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## **EU Court of Justice on Travel Bans and Border Controls: Deference, Securitisation and a Precautionary Approach to Fundamental Rights Limitations**

**Abstract:** *This contribution responds to the Court of Justice of the European Union's (CJEU's) recent judgment in *Nordic Info BV v Belgian State* (C-128/22), in which the Court's Grand Chamber for the first time interpreted the legality of travel restrictions justified on public health grounds during the Covid-19 pandemic. Unsurprisingly, in a preliminary ruling deferential to national powers and to the national court's decision, the CJEU upheld the compatibility of the Belgian pandemic measures with EU laws while interpreting the conditions of the EU Residence Directive and the Schengen Borders Code. Less predictably, the CJEU avoided a more restrictive judicial review and took an approach based on (i) an atypical laxity of review in many respects linked to securitisation of health, free movement, and border management; (ii) an unexpected attitude to scientific evidence; and (iii) a precautionary vision of proportionality and human rights protection. This comment argues that the result of this approach is likely to mean more discretion for Member States to decide on the measures either limiting or derogating from EU free movement based on the precautionary principle and/or public policy/security exception; more difficulty in seeking accountability for decisions on cross-border health measures and their socio-economic consequences, meaning that European societies bear the burden and costs of the pandemic; and, finally, less of a role to play for fundamental rights in public health in the EU.*

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## Introduction

This contribution argues that, in the *Nordic Info* case, the EU Court of Justice (CJEU) was unwilling to question the Covid-19-related decisions of either EU or national authorities and their broad discretion in public health decision-making in relation to cross-border threats, free movement of persons, and border management.<sup>1</sup> The result of the CJEU's preliminary ruling may be that seeking legal accountability for executive authorities decisions on public health measures and border management in the era of transboundary crises will be more difficult in the EU. The judgment confirmed that individual members of societies, migrants, travellers and business entities must effectively bear the burden and costs of the pandemic from the perspective of the distributive effects of restrictive measures. The Court arguably also treated the protection of fundamental rights in public health very formalistically, which might eventually lessen support for and societal trust in public health actions, both EU and national, in the future.

The pandemic is thankfully over, but the CJEU's Grand Chamber judgment considering the compatibility of Belgian emergency measures restricting people's mobility to protect public health against the spread of the deadly virus with EU free movement laws was issued not long ago. The ruling was rendered in reply to preliminary questions from the Brussels Court of First Instance (Dutch-speaking) following a national tort dispute. The case arose from a damage claim in a private legal action between an economic entity (a tourism operator), whose activities were cancelled due to the measures adopted to protect the population's health, and the Belgian Federal Government. This tort case offered the first occasion for an EU-level interpretation of vital constitutional questions regarding fundamental rights, the scope of national powers, and the application of precaution in the area of cross-border health threats and border management within the EU Internal Market. It provided an opportunity to clarify the application of the EU Residence Directive and the Schengen Borders Code in the context of Belgian restrictions based on public health protection, including travel bans and border controls.<sup>2</sup> A Court's judgment questioning the proportionality of any aspect of those public health measures could have rendered the state potentially accountable for some of its actions against Covid-19.<sup>3</sup>

Unsurprisingly, however, the CJEU concluded that the EU Residence Directive and the Schengen Borders Code do not preclude national measures aimed at preventing the pandemic spread provided they met the specified conditions, which would be for the national court to decide.<sup>4</sup> That is, they must comply with the procedural safeguards envisaged by the Residence Directive, the fundamental rights enshrined in the EU Charter for Fundamental Rights, and the principles of non-discrimination and proportionality.

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<sup>1</sup> *Nordic Info BV v Belgische Staat* (C-128/22) ECLI:EU:C:2023:951.

<sup>2</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Residence Directive) and Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L77/1 (Schengen Borders Code).

<sup>3</sup> *Nordic* (C-128/22) at [2].

<sup>4</sup> *Nordic* (C-128/22) at [98].

But, unfortunately, the Court avoided a more rigorous scrutiny of control measures. This note explores the Court's reasoning to reveal that the CJEU attempted to convince the national court of the proportionality of the measures using different logics. It is commonplace that courts defer to public health authorities when they fight epidemic diseases, and the CJEU similarly accepted the priority of public health considerations over economic interests.<sup>5</sup> Nevertheless, the reasons given by courts for deferring do matter.

This contribution claims that the CJEU demonstrated extensive deference in its judicial review of actions of national executive authorities. Although the Court applied a sophisticated (and, in its case-law, a rare) three-step version of the proportionality principle to assess transboundary travel restrictions and a widening interpretation of the Schengen Borders Code to assess the respective border controls, it also pursued an atypical laxity of review in many respects when looked at from the perspective of its past practice and the protection of human rights in public health (see further *Reflection* below).<sup>6</sup> As a result, the judgment allows very broad (perhaps unjustified?) powers to public health authorities in deciding on pandemic measures in the field of the EU Residence Directive and the Schengen Borders Code.

I argue further that the CJEU grounded its deferential interpretations in many assumptions which were unconvincing and in many unclear equations. The Court appeared to equate security threats with public health threats, and not to distinguish clearly pandemic-related actions under the state of emergency from infectious disease control in normal circumstances. Further, the Court treated an application of the precautionary principle in border management, free movement of persons and fundamental rights limitations, in the similar way to risk regulation in its product-related case-law, although with less requirements for scientific evidence. The Court also seemed to treat political assumptions about scientific data as equivalent to epidemiological evidence and the surveillance of infectious disease threats. The CJEU relied on a low threshold for the burden of proof within the proportionality assessment, and presented a perplexing vision of public health and expertise. In short, the Court did not recognise the unique challenge of human rights protection in pandemics, where there are often multiple conflicting individual rights and values, as well as broader societal entitlement to the protection of the collective right to health.

Given that the implementation of anti-Covid-19 measures and EU border management was often criticised, and that the judgment was rendered long after the seriousness of the situation in EU ended,

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<sup>5</sup> Cf. W.E. Parmet, "Quarantining the Law of Quarantine: Why Quarantine Law Does not Reflect Contemporary Constitutional Law" (2019) 9 *Wake Forest J.L. & Pol'y* 1.

<sup>6</sup> On the past EU jurisprudence and proportionality, see G. de Búrca, "The Principle of Proportionality and its Application in EC Law" (1993) 13:1 *YEL* 105; P. Craig, "Proportionality, Rationality and Review" (2010) 2 *New Zealand Law Review* 265; A. Herwig and A. Serdarevic, "Standard of review for necessity and proportionality analysis in EU and WTO law: Why differences in standards of review are legitimate?" in: L. Gruszczynski and W. Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, (Oxford: Oxford University Press, 2014), pp.216-217.

this is disappointing. It also leaves confusion regarding the future application and significance of the judgment.

While reflecting on the CJEU's judgment, this commentary applies a human rights and public health lens<sup>7</sup> and several insights from the fields of risk regulation and constitutional review.<sup>8</sup> It uses health and human rights, EU law and migration literature to contextualise the analysis further within EU jurisprudence on the free movement of persons and the precautionary principle. The examination focuses primarily on the internal dimension of the EU area without borders. The analysis proceeds as follows: part one sets the background of the case; part two offers an analytical summary of the most important aspects of the judgment; and part three engages in a critical discussion and reflects on the outcomes of the case.

## **Background of the case**

### *National proceedings*

As already mentioned, the preliminary ruling procedure before the CJEU resulted from a Belgian civil law dispute in which Nordic Info, a travel agency specializing in trips to Scandinavia, was seeking compensation from the state following its adoption of anti-pandemic, emergency legislation pursuant to the EU Recommendations and coordination.<sup>9</sup> On 10 July 2020, the Belgian Ministerial Decree<sup>10</sup> prohibited all non-essential travel (incoming and outgoing). It allowed for derogations for travel between Belgium and the EU, the Schengen area and the UK, provided that the countries concerned were *not* classified as red zones in light of their epidemiological situation or the level of restrictive health measures adopted by their authorities.<sup>11</sup> Accordingly, epidemiological data divided states into colour zones of differing risk levels (green, orange and red), where the red indicated a high-risk area resulting in prohibition of non-essential travelling (to and from). Also, those arriving from a red zone were subject to mandatory testing and quarantine in Belgium. The categories of country classification were published on the website of the Belgian Federal Public Service for Foreign Affairs.<sup>12</sup>

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<sup>7</sup> See e.g. G.J. Annas and W.K. Mariner, "(Public) Health and Human Rights in Practice" (2016) 41:1 *J of Health Politics, Policy & Law* 129.

<sup>8</sup> P. Dąbrowska-Kłosińska, "Risk, Precaution and Scientific Complexity before the Court of Justice of the European Union" in: L. Gruszczynski and W. Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, pp.192-208.

<sup>9</sup> *Nordic* (C-128/22) at [26], [32]-[43]. Council Recommendation 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2020] OJ L208I/1.

<sup>10</sup> Ministerieel besluit houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken (Ministerial Decree on emergency measures to limit the spread of the COVID-19 coronavirus) of 30 June 2020 (*Belgisch Staatsblad*, 30 June 2020, p. 48715); Ministerieel besluit houdende wijziging van het ministerieel besluit van 30 juni 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken (Ministerial Decree amending the Ministerial Decree of 30 June 2020 on emergency measures to limit the spread of the COVID-19 coronavirus) of 10 July 2020, (*Belgisch Staatsblad*, 10 July 2020, p. 51609).

<sup>11</sup> *Nordic* (C-128/22) at [33].

<sup>12</sup> *Nordic* (C-128/22) at [27]-[30].

On 12 July 2020, Sweden was classified as a red zone and was excluded from the possibility of free travel.<sup>13</sup> As a result, Nordic Info cancelled all scheduled trips from Belgium to Sweden and advised its customers in Sweden to return to Belgium. However, three days later, on 15 July 2020, Sweden was re-assessed as an orange zone meaning “that travel to and from that country was no longer prohibited, but simply not recommended”.<sup>14</sup> This move reinstated travelling without restriction.

During the proceedings in the Brussels Court, Nordic Info claimed that it had suffered damages, because the state had mismanaged the public health crisis by adopting the “colour code” measures following the EU Recommendations. The company grounded its claims in the infringement of Articles 27 and 29 of the EU Residence Directive and 23 and 25 of the Schengen Borders Code respectively. Against those facts, the national court stayed the proceedings and referred to the CJEU two questions for a preliminary ruling. The first question regarded the legality of the exit ban from the Belgian territory imposed on Belgian citizens, residents and their family members and the restrictions on entry to the territory imposed on non-Belgian citizens and their family members, including the obligation of the quarantine and testing.<sup>15</sup> Both aspects of the question regarded the role of epidemiological data as an evidence-base for restrictions. The second question concerned the reintroduction of border checks and internal border controls based on public health protection, a reason which was not provided in the Schengen Borders Code.<sup>16</sup>

### *Pandemic borders management in the EU and the AG Opinion*

Before recalling the content of the judgment, two points should be noted. First, prior to the Covid-19 era, the dominant view of EU authorities was that national cross-border restrictions of personal mobility were an inadequate means of solving public health problems in line with the applicable rules.<sup>17</sup> No direct travel restrictions on the free movement of persons on grounds of public health had been previously litigated before the CJEU in the context of the EU Residence Directive.<sup>18</sup> Second, the pandemic border-management in the EU during the years 2020-22 was subject to varying criticism relating to actions of both EU and national authorities.<sup>19</sup> Some of these criticisms included claims that decisions to close borders were linked to political symbolism; that there was insufficient consideration of aspects related

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<sup>13</sup> Nordic (C-128/22) at [33]-[36] and [27].

<sup>14</sup> Nordic (C-128/22) at [35].

<sup>15</sup> Nordic (C-128/22) at [32]-[45].

<sup>16</sup> Nordic (C-128/22) at [37]-[38] and [42].

<sup>17</sup> See M. Diaz Crego et al., *Legal Issues surrounding compulsory Covid-19 vaccination* (Brussels: European Parliament Research Service, March 2022), pp.3-5.

<sup>18</sup> P. Craig and G. de Búrca, *EU Law Text, Cases, and Materials*, 7<sup>th</sup> edn (Oxford: Oxford University Press, 2020), pp.755-60. The persons-related case-law concerned public policy and security exceptions only.

<sup>19</sup> See T.K. Hervey et al., “Management of the European Union’s (External and Internal) Borders during the Covid-19 Pandemic” in: C.M. Flood et al. (eds), *Pandemics, Public Health, and the Regulation of Borders: Lessons from COVID-19*, 1<sup>st</sup> ed. (London: Routledge 2024); G. 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* 1; E. Guild, “Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19” (2021) 23:4 *EJML* 385.

to the diverse statuses of migrants; that there were hidden, discriminatory effects of measures on vulnerable groups; and that there was a range of other public health failings more generally.<sup>20</sup>

Some of those issues were mentioned, but not really addressed, in the Opinion of Advocate General Emiliou<sup>21</sup>, which has been called a “surprisingly emotional piece of EU jurisprudence”.<sup>22</sup> The AG discussed some of the critical literature<sup>23</sup> and admitted that the scientific evidence was conflicting and changing over time, including the expertise provided by the World Health Organisation (WHO).<sup>24</sup> He concluded that the Belgian measures passed the three-step proportionality test. Throughout its ruling, the CJEU cited the AG’s views several times.<sup>25</sup> Still, given that the AG’s opinion was often framed around the “seemed to” wording (“consistent, appropriate, necessary”), the reasoning of the opinion appeared hesitant.<sup>26</sup>

## The Court’s Reasoning

The CJEU interpreted the relevant provisions of the EU Residence Directive and the Schengen Borders Code and reached conclusions similar to those in the AG’s opinion: that they do not preclude national legislation as the Belgian Decree in question provided it satisfies a proportionality assessment.

In response to the first question which concerned the Residence Directive provisions (para. 46-98), the CJEU explained what diseases are capable of justifying the restrictions;<sup>27</sup> enumerated the rights of EU citizens and their family members which could be affected;<sup>28</sup> and confirmed the personal scope and forms of measures which could be adopted;<sup>29</sup> including the conditions and safeguards for their legal application under the EU Residence Directive.<sup>30</sup> The CJEU declared that EU law allows Member States to restrict the free movement of persons on the EU Internal Market when they “respond to a threat linked

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<sup>20</sup> Cf. G.J. Annas and S. Galea, “Addressing public health’s failings during year one of Covid-19” (2021) 32 *eClinicalMedicine* 100714; T. de Lange et al., “Into the Unknown: COVID-19 and the Global Mobility of Migrant Workers” (2020) 114 *AJIL Unbound* 332.

<sup>21</sup> Opinion of Advocate General Nicholas Emiliou delivered on 7 September 2023, *Nordic Info* (C-128/22), ECLI:EU:C:2023:645.

<sup>22</sup> L. Züllig, “The Traumatic Growing of Age of EU Law’s ‘Cherished Child’? AG Emiliou’s Opinion on Covid-19 Related Mobility Restrictions in the Nordic Info Case (C-128/22)” *European Law Blog* (2 November 2023).

<sup>23</sup> Opinion of AG Nicholas Emiliou in *Nordic* (C-128/22) at [62]-[72].

<sup>24</sup> *Nordic* (C-128/22) at [100]-[102].

<sup>25</sup> *Nordic* (C-128/22) at [56], [67], [85] and [125].

<sup>26</sup> Opinion of AG Nicholas Emiliou in *Nordic* (C-128/22) at [96]-[110].

<sup>27</sup> *Nordic* (C-128/22) at [52]-[54].

<sup>28</sup> *Nordic* (C-128/22) at [55]-[59].

<sup>29</sup> *Nordic* (C-128/22) at [60]-[61].

<sup>30</sup> *Nordic* (C-128/22) at [65]-[75]. See Art. 27 and 29, Residence Directive, in connection with Articles of 4 and 5, Residence Directive and its Chapter VI providing for material and procedural conditions for restrictive measures on ground of public policy, public security and health. See also Art 6, Council Directive 2003/86/EC on the right to family reunification in the area of rights of third-country nationals [2003] OJ L251/12.

to a contagious infectious disease which is of a pandemic nature”<sup>31</sup> recognised by the World Health Organisation,<sup>32</sup> although there is no explicit reference to “a pandemic” in the Directive’s wording.<sup>33</sup>

In reply to the claim of the Nordic Info in the national dispute that the possibility of adopting restrictive measures in the EU Residence Directive refers to the right of entry only,<sup>34</sup> the CJEU confirmed that public health protection can justify adoption of national rules which limit both the right to exit and the right of entry in the implementation of the Directive.<sup>35</sup> This logic accords with the existence and scope of the Internal Market freedoms and the Schengen area without borders which cover both the host-State and home-State measures. The Court ascertained importantly that the procedural guarantees of the Directive, which are worded as designed for individual measures, also apply to measures of general application (i.e. the Belgian executive act).<sup>36</sup> The CJEU ruled that restrictive public health measures can be laid down in the form of acts of general application, because diseases which justify such means “are liable, on account of their very characteristics, to affect entire populations”<sup>37</sup>, while any restrictions based on public policy/security must be linked to an individual act based on the behaviour and action of a person. The Court emphasised that all measures restricting the freedom of movement of EU citizens and their family members<sup>38</sup>, notwithstanding whether they apply to individual decisions and/or acts with abstract and general norms, must ensure a high level of protection of individual rights and be subject to the principles of the rule of law, above all, the principle of legal certainty; the general principle of EU law relating to good administration and proportionality; and the right to effective judicial remedy.<sup>39</sup> Consequently, the Court maintained that any national measure, including quarantines and screening tests, which apply without distinction and merely render less attractive the exercise of the freedom, can be regarded as potential obstacles to mobility and are thus subject to scrutiny and justification.<sup>40</sup>

The CJEU’s response to the second preliminary question concerned the claimed breach of the Schengen Borders Code (para. 99-129). The CJEU recalled that the EU Area of Freedom, Security and Justice provides for the absence of internal border controls for persons irrespective of nationality (Art. 67 and 77 TFEU), while national competent authorities retain the police powers to carry out controls in

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<sup>31</sup> *Nordic* (C-128/22) at [53].

<sup>32</sup> Art. 29 par. 1, Residence Directive.

<sup>33</sup> Art. 27 and 29. It had caused doubt before Covid-19 because the Residence Directive refers explicitly to two types of public health threats only: diseases with epidemic potential as defined by the relevant instruments of the WHO (i), and other infectious diseases or contagious parasitic diseases (ii).

<sup>34</sup> See the title of Chapter VI “Restrictions on the Right of Entry and the Right of Residence on Grounds of Public Policy, Public Security or Public Health”, Residence Directive and its Articles 27(1) and 29(2-3).

<sup>35</sup> *Nordic* (C-128/22) at [39]-[40] and [55]-[56].

<sup>36</sup> *Nordic* (C-128/22) at [75]-[76].

<sup>37</sup> *Nordic* (C-128/22) at [64] and [62]-[63].

<sup>38</sup> *Nordic* (C-128/22) at [65]-[67] as per the *ratione personae* of Residence Directive set in Art. 3-4 and linked with Art. 27 and 29 (public health restrictions) and Art. 30-32 (procedural safeguards).

<sup>39</sup> *Nordic* (C-128/22) at [67]-[70], and [69]. See P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2018).

<sup>40</sup> *Nordic* (C-128/22) at [58]-[59], [63] and [84]-[85]. See also the judgment in *Byankov* (C-249/11) ECLI:EU:C:2012:608.

national territories, including in border areas, which were justified by the use of those powers, as long as they do not amount to an effect equivalent to border checks. Under the Code, internal border controls can also be introduced temporarily under specific conditions.<sup>41</sup>

Then, the CJEU decided that the controls exercised under the Belgian Decree were not equivalent to border checks, because:

“the main objective of those controls was to limit, as a matter of urgency, the spread of COVID-19 in that territory and, in view of the obligation laid down moreover for every traveller entering that territory from a State in the Schengen area classified as a red zone to undergo screening tests and observe quarantine, to ensure that those travellers were identified and monitored”.<sup>42</sup>

In relation to the Code rules which did not provide for public health grounds as a justification for the re-introduction of internal border controls and border checks, the CJEU essentially equated public health threats with security threats/public policy threats to justify the re-introduction.<sup>43</sup>

Finally, the travel restrictions were subject to the proportionality assessment in the ruling. The CJEU offered guidelines for the appraisal of the Belgian Decree by a national court through a three-step proportionality test: in terms of the appropriateness of measures (para. 82-86); their strict necessity and “evident” effectiveness versus availability of less restrictive means such as masking and social distancing (para. 87-91); and finally, proportionality *stricto sensu*, which involved balancing the impact of measures on the fundamental rights under Articles 7 and 16 of the Charter for Fundamental Rights against the objective of public health (para. 92-97). In addition, the CJEU prescribed that the proportionality analysis must be undertaken in light of the wide discretion of public health authorities and the precautionary principle (para. 79, 90, 97, 122-128).

## Reflection

The CJEU’s ruling gives the impression that the CJEU deferred to the Belgian authorities Decree and attempted to convince the national court by and large of the proportionality of those measures in question. The Court offered a range of possible arguments to defend pandemic management in the EU *ex post*, instead of taking the opportunity to ask objective questions about both the type of means and strategies used by political authorities and public health officials and their justifications and the processes which led to their adoption. Thus, the Court interpreted the relevant EU provisions in a manner which “saved” the validity of national control measures within the Schengen *acquis* (although the latter had proven inadequate in several dimensions for the pandemic concerns).<sup>44</sup> The extensive deference to

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<sup>41</sup> *Nordic* (C-128/22) at [102]-[104]. Art 23(a), Schengen Borders Code. See also the judgment in joint cases *NW v Landespolizeidirektion* (C-368/20) and *Bezirkshauptmannschaft Leibnitz* (C-369/20), ECLI:EU:C:2022:298.

<sup>42</sup> *Nordic* (C-128/22) at [114].

<sup>43</sup> *Nordic* (C-128/22) at [105] and [123]-[129].

<sup>44</sup> See H. van Eijken and J.J. Rijpma, “Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona” (2021) 17(3) *Utrecht Law Review* 35.

pandemic decision-making by national authorities, and indirectly by the EU, is a core feature of the ruling.<sup>45</sup> While evaluating the measures, the CJEU acted as if it were a public health authority explaining their proportionality and not a reviewing judicial authority. The Court's deference is evident in its securitisation of public health, its rather formalistic treatment of procedural guarantees contained in the Residence Directive, and in its precautionary approach to public health, border management and fundamental rights protection.

*Securitisation of public health and restrictions of mobility between the state of pandemic emergency and the state of normality*

The notion of “public health” appears more than sixty times in the text of the CJEU's ruling, but there is no reference to its actual legal definition nor to the relevant EU rules for cross-border health threats and the legal emergency preparedness framework.<sup>46</sup> The Court's interpretation and its proportionality assessment in the ruling scrutinised the national measures based on “public health grounds”, “in the light of the objective of public health protection” and in view of “the serious public health context resulting from the Covid-19 pandemic”, but the CJEU did not explicitly define “public health”.<sup>47</sup> This is puzzling, because the justification of restrictive measures based on public health ought to consider the dimension of “public health” that was intended to be protected in a particular case.<sup>48</sup> Two possible answers to this query can be identified in the ruling.

(I) First, the CJEU followed the “securitisation of health approach”, which is a phenomenon whereby public health and cross-border health threats are perceived as security issues and not as unique and distinct fields. This understanding leads to treating public health and its policy interventions in the same way as actions ensuring public policy/security.<sup>49</sup> It is a trend which has been evident in EU public health regulatory policy and which may perhaps be seen as unavoidable, but which should be applied cautiously.<sup>50</sup> It is unclear whether the Court did so with sufficient awareness and reflection.

When scrutinising the proportionality of the Belgian measures, the CJEU seemed to prefer the implementation of health security protection through population-wide measures addressing

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<sup>45</sup> See L. Vyhnánek et al., “The Dynamics of Proportionality: Constitutional Courts and the Review of COVID-19 Regulations” (2024) 25(3) GLJ 368.

<sup>46</sup> See *Nordic* (C-128/22) at [83] where the CJEU mentions supporting competences of EU/Member States for “monitoring, early warning of and combating serious cross-border threats”. See also definitions and institutional powers which are not referred to: Decision No 1082/2013/EU on serious cross-border threats to health and repealing Decision No 2119/98/EC [2013] OJ L293/1, now Regulation 2022/2371 on serious cross-border threats to health and repealing Decision No 1082/2013/EU [2022] OJ L314/26.

<sup>47</sup> *Nordic* (C-128/22) at [98] and [129], and at [95], [120], [127].

<sup>48</sup> See W.K. Mariner, “Law and public health: beyond emergency preparedness” (2005) 38 *J Health Law* 247.

<sup>49</sup> Securitization of health means treating public health predominantly as a security issue, in different legal orders it can be done through variety of means, e.g. through using securitised language to speak of health (“war on infectious diseases”), granting public health authorities broad discretionary powers to act and legal immunity during epidemics, etc. See P. Dąbrowska-Kłosińska, “The Protection of Human Rights and Pandemics – Reflections on the Past, Present and Future” (2021) 22 GLJ 1028.

<sup>50</sup> Cf. P. Dąbrowska-Kłosińska, “Electronic Systems of Information Exchange as a Key Tool in EU Health Crisis and Disaster Management” (2019) 10 EJRR 652.

asymptomatic people to stop the spread of a pandemic “irrespective of individual behaviour”,<sup>51</sup> while showing less interest in the actual severity of societal and economic effects or in the significance of individual precautions and behaviour for the measures in question.<sup>52</sup> The wording of the ruling concealed the specificity of the public health perspective with a security standpoint and with the fear or risk of the uncontrolled spread of a pandemic where everybody is suspected of carrying a deadly virus.

In a similar vein, with reference to the second preliminary question of the Belgian court, the CJEU effectively equated health and security. It proposed two broad interpretations of exceptions under the Schengen Borders Code.<sup>53</sup> The ruling stated that Art. 23 of the Code allowed for the unconstrained exercise of discretionary police powers, in particular those “based on general police information and experience regarding possible threats to public security”, which do not exclude a similar exercise of powers “relating to possible or proven threats to public health, such as a pandemic or a risk of a pandemic”.<sup>54</sup> And although the CJEU realised that such police controls should not be carried out on the basis of a general prohibition irrespective of the conduct of travellers, it viewed them as justified simply by the “objective” circumstances of the pandemic, and:

“giving rise to a risk of grave and serious harm to public health and on the basis of the authorities’ general knowledge of the areas of entry to and exit from the national territory through which a large number of travellers targeted by that prohibition were likely to transit”.<sup>55</sup>

Thus, the statement that those controls were not border checks (para. 114) is unconvincing to anybody who crossed the border during the pandemic and was subject to checks authorising them to enter or leave on the basis of, for example, a proof of Covid-19-testing and/or vaccination. In this sense, the CJEU’s view is also distant from pandemic experiences of an ordinary person travelling in EU.

Further, the CJEU indicated that a health threat can be considered a “sufficiently serious threat affecting one of the fundamental interests of society”. Consequently, a general “public policy” exception justified the reinstatement of controls under Art. 25 SBC in a straightforward manner<sup>56</sup>, and Member States were accorded discretion in “devising and executing the controls as regards their intensity, frequency and selectivity”.<sup>57</sup>

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<sup>51</sup> *Nordic* (C-128/22) at [64], [122]-[127].

<sup>52</sup> *Nordic* (C-128/22) at [91]-[97], [120]. For public health terminology see e.g. M.R. Ulrich, W.K. Mariner, “Quarantine and the Federal Role of Epidemics” (2018) 71 *SMU Law Review* 403-404.

<sup>53</sup> *Nordic* (C-128/22) at [123]-[126], and [124] where the CJEU stated that exceptions must be interpreted strictly, but nonetheless equalised public health threat with public policy/security threat.

<sup>54</sup> *Nordic* (C-128/22) at [118].

<sup>55</sup> *Nordic* (C-128/22) at [120].

<sup>56</sup> *Nordic* (C-128/22) at [105] and [126].

<sup>57</sup> *Nordic* (C-128/22) at [122]. See S. Salomon and J. Rijpma, “The Promise of Free Movement in the Schengen Area—the Decision of the Court of Justice in *Landespolizeidirektion Steiermark (NW)*” (2003) 1 *E.L. Rev.* 124, where the CJEU seemed to be more restrictive when interpreting national powers.

(II) Second, the CJEU appeared to understand public health protection narrowly and to identify it with pandemic control of infectious disease spread (Covid-19) and the maintenance of the Belgian healthcare system (a “pandemisation effect”). Public health appeared in the ruling as “a function” of the possible overstretching or overwhelming of the national healthcare infrastructure, which was a certain threat to state-functioning due to the pandemic.<sup>58</sup> That attitude relied upon a clearly economic argument as part of a justification for restrictions (which, according to existing EU law, should not serve economic ends – see below),<sup>59</sup> rather than treating public health as a population-good requiring state action and strategy for community-based and diverse-group tailored efforts, including vulnerable groups, and determined by complex social-setting, economic and environmental factors. It is true that public health and medicine or medical care “must work together to be effective”,<sup>60</sup> but it would be better if the Court had delineated the distinctions between the two in times when they are increasingly blurred and when public health is often narrowed down to pandemic or infectious disease control.

The consequences of such securitisation and “pandemisation” of public health processes can be diverse. A first consequence leads to a noticeable lowering of applicable standards for limitations of fundamental rights through the unconstrained discretion of public health authorities.<sup>61</sup> The security lens tends to prioritise extraordinary executive powers, to offer paternalistic justifications and to permit a general overuse of restrictions, which can lead to overlooking the complexity and multiplicity of pandemic contexts.<sup>62</sup> Further, it also prioritises a risk and certainty/uncertainty framing over clear references to medical, scientific and epidemiological knowledge. This is discussed further below.

A second consequence can be the blurring of the distinction between the conditions for mobility restrictions under states of emergency due to a pandemic, on the one hand, and, for example, the conditions for mobility restrictions in normal circumstances of disease control due to a local epidemic on the other hand.<sup>63</sup>

On the one hand, the operative part of the judgment, in the answers to both preliminary questions, referred clearly to “grounds connected with combating the Covid-19 pandemic”.<sup>64</sup> This may be taken to imply that the content of the judgment and its conditions applied to the past situation of the pandemic only.<sup>65</sup> On the other hand, the word “emergency” did not appear in the judgment, and the interpretation

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<sup>58</sup> *Nordic* (C-128/22) at [82], [120], [127].

<sup>59</sup> *Nordic* (C-128/22) at [120], [127].

<sup>60</sup> G.J. Annas, *Worst case bioethics: death, disaster, and public health* (New York: Oxford University Press, 2010), p.226.

<sup>61</sup> S. Haack, “Things Will Never be the Same Again: How the Coronavirus Pandemic is Changing the Understanding of Fundamental Rights in Germany” (2022) 27 *Białystok Legal Studies* 75.

<sup>62</sup> See W.E. Parmet, “Dangerous Perspectives. The Perils of Individualizing Public Health Problems” (2009) 30 *Journal of Legal Medicine* 83.

<sup>63</sup> See on the past cases of public health measures in EU, P. Dąbrowska-Kłosińska, “Tracing Individuals under the EU Regime on Serious, Cross-border Health Threats: An Appraisal of the System of Personal Data Protection” (2017) 8 *EJRR* 700.

<sup>64</sup> *Nordic* (C-128/22) at [98] and [129].

<sup>65</sup> See also D.F. Povse, “So long and see you in the next pandemic? The Court’s one-and-done approach on permissible reasons to restrict freedom of movement for public health reasons in the *Nordic Info* case (C-128/22) of 5 December 2023” *European Law Blog* (19 December 2023).

did not really consider the fact that the Belgian measure was adopted as an emergency rule and that some of the procedural safeguards (EU Residence Directive) could not have effectively been respected because of pandemic conditions. The CJEU highlighted the role of those safeguards and the protection of fundamental rights of EU citizens facing pandemic measures and referred to the guarantees of the EU Charter for Fundamental Rights throughout the ruling.<sup>66</sup> But the CJEU proceeded with the interpretation as if there had been no doubts surrounding the management of pandemic borders in the EU, especially with regard to existing differential treatment of different types of human migration in the EU (internal/external; EU-citizens/non-EU citizens). The colour-zones rules, the choice and selectivity of essential/non-essential travel arrangements, the availability of epidemiological data and changes in decisions on their interpretation over time, as well as police enforcement, did indeed affect the rights of private individuals/EU citizens, entities (such as the Nordic Info), and vulnerable migrants – as the national court inquired.<sup>67</sup> Yet, the CJEU avoided questioning those emergency exceptions as such, including their resulting long-lasting effects, and actual barriers to their effectiveness at the time. The following section highlights several issues to illustrate the argument.

### *Formal procedural safeguards and the role of national courts*

The ruling emphasised the importance of legal guarantees when any restrictive measures were adopted in the form of an act of general application under the Residence Directive, that is, the need for respect of legal certainty and clarity of rules and obligations for all concerned individuals and the principle of good administration and access to justice.<sup>68</sup> However, the judgment did not really consider the problematic implementation and effectiveness of those guarantees during the time of Covid-19 emergency, although many such issues were often raised in the criticism of the EU pandemic management.

First, the EU pandemic counter-actions faced problems due to the lack of foreseeability, clarity, and information about the public health measures which had been applied throughout Europe. Especially during the first year, rules changed amidst a lot of contradictory information about the effectiveness of different types of measures. Second, the interaction between national measures and the EU co-ordination exercised by the Commission (March-August 2020), including reliance on the colour-zones policy in the summer (which was confirmed by the EU Council Recommendation on 30<sup>th</sup> June 2020 only), suffered from a lack of democratic control over pandemic management through EU soft-law measures.<sup>69</sup> The attitude towards travel restrictions generally changed from one day to the next and, until the

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<sup>66</sup> *Nordic* (C-128/22) at [68]-[72] and [92]-[93] referring to Art. 7 (right to private and family life); Art. 16 (freedom to conduct a business) and Art. 45 (freedom of movement) of the EU Charter.

<sup>67</sup> *Nordic* (C-128/22) at [45]. See 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* (Brussels: European Parliament, 2020).

<sup>68</sup> *Nordic* (C-128/22) at [69]-[70].

<sup>69</sup> See D. Thym and J. Bornemann, “Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics” (2020) 5:3 *European Papers* 1143.

adoption of the regulation on EU Vaccines Certificate,<sup>70</sup> the EU policy relied solely on soft law.<sup>71</sup> The latter means that crisis emergency legislation escaped both EU parliamentary oversight and transparency with regard to political processes behind it if considered from the standpoint of EU standards of democratic control.<sup>72</sup>

Next, the CJEU asserted the importance of the official publication of rules restricting freedom of movement but did not consider the legality of publication from the perspective of the existence of EU competence nor the availability of the rules in different EU languages to bring them to “the attention of the public”.<sup>73</sup> In fact, the concerns regarding the respect for the principle of legality and the democratic control of special powers accorded to executive authorities during the crisis were raised and debated internally in Belgium, including in relation to the on-line publication of guidelines containing legal obligations.<sup>74</sup> Further, in 2020-2021 during the later waves of the disease, any travel across EU borders faced differing information on national websites, contradictory information and data received from and enforced by tour operators about tests, quarantines, and masks (and the respective costs of measures for individuals), and a degree of general disinformation associated with the pandemic.

The importance of judicial redress procedures was also highlighted several times in the beginning of the judgment, including the right to an effective judicial remedy and to access to a court or tribunal as per Articles 30 to 32 of the Residence Directive.<sup>75</sup> Later in the ruling, the CJEU qualified this requirement by stating that acts of general application should be “at least” challengeable in incidental procedures.<sup>76</sup> Fortunately for the Nordic Info company, this was the case, but it could be difficult to comply with this requirement in the case of executive emergency measures adopted in different national legal orders. In some jurisdictions, there may be only a very narrow judicial review or none at all.<sup>77</sup>

This may render the enforcement of the procedural guarantees envisaged in the Residence Directive and emphasised by the Court difficult, or even, practically ineffective. Consequently, the approach of the Court towards those guarantees in the judgment appears relatively formalistic. Similarly, EU soft law pandemic measures of general application, like the EU Council Recommendation on which the

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<sup>70</sup> Regulation (EU) 2022/1034 amending Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic [2022] OJ L173/37.

<sup>71</sup> The available legal basis and mechanisms had not been fully employed. See Decision No 1082/2013/EU on serious cross-border threats to health and repealing Decision No 2119/98/EC repealed by Regulation (EU) 2022/2371 on serious cross-border threats to health and repealing Decision No 1082/2013/EU.

<sup>72</sup> See V. Delhomme and T.K. Hervey, “The European Union’s response to the Covid-19 crisis and (the legitimacy of) the Union’s legal order” (2023) 41 YEL 48.

<sup>73</sup> *Nordic* (C-128/22) at [71]-[73].

<sup>74</sup> T. Moonen, “Questions of Constitutional Law in the Belgian Fight against Covid-19” in: J.M. Serna de la Garza (ed), *Covid-19 and Constitutional Law*, (Mexico: Universidad Nacional Autónoma de México, 2020) pp.123–30.

<sup>75</sup> *Nordic* (C-128/22) at [67]-[69], [72].

<sup>76</sup> *Nordic* (C-128/22) at [72] „where national law does not allow persons covered by a situation defined in general terms by that act to challenge directly the validity of such an act in an independent action, it must at least provide, as appears to be the case here, for the possibility of challenging that validity incidentally in an action the outcome of which depends on whether that act is valid”.

<sup>77</sup> A. Vedaschi and C. Graziani, “New Dynamics of the “Post-COVID-19 Era”: A Legal Conundrum” (2023) 24(9) GLJ 1637-42.

contested Belgian emergency Ministerial Decree was based, also escape individual claims for judicial review due to EU law *locus standi* rules.<sup>78</sup> As a result, the scope and workability of the justiciability of those measures is also virtually non-existent – Nordic Info would not be able to challenge the Council Recommendation.

Finally, to scrutinise the appropriateness of the Belgian measures, the CJEU was rightly concerned with whether the travel restrictions were non-discriminatory (i.e., applying likewise to Belgian nationals and other EU travellers) and whether they served economic interests.<sup>79</sup> The CJEU noted and positively evaluated that the measures applied without distinction internally within the Belgian territory where isolation, contact-tracing, closure of leisure and entertainment and travel limitation also took place.<sup>80</sup>

Yet, the CJEU did not inquire whether the conditions of distinguishing travel into essential and non-essential categories could have caused any discriminatory effects.<sup>81</sup> The Court assumed that those aspects did not appear in the case. It also did not mention the aspect of financial costs incurred because of screening tests and quarantines, which could have discriminatory effects for vulnerable groups and many individuals.<sup>82</sup> Further, the Court found that not all exit travels were prevented from the Belgian territory (because there were exceptions for travels, e.g., justified by “imperative family reasons”) and that fact shall be considered by the national court in the proportionality analysis. But, the CJEU did not analyse how the family could be understood for the purposes of travel.<sup>83</sup> Arguably, this could mean discrimination for some (e.g., for the so-called patchwork families).<sup>84</sup> Likewise, there was no mention of the problematic situation of persons who may have difficulties in proving the status of a family member for purposes of essential travel (e.g., unmarried couples; non-heteronormative persons).<sup>85</sup> There was also no inquiry into whether the guidance allowed for travelling for healthcare-related purposes (e.g., for reproductive rights-related purposes).

In summary, although the CJEU paid attention to the enumeration of conditions and procedural safeguards applicable to mobility restrictions under Chapter VI of the EU Residence Directive, it appeared to take a rather formal approach to their fulfilment and left them to the national courts’ decision. It was not willing to engage with real-life sensitive issues that were well known to affect the enforcement of those conditions during the pandemic, but was more elaborate on the evidence needed for the

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<sup>78</sup> See O. Stefan, “COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda” (2020) 1 *European Papers* 1; M. Eliantonio et al., “Special Issue Editorial: COVID-19 and Soft Law: Is Soft Law Pandemic-Proof?” (2021) 12(1) *EJRR* 1.

<sup>79</sup> *Nordic* (C-128/22) at [51] and [74].

<sup>80</sup> *Nordic* (C-128/22) at [54] and [85].

<sup>81</sup> See S. 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* 613-619.

<sup>82</sup> *Nordic* (C-128/22) at [84]-[89] and [122].

<sup>83</sup> There might be different understanding of a family under Art. 2 and 3 of the EU Residence Directive (family members and beneficiaries) which the national court included in its question; see *Nordic* (C-128/22) at [47]-[49], [61], [74], [88] and [94].

<sup>84</sup> See critically on “non-essential travel” conditions in the pandemic: D. Thym and J. Bormemann, *supra* n 69.

<sup>85</sup> C.f. *Adrian Coman* (C-673/16) ECLI:EU:C:2018:385.

proportionality and precautionary justification of restrictions. Those aspects are dealt with in the next section.

### *Problematic precaution and conflicting fundamental rights*

The earlier CJEU case-law on national public health policy has long afforded EU and Member States “some measure of discretion”<sup>86</sup> to decide both the acceptable *level* of risk and *methods* to achieve protection, sometimes when necessary, in accordance with the principle of precaution.<sup>87</sup> The asymmetrical<sup>88</sup> results of this case-law on the Internal Market varied from the usual market deregulatory effects in the area of product risk regulation (food safety, GMOs), when the CJEU almost always treated national measures as unjustified obstacles to the Internal Market through negative integration,<sup>89</sup> to more often uphold policies on dangerous substances (e.g., anti-alcohol) as justified national measures which usually did not have the negative-integration deregulatory effect of the former case-law.<sup>90</sup> Moreover, the CJEU also previously applied its precautionary doctrine, albeit without naming it *expressis verbis*, to restrictions of the freedom of movement of students under the Residence Directive and protection of the future labour force in the national healthcare system in Belgium. Yet, the Bressol case was not referred to in the ruling.<sup>91</sup>

In *Nordic Info*, the Court confirmed “some measure of discretion” of Member States allowing for the possibility of policy diversity between the Member States<sup>92</sup>, arguably using a light version of a precautionary approach without imposing extensive procedural and evidentiary requirements toward scientific evidence and risk assessment. Those requirements, which were present in most of the past case-law on the precautionary principle, but not in the *Nordic Info* case, usually concerned both quality of evidence (“excellence”), responsible institutions and fairness of processes leading to its obtainment (“independence”, “transparency”).<sup>93</sup> Instead, the CJEU intertwined the application of the principle of precaution with the assessment of the proportionality of the Belgian measures through a three-step

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<sup>86</sup> *Nordic* (C-128/22) at [78] – “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”.

<sup>87</sup> *UK v Commission* (C-180/96) ECLI:EU:C:1998:192.

<sup>88</sup> F.W. Scharpf, “The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy” (2012) *MPIfG Working Paper* no. 09.

<sup>89</sup> *Commission v. France* (C-333/08) ECLI:EU:C:2010:44; *Austria v Commission* (C-439/05 P and C-454/05 P) ECLI:EU:C:2007:510. See also N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, 2<sup>nd</sup> edn (Oxford: Oxford University Press, 2020), ch 3.

<sup>90</sup> The degree of judicial scrutiny of scientific evidence in those cases varied. The scrutiny of EU measures linked to the so-called proceduralised version of the precautionary principle usually led to their upholding, see *Pfizer Animal* (T-13/99) ECLI:EU:T:2002:209, and recently, *Ascenza Agro* (T-77/20) ECLI:EU:T:2023:602. Cf. L. Knuth and E. Vos, “When EU Courts meet science: Judicial review of science-based measures post-Pfizer” in: M. Dawson et al., (eds), *Revisiting Judicial Politics in the EU* (Cheltenham: Edward Elgar Publishing 2024), pp.191-228.

<sup>91</sup> The CJEU applied the risk and uncertainty analysis to numerus clausus of students’ movement between Belgium and France, see *Bressol* (C-73/08) ECLI:EU:C:2010:181.

<sup>92</sup> *Nordic* (C-128/22) at [78]-[79] citing *Cannabidiol CBD* (C-663/18) ECLI:EU:C:2020:938 and *Scotch Whisky Association* (C-333/14) ECLI:EU:C:2015:845 which indicate an approach similar to rulings on national policies on dangerous substance.

<sup>93</sup> See J. Scott, *Legal Aspects of the Precautionary Principle* (London: the British Academy 2018), p.17.

analysis.<sup>94</sup> What comes out of this mix in terms of limiting fundamental rights on the basis of a public health justification? This section argues that several issues call for a deeper reflection.

### Conflicting values and human rights of various actors in pandemics

Can a product-withdrawal from the market, based on precaution due to its risk, be equated with restrictions on the movement of people due to a danger posed by an epidemic? The affirmative response to the question is very problematic, but it seems to be an answer emanating from the *Nordic Info* judgment. The CJEU applied the precautionary principle<sup>95</sup> for the first time explicitly to cross-border health threats, public health protection against infectious diseases, person-related restrictions of the right to free movement of persons in the EU (travel bans, screening and quarantining) as well as border management and the limitation of fundamental rights of the EU Charter of Fundamental Rights (notably Articles 7, 16 and 45 CFR), but it did not differentiate its application in the person-related context from other product-related case law.<sup>96</sup> Several and repeated references to the precautionary principle throughout the ruling, including a direct link to the proportionality assessment of the necessity of rights limitations (para. 90-93, 97, 122), imply that, in the CJEU's opinion, there should be no differentiation between the product risk regulation case law and public health in a pandemic situation. This risks confusion, because those situations are arguably different from the perspective of human rights.

Withdrawal of a product due to its risk is intended to benefit societies, public health and the environment even while an economic right of a company is limited. Further, economic rights can be limited due to a typical situation of conflicting human rights of different actors.<sup>97</sup> But, epidemics, infectious disease control and public health protection are considerably more complex because of wide-ranging person-related restrictions. A pandemic usually affects a whole network of rights and actors and raises a need to mediate between them: the rights of a business actor (*Nordic Info*) and its economic freedom to conduct a business (and freedom to offer services), the rights of EU citizens and other entitled persons to move freely within and outside the EU, and the right to respect their private and family lives; the rights of migrants and asylum-seekers; the rights of all persons and travellers to expect that the Schengen Borders Code provisions are respected; and lastly, positive state obligations as duty bearers to protect health (the collective right to health) stemming from the constitutional traditions of the Member States, International Human Rights obligations and the European Social Charter.

Yet, the CJEU did not frame its reasoning within a rights-based approach (although, as mentioned above, there are numerous references to fundamental rights and procedural guarantees in the ruling), but rather within a risk and uncertainty approach, which allowed for lowering the burden of proof for

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<sup>94</sup> *Nordic* (C-128/22) at [76]-[97] and [120]-[122].

<sup>95</sup> K. Lenaerts, "In the Union we Trust. Trust-Enhancing Principles of Community Law" (2004) 41 C.M.L.R. 317.

<sup>96</sup> Cf. also the reference to the precautionary principle by the General Court in joined cases *Robert Roos and Others* (T-710/21, T-722/21 and T-723/21) ECLI:EU:T:2022:262 on a requirement to present a valid EU digital COVID-19 certificate in order to enter the European Parliament buildings, at [217].

<sup>97</sup> See *Schmidberger v Austria* (C-112/00) ECLI:EU:C:2003:333.

national authorities and thus shifted the standard for the lawfulness of human rights limitation.<sup>98</sup> Indeed, the justification of measures limiting fundamental rights through the precautionary principle adds a new element to the conditions for the lawfulness of human rights limitation. In that context, the ruling gives no consideration of the first paragraph of Art. 52 of the Charter for Fundamental Rights and its requirements, the collective or individual right to healthcare under Art. 35 of the Charter, or the possible obligations of Member States to protect the health of the whole population through appropriate means, strategies and infrastructure, other than through restrictions. Finally, although the broad discretion accorded to Member States in the judgment largely resembles the ECtHR doctrine of the wide margin of appreciation, the CJEU did not refer to the relevant jurisprudence of the European Court of Human Rights.

Using the logic of precaution results in a risk-based and uncertainty-based framing of the applicable restrictions. Undeniably, pandemic crises as complex policy problems often require restrictions and management of different degrees of uncertainty for the justification of response measures.<sup>99</sup> However, it also requires risk assessment together with a clear explanation of those degrees of uncertainty, acknowledgement of potential controversies, and relevant data and knowledge needed for evidence. Otherwise, risk-framing can lead to substituting fact-finding and evidence-based policy with a fear-based and uncertainty-based framing of issues that are actually no longer uncertain and could be scrutinised with regard to statistics of cases, disease severity, mortality rates, etc. In July 2020, when the contested Belgian decree was adopted, knowledge about the pandemic danger and its spread in that country seemed already quite extensive,<sup>100</sup> which may well have reduced the respective degree of uncertainty. This means the assessment of the proportionality of the restrictive measures in the case could have been framed more around the logic of public health prevention rather than precaution and uncertainty. Otherwise, the evidence threshold for human rights limitations is lowered, and the resulting upholding of the national anti-pandemic measures as compatible with EU laws confers a very broad discretion on authorities.<sup>101</sup>

The next section shows that the proportionality consideration in the ruling causes further confusion regarding the relevant sources of evidence and their assessment by the Court.

### Political assumptions or requirement for medical and epidemiological knowledge?

Three evidentiary dimensions can be de-coded from the judgment, which presuppose the tension between political justifications, risk/uncertainty justifications and epidemiological justifications, as well

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<sup>98</sup> *Nordic* (C-128/22) at [79]-[80]: „a burden of proof cannot, however, extend to creating the requirement that the competent national authorities must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions”.

<sup>99</sup> E. Versluis et al., “The Multilevel Regulation of Complex Policy Problems: Uncertainty and the Swine Flu Pandemic” (2019) 5 *European Policy Analysis* 80-98.

<sup>100</sup> T. Moonen, *supra* n 74.

<sup>101</sup> *Nordic* (C-128/22) at [90]-[91].

as an insufficient understanding of modern public health and its determinants and of the role of epidemiological evidence. Further, the CJEU tried to convince the national court of the proportionality of the various national measures using different logics.

First, proportionality evidence is assumed and/or assessed by courts. The CJEU framed the judgment around the precautionary principle and direct acceptance of the justifications for mobility restrictions and border management presented by the Belgian Government. In other words, the CJEU included the evidentiary arguments of public health authorities relied on by the government into the proportionality analysis to assess the actions of the same government without either referring to the expertise and scientific data of relevant EU agencies or calling for evidence of external experts during the proceedings.<sup>102</sup> The latter is possible under the CJEU internal rules of procedure<sup>103</sup>. Although it remains exceptional for the Court to do so, the Covid-19 pandemic was surely an exceptional event. The role of the EU Centre for Disease Control in providing scientific evidence and advice during the pandemic was not considered at all, although it had published data determining colours of different countries as high risk-zones and consequently influenced directly national emergency decisions. The procedural conditions for the independence, excellence and transparency of scientific advice and the crisis management of complex policy problems were also not considered, even though the question of who is a relevant source of evidence is highly relevant, especially, when the evidence is conflicting or inconclusive.<sup>104</sup>

Instead, the CJEU adopted a generalised approval of institutional evidence and an assumption of political justifications (“scientific data commonly accepted at the time of the facts”; “as the scientific community, the EU institutions and the WHO appeared to accept”, para 82-83, emphasis added) without any consideration of specific, statistical data or public health studies on the effectiveness of specific measures and/or strategies which were available. Further, the CJEU engaged directly in deciding the effectiveness of some measures<sup>105</sup> and determined the adequacy of quarantines without referring to any actual medical resources (e.g., “rapidity of tests” and “significant probability” that every traveller would carry the virus).<sup>106</sup> The CJEU followed an approach which the public health and human rights literature would consider coercive in actions intended to counter epidemics.<sup>107</sup> In other words, it was much more concerned with false negatives (failing to identify those potentially having Covid-19) than false positives (isolating and quarantining those who did not have the disease and their respective costs for individuals). It is striking that the CJEU did not question the suitability of voluntary and involuntary measures, the extent to which it relied on those false negatives in its interpretation (cf. par. 91; 97; 114), and how

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<sup>102</sup> *Nordic* (C-128/22) at [85], [106]-[107] and [121].

<sup>103</sup> See Art. 70, Rules of Procedure of the Court of Justice of 25 September 2012 as amended [2012] OJ L265/1.

<sup>104</sup> E. Versluis et al., supra n 99, p.95 and P. Dąbrowska-Kłosińska, supra n 8 for the analysis of the CJEU requirements for scientific evidence in the past case-law.

<sup>105</sup> *Nordic* (C-128/22) at [57]: „measures might prove ineffective”.

<sup>106</sup> *Nordic* (C-128/22) at [91]-[92], [96]-[97] – taking into account falsely negative tests, but not those falsely positive.

<sup>107</sup> G.J. Annas, supra n 60, p.228.

straightforwardly it accepted the contention that precautionary quarantining of every traveller was proportional. This is especially so in view of the fact that, in the summer of 2020, the virus spread widely through communities and states in the EU, and there had been arguments that many travel restrictions were used only for internal politics and symbolically.<sup>108</sup>

This approach to the evidence-base departed from past case-law on risk regulation in which the CJEU was demanding in setting the threshold for proving “risk probability” and procedural requirements for both scientific experts and the knowledge they produce to justify measures taken in the name of precaution.<sup>109</sup> It also departed from earlier cases in the area of the free movement of persons in which, for example, the CJEU engaged directly in reviewing epidemiological data and medical knowledge about the AIDS disease to decide on discrimination,<sup>110</sup> in reviewing required statistical data (“supported by figures (...) solid and consistent”<sup>111</sup>), and in reviewing impact analysis for the acceptance of national restrictions of free movement of students based on public health.<sup>112</sup> This practice of courts assessing fundamental rights limitations and assessing scientific evidence during health crises had been observed elsewhere, too, and often indicates shifting standards of rights protection.<sup>113</sup> This trend seems to continue. In another recent case, the Court effectively accepted that being subject to public health quarantine does not give the right to regain paid annual leave in light of the EU Working Time Directive.<sup>114</sup>

Second, evidence of proportionality requires a multi-factor analysis. In parallel to the assumption that there was adequate scientific evidence, the CJEU mandated that the national court carry out the proportionality assessment. The CJEU provided guidelines as to the necessity and strict proportionality of the Belgian measures through a prescriptive explanation of diverse factors: epidemiological, medical, economic, and time-related<sup>115</sup>. The multiplicity of factors suggests that, along with the precautionary logic of risk and uncertainty, the Court was applying a public health prevention logic to treat the danger of a pandemic as a measurable phenomenon. But the content of the proportionality test is again puzzling.

On the one hand, the fact that measures were subject to ongoing revisability (reassessment of colour zones was done “on the basis of a regular re-evaluation”, para. 94) and were based on the “available information on the Covid-19 virus at the time of the facts in the main proceedings” (summer 2020) should allow the national court to decide whether the choice of travel bans, border checks and internal

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<sup>108</sup> D. Thym and J. Bornemann, *supra* n 69.

<sup>109</sup> J. Scott, *supra* n 93. In many cases, the CJEU did not allow for national public health measures of Member States interfering with the Internal Market in fields of food safety, GMOs, environmental and anti-alcohol policy when they were based on inconclusive scientific evidence in the context of precaution.

<sup>110</sup> *Geoffrey Léger* (C-528/13) ECLI:EU:C:2015:288, at [41]-[65] and [42].

<sup>111</sup> *Bressol* (C-73/08) at [71].

<sup>112</sup> *Bressol* (C-73/08) at [70]-[80].

<sup>113</sup> In 2021 Mariner argued in the U.S. context that some judges adjudicating pandemic emergency restrictions altered standards of judicial review of the state’s emergency powers in ways that could permanently limit access to reproductive health services in normal circumstances, W.K. Mariner *supra* n 45.

<sup>114</sup> *TF v Sparkasse Suedpfalz* (C-206/22) ECLI:EU:C:2023:984 at [44].

<sup>115</sup> *Nordic* (C-128/22) at [85]-[86], [88]-[89], [94]-[96].

border controls was justified.<sup>116</sup> On the other hand, the condition of the Belgian healthcare system and the risk that it might be overwhelmed or overstretched became an essential part of the necessity test and was treated as equivalent to epidemiological evidence (para. 91-92). Thus, the assessment equated the characteristics of a pathogen (e.g., transmission mode, prevalence, severity and incidence of the disease) and the availability of control measures (e.g., diagnostic tests) and less restrictive means (e.g., masks) with the provision of medical infrastructure, which should instead have been treated as a precondition of public health protection rather than a proportionality yardstick for appraising pandemic restrictions.

Third, epidemiological evidence was treated as it must prove causation. The CJEU re-framed the preliminary questions asked by the Brussels Court of First Instance, which arose in the national tort case filed by the Nordic Info against the state, about the role of epidemiological evidence in restricting the individual free movement rights of persons, including economic rights, as EU law constitutional queries. Yet, the Court still treated the evidence as though it were required to prove epidemiological causation in a typical private law tort case.<sup>117</sup> The Court did not appear to recognise the different role played by evidence, including epidemiological evidence, in a constitutional context and did not treat the case as being about the relationship between challenged state intervention and the harms faced by the population, such as would require the state to make an affirmative demonstration of a benefit to the population from its actions.<sup>118</sup> The Court did not require any evidence of those benefits, nor did it impose any burden of proof requirements upon the authorities. Instead, these were largely assumed to be satisfied and obvious due to the pandemic.

## Conclusions

The Covid-19 pandemic was unprecedented, and no one seriously questions the need for measures which were aimed at protecting national populations from the virus. However, this does not mean that all actions taken by political and public health authorities were always adequate and that judicial review should not provide a rigorous framework for their assessment and to ensure that there was a fair limitation of fundamental rights and a degree of accountability.

In the context of the national restrictions on the free movement of persons and the alleged breach of the EU Residence Directive and the Schengen Borders Code, the CJEU showed extensive deference in its review, which offered broad discretion to executive authorities. In this sense, the CJEU joined a well-known community of judicial authorities who defer to public health decisions in times of crises and disasters. However, the deferential degree of scrutiny is also atypical, because the CJEU neither engaged with any scientific evidence base behind the restrictions nor checked the fairness of decision-making processes and procedural steps ensuring the quality of evidence. Instead, the CJEU expressed

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<sup>116</sup> *Nordic* (C-128/22) at [54], [82], [88], [90]-[91], [94], [106]-[107], [120].

<sup>117</sup> Cf. W.E. Parmet, "Public Health and Constitutional Law: Recognizing the Relationship" (2007) 10:13 *JHCLP* 13, 19-20.

<sup>118</sup> *Nordic* (C-128/22) at [80].

its views about the factual base of the case to argue that there was a limited impact of restrictions on travellers' rights and to uphold their proportionality. This approach arguably differs from the Court's past practice. The CJEU grounded its deferential approach in a conceptual "securitisation" of health and free movement and a problematic application of the precautionary principle, including a low evidence threshold within the burden of proof in its proportionality assessment. Further, the CJEU relied on a perplexing vision of public health and expertise linked to a formalistic stance on guarantees of fair procedures and human rights protection. As a result, the CJEU's interpretation appears disconnected from real-life experiences of ordinary persons travelling in EU during the pandemic, and facing e.g. discrimination, high costs of obligatory measures, confusing information, etc. This is particularly disappointing, given that the ruling was rendered in December 2023, when the knowledge of anti-pandemic measures and strategies, as well as public health shortcomings was much more extensive than in the first months of the Covid-19 spread in the EU.

Eventually, the consequence of the CJEU's approach and interpretation from a legal perspective is likely to be two-fold. In the first place, both EU and national authorities have gained more discretion for decision-making in public health in relation to risk regulation, free movement of persons, and border management. The CJEU's ruling also offered an indirect confirmation of the EU's political actions and implicitly legitimated its soft-law coordination during the pandemic without any consideration of the discriminatory effects on travelling persons, including EU citizens, third-country nationals and other migrants. Secondly, it confirmed that EU taxpayers should effectively bear the burden and costs of the pandemic. A more restrictive review by the CJEU would have helped to seek accountability of national authorities by individual actors in other national proceedings for a variety of measures that were adopted during the pandemic instead of placing the costs on business operators and individuals (arguably the former could at least benefit from different state aid means of pandemic-shielding while the latter could not). It would have also enabled accountability to be sought by those affected for political decisions on public health at the national level more openly and directly with reference to EU laws. It is important, also in view of the fact that, during the pandemic, some Member States (e.g., Poland and Hungary) had governments whose democratic credentials were questioned, and who used the "opportunity" of the Covid-19 pandemic to further weaken the rule of law in those states.<sup>119</sup> Further, the result of the Court's reasoning is that Member States may demand more room to decide on measures which depart from EU Internal Market rules based on the precautionary principle, including, in the context of free movement of persons and border management. Finally, the Court might be perceived as paying lip service to the

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<sup>119</sup> See M.E. Klajn, "Politicizing the pandemic: Poland's response to COVID-19", (2020) European Border Communities Blog, Leiden Law School; M. Florczak-Wątor, "Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa" [Unconstitutional restrictions on individual rights and freedoms imposed in connection with the COVID-19 epidemic as a premise for the state liability for damages] (2020) 12 *Państwo i Prawo* 5-22.

protection of fundamental rights in a public health perspective, which eventually may lessen societal trust and support for public health actions in the future.