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The European Union's response to the Covid-19 crisis and (the legitimacy of) the Union's legal order

Vincent Delhomme*, Tamara Hervey†

ABSTRACT

In EU legal scholarship, crises are associated with further European integration, often with legal and institutional innovations. Our analysis, covering examples of all aspects of 'Union Covid law', investigates two questions. To what extent is this true for the Covid-19 crisis—is Union Covid law what we expected? How has the pandemic re-shaped our understanding of the Union's legal order, and especially its legitimacy? We draw out three broad overlapping themes, the 'market/social', 'science/politics', and 'technocracy/democracy' dimensions of Union law. We consider both the Union's health law, and its economic governance, alongside other changes across a wide sweep of Union law including institutional law, and numerous aspects of internal market law, such as competition/state aids and consumer protection law. Overall, we show that Union Covid law is mostly predictable. However, our analysis demonstrates two important surprises. First, a narrow notion of the disciplines of the internal market, usually supposed to be fundamental to Union law, has been profoundly challenged. Second, the Union has not only deployed all its existing redistributive competences to respond to the pandemic. The Union has also effectively redefined its fiscal and economic governance powers to create a redistributive facility which, though formally limited in time, far exceeds in scale and scope any previous Union redistributive activity. Past Union crisis responses involved changes taking place outside Union legal structures, with the law sometimes 'playing catch up' in later Treaty amendments. This time, the Union's Covid-19 crisis response at least purportedly takes place within existing legal constraints. This is new. We show, on the one hand, that the Union's 'output' legitimacy has been enhanced. The Union is not forever condemned to lack legitimacy because of its economic constitutional settlement. The idea of a Union based on a legally encoded dominance of the 'economic' over 'health' interests—already widely discredited in Union health law scholarship—is replaced by Union law based on creative interpretations of formal competences, designed to meet the needs of human health as well as Union-wide economic recovery. On the other hand, however, the move to executive and technocratic governance associated with the Union's pandemic response is a step backwards in terms of 'input' and 'throughput' legitimacy, in terms of both policy substance and law enforcement. The lack of democratic or judicial oversight over Union Covid-19 (soft) law negatively affects the legitimacy of Union law.

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I. INTRODUCTION

It is said that Winston Churchill, when working to build the United Nations in the 1940s, observed that one should 'never let a good crisis go to waste'.¹ The concept of 'crisis' is contested,² but here we consider a crisis to be an unfolding circumstance which is generally understood as constituting an urgent and profound threat to core community values and the structures and institutions that support those values.³ There is no doubt that the Covid-19 pandemic represents such a crisis. As health infrastructures became overwhelmed, stay-at-home orders proliferated, businesses closed, and despite all this, millions of people died,⁴ core values, especially freedom, associated with advanced capitalist democracies were threatened.

In this article, we investigate how the European Union's ('Union') legal order shaped the Union's response to Covid-19, and, in turn, how the Covid-19 crisis has re-shaped how we might understand the Union's legal order.⁵ In Union (legal) scholarship, crises such as the 'global financial/Eurozone crisis' and the 'migration crisis',⁶ or, further back in time, the 'BSE crisis'⁷ and the 'empty chair crisis',⁸ are associated with drives to further integration, and with legal and structural innovation. If you like, we are thinking about the extent to which the Union 'let the crisis go to waste', but that is to assume that more or deeper European integration is necessarily a good thing, which we would regard as unnecessarily reductive. Instead, our central research agenda is to consider to what extent some of the key distinctive features of Union law had an effect on the Union's legal responses to Covid-19.⁹ Our focus is unashamedly *legal*: we cannot be exhaustive in terms of everything the Union has done in response to the pandemic, and we are concentrating on aspects of the Union's response that are legally significant. Throughout, we revisit some of the 'classic' questions of Union law, and we ask ourselves: is the overall legal response what we could have expected in advance, or are there surprises along the way?

The analysis which follows is organized into three broad themes. We acknowledge that these overlap and interact. They can be summarized as the dyads 'market/social', 'science/politics', and 'technocracy/democracy'. We begin with the legal concept of Union competence (Section II). How did the Treaty provisions that empower the Union institutions to take legal actions shape, constrain, or otherwise determine the Union's key legal responses to the pandemic? Did the Union limit itself to 'value-added' legal acts, leaving the rest to its Member States? We then turn to the roles of economic integration, the internal

¹ Guillaume Gruère, 'Never Let a Good Water Crisis Go to Waste' (2019) OECD <<https://www.oecd.org/agriculture/never-waste-a-good-water-crisis/>> accessed 11 October 2022.

² Reinhart Koselleck and Michaela W Richter, 'Crisis' (2006) 67 *Journal of the History of Ideas* 357.

³ Arjen Boin, Paul't Hart and Allan McConnell, 'Crisis Exploitation: Political and Policy Impacts of Framing Contests' (2009) 16 *Journal of European Public Policy* 81, 83–4.

⁴ Globally, as of 23 November 2022, the WHO counts 6603, 803 deaths from Covid-19: WHO, 'WHO Coronavirus (COVID-19) Dashboard' <<https://covid19.who.int/>> accessed 23 November 2022.

⁵ On how a concern with 'crises' (specifically the 'Kosovo crisis') shapes international law, see Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *The Modern Law Review* 377.

⁶ See, eg Justin Borg-Barthet and Carole Lyons, 'The European Union Migration Crisis' (2016) 20 *Edinburgh Law Review* 230; Andrew Geddes, Leila Hadj Abdu and Leiza Brumat, *Migration and Mobility in the European Union* (London: Bloomsbury 2020) 3; Neil Nugent, *The Government and Politics of the European Union* (London: Bloomsbury 2017) ch 1; Thomas Beukers, Bruno de Witte and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge: CUP 2017).

⁷ See, eg Keith Vincent, 'Mad Cows' and Eurocrats: Community Responses to the BSE Crisis' (2004) 10 *European Law Journal* 499; Ellen Vos, 'EU Food Safety Regulation in the aftermath of the BSE Crisis' (2000) 23 *Journal of Consumer Policy* 227; Martin Westlake, 'Mad Cows and Englishmen': The Institutional Consequence of the BSE Crisis' in Neil Nugent (ed), *European Union 1996: The Annual Review* (Chichester: Wiley 1997).

⁸ See, eg Helen Wallace and Pascaline Winand, 'The Empty Chair Crisis and the Luxembourg Compromise Revisited' in Jean-Marie Palayet, Helen Wallace and Pascaline Winand (eds), *Visions, Votes and Vetoes: The Empty Chair Crisis and the Luxembourg Compromise Revisited* (Brussels: PIE Peter Lang 2006).

⁹ For a comparative perspective on national legal responses to Covid-19 in Europe, see Ewoud Hondius and others (eds), *Coronavirus and the Law in Europe* (Cambridge: Intersentia 2021), and the entries in the Lex-Atlas Covid-19 <<https://lexatlas-c19.org/>> accessed 23 November 2022.

market, fiscal governance, and their place in the Union's constitutional order (Section III). To what extent do the Union's legal drivers towards creation of a space of free movement within the Union, relatively closed to the rest of the world,¹⁰ exert a totalizing effect on Union action? How do the complex notions of 'the market' and 'the social' interact in the law of the Union's 'economic constitution'¹¹—does the law encode particular ways of understanding those concepts as in conflict or operating in tandem?

We then move to two themes that engage more general discussions on the type of legal entity that the Union is or seeks to become (Section IV). The first of these is the concept of the Union as a technocratic 'regulatory state'.¹² How does the Union's use, as a primary response to the Covid-19 crisis, of soft law and other 'steering' governance structures, reliant on discourses of 'science', rather than 'politics', affect our understanding of the nature of the Union as a legal order? Second, we consider the Union as a legal order based on representative democracy. How was the European Parliament affected by the Covid-19 crisis, and what did that mean for its law-making powers, and its oversight of Union executive decision-making? Does the Union's Covid-19 response reveal weaknesses in the conceptualization of the Union as a democratic legal order, beyond those that would be expected in a crisis where executive decision-making becomes necessary to protect human health?

All of these themes engage classic questions about how the Union's legal order may, or may not, be regarded as legitimate. As observers of the history of the Union's health law, we agree that European 'politics of emergency' affect the foundations of the Union legal order and raise questions of legitimacy.¹³ Whether we consider input, output or 'throughput' legitimacy,¹⁴ to what extent does the depth or breadth of Union legal integration outstrip the rules, institutions and structures that serve to justify the Union's governance and its effects on the lives of the 'peoples of Europe'? To what extent is there a legally or 'constitutionally' encoded mismatch between 'the market', 'the economic', and 'the social' which condemns the Union forever to lack fundamental legitimacy as a governance space? What about the mismatches between Union powers over monetary integration and budgetary/economic governance? Between (de)regulation and redistribution? Where are the sources of Union legitimacy: in Union law on its democratic institutions, technocratic administrative institutions, judicial institutions, or elsewhere? We reflect back on what our analysis reveals about these questions in our conclusions (Section V).

II. THE UNION COVID-19 RESPONSE THROUGH THE PRISM OF COMPETENCE: WHAT LESSONS?

A first and perhaps obvious distinctive feature of Union law that has shaped the Union's legal response to the Covid-19 pandemic is the limited character of Union competence. The Union is an entity of conferred powers, meaning that it can only act within the remit of the mandate that has been attributed to it under the Treaties. This is particularly relevant to a health crisis, a field where the Union has been granted limited formal powers, and where

¹⁰ See, eg Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: OUP 2020).

¹¹ On the different constitutions of the EU and the tensions between them, see Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Abingdon: Routledge 2016).

¹² Giandomenico Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77; Giandomenico Majone (ed), *Regulating Europe* (Abingdon: Routledge 1996); Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 *Journal of Public Policy* 139.

¹³ Christian Kreuder-Sonnen and Jonathan White, 'Europe and the Transnational Politics of Emergency' (2022) 6 *Journal of European Public Policy* 953.

¹⁴ Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 *Political Studies* 2.

many relevant powers are shared with the Member States. It is thus unsurprising that the Union's public health response has consisted mostly in adopting steering and guidance measures, focusing on coordination and sharing of information and scientific advice; partnership and collaboration with Member States (Section II.A). The nature of Union competences in public health has nonetheless not prevented the Union from making the most out of its powers and using them in a creative way to address the consequences of the pandemic, in particular the economic consequences (Section II.B). Covid-19 provides an occasion to reflect on the Union's constitutional framework of competence and possible changes to be made (Section II.C).

A. The complex canvas of Union health competences

For most of the public health response to the Covid-19 pandemic, the Union was not in the driver's seat. The Union did not order stay-at-home measures, deal with hospital planning, devise vaccine strategies, or set up furlough schemes. Member States were in charge. In these key areas of governmental action, the Union did not have the legal competence to act. Formally speaking, the Union has only been granted limited powers in the field of public health.¹⁵ But the Union competence framework for health is more complex than that formal assessment. To understand that framework, it is necessary to go beyond the simplistic 'no competence in health' discourse, which was very much present at the beginning of the pandemic.

In a systemic health crisis such as that provoked by the SARS-CoV-2 virus, a health response may be divided into three tiers: (i) the preventive aspect of limiting the spread of the virus through public health measures, such as social distancing or closure of premises; (ii) the organization of the healthcare system, in particular, hospitals with intensive care units, and the supply of necessary equipment to protect health professionals who care for those who become critically unwell; and (iii) the procurement of medical countermeasures, such as medicines to cure those infected by the virus or vaccines to protect people from infection. Each of these areas corresponds to a different competence of the Union, for health has a 'mixed competence structure'¹⁶ under the Treaties.

Article 6(a) TFEU grants a competence to the Union to carry out actions to support, coordinate or supplement the actions of the Member States as regards the 'protection and improvement of human health'. Under Article 168(1) TFEU:

Union action, which shall complement national policies, shall be directed towards improving public health, *preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health*. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and *monitoring, early warning of and combating serious cross-border threats to health*.¹⁷ (italics added)

As can be read from Article 168(1), Union action is centred on 'public health' issues, understood as the management of health risks and the prevention of disease,¹⁸ as opposed to

¹⁵ Arts 6(a) and 168 TFEU.

¹⁶ Sacha Garben, 'Article 168 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: OUP 2019) 1448.

¹⁷ Emphasis added.

¹⁸ Scott L Greer, 'The Three Faces of European Union Health Policy: Policy, Markets, and Austerity' (2014) 33 *Policy and Society* 13, 13; Tamara K Hervey and Jean V McHale, 'What Is European Union Health Law?' in Tamara K Hervey and Jean V McHale, *European Union Health Law: Themes and Implications* (Cambridge: CUP 2015) 69.

'healthcare', the provision of health services and medical care.¹⁹ The Union is competent to support Member States in monitoring and combating serious cross-border health threats, such as Covid-19. In this area, however, Union action is limited to the adoption of incentive measures²⁰ or recommendations,²¹ to the exclusion of any harmonization measures.²² Although the precise meaning of 'harmonization' remains unclear, it should be at least interpreted as meaning that the Union may not adopt measures which affect the autonomy of Member States to conduct their own policies.²³ The Union may steer, support, coordinate, but nothing more. The Union's competence in this regard, for cross-border health threats, takes legal and institutional form through Decision 1082/2013/EU,²⁴ which has been central to the Union's response to the Covid-19 pandemic. The Decision contains provisions on epidemiological surveillance, through the European Centre for Disease Prevention and Control (ECDC),²⁵ monitoring, early warning, and response planning to serious cross-border health threats.²⁶ The Decision formally establishes a Health Security Committee, composed of representatives of the health ministries of the Member States, to coordinate national responses.²⁷ The Decision also sets up a joint procurement scheme for medical countermeasures, which has been used for various purposes such as personal protective equipment ('PPE'), ie gloves, coveralls, masks, etc, laboratory equipment or medicinal products.²⁸

As regards health care, the second aspect of the health response to a pandemic, the Union's role is even more limited. Article 168(7) makes clear that 'Union action shall respect the responsibilities of the Member States [...] for the organisation and delivery of health services and medical care', including 'the management of health services and medical care and the allocation of the resources assigned to them'. In that field, Union action is limited to the coordination of social security systems²⁹ and cross-border healthcare.³⁰ Competences here are found in Articles 48 and 114 TFEU. In the context of Covid-19, one might think that the Union could do nothing to respond to the challenges that the pandemic meant for healthcare systems. While in general this may be true, it is not the case entirely. The Commission contributed to coordinating the collaboration and mutual support of healthcare facilities, for the transfer of patients for instance, especially in border

¹⁹ On the difference between 'public health' and 'health-care', see Anniek de Ruijter, *EU Health Law & Policy: The Expansion of EU Power in Public Health and Health Care* (Oxford: OUP 2019) 62. 'Public health' is hence understood here in a narrow sense, unlike the sense given to it under the Treaties, which is interchangeable with that of 'human health'.

²⁰ Art 168(5) refers both to 'incentive measures' and 'measures'. Following Bartlett's contextual and historical interpretation of this provision, one may conclude that these refer to the same type of act, which excludes harmonization, and that the use of both expressions is a result of poor drafting: Oliver Bartlett, 'The EU's Competence Gap in Public Health and Non-Communicable Disease Policy' (2016) 5 *Cambridge International Law Journal* 50, 60.

²¹ Art 168(6) TFEU.

²² Arts 2(5) TFEU and 168(5) TFEU.

²³ See Robert Schütze, 'Co-operative Federalism Constitutionalized: The Emergence of Complementary Competences in the EC Legal Order' (2006) 31 *European Law Review* 167; Bartlett (n 20) 63–4; Robert Schütze, 'Classifying EU Competences: German Constitutional Lessons?' in Sacha Garben and Inge Govaere (eds), *The Division of Competences Between the EU and the Member States: Reflections on the Past, the Present and the Future* (Oxford: Hart Publishing 2017) 50.

²⁴ Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC [2013] OJ L293/1.

²⁵ Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control [2004] OJ L142/1.

²⁶ Decision 1082/2013, Art 1.

²⁷ Decision 1082/2013, Art 17. This committee meets several times a month and has played a key role for coordination during the pandemic. The reports are available at <https://health.ec.europa.eu/health-security-and-infectious-diseases/preparedness-and-response/health-security-committee-hsc/health-security-committee-reports_en> accessed 11 October 2022.

²⁸ Decision 1082/2013, Art 5. The various contracts may be retrieved via <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/ensuring-availability-supplies-and-equipment_en#identifying-demands-and-matching-supplies-of-medical-equipment> accessed 11 October 2022.

²⁹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.

³⁰ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45.

regions.³¹ The Commission was able to build on the long-standing 'Euregios', in which health cooperation has been a strong dimension since the 1990s, such as the Germany–Netherlands–Belgium, Denmark–Sweden, or Spain–Portugal border regions.³² Nonetheless, Union action was limited to that. No guidance of which we are aware, even in the form of non-binding soft law measures, was given regarding the organization of healthcare systems, especially hospitals, during the crisis.

In the third aspect of Union public health competence, on medicinal products and medical devices and equipment, the Union is specifically granted with a stronger competence of a shared nature. Under Article 4(2)(k) TFEU, the Union shares competence with the Member States in the area of 'common safety concerns in public health matters', which permits the adoption of harmonization measures 'setting high standards of quality and safety for medicinal products and devices for medical use'.³³ Here, the Union's competence in public health should be understood alongside its internal market competence. Article 114(3) TFEU requires the Commission to 'take as a base a high level of protection', 'taking account in particular of any new development based on scientific facts', when proposing internal market measures concerning, *inter alia*, health. The Union as a whole is obliged 'in defining and implementing [all] its policies and activities' to take into account 'requirements linked to [...] a high level of [...] protection of human health'.³⁴ Products like medicines, vaccines, medical devices, and medical equipment like PPE are subject to Union internal market law throughout their life cycle from development, clinical trials, manufacturing, marketing, and post-marketing surveillance ('pharmacovigilance').³⁵ The European Medicines Agency (EMA) played a pivotal role in the roll-out of Covid-19 treatments and vaccines,³⁶ ensuring that these are safe for human use. Thus the role of the Union extended beyond the procurement of medicines, vaccines, or tests, because medicines are regulated by the EMA and Covid-19 tests are medical devices which are subject to Union regulation.³⁷ However, the development of vaccination policies (such as the definition of priority groups, and so on) as well as the actual conduct of the vaccination campaigns (such as the modalities of their implementation, for example, who administers vaccines and where they are administered) falls within the remit of the Member States.³⁸ So far, all is as expected. The Union respected the allocation of competences in Articles 168, 114, and 48 TFEU, leaving most aspects of crisis response to the Member States.

³¹ European Commission, 'Communication from the Commission—Guidelines on EU Emergency Assistance on Cross-Border Cooperation in Healthcare related to the COVID-19 crisis' [2020] OJ C111/1. See also European Commission, Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions, 'Short-term EU health preparedness for COVID-19 outbreaks' COM (2020) 318 final.

³² See Helmut Brand and others, 'Cross-Border Health Activities in the Euregios: Good Practice for Better Health' (2008) 86 *Health Policy* 245.

³³ See Art 168(4). In conjunction with Art 114 TFEU.

³⁴ Art 9 TFEU.

³⁵ For overviews of the Union pharmaceutical regulatory framework, see Sally Shorthose, *Guide to European Pharmaceutical Regulatory Law* (7th edn, Alphen aan den Rijn: Wolters Kluwer 2017); Maria Isabel Manley and Marina Vickers (eds), *Navigating European Pharmaceutical Law: An Expert's Guide* (Oxford: OUP 2015); Peter Feldschreiber (ed), *The Law and Regulation of Medicines and Medical Devices* (2nd edn, Oxford: OUP 2021).

³⁶ Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L136/1.

³⁷ The tests are medical devices which were regulated until 26 May 2022 under Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices [1998] OJ L331/1, the date of entry into force of Regulation (EU) 2017/746 of the European Parliament and of the Council of 5 April 2017 [2017] OJ L117/176.

³⁸ The Commission did provide some advice on 'possible priority groups' for the initial phase of vaccine deployment: see European Commission, 'Communication to the European Parliament and the Council—Preparedness for COVID-19 Vaccination Strategies and Vaccine Deployment' COM (2020) 680 final, 11–13.

B. The unexpected potential of Union fiscal powers

The Covid-19 crisis is not only a health crisis but also an economic crisis, fuelled by the closure of businesses and the significant slowing of global trade. Member States have adopted a host of measures to support businesses and individuals. The Union is not competent to adopt measures relating to cash-based social assistance (such as cash transfers, non-contributory social pensions, child-care support, or cash-for-work schemes), nor in-kind assistance (such as school meals, food vouchers, utility waivers, rental payment deferrals, or suspension of evictions). Nor is the Union competent to adopt measures relating to contribution-linked benefits, such as employment benefits, paid sick leave, pensions, or waivers of social security contributions. The Union has no competence over income or wealth-relation taxation. These are matters for Member States.

It is nonetheless in the area of financial support to the economy that Union involvement has been the most spectacular, with the adoption of the 'NextGenerationEU' (NGEU) recovery plan, a remarkable development both from a political and a legal perspective. NGEU is a complex legal construction based on three pillars: two new instruments, the European Union Recovery Instrument (EURI)³⁹ and the Recovery and Resistance Facility (RRF),⁴⁰ and a new Own Resources Decision (ORD),⁴¹ which is the text organizing the system of own resources of the European Union. The EURI is the formal instrument which allows the Union to finance measures to tackle the adverse economic consequences of the Covid-19 crisis. The measures themselves are carried out under specific Union programmes.⁴² The RRF is the main such programme, specifically created to support Member States in the Covid-19 context, but existing Union programmes are also involved. The EURI is financed on the basis of a specific empowerment provided for in the ORD, which allows the Commission to borrow funds on capital markets on behalf of the Union.⁴³

To establish NGEU, the Union has made creative use of its powers, considering that in principle the Union does not have such redistributive capacities to support Member States. To do this, the Union relied on two legal bases, Articles 122 and 175 TFEU.

The EURI Regulation is based on Article 122 TFEU. Contained in the TFEU Chapter on economic policy, this provision is part of what De Witte calls Union 'emergency law',⁴⁴ powers which allow the Union to adopt measures in times of severe difficulties or exceptional circumstances. Pursuant to Article 122:

Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, *in a spirit of solidarity* between Member States, upon the *measures appropriate* to the economic situation, in particular if *severe difficulties* arise in the supply of certain products, notably in the area of energy.

Where a Member State is in difficulties or is seriously threatened with *severe difficulties caused by natural disasters or exceptional occurrences* beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, *Union financial assistance* to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken. (*Italics added.*)

³⁹ Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (EURI Regulation) [2020] OJ L4331/23.

⁴⁰ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (RRF Regulation) [2021] OJ L57/17.

⁴¹ Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (ORD) [2020] OJ L424/1.

⁴² EURI Regulation, Art 1.

⁴³ ORD, Art 5.

⁴⁴ Bruno De Witte, 'Guest Editorial: EU Emergency Law and Its Impact on the EU Legal Order' (2022) 59 *Common Market Law Review* 3.

The use of Article 112 TFEU to create the EURI is, depending on the perspective taken, a welcome creative use of Union powers or an unlawful extension thereof.⁴⁵ While Article 122 is meant to respond to emergency situations, NGEU is not only an emergency instrument, it is here to support 'recovery' and 'resilience' and the funds allocated will be used for long-term objectives that ostensibly have little to do with Covid-19, such as the green and digital transitions sought for the Union's economy.⁴⁶ Arguably, though, any form of economic recovery plan post-pandemic can only be successful if it takes account of the broader economic contexts in which it must take place: the climate crisis and digitization. Contrary to previous practice, Article 122 TFEU as a whole was used as a legal basis, even though the Court has ruled that Article 122(1) 'does not constitute an appropriate legal basis for any financial assistance from the Union to Member States'.⁴⁷ The decision to cumulate both paragraphs rather than relying on 122(2) alone, which is explicit on the 'exceptional' occurrences under which financial assistance may be granted,⁴⁸ is a particularly novel aspect of the Union's approach to its competences here. It is an acknowledgement that neither provides sufficient powers on its own. Once again, if the Covid-19 crisis undoubtedly constitutes exceptional circumstances, it is unclear whether NGEU is truly meant to remedy those circumstances or rather to create a permanent budgetary capacity for the Union. On the other hand, of course, a recovery from a global pandemic is not something that can be achieved overnight, so effective economic responses could be expected to have a long timeline.

Less controversially, the powers conferred by Article 122 TFEU were also used by the Commission for the procurement of vaccines. Member States had agreed that the Commission would centrally procure vaccines and coordinate a negotiation team that included experts from national administrations.⁴⁹ In this context, the Commission used the Emergency Support Instrument (ESI) in order to conclude Advance Purchasing Agreements with vaccine producers.⁵⁰ These agreements were entered into by the Commission on behalf of the Member States. The ESI is based on Article 122(1).⁵¹ It was first activated in 2020 for the purpose of responding to the Covid-19 pandemic. Its scope was extended to include medical countermeasures.⁵² The ESI was also used to purchase tests and treatments and in the framework of the 'EU Digital Covid Certificate' (see further Section IIA).⁵³ This is a classic and expected use of Union competences: the Union provides clear 'value-added' to what could be achieved by the Member States acting alone, in circumstances where the legal bases of the Treaty, literally interpreted, give competence to do so.

The legal creativity behind NGEU does not stop at the use of Article 122. The RRF, the vehicle used for the disbursement of the funds, is based on Article 175 TFEU, the legal basis for Union cohesion policy. Under Article 174 TFEU, 'the Union shall develop and pursue its

⁴⁵ For the more critical appraisal: Matthias Ruffert and Päivi Leino-Sandberg, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 *Common Market Law Review* 433, 444–5; Paul Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) 47 *Legal Issues of Economic Integration* 337, 345. Contra Bruno de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 *Common Market Law Review* 635, 655; De Witte (n 44) 10.

⁴⁶ EURI Regulation, Art 1 and recitals 5 and 7.

⁴⁷ Case C-370/12 *Pringle* [2012] EU:C:2012:675, para 116.

⁴⁸ Ruffert and Leino-Sandberg (n 45) 445–6.

⁴⁹ European Commission, 'Commission Decision of 18.6.2020 approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedures' C (2020) 4192 final. See also European Commission, Communication from the Commission 'EU Strategy for COVID-19 vaccines' COM/2020/245 final.

⁵⁰ See Erich Schanze, 'Best Efforts in the Taxonomy of Obligation—The Case of the EU Vaccine Contracts' (2021) 22 *German Law Journal* 1133.

⁵¹ Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union [2016] OJ L70/1.

⁵² Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak [2020] OJ L117/3. See in particular recital 9.

⁵³ European Commission, 'Emergency Support Instrument' <https://civil-protection-humanitarian-aid.ec.europa.eu/what/civil-protection/emergency-support-instrument_en> accessed 11 October 2022.

actions leading to the strengthening of its economic, social and territorial cohesion', aiming in particular at 'reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions'. Cohesion policy—which aims to assist less-developed parts of the Union and reduce economic disparities within the Union's territory—is normally conducted through the use of the structural funds, such as the European Social Fund or the European Regional Development Fund. However, Article 175(3) TFEU allows for action to be undertaken 'outside the Funds', if 'specific actions prove necessary'. The RRF was concluded under that third paragraph.

The scope of the RRF is extremely wide and permits allocation of funds for six purposes: (i) green transition; (ii) digital transformation; (iii) smart, sustainable, and inclusive growth, (iv) social and territorial cohesion; (v) health, and economic, social, and institutional resilience, and (vi) policies for the next generation, children and the youth, such as education and skills.⁵⁴ This illustrates even more that NGEU is not a one-off construction, but rather pursues long-term goals that, at least on their face, do not directly flow from Covid-19, such as those of Union cohesion policy.⁵⁵ Further, many commentators have noted that the RRF illustrates how cohesion policy is progressively losing its specific content to become a proxy for any economic policy, which was not its intended purpose. Cohesion, economic, social, and territorial,⁵⁶ is necessarily a broad creature, but the six pillars of the RRF are very broad indeed. It seems that any limits or 'contours' for Union competence in cohesion policies are almost entirely porous. Any measure involving Union funding could now count as 'cohesion'.⁵⁷ The acute emergency of the Covid-19 pandemic apparently justifies a novel interpretation of Articles 122 and 175 TFEU, which some have claimed is 'likely to change the Union permanently',⁵⁸ and to do so by 'stealth', instead of acknowledging the insufficient competencies in the current Treaty competence settlement, and reflecting on its longer-term sustainability in the context of Eurozone governance.⁵⁹ Previous crises have led to the creation of new Union competences, often through Treaty reform, or through action outside of the formal scope of Union law. The RRF Covid-19 response is one example where this is not the case. Rather, it is an unusual take on Union competences, bringing to bear the Union's extremely modest redistributive powers through cohesion policy on what is effectively a problem of economic governance limitations in Union power.

A final legal artifact should be mentioned. Another novelty of NGEU is the recourse to debt, the Union borrowing money on markets to be later repaid. Part of the funds are grants and not only loans to Member States, meaning that for the former the Union is the final debtor. This not only represents a fundamental change of practice,⁶⁰ it sits awkwardly with the letter of Article 310 TFEU which provides that '[t]he revenue and expenditure shown in the [Union] budget shall be in balance'. This provision has always been interpreted, until now, as precluding the Union from issuing debt to finance itself.⁶¹ To overcome this hurdle, the money used for grants was given the status of 'external assigned revenue',⁶² within the meaning of the Union's Financial Regulation.⁶³ To put it simply, the money was put 'off-budget'. This way,

⁵⁴ RRF Regulation, Art 3. See also Art 4.

⁵⁵ Art 174 TFEU. In particular, 70 per cent of the funds available under the RRF are allocated on the basis of cohesion criteria, while only 30 per cent depend on factors that can in principle be affected by the pandemic. See RRF Regulation, Art 11.

⁵⁶ Art 174 TFEU.

⁵⁷ Ruffert and Leino-Sandberg (n 45) 449. See also Dermine (n 45) 346. De Witte (n 45) 658.

⁵⁸ Ruffert and Leino-Sandberg (n 45) 450.

⁵⁹ Dermine (n 45) 346.

⁶⁰ Ruffert and Leino-Sandberg (n 45) 452.

⁶¹ Ibid 450–1.

⁶² EURI Regulation, Art 3(1) and recital 9.

⁶³ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014,

almost magically, what is an expenditure for the Union becomes a revenue, and there is no longer any problem of budgetary balance. Thus doing however, the Union undermines another principle of its budget, that of universality, whereby '[a]ll items of revenue and expenditure of the Union [...] shall be shown in the budget.'⁶⁴ The use of external assigned revenue is acceptable where it represents an accessory to the budget, but it is far more problematic where it concerns such large chunks of money.⁶⁵ In short, to avoid openly breaking its obligation to have a budget in balance, the Union has created NGEU 'off-budget', at the risk of nullifying another important principle that the budget is truthful and shows all items of revenue and expenditure. Once again, we are on 'thin ice' from a competence perspective.⁶⁶

Given the creativity in use of existing Union competences in response to the pandemic, it is not a surprise that there are instances of opposition, for example, litigation arguing that the Union has used the pandemic to unlawfully extend its competences.⁶⁷ However, the Treaty settlement in terms of judicial review of Union action is such that, if no 'privileged applicant', such as a Member State government, or the European Parliament, challenges Union acts based on creative interpretations of Union competence, then the practice in effect 'becomes the law'. This is so even if the use of Articles 122, 175, and 310 TFEU in this way might have been overturned as an 'infringement of the Treaties' under Article 263 TFEU.⁶⁸ In this way, the Treaty provisions on rule of law, especially its judicial review provisions, also contribute to the feature of Union competence that allows for creative interpretations of the legal position where there is political consensus to do so. This feature has actually been, to this day, instrumental in the development of Union health policies. There is nothing new about this observation: it has been part of the legal structures of Union competence since the inception of the EEC in the 1950s. However, it is often missed in legal commentaries that point out when the Union has exceeded its competences.

C. The future of Union competences

Taking all this into account, it is easy to reach a conclusion that, legally speaking, the Union has done the most it could—and maybe more than it legally should—in response to the Covid-19 crisis, considering the limited nature of its competence. It is noteworthy that Member States did not feel the need, as had been the case during the Eurozone crisis, to act outside the Union legal order.⁶⁹ Whatever position one takes on the NGEU recovery plan, it is at the very least a legal construct which stretches Union competences to their limit. At a

and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (EU Financial Regulation) [2018] OJ L193/1.

⁶⁴ Art 310 TFEU.

⁶⁵ Dermine (n 45) 348.

⁶⁶ Ibid 349.

⁶⁷ A complaint against the German act ratifying the Union's Own Resources Decision (*Eigenmittelbeschluss-Ratifizierungsgesetz*—ERatG) has been filed in the German Federal Constitutional Court (FCC), which rejected an application for preliminary injunction on 15 April 2012: BVerfG, Order of the Second Senate of 15 April 2021—2 BvR 547/21. The case is still pending on substance. The recent judgement of the FCC in the *PSPP* case, regarding the legality of the Public Sector Purchase Programme of the European Central Bank, is likely to have a bearing on such Covid-19 litigation concerning EU competence: BVerfG, Judgment of the Second Senate of 5 May 2020—2 BvR 859/15. For discussions, see Mark Dawson and Ana Bobić, 'Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court' (2020) 57 *Common Market Law Review* 1953; Isabel Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) 21 *German Law Journal* 1090; Matthias Goldmann, 'The European Economic Constitution after the PSPP Judgment: Towards Integrative Liberalism?' (2020) 21 *German Law Journal* 1058; Peter Hilpold, 'So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European "Popular Spirit"' (2021) 23 *Cambridge Yearbook of European Legal Studies* 159.

⁶⁸ There is a bigger picture here too, involving a shift from the focus on internal market law where individuals, through 'direct and individual concern' have legal standing to challenge regulatory decisions that affect them specifically, to a focus on economic governance, where individuals are excluded from reviewing legal provisions concerning relations between the Union and its Member States. We understand that this point is discussed in Ana Bobić, *The Individual in the Economic and Monetary Union: A Study of Legal Accountability* (Cambridge: CUP, forthcoming 2023).

⁶⁹ De Witte (n 44) 13.

time where the follow-up to the Conference on the Future of Europe (CoFoE) has not yet taken place, the Covid-19 pandemic surely represents a timely occasion to reflect on the current Union competence framework and the need for potential changes. This would be a usual and expected response to the crisis.

As regards health competences, Covid-19 could create a new impetus. It is a truism to say that Union health policy was forged in crisis. The European Food Safety Authority and the Union's food safety framework were created in the aftermath of the BSE (mad cow) crisis.⁷⁰ The ECDC was created after the Severe Acute Respiratory Syndrome (SARS) outbreak in 2003.⁷¹ More generally, when we consider global governance, infectious disease is a regular catalyst for extra-state activity, pointing up both divisions and connections in human experience.⁷² Covid-19 has now prompted talks of a European Health Union,⁷³ a discourse embraced by the Commission itself.⁷⁴ While the concept of European Health Union remains fuzzy, a number of voices are calling for a renewed public health mandate for the Union, whether through a treaty change or not.⁷⁵ This is what transpires from the CoFoE too.⁷⁶

Changes are already underway to address some of the shortcomings identified in the Union's health-focused legal and institutional apparatus.⁷⁷ A new body, the Health Emergency Preparedness and Response Authority (HERA),⁷⁸ has been created as a Directorate General within the Commission. HERA's purpose is to better prevent, detect, and rapidly respond to health emergencies. A Regulation has also been adopted to strengthen the role of the EMA in crisis preparedness and management.⁷⁹ Some reforms are still pending. The Commission is proposing to replace Decision 1082/2013 on cross-border threats to health with a new Regulation,⁸⁰ which would also lead to revisions in the ECDC's mandate.⁸¹ It is felt that '[s]tructures and mechanisms under the Decision, while essential in facilitating the exchange of information on the evolution of the pandemic and supporting the adoption of national measures, could do little to trigger a timely common Union level

⁷⁰ See Tamara K Hervey and Jean V McHale, *Health Law and the European Union* (Cambridge: CUP 2004); Scott Greer and others, *Everything You Always Wanted to Know about European Union Health Policies but Were Afraid to Ask* (2nd edn, Copenhagen: World Health Organization Regional Office for Europe 2019); Vos (n 7); Damian Chalmers, "Food for Thought": Reconciling European Risks and Traditional Ways of Life' (2003) 66 *Modern Law Review* 532; Damian Chalmers, 'Risk, Anxiety and the European Mediation of the Politics of Life' (2005) 30 *European Law Review* 649.

⁷¹ Hervey and McHale, *European Union Health Law: Themes and Implications* (n 18); Greer and others (n 70); Scott L Greer, 'The European Centre for Disease Prevention and Control: Hub or Hollow Core?' (2012) 37 *Journal of Health Politics, Policy and Law* 1001.

⁷² Eleanor Brooks and Annie de Ruijter, 'Towards More Comprehensive Health Law and Policy Research' (2021) 16 *Health Economics, Policy and Law* 104, 106.

⁷³ See the civil society manifesto: <<https://europeanhealthunion.eu/>> accessed 11 October 2022.

⁷⁴ European Commission, 'European Health Union: Protecting the Health of Europeans and Collectively Responding to Cross-Border Health Crises' <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/european-health-union_en> accessed 11 October 2022.

⁷⁵ Timo Clemens and Helmut Brand, 'Will COVID-19 Lead to a Major Change of the EU Public Health Mandate? A Renewed Approach to EU's Role Is Needed' (2020) 30 *European Journal of Public Health* 624; Scott Greer and Annie de Ruijter, 'EU Health Law and Policy in and after the COVID-19 Crisis' (2020) 30 *European Journal of Public Health* 623; Andrea Renda and Rosa Castro, 'Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic' (2020) 11 *European Journal of Risk Regulation* 273. See also Eleanor Brooks and Robert Geyer, 'The Development of EU Health Policy and the Covid-19 Pandemic: Trends and Implications' (2020) 42 *Journal of European Integration* 1057.

⁷⁶ See European Commission, Communication, 'Conference on the Future of Europe: Putting Vision into Concrete Action' COM (2022) 404 final.

⁷⁷ See European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Drawing the early lessons from the COVID-19 pandemic' COM (2021) 380 final.

⁷⁸ Commission Decision of 16 September 2021 establishing the Health Emergency Preparedness and Response Authority [2021] OJ C3931/3.

⁷⁹ Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices [2022] OJ L20/1.

⁸⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013/EU COM (2020) 727 final.

⁸¹ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 853/2004 establishing a European Centre for disease prevention and control COM (2020) 726 final.

response, co-ordinate the crucial aspects of risk communication, or ensure solidarity among Member States.⁸² Finally, the Commission is also proposing to adopt another emergency instrument under Article 122(1) TFEU, this time focused on medical countermeasures, to ensure a sufficient and timely availability and supply of crisis-relevant medical countermeasures.⁸³

All of this activity in the public health sphere shows that more can be done under the current constitutional settlement. In general, Union health powers are underestimated.⁸⁴ Such an observation suggests caution, rather than a Pavlovian response to call for more Union powers and a Treaty change to respond to every crisis. Flexibility and creativity within a more settled constitutional framework are things to be valued. More fundamentally, one needs to ask *why* more powers for the Union might be needed. Beyond a role of coordinating, providing expertise, monitoring, was there a need for more of the Union during the worst of the crisis? Should the Union directly order public health measures or take care of healthcare planning? There are good reasons for a division of tasks whereby the Union takes a leading role in risk assessment, a more objective task where overview is beneficial, while risk management is left to Member States. This is especially so given the great variety in organization of national health systems across the Member States, rooted in different histories and national cultures, as well as different stages of economic development.⁸⁵ National or sub-national governments are better placed than the Union to understand and respond to their population's needs and likely responses in terms of citizen behaviour in a crisis. Responsibility for a crisis response lies at national, or sub-national, level, depending on the structures and institutions that legitimate and inspire trust in national (and sub-national) governments and their public health systems, an integral part of their national healthcare systems as a whole.⁸⁶

As regards health, what is needed is perhaps not a Treaty change to do *more*, but one to better reflect the current extent of Union involvement in health. The Treaty competence scheme distinguishes 'supporting and complementing' policy areas from areas of shared competence, but in the area of health, it is hard to make this distinction meaningful.⁸⁷ The blurring of competences here affects the legitimacy of Union action in the field and creates legal tensions.⁸⁸

Clarification of competences is especially pressing as regards NGEU and the architecture of the Economic and Monetary Union. The rebalancing between monetary policy and budgetary capacity may be a welcome development in terms of effective pandemic response, and for the EMU at large, thus strengthening Union's output legitimacy,⁸⁹ but it is the aspect of Union Covid-19 law that probably most deserves a new formal constitutional settlement.⁹⁰

⁸² Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health, Explanatory Memorandum, 1.

⁸³ European Commission, Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level COM (2021) 577 final.

⁸⁴ See Oliver Bartlett, 'COVID-19, the European Health Union and the CJEU: Lessons from the Case Law on the Banking Union' (2020) 11 *European Journal of Risk Regulation* 781; Tamara Herve and Anniek De Ruijter, 'The Dynamic Potential of European Union Health Law' (2020) 11 *European Journal of Risk Regulation* 726; Kai P Purnhagen and others, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak' (2020) 11 *European Journal of Risk Regulation* 297.

⁸⁵ For a summary, see Herve and McHale, *European Union Health Law: Themes and Implications* (n 18) 211–26.

⁸⁶ Alessio M Paces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) 11 *European Journal of Risk Regulation* 283, 286.

⁸⁷ Sacha Garben, 'Supporting Policies', in Pieter Jan Kuijper and Fabian Amtenbrink (eds), *The Law of the European Union* (5th edn, The Hague: Kluwer Law International 2018) 1208.

⁸⁸ Vincent Delhomme, 'Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health' (2020) 11 *European Journal of Risk Regulation* 747.

⁸⁹ Federico Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic' (2022) 60 *Journal of Common Market Studies* 186; Stella Ladi and Dimitris Tsarouhas, 'EU Economic Governance and Covid-19: Policy Learning and Windows of Opportunity' (2020) 42 *Journal of European Integration* 1041.

⁹⁰ Fabbrini (n 89).

Notwithstanding an inter-institutional agreement,⁹¹ the input legitimacy of NGEU is deficient, not least because under the legal bases used, the European Parliament was excluded from the adoption of both the EURI Regulation and the new ORD, as Articles 122 and 311 TFEU provide for adoption procedures in which the European Parliament is not legislatively associated (see further Section IV.B.).⁹² Furthermore, the implementation of NGEU, through RRF and other Union funds, such as SURE (see further Section III.C), involves relatively little parliamentary oversight. The European Parliament is excluded from approval of national plans, this being the prerogative of the Commission and Council.⁹³ Whether national parliamentary oversight is effective depends on constitutional settlements in each Member State.⁹⁴ The provision on conditionality, linking RRF funding to sound economic government, envisages a minimal parliamentary role.⁹⁵ The European Parliament has access to redacted information and the Commission is obliged to report to Parliament on the fulfilment of the plans, but only in ‘overview’ form, and through an annual report.⁹⁶ That said, Parliament may comment on every aspect of the RRF scheme, so scrutiny in the sense of publicly available commentary is envisaged.⁹⁷ The approach is consistent with Union economic governance more generally, from which Parliament is, broadly speaking, excluded.⁹⁸ The overall settlement thus suggests that ‘throughput’ legitimacy could also be improved.

III. THE UNION ‘ECONOMIC CONSTITUTION’: A NEW PARADIGM?

Member States’ responses to the Covid-19 pandemic have put the Union internal market under considerable strain, restraining the free movement of people, including economically active citizens, disrupting supply chains, and threatening the availability of essential goods and services. Stay-at-home orders and closures of entire swathes of the economy put the Member States on the verge of an economic meltdown. In this section, we investigate how the traditional legal tools of the Union ‘economic constitution’ have been put to use to address and seek to remedy the crisis. We understand this economic constitution in a holistic manner, as encompassing, *inter alia*, legal provisions on free movement—both ‘positive’ and ‘negative’ integration⁹⁹—competition rules and the legal architecture of the EMU. Our aim is double: to show not only that the Union response to Covid-19 heralds a new political paradigm for European economic integration, away from austerity discourses; but also that, legally speaking, the rules governing the Union economy in the field of health were never only tilted in favour of the market. In this regard, we challenge, or at least nuance in the context of health,¹⁰⁰ the traditional account of the internal market as the primary source of Union

⁹¹ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources of 16 December 2020 OJ L4331/28.

⁹² On the shifts of power and institutional balance for the NGEU, see De Witte (n 45) 668–9; Ruffert and Leino-Sandberg (n 45) 454–6.

⁹³ RRF Regulation n 40, Art 20.

⁹⁴ Bruno Dias Pinheiro and Cristina Sofia Dias, ‘Parliaments’ Involvement in the Recovery and Resilience Facility’ (2022) 28 *The Journal of Legislative Studies* 332.

⁹⁵ RRF Regulation n 40, Art 10.

⁹⁶ RRF Regulation, Arts 25 and 31.

⁹⁷ Dias Pinheiro and Dias (n 94) 335.

⁹⁸ EU Financial Regulation, Art 22. See Dermine (n 45) 348.

⁹⁹ Joseph HH Weiler, ‘The Transformation of Europe’ (1990) 100 *Yale Law Journal* 2403; Fritz Scharpf, ‘Negative and Positive Integration in the Political Economy of European Welfare States’ in Martin Rhodes and Yves Mény (eds), *The Future of European Welfare: A New Social Contract?* (London: Palgrave Macmillan 1998).

¹⁰⁰ See, eg Tamara Hervey, ‘Social Solidarity: A Buttress against Internal Market Law’ in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing 2000); Tamara K Hervey, ‘EU Law and National Health Policies: Problem or Opportunity?’ (2007) 2 *Health Economics, Policy, and Law* 1; Tamara K Hervey, ‘The European Union’s Governance of Health Care and the Welfare Modernization Agenda’ (2008) 2 *Regulation & Governance* 103; Hervey and

powers, with any 'social' concerns constructed as exceptions to the rule of free movement.¹⁰¹ According to this traditional view, the imbalance between 'negative' market integration and the Union's constrained powers in non-market domains is fatal to any attempt by the Union to adopt policies that correct unwanted effects of free markets, for instance, through redistribution, or the protection of labour, the environment, or other interests, including health.

Our challenge to this view will be shown in three ways. First, while the Union has tried to preserve free movement to the largest extent possible—a 'classic' and expected Union law answer to any problem—it has done so while respecting the importance of health and acknowledging the severity of the crisis. Crucially, from the point of view of our argument, the Union has not only accommodated national restrictive measures (health concerns as the 'exception'). The Union has *also* used the tools of the internal market to support health itself (health concerns as *embedded in or part of* the Union's conception of its internal market) (Section III.A.). Second, while trying to safeguard the principles and freedoms upon which the internal market is based, the Commission has presided over a considerable relaxation of the rules under which it operates, so as to enable Member States to adopt measures to tackle the health crisis and support their tattered economies (Section III.B). Finally, the Union has also directly disbursed vast sums of money to support Member States in the worst moments of the crisis and to prepare the future recovery, leading to a fundamental change in the architecture of the EMU. This change of policy direction represents a rebalance between Union governance by (economic) law and by redistribution (Section III.C). Overall, we argue that the three phenomena read together show that the 'classic' rule/exception paradigm of Union market law and economic governance does not withstand scrutiny in the context of a detailed understanding of the Union's Covid-19 response.

A. The 'classic' response: safeguarding the Union 'embedded' market

At first sight, the Union response to the demise of the internal market during the pandemic presents classical features, trying to preserve free movement as much as possible (the 'rule') while accommodating legitimate national restrictive measures (as public health exceptions). The Union approach arises both because free movement is a fundamental freedom of the Union legal order and because it is essential to the economic vitality of the Union. The power to restrict free movement, on the basis of a narrow list of public interest objectives, including public health, lies with the Member States, subject to compliance with Union law, the principle of proportionality in particular.¹⁰² Regarding the free movement of persons, the Schengen Borders Code is also relevant,¹⁰³ providing the possibility for countries to exceptionally and temporarily reintroduce border controls in case of a serious threat to public policy and internal security,¹⁰⁴ which is deemed to also include the 'risk posed by a contagious disease'.¹⁰⁵

McHale, *European Union Health Law: Themes and Implications* (n 18); Katherine Fierlbeck, 'Health Care and the Fate of Social Europe' (2021) 46 *Journal of Health Politics, Policy and Law* 1 and the papers in that special issue.

¹⁰¹ See eg Scharpf (n 99); Christopher Newdick, 'Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 *Common Market Law Review* 1645; Sacha Garben, 'The Constitutional (Im)Balance between "the Market" and "the Social" in the European Union' (2017) 13 *European Constitutional Law Review* 23; and more recently Luka Mišić and Grega Strban, 'Functional and Systemic Impacts of COVID-19 on European Social Law and Social Policy', in Hondius and others (n 9).

¹⁰² Arts 21(1), 36, 52, 62, and 45(3) TFEU. Regarding the free movement of persons, see also Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, Arts 27 and 29.

¹⁰³ European Parliament and Council Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

¹⁰⁴ Ibid, Art 25(1). This is subject to procedural safeguards and temporal limitations: Arts 25, 28, and 29.

¹⁰⁵ European Commission, 'Covid-19 Guidelines for Border Management Measures to Protect Health and Ensure the Availability of Goods and Essential Services' [2020] OJ C861/1, para 18. Notably, the Schengen Borders Code itself does not expressly mention public health as a reason for the reintroduction of border controls.

In the early spring of 2020, Member States, acting with complete lack of coordination, adopted various control measures to seek to stop the spread of Covid-19. These measures severely hindered the free flow of goods, persons, and services within the internal market. Among the relevant measures were border measures and public health measures restricting individual mobility,¹⁰⁶ as well as export bans or restrictions on goods like personal protection equipment or medicines.¹⁰⁷

While accepting the necessity of the restrictions adopted by Member States, the Commission acted from the beginning to safeguard free movement to the greatest extent possible and to seek to convince Member States to remove restrictions progressively as the situation improved. A notable feature of the Union response, to which we will return in Section IV.A, was the reliance on non-binding soft law instruments—Commission Communications and Guidelines, Council Recommendations, and technical/scientific guidance of EU agencies, the ECDC in particular—to steer Member States towards the lifting of their measures.

Union action unfolded along two main lines: (i) preserving the operation of the internal market by allowing the free movement of ‘essential’ workers and economically active citizens, as well as goods (via the so-called ‘green lanes’),¹⁰⁸ and (ii) protecting intra-Union movement at the expense, if necessary, of extra-Union movement. As regards the latter, the Commission decided to accompany the collective choice of Member States ‘to be strict when it comes to travel to the Union, while maintaining the necessary mobility within the Union’.¹⁰⁹ This is a classic feature of Union border management, which is also apparent in the context of the so-called ‘migration crisis’.¹¹⁰

As regards the distinction between essential and non-essential travel, the Commission recommendations for ‘effective border management’¹¹¹ created a model of ‘restrictive selection’ or ‘selective mobility’.¹¹² Member States were encouraged to permit and facilitate the crossing of workers and economically active citizens along two main lines: people who are mobile ‘by definition’—frontier, posted, and seasonal workers—and those who work in sectors considered as essential, such as health, food, essential infrastructures, or transportation.¹¹³

¹⁰⁶ 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; Sergio Carrera and Ngo Chun Luk, ‘In the Name of Covid-19: An Assessment of the EU Border Controls and Travel Restrictions in the EU’ (2020) European Parliament, Study requested by the LIBE committee; 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.

¹⁰⁷ See European Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup—Coordinated economic response to the COVID-19 Outbreak’ COM (2020) 112 final, 3–4. For an overview of the measures adopted and a discussion of their legality, see Benedikt Pirker, ‘Rethinking Solidarity in View of the Wanting Internal and External EU Law Framework concerning Trade Measures in the Context of the COVID-19 Crisis’ (2020) 5 *European Papers* 573.

¹⁰⁸ European Commission, ‘Communication from the Commission Guidelines Concerning the Exercise of the Free Movement of Workers during COVID-19 Outbreak’ [2020] OJ C102I/12. European Commission (n 105). See also European Commission, ‘Communication from the Commission on the Implementation of the Green Lanes under the Guidelines for Border Management Measures to Protect Health and Ensure the Availability of Goods and Essential Services’ [2020] OJ C96I/1; European Commission, ‘Communication from the Commission European Commission Guidelines: Facilitating Air Cargo Operations during COVID-19 outbreak’ [2020] OJ C100I/1.

¹⁰⁹ European Commission, ‘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.

¹¹⁰ 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, 1555–7.

¹¹¹ European Commission (n 105); European Commission, ‘Communication from the Commission Guidelines Concerning the Exercise of the Free Movement of Workers during COVID-19 Outbreak’ (n 108).

¹¹² 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.

¹¹³ Ibid 616–17. See European Commission (n 105), para 23; European Commission, ‘Communication from the Commission Guidelines Concerning the Exercise of the Free Movement of Workers during COVID-19 Outbreak’ (n 108).

A similar logic is applied to extra-Union travels.¹¹⁴ These soft law interventions (consistent with Union competences, see Section II) highlight an important feature of the Union's economic constitution. The law of the Union's internal market is not justified by free movement for the sake of free movement, nor is it structured to value freedom above all other values in all circumstances (see Section III.B). In a crisis such as that of the Covid-19 pandemic, free movement of essential goods, services, and workers is crucial *to protect health* (and not just to protect the market), by ensuring as uniform as possible a supply throughout the Union of such essential goods, services and workers, and that these reach the populations who need them the most.

Regarding intra-Union movement, the Union quickly tried to accompany the progressive lifting of containment measures restricting free movement, in a coordinated way.¹¹⁵ This approach was central to Council Recommendation 2020/1475, adopted in October 2020, which establishes common criteria for the adoption of travel restrictions: number of cases, testing, and positivity rates.¹¹⁶ The data provided by the Member States were processed and turned into a weekly map, broken down by regions, showing the different areas marked in green, orange, and red.¹¹⁷ In theory, free movement of persons to or from green areas should not be restricted and measures could be adopted for others, such as imposing a quarantine or testing for travellers. The idea was that in higher-risk areas, travellers with an essential function or need should not be subjected to quarantine measures.¹¹⁸

As regards international travel into the Union, the actions of the Member States were more coordinated from an earlier stage of the pandemic and the necessity of border closures more easily accepted. As early as 16 March 2020, the Commission recommended the temporary restriction of non-essential travel from third countries into the Union for 30 days, with potential prolongation after assessment, making clear that citizens of Member States and Schengen Associated States, as well as other legal residents, were not concerned.¹¹⁹ On the following day, the Heads of State or Government of the Union and the four Schengen Associated States agreed to implement the temporary restriction.¹²⁰ What is sometimes referred to as the Union 'entry-ban' was thus not initially based on a legally binding measure.

¹¹⁴ European Commission, Communication to the European Parliament, the European Council and the Council, 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU in View of COVID-19' COM (2020) 115 final. 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 L2081/1, annex II.

¹¹⁵ European Commission and European Council, 'Joint European Roadmap towards Lifting COVID-19 Containment Measures' [2020] OJ C126/1. Evidence suggests that coordination did not really occur, at least during the 'first wave'. See Pieter Thielbörger and Mark Dawson, 'EU Law in the 'First Wave': The Legality of National Measures to Tackle the Covid-19 Crisis' (2020) A study commissioned by MEPs Terry Reintke and Tineke Strik <https://www.greens-efa.eu/files/assets/docs/eu_law_in_the_first_wave_-_covid_study_web.pdf> accessed 23 November 2022.

¹¹⁶ Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2020] OJ L337/3, para 8. Recommendation 2020/1475 was later replaced by Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475 [2022] OJ 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.

¹¹⁷ Archives of data and maps may be accessed 11 October 2022 at <<https://www.ecdc.europa.eu/en/covid-19/situation-updates/weekly-maps-coordinated-restriction-free-movement>>. The update and publication of the map is currently discontinued.

¹¹⁸ Council Recommendation 2020/1475, para 19.

¹¹⁹ European Commission, Communication to the European Parliament, the European Council and the Council (n 114). The Commission gave further guidance on the implementation of the travel restrictions: European Commission, '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 C1021/3.

¹²⁰ European Council, 'Conclusions by the President of the European Council Following the Video Conference with Members of the European Council on COVID-19' (2020) <<https://www.consilium.europa.eu/en/press/press-releases/2020/03/17/conclusions-by-the-president-of-the-european-council-following-the-video-conference-with-members-of-the-european-council-on-covid-19/>> accessed 11 October 2022.

When it comes to lifting restrictions on extra-Union movement, the Commission acted with more caution, on the basis that external border reopening and access of non-Union residents to the Union should only happen ‘in a second stage’.¹²¹ After several prolongations of the restrictions of travel into the Union recommended by the Commission, the time had come in summer 2020 to move forward with a common strategy towards lifting the restrictions.¹²² The Council adopted its first Recommendation on the restrictions on non-essential travel into the Union on 30 June 2020,¹²³ asking the Member States to lift their restrictions on non-essential travel into the Union starting from 1 July 2020 for certain countries contained on a list annexed to the Recommendation.¹²⁴

The focus on preserving intra Union-movement could also be seen with regard to the free movement of goods. In order to encourage the lifting of national bans on the export of PPE, while ensuring sufficient equipment within the Union, the Commission adopted two Implementing Regulations to the Regulation on common rules for export¹²⁵ which temporarily made the export to third countries of certain goods (including PPE and face masks) subject to an export authorization to be issued by national competent authorities.¹²⁶ Probably the most potentially powerful legal innovation in the law of the internal market is the case of national export restrictions. While these restrictions may very well be considered justified and proportionate if considering the health of the population of the Member State enacting the ban, the Commission considered that such a measure could not meet the legal requirement of proportionality because it does not, in itself, ‘ensure that the products will reach the persons who need them most’ and ‘would therefore prove unsuitable to reach the objective of protecting the health of people living in Europe’.¹²⁷ This vision of the internal market as a ‘solidarity instrument’¹²⁸ and of the assessment of proportionality based on the health of *Europeans*, and not nationals of the Member State enacting the measure, signals a different reading of Article 36 TFEU to the ‘classical’ analytical position.¹²⁹ We argue that this is consistent with the already-existing position to the effect that the Union’s ‘economic constitution’ envisages that a well-functioning internal market is not only beneficial to economic operators availing themselves of their free movement rights, but also to other protected values and interests.

With regard to the free movement of persons, the next big step towards a coordinated lifting of restrictions was made through the ‘EU Digital Covid Certificate’, which should be placed in the context of the attempts to coordinate re-establishment of free movement within the Union and opening towards travel from third countries in view of the summer and

¹²¹ European Commission and European Council (n 115) 12.

¹²² The Commission recommended to lift the application of the travel restriction on non-essential travel for some countries from 1 July 2020: see European Commission, ‘Communication to the European Parliament, the European Council and the Council—On the Third Assessment of the Application of the Temporary Restriction on Non-Essential Travel to the EU’ COM (2020) 399 final.

¹²³ Council Recommendation (EU) 2020/912. The recommendation has been amended on multiple occasions. The last amendment is Council Recommendation (EU) 2022/290 of 22 February 2022 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2022] OJ L43/79.

¹²⁴ Council Recommendation (EU) 2020/912, annex I.

¹²⁵ Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports [2015] OJ L83/34.

¹²⁶ Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorization [2020] OJ L771/1; Commission Implementing Regulation (EU) 2020/568 of 23 April 2020 making the exportation of certain products subject to the production of an export authorization [2020] OJ L129/7. For a discussion of the export authorizations as EU composite procedures, see Luis Arroyo Jiménez and Mariolina Eliantonio, ‘Masks, Gloves, Exports Licences and Composite Procedures: Implementing Regulation 2020/402 and the Limelight of Accountability’ (2020) 11 *European Journal of Risk Regulation* 382.

¹²⁷ European Commission (n 107) annex 2, 4.

¹²⁸ *Ibid* 3.

¹²⁹ Purnhagen and others (n 84) 305; Tomislav Sokol, ‘Public Health Emergencies and Export Restrictions: Solidarity and a Common Approach or Disintegration of the Internal Market?’ (2020) 57 *Common Market Law Review* 1819.

vacation season 2021.¹³⁰ 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.¹³¹ Initially planned to expire on 30 June 2022, both have been extended for one more year.¹³²

Legally speaking, the certificate as introduced by Regulation 2021/953 is not required for Union citizens to exercise their free movement rights.¹³³ The core idea of the certificate is that the freedom of movement, without conditions like testing or quarantining, will be facilitated for persons who can prove that they have either been fully vaccinated or have been negatively tested for Covid-19, or recovered from an infection. At the same time, some have argued that the EU Digital Certificate has *de facto* made the right of free movement conditional upon certification, legitimizing border controls within the Union, while access to testing and vaccination remains a national competence (see Section II.A), increasing the risk of inequalities throughout the Union.¹³⁴ The main concerns for the Union are that the certificate, which is issued by the Member States, is interoperable and mutually recognized, as well as compatibility with data protection and privacy.¹³⁵ Regulation 2021/953 was the subject of two legal challenges, based on an alleged unlawful breach of fundamental rights and restriction of the free movement of persons, which were both considered inadmissible.¹³⁶

Beyond border measures, the Union also addressed individual mobility restrictions—stay-at-home orders, curfew limitations on public or private gatherings, closures of premises and facilities, etc—in its policy guidance documents. Even if these measures do not directly prevent the crossing of a frontier, they may affect free movement nonetheless insofar as they restrict mobility. Further, too wide differences between neighbouring states can lead to negative externalities and prompt further border restrictions. The population in a given Member State where, say, shops are closed, may take advantage of free movement to go shopping in another State where these premises are open, leading to an influx of movement which is not desirable from a public health perspective. Such cross-border movements have been witnessed during the Covid-19 crisis.¹³⁷ A certain degree of coordination of national

¹³⁰ European Commission, '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.

¹³¹ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, 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 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, 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.

¹³² Regulation (EU) 2022/1034 of the European Parliament and of the Council of 29 June 2022 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 of the European Parliament and of the Council of 29 June 2022 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.

¹³³ Regulation 2021/953, Art 3(6).

¹³⁴ From the rich discussion see eg Henry T Greely, 'COVID-19 Immunity Certificates: Science, Ethics, Policy, and Law' (2020) 7 *Journal of Law and the Biosciences* 150; 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.

¹³⁵ See further Commission Implementing Decision (EU) 2021/1073 of 28 June 2021 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 of the European Parliament and of the Council [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: <https://health.ec.europa.eu/health-digital-health-and-care/health-and-covid-19_en> accessed 11 October 2022.

¹³⁶ Case T-503/21 *Lagarrière, unité médico-sociale v Commission* [2022] EU : T : 2022:78 ; Case T-527/21 *Abenante and Others v Parliament and Council* [2022] EU : T : 2022:278.

¹³⁷ Paces and Weimer (n 86) 287.

policies may therefore prove necessary. Similarly, the Union interest in coherent testing strategies amongst the Member States was not only based on public health reasons, but also on the realization that the free movement of persons depends on the mutual recognition of test results.¹³⁸

The Commission's priority as regards individual mobility restrictions was to avoid, after the 'first wave', a repetition of the adoption of lockdown measures on a large scale, pointing to the economic and social costs of these measures, as well as the impact on the free movement of people and goods and the disruption of supply chains. The Commission favoured the adoption of 'targeted and localised medical countermeasures'.¹³⁹ In the winter of 2020, before the festive season, the Commission nonetheless 'strongly encouraged' the Member States to maintain or introduce night-time curfews,¹⁴⁰ together with other mobility restrictions. Overall, the Commission favoured limitations on public and private gatherings rather than closure of businesses, so as to limit negative economic consequences.¹⁴¹ The Commission developed guidance for the safe reopening of the cultural, hospitality, and tourism sectors.¹⁴²

The Commission was similarly concerned about the cross-border and free movement effects of contact tracing applications. Via the 'eHealth Network',¹⁴³ a 'Union toolbox' was created to foster a common approach for the use of these technologies, in order to allow for the interoperability of applications developed at the national level and ensure respect for security, privacy, and data protection.¹⁴⁴ A Union 'interoperability gateway' went live in October 2020, which connects the national apps and allows the tracing and warning also if the user is travelling within the Union.¹⁴⁵ The Union 'gateway' is another example of Union measures that facilitate free movement, while at the same time regulating an internal market within which other interests—specifically human health—are also constitutionally protected.

B. Suspension of Union internal market rules

While striving to preserve the integrity of the internal market, in a way, as we have seen (Section III.A), which does not necessarily put free movement above all other interests, the

¹³⁸ European Commission, 'Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions, Short-term EU Health Preparedness for COVID-19 Outbreaks' COM (2020) 318 final, 10; European Commission, 'Communication from the Commission to the European Parliament and the Council—Staying safe from COVID-19 during winter' COM (2020) 786 final, 5; Council Recommendation on a common framework for the use and validation of rapid antigen tests and the mutual recognition of COVID-19 test results in the EU [2021] OJ C24/1.

¹³⁹ European Commission, 'Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions—Short-term EU health preparedness for COVID-19 outbreaks' (n 138). See also ECDC, 'Guidelines for the implementation of non-pharmaceutical interventions against COVID-19' (2020) 2.

¹⁴⁰ European Commission, 'Communication from the Commission to the European Parliament and the Council—Staying Safe from COVID-19 during Winter' (n 138).

¹⁴¹ *ibid* 4-5.

¹⁴² European Commission (n 130); European Commission, 'Communication from the Commission—EU Guidelines for the Safe Resumption of Activities in the Cultural and Creative Sectors—COVID-19' [2021] OJ C262/1.

¹⁴³ The network is created on the basis of the Patient's Rights Directive: Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45, art 14. See Commission Implementing Decision 2019/1765 of 22 October 2019 providing the rules for the establishment, the management and the functioning of the network of national authorities responsible for eHealth, and repealing Implementing Decision 2011/890/EU [2019] OJ L270/83.

¹⁴⁴ European Commission, 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 anonymized mobility data [2020] OJ L114/7. See also European Commission, 'Communication from the Commission Guidance on Apps Supporting the Fight against COVID 19 Pandemic in Relation to Data Protection' [2020] OJ C124/1. Regarding privacy, see Hannah van Kolschooten and Anniek de Ruijter, 'COVID-19 and Privacy in the European Union: A Legal Perspective on Contact Tracing' (2020) 41 *Contemporary Security Policy* 478.

¹⁴⁵ See Commission Implementing Decision (EU) 2020/1023 of 15 July 2020 amending Implementing Decision (EU) 2019/1765 as regards the cross-border exchange of data between national contact tracing and warning mobile applications with regard to combatting the COVID-19 pandemic [2020] OJ L227/1.

Union has also taken drastic steps to support Member States in dealing with the economic fallout resulting from the pandemic and to ensure the availability of medical countermeasures. This was done in two main ways: suspending the normal rules of operation of the internal market and providing direct financial support to Member States, in the form of direct payment or loans, addressed below (Section III.C).

The Union internal market and economic and monetary union are based on rules whose goal is to ensure free movement and prevent distortions of competition and economic imbalances. These rules, policed by the European Commission, but also by private litigation through the 'direct effect' and supremacy of Union law, provide a check on Member State interventions in the economy. A striking feature of the Union response during the pandemic has been the temporary suspension of a vast body of law. The Union has relaxed the ordinary rules of trade and other obligations of Union membership, such as public procurement, competition, and state aids law, so as to make it easier for its Member States to adopt social and employment protection measures in the face of the economic effects of the pandemic.

When assessing the novelty of these aspects of the Union's legal response to the pandemic, it should be observed that the possibility of a suspension in case of an exceptional event and/or severe economic disturbance was *already included* in many Union legal instruments. For instance, the Commission published Guidance on how to best use the Union public procurement legal framework for the purchase of the supplies, services, and works needed to address the crisis. According to the Commission, Union public procurement rules provided 'all necessary flexibility to public buyers to purchase goods and services directly linked to the Covid-19 crisis as quickly as possible'.¹⁴⁶ Rules on value added tax and custom duties also provide for the possibility of exempting certain goods. These provisions were relied on for goods needed to combat the effects of the Covid-19 outbreak.¹⁴⁷ As regards state aid, the European Commission relied on Article 107(2)(b) TFEU, which provides that 'aid to make good the damage caused by natural disasters or exceptional occurrences' shall be compatible with the internal market.¹⁴⁸ Under this *de jure* derogation, the Commission's discretion is limited to ensuring that the conditions provided for in Article 107 are met.¹⁴⁹ Perhaps the most remarkable use of a flexibility provision is the activation of the so-called 'general escape clause' contained in the Stability and Growth Pact (SGP),¹⁵⁰ which allows for a coordinated and temporary deviation from the normal budgetary rules in a situation of generalized crisis caused by a severe economic downturn.¹⁵¹ Introduced in 2011 as part of

¹⁴⁶ European Commission, 'Communication from the Commission—Guidance from the European Commission on Using the Public Procurement Framework in the Emergency Situation Related to the COVID-19 Crisis' [2020] OJ C1081/1, 2. The basic rules on public procurement, to which the Communication refer, are contained in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] JO L94/65. For discussions, see Roberto Baratta, 'EU Soft Law Instruments as a Tool to Tackle the Covid-19 Crisis: Looking at the "Guidance" on Public Procurement through the Prism of Solidarity' (2020) 5 *European Papers* 365; Albert Sanchez-Graells, 'Procurement in the Time of COVID-19 Notes and Commentaries' (2020) 71 *Northern Ireland Legal Quarterly* 81.

¹⁴⁷ Commission Decision (EU) 2020/491 of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020 [2020] OJ L1031/1.

¹⁴⁸ See the relevant decisions in European Commission, 'Authorisation for State Aid Pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union—Cases where the Commission Raises No Objections' [2020] OJ C125/1.

¹⁴⁹ For a discussion of the application of Article 107(2)(b) TFEU to Covid-19 measures, see Phedon Nicolaides, 'Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence' (2020) 11 *Journal of European Competition Law & Practice* 238.

¹⁵⁰ European Commission, 'Communication from the Commission to the Council on the Activation of the General Escape Clause of the Stability and Growth Pact' COM (2020) 123; Council of the European Union, 'Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis', Press release of 23 March 2020. The general escape clause is contained in Articles 5(1), 6(3), 9(1) and 10(3) of Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1 and Articles 3(5) and 5(2) of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6.

¹⁵¹ See Dermine (n 45) 338–41.

the reform of the SGP after the economic and financial crisis, it was used for the first time to respond to the Covid-19 crisis. The escape clause will remain active until at least the end of 2022.¹⁵² Our view is that the use of these flexibilities is not paradigm-shifting: the law already pre-empted the need to adopt exceptional provisions in exceptional circumstances. The Union simply acted within that pre-existing legal framework.

There are also instances where the Union used soft law to seek to temper the application of existing internal market law in the light of the effects of the pandemic. Under the Passenger Rights Regulation,¹⁵³ an aspect of the consumer protection embedded in internal market law, air passengers whose flights are cancelled at short notice, and who are not offered re-routing within specific parameters are entitled to compensation.¹⁵⁴ An exception applies where cancellations arise from ‘extraordinary circumstances’, meaning events which are not inherent in the normal activity of air carriers and are beyond their actual control.¹⁵⁵ Similar rules apply in the context of other modes of transport,¹⁵⁶ and to ‘package holidays’.¹⁵⁷ Although there is not yet case law on the point,¹⁵⁸ it seems likely that Covid-19 stay at home measures constitute such ‘extraordinary circumstances’, but that these measures would not cover all travel cancellations that took place. This is certainly the Commission’s view.¹⁵⁹ Through a Recommendation, the Commission sought to make vouchers a more attractive alternative to reimbursement in money.¹⁶⁰ The objective was to limit money claims, otherwise numerous cancellations entailed by the pandemic would have led to an unsustainable cash-flow and revenue situation for the transport and travel sectors. A voucher system would help to ease industry liquidity problems and would contribute to better protecting the longer-term interests of travellers.¹⁶¹ The use of soft law fell short of requests from some Member States, who sought Union suspension of the relevant provisions,¹⁶² or unilaterally suspended them in breach of Union law.¹⁶³ An even softer approach is found in the European Commission’s website¹⁶⁴ giving consumers advice about how *force majeure* clauses,

¹⁵² European Commission, ‘Communication from the Commission to the Council—One Year since the Outbreak of COVID-19: Fiscal Policy Response’ COM (2021) 105 final, para 4.

¹⁵³ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L 46/1.

¹⁵⁴ *ibid.*, art 5.

¹⁵⁵ *ibid.*, art 5(3). See Case C-549/07 *Wallentin-Hermann* [2008] EU : C : 2008:771; Joined Cases C-402/07 and C-432/07 *Sturgeon and Böck* [2009] EU : C : 2009:716. The Eyjafjallajökull volcano eruption is a case in point, see Case C-12/11 *McDonagh* [2013] EU : C : 2013:43.

¹⁵⁶ Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations [2007] OJ L315/14; Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway [2010] OJ L334/1; Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport [2011] OJ L55/1.

¹⁵⁷ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements (Package Travel Directive) [2015] OJ L326/1.

¹⁵⁸ C-407/21 *UFC—Que choisir and CLCV* [2022] EU : C : 2022:690, Opinion of Advocate General Medina.

¹⁵⁹ European Commission, ‘Interpretative Guidelines on EU Passenger Rights Regulations in the Context of the Developing Situation with COVID-19’ [2020] OJ C891/1, which express the view that, under certain circumstances, a cancellation in the context of the COVID-19 outbreak can be due to ‘extraordinary circumstances’.

¹⁶⁰ Commission Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic [2020] OJ L151/10.

¹⁶¹ See however the report of the European Court of Auditors, concluding that key passenger rights were not adequately protected during the Covid-19 crisis: European Court of Auditors, ‘Air passenger rights during the COVID-19 pandemic : key rights not protected despite Commission efforts’ (2021) Special report No 15.

¹⁶² Verica Trstenjak, ‘The Corona Crisis and Fundamental Rights from the point of view of EU Law’ in Hondius and others (n 9).

¹⁶³ The Commission commenced enforcement proceedings, which had the effect of reversing the unlawful suspensions, see <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/travel-during-coronavirus-pandemic/travel-during-pandemic-faq_en> accessed 23 November 2022. For further discussion, see Marc Steiert, ‘Little Man, what now? How COVID-19, the Commission and EU consumer protection interact’, EUIdeas, 11 June 2020 <<https://euiideas.eu/2020/06/11/little-man-what-now-how-covid-19-the-commission-and-eu-consumer-protection-interact/>> accessed 23 November 2022.

¹⁶⁴ European Commission, ‘FAQ on Cancellations of Individually Booked Accommodations, Car Rental and Events due to COVID-19’ <<https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-com>

relied on by various suppliers of consumer services, in the context of the pandemic, might breach the Unfair Contract Terms Directive.¹⁶⁵

However, instances where the Commission has temporarily suspended the normal application of rules through the use of its enforcement powers, outside of, or significantly extending, a pre-existing framework, are more legally significant. The Commission has, for instance, issued a temporary framework for assessing antitrust issues related to cooperation in response to the Covid-19 outbreak. Exchanges and coordination between undertakings which aim at addressing the shortage of essential products and services, that are 'in normal circumstances problematic under Union competition rules' would no longer be considered as such.¹⁶⁶ A temporary framework was also adopted for state aid, this time for application of Article 107(3)(c), under which an aid may be compatible 'to remedy a serious disturbance in the economy of a Member State'.¹⁶⁷ While Article 107(2)(b) TFEU allows to compensate losses 'caused primarily and directly by the exposure to Covid-19 during the peak of the pandemic or in its immediate aftermath',¹⁶⁸ Article 107(3)(c) permits the Commission to address more long-term consequences. Under Article 107(3)(c), the Commission has much greater discretionary powers to ensure that the aid given serves a legitimate purpose, is proportionate, and does not create too much disturbance of competition. The Commission has relied on this framework to set out *additional* temporary State aid measures that it considers compatible under Article 107 (3)(b) TFEU.¹⁶⁹ Amended several times to broaden its scope or extend its use, the temporary framework expired on 30 June 2022 for most of the tools provided, but some exceptions for some measures continue until 31 December 2022, 30 June 2023, or 31 December 2023.¹⁷⁰

The other paradigm shift, which might not have been expected, is that the Commission did not make use of its formal enforcement powers in relation to Member State border measures, but instead relied on steering by soft law. The Commission could have used the infringement procedure to guard a core value such as free movement of Union citizens against unjustified interference. The legality of the reintroduction of border controls and travel restrictions for citizens within the Union, their proportionality, in particular, is by no means undisputed.¹⁷¹ As regards consistency, for instance, a requirement increasingly present in the Court's control of proportionality,¹⁷² having national borders closed while free movement is

[plaint/european-consumer-centres-network-ecc-net/faq-cancellations-individually-booked-accommodations-car-rental-and-events-due-covid-19_en](https://european-consumer-centres-network-ecc-net/faq-cancellations-individually-booked-accommodations-car-rental-and-events-due-covid-19_en)>.

¹⁶⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29. For further discussion, see Case C-407/21 (n 158), Opinion of Advocate General Medina; Hondius and others (n 9).

¹⁶⁶ European Commission, 'Communication from the Commission—Temporary Framework for Assessing Antitrust Issues Related to Business Cooperation in Response to Situations of Urgency Stemming from the Current COVID-19 Outbreak' [2020] OJ C1161/7, para 15.

¹⁶⁷ Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C911/1.

¹⁶⁸ Delia Ferri, 'The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis' (2021) 12 *European Journal of Risk Regulation* 176, 183.

¹⁶⁹ Para 16. It would be later extended to occurrences under 107(3)(c): see Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C1121/1. For an analysis of the decisions taken under that framework, see Ferri, (n 168) 183. For an analysis of the EU state aids response more generally, see Alessandro Rosano, 'Adapting to Change: COVID-19 as a factor shaping EU State Aid Law' (2020) 5 *European Papers* 621.

¹⁷⁰ European Commission, 'Communication from the Commission—Sixth Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak and Amendment to the Annex to the Communication from the Commission to the Member States on the Application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to Short-Term Export-Credit Insurance' [2021] OJ C473/1.

¹⁷¹ Carrera and Chun Luk (n 106); Gareth Davies, 'Does Evidence-Based EU Law Survive the Covid-19 Pandemic? Considering the Status in EU Law of Lockdown Measures Which Affect Free Movement' (2020) 2 *Frontiers in Human Dynamics* <https://www.frontiersin.org/articles/10.3389/fhumd.2020.584486/full>; 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' (2021) *European Journal of Risk Regulation* doi: 10.1017/err.2020.120; Thym and Bornemann (n 110) 1662–9.

¹⁷² See very recently, Case C-391/20 *Boriss Cilevičs and Others* [2022] EU:C:2022:638.

unfettered within a country makes little sense, especially if bordering countries face a similar health situation. ‘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?’¹⁷³ Scientific evidence, normally a strong element in the Commission’s proportionality control, and consistently relevant in the Court’s assessment of proportionality of impediments to free movement, seems to have played a weaker role in the context of Union-led control over design of national Covid-19 measures. This point is addressed further below (Section IV.A).

Outside the context of the formal infringement procedure, the Commission called upon Member States in February 2021, via a letter by Commissioner Reynders (Justice) and Commissioner Johansson (Home Affairs), to adhere to the Recommendations on travel restrictions.¹⁷⁴ Reportedly, six letters were sent to Member States individually, in March 2021, calling on them to bring their travel restrictions in line with Union law.¹⁷⁵ However, no formal legal action was taken against Member States, even though the proportionality and inconsistency tests would almost certainly have been found to be breached, had the matter reached the Court.

However, the Commission’s approach was not uniform in this regard. Some infringement procedures were initiated against national export restrictions on protective equipment and medicines, persuading Member States to lift such restrictions.¹⁷⁶ Another area in which the Commission has been actively pursuing infringement procedures against Member States, noted above, is travellers’ rights. According to the Commission, it opened procedures against a total of 11 Member States for breach of their obligations under the Package Travel Directive, with most procedures being closed after amendment or expiry of the national legislation.¹⁷⁷ The Commission’s case against Slovakia is pending.¹⁷⁸

The examples discussed in this section show the Union’s ‘economic constitution’ is characterized by a valuable degree of flexibility, with internal market rules which are sufficiently adaptable to allow Member States to weather the storm of the Covid-19 crisis as effectively as possible. Yet, the adoption of a wide array of restrictive measures adopted by Member States, which were largely accepted by the European Commission, and not subject to review by the Court, as well as the suspension of a large body of rules, does raise questions. The European Commission claims that its infringements policy involves a focus on systemic or structural issues¹⁷⁹: it is difficult to imagine more systemic or structural issues than suspension of foundational internal market rules. The internal market, as well put, ‘is not set up to withstand a quasi-general suspension of the rules, in key domains, and in relation to most Member States at the same time’.¹⁸⁰ Those rules are here for a reason, to ensure a level playing field. To give just one example of the consequence of widespread suspension of the disciplines of internal market law, facilitating the granting of aid by Member States risked favouring the strongest economies.¹⁸¹ In the same way, certain Member States, due to their

¹⁷³ Thym and Bornemann (n 110) 1168–9.

¹⁷⁴ European Commission (n 109).

¹⁷⁵ Schengen Visa Info News, ‘EU Commission Urges Six Member States to Remove Some of Their COVID-19 Border Restrictions’ (24 February 2021) <<https://www.schengenvisa.info.com/news/eu-commission-urges-six-member-states-to-remove-some-of-their-covid-19-border-restrictions/>> accessed 11 October 2022.

¹⁷⁶ European Commission, ‘Monitoring the Application of European Union Law - 2020 Annual Report’ COM (2021) 432 final, 4.

¹⁷⁷ Ibid 4.

¹⁷⁸ Action brought on 27 August 2021—*European Commission v Slovak Republic* (Case C-540/21).

¹⁷⁹ European Commission, ‘Commission Communication—Enforcing EU Law for a Europe that Delivers’ COM(2022) 518 final; European Commission, ‘Commission Communication—EU Law: Better Results through Better Application’ [2017] OJ C18/10.

¹⁸⁰ ‘Editorial Comments: Disease and Recovery in (COVID-Afflicted) Europe’ (2020) 57 *Common Market Law Review* 624.

¹⁸¹ Ibid.

geography or economic model, rely more extensively than others on cross-border trade and cross-border workers. It may be, therefore, that the protection of health interests within the Union's 'economic' rules is sub-optimal, not for the 'classical' reason that the 'economic' is favoured over the 'social'. Rather, it is because, without Union-wide redistributive policies, removing the legal protections of a level playing field means people in more economically powerful Member States benefit disproportionately from the inherent flexibilities in the rules. This conclusion must, however, be considered in the light of the Union's 'economic constitution' as a whole, including its fiscal powers.

C. Redistribution and the dramatic increase of Union fiscal capacities

The Union's response to the risks to people in less wealthy Member States, as the Union recovers from the Covid-19 crisis, is the provision of direct financial assistance to the Member States, unprecedented on such a massive scale. The most visible aspect of that is the NGEU recovery plan (Section II.B), whose size, 750 billion euros, represents the equivalent of five times the Union annual budget. NGEU is not the only financial support granted by the Union. In May 2020, the Union adopted the Support to mitigate Unemployment Risks in an Emergency ('SURE') scheme, which is an instrument of Union loan funding to Member States to mitigate temporary employment risks arising because of the Covid-19 pandemic, by supporting the costs associated with short-time work schemes.¹⁸² 100 billion euros were made available in the form of loans for the Member States, prefiguring NGEU.

Furthermore, on 24 March 2020, the European Central Bank decided to create a new programme of quantitative easing, the Pandemic Emergency Purchase Programme (PEPP), consisting in a temporary purchase programme of private and public sector securities.¹⁸³ The original envelope of 750 billion euros was extended by 600 billion on 4 June 2020 and 500 billion by 10 December 2020. The Governing Council decided to discontinue net asset purchases under the PEPP after March 2022.¹⁸⁴ Available resources from the European Stability Mechanism (ESM)¹⁸⁵ and the European Investment Bank¹⁸⁶ were also used.

The Union also expanded the reach and size of its existing funds. With the 'Coronavirus Response Investment Initiative', the Union made formal amendments to allow existing 'structural funds' to be deployed to combat the economic, social, and public health effects of Covid-19.¹⁸⁷ The rationale behind these formal amendments was to ensure that Member States, which had had to make sudden, unplanned investments in their healthcare systems and other sectors of their economies in response to the pandemic, creating or aggravating serious liquidity shortages, could nonetheless continue to access cohesion funding and invest in the programmes thus supported. A new cohesion package specific to the Covid-19

¹⁸² Council Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak [2020] OJ L159/1.

¹⁸³ Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme [2020] OJ L91/1. Regarding the legality of the PEPP programme, see Annelieke AM Mooij, 'The Legality of the ECB Responses to COVID-19' (2020) 45 *European Law Review* 713.

¹⁸⁴ European Central Bank, 'Pandemic Emergency Purchase Programme' <<https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html>>.

¹⁸⁵ On the ESM's Pandemic Crisis Support scheme, see Eurogroup, 'Report on the Comprehensive Economic Policy Response to the COVID-19 Pandemic' (2020) para 16 <<https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic>>.

¹⁸⁶ See European Investment Bank, 'Press Release—EIB Group Moves to Scale Up Economic Response to COVID-19 Crisis' (2020) <<https://www.eib.org/en/press/all/2020-094-eib-group-moves-to-scale-up-economic-response-to-covid-19-crisis>>.

¹⁸⁷ Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013, and (EU) No 508/2014 as regards specific measures to mobilize investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative) [2020] OJ L99/5.

response, REACT-EU, was also adopted,¹⁸⁸ providing an additional allocation to the Structural Funds of up to EUR 47.5 billion euros for 2021 and 2022. The scope of the 'European Solidarity Fund', which was set up in 2002 for relief and assistance following natural disasters, was formally extended to cover 'major public health emergencies'.¹⁸⁹ The Union also adjusted the rules for its 'Fund for European Aid to the Most Deprived', a peripheral Union policy instrument, which replaced the Union's food aid programme which has been running since the 1980s.¹⁹⁰ This fund works with partner organizations in the Member States to provide food and other basic necessities to help people take steps out of poverty. Moreover, the Union financed stockpiling of medical equipment which was redistributed to the Member States under the rescEU mechanism.¹⁹¹

This massive influx of money, combined with the activation of the general escape clause under the SGP, granting budgetary leeway to Member States, represents a significant departure from the austerity discourse that had prevailed in Union politics since the global financial crisis. The Union's semester system has been significantly criticized for its indirect effects on healthcare systems.¹⁹² In the aftermath of the global financial crisis, and the Eurozone crisis, the semester system was used to 'steer' Member States towards economic policies of fiscal prudence and austerity, with consequent repercussions for resourcing of national health systems.¹⁹³ The Covid-19 pandemic appears to have fundamentally changed the approach in this regard. The economic and fiscal conditionality traditionally used for the disbursement of Union funds, under which Member States need to comply with country-specific recommendations and implement various reforms to obtain funding, is present in an attenuated form in the RFF.¹⁹⁴ The days of strict conditionality seem to be over. Rather than an austerity-based approach, the Union institutions have adopted a position that sees economic recovery as dependent on the ability to increase public spending, especially on certain sectors, including health. An understanding of Union economic governance as limited to (austerity-based) regulation is therefore incomplete: the Union's economic governance regime includes a redistributive function, and one which encompasses health.¹⁹⁵

The 'classical analysis' of the Union's internal market law, which suggests it is constitutionally encoded to favour the 'rule' of free movement and fair market competition over inconvenient exceptions to be tolerated for social or other reasons, thus does not stand up in the context of the Union's legal response(s) to Covid-19. What is needed is a conception of the Union's internal market that includes objectives other than economic freedom and openness,

¹⁸⁸ Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU) [2020] OJ L437/30.

¹⁸⁹ Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No 1012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency [2020] OJ L99/9.

¹⁹⁰ Regulation (EU) 2020/559 of the European Parliament and of the Council of 23 April 2020 amending Regulation (EU) No 223/2014 as regards the introduction of specific measures for addressing the outbreak of COVID-19 [2020] OJ L130/7; Regulation (EU) 2021/177 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 223/2014 as regards the introduction of specific measures for addressing the crisis associated with the outbreak of COVID-19 [2021] OJ L53/1. See Johanna Greiss, Bea Cantillon and Tess Penne, 'The Fund for European Aid to the Most Deprived: A Trojan Horse Dilemma?' (2020) 55 *Social Policy Administration* 4.

¹⁹¹ Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities [2020] OJ L821/1.

¹⁹² Greer (n 18); Sokol (n 129).

¹⁹³ See Natasha Azzopardi-Muscat and others, 'EU Country Specific Recommendations for Health Systems in the European Semester Process: Trends, Discourse and Predictors' (2015) 119 *Health Policy* 375.

¹⁹⁴ RRF Regulation, Arts 17–19. See Ruffert and Leino-Sandberg (n 45) 437; De Witte (n 45) 676. See also Dermine (n 45) 351–2. Rather, the days of rule of law conditionality have come, see Mario Kölling, 'The Role of (Rule of Law) Conditionality in MFF 2021–2027 and Next Generation EU, or the Stressed Budget' (2022) *Journal of Contemporary European Studies*, Online First <<https://www.tandfonline.com/doi/full/10.1080/14782804.2022.2059654>> accessed 11 October 2022.

¹⁹⁵ Ladi and Tsarouhas (n 89).

and a legal framework that respects that conceptualization of the internal market, and its relations with broader Union economic governance. As we already noted above, the 'classical analysis' of Union internal market law has been challenged in Union health law scholarship since at least the 2000s.¹⁹⁶ These aspects of the Union's Covid-19 response could therefore have been predicted. The legal paradigm shift that *has* taken place in response to the Covid-19 pandemic is the change in the law of Union fiscal governance. This reconceptualization of the architecture of EMU and the consequent understanding of Union formal legal competences to take redistributive action within the internal market was much less predictable. In our view, therefore, the interaction between this economic governance policy shift and the reframing of internal market law constitutes a fundamental legal paradigm shift in terms of the Union's 'economic constitution', if understood holistically.

IV. COMPETING VISIONS OF THE UNION AS A *LEGAL ORDER*?

The Union legal order, especially through its twin principles of direct effect and primacy, is a powerful engine for European integration. As Weiler,¹⁹⁷ and Scheingold before him,¹⁹⁸ have argued, while this sets Union law apart from ordinary international law through the empowerment of individuals (especially economic actors) and both national and European courts, it also comes with a downside, the prevalence of law with technocratic characteristics but lacking in democratic legitimacy, in the sense of accountability and representation. Majone described the Union as a 'regulatory State', where governance is achieved by technocratic law, rather than other redistributive instruments, and is insulated from majoritarian national politics.¹⁹⁹ While this mode of governance has proven effective in building the Union, especially in areas linked to the internal market, including risks to health and the environment, its limits have been noted, in an era of increased politicization and contestation.²⁰⁰ During the pandemic, the Union has acted in highly politicized matters, be it vaccine procurement, the Covid-19 Digital Certificate, or the NGEU recovery and resilience plan.²⁰¹

Against that background, our question is hence the following: to what extent does the Union response during the Covid-19 pandemic display the features described above, of a *legal* Union built on a law that is technocratic in character and lacks democratic credentials? And to what extent do elements of Union Covid-19 law-making compensate by ensuring representative democratic input into the legal decisions taken, suggesting a Union that is attentive to political preferences, irrespective of 'science-driven' technocratic decision-making? To answer those questions, we look at two selected and relevant aspects of the Union response: the role of 'science' in the elaboration of 'Union Covid-19 law', especially as regards border closures (Section IV.A.), and the role played by the institutions of representative democracy during the pandemic, the European Parliament in particular (Section IV.B). Our aim is not to take a normative stance on how regulation should be achieved in the European Union, or whether the Union's legal responses to Covid-19 were 'appropriate'. Rather, we highlight the tensions between two visions of the Union's legal order: Union law as 'functional law', with further integration and harmonization as a driving value, insulated from national political

¹⁹⁶ See, seminally, Hervey and McHale, *European Union Health Law: Themes and Implications* (n 18). See also n 91.

¹⁹⁷ Weiler (n 99); Joseph HH Weiler, 'Van Gend En Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 *International Journal of Constitutional Law* 94.

¹⁹⁸ Stuart A Scheingold, *The Rule of Law in European Integration* (New Haven: Yale UP 1965).

¹⁹⁹ Giandomenico Majone, 'The Regulatory State and Its Legitimacy Problems' (1999) 22 *West European Politics* 1.

²⁰⁰ Mark Dawson, 'Better Regulation and the Future of EU Regulatory Law and Politics' (2016) 53 *Common Market Law Review* 1209.

²⁰¹ 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.

preferences; and Union law as itself incorporating and sometimes foregrounding values other than integration, responding to national diversity and political preferences. We also consider whether the Covid-19 crisis demonstrates some inherent limits to the Union as a *legal* order, fundamentally different from ordinary international law.

A. Border closures: beyond the functional ‘regulatory State’?

In a crisis such as that of the Covid-19 pandemic, science is meant to play a key role both to understand the nature of risk and to elaborate a response to mitigate it. Rarely have epidemiologists, virologists, and other scientific advisors been more under the spotlight, or more relied upon in governance responses. The scrutiny of such technocratic processes is not only because of the unprecedented nature of the pandemic in recent history, but also because of the high degree of uncertainty that has surrounded the new virus since its apparition.²⁰² This uncertainty applied both at the level of risk assessment, as little was known about the contagious potential of the SARS-CoV-2 and its consequences, and at that of risk management, in terms of which control measures were necessary to stem its spreading.

The Union is an organization that ostensibly puts ‘science’ at the heart of its decision-making. Legal and policy decisions (including legislation, secondary legislation, guidance, and other soft law, and also court decisions) must be informed by the ‘best available evidence’, including, where available, scientific evidence.²⁰³ Science takes an even more important role when it comes to risk regulation, in particular risk assessment.²⁰⁴ For the Union, scientific evidence fulfils a dual role. It is an instrument of legitimization which reinforces the authority of political and judicial decision-making, grounding it in a higher form of technocratic authority that limits opportunities for contestation.²⁰⁵ Good or ‘better’ regulation is regulation that is based on evidence and meets certain procedural or technical standards.²⁰⁶ Collecting evidence, benchmarking, and providing advice is at the core of Union health policy, especially in areas where the Union is formally competent only to support Member State action.²⁰⁷ As regards judicial decision-making, science and evidence are often used as the ‘neutral arbiter’ to decide on whether a measure is proportionate or not.²⁰⁸ For the internal market, but also to some extent for fiscal and economic governance, ‘science’ functions as an ‘anti-protectionist tool’.²⁰⁹ It is a long-standing principle in free movement case law that ‘the reasons which may be invoked by a Member State by way of justification must be accompanied by *appropriate evidence* or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and *specific evidence* substantiating its arguments’.²¹⁰

For both of these endeavours, the Union develops a strong sense of what ‘sound science’ is,²¹¹ one that is ‘objective’, ‘neutral’, and not tainted by national interests. In free movement

²⁰² Regarding uncertainty in the Covid-19 pandemic, see Lang (n 171) 14.

²⁰³ See European Commission, ‘Better Regulation Guidelines’ (Staff Working Document) SWD (2021) 305 final, 6.

²⁰⁴ European Commission, ‘Better Regulation Toolbox’ (2021) 100, 101 <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox/better-regulation-toolbox-0_en> accessed 11 October 2022. See also Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1 (General Food Law Regulation), Art 3(11). See also Marjolein BA van Asselt and Ellen Vos, ‘EU Risk Regulation: The Role of Science in Political and Judicial Decision-Making’ in Hans-W Micklitz and Takis Tridimas (eds), *Risk and EU Law* (Cheltenham: Edward Elgar Publishing 2015).

²⁰⁵ Van Asselt and Vos (n 204).

²⁰⁶ Dawson (n 200).

²⁰⁷ See EU4health, Art 3(d)(ii): ‘promoting the implementation of best practices and promoting data sharing’.

²⁰⁸ Van Asselt and Vos (n 204).

²⁰⁹ Alberto Alemanno, ‘The Shaping of European Risk Regulation by Community Courts’ (2009) Jean Monnet Working Paper 18/08, 11. Van Asselt and Vos talk about a ‘neutral arbiter’ (n 204) 122.

²¹⁰ Case C-333/14 *The Scotch Whisky Association* [2015] EU:C:2015:845, para 54, emphasis added. See also Case C-156/10 *ANETT* [2012] EU:C:2012:24, para 50.

²¹¹ Christian Joerges, ‘Sound Science in the European and Global Market: Karl Polanyi in Geneva’ in Ellen Vos and Michelle Everson (eds), *Uncertain Risks Regulated* (Abingdon: Routledge-Cavendish 2009).

cases, the Court insists that Member State measures be based on to the 'latest scientific data available' at the date of the adoption of a measure²¹² and requires that 'the results of *international* scientific research' be considered.²¹³ The latter requirement can be seen as a way for the Court to prevent reliance on purely 'national' evidence, which potentially supports non-scientific, protectionist interests. Throughout its case law, the Court has 'developed an increasingly suspect position towards nationally determined versions of hazard'.²¹⁴ As regards Union legislation, the WHO represents this neutral arbiter in the Court's assessment of proportionality.²¹⁵

Unsurprisingly then, 'science' has played a key role in Union action during the pandemic. The Union has 'produced' science and has insisted that it should inform, as much as possible, its response and that of the Member States. The 'Joint European Roadmap towards lifting containment measures', published in April 2020, cites among three basic principles the fact that '[a]ction should be based on science' and that '[t]he available scientific evidence must inform as much as possible Member States' decisions and Member States should be ready to revise their approaches as more scientific evidence appears.²¹⁶ The ECDC has played a crucial role in this regard, as a body in charge of collecting, evaluating, and disseminating relevant scientific data, providing scientific opinions and assistance, and exchanging information and best practices.²¹⁷ The ECDC released many technical reports providing guidance to Member States on health countermeasures,²¹⁸ for instance, offering advice regarding isolation of infected individuals and quarantine of individuals suspected of infection,²¹⁹ use of facemasks,²²⁰ or testing.²²¹ The European Commission also sought to coordinate scientific guidance, through a 'scientific advice platform' bringing together scientific advisors from national governments of the Member States, which has been meeting once or twice a month since November 2020.²²² The link between Union scientific advice, and that of the WHO, was also evident. The Union institutions consistently referred to the WHO's 11 March 2020 declaration of Covid-19 as a global pandemic.²²³ The ECDC draws on WHO epidemiological guidance in developing its policy recommendations for the Union.²²⁴

At first sight, grounding political and judicial decision-making in 'science' does not seem to suffer much contestation. Yet, the authority and legitimacy of the law, in areas involving

²¹² Case C-663/18 *B S and C A (CBD)* [2020] EU:C:2020:938, para 88.

²¹³ *Ibid.*, para 87.

²¹⁴ Hervey and McHale, *European Union Health Law: Themes and Implications* (n 18) 407.

²¹⁵ See eg Case C-477/14 *Pillbox 38* [2015] EU:C:2016:324, paras 50–53.

²¹⁶ European Commission and European Council (n 115) 6.

²¹⁷ See Regulation 851/2004, 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* 977.

²¹⁸ As regards non-pharmaceutical interventions, see the extensive repository <<https://www.ecdc.europa.eu/en/publications-data/covid-19-guidelines-non-pharmaceutical-interventions>> accessed 11 October 2022.

²¹⁹ The latest version is ECDC, 'Technical Report—Guidance for Discharge and Ending of Isolation of People with COVID-19' (2020) <<https://www.ecdc.europa.eu/sites/default/files/documents/Guidance-for-discharge-and-ending-of-isolation-of-people-with-COVID-19.pdf>> accessed 11 October 2022.

²²⁰ ECDC, 'Technical Report—Guidelines for the Use of Non-Pharmaceutical Measures to Delay and Mitigate the Impact of 2019 n-COV' (2020) <https://www.ecdc.europa.eu/sites/default/files/documents/novel-coronavirus-guidelines-non-pharmaceutical-measures_0.pdf> accessed 11 October 2022; ECDC, 'Technical Report—Using Face Masks in the Community: Reducing COVID-19 Transmission from Potentially Asymptomatic or Pre-Symptomatic People through the Use of Face Masks' (2020) <<https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-use-face-masks-community.pdf>> accessed 11 October 2022.

²²¹ ECDC, 'Testing Strategies for SARS-CoV-2' 21 May 2021 <<https://www.ecdc.europa.eu/en/covid-19/surveillance/testing-strategies>> accessed 11 October 2022.

²²² 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>.

²²³ World Health Organization, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>> accessed 11 October 2022.

²²⁴ See eg ECDC, 'Introducing a Coherent European Framework for Tuning COVID-19 Response Measures' (2021) <<https://www.ecdc.europa.eu/sites/default/files/documents/Framework-for-tuning-COVID-19-response-measures.pdf>> accessed 11 October 2022.

risk especially, can never be secured on science alone, but has to integrate other broader societal concerns. There is otherwise a risk of depoliticizing issues and transferring the responsibility for decisions to the executive or to non-majoritarian institutions, particularly technocratic agencies in the case of the Union.²²⁵ Further, where uncertainty exists, ‘science’ may not constitute the desired neutral arbiter, in which case it is even less likely to constitute a sufficient basis for decision-making.²²⁶ The incapacity of the Union executive, legislator, or courts to make room for non-scientific concerns and the Union’s tendency to ‘fabricate’ certainty in areas where uncertainty is rife has been well identified in scholarship, pointing to the risk posed for the legitimacy of Union action and its responsiveness to more political and ethical concerns.²²⁷

Yet, what we have witnessed during the Covid-19 pandemic was an openness of the Union towards greatly diverging ways of managing the risk, as regards especially travel restrictions and border closures (Section III.A).²²⁸ International borders, internal and external to the Union, have been closed for very long periods that arguably far exceeded what was necessary from a health point of view. Both the WHO and the ECDC consistently pointed to the fact that indiscriminated border closures were overall ineffective.²²⁹ This advice has not prevented Member States from enacting such measures, without much reaction from the European Commission. In accompanying Member States in their wish to close the external Union borders over a prolonged period, the Union in effect ignored the advice of the WHO and of its own agency.²³⁰

In a way, these measures can be assessed as an application of the principle of precaution,²³¹ according to which ‘where there is uncertainty as to the existence or extent of risks, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent.’²³² That would be, however, too benevolent an appraisal.

²²⁵ Maria Weimer and Annië de Ruijter, ‘Regulating Risks in the European Union: The Co-Production of Expert and Executive Power’ in Maria Weimer and Annië De Ruijter (eds), *Regulating Risks in the European Union: The Co-Production of Expert and Executive Power* (Oxford: Hart Publishing 2017) 3. See also Chalmers, “Food for Thought” (n 70); Chalmers, ‘Risk, Anxiety and the European Mediation of the Politics of Life’ (n 70).

²²⁶ Vos and Everson (n 211); Van Asselt and Vos (n 204); Marjolein BA van Asselt and Ellen Vos, ‘The Precautionary Principle and the Uncertainty Paradox’ (2006) 9 *Journal of Risk Research* 313; Ellen Vos, ‘The European Court of Justice in the Face of Scientific Uncertainty and Complexity’ in Mark Dawson, Bruno De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar Publishing 2013).

²²⁷ Sheila Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton NJ: Princeton UP 2007); Maria Weimer, *Risk Regulation in the Internal Market: Lessons from Agricultural Biotechnology* (Oxford: OUP 2019); Vos and Everson (n 211); Van Asselt and Vos (n 226); Vos (n 226). 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.

²²⁸ Davies (n 171); Peter Van Elsuwege, ‘Lifting Travel Restrictions in the Era of COVID-19: In Search of a European Approach’ <<https://verfassungsblog.de/lifting-travel-restrictions-in-the-era-of-covid-19-in-search-of-a-european-approach/>> accessed 11 October 2022; Paces and Weimer (n 86).

²²⁹ WHO, ‘Policy and Technical Considerations for Implementing a Risk-Based Approach to International Travel in the Context of COVID-19’ <<https://www.who.int/news-room/articles-detail/policy-and-technical-considerations-for-implementing-a-risk-based-approach-to-international-travel-in-the-context-of-covid-19>> accessed 11 October 2022; ECDC, ‘Considerations for Travel-Related Measures to Reduce Spread of COVID-19 in the EU/EEA’ (2020) <<https://www.ecdc.europa.eu/en/publications-data/considerations-travel-related-measures-reduce-spread-covid-19-eueea>> accessed 11 October 2022.

²³⁰ In its communication, European Commission, Communication to the European Parliament, the European Council and the Council (n 114), the European Commission acknowledges this: ‘while travel restrictions are generally not seen by the World Health Organisation as the most effective way of countering a pandemic, the rapid spread of COVID-19 makes it essential that the EU and Member States take urgent, immediate and concerted action not only to protect the public health of our populations, but also to prevent the virus from further spreading from the EU to other countries, as has been observed in recent weeks.’

²³¹ Lang (n 171).

²³² Case C-452/20 *Agenzia delle dogane e dei monopoli and Ministero dell’Economia e delle Finanze* [2022] EU:C:2022:111, para 34. Following the approach taken by De Sadeleer, we ‘will not reopen discussion on the meaning of this principle, other than to recall its function as the expression of a philosophy of anticipated action, not requiring that the entire corpus of scientific proof be collated in order for a public authority to be able to adopt a preventive measure’: Nicolas de Sadeleer, ‘The Precautionary Principle in EC Health and Environmental Law’ (2006) 12 *European Law Journal* 139, 139.

The case of border closures rather seems to be a case where lay perception of risk has prevailed over expert assessment,²³³ of 'fear' prevailing over evidence.²³⁴

Borders carry an immense symbolic weight and politicians in the Union and beyond have responded to citizens' pressure when deciding to close them.²³⁵ During a pandemic as severe as that of Covid-19, borders provide reassurance, even if ill-founded. There is little doubt that the firm decision of the Union to close Union external borders was made under pressure from the Member States, who shared a general consensus that borders, both within the Union²³⁶ and between the Union and third countries, should be closed. Moreover, the Union increasingly plays on the narrative of the 'protective' Union, or 'fortress' Union if one takes a less positive view of this evolution.

The Covid-19 crisis thus represents a limitation to the understanding of the Union's legal order as driven by technocratic science-based decision-making as an engine of greater integration. Like its Member States, the Union set aside some of its core principles—internal free movement as a fundamental right of Union citizens and the importance of grounding measures as far-reaching as quasi-total border closures on some sort of scientific evidence—in view of a non-scientific and overtly politically driven response to a novel and unknown threat to human health.

B. Parliamentary involvement in the elaboration of the Union's response

If 'science' did not justify key elements of Union Covid-19 law, did democratic representation do so instead? We have already implicitly answered this question, by considering the pressure from the governments of Member States as a driver to Union rules on border closures. But the governments of Member States are only an indirect source of democratic representation in the Union's legal order: Union law provides for a directly elected European Parliament as co-legislature with Council and the European Commission. In this section, we consider the role of the Union's Parliament in responding to the Covid-19 crisis.

In assessing the position of the Union Parliament, we need to be attentive to the general phenomenon that, in times of crisis and emergency, there is a natural tendency towards a reinforcement of the prerogatives of the executive over those of the legislative branch. This tendency has been observed across constitutional democracies during the Covid-19 pandemic.²³⁷ The phenomenon was identified by the Commission and the European Parliament, which were quick to stress, regarding the Member States, that an effective response to the pandemic should not result in undermining the fundamental values upon which the Union is based, including democracy, the rule of law and respect for human rights.²³⁸ The question was less acute for the Union, as its legal framework does not provide for the possibility to declare a constitutional state of emergency, in the sense of a normative act that extends powers or suspends provisions concerning the protection of basic rights, the operations of legislatures, and access to courts beyond what is possible and acceptable in normal times.

²³³ Sweta Chakraborty, 'How Risk Perceptions, Not Evidence, Have Driven Harmful Policies on COVID-19' (2020) 11 *European Journal of Risk Regulation* 236.

²³⁴ Lang (n 171); Davies (n 171) 4.

²³⁵ Thym and Bornemann (n 110). Sarah Wolff, Ariadna Ripoll Servent and Agathe Piquet, 'Framing Immobility: Schengen Governance in Times of Pandemics' (2020) 42 *Journal of European Integration* 1127.

²³⁶ 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.

²³⁷ See, for example, the entries in the Lex Atlas Covid-19: 'Lex-Atlas: Covid-19: A Global Academic Project Mapping Legal Responses to Covid-19' <<https://lexatlas-c19.org/>> accessed 11 October 2022.

²³⁸ Art 2 TEU. See European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2020 Rule of Law Report: The Rule of Law Situation in the European Union' COM (2020) 580 final; European Parliament, Resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights [2020] OJ C415/39.

A problem specific to the Covid-19 emergency, and highly relevant for parliamentary activity, was that of the limitations on travels and gatherings. All Union institutions had to adapt to the restrictions on individual mobility and the necessity to pursue activities remotely.²³⁹ The European Parliament is probably the institution that has been most affected by the pandemic. It has not only suffered as a *parliament*, a place for meeting and debating, which sits uneasily with stay-at-home measures and rules limiting gathering, but also as a *European* one, made of representatives from the 27 Member States who travel weekly in and out of Brussels or Strasbourg, and have been particularly affected by border closures. In March 2020, the President of the European Parliament took the decision to close the institution, under its executive powers and responsibility for the 'security and integrity' of Parliamentary premises,²⁴⁰ and to move to remote working, debating, and voting for the MEPs. A quickly arranged remote system involving the Parliament's translation service was used for over 1500 meetings.²⁴¹ In December 2020,²⁴² formal amendments were made to the European Parliament's Rules of Procedure, with the addition of a new title XIIIa on 'Extraordinary circumstances'.²⁴³ Thus we see that the European Parliament itself acted within the existing legal framework, and formally amended the rules where necessary.

Formally speaking, therefore, it seems that the pandemic has not affected the business of the Parliament, or the legal structures that constrain and enable it, to too significant an extent.²⁴⁴ Such a conclusion suggests that legitimacy through representative democracy as articulated through the law that governs the role of the European Parliament in the Union was not altered by the crisis. But this conclusion would be inadequate. Although the Parliament's powers have not been *formally* diminished, its role in the elaboration of the Union response has been particularly weak, especially if compared to that of the Commission, the European Council and the Council.²⁴⁵ This weakness is visible in at least three respects.

First, lack of parliamentary oversight is especially problematic during a crisis where, as most commentators would agree, and we argued above (Sections II and III), important changes have occurred on fundamental orientations of the Union²⁴⁶: its regulatory, fiscal and redistributive powers, the nature of the internal market and intra-Union mobility: in short, the Union's 'economic constitution'. The NGEU recovery plan and the accompanying support measures adopted by the Union undoubtedly represent a historical moment, but not necessarily one that requires new 'constitutional' legitimating structures. This policy shift was largely the result of a deal between Member States, put into practice by the European

²³⁹ The European Commission amended its Rules of Procedure to permit remote teleworking and formal virtual meetings: Commission Decision (EU, Euratom) 2020/555 of 22 April 2020 amending its Rules of Procedure [2020] OJ L1271/1. The Council adopted a first formal Decision temporarily derogating from its normal rules of procedure in March 2020: Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the EU [2020] OJ L881/1. The European Court of Justice suspended all hearings on 16 March 2020. Prescribed time limits for proceedings were extended until 1 September 2021. The 'e-Curia' system for electronic document submission was already in place, which supported the Court continuing to provide a judicial service through remote working. See CJEU, 'Covid-19—Information' <https://curia.europa.eu/jcms/jcms/p1_3012065/en/> accessed 11 October 2022.

²⁴⁰ Rules of Procedure of the European Parliament, Rule 22 (5). See Gabriel Richard-Molard, 'The European Parliament in the COVID-19 Crisis. A Remote Parliament' (2020) The European Parliament in the time of coronavirus—Robert Schuman Foundation.

²⁴¹ Klaus Welle, 'Protecting Members and Staff, Ensuring Business Continuity and Implementing Practical Solidarity' (2020) The European Parliament in the time of coronavirus—Robert Schuman Foundation.

²⁴² European Parliament decision of 17 December 2020 on amendments to the Rules of Procedure in order to ensure the functioning of Parliament in extraordinary circumstances (2020) 2098 (REG).

²⁴³ European Parliament, Rules of Procedure of the European Parliament, Title XXIIIa, Rules 237a–237d <https://www.europarl.europa.eu/doceo/document/RULES-9-2022-07-11-RULE-237-1_EN.html> accessed 11 October 2022.

²⁴⁴ Welle (n 241); Richard-Molard (n 240); Sophia Russack and Drew Fenner, 'Crisis Decision-Making: How Covid-19 Has Changed the Working Methods of the EU Institutions' (2020) 17 CEPS Policy Insight https://www.ceps.eu/wp-content/uploads/2020/07/PI2020-17_Crisis-decision-making.pdf.

²⁴⁵ This appears clearly from Schmidt (n 201).

²⁴⁶ Ibid; Wolff and Ladi (n 201).

Commission, without much involvement from the European Parliament, despite its central role on budgetary issues under the TFEU.²⁴⁷ As discussed above (Section II.B), the legal architecture of NGEU, as an off-budget instrument, with recourse to Articles 122 and 311 TFEU as legal basis, meant that the European Parliament was merely informed and consulted, respectively. The SURE Regulation is also based on Article 122 TFEU.²⁴⁸ Such mode of governance looks like a throwback to the legal settlement on legitimacy before Parliament effectively became a co-legislature with the Council. The deficiencies of such a system in the context of a Union of expanding competences led to the Single European Act and Treaties of Maastricht and Nice which enhanced Union legitimacy through representative democracy models. The Parliament has tried to strengthen its role in the Union's economic response to the crisis. But Parliamentary input remains overall insufficient,²⁴⁹ limited to the RRF.²⁵⁰ Moreover, the exclusion of the European Parliament was not compensated by a greater involvement of national parliaments.²⁵¹

The modest role played by the European Parliament could have been expected, as it is historically a 'dwarf' in EMU matters.²⁵² Yet, for the first time, grants were given to Union Member States, to be financed by Union bonds issued by the Commission. If the Union's legal order is based in part on representative democracy, the European Parliament should have been involved in the creation of a common debt, regardless of its legality in terms of Union competence. The fact that the Parliament was not involved suggests a limitation to the notion of the Union as a *legal* order, as opposed to a framework for intergovernmental politics. The warning given by Dawson and De Witte after the Euro-crisis echoes particularly well here: as the Union is venturing into redistributive politics, it needs to ensure adequate input legitimacy so as not to upset the Union 'constitutional balance'.²⁵³ One can justify a relatively de-politicized political structure if Union funding instruments are cost-neutral between states and based on benchmarks known and agreed by the Member States. In the NGEU case, however, there is no cost-neutrality, but winners and losers, and the benchmarks are sufficiently broad so as to give the Commission significant discretion.²⁵⁴

Second, the fact that so much of the Union response was non-legislative in nature means that the Parliament was little involved in its elaboration, or not at all. As already mentioned (Sections II.A and III.A), the Union relied heavily on soft law instruments,²⁵⁵ which mostly originated from the Commission, in the form of communications, but also from the Council,

²⁴⁷ See Arts 310–324 TFEU, especially Art 314.

²⁴⁸ Council Regulation 2020/672.

²⁴⁹ Cristina Fasone, 'Fighting Back? The Role of the European Parliament in the Adoption of Next Generation EU' (2022) 28 *The Journal of Legislative Studies* 368; Diane Fromage and Menelaos Markakis, 'The European Parliament in the Economic and Monetary Union after COVID: Towards a Slow Empowerment?' (2022) 28 *The Journal of Legislative Studies* 385.

²⁵⁰ Dias Pinheiro and Dias (n 94).

²⁵¹ See Elena Griglio, 'National Parliaments' Resilience under the Euro-Zone and the Covid-19 Crises: Continuity and Discontinuity in the Euro-National Scrutiny' (2022) *The Journal of Legislative Studies*, Online First <<https://www.tandfonline.com/doi/full/10.1080/13572334.2022.2111141>> accessed 11 October 2022. Bruno Dias Pinheiro and Diane Fromage, 'National Parliaments and Their (Limited) Role in the EU in a Crisis: The Example of SURE' in Bruno Dias Pinheiro and Diane Fromage (eds), *National and European Parliamentary Involvement in the EU's Economic Response to the COVID-19 Crisis* (2020) 36 EU Law Live Weekend Edition 5–11 <https://issuu.com/eulawlive/docs/weekend_edition_36> accessed 11 October 2022; Ton Van den Brink, 'National Parliaments and the Next Generation EU Recovery Fund' in *Ibid* 21–8.

²⁵² Fromage and Markakis (n 249).

²⁵³ Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *The Modern Law Review* 817. See also Mark Dawson and Floris De Witte, 'Self-Determination in the Constitutional Future of the EU' (2015) 21 *European Law Journal* 371.

²⁵⁴ Basically, NGEU has the accountability structure of Majone's regulatory state but pursues objectives that go well beyond Majone's acceptable parameters. See Mark Dawson and Adina Maricut-Akbik, 'Accountability in the EU's Para-Regulatory State: The Case of the Economic and Monetary Union' (2021) *Regulation & Governance* <https://doi.org/10.1111/rego.12442>.

²⁵⁵ For an in-depth analysis of the roles of soft law in the EU, see Linda Senden, *Soft Law in European Community Law: Its Relationship to Legislation* (Oxford: Hart Publishing 2003). See also Oana Stefan and others, 'EU Soft Law in the EU Legal Order: A Literature Review' (2019) King's College London Law School Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346629> accessed 11 October 2022.

in the form of recommendations. Although not unique to the Union,²⁵⁶ the scale is significant: 197 such instruments had been adopted up to August 2020,²⁵⁷ a total which is likely to be double or triple if one considers the period that has elapsed since then. One of the last such documents, at the time of writing, is the September 2022 Communication from the Commission 'EU response to COVID-19: preparing for autumn and winter 2023', where the Commission urges Member States to put the necessary strategies and structures in place to respond to future outbreaks.²⁵⁸ The Union's soft law approach shows no signs of abating. The legitimacy of the extensive use of soft law, as seen in the Union's pandemic response, is also contested.²⁵⁹ Significant problems with soft law measures include the opacity of the decision-making that leads to their adoption and the lack of involvement of the Parliament but also of a broad range of stakeholders.²⁶⁰ The European Parliament was almost completely absent from the adoption of the Union's Covid-19 soft law measures.²⁶¹ Again, as a governance mode, the approach is more akin to intergovernmental politics than to a legal order of a different nature to the World Health Organization or Organisation for Economic Cooperation and Development, neither of which rely on representative democracy.

Third, much of the Union response consisted of the exercise by the Commission of its executive powers, or acting in an executive capacity even in the absence of formal powers. This was the case, for instance, with the temporary frameworks adopted in the field of competition and state aids. The decision to deal with unjustified or disproportionate restrictions to fundamental freedoms through soft law, rather than through the use of infringement proceedings, is another example of a significant choice that escapes democratic oversight or discussion. The Parliament's judicial review powers, as a privileged applicant, are excluded by a decision to use soft law, because soft law measures lack the qualities of reviewable acts.²⁶² The Covid-19 crisis revealed significant weaknesses in the conceptualization of the Union as an entity whose governance powers are based on a legal order which includes the institution of a representative Parliament. In so doing, the Union adopts a vision of 'executive federalism' which is ill-suited to its new redistributive role and its dealings with core issues of political self-determination.²⁶³ The idea is that this legal order is legitimated (in part) through Parliament's role in checking and balancing the Union's executive arm, in the forms both of the European Commission and Union agencies as entities undertaking technocratic governance, and in the forms of the governments of the Member States acting through Council, undertaking *political* decision-making.

V. CONCLUSIONS

Overall, and painting with a broad brush, the Union's legal response to Covid-19 is largely what could have been predicted in advance by any scholar of the history of Union law, and of legal responses to pandemics. Given the nature of Union and national competences in the health domain, the Union's response mainly takes the form of soft law, guidance, and sharing

²⁵⁶ Barbara Boschetti and Maria Daniela Poli, 'A Comparative Study on Soft Law: Lessons from the COVID-19 Pandemic' (2021) 23 *Cambridge Yearbook of European Legal Studies* 20.

²⁵⁷ Mariolina Eliantonio and Oana Ștefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 *European Journal of Risk Regulation* 159.

²⁵⁸ 'EU response to COVID-19: Preparing for Autumn and Winter 2023' COM (2022) 452 final.

²⁵⁹ Oana Ștefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (2020) 2020 5 *European Papers* 663; Eliantonio and Ștefan (n 257).

²⁶⁰ Sacha Garben, 'Competence Creep Revisited' (2019) 57 *Journal of Common Market Studies* 205, 210–11; Sacha Garben, 'The Principle of Legality and the EU's Legitimacy as a Constitutional Democracy: A Research Agenda', in Sacha Garben, Inge Govaere and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Oxford: Hart Publishing 2019) 402; Boschetti and Poli (n 256) 52.

²⁶¹ Eliantonio and Ștefan (n 257).

²⁶² Art 263 TFEU. Only acts with 'legal effects' are reviewable, see Case C-57/95 *France v Commission (Re Pension Funds Communication)* [1997] EU:C:1997:164; Case C-370/07 *Commission v Council (CITES)* [2009] EU:C:2009:590, para 42.

²⁶³ Dawson and De Witte, 'Self-Determination in the Constitutional Future of the EU' (n 253).

of scientific information. Some opportunities for 'Union value added' through collective action, such as in vaccine purchase, have been taken, but these are optional, not mandatory. Where the Union has adopted hard law, many such provisions are based on internal market competences, and the need to ensure free movement of goods, services, and people within an internal market that itself embeds the protection of human health. We acknowledge that this particular understanding of the internal market is not necessarily mainstream in Union legal scholarship. High-profile examples include the EMA marketing authorizations for the Covid-19 vaccines, and the 'EU Digital Covid Certificate'. The Union has focused on opening its internal borders as soon as feasible, while maintaining a stance of closure to the rest of the world. The Union's crisis response overall is characterized by executive rule-making, reliant on a conception of 'science-based' technocratic governance, which foregrounds Union agencies, especially the ECDC and EMA, and side-lines the European Parliament and national parliaments. The Court of Justice has barely been involved, either because litigation has not been brought to challenge actions taken or because the Court has declined to review key executive decisions by finding claims to be inadmissible. The crisis is now being instrumentalized by those who wish to see a formal legal expansion in Union competence.

But our analysis also shows a considerable number of surprises in the Union's legal responses to Covid-19. The most important of these is the generous interpretation of the Union's economic governance competences. The Union has not only deployed all of its existing relatively small-scale redistributive competences to respond to the unfolding crisis. It has also effectively redefined the nature of Union fiscal and economic governance powers to create a redistributive facility which, while being for the moment formally limited in time, far exceeds in scale and scope any previous Union activity of that type. What is different from previous crises is that past Union crisis responses have involved changes taking place outside Union legal structures, with the law sometimes 'playing catch up' in later Treaty amendments. The Union's Covid-19 crisis response at least purportedly takes place *within* existing legal constraints.

The idea that a narrow notion of the disciplines of the internal market is fundamental to the Union's legal order has also been profoundly challenged, and not only through the maximal approach to pre-existing and embedded exceptions to internal market law for times of crisis. The Commission has avoided reviewing market-closing and discriminatory national actions, usually subject to strict proportionality standards, even when aimed at protecting human health. Furthermore, legal standards that seemed core to the Union's economic constitution, such as the principle of budgetary universality, have been set aside without explicit acknowledgement.

In 1976, Jean Monnet suggested that the Union would be 'forged in crisis', and would be 'the sum of the solutions adopted for those crises'.²⁶⁴ Monnet was writing about the politics of European integration. Our focus here is the legal, and our observations of the Union's legal order hitherto suggested that the Union's response to crises is to circumvent legal limitations that are politically inconvenient, while leaving the structures of Union law intact. Yet the nature and scale of the unexpected aspects of the Union's legal response to the pandemic make us pause and reconsider our initial intuition that the Covid-19 crisis has not itself fundamentally affected the Union's legal order. If this is the case, where does it leave the legitimacy of that legal order?

In terms of 'input' and 'throughput' legitimacy,²⁶⁵ the Union's crisis responses were characterized by a move towards executive decision-making and away from Parliamentary input, oversight or scrutiny. If we accept the premise that the European Parliament, as the representative of the European citizenry as a whole, is central in the Union's representative democracy, and that the dramatic increase in its powers in the short constitutional history of the Union has considerably

²⁶⁴ Jean Monnet, *Mémoires* (Fayard 1976). Our translation.

²⁶⁵ Schmidt (n 14).

increased the legitimacy of Union law,²⁶⁶ the Union's Covid-19 crisis response represents a step backwards. The exercise of technocratic governance applies not only in terms of policy substance, but also in enforcement of Union law. The lack of a genuine democratic discussion over Union Covid-19 (soft) law, and the lack of judicial oversight, affects its legitimacy. We acknowledge that this use of unconstrained executive power was also the case in pandemic responses at national level, across the globe.²⁶⁷ But to accept that this was legitimate *in the context of the Union* is to infer that the Union is sufficiently similar to a nation-state to justify its actions, a view that is far from universally shared. On the contrary, important aspects of the Union's legal order provide, or at least seek to provide, legitimacy of an entity that is *not* a nation-state, but neither is an ordinary international organization.²⁶⁸

In terms of 'output' legitimacy, in a substantive and not just procedural sense, however, what we have shown is that the idea of a Union based on a legally encoded dominance of the 'economic' over 'health' interests does not stand up when we consider the Union's Covid-19 response. Instead, what we see is a Union that is prepared to stretch its formal competences to—or beyond, depending on your view—their legal limits, so as to craft responses to the crisis that meet the needs of human health as well as Union-wide economic recovery. These are Union goals that enjoy widespread support in the European population.²⁶⁹ At the same time, however, the Union's constrained competences play an important role in legitimacy of Union law: the Union only acts where it is given power to do so by the democratically-elected governments of the Member States acting through the founding Treaties. All other matters are reserved to the Member States, who exercise authority through national democratic mandates and procedures. In acting at the limits of conferred competences, the Union potentially puts its own legitimacy into question. But the creative use of existing competences is not *per se* illegitimate. To render a crisis response which speaks to politically determined aims in a form which fits within existing Union legal structures is not insignificant. Previous health, and other, crises, involved extra-legal Union action. This time, and without legal challenge from within the Union's institutional settlement, the political consensus is articulated and implemented within Union law. The tension between the legal limits of Union action and the functional, crisis-driven engine of European integration is a foundational one. The Covid-19 crisis provides a textbook illustration thereof but certainly does not settle this perennial question of Union law.

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²⁶⁶ The question of the 'democratic deficit' of the European Union has filled enough library volumes and it is not our intention to reengage with this perennial question of Union studies. For recent reflections, see Garben, Govaere and Nemitz (n 260). For an early critical take on links between Union legitimacy and the democratic deficit, see Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 *Journal of Common Market Studies* 603.

²⁶⁷ See, for example, the entries in the Lex Atlas Covid-19 <<https://lexatlas-c19.org/>>.

²⁶⁸ Case 26/62 *Van Gend en Loos* [1963] EU:C:1963:1: 'The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited field, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.'

²⁶⁹ Health protection and economic development are consistently high priorities for European populations as reported in Eurobarometer surveys, see, especially, Standard Eurobarometer 94, Winter 2020–21, but also see the more recent Standard Eurobarometer 97, Summer 2022; 96 Winter 2021–22.