadmap*,²³ and *Council Recommendation 2020/1475*.²⁴ Both are soft law measures. Both focus on removing travel restrictions and are imbued with narratives of 'opening up' and 'freedom'. Both purport to be based on 'science'.²⁵ Both seek to establish common criteria for adoption of travel restrictions. Under the *Recommendation*, travel restrictions are to be based on the density of positive Covid-19 cases in any particular area. The EU's Member States provided weekly data, and the EU portrayed that data in a map, broken down by region, using a 'traffic light' system.²⁶ The EU Council recommended no restrictions on movement of people coming to or from 'green' areas on the map. Quarantine or compulsory testing could be adopted for non-essential travellers to

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

²⁰ *European Centre for Disease Prevention and Control* "Technical Report - Guidance for COVID-19 quarantine and testing of travellers" (2021).

²¹ *European Centre for Disease Prevention and Control & European Union Aviation Safety Agency* "COVID-19 Aviation Health Safety Protocol - Guidance for the management of airline passengers in relation to the COVID-19 pandemic" (2020); *European Centre for Disease Prevention and Control & European Union Aviation Safety Agency* "Guidelines for COVID-19 testing and quarantine of air travellers - Addendum to the Aviation Health Safety Protocol" (2 December 2020).

²² *European Centre for Disease Prevention and Control* "Considerations for travel-related measures to reduce spread of COVID-19 in the EU/EEA" (26 May 2020); *European Centre for Disease Prevention and Control* "COVID-19 Rail Protocol: Recommendations for safe resumption of railway services in Europe" (21 July 2020).

²³ *European Commission and European Council, Joint European Roadmap towards lifting COVID-19 containment measures* [2020] OJ C 126/1.

²⁴ *Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic* [2020] OJ L337/3 at para 8 (Recommendation 2020/1475 was later replaced by *Council Recommendation (EU) 2022/107 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475* [2022] OJ L18/110. Both recommendations have also been applicable to the Schengen area: see *Council Recommendation (EU) 2020/1632 of 30 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic in the Schengen area* [2020] OJ L366/25.

²⁵ *European Commission and Council of Europe, Joint European Roadmap towards lifting COVID-19 containment measures* [2020] OJ C 126/1.

²⁶ Archives of data and maps may be accessed at: "Maps in support of the Council Recommendation on a coordinated approach to travel measures in the EU" (last modified 21 July 2022): *European Centre for Disease Prevention and Control* <<https://www.ecdc.europa.eu/en/covid-19/situation-updates/weekly-maps-coordinated-restriction-free-movement>>.

and from ‘orange’ and ‘red’ areas. The *Recommendation* was amended in early February 2021, as new, more infectious variants of Covid-19 proliferated,²⁷ to add a new category (‘dark red’) for areas with very high infection rates. In June 2021, vaccine rollout was factored into the *Recommendation* and maps.²⁸

As ‘soft’ law, Member States were able to ignore the EU’s recommendations, and as far as we are aware virtually every Member State did so at one point or another.²⁹

From the beginning, the Commission made recommendations for ‘effective border management’,³⁰ creating a model of ‘restrictive selection’ or ‘selective mobility’.³¹ The focus was on encouraging Member States to permit people who are mobile ‘by definition’ (frontier, posted and seasonal workers) and ‘essential workers’ in sectors such as health, food, essential infrastructures or transportation³² to cross internal borders. EU action thus focused on preserving the EU’s internal market, while recognising that a response to a global pandemic needed to restrict human movement. A similar logic applied to extra-Union travels, but, as explained below, was more restrictive of cross-border movement.³³

Consistent with a focus on the internal market, the EU moved as quickly as it could towards coordinating progressive *lifting* of internal border restrictions. This approach was central to *Recommendation 2020/1475*.³⁴ The logic of Covid-19 border controls, in the context of a ‘single’ EU market, including people as a ‘factor of production’, is suspect. As one academic commentator puts it: ‘Why should a journey from Berlin to Frankfurt be permitted, while travelling from Luxembourg to Frankfurt is not, even though both destinations currently constitute high-risk areas?’³⁵ And if movement is unfettered within a Member State, but national borders are controlled, even where neighbouring countries face a similar health

²⁷ Council Recommendation (EU) 2021/119 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, [2021] OJ L 361/1.

²⁸ Council Recommendation (EU) 2021/961 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, [2021] OJ L 213/1.

²⁹ For details on individual EU Member States’ border controls, see the country entries in “Lex-Atlas: Covid-19”: <<https://lexatlas-c19.org/>>.

³⁰ European Commission Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services [2020] OJ C 861; Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak [2020] OJ C/102I/12.

³¹ Sophie Robin-Olivier, “Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility” (2020) 5 *European Papers* 613.

³² Robin-Olivier, *supra*, at 616-617. See European Commission Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services [2020] OJ C 861, para 23; Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak [2020] OJ C/102I/12.

³³ Communication to the European Parliament, the European Council and the Council, ‘COVID-19: Temporary Restriction on Non-Essential Travel to the EU in view of COVID-19 COM (2020)115. See also Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, [2020] OJ L208I/1, annex II.

³⁴ European Commission and European Council, *Joint European Roadmap towards lifting COVID-19 containment measures* [2020] OJ C126/1.

³⁵ Daniel Thym and Jonas Bornemann, ‘Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics’ (2021) 2020 5 *European Papers* 1143, at 1168-1169. For other critiques in this vein, see, eg, Carrera and Chun Luk, *supra*; Davies, (2020) *supra*; Goldner Lang, *supra*.

situation, the restrictions on cross-border movement would normally be a disproportionate limitation in EU law.³⁶

But the EU did not use its hard law powers to underpin the desire to secure free movement within the EU's internal market. The European Commission did not take any formal legal action against Member States. Instead, the Commissioners for Justice and Home Affairs wrote informally to all Member States in February 2021, urging them to adhere to the Recommendations on travel restrictions.³⁷ It was also reported that letters were sent to six individual Member States, calling on them to bring their travel restrictions in line with EU law.³⁸

The EU took its next significant step towards lifting border controls in June 2021, for the summer season.³⁹ This step did involve 'hard' law, but law that seeks to *coordinate* Member State action, rather than to adopt a binding harmonised regional approach to Covid-19 border control. The EU adopted legislation to ensure that the certificates recognised by its Member States as evidencing Covid-19 vaccination, recovery or negative test, would be mutually recognised in all the EU Member States. These digital certificates are used in various contexts, including border control. Mutual recognition of a single 'EU Digital Certificate' aims to secure ease of cross-border movement both within and into the EU.⁴⁰ Initially planned to expire on 30 June 2022, the Regulations have been extended until June 2023.⁴¹

The EU Digital Certificate is controversial. The EU's concerns, alongside mutual recognition and interoperability, focused on removing border restrictions, also included protection of privacy and data protection.⁴² The EU has strong data protection laws and the technical design

³⁶ Cf C-34/79, *R v Henn and Darby*, (by analogy).

³⁷ *Letter from Commissioners Johansson and Reynders Addressed to the EU Ministers for Home Affairs and Justice on Travel Restrictions in the Context of the Covid 19 Pandemic* (17 February 2021) Brussels, Ares(2021)1401977.

³⁸ "EU Commission Urges Six Member States to Remove Some of Their COVID-19 Border Restrictions" *Schengen Visa Info News* (24 February 2021).

³⁹ *Communication from the Commission to the European Parliament, the European Council and the Council - A common path to safe and sustained re-opening* COM(2021)129.

⁴⁰ The certificate consists of two separate Regulations, one for Union citizens and their families and one for third-country nationals who are legally staying or residing in the Union. See *Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic*, [2021] OJ L211/1; *Regulation (EU) 2021/954 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic*, [2021] OJ L211/24.

⁴¹ *Regulation (EU) 2022/1034 amending Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic*, [2022] OJ L173/37; *Regulation (EU) 2022/1035 amending Regulation (EU) 2021/954 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic*, [2022] OJ L173/46.

⁴² See also *Commission Implementing Decision (EU) 2021/1073 laying down technical specifications and rules for the implementation of the trust framework for the EU Digital COVID Certificate established by Regulation (EU) 2021/953*, [2021] OJ L230/32.

of the EU Digital Certificate was intended to ensure compliance with those.⁴³ Although legally speaking the EU Digital Certificate is not *required* for exercise of EU free movement rights, *in practice* movement within the EU is significantly impeded for people who do not have the Certificate. This has raised concerns about inequalities across the EU, as the issuing of the Certificates is a national, not EU, competence.⁴⁴ The Regulation 2021/953 has been legally challenged, but the relevant claims were held to be inadmissible.⁴⁵ Perhaps surprisingly, there seems to be less concern about fraud, than about privacy, even though the system meant that the whole EU was as vulnerable as the weakest link in vaccination certification.⁴⁶

3.2 EU external borders

One of the earliest measures of EU Covid-related border control concerned travel into the EU from outside its external borders. The Commission recommended a temporary restriction on non-essential travel on 16 March 2020.⁴⁷ The Recommendation did not apply to EU citizens or long-term and other legal EU residents. Nor did it define ‘non-essential travel’, but instead it provided a non-exhaustive list of essential functions and needs, including health- and elder-care professionals and health researchers; frontier workers; transport and haulage workers; diplomats and other international workers, including those providing humanitarian aid; imperative family reasons; humanitarian protection; and passengers in transit. The next day, the Heads of State and Government of the EU Member States and the four Schengen Associated States agreed to implement the temporary restriction.⁴⁸ As with measures on internal borders, the relevant measure took the form of soft law. These initial restrictions were repeatedly extended.⁴⁹

⁴³ See further, *Commission Implementing Decision (EU) 2021/1073 laying down technical specifications and rules for the implementation of the trust framework for the EU Digital COVID Certificate established by Regulation (EU) 2021/953*, [2021] OJ L230/32. In this context, the E-Health network adopted Guidelines on interoperability and the Health Security Committee adopted a common dataset to be included in the Covid-19 test certificates: “eHealth and COVID-19”: <https://health.ec.europa.eu/ehealth-digital-health-and-care/ehealth-and-covid-19_en>.

⁴⁴ See e.g. Henry T Greely, “COVID-19 Immunity Certificates: Science, Ethics, Policy, and Law” (2020) 7 *Journal of Law and Bioscience* 13; Alberto Alemanno and Luiza Bialasiewicz, “Certifying Health: The Unequal Legal Geographies of COVID-19 Certificates” (2021) 12 *European Journal of Risk Regulation* 273; Sarah Ganty, “The Veil of the COVID-19 Vaccination Certificates: Ignorance of Poverty, Injustice towards the Poor” (2021) 12 *European Journal of Risk Regulation* 343; Mark A Hall and David M Studdert, “‘Vaccine Passport’ Certification — Policy and Ethical Considerations” (2021) 385 *New England Journal of Medicine* e32; Iris Goldner Lang, “EU COVID-19 Certificates: A Critical Analysis” (2021) 12 *European Journal of Risk Regulation* 298.

⁴⁵ T-503/21, *Lagardère, unité médico-sociale v Commission*; T-527/21 *Abenante and Others v Parliament and Council*.

⁴⁶ See Michael Veale’s chapter.

⁴⁷ *Communication to the European Parliament, the European Council and the Council, COVID-19: Temporary Restriction on Non-Essential Travel to the EU in view of COVID-19*, COM(2020)115. The Commission gave further guidance on the implementation of the travel restrictions: see *Communication from the Commission COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy*, [2020] OJ C102I/3.

⁴⁸ European Council, News Release, “Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19” (17 March 2020).

⁴⁹ The 30-day limitation placed on travel into the EU via *Communication from the Commission: COVID-19: Temporary Restriction on Non-Essential Travel to the EU*, COM(2020)115 was prolonged by further *Commission*

By summer 2020, the EU focus had changed to progressive lifting of the restrictions on non-essential travel into the EU.⁵⁰ A June 2020 *Council Recommendation* requested that Member States lift travel bans from certain countries.⁵¹ The Recommendation listed non-EU countries in a regularly-updated annex, for which travel into the EU for their residents should be facilitated. Inclusion on the list was supposed to be based on epidemiological criteria, including the number of Covid-19 cases, decreasing case numbers, testing and containment. This Recommendation was amended in May 2021, to take into account vaccine rollout.⁵²

In its original form, in June 2020, the list of ‘third countries whose residents should not be affected by temporary external borders restriction on non-essential travel into the EU’ included Australia, Canada, Japan, New Zealand, South Korea, and Thailand. China was included on a reciprocal basis only. The only African countries were Algeria, Morocco, Rwanda and Tunisia. By early June 2021, after the vaccine rollout, the list was shorter, no longer included Canada, included Israel, and the only country in Africa that was included was Rwanda. By 18 June 2021, the list had been amended again, to include the USA, but no other country in Africa had been added. By early July 2021, Canada was back on the list, but still no other country in Africa. By mid July 2021, no country in Africa was on the list. Rwanda returned to the list in late September 2021, to be joined by Namibia from late October to early December 2021.⁵³

Because of possible changing global virus mutations, the May 2021 Recommendation includes an ‘emergency brake’, allowing Member States to rapidly adopt new restrictions on an individual basis, subject to subsequent coordination at EU level. The EU’s provisions thus not only took the form of soft law, but also permitted uncoordinated Member State action, on the proviso only that coordination took place later.

4. Analysis and Conclusions

The political dynamics of the (perhaps ill-founded) reassurance that comes from border closure were at play in the EU’s unfolding Covid border (soft) law and policy.⁵⁴ The EU Member States’ governments shared a view that both internal⁵⁵ and external borders should be closed. The EU institutions played into this consensus, by articulating an idea of the EU as ‘protective’ of its citizens and residents.

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

⁵⁰ *Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction*, [2020] OJ L 208I/1 .

⁵¹ *Communication from the Commission - Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*, [2020] OJ C 102I/12.

⁵² *Council Recommendation (EU) 2021/816 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction*, [2021] OJ, L 182/1.

⁵³ This list echoes the message of Chidi Oguamanam’s chapter, about the colonial patterns of othering Africa in border control, and also the relative lack of access to Covid-19 vaccines in countries in Africa.

⁵⁴ Thym and Bornemann, ‘supra’; Sarah Wolff, Ariadna Ripoll Servent and Agathe Piquet, “Framing Immobility: Schengen Governance in Times of Pandemics” (2020) 42 *Journal of European Integration* 1127.

⁵⁵ Stefan Salomon and Jorrit Rijpma, “A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship” (2021) *German Law Journal* 1.

The key features of EU Covid border law and policy can be summarised as follows. The EU relied on ‘soft’ law, based on technocratic / ‘science-based’ decision-making. The EU’s initial activities only much later led to measures of ‘hard’ law. EU law and policy is imbued with a focus on ‘freedom’ and ‘opening’ up. EU law and policy makes a distinction between the EU’s internal borders and its external borders. All of these features of EU Covid law on borders have important implications for public health. Each is discussed in turn.

First, the EU’s initial responses, and the vast majority of its ongoing governance of the pandemic, took the legal form of soft law. The EU’s institutions relied on Commission Communications and Guidelines, Council Recommendations and technical/scientific guidance of EU agencies, in particular the ECDC. The ECDC played a crucial role, as a body in charge of collecting, evaluating and disseminating relevant scientific data, providing scientific opinions and assistance, and exchanging information and best practices.⁵⁶ The European Commission also sought to coordinate scientific guidance through a ‘scientific advice platform’, bringing together advisors from national governments of the Member States, which has been meeting once or twice a month since November 2020.⁵⁷ This approach is very much ‘classical’ international law: using statements of good practice, and sharing recommendations based on comparative data, in order to steer Member States towards particular behaviours. It is quite different from the ‘ordinary’ EU law of border control and human migration, as outlined briefly above.

The public health implications of a soft law approach are difficult to measure. On the one hand, the EU’s approach meant significant and irrational variance in border control within and into the EU. On the other hand, soft law leaves significant discretion at national, or even sub-national, levels for Member States to determine their own border control laws and policies. The EU’s approach meant that the irrationality and disproportionality of EU Member States’ border control laws were not tackled with the EU’s legal powers. There were no legal/constitutional challenges to EU border controls, equivalent to those seen in Canada or Australia.⁵⁸ But, given that border control is an effective proportionate response to a global pandemic only in certain circumstances,⁵⁹ and given that the EU has very limited competence to adopt necessary other measures, perhaps we should ‘forgive’ the EU for the effects on public health of its soft law approach.

Second, the EU’s approach was portrayed as based on ‘technocratic’ or ‘scientific’ decision-making: the EU ‘regulatory state’ in its normal mode of governance.⁶⁰ The EU produced its own interpretations of ‘the science’, and disseminated those among its Member States. It took the view that both EU and national law and policy-making should be based on ‘sound science’. Of course, in the context of the Covid-19 pandemic, ‘the science’ was highly contested.

⁵⁶ *Regulation (EC) No 853/2004 establishing a European Centre for disease prevention and control*, [2004] OJ L 142, art 3. See Tamara Hervey, “The Role of the European Court of Justice in the Europeanization of Communicable Disease Control: Driver or Irrelevance?” (2012) 37 *Journal of Health Politics, Policy and Law* 975.

⁵⁷ European Commission, *EU Scientific Advice platform on COVID-19*: <https://health.ec.europa.eu/health-security-and-infectious-diseases/preparedness-and-response/eu-scientific-advice-platform-covid-19_en>.

⁵⁸ See chapters by Brenda Wilson (Canada) and Stephen Duckett (Australia).

⁵⁹ See e.g. chapters by Lisa Forman, David Fisman, and Raywat Deonandan. See also <https://www.vox.com/22346085/covid-19-vietnam-response-travel-restrictions>.

⁶⁰ Giandomenico Majone, “The Regulatory State and Its Legitimacy Problems” (1999) 22 *West European Politics* 1.

Furthermore, the EU did not operate in a vacuum, but worked with the World Health Organisation, and with its Member States, in both gathering and analysing data, and in developing its policy recommendations.⁶¹ The EU allowed more latitude than usual to the risk assessments of its Member States. In this way, the EU was able to portray its Covid-19 border governance as legitimate, and even ‘depoliticised’, by decision-making residing with technocratic agencies.⁶² However, the EU actually took many ‘political’ decisions in its response to the pandemic, including collective vaccine procurement, the Covid-19 Digital Certificate or the Next Generation EU recovery and resilience plan.⁶³

This aspect of the EU’s approach is consistent with the EU’s tendency to articulate certainty where it is not present, and raises questions about how responsive the EU is to political or ethical concerns.⁶⁴ Public health governance, as understood broadly across this book, *includes* its ethical and political dimensions: it is not a purely technocratic undertaking (even if that were possible). In its depoliticised portrayal of its Covid-19 border control, the EU obfuscated its political choices. The EU’s approach also left almost no space for discussion of ethical dimensions, especially not through legal processes, which allow for holding executives to account.

Third, the narratives of the EU’s Covid-19 border governance are striking in their focus on ‘freedom’. While the Member States were closing borders, even from the very beginning of the pandemic’s hold in Europe, the EU was articulating recommendations that focused on *opening* borders. These began as articulations of shared EU concepts of essential migration, be that key workers, or repatriation of residents or humanitarian protection for vulnerable or displaced people. They developed into ‘science-led’ recommendations to open the EU’s internal borders, and eventually the EU’s external borders. They ‘hardened’ into mutual recognition of the ‘EU Digital Covid Certificate’.

The implications for public health on ‘opening’ and ‘freedom’ are difficult to assess. In the earlier phases of the pandemic, before effective vaccines were available, they were obviously at odds with most other global legal and policy responses. To protect populations, health

⁶¹ See e.g. European Centre for Disease Prevention and Control, *Introducing a coherent European framework for tuning COVID-19 response measures* (17 March 2021).

⁶² Maria Weimer and Anniek de Ruijter “Regulating Risks in the European Union : The Co-Production of Expert and Executive Power” in Maria Weimer and Anniek De Ruijter, eds, *Regulating Risks in the European Union : The Co-Production of Expert and Executive Power* (Hart Publishing, 2017) 3. See also Damian Chalmers, “Food for Thought: Reconciling European Risks and Traditional Ways of Life” (2003) 66(4) *Modern Law Review* 532; Damian Chalmers, “Risk, Anxiety and the European Mediation of the Politics of Life” (2005) 30(5) *European Law Review* 649.

⁶³ Vincent Delhomme and Tamara Hervey, *supra*; Vivien A Schmidt, “Theorizing Institutional Change and Governance in European Responses to the Covid-19 Pandemic” (2020) 42 *Journal of European Integration* 1177; Sarah Wolff and Stella Ladi, “European Union Responses to the Covid-19 Pandemic: Adaptability in Times of Permanent Emergency” (2020) 42 *Journal of European Integration* 1025.

⁶⁴ Sheila Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton: Princeton University Press, 2007); Maria Weimer, *Risk Regulation in the Internal Market: Lessons from Agricultural Biotechnology* (Oxford University Press, 2019); Ellen Vos and Michelle Everson (eds), *Uncertain risks regulated* (Routledge-Cavendish 2009); Marjolein BA van Asselt and Ellen Vos, ‘The Precautionary Principle and the Uncertainty Paradox’ (2006) 9 *Journal of Risk Research* 313; Ellen Vos, ‘EU Food Safety Regulation in the aftermath of the BSE Crisis’ (2000) 23 *Journal of Consumer Policy* 227. Regarding the Court of Justice’s case law on free movement provisions, see Gareth Davies, “Internal Market Adjudication and the Quality of Life in Europe” (2015) 21 *Columbia Journal of European Law* 289, 298.

systems, and individuals, major restrictions on freedom were justified. But, especially as vaccines were rolled out, it became necessary to consider also the other health (especially mental health), and wider effects of the initial lockdowns. Perhaps the EU's articulations of 'freedom' and 'opening up' felt rather inappropriate in summer 2020, when so many people across the world were still to be fully vaccinated. They certainly sit at odds with any values of global health equity, given the lack of global approach to vaccine rollout and the consequent lack of access to essential medicines across many least-developed countries.⁶⁵

A fourth key feature of the EU's response is a focus on opening internal borders, at the expense, if necessary, of closing or keeping closed external borders. As Commissioners Johansson and Reynders put it in February 2021, the EU supported the Member States' choice 'to be strict when it comes to travel to the Union, while maintaining the necessary mobility within the Union'.⁶⁶ The characterisation of internal mobility as 'necessary' is revealing, and, as we have seen in other chapters in this book, bears little resemblance to public health indicators. The differential treatment in EU law of internal and external borders was already well-established in EU law and policy, for example in response to the so-called 'migration crisis'.⁶⁷ It resonates with notions of 'citizenship' and 'nationhood', for instance as at issue in the Canadian *Taylor* case.⁶⁸ While the focus of the EU was on 'opening' and 'lifting' border controls, when it came to borders external to the EU, these were to be lifted only 'in a second stage'.⁶⁹ The EU's Covid-19 border laws perpetuated the existing differential treatment of different types of human migration in EU law, rather than considering the inherent dignity of all migrant human beings present within the EU, or seeking to come to the EU. Further, they embed global structural inequalities that flow from (post)colonial relations.⁷⁰ In this regard, we can consider the EU's response as deficient.

Overall, despite significant EU competence over internal borders and some over external borders, the EU Covid-19 border laws respected a very wide range of divergence between the Member States in how the risks associated with the pandemic were managed.⁷¹ Despite the *narratives* of 'science-based' decision-making, in practice both internal and external EU borders were closed for longer than necessary from a public health point of view, for reasons which can be understood as political. Advice from both the WHO and the EU's own ECDC⁷² to the effect that undifferentiated border closures are overall ineffective⁷³ was not heeded by

⁶⁵ See [chapters by Sam Halabi and Adam Houston](#).

⁶⁶ *Letter from Commissioners Johansson and Reynders Addressed to the EU Ministers for Home Affairs and Justice on Travel Restrictions in the Context of the Covid 19 Pandemic*, Ares(2021) 1401977.

⁶⁷ Thym and Bornemann, *supra*, at 1555-1557.

⁶⁸ *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, discussed in [Brenda Wilson's chapter](#).

⁶⁹ *European Commission and European Council, Joint European Roadmap towards lifting COVID-19 containment measures i*, [2020] OJ C 126/1.

⁷⁰ See the [chapter by Chidi Oguamanam](#).

⁷¹ Davies, (2020) *supra*; Peter Van Elsuwege, "Lifting Travel Restrictions in the Era of COVID-19: In Search of a European Approach" (2 June 2020), *Verfassungsblog* <<https://verfassungsblog.de/lifting-travel-restrictions-in-the-era-of-covid-19-in-search-of-a-european-approach>>; Alessio M Paces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) 11 *European Journal of Risk Regulation* 283.

⁷² *Communication to the European Parliament, the European Council and the Council, 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU in view of COVID-19'* COM (2020)115.

⁷³ WHO, News Release, "Policy and technical considerations for implementing a risk-based approach to international travel in the context of COVID-19" (2 July 2021); European Centre for Disease Prevention and

the Member States. The European Commission did nothing to challenge these national politically-based decisions. Roles for law and legal accountability were diminished, meaning that scrutiny of executive power deployed to control borders within and at the edges of the EU was also diminished. Effective public health governance should be subject to the rule of law: in this regard, the EU's Covid-19 border law and policy may be found lacking.

Control, "Considerations for travel-related measures to reduce spread of COVID-19 in the EU/EEA" (26 May 2020).