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EXPLORING ASYMMETRIES OF MARKET INTEGRATION AT THE INTERSECTION OF HEALTH PROTECTION AND MOBILITY DURING THE PANDEMIC AND THE EFFECTS ON THE RIGHTS OF INDIVIDUALS IN THE EU**

Abstract: *Drawing on the theoretical approach of F.W. Scharpf (2012), as critically contested by M. van den Brink, M. Dawson and J. Zglinski (2023), the article unearths the implications for individual rights at the intersection of health protection and freedom of movement of persons in the European Union's integrated market during the pandemic. The findings are based on empirical analysis of the CJEU case law and European secondary laws adopted in the context of counteracting the COVID-19 pandemic (2020–2022). The text shows that the Court of Justice of the European Union (CJEU) has adopted a variety of approaches in its standard of review towards national regulatory measures (either strict or deferential review), while many secondary laws were adopted at the EU level to pursue market correction policies (e.g. crisis preparedness or protection of health data). Thus the research confirms that the current internal market dynamics in the areas of health and movement of persons is indeed too complex to be described solely by the original asymmetry thesis. Yet, it is also argued that less de-regulation at the national level (negative integration) and more re-regulation at*

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the EU level (positive integration) does not necessarily lead to better protection and enforcement of Treaty-based and fundamental rights of individuals in the EU.

Keywords: EU health law, EU individual rights, EU internal market, free movement of persons, structural asymmetries

INTRODUCTION: THE STARTING POINTS

The health policy of the European Union (EU) has "clearly become strategically important" and has gained key significance for the EU since the pandemic hit five years ago.[1] According to the EU Commission, the principal EU achievements in countering COVID-19 can be summarised as parallel actions to safeguard the functioning of the Single Market and keep internal borders open; to prevent diseases and protect health through vaccines; to develop the European Health Union; and to help aid in recovery and stimulate post-pandemic re-investment.[2] The EU's pandemic response was firstly implemented through a soft-law and "coordinated approach" between the EU and its Member States (MSs), and then through a considerable amount of EU secondary laws, often allowing for harmonisation, and adopted at the EU level on the legal basis of the Single Market (Art. 114 of the Treaty of the Functioning of the European Union, TFEU), due to the limited EU competence for health pursuant to Art. 168 TFEU.[3] The EU's handling of the pandemic has also been presented by the Commission as a great success in light of the exceptional circumstances.[4]

However, the EU pandemic response also attracted a lot of substantive criticism.[5] The national-level travel restrictions fragmented the EU market and were a sign of processes re-nationalising the free movement of persons, and arguably caused discriminatory effects on a variety of vulnerable groups, while the EU focussed on

[1] E. Kuiper, D. Brady, *EU Health Policy: From Reaction to Resilience*, European Policy Center, 12 February 2024, p. 1, available at: https://www.epc.eu/publication/EU-health-policy-From-reaction-to-resilience-57efb8/ (accessed 30 June 2025).

[2] *See Overcoming the COVID-19 Pandemic Together and Building a Health Union*, European Commission, 11 October 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/fs_24_1389 (accessed 30 June 2025).

[3] *See e.g.* T.K. Hervey, S. Roettger-Wirtz, *The European Union: Legal Response to Covid-19*, in: J. King, O. Ferraz, P.A. Villarreal, A. Jones, A. Bogg, N. Countouris, E. Pils, N. Steytler, E. de Nicolis, B. Thomas, M. Veale, S. Suteu, C. Flood, C. Costello, N. Byrom (eds.), *The Oxford Compendium of National Legal Responses to Covid-19*, Oxford University Press, Oxford: 2021, pp. 1–91.

[4] European Commission, *The European Health Union: Acting Together for People's Health*, Brussels, 22 May 2024, COM(2024)206 final.

[5] *See e.g.* D. Thym, J. Bornemann, *Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics*, 5(3) European Papers 1143 (2020).

"opening borders" through actions which may have themselves led to discriminatory impacts on various groups residing in the EU.[6]

Clearly, both the pandemic response and the follow-up actions meant a further expansion of EU regulation in the area of health protection, often achieved notwithstanding the limits of the wording of Art. 168 TFEU.[7] One may surely argue that those processes could have been expected because of the fact that "a silent revolution" of the EU powers being expanded through secondary health law (including public health and health care) had been long observed.[8] Others contend that the case law of the Court of Justice of the European Union (CJEU) related to the pandemic was "business as usual", and affirmed EU law orthodoxy more generally.[9] In that sense, the pandemic likely catalysed and illuminated previously obscured processes. Ultimately, the post-pandemic assessment of the EU's actions on border management, health and mobility vary.[10] The crisis had a destabilising effect, which prompts further inquiry into the nature and role of the case law and regulations, and their interpretation and application in specific fields.

One issue has definitely emerged: the relationship between protecting (public) health and the integrated market mobility of persons was a key dimension of the EU's response. The pandemic visibly challenged both the legal structures and the thinking about the free movement of persons in the EU (restrictions and border controls) and the regulatory integration in the field of health (European Health Union). At the same time, the coronavirus crisis triggered the development of regulatory frameworks and interpretations of the EU's free movement of persons,

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[6] *See e.g.* S. Robin-Olivier, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility*, 5(1) European Papers 613 (2020); 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*, 2 Frontiers in Human Dynamics 1 (2020); A. Alemanno, L. Bialasiewicz, *Certifying Health: The Unequal Legal Geographies of COVID-19 Certificates*, 12(2) European Journal of Risk Regulation 273 (2021).

[7] *See* C. Seitz, *The European Health Union and the Protection of Public Health in the European Union: Is the European Union Prepared for Future Cross-border Health Threats?*, 23 ERA Forum 543 (2023); *Editorial Comments: Charting Deeper and Wider Dimensions of (Free) Movement in EU Law*, 58(4) Common Market Law Review 969 (2021), pp. 974–984.

[8] A. de Ruijter, *EU Health Law & Policy: The Expansion of EU Power in Public Health and Health Care*, Oxford University Press, Oxford: 2019.

[9] *See Editorial Comments: COVID in the Case Law of the CJEU: Affirming EU Law Orthodoxy Even under Extraordinary Circumstances*, 61(3) Common Market Law Review 581 (2024).

[10] *Cf.* V. Delhomme, T.K. 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 48 (2023); T.K. Hervey, A. Fyfe, V. Delhomme, *Management of the European Union's (External and Internal) Borders during the Covid-19 Pandemic*, in: C.M. Flood, Y.Y.B. Chen, R. Deonandan, S. Halabi, S. Thériault, (eds.), *Pandemics, Public Health, and the Regulation of Borders: Lessons from COVID-19*, Routledge, London: 2024, pp. 65–78; T.K. Hervey, M. Michalak, *European Union Border Law During The Covid-19 Pandemic*, 62(3) Common Market Law Review 747 (2025).

border management and health law, which still merit further inquiry. An ampler appraisal of those developments could tell more, especially about their regulatory nature, the effects on individuals in the MSs and the relationship between the EU and national legal systems.

Against this background, this article explores the EU-level case law and secondary law at the health–mobility nexus which resulted (directly/indirectly) from the pandemic. It also inquires into the relationship between processes of negative integration through CJEU's judicial intervention and EU-level positive integration through regulation of the EU market in order to uncover possible distributive effects.[11] It asks what possible effects for individuals and their Treaty-based and fundamental rights can be observed, including socioeconomic effects.

One way of approaching those issues and to analyse EU case law and measures of secondary law is to refer to one of the prominent theories of European integration, that is, the conceptualisation of Fritz Scharpf's asymmetry thesis.[12] Scharpf argued *inter alia* that "integration through law" moved forward "through the seemingly inexorable evolution of judicial doctrines protecting and extending the treaty-based rights of private individuals"[13] and a parallel de-regulation of national market-correcting policies. He also claimed that the EU suffers from an inability to successfully re-regulate those policies through secondary law at the EU level, creating a structural "double asymmetry" between the processes of negative and positive integration and eventually leading to social and democratic deficits.

Those arguments were recently constructively critiqued by van den Brink, Dawson and Zglinski,[14] who argued that the thesis about structural/institutional asymmetry no longer adequately describes the reality and dynamics of the Single Market, and that the relationship between the negative and positive integration is now different. They suggested that the CJEU has recently been very deferential, leaving more room for national measures to potentially reconfigure the economic freedoms in its case law, while there has been growing evidence of the powerful EU

[11] *Cf.* B. Bennett, I. Freckelton, G. Wolf, *COVID-19, Law & Regulation; Rights, Freedoms, and Obligations in a Pandemic*, Oxford University Press, Oxford: 2023; V. Hooton, *Free Movement and Welfare Access in the European Union: Re-Balancing Conflicting Interests in Citizenship Jurisprudence*, Hart Publishing, Oxford: 2024.

[12] *See* F.W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40(4) Journal of Common Market Studies 645 (2002). *See also* F.W. Scharpf, *Governing Europe: Effective and Democratic?*, Oxford University Press, Oxford: 1999.

[13] F.W. Scharpf, *The Double Asymmetry of European Integration – Or: Why the EU Cannot Be a Social Market Economy*, Max Planck Institut für Gesellschaftsforschung, Köln: 2009, p. 13.

[14] M. van den Brink, M. Dawson, J. Zglinski, *Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU*, 32(1) Journal of European Public Policy 209 (2023).

social market regulation and "correction politics" at the EU level through legislative means and political processes.[15]

It is not the aim of this paper to directly challenge the above theories on the EU's political economy, but rather to investigate the case law and secondary law which arose from the pandemic in the fields of health and mobility (see Appendix 1 and 2 below) through the lens of those asymmetries.[16] In that sense the paper also responds to a call for more research to test the structural asymmetry arguments in sectoral policy areas, both in terms of case law and legislation.[17] The objective is thus to offer an informative and systematising value from the viewpoint of individual rights in the EU.

The article proceeds as follows: section 1 contains the explanation of the conceptual framework of the article; section 2 describes the research design and methods; sections 3 and 4 offer an analysis of the relevant EU case law and secondary laws pertinent to the field of the study. The final section concludes and Appendices 1 and 2 list the relevant judgments and legislation, respectively.

1. PRELIMINARY REMARKS ON THE CONCEPTUALISATION OF "ASYMMETRIES" IN RELATION TO HEALTH AND MOBILITY IN THE EU

The justification for employing and testing concepts of structural and substantive "asymmetries" in this text is the fact that the reaction to the pandemic from the EU and the MSs indeed triggered the adoption of a considerable number of EU-level, Treaty-based harmonisation measures (positive integration forming a politically declared European Health Union), notwithstanding the limited EU competence in health – which seems contrary to one of Scharpf's arguments on the structural asymmetry.[18] There are also some heralds of a parallel trend in the case law of the CJEU, that is, an arguably deferential approach to national public health measures regarding travel bans and restrictions on intra-European mobility.[19] Those findings might suggest that indeed the claims of van den Brink and his colleagues are

[15] *Ibidem*, pp. 221–26. *See also* J. Zglinski, *The End of Negative Market Integration: 60 Years of free Movement of Goods Litigation in the EU (1961–2020)*, 31(3) Journal of European Public Policy 633 (2023).

[16] *See* Scharpf, *supra* note 13, pp. 23–27; van den Brink, Dawson, Zglinski, *supra* note 14. *See also* B. Van Leeuwen, *Repositioning Free Movement of Services: A Substantive Perspective on the Structure and Dynamics of the Internal Market*, 62(3) Common Market Law Review 705 (2025).

[17] Scharpf, *supra* note 12, p. 18; van den Brink, Dawson, Zglinski, *supra* note 14, pp. 226–229.

[18] Scharpf, *supra* note 12, p. 19; *see also* de Ruijter, *supra* note 8, p. 183.

[19] P. Dąbrowska-Kłosińska, *The EU Court of Justice on Travel Bans and Border Controls: Deference, Securitisation and a Precautionary Approach to Fundamental Rights Limitations*, 50(1) European Law Review 107 (2025).

apt.[20] On the other hand, while they suggest that the EU's ability to achieve social objectives may be enhanced via positive integration and harmonisation (the EU's "market correcting policies"), they leave quite open the questions (and answers) of what the demise of the asymmetry thesis and the possible reversal of asymmetry between negative (toward less) and positive (toward more) integration actually mean for individuals and their rights at the national level (Treaty-based and fundamental rights, including socioeconomic ones).[21] If the CJEU is less interventionist than before, and the EU secondary regulation is growing, it will arguably impact those rights, including in the fields of EU health and mobility.[22]

It should also be noted that the EU health policy in relation to the free movement of persons *and* to the free movement of products in the Single Market has always been both relevant and intriguing for this conceptualisation. This is so for three reasons. Firstly, earlier CJEU jurisprudence on national public health policies afforded various degrees of discretion to both the EU and MSs in deciding on the acceptable *level* of risk and *methods* to achieve health protection, when necessary, in accordance with the principle of precaution.[23] Thus, it can be claimed that in the product-related case law, the "asymmetrical" impacts on the Single Market fluctuated: from usual market deregulatory effects of national measures in the field of risk regulation (e.g. food safety or GMOs), when the CJEU almost always treated national measures as unjustified obstacles to the EU market (negative integration),[24] to justifications of national-level policies on dangerous substances (e.g. anti-alcohol), which usually did not have the negative-integration deregulatory effects of the former case law.[25] Secondly, the viability of the original asymmetry thesis in the person-related case law in the context of health was also not decisive in the past: in 2010, the CJEU accepted broad national autonomy and measures based

[20] van den Brink, Dawson, Zglinski, *supra* note 14, pp. 226–229.

[21] *Ibidem*, p. 20. *Cf.* de Ruijter, *supra* note 8, pp. 178–179.

[22] *Cf.* Scharpf, *supra* note 12, p. 23. *See generally* L. Gruszczynski, W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014.

[23] *See* Case C-180/96 *United Kingdom v. Commission of the European Communities*, EU:C:1998:192; and Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, EU:C:2004:802.

[24] *See* Case C-333/08 *European Commission v. France*, EU:C:2010:44; Joint Cases C-439/05 and C-454/05 *Land Oberosterreich v. European Commission*, EU:C:2007:510. *See also* N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, Oxford University Press, Oxford: 2020, ch. 3; P. Dąbrowska-Kłosińska, *Risk, Precaution and Scientific Complexity before the Court of Justice of the European Union*, in: L. Gruszczynski, W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014, pp. 192–208.

[25] Baumberg and Anderson argue that although "a partial juridification of alcohol policy has led to the negative integration of alcohol policies, this effect is not as strong as sometimes thought" – B. Baumberg, P. Anderson, *Health, Alcohol and EU Law: Understanding the Impact of European Single Market Law on Alcohol Policies*, 18(4) European Journal of Public Health 392 (2008).

on precautionary framing (albeit without naming it *expressis verbis*) in case of the freedom of movement of students under the TFEU and the Residence Directive[26] in *Bressol*.[27] It was justified on the basis of protecting the future labour force in the national health care system in Belgium (economic grounds). This judgment constitutes a counterexample to a similar case described by Scharpf and decided five years earlier (2005), which enforced access to the Austrian universities of German medical students.[28] Furthemore, in *Leger* the CJEU's standard of review regarding evidence base and the proportionality analysis of national law[29] was very similar to that in the judgment in *Scotch Whisky*,[30] which van den Brink and others consider to be proof that the asymmetry thesis is outdated.[31] Thirdly, the construct of power-sharing between the EU and MSs in Art. 168 TFEU (Title XIV Public Health), at least in the version of the Treaty of Lisbon, both allows and prohibits harmonisation of certain person-related and product-related fields, which in turn either enables or discourages the political and institutional feasibility of harmonisation at the EU level.

2. RESEARCH DESIGN: CASE SELECTION AND METHODS

The choice of scope of this article (health protection and mobility of persons in the Single Market during the COVID-19 pandemic) was also prompted by the fact that similar policy fields (mobility and health) had been of interest to scholars exploring asymmetries in the past, including the deregulation of national social policy measures and the impossibility of a parallel re-regulation at the EU level.[32] It makes the research design of health and mobility field (a sector which crosscuts

[26] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77 (Residence Directive).

[27] *See* the risk and uncertainty analysis as a justification to a measure of *numerus clausus* concerning the free movement of students between Belgium and France in: Case C-73/08 *Bressol v. Gouvernement de la Communaute Francaise*, EU:C:2010:181.

[28] Case C-147/03 *Commission v. Austria*, EU:C:2005:427; *see* Scharpf, *supra* note 13, pp. 14–15.

[29] Case C-528/13 *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, EU:C:2015:288.

[30] Case C-333/14 *Scotch Whisky Association and Others v. The Lord Advocate and The Advocate General for Scotland*, EU:C:2015:845.

[31] *Cf.* van den Brink, Dawson, Zglinski, *supra* note 14, p. 220–221.

[32] For the classic Scharpf thesis, *see* Scharpf, *supra* note 13, pp. 18–19, 28–29; *cf.* van den Brink, Dawson, Zglinski, *supra* note 14, pp. 220, 223. *See also* O. Gerstenberg, *The Justiciability of Socio-economic Rights, European Solidarity, and the Role of the Court of Justice of the EU*, 33(1) Yearbook of European Law 245 (2014) who refers also to health-related arguments.

the Single Market and the Health Policy) a most likely case to investigate and test for both viewpoints.[33]

The research was designed to examine both potential structural (institutional) asymmetries – negative and positive integration – and possible substantive asymmetries regarding the impact on the rights and interests of individual actors at the national level in the field of EU health protection and free movement of persons as affected by the COVID-19 pandemic.[34] The research scope was delineated by the subject matter: health protection in the EU in the context of COVID-19 measures (e.g. quarantines, online schooling and restrictions on movement) and the exercise of the freedom of movement of persons (individuals and entities) within the EU.

The article employs a relatively broad understanding of both mobility and health: "health" includes both public health and health care, in line with the general approach of many scholars.[35] The broad sense of the notion of "mobility" reflects the broad scope of application of the free movement of persons in the EU.[36] The material scope of research was thus based on qualitative, theoretically informed criteria[37] and the temporal scope was based on quantitative criteria related to either the CJEU's legal proceedings or EU-level legislative initiatives (2020–2022, when the pandemic was the most severe).

The methodology applied in the article follows a traditional doctrinal and empirical legal approach, which is applied to the analysis. The initial search results of judgments and secondary law were gathered from publicly available EU institutional databases.[38]

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[33] *Cf.* K. Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109(3) American Journal of International Law 475 (2015).

[34] *Cf.* R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53(1) American Journal of Comparative Law 125 (2005).

[35] *See* T.Hervey, J.V. McHale, *European Union Health Law*, Cambridge University Press, Cambridge: 2015; T.K. Hervey, *Telling Stories about European Union Health Law: The Emergence of a New Field of Law*, 15(3) Comparative European Politics 352 (2017); *but see* de Ruijter, who treats public health and health care as largely separate (de Ruijter, *supra* note 8). *See also* W.E. Parmet, M. Frischhut, A. Garde, B. Toebes, *Introduction to Public Health Law*, in: D. Orentlicher, T.K. Hervey (eds.), *The Oxford Handbook of Comparative Health Law*, Oxford University Press, Oxford: 2021, pp. 68–76.

[36] *Cf.* P. Dąbrowska-Kłosińska, *The Right to Family Reunion vs Integration Conditions for Third-Country Nationals: The CJEU's Approach and the Road Not Taken*, 20(3) European Journal of Migration and Law 251 (2018).

[37] *See generally* K. Linos, M. Carlson, *Qualitative Methods for Law Review Writing*, 84(1) University of Chicago Law Review 213 (2017).

[38] The judgments of the Court of Justice of the EU were searched in the CURIA database (www.curia.europa.eu), and the EU secondary laws were searched in the European Parliament Legislative Observatory database (https://oeil.secure.europarl.europa.eu).

2.1. Description of case law selection

The initial search of the CJEU database using the keyword "COVID" returned almost 650 documents, a considerable majority of which related to competition law and state aid. For this reason, the search criteria were narrowed in accordance with the subject matter of the research design, and the competition law cases were excluded.[39]

The actual search of the relevant case law was thus conducted using "COVID" as the principal search keyword in the text of documents and specific, predetermined criteria relevant to the material and temporal scope of the research. Those criteria were chosen by ticking the relevant boxes in the search form: (i) documents (all available documents, including national decisions and excluding summaries for the purpose of economical research); (ii) subject matter ("Internal Market – Principles", "Right of entry and residence", "Public health", "Free movement of workers", "Area of freedom, security and justice", "Fundamental rights", "Data protection", "Citizenship of the Union" and "non-discrimination"); (iii) timeframe (from 1 January 2020 to 31 December 2022); and (iv) publication (both completed cases and those in progress).

The search returned 128 documents, sometimes with repeated entries (79), which were checked for relevance to the research subject, and then analysed in detail (see section 3 and Appendix 1).[40] The cases declared inadmissible were also considered (see section 4.2 and Appendix 1).[41] The results were cross-checked against CJEU press releases and the additional search of two specific acts of secondary law regarding the cross-border movement of patients – the Cross-border Healthcare Directive and the Social Security Regulation[42] – to make sure that no important cases were omitted.

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[39] The latter would merit a separate analysis which would exceed the scope of this text due to the cases' number, complexity and lack of direct relevance to this study (although the aviation sector might be considered to belong to a broadly defined mobility).

[40] The cases which were omitted from the detailed description (section 4.1.) concern the functioning of the judicial system, access to EU institutions, product-related scientific evidence and insurance services (*see* Appendix 1).

[41] *Cf. Editorial Comments...*, *supra* note 9, pp. 583–585, where COVID-19 inadmissible case law is easily dismissed as a purely procedural matter.

[42] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45; Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1. No pandemic-related cases were decided under those two acts in relation to cross-border health care during the study period.

2.2. Description of secondary law selection

A search of secondary law relevant to the research was also done using the keyword "COVID" in the text of documents (as an exact word/phrase) for the selected timeframe (legislative initiatives between 2020 and 2022). The first search of the European Parliament database concerned all types of legislative acts in the co-decision procedure (the ordinary legislative procedure ticked in the boxes of the search form). The search returned a total of 96 files, which was too many to feasibly analyse for this text.[43] In order to narrow down the number of results, criteria were introduced to select Directorates General in the European Commission usually leading files (so-called *chef the file*) relevant to the subject of the research: (i) "Justice and Consumers" (seven files); (ii) "Health and Safety" (nine files); and (iii) "Migration and Home Affairs" (six files). The search returned 22 legislative files in total, which are listed in Appendix 2. An additional search was conducted with the keyword "Health Union" in order to cross-check that no key files were omitted.

3. THE ANALYSIS OF CJEU JUDICIAL REVIEW: TRAVEL BANS, PUBLIC GATHERINGS, SOCIAL BENEFITS, HEALTH DATA AND INTERNATIONAL PROTECTION OF MIGRANTS

Before turning to the analysis of the specific findings on the CJEU case law under investigation, a few preliminary remarks are needed. Firstly, the number of requests for preliminary rulings and claims filed with the CJEU and the resulting number of judgments on the subject at hand appeared to be relatively small, especially given the catastrophic nature of the pandemic and the hundreds of judicial proceedings (civil, administrative and constitutional) at the national level in many MSs.[44] The relatively few EU-level judgments and interpretations partly confirms the findings of van den Brink and his colleagues about the decreasing trend of Single Market case law (in terms of quantity)[45] and the observation that the pandemic was quite oddly absent from CJEU jurisprudence in general (in terms of quality).[46]

Secondly, the research for this article returned a large number of cases where EU-level secondary laws (positive integration) were contested, but rendered in-

[43] Forty-nine legislative files for the year 2020, twenty-three for the year 2021 and twenty-four in 2022.

[44] *See e.g.* L. Vyhnánek, A. Blechová, M. Batrla, J. Míšek, *The Dynamics of Proportionality: Constitutional Courts and the Review of COVID-19 Regulations*, 25(4) German Law Journal 386 (2024); A. Golia, L. Hering, C. Moser, T. Sparks, *Constitutions and Contagion: European Constitutional Systems and The Covid-19 Pandemic*, Max Planc Institute, Munich: 2020; P. Dąbrowska-Kłosińska, *The Protection of Human Rights in Pandemics – Reflections on the Past, Present, and Future*, 22(6) German Law Journal 1028 (2021). *Cf.* J. Mulder, *Editorial*, 22(6) German Law Journal 1 (2021).

[45] *Cf.* van den Brink, Dawson, Zglinski, *supra* note 14, p. 220.

[46] *Cf. Editorial Comments...*, *supra* note 9, p. 586.

admissible; interestingly, however, no cases of any type of proceedings concerned an interpretation of the Cross-border Healthcare Directive and Social Security Regulation (see section 4.3).

Thirdly, a great many COVID-19-related cases before European Courts regarded state aid and the air transport sector.[47] During the pandemic, a significant number of state aid decisions issued by the Commission accepted the aid granted by MSs to aviation companies. Most, if not all, of those cases were referred to the General Court – and later appealed to the Court of Justice – by some competitors on grounds of discrimination and claims that the states had favoured national airlines.[48] It is beyond the scope of this article, but it would be interesting to examine this jurisprudence more comprehensively in the context of the asymmetry thesis and establish whether the CJEU upheld state aid interventions through a deferential application of EU competition rules, with the resulting social effects for the regulation of national markets, public services/companies and economic rights.[49] In any case, the number of such proceedings confirms that during the pandemic a lot of public funding was redirected to private corporations as aid measures (often for political reasons).[50]

Finally, the cases identified in the research, where judgments were actually rendered by the CJEU, can be divided into various groups, concerning restrictions of movement, public gatherings and COVID-19 mobile apps, social benefits, protection of data privacy and protection of migrants' rights. Considered from the perspectives of the CJEU's review, national autonomy, positive/negative integration and the resulting consequences for individuals, these cases prompted the observations presented in the next section.

3.1. The outcomes of CJEU judicial review: Interventionism or deference?

It is now time to turn to a more detailed analysis of the case law under study (see also Appendix 1). Consider the two cases which concerned restrictions of movement (travel bans, compulsory testing/quarantines and limits on public gatherings).[51] In

[47] As a matter of principle, state aid is prohibited under EU law and Art. 107(1) TFEU if it distorts competition, save for three exceptions under para. 2 of that article. One of those exceptions under Art. 107(3)(b) TFEU regards state aid to compensate for damages caused by natural disasters or exceptional occurrences, which is considered to be compatible with the Single Market.

[48] *See e.g.* Case T-657/20 *Ryanair DAC v. European Commission*, EU:T:2022:390; *see also Editorial Comments...*, *supra* note 9, p. 586–587.

[49] *Cf.* the importance of competition law for the asymmetry as explained by Scharpf, *supra* note 13, pp. 7–8.

[50] *Cf.* M. Scheinin, H. Molbæk-Steensig, *Human Rights-based versus Populist Responses to the Pandemic*, in: M. Kjaerum, M.F. Davis, A. Lyons (eds.), *COVID-19 and Human Rights*, Routledge, London: 2021, p. 30.

[51] Case C-128/22 *Nordic Info BV v. Belgische Staat*, EU:C:2023:951; C-659/22 *RK v. Ministerstvo zdravotnictví (Application Mobile Covid-19)*, EU:C:2023:745.

the *Nordic Info* case – which was a private tort action against Belgium for damages caused by an alleged mis-management of the pandemic – the CJEU interpreted the compatibility of national law, which restricted non-essential travel and required compulsory tests, screening and quarantines on the grounds of protecting public health, with the provisions of secondary law regulating the right to move freely in the EU, through a very deferential review.[52] The Court granted broad powers – viewed by some authors as a *carte blanche*[53] approach – to national public health authorities and to the decision of the referring court. The latter was tasked with assessing the proportionality of measures through detailed guidelines elaborated by the Court. In principle, the domestic provisions were deemed compatible with the EU legal framework as a proportionate exception to the free movement of persons in the interest of protecting public health during the COVID-19 pandemic and on the principle of general interest, which can justify human rights limitations (of Arts 7, 16 and 45 of the EU Charter; Art. 3(2) TEU; Arts 20 and 21 TFEU; and Directive 2004/38).[54] From the perspective of protecting individual, fundamental rights in EU, the CJEU conditioned the legality of national law on procedural safeguards enshrined in Directive 2004/38 (the principle of legal certainty, the principle of good administration and the right to an effective judicial remedy), respect for the relevant fundamental rights and principles of the EU Charter, the prohibition against discrimination and the principle of proportionality. Yet, it also incorporated the precautionary principle in its assessment of the proportionality of those rights' limitations, and further, it included the functioning of the national health care system in the conditions of the proportionality assessment, which may eventually render the protection of fundamental rights less effective.[55] Additionally, the standard of scientific evidence was lower in this case than in earlier jurisprudence. The direct result of this case for the applicant was a limitation of the company's Treaty-based freedom and a likely lack of entitlement to damages. In light of the judgment, the national law issued to counter the pandemic was considered a proportionate ex-

[52] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

[53] 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, available at: https://tinyurl.com/yc2f39xp (accessed 30 June 2025).

[54] Case C-128/22 *Nordic Info BV v. Belgische Staat*, EU:C:2023:951, paras. 93–98.

[55] For a critical account, *see* Dąbrowska-Kłosińska, *supra* note 19.

ception to EU market integration and a part of social regulation on the national territory (which aimed to protect public health).[56]

Consider the next case, which concerned the compatibility of national law restricting access to public spaces and gatherings during the pandemic – by requiring verification via a digital mobile application that the individual is "infection free" – with the General Data Protection Regulation (GDPR). The dispute arose in another small EU MS: Czechia.[57] The applicant claimed that the fact that the mobile application gave all personnel access to a variety of personal health data beyond the green mark on the screen (which was to prove compliance with the EU Covid Digital Certificate and the national health law requirements) constituted an infringement of the right to privacy and the GDPR.[58] In the answers to preliminary questions, the CJEU stated that the verification done via the mobile application constituted personal data processing,[59] but left it for the referring court to "ascertain whether the processing introduced by the extraordinary measure, first, observes the principles relating to the processing of data laid down in Article 5 of the GDPR and, second, observes one of the principles relating to the lawfulness of processing laid down in Article 6 of that regulation."[60] As a result, the CJEU carried out a moderately strict review of national measures, suggesting that they were incompatible with secondary law constituting complete harmonisation of the GDPR. Yet, it was left to the national court to determine specific infringements.[61] Indeed, following the CJEU judgment, the national court conducted a strict review of the national public health measure regarding the COVID-19 mobile app and decided in favour of the plaintiff, stating that the contested national measure had infringed the individual's right to privacy and right to data protection.[62]

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[56] *Cf.* Case C-128/22 *Nordic Info BV v. Belgische Staat*, EU:C:2023:951, para. 98. *See also* Case C-73/08 *Bressol v. Gouvernement de la Communaute Francaise*, EU:C:2010:181. It should be noted that specific distributive effects in that type of cases are difficult to establish and dispersed – the private applicant might have received some state aid instead of compensation, but it is difficult to quantify costs for individuals in the Nordic states and other categories of individuals in the EU who might have wanted to travel with Nordic Info, but could not.

[57] Case C-659/22 *RK v. Ministerstvo zdravotnictví (Application Mobile Covid-19)*, EU:C:2023:745.

[58] *Ibidem*, paras. 16–20.

[59] *Ibidem*, para. 30; *see also* para. 16: "The application scans the QR code of the certificate using the camera of the mobile telephone of the person conducting the check. That person then has a preview of the basic identifying data of the certificate holder (surname, first name and date of birth) as well as the status (valid or invalid) of the certificate. By clicking on a specific button of the application, the person conducting the check is able to access the complete set of the information shown in the certificate, such as vaccination, type of vaccine, vaccine manufacturer, number of doses received, date of vaccination, date of first positive result and certificate issuer."

[60] *Ibidem*, para. 32.

[61] *Ibidem*, paras. 31–32.

[62] The national court decided that the applicant did not have standing for part of the action – *see* Supreme Administrative Court in Czech, judgment of 30 November 2023, 8 Ao 7/2022-132, paras 16, 31–32, 37, 64, 75–79 and 84–85.

Another pair of cases concerned labour law and social security rights, a national public health quarantine order and individuals' right to annual leave. In the *Sparkasse Südpfalz* case, a person employed in Germany claimed that an annual paid leave which had been consumed by the quarantine order imposed by a national health authority should be moved to the next year, so that the person could use it appropriately.[63] The core of the dispute related to the compatibility of national law and labour courts' previous practice (case law) with the provisions and standards of the Working Time Directive and Art. 31(2) of the Charter (the right to an annual period of paid leave).[64] The German courts have repeatedly ruled that the German law requires employers to carry over days of leave when workers demonstrate a real incapacity for work, but it was not applicable during the pandemic in cases of a quarantine, which does not amount to an incapacity to work.[65] In the judgment, which contains a very surprising turning point in the judicial interpretation, the CJEU held that the purpose of a quarantine was different from that of sick leave, and that in consequence a period of quarantine "cannot, in itself, present an obstacle to the attainment of the purpose of paid annual leave, which is intended to enable workers to rest from carrying out the work [...] and to enjoy a period of relaxation and leisure."[66] As a result, "national legislation and practice which does not allow days of paid annual leave granted to a worker who is not sick to be carried forward for a period which coincides with a period of quarantine ordered by a public authority due to that worker's contact with a person infected with the virus" was found to be compatible with EU law.[67]

The CJEU exercised a deferential review of the national law in the case (while adjudicating on a public health measure and national labour law), but ultimately, the interpretation on the compatibility of national measures and practice with the Working Time Directive and the Charter did not work in the interest of the individual. A careful reading of the CJEU judgment reveals that it likely did not want to counter the practice of the German labour courts (and state policy) during the pandemic. Nonetheless, the interpretation of the CJEU that equated a period of quarantine with paid annual leave (when one could, for example, travel or spend time in nature), which eventually would not be allowed to be carried over to the next year, was very odd.

In another case – *Thermahotel Fontana* – the Court performed a typically intensive review of a national law and declared that provisions refusing compensation to

[63] Case C-206/22 *TF v. Sparkasse Südpfalz*, EU:C:2023:384.

[64] Art. 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

[65] C-206/22 *TF v. Sparkasse Südpfalz*, EU:C:2023:384, para. 12.

[66] *Ibidem*, para. 43.

[67] *Ibidem*, para. 45.

frontier workers from other MSs in case of COVID-19 isolation in that MS were incompatible with the rights of those workers from the Treaty and EU secondary law.[68] The CJEU held that Article 45 TFEU and Article 7 of Regulation No 492/2011 must be interpreted as precluding legislation of a Member State under which the granting of compensation for loss of earnings suffered by workers as a result of isolation ordered following a positive COVID-19 test result is subject to the condition that the imposition of the isolation measure be ordered by an authority of that Member State under that legislation.[69]

Evidently, the Court decided in favour of cross-border workers prioritising the principle of non-discrimination and negative market integration over the overreach of the national (Austrian) system of social security. The Court also held – contrary to the argument of the Austrian government – that the concern about the financial costs of compensation granted to workers isolating themselves in other MSs due to COVID-19 infection does not justify limiting the free movement of persons (economic concerns).[70] The Court further stated that "although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers", and noted that "to avoid the unjust enrichment of migrant workers who are also compensated by their Member State of residence for the isolation imposed by the competent authorities of that State" it is sufficient that the Austrian authorities take account of compensation already paid or due under the legislation of another MS, where appropriate by reducing the amount thereof, so as to avoid overcompensation.[71] As a result, the CJEU ruling created specific distributive effects: it protected the Treaty-based and social security rights of frontier workers from other MSs while making the compensation system in Austria responsible for financial and administrative costs.[72]

The next group of cases concerned data protection in the context of pandemic measures restricting the free movement of persons in order to protect health.[73] In a German case about the right to privacy and the protection of teachers' data in the context of online schooling, the CJEU issued a seminal judgment on the compatibility of national law with Art. 88 GDPR, which was widely discussed.[74]

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[68] Case C-411/22 *Thermalhotel Fontana*, EU:C:2023:490, paras. 31–48.

[69] *Ibidem*, para. 48.

[70] *Ibidem*, paras. 44–45.

[71] *Ibidem*, paras 46–47.

[72] *Cf.* Scharpf's explanation of the Austrian universities case – Scharp, *supra* note 13, p. 14.

[73] Case C-34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer*, EU:C:2023:270; Case C-710/23 *L.H. v. Ministerstvo zdravotnictví*, EU:C:2025:231. *See also* Case C-683/21 *Nacionalinis visuomenės sveikatos centras*, EU:C:2023:949.

[74] *Cf.* C. Galichet, *Règles complémentaires au RGPD en matière de traitement de données à caractère personnel dans les relations de travail*, 11 Dalloz IP / IT 597 (2023); H.H. Abraha, *Hauptpersonalrat der*

The CJEU decided that the processing of teachers' personal data during the live-streamed videoconferences of the public education classes they were teaching falls under the material and personal scope of Art. 88, which grants a broad margin of discretion to MSs wishing to adopt "more specific rules" (an opening clause) to ensure protection of the rights and freedoms regarding the processing of employees' personal data.[75] This discretion is qualified by the wording of that provision which – especially in paragraph 2 – reflects the limits of differentiation allowed by the GDPR, because it sets conditions which national regulations must respect (if they are to qualify as such rules). That is,

> those more specific rules must seek to protect employees' rights and freedoms in respect of the processing of their personal data in the employment context and include suitable and specific measures to protect the data subjects' human dignity, legitimate interests and fundamental rights. Particular regard must be had to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity, and monitoring systems at the workplace.[76]

As a result, a mere repetition of the requirement of the EU data protection rules is not sufficient for national rules to be compliant with Art. 88.

The outcome of the ruling had a clear bearing on the national dispute which arose between a teacher's organisation and the Culture Ministry in the Land of Hessen. The representatives of the organisation claimed that the legal and organisational framework for school education during the COVID-19 pandemic, which made it possible for pupils who could not be present in a classroom to attend classes live by videoconference, did not provide for the teachers concerned to give consent to participate in that service, although respective provisions did call for the consent of the pupils themselves or, for those pupils who were minors, of their parents.[77] In answer to the preliminary questions, the Court held that the national rules were not compatible with the EU secondary law and the protection of fundamental rights of individuals (the teachers) – subject to a final verification by the referring court.[78] In the words of the Advocate General, the national rules did not appear to have adequate normative content, which demonstrates a typical strict scrutiny review by

Lehrerinnen: Article 88 GDPR and the Interplay between EU and Member State Employee Data Protection Rules, 87(2) The Modern Law Review 484 (2024); S. Glaser, *Zoomed Out Teachers: The Covid-19 Pandemic, Data Processing in the Context of Employment and the Social Contract in Hauptpersonalrat der Lehrerinnen und Lehrer*, 61(4) Common Market Law Review 1103 (2024).

[75] Case C-34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer*, EU:C:2023:270, paras. 51–52.

[76] *Ibidem*, paras. 73–74.

[77] *Ibidem*, paras. 14–15.

[78] *Ibidem*, paras. 78–81.

the Court (para. 81). The result of that answer was the obligation for the national court to disregard the national law in accordance with the principle of primacy of EU law, which renders any conflicting provision of national law automatically inapplicable.[79] However, the CJEU also obliged the national court to check whether the national provisions in question satisfied the requirements for the grounds of public interest regarding the lawfulness of processing under the GDPR (Art. 6.3, with connection to Art.6.1e). If the processing of teachers' personal data could be classified as performing a task in the public interest (protecting health during the pandemic), they must not be disregarded.[80] In such a case the national law is valid and individual rights are considered to be limited, the lawfulness and proportionality of which is assessed by the referring court. The court also ultimately exercises the choice of the two possible pathways of interpreting and applying national law offered by the CJEU.

Consider also the case of *L.H.*, in which access to public documents was requested in order to obtain information concerning identification of persons who had signed contracts with the Czech Ministry of Health for the purchase of COVID-19 screening tests, as well as the certificates demonstrating that those tests may be used on the territory of the EU.[81] The national authority refused to release personal data because the relevant national data protection law required the prior consent of the person in question, and this was too difficult in the case of personnel/representatives of legal persons with a seat outside the EU (e.g. in China). The applicant brought legal proceedings against the decision. In response to the national court, the CJEU quite broadly construed the understanding of the duty of a national public authority (a data controller) to inform and consult natural persons prior to the disclosure of official documents containing their personal data, reconciling the individual right to access public information (Art. 1 and 10 TEU and Art. 15 TFUE) with the right to protection of personal data and privacy (Art. 8 of the Charter and Art. 16 TFEU).[82] It was done contrary to the suggestion of the national court, which deemed the scope of the duty too burdensome vis-à-vis the right to access information.[83] The CJEU accepted national autonomy to define specific conditions for the implementation of the GDPR, but emphasised that the practical consequences,

[79] *Ibidem*, paras. 82–83.

[80] *Ibidem*, para. 88: "[W]here the referring court finds that the national provisions on the processing of personal data in the employment context do not comply with the conditions and limits laid down in Article 88(1) and (2) of the GDPR, it must still verify whether those provisions constitute a legal basis referred to in Article 6(3) of that regulation, read in conjunction with recital 45, which complies with the requirements laid down in that regulation. If that is the case, the national provisions must not be disregarded."

[81] Case C-710/23 *L.H. v. Ministerstvo zdravotnictví*, EU:C:2025:231.

[82] *Ibidem*, paras. 32–48.

[83] *Ibidem*, paras. 16, 39–43.

of an organisational, economic and medical nature in particular, arising from the additional requirements could not be so excessive as to render the right to access information ineffective.[84] The Court ruled that "it is common ground that that law requires public authorities to disclose information, including official documents, to the persons who so request."[85] Thus, in the ruling the CJEU both left broad discretion to national law and earlier case law and ensured rather generously – for the referring court to verify – that the scope and boundaries of the right to access information at the national level were not disproportionately narrow.[86]

One more pair of cases concerned the international protection of migrants and the suspension of transfers of asylum seekers between MSs during the pandemic (from Germany to Italy, where the persons had entered the EU, in line with the EU migration law system, the so-called Dublin system).[87] According to the case, the German authorities adopted administrative suspension decisions in 20,000 cases, and legal proceedings before the court were pending in over 9,300 cases.[88] The legal issues in those cases concerned procedural safeguards (time limits for a maximum of six months when transfer can take place between states) and judicial remedies opposing transfer decisions taken against persons seeking international protection. The CJEU decided on a broad construction of the rights of those asylum-seekers' rights in international protection versus the MS's procedural autonomy. As a result, the national proceedings were discontinued in favour of the applicants because of the withdrawals of the state.[89]

[84] *Ibidem*, paras. 39–42, 45–46.

[85] *Ibidem*, para. 42.

[86] *Ibidem*, para. 46: "an absolute application of that obligation [to inform a person concerned whose personal data are to be disclosed] could give rise to a disproportionate restriction on public access to official documents. It is conceivable that, for various reasons, informing and/or consulting the data subject may prove impossible or would require disproportionate effort. In such a context, invoking the impossibility, in practice, of informing and consulting that data subject in order to justify the systematic refusal of any disclosure of information concerning that person would lead to the exclusion of any attempt to reconcile the interests involved, even though such reconciliation is expressly prescribed for in Article 86 of the GDPR."

[87] Joined Cases C-245/21 and C-248/21 *Bundesrepublik Deutschland v. MA and Others*, EU:C:2022:709. *See also* Case C-823/21 *Commission v. Hungary*, EU:C:2023:504; Case C-123/22 *Commission v. Hungary* EU:C:2024:493; and Case C-808/18 *Commission v. Hungary*, EU:C:2020:1029.

[88] Joined Cases C-245/21 and C-248/21 *Bundesrepublik Deutschland v. MA and Others*, EU:C:2022:709, para. 30.

[89] BVerwG, Order of the Senate of the Federal Administrative Court of 14 August 2020 – 2 K 232/20.A; BVerwG, judgment of the Senate of the Federal Administrative Court of 10 June 2020 – 9 K 2584/19.A. *See also Editorial Comments...*, *supra* note 9, pp. 587–88; H. Zaruchas, *Challenging Dublin Transfers: Revisiting Judicial Developments in Light of the New Asylum and Migration Management Regulation: CZA and X v. Staatssecretaris*, 62(1) Common Market Law Review 237 (2025).

3.2. Impacts on the rights of individuals and the role of national courts

Before proceeding to the next section and examining the EU secondary law which can tell more about positive integration at the intersection of health and the movement of persons, as well as the dynamics of the Single Market, this summary presents some interim observations concerning the CJEU's jurisprudence. Firstly, from the perspective of either the original "asymmetry thesis" or its critique, the judgments reveal a mix of approaches and a complex reality of judicial interpretation in a multi-level polity under the pressure of the pandemic. There is a tendency towards a generally less interventionist review of national regulatory measures for social objectives (public health and data protection), a broad construction of exceptions to restrictions of movement (e.g. in *Nordic Info* or *Sparkasse Südpfaltz*) and much deference to national courts' discretion. In such cases, there is little chance for individuals to enforce their Treaty-based claims (e.g. seek compensation for national authorities' conduct) when there is a priority of national social protection of public health.

Still, there is also an indication of the sometimes very diverse approaches of the CJEU. Compare for example the decisions in *TF v. Sparkasse Südpfaltz* with the judgment in *Thermalhotel Fontana*: in the former, the CJEU performed a deferential review towards national practice and the national court's decision, leaving much room for the national court regarding individual labour rights (resulting in their disregard towards the welfare policy of enforcing quarantines at no excessive cost for employers, but for employees); the latter is a typical negative integration ruling (in the Scharpfian sense), where national law must obey the Treaty-based freedoms and avoid discrimination for the purposes of market integration, equality and social security benefits for frontier workers of other MSs, with all the socioeconomic distributive consequences.

Secondly, the majority of cases concerned the interpretation of secondary law previously adopted at the EU level in the form of positive integration (data protection, working time and asylum). In cases where there is EU positive integration law, the intervention of the CJEU often took the form of a stricter review, including the enforcement of fundamental rights guarantees of data subjects (privacy and data protection), migrants (right to asylum and effective judicial remedy) and individual citizens (right to access information). However, rather typically, this largely leaves it for the national courts to decide on the final outcome of the proceedings (e.g. *Application Mobile COVID-19*, *On-line Teaching*, *Sparkasse Südpfalz*, *M.A.*, *P.B.*, *L.E.* or *L.H.*). This can lead to different effects for individuals depending on the national judicial/administrative practice and state policy. For example, in some cases the national court decisions implemented a strict review of national-level law *vis-à-vis* fundamental rights following the CJEU decisions (*Application Mobile*

COVID-19; see also *M.A.*, *P.B.* and *L.E.*), but that may not always be the case (cf. *On-line Teaching* or *Sparkasse Südpfalz*) depending on subtle differences within national-level implementation of EU standards.[90] This also changes the dynamic of the EU market integration because national (welfare state) laws and practices interplay with EU regulatory acts, and although both aim to fulfil the same social objectives, some values (at the national level) are objectively different.[91] The amount of case law is also lower generally. Those latter statements at least partly confirm the claims presented by van den Brink and his colleagues.[92]

Thirdly, a national court is sometimes really empowered to decide on the model of integration: either a strict review of national market-correcting policy (data protection) and more protection for fundamental and EU-law-based rights or laxity of review and deference to national policy at the cost of less protection for individuals (*On-line Teaching*).[93] In other words, in *On-line Teaching* (see also *Nordic Info BV*, *Application Mobile Covid-19* and *Thermalhotel Fontana*), the CJEU left the national court with a choice of interpreting, verifying and applying the model of integration (and possible asymmetry) to be implemented: either negative integration, where national laws are disapplied and individuals can rely on the EU-level laws (both primary and secondary) to enforce their fundamental rights and pursue their interests, but MSs' autonomy and powers to implement national market-correcting policy are limited, or differentiated/neutral integration, where MSs pursue different levels of protection through specific policies in the shadow of EU-level secondary law. In the latter case, individuals are offered a national-level protection of fundamental rights to a varying degree, but states pursue their national policies (e.g. protection of public health). To give one more pre-pandemic example, in the 2015 *Leger* judgment, the CJEU engaged directly in reviewing epidemiological data and medical knowledge about the disease AIDS to decide on discrimination, but ultimately left the national court to decide the outcome of the case.[94]

Fourthly, the legal effects for individuals vary. A more restrictive review of the CJEU usually means the possibility of enforcing the claims based on the Treaties and EU secondary law, including the protection of fundamental rights against the state. This constitutes a clear benefit for EU integration of mobile individuals in terms of socioeconomic (distributive) effects, but at the cost of possibly weaker

[90] It is possible that those national social standards in some states were lowered in the process of integration, which would prove the asymmetry thesis at some point, or because of the pandemic.

[91] *See also* de Ruijter, *supra* note 8.

[92] *See* van den Brink, Dawson, Zglinski, *supra* note 14.

[93] *Cf.* Case C-34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer*, EU:C:2023:270.

[94] *See* M. Frischhut, *Communicable and Other Infectious Diseases: The EU Perspective*, in: D. Orentlicher, T.K. Hervey (eds.), *The Oxford Handbook of Comparative Health Law*, Oxford University Press, Oxford: 2020, pp. 77–96; Case C-528/13 *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, EU:C:2015:288.

state welfare policies and varying degrees of protection of fundamental rights (e.g. political vs social rights in different states). On the other hand, the CJEU's deference leaves the protection of fundamental rights to national courts and may lead to more uncertain outcomes in terms of enforcing protection and distributive effects for individuals unless EU-level regulatory acts and policies are applied directly, uniformly and generally to substitute national policies and agree on common objectives (see *L.H.*, *M.A.*, *P.B.* and *L.E.*). By saying that, I mean that the very fact of adopting a large number of positive integration measures (as claimed by van den Brink and his colleagues) indicates a change in the market dynamics, but tells little about how those acts pursue adequate market-correcting policies at the national level, replace or complement welfare state polices and work responsively towards the interests of individuals.

Before turning to positive integration in the next section, one more comment is due. The case law on the subject has arguably been relatively limited because of the fact that many cases are declared inadmissible (see also section 4.3) and the CJEU is unwilling to loosen its interpretation of the procedural rules of legal standing under Art. 263(4) TFEU. At the same time, there is a gap between the alleged impossibility of individuals filing direct claims to the Court and an arguable stretching of the limits of EU competence when adopting EU regulatory acts (positive integration) at the intersection of mobility and health. The only way for individuals to reach the Court was via the preliminary ruling procedure, which – for understudied reasons that surely go beyond the scope of this work – favoured states from Northern Europe in terms of legal geography (Germany, Belgium, Latvia, Czechia and Austria).[95] On the other hand, the 18 cases which were declared inadmissible (both direct and indirect actions to the Court) all came from Italy, France and Spain (see also section 4.3).

4. THE ANALYSIS OF EU SECONDARY LAW: FROM THE REGULATION ON EU COVID DIGITAL CERTIFICATE TO THE REGULATION ON EUROPEAN HEALTH DATA SPACE

It is now time to move to the examination of the EU secondary law which was identified through the research selection (see section 2.2). Certainly, a detailed analysis of the substantive content of each act and its provisions would not be possible in one research article. Instead, this section offers an analysis of those aspects of EU-level regulation which can lead to a better understanding of the implications for rights of individuals in the EU stemming from the positive integration (re-regulation)

[95] F. De Witte, *Here Be Dragons: Legal Geography and EU Law*, 1(1) European Law Open 113 (2022), p. 115.

of policies pertinent to health protection and movement of persons. Accordingly, section 4.1 investigates the features of EU regulatory acts and section 4.2 considers the potential of re-regulating social market objectives at the EU level.

4.1. Features of EU-level regulatory measures

The research conducted for this article revealed that the EU was willing and politically capable of addressing various aspects of health protection and free movement of persons through positive integration measures. The regulatory acts (16 secondary laws) initiated and adopted (most of them) during the study period (2020–22) can be divided into three groups according to their subject matter: (i) five acts directly related to health protection and movement of persons; (ii) six acts related to institutional developments; and (iii) seven acts indirectly related to health protection and movement of persons.

The first factor which is plainly visible in the analysis of those acts of EU-level secondary law, whose adoption was triggered by the COVID-19 pandemic, is that a large number of them take the form of regulations (75%), which may correspond with a general EU trend in legislation. Furthermore, with regard to the legal form, one can observe the conversion of decisions/directives into regulations (e.g. the Cross-border Health Threats Regulation), which means increasing unification of national laws through positive integration: all regulations contain general, directly applicable and – usually – directly enforceable EU law provisions which co-exist with the domestic legal order in all EU MSs. It also means more direct legal entitlements for individuals (e.g. in the case of the EU Digital Covid Certificate Regulation or the European Health Data Space Regulation), as well as more obligations (e.g. the EU Digital Covid Certificate Regulation or the Schengen Border Code) and risks for potential infringements of disproportionate limitations of fundamental rights (e.g. European Health Data Space Regulation or the Cross-border Health Threats Regulation).

Next, the additional obligations and the risk of potential limitations of fundamental rights generally do not correspond with increased opportunities for individuals to access EU Courts. Nor do they initiate the development of any new provisions which would acknowledge other types of either administrative remedies or direct claims for individuals to the institutions responsible for overseeing the EU/national administration which enforces new regulations.[96] One exception to that statement should be highlighted and applauded: the European Health Data Space Regulation contains several provisions on additional, individual remedies (see Arts 21 and 81, which provide for the right to lodge a complaint with a digital health

[96] *Cf.* recital 62 of the preamble to the EU Digital Covid Certificate regulation (but not a specific provision).

authority; Art. 71, on the right to opt out of the processing of electronic personal health data for secondary use; and Art. 100, on the right to receive compensation).

Relatedly, health data mobility gained a special status through a new instrument of collecting, sharing and using data via the European Health Data Space Regulation,[97] and through designated, additional clauses for health data protection and processing within several acts (see e.g. Art. 10 of the EU Digital Covid Certificate Regulation; Arts. 27–28 of the Cross-border Health Threats Regulation).

Secondly, the regulatory measures at the EU level that were studied in the research show a clear tendency to treat health (public health) as a security issue as well as a strong focus on public health emergency preparedness (e.g. Cross-border Health Threats or the Schengen Border Code), crisis management and the availability of medicinal products and vaccines on the internal market (e.g. modified rules on European Medicines Agency and European Centre for Disease Prevention and Control). Furthermore, a greater integration of border management, public health emergencies and free movement of persons seems to be found in some of those acts (e.g. the EU Digital Covid Certificate or the Schengen Border Code), which may lead to legal and rights-related implications for individuals in EU. Those regulations also reinforce an increase of EU powers at the intersection of health protection and the free movement of persons and public health emergencies.

Thirdly and institutionally, several of the researched EU regulations were related to organisational developments, either new bodies within existing structures (e.g. the Advisory Committee on public health emergencies, within the Commission's Directorate General responsible for health, Art. 24 of the Cross-border Health Threats Regulation)[98] or broader powers for existing EU agencies (rules on the European Medicines Agency and the European Centre for Disease Prevention and Control). Those institutions were also allocated considerable budgets to fund their new their responsibilities in research, scientific expertise and medical product management.

Consequently, from a financial perspective the adopted regulations also indicate the EU's capability to react to the pandemic and manage the crisis through specific recovery and funding programmes (positive integration). For example, a huge budget (EUR 5.3 trillion) was assigned to a Union programme in the field of health ("EU4Health Programme") for the period 2021–2027.[99] Another example is the European Health Data Space Regulation, where EUR 810 million was initially al-

[97] *See also* Case C-683/21 *Nacionalinis visuomenės sveikatos centras*, EU:C:2023:949 regarding the direct applicability and enforcement of the General Data Protection Regulation in the context of creating a national mobile application for COVID-19 epidemiological monitoring.

[98] *See also* Commission Decision of 16 September 2021 establishing the Health Emergency Preparedness and Response Authority 2021/C 393 I/02 [2021] OJ C 393I/3–8.

[99] An initial budget of EUR 6 trillion for the period 2022–2027 was assigned, although 1 trillion has already been reallocated. For comparison, in earlier budgetary frames, the EU budget for health was estimated to be around EUR 450 million.

located for digitalisation in the field of health and the creation of a digital platform for the operation of the European Health Data Space project. The question of what real benefits at the national level those funds can bring remains unanswered.

The next section offers a few insights about the potential effects of adopting EU regulatory measures on health and mobility.

4.2. Social market re-regulation at the EU level?

The examination of secondary law in this study prompts the following cautious observations. The number, content and legal form of the regulatory acts suggest that the EU was able to effectively carry out the political processes of adopting positive integration and responding to the needs of market regulation during the pandemic.

It can be thus noted that, substantively, the regulations in question expanded the field of EU legal harmonisation and increased EU influence on (and interconnection with) national health, movement of persons and border management policies.[100] It likely also indicates a more legally unified approach to integration and an influence on the autonomy of MSs. Those implications are shaped by the fact that EU powers in both health care and public health *de iure* are quite limited (see Art. 168 TFEU), while *de facto* they are stretched according to political needs. As a result, the options of the EU to regulate and impact national health policies (in combination with the internal market powers to regulate) are various and expansive, for example, through the use of other legal bases available in the EU Treaties (see Art. 114 TFEU – the Single Market legal basis). Some authors thus suggest that the structure of those powers (in health) should be re-considered.[101]

Others argue that the EU-level regulation of health excludes considerations of the rights (and values) which are impacted, or to put it more elegantly, the "EU health policy is a balancing act"[102] where the varying interests and rights of communities and individuals are protected through structurally asymmetric processes. However, the change in the character of and relationship between those asymmetries, as this article analysed, requires more research – empirical research in particular – to establish to what extent and how those rights and interests are impacted. For example, the question emerges of whether the generous financing of the European Health Union (and the creation of the European Health Data Space) indeed translates into the capability of the EU to realise social objectives and "market correction policies" in the field of health (and mobility of patients/persons). Also unclear is the potential of the re-distribution of money through EU health fun-

[100] I do not focus here on product-related issues regarding access to medical products, joint procurement of vaccinations, etc.

[101] *See e.g.* Seitz, *supra* note 7, pp. 543–566; *Editorial Comments...*, *supra* note 7, pp. 974–984.

[102] de Ruijter, *supra* note 8, p. 190.

ding programmes and regulations (which apply at the health–mobility nexus) to actually be transformed into real benefits for individuals in the MSs through potential investment in health care systems (which are often underfunded or incur debts) and financing of research and infrastructure at the national level.[103] More knowledge is also needed as to who the real beneficiaries of the EU-level re-regulation and resource re-distribution prompted by the pandemic are (e.g. state agencies, NGOs, economic entities or patients) and whether those policies really support the realisation of the individual's right to health (which is a key aspect from the perspective of individual rights).

One issue in particular should cause concern when one considers the growing regulation and re-regulation at the EU level in the fields of health and mobility: ordinary individuals (EU citizens) in MSs, in the above-presented contexts, usually have a limited capacity to participate and influence the EU-level legislative processes, or challenge before the EU courts the regulatory acts underpinning EU-level policies (particularly when those take the form of regulations).[104] The next section presents those concerns.

4.3. The EU acts of secondary law and the CJEU cases declared inadmissible

The research for this article revealed a high number of inadmissible cases regarding EU secondary law (see Appendix 1 and 2 below). Many individuals from several MSs have challenged regulations, delegated regulations and implementing decisions relating to various aspects of regulatory acts adopted at the EU level (health policy). The complaints included the period for recognising the new EU digital COVID certificate,[105] the exemption of minors from this period,[106] the exportation of COVID-19 vaccines to Northern Ireland,[107] granting authorisation to certain COVID-19 vaccines[108] and annulling the Covid Digital Certificate Regulation.[109] All these actions were rendered inadmissible due to a lack of legal standing under Art. 263(4) TFUE to challenge acts which are not of a direct concern to an individual – a long-known interpretative position of the CJEU.[110] It is easy to downplay

[103] *Ibidem*, pp. 182–185.

[104] *Cf.* A. Alemanno, *When Failure Succeeds and Success Fails: A Reality Check on the European Citizens' Initiative*, VerfassungsBlog, 19 June 2025, available at: https://verfassungsblog.de/european-citizens-initiative/ (accessed 30 June 2025).

[105] Case T-103/22 *ON v. Commission*, EU:T:2022:658.

[106] Case T-101/22 *OG and Others v. Commission*, EU:T:2022:661 and the appeal (C-754/22 P).

[107] Case T-161/21 *Order McCord v. Commission*, EU:T:2021:910.

[108] Case T-786/22 *Frajese v. Commission*, EU:T:2023:457; Case T-632/21 *Karin Agreiter and Others v. Commission*, EU:T:2022:135; Case T-464/21 *Faller and Others v. Commission*, EU:T:2022:68.

[109] Case T-527/21 *Stefania Abenante and Others v. Parliament and Council*, EU:T:2021:750; T-503/21 *Lagardère, unité médico-sociale v. Commission*, EU:T:2021:750.

[110] *Cf.* K. Szepelak, *Does the Court of Justice Practice What It Preaches? Upholding the Value of Rule of Law in the Interpretation of Article 263(4) TFEU*, European Law Blog, 21 May 2025, available at: https://www.europeanlawblog.eu/pub/wga8jjtx/release/1 (accessed 30 June 2025).

the inadmissibility of those cases as procedural matters,[111] but they also show an existing (and growing?) gap between the amount of EU positive integration, especially in the form of regulations and in the field of health where EU has a limited competence (Art. 168 TFEU), and the possibility for individuals to seek judicial review of EU-level regulation. In other words, there are limited possibilities to seek justice although EU secondary law on the health–mobility nexus functions as a complement, or even a substitute, to national welfare/"market correction" policies (e.g. those regulating some aspects of vaccination).

This also shows a problematic, substantive asymmetry between individuals who cannot appeal to the CJEU in those cases (because of limited or no EU competence under Art. 168 TFEU or a lack of standing under Art 263(4) TFEU) and EU institutions which adopt regulatory measures on the nexus of health and the Single Market (product- and person-related), notwithstanding limited or no EU competence under Art. 168 TFEU.

The only available possibility for individuals in EU MSs in such cases remains to initiate national proceedings and to prompt a court to refer a preliminary question to the CJEU. However, this may also be unsuccessful, as the case *Azienda Ospedale-Università di Padova* demonstrates. In a rather unconvincing judgment, the Court decided that the preliminary questions regarding conditional marketing authorisations for medicinal products for human use; the issuing, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates to facilitate free movement during the COVID-19 pandemic; and the obligation to vaccinate health care personnel against COVID-19; and various fundamental rights, including the right to work, was not admissible.[112]

Ultimately, this means that, again, it will be a national court that will decide on the applicability of legal provisions, and a resulting model of integration upholding either EU or national law (negative and/or positive integration).[113] It will also be a national court that will enforce decisions regarding EU/state social policies pursued by EU legislation in line with the general principles of EU law and the national constitutional system in order to protect individual rights based on the Charter and the EU Treaties.

[111] *Editorial Comments...*, *supra* note 9, p. 583.

[112] Case C-765/21 *D.M. v. Azienda Ospedale-Università di Padova*, EU:C:2023:566.

[113] *See also* J. Kranz, *Supremacy Over Primacy...? Reflections on Legal Controversies between Poland and the European Union (2015–2023)*, 43 Polish Yearbook of International Law 13 (2024).

CONCLUSIONS: RIGHTS OF INDIVIDUALS ON THE SINGLE MARKET AT THE NEXUS OF HEALTH AND MOBILITY DURING THE PANDEMIC

The research for this article was prompted, on the one hand, by the fact that the pandemic exposed the dimension of health protection and the movement of persons in the Single Market as a key aspect of EU integration, and on the other hand, by the observation of changes in the CJEU's approach towards a review of national measures (less interventionist) and of a growing body of EU regulations (secondary law). The conclusions which stem from the research merit the following final comments and recapitulations.

Firstly, it is apparent from this research that the Single Market dynamic at the intersection of health protection and the freedom of movement of persons is much too complex to be described by the structural symmetry thesis, as put forward by F.W. Scharpf. His arguments about the imbalance between the processes of negative integration (very strong judicialisation and deregulation via the CJEU's actions) and of positive integration (weak EU-level legislative, political processes that does not provide sufficient re-regulation of social standards via secondary/positive EU law) no longer fully portray the present, post-pandemic reality. In that sense, the findings of van den Brink and his colleagues shed new light on the asymmetry thesis. For example, they are convincing with regard to the observation that currently, in some cases, the processes of positive and negative integration are mutually reinforcing.[114] For example, a deferential review of the CJEU regarding the introduction of border controls on the grounds of public health at the national level may be said to coincide with the introduction of new, harmonised rules through an EU regulation.[115] Yet, their findings say less about social and democratic standards with regard to the situation of individuals in MS. The claim that the structural asymmetry of EU integration led to lower social and democratic standards seemed Scharpf's main concern, along with a decrease, or even loss, of socio-democratic ideals of market regulation and a welfare state. The latter, according to Scharpf, could be possible only at the national level.[116]

The case study conducted for this article shows unequivocally that more empirical research is needed to better understand the implications for the protection of fundamental, including socioeconomic, individual rights and Treaty-based claims

[114] van den Brink, Dawson, Zglinski, *supra* note 14, pp. 18–21.

[115] 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 [2024] OJ L 1717; Case C-128/22 *Nordic Info*, EU:C:2023:951.

[116] Scharpf, *supra* note 13, pp. 14–18, 28–29.

at the national level, and more broadly, guaranteeing social advantages and democratic standards accordingly. A special focus should be placed on exploring spaces and gaps between the situation of ordinary individuals (EU citizens) and EU-level judicial review and regulation.[117] The proof about the growing re-regulation of some social objectives at the EU level (e.g. the EU COVID-19 Digital Certificate, EU4Health or the European Health Data Space) does not fully answer the question of how much harmonisation and regulations on health and mobility of individuals actually translate into the right to health, access to health care and investment in better quality health care at the national level.

Secondly, the inquiry into judicial review standards and the development of EU secondary law at the intersection of health protection and movement of persons can be interpreted as demonstrating a trend of the CJEU conducting less interventionist reviews of national measures. It means somewhat less significant Treaty-based individual rights, but it is unclear whether it is advantageous to the protection of individual rights at the national level. The deferential-review case law also usually protects national health care systems and the powers of public health authorities, which may indicate a trend towards a stronger market etatism in the long term.

On the other hand, this analysis of the case law can be also interpreted as revealing a variety of approaches adopted by the CJEU in its judgments – if looked at from the perspective of the intensity of review. The tendency of the Court to become less interventionist and more deferential, especially towards decisions of national judicial bodies, is not unequivocal because there are some clear examples of judgments where the Court performed a strict scrutiny, resulting in negative integration distributive consequences for individuals and MSs.

Thirdly, the research for this text also shows a substantive asymmetry, at the intersection of health protection and free movement of persons during the pandemic, between limited access of individuals to the EU Courts (and case law) in the case of most regulatory acts (positive integration, see section 4.3) and the political (and legal) possibility for EU institutions and MSs to adopt a variety of measures on either the health or the Single Market legal bases. Given the CJEU's unchanged interpretation of Art 263(4) TFEU on the legal standing for individuals, one way to address this asymmetry is to include directly applicable and enforceable provisions (on judicial remedies and claims) in the positive integration laws. At the same time, the research demonstrated that less de-regulation at the national level (negative integration) resulting from a less interventionist review of the CJEU and more re-regulation at the EU level (positive integration) do not always lead to a better protection and

[117] *Cf.* L. Azoulai, *Reconnecting EU Legal Studies to European Societies*, Verfassungsblog, 19 March 2024, available at: https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/ (accessed 30 June 2025).

enforcement of Treaty-based and fundamental rights of individuals in the EU. As a results, national courts become key determiners of the protection of those rights (which is not a new phenomenon in the EU), and they sometimes play an essential role in choosing an applicable path of integration (see section 4.2.).

Finally, the hope of this paper is also to foster more discussion about the effects of the picture of asymmetries in EU health/mobility policy and about their socio-economic effects, which can eventually lead to freshly informed debates about the causes and remedies of social and socio-democratic deficits in EU integration. The question of whether Europe can indeed achieve the ideals of a social market economy (about which F.W. Scharpf was very sceptical) is still valid, as a recent, widely discussed report by Mario Draghi indicates.[118] The report has called for both more competitiveness and a continuation of the European welfare state. Accordingly, there is a continued need to explore those angles, especially in the face of rising populism, right-wing conservatism and a weakening belief in democracy among young people throughout the EU.[119] Finally, those debates are also important in view of the need for a coherent vision of the future EU policy on health *vis-à-vis* the MSs' policies – one that is based on equality and solidarity.[120]

APPENDIX 1. – LIST OF CASE LAW

Subject matter directly relevant to health and mobility of persons (restrictions)

- C-128/22 *Nordic Info BV v. Belgische Staat*, EU:C:2023:951.
- C-659/22 *RK v. Ministerstvo zdravotnictví (Application Mobile Covid-19)*, EU:C:2023:745.
- C-206/22 *TF v. Sparkasse Südpfalz*, EU:C:2023:384.
- C-411/22 *Thermalhotel Fontana*, EU:C:2023:490.
- C-34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer (On-line Teaching)*, EU:C:2023:270.
- C-710/23 *L.H. v. Ministerstvo zdravotnictví*, EU:C:2025:231.
- C-683/21 *Nacionalinis visuomenės sveikatos centras*, EU:C:2023:949.
- C-245/21 and C-248/21 *Bundesrepublik Deutschland v. MA and Others*, EU:C:2022:709.

[118] M. Draghi, *The Future of European Competitiveness*, Publications Office of the European Union, Luxembourg: 2025.

[119] *See* W. Bieliaszyn, *Sondaż. Młodzi Europejczycy tracą wiarę w demokrację. Szczególnie widać to w Polsce* [Survey: Young Europeans are Losing Faith in Democracy. This is Especially Visible in Poland], wyborcza.pl, 4 July 2025, available at: https://wyborcza.pl/7,75399,32078649,sondaz-mlodzi-europejczycy-traca-wiare-w-demokracje-szczegolnie.html (accessed 30 June 2025).

[120] *Cf.* also A. de Ruijter, T.K. Hervey, B. Prainsack, *Solidarity and Trust in European Union Health Governance: Three Ways Forward*, 46 The Lancet Regional Health – Europe 1 (2024).

- C-823/21 *Commission v. Hungary*, EU:C:2023:504.
- C-123/22 *Commission v. Hungary*, EU:C:2024:493.
- C-808/18 *Commission v. Hungary*, EU:C:2020:1029.

Subject matter indirectly relevant to health and mobility of persons (restrictions)

- C-18/21 *Uniqa Versicherunge AG v. VU*, EU:C:2022:682.
- C-363/21 *Ferrovienord*, EU:C:2023:563.
- T-710/21 *Robert Roos and Others v. European Parliament*, EU:T:2022:262.
- C-458/22 P *Robert Roos and Others v. European Parliament*, EU:C:2023:871.
- T-724/21 *IL and Others v. Parliament* (case removed), EU:T:2021:873.
- T-207/18 *Plastics Europe v. ECHA* (biosfenol), EU:T:2020:623.
- T-496/20 *CRII-GEN and Others v. Commission* (glifosat), EU:T:2021:179.
- C-667/21 *Krankenversicherung Nordrhein* (health data processing, not related to Covid), EU:C:2023:433.

other irrelevant cases have been omitted.

Inadmissible preliminary rulings

- C-220/20 *XX v. OO (Suspension de l'activité judiciaire)*, EU:C:2020:1022.
- C-765/21 *Azienda Ospedale-Università di Padova*, EU:C:2023:566.
- C-161/21 *Comune di Camerota*, EU:C:2021:833.

Inadmissible applications with appeals – No locus standi

- T-161/21 *McCord v. Commission*, EU:T:2021:910.
- T-786/22 *Frajese v. Commission*, EU:T:2023:457.
- T-103/22 *ON v. Commission*, EU:T:2022:658.
- T-101/22 and C-754/22 P *OG and Others v. Commission*, EU:T:2022:661.
- T-632/21 *Agreiter and Others v. Commission*, EU:T:2022:135.
- T-527/21 *Abenante and others v. Parliament and Council*, EU:T:2021:750.
- T-503/21 *Lagardère, unité médico-sociale v. Commission*, EU:T:2021:750.
- T-469/21 *Natale v. Italy*, EU:T:2021:704.
- T-464/21 *Faller and Others v. Commission*, EU:T:2022:68.
- T-418/21 *Alauzun and Others v. Commission and EMA*, EU:T:2022:39.
- T-267/21 *Amort and Others v. Commission*, EU:T:2021:802.
- T-165/21 *Amort and Others v. Commission*, EU:T:2021:805.
- T-136/21 *Amort and Others v. Commission*, EU:T:2021:807.
- T-96/21 *Amort and Others v. Commission*, EU:T:2021:804.
- T-633/20 *CNMSE and Others v. Parliament and Council*, EU:T:2021:678.
- C-749/21 P *CNMSE and Others v. Parliament and Council*, EU:C:2022:699.

– APPENDIX 2. – LIST OF SECONDARY LAW

Acts with subject matter directly relevant to health and mobility of persons

- Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU [2022] OJ L 314/26.
- Regulation (EU) 2025/327 of the European Parliament and of the Council of 11 February 2025 on the European Health Data Space and amending Directive 2011/24/EU and Regulation (EU) 2024/2847 [2025] OJ L 2025/327.
- Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic AND Regulation (EU) 2022/1034 of the European Parliament and of the Council of 29 June 2022 amending Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic [2022] OJ L 173/37.
- Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic [2021] OJ L 211/24.
- Regulation (EU) 2022/1035 of the European Parliament and of the Council of 29 June 2022 amending Regulation (EU) 2021/954 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic [2022] OJ L 173/46.
- 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 [2024] OJ L 2024/1717.

Acts on institutional developments indirectly relevant to health and mobility of persons

- Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices [2022] OJ L 20/1.
- Regulation (EU) 2024/568 of the European Parliament and of the Council of 7 February 2024 on fees and charges payable to the European Medicines Agency, amending Regulations (EU) 2017/745 and (EU) 2022/123 of the European Parliament and of the Council and repealing Regulation (EU) No 658/2014 of the European Parliament and of the Council and Council Regulation (EC) No 297/95 [2024] OJ L 2024/568.
- Regulation (EU) 2022/112 of the European Parliament and of the Council of 25 January 2022 amending Regulation (EU) 2017/746 as regards transitional provisions for certain in vitro diagnostic medical devices and the deferred application of conditions for in-house devices [2022] OJ L 19/3.
- Regulation (EU) 2022/2370 of the European Parliament and of the Council of 23 November 2022 amending Regulation (EC) No 851/2004 establishing a European centre for disease prevention and control [2022] OJ L 314/1.
- Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027, and repealing Regulation (EU) No 282/2014 [2021] OJ L 107/1.
- Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC [2022] OJ L 333/164.

Acts not directly relevant to health and mobility of persons

- Regulation (EU) 2024/1938 of the European Parliament and of the Council of 13 June 2024 on standards of quality and safety for substances of human origin intended for human application and repealing Directives 2002/98/EC and 2004/23/EC [2024] OJ L 2024/1938.
- Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC [2023] OJ L 135/1.

– Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms [2023] OJ L 132/21.
– Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC [2023] OJ L 2023/2225.
– Directive (EU) 2023/2673 of the European Parliament and of the Council of 22 November 2023 amending Directive 2011/83/EU as regards financial services contracts concluded at a distance and repealing Directive 2002/65/EC [2023] OJ L 2023/2673.