The Legality of Covid-19 Travel Restrictions in an 'Area without Internal Frontiers'

Court of Justice (Grand Chamber) 5 December 2023, Case C-128/22, *Nordic Info*

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Introduction

The Covid-19 pandemic shook our societies to their core, leading to restrictions on civil liberties unseen in recent history. Its effects on the EU legal order may still be felt today,[1] not least because of the adoption of the Next Generation EU recovery plan.[2] Among the non-pharmaceutical interventions adopted to limit the spread of the virus, limitations on people's freedom of movement and assembly were at the forefront of the public response, in the form of stay-at-home orders, closures of businesses and international travel bans. The *Nordic Info* case deals with the latter type of restrictions, more specifically the measures adopted by Belgium during the summer of 2020. These measures sought to limit the

[1]V. Delhomme and T. Hervey, 'The European Union's Response to the Covid-19 Crisis and (the Legitimacy of) the Union's Legal Order', 41 *Yearbook of European Law* (2022) p. 48.

[2]*See* P. Dermine, 'The EU's Response to the Covid-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture', 47 *Legal Issues of Economic Integration* (2020) p. 337; B. De Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', 58 *Common Market Law Review* (2021) p. 635; M. Ruffert and P. Leino-Sandberg, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment', 59 *Common Market Law Review* (2022) p. 433.

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movement of persons between the Belgian territory and the zones where the virus was most active, the so-called 'red zones'. Belgium was not alone in this regard. At different points in time during the pandemic, governments within and outside the EU adopted more or less stringent travel restrictions.

Such restrictions raise a specific challenge for the EU as an area without internal frontiers in which persons circulate freely. Free movement is arguably the most tangible and cherished achievement of European integration. A fundamental right of EU citizens,[3] it lies at the heart of two of the EU's fundamental pillars: the area of freedom, security and justice (AFSJ); and the internal market.[4] The *Nordic Info* case was the first opportunity for the Court to interpret the provisions of two core instruments regulating the internal market and the AFSJ, namely Directive 2004/38 (the Citizenship Directive or the Directive) and Regulation 2016/399 (the Schengen Borders Code), in light of free movement restrictions enacted by member states in the context of a global pandemic.

More generally, the *Nordic Info* case brings to the fore the fundamental issue of how to balance the protection of the life and health of citizens with the principles underpinning liberal democratic systems bound by law in times of existential crises. The difficulty inherent in this exercise is compounded by emergency situations and scientific uncertainty, as was the case with Covid-19.

Through a novel interpretation of the two instruments at hand, the Court's Grand Chamber delivered an important and, overall, convincing judgment. While leaving the final word to the national judge, as per its jurisdiction under the preliminary reference procedure, the Court upheld the Belgian travel restrictions as legitimate and proportionate public health measures, largely following the Opinion of Advocate General Emiliou.[5] The ruling strikes a satisfactory balance between the different interests at stake, granting a wide degree of discretion to public authorities to fight public health emergencies of this sort, while insisting on a number of procedural safeguards for individuals. Beyond Covid-19, the judgment contains noteworthy elements regarding the proportionality assessment of free movement restrictions, fundamental rights and the governance of risk in situations of scientific uncertainty.

Factual and legal background

In the early spring of 2020, member states, acting with a complete lack of coordination, adopted various control measures to stop the spread of Covid-19.

[3]Art. 20 TFEU and Art. 45 Charter.
[4]Art. 3 TEU and Art. 26 TFEU.
[5]Opinion of A.G. Emiliou in Case C-128/22, *Nordic Info*, EU:C:2023:645.

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,[6] as well as export bans and restrictions on goods like personal protection equipment or medicines.[7] After an initial peak of Covid-19 infections throughout spring 2020, the so-called 'first wave' of the pandemic, most of the measures restricting individual movements had been lifted by the beginning of that summer, reflecting lower infection rates and a (slight) improvement of the situation in the hospital sector. Some member states, wary of a potential second wave, decided to maintain restrictions on international movements, based on the epidemiological situation of the state of arrival or destination.

On 10 July 2020, Belgium amended its 'Ministerial Decree on urgent measures to limit the spread of the coronavirus Covid-19' (the Decree) to adapt its travel restrictions to the new situation. Non-essential travel to and from Belgium was prohibited, unless originating from or arriving at an EU country, a non-EU Schengen country or the UK (the 'EU+ countries'), and provided that such a country was not classified as 'red', meaning 'high risk'. The classification of a zone as 'green', 'orange' or 'red' was based on the epidemiological situation of each country. Essential travel to and from red zones was still possible, but travellers had to undergo quarantine and mandatory testing on their return. To monitor compliance with the rules, travellers on flights and routes between Belgium and states classified as red zones were the subject of random controls at airports and railway stations. Random controls were also carried out on roads.

On 12 July 2020, the colour classification of EU+ countries was published on the website of the Belgian Foreign Ministry. Sweden was first classified as red, before being re-classified from red to orange only three days later. In the meantime, however, the tour operator Nordic Info had cancelled all scheduled trips to Sweden for the 2020 summer season and provided the travellers present in that country with assistance to return to Belgium. Nordic Info subsequently brought a civil liability claim against the Belgian State before the Brussels Court of

[6]For an overview of the measures adopted, *see* A. Alemanno, 'The European Response to Covid-19: From Regulatory Emulation to Regulatory Coordination?', 11 *European Journal of Risk Regulation* (2020) p. 307; S. Carrera and N. 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; S. Montaldo, 'The Covid-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a serious Crisis Go to Waste', 5 *European Papers* (2020) p. 521.

[7]*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, p. 3-4.

First Instance, seeking damages for the loss it suffered as a result of the cancellations stemming from the classification. The company argued that the travel restrictions set out by the amended Decree were contrary to the Citizenship Directive and, because they entailed the reintroduction of border controls in practice, were also in breach of the Schengen Borders Code.

The national court decided to stay the proceedings and to refer two questions to the Court of Justice for a preliminary ruling, the first regarding the provisions of the Decree itself and the second regarding the associated police controls. As reformulated by the Court of Justice,[8] the two questions are as follows:

(i) 'whether Articles 27 and 29 of Directive 2004/38, read in conjunction with Articles 4 and 5 thereof, must be interpreted as precluding legislation of general application of a Member State which, on public health grounds connected with combating the Covid-19 pandemic, (i) prohibits Union citizens and their family members, whatever their nationality, from engaging in non-essential travel from that Member State to other Member States classified by it as high-risk zones on the basis of the restrictive health measures or the epidemiological situation in those other Member States, and (ii) requires Union citizens who are not nationals of that Member State to undergo screening tests and to observe quarantine when entering the territory of that Member State from one of those other Member States.'

(ii) 'whether Articles 22, 23 and 25 of the Schengen Borders Code must be interpreted as precluding legislation of a Member State which, on public health grounds connected with combating the Covid-19 pandemic, prohibits, under the control of the competent authorities and on pain of a penalty, the crossing of the internal borders of that Member State in order to engage in non-essential travel from or to States in the Schengen area classified as high-risk zones.'

The Citizenship Directive lays down the conditions governing the exercise of the rights of free movement and residence by Union citizens and their family members, as well as the limits placed on these rights.[9] Such limits are contained in Chapter VI of the Directive. Article 27 permits member states to restrict free movement and residence on grounds of public policy, public security or public health.[10] Measures taken on grounds of public security and public policy 'shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned'.[11] Article 29 specifies the conditions applying to public health measures. Such measures can only be

[8]Case C-128/22, *Nordic Info*, EU:C:2023:951, paras. 49 and 101.
[9]Citizenship Directive, Art. 1.
[10]Ibid., Art. 27(1).
[11]Ibid., Art. 27(2).

adopted in case of diseases with epidemic potential, as defined by the WHO, and 'other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State'.[12] In its second and third paragraph, Article 29 lays down further conditions regarding the expulsion of individuals and the requirement for a medical examination in specific situations. Articles 30–32 contain procedural safeguards for individuals affected by restrictions on their freedom of movement or residence. Among other things, the person must be notified in writing of any decision restricting her freedom of movement or residence,[13] and have access to judicial and administrative redress procedures.[14]

The Schengen Borders Code is a codification within standard EU law of various instruments previously part of the Schengen acquis.[15] In principle, it prohibits controls on crossing the EU internal borders and lays down common rules on the control of persons crossing its external borders. Under Article 22, internal borders 'may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out'. According to Article 23, the absence of internal border controls does not affect 'the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks'.[16] Such an effect is deemed to be absent where the police measures '(i) do not have border control as an objective; (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime; (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders; (iv) are carried out on the basis of spot-checks'. Finally, Article 25 allows for the exceptional and temporary reintroduction of internal border controls. These may be reinstated where there is a serious threat to public policy or internal security, 'for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days'.[17] With the revision of the Schengen Borders Code, adopted in June 2024,[18] these provisions have now been amended. The changes and their implications are discussed in the commentary section.

[12]Ibid., Art. 29(1).

[13]Ibid., Art. 30(1).

[14]Ibid., Art. 31(1).

[15]*See* Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders, COM (2004) 391 final, p. 4-7.

[16]Schengen Borders Code, Art. 23(a).

[17]Ibid., Art. 25(1).

[18]Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L 2024/2017.

Judgment of the Court

The Court answered the two questions referred by the national judge in turn. On the first question, it addressed six points. The Court confirmed, first, that a disease such as Covid-19, classified as a pandemic by the WHO, is capable of justifying, on the basis of Article 27(1) and Article 29(1) of Directive 2004/38, measures restricting free movement on public health grounds.[19] Second, as regards the rights which may be affected by such measures, the Court found that member states may restrict both the right to leave and to enter their territory. This derives from the 'clear wording' of Articles 27(1) and 29(1) of the Directive – both provisions refer to the general term 'freedom of movement' – as well as the objectives of these provisions. The Court considered that the protection of health would be jeopardised if the right to leave could not be restricted.[20] Member states may also adopt measures requiring testing and quarantine, which, according to the classic free movement case law, are liable to 'prohibit, impede or render less attractive the exercise of the freedom of movement of Union citizens and their family members'.[21] As the third point, the Court reiterated that nationals of a member state whose free movement rights have been restricted by that member state fall within the personal scope of the Directive.[22]

Moving, fourth, to the form of the measures that member states may adopt on public health grounds, the Court found that Articles 27(1) and 29(1) of the Directive permit the adoption of protective measures in the form of an act of general application. This is confirmed by Article 27(2), which requires measures taken on public policy and security grounds to 'be based exclusively on the personal conduct of the individual concerned' and to be '[directly related to] the particulars of the case', but does not set similar conditions for public health measures.[23] It is further justified by the nature of the diseases covered by Article 29(1), infectious diseases, which 'are liable, on account of their very characteristics, to affect entire populations irrespective of individual behaviour'.[24]

The fifth point touches upon the conditions and safeguards attached to restrictive measures. Following the Opinion of the Advocate General,[25] the Court found that Articles 30–32 of the Directive, which give effect to the principle of legal certainty, the principle of good administration and the right to an effective judicial remedy, apply not only to individual decisions but also to measures

[19]*Nordic Info*, *supra* n. 8, paras. 52-54.
[20]Ibid., paras. 55-57.
[21]Ibid., paras. 58-59.
[22]Ibid., paras. 60-61.
[23]Ibid., para. 63.
[24]Ibid., para. 64.
[25]Opinion in *Nordic Info*, *supra* n. 5, paras. 73 and 115.

adopted in the form of an act of general application.[26] In the case of general measures, these provisions require, in the first place, that the act be brought to the attention of the public through an official publication and by means of sufficient official media coverage. The publication should allow for understanding the content and effects of the act, the public health grounds underpinning its adoption and the remedies available.[27] In the second place, the act must be open for challenge in judicial and administrative redress procedures, whether directly or incidentally.[28] Lastly, the public must be informed about the relevant court or administrative authority before which the act may be appealed and of the applicable time limits.[29]

In its sixth and final point, the Court provided guidance as to the proportionality of the measures at stake. It recalled its classic case law regarding the general structure of the proportionality test, its specific application in the field of health and in situations of uncertainty, the burden and standard of proof and, finally, the respective jurisdictions of the EU and the national judge.[30] Regarding the suitability of the measures for containing or curbing the spread of the virus, the Court highlighted a number of elements that must be taken in account by the national judge. These are the uncertainty regarding the development of the pandemic prevailing at the time of adoption of the measures; the position of the scientific community, the EU institutions and the WHO on the matter; and, finally, the fact that other member states were adopting similar measures, under the coordination of the EU.[31] The Court also noted that the measures appeared to have been implemented in a coherent and systematic manner, as part of a broader strategy to limit the spread of Covid-19 and applied to all travellers and states concerned according to objective criteria.[32] On the necessity of the measures, the Court observed that these were applied only with regard to non-essential travel to and from territories classified as high-risk zones.[33] The Court doubted that, taking into account the precautionary principle, alternative measures such as social distancing, wearing of a mask and regular testing would have constituted equally suitable means to achieve the objective of limiting the spread of the virus.[34]

Regarding, lastly, proportionality *sensu stricto*, the Court started with laying down the different rights and freedoms that might have been adversely affected in

[26]*Nordic Info*, *supra* n. 8, paras. 67-70.
[27]Ibid., para. 71.
[28]Ibid., para. 72.
[29]Ibid., para. 73.
[30]Ibid., paras. 75-81.
[31]Ibid., paras. 82-83.
[32]Ibid., paras. 84-85.
[33]Ibid., paras. 88-89.
[34]Ibid., paras. 90-91.

the present case: the right to respect for one's private and family life, the freedom to conduct a business and the right to free movement.[35] On the travel ban itself, the Court highlighted again that the measures were limited solely to non-essential travel, and that the exit bans 'were lifted as soon as the Member State of destination concerned was no longer classified as a high-risk zone on the basis of a regular revaluation of its situation'.[36] As regards compulsory screenings, the Court observed that on account of the rapidity of the tests, such measures only encroached on the fundamental rights concerned to a limited extent.[37] Regarding quarantine, the Court, while acknowledging the highly restrictive aspect of the measure, found it to be proportionate, in particular because of the significant probability of a traveller arriving from a high-risk zone to be carrying the virus, even if unknowingly.[38]

On the second question referred for a preliminary ruling, the Court started with distinguishing, among the controls put in place by Belgium to monitor compliance with the travel restrictions, between those carried out at the crossing of internal borders, and those carried out within Belgian territory, including in border areas.[39] While the former type of control is governed by Articles 25–28 of the Schengen Borders Code concerning the temporary reintroduction of controls at internal borders, the latter is governed by Article 23(a) of that Code concerning the exercise of police powers by the member states.

As regards controls carried out within Belgium, the Court first recalled its interpretation of Article 23(a)(i), which requires that police measures must not have 'border control as an objective', meaning that these measures must not seek '(i) to ensure that persons may be authorised to enter the territory of the Member State or authorised to leave it and (ii) to prevent persons from circumventing border checks'.[40] According to the Court, the operations carried out by the Belgian police differed 'in certain essential respects' from border checks, in that the main objective of these operations was 'to limit, as a matter of urgency, the spread of Covid-19 in that territory'.[41] The Court also considered immaterial the fact that roadside controls were mainly carried out in border areas.[42]

On Article 23(a)(ii), the Court first addressed the mention of 'threats to public security' in that provision. For the Court, Article 23(a) does not provide an exhaustive list of the conditions which must be satisfied by police measures and

[35]Ibid., paras. 92-93.
[36]Ibid., paras. 94-95.
[37]Ibid., para. 96.
[38]Ibid., para. 97.
[39]Ibid., paras. 102-109.
[40]Ibid., para. 113.
[41]Ibid., para. 114.
[42]Ibid., para. 116.

the objectives of such measures.[43] Accordingly, the fact that threats to public health are not expressly referred to in that provision does not mean that such ground could not be relied on by a Member State.[44] Second, the Court tackled the requirement that police measures must be based on 'general police information and experience' in the area concerned. That requirement is not satisfied where the controls are imposed on the basis of a general prohibition, irrespective of a person's conduct or of specific local circumstances.[45] The Court acknowledged that the Belgian operations were carried out on the basis of a prohibition of a general nature and irrespective of the conduct of travellers. Yet, considering the specificities of the public health threat involved here, the Court ruled that it was enough that the controls were carried out on the basis of the authorities' general knowledge of the areas involved.[46]

Finally, as regards Article 23(a)(iii) and (iv) of the Schengen Borders Code, the Court required the national judge to examine whether the controls were devised and executed in a manner clearly distinct from systematic checks on persons, which entails a close examination of the rules contained in national legislation concerning the 'intensity, frequency and selectivity of those controls'.[47] The Court considered, in the light of the specificities of the Covid-19 pandemic and of the precautionary principle, that the member state concerned must be granted some measure of discretion in its implementation of the controls.[48]

On Article 25 of the Schengen Borders Code, the Court recalled that the exception introduced in that provision, allowing for the temporary reintroduction of controls at internal borders, must be understood strictly, which means that a threat to public health cannot, as such, justify such reintroduction.[49] Yet, the Court argued that the article does not prevent member states from reintroducing border controls where the health threat concerned also raises issues of public policy and internal security.[50] Such is the case regarding a pandemic of the nature of Covid-19, which affects the very survival of parts of the population and the functioning of the healthcare system.[51] The Court added that it is for the referring court to check whether the other conditions referred to in Articles 25–28 of the Schengen Borders Code are also satisfied in the present case.

[43]Ibid., para. 117.
[44]Ibid., para. 118.
[45]Ibid., para. 119.
[46]Ibid., para. 120.
[47]Ibid., para. 121.
[48]Ibid., para. 122.
[49]Ibid., para. 124.
[50]Ibid., paras. 125-126.
[51]Ibid., para. 127.

For both questions referred, the Court therefore concluded, subject to the necessary verification of the national court, that Articles 27 and 29 of Directive 2004/38, read in conjunction with Articles 4 and 5 thereof, and Articles 22, 23 and 25 of the Schengen Borders Code, do not preclude legislation such as the one at issue.[52]

Commentary

Nordic Info is a rich and well-structured judgment, which manages, overall, to strike a convincing balance between the various interests at stakes – those of citizens, the member states and the EU. It preserves the capacity for member states to act and react swiftly to a public health emergency of such type as Covid-19, while insisting on a number of safeguards to the benefit of fundamental rights and freedoms. Beyond the specifics of the case, the ruling contains a number of lessons of broader relevance for EU law regarding the application of (secondary) law to novel and unforeseen events, the assessment of proportionality in situations of uncertainty and the role of fundamental rights in free movement cases.

Making the Citizenship Directive and the Schengen Borders Code pandemic-proof

The Court grappled with two perennial legal questions in the case: how to apply a piece of legislation, or any legal norm, to a situation unforeseen by its drafters, and whether, if at all, the intention of the drafters may be of any help in this regard. The suddenness and the gravity of the pandemic took everyone by surprise. It is safe to assume that none of the actors involved in the adoption of the Citizenship Directive and the Schengen Borders Code conceived of a public health emergency that could justify the quasi-suspension of free movement within the EU through general travel bans. Yet that did not prevent the Court from finding that such measures, provided these respect a number of conditions and safeguards, could lawfully be adopted under both pieces of legislation. As regards more specifically the Directive, the interpretative difficulties were compounded by a lack of consistency in the terms used throughout the text.

The first of these inconsistencies touched on the possibility for member states to adopt, under Articles 27 and 29 of the Citizenship Directive, measures restricting *exit* from their territory, as was the case here with Belgium. It might appear surprising that this question was discussed at all. While measures restricting free movement are generally adopted by the host member state, it is not unusual that such measures are adopted by the home member state. Examples

[52]Ibid., paras. 98 and 129.

abound in the Court's case law with regard to the freedom of establishment of legal persons[53] or the free movement of workers.[54] It is a well-established principle, recalled by the Court in the judgment,[55] that the free movement of persons include both the right for citizens to enter a member state other than the one of origin and the right to *leave* their state of origin or residence.[56] Restrictions on the right to leave are treated as any other restrictive measures in EU law, i.e. they are prohibited unless justified and proportionate. Two provisions of the Directive, however, seemed to suggest an absolute prohibition for member states to restrict the right of exit from their territory. Chapter VI of the Directive, which contains Articles 27 and 29, is entitled 'Restrictions on the right of *entry* and *the right of residence* on grounds of public policy, public security or public health', making no reference to the right of exit. Further, as observed by Advocate General Emiliou, Article 29(1) refers to the '*host* Member State', instead of using a more general term such as 'the Member State in question'.[57]

The Court resisted such an interpretation of the Directive, relying on the wording used in both Articles 27(1) and 29(1), 'freedom of movement', a term that encompasses both exit from and entry into a territory. The Court rightly added, as a supplementary argument, that in the context of travel restrictions adopted to fight a pandemic, restrictions on the right to entry might prove ineffective if corresponding restrictions could not be imposed on the right to exit.[58] Unlike the Advocate General, the Court did not rely on the *travaux préparatoires* to the Directive, which clearly established that the legislator's intention was to include restrictions on the right of exit within the measures permitted under Articles 27 and 29.[59] Both provisions originally referred to 'leave' and 'entry' only. The use of the term 'freedom of movement' was deemed preferable by the co-legislators in order to cover all types of restrictive measures – removal, refusal of leave and refusal of entry. The lack of consistency in the drafting of Chapter VI appears thus as 'a mere omission' of the EU legislature, following the amendments made to the original legislative proposal.[60]

The real difficulty here was to determine whether, in order to address a public health threat, member states could adopt measures of a general nature, such as

[53]Case 81/87, *Daily Mail*, EU:C:1988:286; Case C-428/05, *Viking*, EU:C:2007:772.

[54]Case C-415/93. *Bosman*, EU:C:1995:463.

[55]*Nordic Info*, *supra* n. 8, para. 55.

[56]*See also* Art. 4 of the Citizenship Directive.

[57]Opinion in *Nordic Info*, *supra* n. 5, para. 61, fn. 76.

[58]*Nordic Info*, *supra* n. 8, para. 57.

[59]European Commission, Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2003) 199 final, p. 8, 29 and 30.

[60]Opinion in *Nordic Info*, *supra* n. 5, para. 61, fn. 76.

travel bans. While it is obvious that public authorities need to adopt population-level measures to fight a disease such as Covid-19, it seems equally clear that the entire framework of Chapter VI of the Directive, if taking a literal reading, relates to measures adopted as regards specific individuals. Indeed, references to individual measures are not only in Article 29(2) and (3), but Articles 30–32 also call to mind restrictive measures laid down in the form of individual decisions. The *travaux préparatoires*, this time (willingly?) ignored by the Advocate General, only confirm this interpretation.[61] The Commission, Parliament and Council, when proposing and negotiating that piece of legislation, most likely did not have a disease such as Covid-19 in mind, and probably did not think of a situation that would warrant the adoption of general restrictions on the right to move.

In such 'hard' cases, where reconstructing the legislator's intentions appears particularly arduous, a way to solve the riddle is, in Ronald Dworkin's words, to not attach to a piece of law 'any consequence the legislators would have rejected if they had contemplated it'.[62] Had the EU legislature contemplated the existence of a vicious virus of the kind of SARS CoV-2, can it be reasonably assumed, considering the importance given to public health in the Directive, and in the EU legal order,[63] that the legislature would have expressly included the possibility for member states to adopt measures of general application? It seems that it can. In other words, this conclusion is what the Court's reasoning amounts to, where it states that diseases with epidemic potential covered by Article 29(1) 'are liable, on account of their very characteristics, to affect entire populations irrespective of individual behaviour'.[64] Put differently by the Advocate General, while 'threats to "public policy" or "public security" usually stem from the behaviour of certain specific individuals', the risk of spreading of diseases 'is usually not related to the behaviour of certain specific individuals'.[65] Limiting the tools available for

[61]When drafting Chapter IV of the Directive, the Commission intended to stick to the Court's interpretation of Treaty free movement provisions, according to which public health, security and policy grounds are 'intended to make it possible, in *individual cases* and where duly warranted, for restrictions to be placed on the exercise of the right', meaning 'that Member States may not cite grounds of public policy, public security or public health as general grounds or *without case-specific justification* in order to restrict the exercise of the right to move and reside freely': Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2001) 257 final (emphasis added). While this drafting is not devoid of ambiguity, it does not suggest that member states could adopt measures of general application.

[62]R. Dworkin, *Law's Empire* (Bloomsbury Publishing 1998) p. 19.

[63]*See* Arts. 9 and 168(1) TFEU; Art. 35 Charter. *See also* Case C-333/14, *The Scotch Whisky Association*, EU:C:2015:84536, para. 35.

[64]*Nordic Info*, *supra* n. 8, para. 64.

[65]Opinion in *Nordic Info*, *supra* n. 5, paras. 69-70.

member states to adopt individual measures would make it practically impossible to fight pandemics of the Covid-19 kind, running contrary to public health needs.

There is another argument to buttress the Court's interpretation.[66] The individual measures referred to in Articles 27–29 of the Directive are directly discriminatory measures, i.e. measures that a member state would take against a non-national but not against its own nationals. A travel ban such as the one adopted by Belgium is non-discriminatory. Even if its restrictive effects on free movement are beyond comparison to that of an individual measure, there is a certain 'internal market' logic in not prohibiting these non-discriminatory schemes out of hand.

Conversely, the finding by the Court and the Advocate General that, through a contextual reading of its provisions, the Directive can be interpreted as permitting the adoption of general measures appears far less convincing. It is plainly not the case that the general scheme of Chapter VI supports such an interpretation.[67] If Article 27(2) refers to 'the personal conduct of the individual concerned' only with respect to measures taken on grounds of public policy and security, and not on grounds of public health,[68] it is because of the criminal or quasi-criminal nature of such measures. As developed above, the scheme of the Directive is entirely directed towards the adoption of measures addressed to specific individuals, which is precisely why the Court had to interpret Articles 30–32 so differently from their actual wording. Article 30 mentions, for instance, 'the person concerned' in relation to the notification of decisions restricting free movement. This has no relevance in the case of general measures.

The Court had to deal with similar interpretive problems as regards the lawfulness of the police controls enacted by Belgium under the Schengen Borders Code, whose provisions were also not intended to make space for the kind of measures needed in the Covid-19 context. To start with, Articles 23(a)(ii) and 25 only refer, respectively, to 'threats to public security' and 'a serious threat to public policy or internal security', without any mention of public health. This was less of a problem for Article 23(a)(ii), which does not actually seek to limit the grounds that may be relied on by a member state to justify its exercise of police powers. Article 25, on the other hand, is far more strict, limiting member state action to the two grounds mentioned.[69] Moreover, the legislative history of the Schengen Borders Code shows that public health was removed from the grounds permitting the reintroduction of internal border controls in 2006.[70] This was seemingly done

[66]This argument was astutely suggested to me by Fulvia Ristuccia, whom I thank again for her insightful comments.

[67]Opinion in *Nordic Info*, *supra* n. 5, para. 66.

[68]*Nordic Info*, *supra* n. 8, para. 63 and Opinion in *Nordic Info*, *supra* n. 5, para. 66.

[69]*Nordic Info*, *supra* n. 8, para. 124.

[70]Opinion in *Nordic Info*, *supra* n. 5, para. 154 and fn. 209.

because the European Parliament, or at least some of its members, did not think that a threat to public health could justify the reintroduction of border controls.[71] Yet, perhaps ironically, the Court had little difficulty with overcoming that hurdle by relying on the available grounds of public policy and internal security. Considering the particular gravity of the Covid-19 pandemic, it is hard to deny that it constitutes 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' and 'a threat to the functioning of institutions and essential public services and the survival of the population'.[72]

The Court's creative interpretation was somewhat stretched to its limits regarding the conditions set in Article 23(a)(i) and (ii), namely that police operations carried out within the territory of a member state must not have border control as an objective and must be based on general police information and experience. While it was not disputed that the purpose of the controls set up by Belgium was 'to ascertain whether persons intending to cross or who had crossed the borders were authorised to leave or enter Belgian territory', the Court considered such a purpose only secondary to the main objective of the measure, which was 'was to limit, as a matter of urgency, the spread of Covid-19 in that territory'.[73] However, one might wonder if borders are ever policed simply for the sake of it. Laws that prescribe under which circumstances individuals might enter the territory of a country are adopted for various reasons of public policy, security or health that can seemingly be detached from the actual objective of controlling borders. This part of the Court's reasoning is puzzling. Equally puzzling is the Court's approach to Article 23(a)(ii). The requirement that police operations be based on 'general police information and experience' precludes, under the Court's interpretation, controls that are imposed on the basis of a general prohibition, which does not take into account the conduct of the persons concerned.[74] Such a personal assessment is absent here, since the measures to be enforced are of a general nature. Perhaps because re-interpreting that condition in a sense that would be favourable to general measures proved too difficult, the Court decided simply to ignore it.[75]

Striking the balance between creative interpretation and consideration for the letter of the law is no easy task. Respecting the legislature's prerogative, however, is

[71]Ibid.

[72]*Nordic Info*, *supra* n. 8, paras. 126-127. *See also* H. van Eijken and J.J. Rijpma, 'Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona', 17 *Utrecht Law Review* (2021) p. 34 at p. 40; D. Thym and J. Bornemann, 'Schengen and Free Movement Law during the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics', 5 *European Papers* (2021) p. 1143 at p. 1148-1149.

[73]*Nordic Info*, *supra* n. 8, para. 114.

[74]Ibid., para. 119.

[75]Ibid., para. 120.

a matter of rule of law and democracy. With the 2024 revision of the Schengen Borders Code, the legislator has now stepped in, clarifying that travel bans of the kind adopted by Belgium are permitted under this instrument. Article 25(1) now provides that 'a serious threat to public policy or internal security may be considered to arise from, in particular: … (b) large scale public health emergencies'.[76] Article 23(a)(ii) allows the exercise of police operations based on 'public health information', with an aim 'to contain the spread of an infectious disease with epidemic potential as identified by the European Centre for Disease Control'.[77] An anticipatory reference to the Commission's proposal,[78] known at the time of the proceedings before the Court of Justice, could have been a way for the Court to solve some of the aforementioned interpretive problems.[79]

Proportionality and evidence review in the context of uncertainty

Alongside the interpretation of specific provisions of the Citizenship Directive and the Schengen Borders Code, proportionality was the other key aspect on which the Court's guidance was necessary. The Court clearly signalled that it found the Belgian measures – travel ban, testing and quarantine – to be proportionate to the objective of limiting the spread of Covid-19, taking into account the prevailing uncertainty. Overall, it delivered a cautious and compelling assessment. Regarding the necessity of the measures, it acknowledged the seriousness of the threat posed by Covid-19, for individuals and society, and was rightly sceptical of potential alternative measures, such as the obligation to maintain social distancing or the wearing of a mask. It insisted that the scope of the travel bans should be tightly defined, not going beyond what was strictly necessary, through distinguishing between essential and non-essential travel and between different risk-zones, stressing the need for regular updates to the latter.

It is on suitability that the judgment appears most novel. The Court pointed out that the EU institutions not only recognised the appropriateness of travel bans, but that their adoption was 'accompanied and coordinated' by these institutions under the EU public health competence contained in Article 168 TFEU.[80] This is a remarkable development, which may be explained by the unprecedented level of coordination between the EU and its member states that

[76]Schengen Borders Code, Art. 25(1), as amended by Regulation 2024/1717.

[77]Ibid., Art. 23(a)(ii).

[78]Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM (2021) 891.

[79]Thank you to one of the anonymous reviewers for pointing that out to me.

[80]*Nordic Info*, *supra* n. 8, para. 83.

took place during the pandemic,[81] by each according to its responsibilities, with the member states in the driver's seat. This reflects the broader trend that public health, although formally an area of supporting competence,[82] is a domain where powers are increasingly shared between the EU and the member states.[83] That this affects the proportionality assessment of national measures is a logical and welcome consequence, although one that might conflict with the idea that 'it is for the Member States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved'.[84] The broader implications of this development remain to be seen, but one could imagine it functioning as a sort of presumption, i.e. that where a national measure is accompanied by coordination at EU level the measure is presumed to be suitable.[85]

Nonetheless, while creative on that account, the Court's suitability assessment appears at the same time too timid in simply requiring the referring court to ascertain whether 'the adoption of the measures and the criteria for their implementation were appropriate' in the light of the scientific data available at the time and the epidemiological situation.[86] The Court's approach is consistent with its general practice in free movement cases, where suitability is loosely understood as member states having to show a sufficient degree of connection between the measure and the objective put forward; a requirement usually easily met.[87] Yet, as correctly observed by the Advocate General, the contribution of the travel restrictions to the objective pursued, i.e. limiting the spread of the virus, was far from 'self-evident' in this case.[88] Before Covid-19, it was generally accepted that travel restrictions were not effective in containing outbreaks of epidemic diseases, although Covid-19 would contribute to changing this view within the scientific community.[89] In addition, even if one is ready to accept the useful nature of a travel ban to and from a territory where the virus has not yet spread, this was not

[81] *See* Delhomme and Hervey, *supra* n. 1.

[82] Health has a mixed competence structure under the Treaties. While most of public health belongs to the area of supporting competences, the EU has a shared competence for 'common safety concerns in public health matters': *see* Arts. 4(2)(k) and 6(a) TFEU.

[83] *See also* the novel approach to Art. 36 TFEU taken by the Commission regarding the export bans on personal protective *equipment* adopted during the pandemic: Delhomme and Hervey, *supra* n. 1, p. 64.

[84] *Nordic Info*, *supra* n. 8, para. 78.

[85] I should again thank Fulvia Ristuccia for suggesting this to me.

[86] *Nordic Info*, *supra* n. 8, para. 82.

[87] In the field of health, *see* Case C-333/14, *Scotch Whisky*, para. 36; Case C-394/97, *Heinonen*, EU:C:1999:308, para. 43; Case C-434/04, *Ahokainen and Leppik*, EU:C:2006:609, para. 32.

[88] *Nordic Info*, *supra* n. 8, para. 99.

[89] Opinion in *Nordic Info*, *supra* n. 5, para. 100.

the case for Belgium at the time the measure was adopted.[90] The virus had already widely circulated there. Ultimately, however, one might agree with Advocate General Emiliou that, considering how the epidemiological situation varied significantly from one EU+ country to another, the adoption of a targeted travel ban was not an unreasonable measure.[91] Yet, regrettably, the Court did not address these questions at all, missing an opportunity to stress, for example, that any such measure adopted in the future will have to take into account the evidence base accumulated during the Covid-19 pandemic.[92]

The Court's unwillingness to engage with the evidence, or lack thereof, underpinning the adoption of the travel ban should be seen as part of a broader reluctance to scrutinise the evidence available in the present case. The Court applied a cautious standard of review, which is a sensible approach not only justified by the complexity of the case, but also because assessing evidence is a fact-specific exercise better left to the national judge. This judgment thus differs to a notable degree from the one in *Scotch Whisky*, where the Court showed a greater willingness to engage with the adduced evidence.[93] In that judgment, the Court actually misinterpreted available studies.[94] This shows the risk inherent in such an exercise for judges, who are not scientific experts. Yet the Court cannot fully escape scrutinising the adequacy of the informational base of any contested measures. It must provide some guidance on the standard of proof (to be distinguished from the standard of review) and the type of evidence that is required from member states to substantiate their claims 'to ensure that decision-makers have the right type and quality of information at their disposal to make decisions that are consistent with the goal sought and the relevant legal norms'.[95]

[90]Ibid., para. 101.

[91]Ibid.

[92]The Court could have adopted an approach akin to the one in *Scotch Whisky*, where it welcomed the inclusion of a sunset clause in the measure at stake: Case C-333/14, *Scotch Whisky*, para. 57. Sunset clauses are a good proportionality tool, insofar as they allow member states to experiment with new forms of regulation, hence relaxing the evidential requirement, while at the same time requiring that a measure be abandoned if it is revealed not to be effective.

[93]Case C-333/14, *Scotch Whisky*. *See* O. Bartlett and A. Macculloch, 'Evidence and Proportionality in Free Movement Cases: The Impact of the Scotch Whisky Case', 11 *European Journal of Risk Regulation* (2020) p. 109.

[94]O. Bartlett, 'Minimum Unit Pricing for Alcohol May Not Be a Proportionate Public Health Intervention', 7 *European Journal of Risk Regulation* (2016) p. 218.

[95]On this 'catalyst' function of courts: *see* J. Scott and S. Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance Narrowing the Gap: Law and New Approaches to Governance in the European Union', 13 *Columbia Journal of European Law* (2006) p. 565.

Congruent with its usual position, the Court does not expand here on what constitutes 'appropriate'[96] or 'specific'[97] evidence, but shows its preference for data supported widely and internationally, by the WHO in particular.[98]

The Court's cautious approach is also justified by the large degree of uncertainty at the time the travel bans were adopted and the necessity to respect the precautionary principle. In the summer of 2020, numerous unknowns remained regarding the transmissibility of the disease, its consequences, and the effectiveness of interventions to limit the spread of the virus. The Court makes numerous references to uncertainty and precaution at all stages of the proportionality assessment.[99] This further relaxes the evidentiary requirement and offers greater leeway to the member state. In doing so, the Court confirms the novel approach taken regarding the precautionary principle, which is no longer limited to situations where there is uncertainty as to the existence or the extent of a risk but applied where uncertainty exists as regards the effectiveness of mitigating measures.[100] Although unorthodox, this adequately reflects the difficulties and complexities of comparing various policy options, where public authorities are confronted with a novel threat to public health.[101]

Applying the Charter in free movement cases: towards a change in the structure and substance of the proportionality test?

As is increasingly the approach in free movement cases, as part of its proportionality assessment, the Court scrutinised the compliance of the Belgian measures with the rights and freedoms guaranteed by the Charter of Fundamental Rights of the European Union, in particular with respect to the right to private and family life and the freedom to conduct a business, enshrined in Articles 7 and 16.[102] These two provisions are rarely, if ever, applied simultaneously.[103] This reflects the seriousness of the restrictions at stake, which applied to individuals but also had severe consequences on economic operators like Nordic Info.

[96]Opinion in *Nordic Info*, *supra* n. 5, para. 80.

[97]Case C-333/14, *Scotch Whisky*, para. 54.

[98]*Nordic Info*, *supra* n. 8, para. 82.

[99]Ibid., paras. 82, 90, 97.

[100]Case C-333/14, *Scotch Whisky*, para. 56. *See also* Case C-649/18, *A (Advertising and sale of medicinal products online)*, Opinion of A.G. Saugmandsgaard Øe, EU:C:2020:134, para. 131.

[101]A. Alemanno, 'Balancing Free Movement and Public Health: The Case of Minimum Unit Pricing of Alcohol in Scotch Whisky', 53 *Common Market Law Review* (2016) p. 1037 at p. 1061.

[102]The Court also refers to Art. 45 Charter; the A.G. to Arts. 14 and 15 Charter.

[103]*See* Case C-460/20, *Google (Déréférencement d'un contenu prétendument inexact)*, EU:C:2022:962.

While Article 7 of the Charter is routinely applied by the Court in cases involving the free movement of persons, a field where fundamental rights questions abound,[104] reference to the Charter in cases involving restrictions on 'economic' freedoms is far less common. A few examples may be found in relation to the freedom to provide services and the freedom of establishment, especially in the field of gambling.[105] Yet such restrictions are likely to constitute interferences with the freedom to conduct a business, the freedom to choose an occupation and right to engage in work, and the right to property, protected by Articles 15–17 of the Charter. The Court's reticence to rely on 'economic' Charter rights in its internal market case law might be explained by the largely similar substance between these rights and the TFEU free movement provisions. As regards services and establishment, the Court's case law suggests that the Charter offers no greater protection to economic operators than that provided by the TFEU alone,[106] so much so that a separate examination of Articles 15–17 of the Charter is usually not performed.[107] The situation is different here for Article 16, applied in the absence of any reference to Article 49 or 56 TFEU, the breach of which was not alleged by Nordic Info and not brough up by the Court on its own motion.

It is only where Charter provisions differ significantly from free movement provisions (for instance regarding freedom of expression and information) that a separate assessment of that right or freedom becomes valuable.[108] This is the case for Article 7 of the Charter, which, in the present case, opened up the space for a discussion of the effect of the Belgian measures on family life, going beyond mere cross-border movement but protecting the right to cultivate a trans-national identity.[109] That being said, it is doubtful that a disproportionate restriction would not have been caught by Article 21 TFEU applied on its own. That provision and

[104]F. Ristuccia, 'European Identity through Free Movement Law? The Interactions between Union Citizenship, Free Movement of Persons, and EU Values', 1 *Quaderni AISDUE* (2024); E. Spaventa, 'The Relationship between Free Movement of Persons and Fundamental Rights', in J. Adams-Prassl et al. (eds.), *The Internal Market Ideal: Essays in Honour of Stephen Weatherill* (Oxford University Press 2024).

[105]*See* Case C-390/12, *Pfleger*, EU:C:2014:281; Case C-98/14, *Berlington Hungary*, EU:C:2015:386; Case C-322/16, *Global Starnet*, EU:C:2017:985.

[106]Ibid. *See* Case C-390/12 *Pfleger*, Opinion of A.G. Sharpston, EU:C:2013:747, para. 70. *See also* M. Fallon, 'La proportionnalité des entraves aux libertés économiques de circulation sous le prisme de la Charte, valeur ajoutée ou décorative ?', in P. Paschalidis and J. Wildemeersch (eds.), *L'Europe au présent!: Liber amicorum Melchior Wathelet* (Bruylant 2018).

[107]Case C-322/16, *Global Starnet*, para. 50. This is true for preliminary reference cases, but the situation is different in infringement proceedings. *See* Case C-253/17, *Commission* v *Hungary*, EU:C:2019:432. *See also* S. Prechal, 'Fundamental Rights and Treaty Freedoms: The "Derogation Situation" and Infringement Proceedings', in Adams-Prassl et al., *supra* n. 104.

[108]*See* Case C-555/19, *Fussl Modestraße*, EU:C:2021:89.

[109]*Nordic Info*, *supra* n. 8, para. 94; Opinion in *Nordic Info*, *supra* n. 5, paras. 129-133.

the instrument adopted to give it effect, the Citizenship Directive, already incorporate aspects related to family life.

Where the influence of the Charter is most visible, however, is in the assessment of the proportionality '*sensu stricto*'[110] of the Belgian measures. This step is most often overlooked in free movement cases,[111] but features more prominently in cases involving national measures that limit Charter rights.[112] Unlike the 'technocratic' steps of suitability and necessity – Is the measure capable of achieving its goal? Can it be replaced by an equally suitable measure? – *sensu stricto* proportionality involves a genuine balancing of the interests at stake, of the importance of the objective pursued by a measure with the seriousness of its interference with the rights and freedoms protected under EU law. This exercise, the true act of reconciling conflicting interests by considering their relative importance, is a sensitive one, as it 'opens a debate about the values that must prevail in a democratic society and, ultimately, about what kind of society we wish to live in'.[113] In that way, if it leads to a more systematic application of proportionality *sensu stricto*, more references to the Charter in free movement cases might indeed contribute to strengthening the rule of law and reinforcing the legitimacy of the EU.[114] It could also translate into a greater scrutiny of national measures.[115]

From this perspective, the judgment offers a contrasted picture. The distinction between essential and non-essential travel, for instance, clearly signals the higher value given to family ties over other types of relationships. Yet, when scrutinising the effect of the travel ban on Nordic Info's freedom to conduct a business, the Court missed an opportunity to state, as it did in previous judgments,[116] 'that the protection of human health has considerably greater

[110]Opinion in *Nordic Info*, *supra* n. 5, para. 123. *See* J.H. Jans, 'Proportionality Revisited', 23 *Legal Issues of Economic Integration* (2000) p. 238; T.-I. Harbo, 'The Function of the Proportionality Principle in EU Law', 16 *European Law Journal* (2010) p. 158.

[111]J. Snell, 'True Proportionality and Free Movement of Goods and Services', 11 *European Business Law Review* (2000) p. 50.

[112]Opinion in *Nordic Info*, *supra* n. 5, para. 120.

[113]Joined Cases C-203/15 and C-698/15, *Tele2 Sverige*, Opinion of A.G. Saugmandsgaard Øe, EU:C:2016:572, para 248.

[114]K. Lenaerts and J.A. Gutiérrez-Fons, 'The EU Internal Market and the EU Charter: Exploring the "Derogation Situation"', in F. Amtenbrink et al. (eds.), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019) p. 64. *See also* Prechal, *supra* n. 107.

[115]*See* for instance Case C-391/20, *Boriss Cilevičs and others*, where the analysis of A.G. Emiliou and the ruling of the Court (EU:C:2022:638) differed. While the A.G. (EU:C:2022:166, paras. 106-114) applied Art. 13 Charter and conducted a genuine comparison of the negative and positive effects expected from the national legislation at stake, expressing clear doubts as to its proportionate nature, the Court did not apply the Charter and ignored the third step of proportionality altogether.

[116]*See* e.g. Case C-547/14, *Philip Morris*, EU:C:2016:325, para. 156.

importance in the value system under EU law than … essentially economic interests'.[117] Most regrettably, the Court limited its assessment here to the restrictive impact of the Belgian measures on fundamental rights, the 'derogation situation',[118] failing to acknowledge that these measures also served to protect other rights enshrined in the Charter. The obvious candidate was Article 35 of the Charter on the 'right to health', which requires the EU, as well as the member states where they apply EU law, to take appropriate steps to control the spread of diseases.[119] The right to life, enshrined at Article 2, could also have been mentioned in the present case.[120] This judgment thus illustrates the fading role played by Article 35 of the Charter in internal market case law, although that provision is useful in buttressing the legitimacy of member state interventions.[121] To conclude, while the *Nordic Info* judgment clears a path for a more comprehensive analysis of the proportionality of national measures which restrict free movement, thanks to the Charter, the Court refrained from walking that path. The influence of that judgement on future case law remains to be seen.

Conclusion

The *Nordic Info* judgment offers many takeaways – both specific to Covid-19 and of broader relevance for free movement in the EU. It is a welcome confirmation that EU law does not in principle oppose travel bans of the kind adopted during the pandemic – general measures restricting both entry to and exit from a member state's territory – despite their highly restrictive effect on free movement and their damaging consequences for certain sectors of the economy, especially tourism. At the same time, the Court insisted on a number of features that such measures must respect. These must be limited, in their scope, to what is strictly necessary, targeting non-essential travels and high-risk zones, and must be accompanied by extensive procedural safeguards, in particular ensuring legal challenges are possible. To reach this conclusion, the Court nonetheless had to interpret the Citizenship Directive and the Schengen Borders Code in ways that went far beyond the wording of both texts, almost at risk of judicial rewriting. Yet with this approach, the Court secured future action by the EU and member states in case a

[117]Case C-547/14, *Philip Morris*, Opinion of A.G. Kokott, EU:C:2015:853, paras. 179, 193 and 204.

[118]Lenaerts and Gutiérrez-Fons, *supra* n. 114; Prechal, *supra* n. 107.

[119]Opinion in *Nordic Info*, *supra* n. 5, para. 124, fn. 177.

[120]Ibid.

[121]*See* e.g. Joined Cases C-570/07 and 571/07, *Blanco Pérez et Chao Gómez* EU:C:2010:300, para. 65; Joined Cases C-159/12 and C-161/12, *Venturini*, EU:C:2013:791, para. 41. *Venturini* appears to be the last judgment in the field of free movement where a reference to Art. 35 Charter is made.

similar crisis hits, although one hopes that a public health emergency of the magnitude of Covid-19 remains a once in a lifetime occurrence.

As regards EU free movement law, the judgment holds a number of lessons. Confirming some older as well as newer doctrines regarding the assessment of the proportionality of member state measures, *Nordic Info* leaves significant space for precaution. It allows public authorities, in this case member states, to experiment with measures the effectiveness of which is still in doubt at the time of adoption. That is to be commended but should not have prevented the Court from requiring that the evidence collected during the crisis be put to good use, even after the measures had been lifted and the situation brought under control. The reliance on Charter rights and freedoms is more promising, leading to a transformation in the structure and, potentially, the substance of the proportionality test. Conducting a fully-fledged proportionality assessment of national measures would allow for a greater acknowledgement of the various interests at stake, with the Court assuming bolder positions on politically salient questions. This might not only enhance the legitimacy and the persuasiveness of the solution reached, but would also open up more space for contestation.

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