

**EU, COVID-19 AND
NATIONALISM: LEGAL
ASPECTS**

FIDE OXFORD/22

JANUARY 2023

Relevant Information

This document summarises the key point of one of the round tables held at the [Fide Foundation 2nd International Congress at Oxford, on Nationalism, Populism and Identities: Contemporary Challenges](#). The key topic was the Impact of nationalism and populism at the national level.

The author of this panel was **Ulla Neergaard**, Professor of EU Law, Faculty of Law, University of Copenhagen, Denmark.*

About the Fide Foundation

The Fide Foundation is a legal-economic think-tank based in Spain, committed to involving the civil society in all major legal and economic developments in Spain, the EU and abroad.

Website: thinkfide.com

* The paper is partly based on Ulla Neergaard's previous co-authored works (where the analysis and conclusion are further developed and independent from), in particular: *"Whatever is necessary... will be done' - Solidarity in Europe and the COVID-19 Crisis"*, Together with Sybe de Vries, In Dolores Utrilla & Anjum Shabbir (eds.): *"EU Law in Times of Pandemic"*, EU Law Live Press, 2021, pp. 75-93; and *"Broken Wings: Closure of Borders in the Three Nordic EU Member States during the COVID-19 Pandemic"*, Together with Jaan Paju & Juha Raitio, EU Law Live, 2021, pp. 1-20.

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K. EU, COVID-19 AND NATIONALISM: LEGAL ASPECTS

ABSTRACT

Covid-19 turned the world upside down and thus calls for self-reflections. In light of that, the present paper takes a European legal perspective and unpacks the main responses of the EU to the Covid-19 crisis during the first two years. Also, the closures of borders in the three Nordic EU Member States are analysed as a concrete example of actions and responses. It concludes that within the prevailing limits and in general terms, the EU, after all, did quite well in relation to the handling of the pandemic. The reactions were at first far too slow with extremely tragic consequences. However, that the EU eventually was capable of setting up a series of actions including in particular the common EU strategy for COVID-19 vaccines and a Recovery Plan appears to be a historically outstanding achievement. Also, the conditionality mechanism - which was encompassed as a kind of side-effect - might hopefully prove to be an extremely important tool in combatting the current rule of law challenges in certain Member States. On the other side of the coin, the internal market and free movement were severely challenged (both in letter and in spirit) and were not handled fully satisfactorily.

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INTRODUCTION: A DWARFENED CHALLENGE, YET STILL OF RELEVANCE

“We are more united than ever, and we will stand up in this war, that is for sure that we will overcome, and we will prevail. We are united and we stay united.”¹

As this quotation from the speech by President von der Leyen at the European Parliament Plenary on 1 March 2022 clearly puts into perspective, the recent Russian invasion of Ukraine and the terrors currently taking place there have severely altered the issues of nationalistic forces in Europe. The

¹ Speech by President von der Leyen at the European Parliament Plenary on the Russian aggression against Ukraine, 1 March 2022, available at [Speech by the President: Russian aggression against Ukraine \(europa.eu\)](https://www.europa.eu/press-room/en/infographic-speeches/20220301-president-von-der-leyen).

continent has witnessed shock after shock over the last decade or so, and once again, but even more fundamentally, Europe changed radically on 24 February this year. It seems that, as the old aphorism declares, there is nothing like a common enemy to unite forces, and thereby in this case may have diminished the otherwise strong nationalist forces within Europe.

Thus, currently, Europe appears to be more united than ever, in contrast to the situation two and a half years ago. Thereby, the relevance of the Covid-19 crisis and the related problems of increased nationalism in the wake thereof, has largely lessened (although nationalism in many other regards is still strongly alive). The size of this new challenge is more than gigantic even in comparison with the Covid-19 crisis, and at least in Europe the pandemic for the time being seems under control due to e.g., efficient vaccinations and largely attained herd immunity, leading to glimmers of light in the very long pandemic tunnel.

Nevertheless, as one of the largest challenges, which the EU has faced in recent times, and in spite of the new dark chapter, which painfully has been opened up by the invasion, it is still of value to take a bird's eye perspective to reflect upon the role of EU law in the context of the Covid-19 crisis, nationalism, and solidarity.

Against this backdrop, this paper will unpack the main responses of the EU to the Covid-19 crisis during the first two years. Also, the closures of borders in the three Nordic EU Member States will be analysed as a concrete example of actions and responses. On that basis, some final key points are identified.

CHANGE OF BEHAVIOUR: FROM NATIONALISM TOWARDS SOLIDARITY

The flaws of human nature during crises such as pandemics is not something new, as they inevitably permit a large amount of selfishness to develop and embed itself as a new normal. Somehow confirming such a depiction, we witnessed in Europe, particularly at the beginning of the Covid-19 crisis, on the one hand, for instance, individuals hoarding food and thefts from hospitals of essential protective equipment. On the other hand, we saw near unsuccessful pleas for exports of doctors and ventilators from the more privileged countries to the most wounded ones, as well as little success in requests to take Covid-19 patients from the latter kinds of Member States to those countries estimated to have a higher capacity in the health sector. In addition, we witnessed unsympathetic 'competition' between Member States in the purchase, for instance, of ventilators and personal protective equipment such as masks, and Member States' surprising confiscations and export bans of such items, and more. Furthermore, we continuously experienced closures of borders internally in the EU likely to be in conflict with all otherwise prevailing free movement principles, apparently leaving the EU level completely pacified and largely acquiescent; a development, which may be viewed as closely related to a strengthening of the Nation State at the cost of the EU.

The EU has in the context of the pandemic often been criticised for its lack of action as well, when finally taking action, doing so insufficiently. The initial difficulties in reaching common solutions to developing economic help packages, in particular, have continuously been highlighted. Generally, solidarity amongst Member States was continuously called for, especially when the crisis first exploded, at a time when the increase in the preservation of self-interest appeared rather shocking.

However, undoubtedly, the law – if there is a will - can to a large extent compensate for selfish human and State behaviour, and solidarity has long served both as a profound value of and a dominant aim to be pursued by the EU (as expressed in Articles 2 and 3 TEU). Thus, criticism of the EU in that regard is indeed quite strong, as solidarity among the Member States has been viewed as a kind of binding glue from the very beginning, playing a fundamental role in defining the identity of the EU and in ensuring the internal coherence of the EU. The principle of sincere cooperation, as enshrined in Article 4(3) TEU, constitutes, together with the principle of unity, the cornerstone of European integration; or

the 'pillar of our Union'.² In consequence, solidarity is viewed as a special and important value and virtue of what Europe – including both the EU as such and the individual Member States – is about; something which apparently is viewed as positively distinguishing it from other continents.

Yet, the question how to transform the general visions of solidarity into concrete action has always been the Achilles heel of the EU, and therefore it is easily a target for criticism. In relation to the Covid-19 crisis, the EU at least at first was - once again - proven to appear as very fragile in this regard, which at the very worst could give rise to further Euroscepticism and endangering the entire project.³

Later on, the EU did after all reach certain compromises regarding most importantly common economic help packages, but also adoptions of e.g., a range of recommendations and communications, for example to keep essential border crossings open and a common EU strategy for Covid-19 vaccines. Thus, little by little a growing degree of action has taken place at the EU level.

As it has turned out the three most pertinent, ultimately interrelated, dimensions became: the health dimension, the rule of law dimension, and the economic dimension. Thus, the handling of the covid-19 crisis essentially took place in three rather different respects, namely the saving of lives, the saving of economies, and the saving of essential democratic values and rights. These three points are all delicate, complex, and permeated by challenging dilemmas. Serving as an overview, Europe's responses to the crisis may be graphically depicted in the following manner:⁴

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² See European Council, 'Letter by President Charles Michel to the President of the Italian Republic, Sergio Mattarella' press release of 20 March 2020.

³ See further e.g., the paper drafted by the group handling the "Future of the European Project".

⁴ See further e.g. [Timeline of EU action | European Commission \(europa.eu\)](#) and [Overview of the Commission's response | European Commission \(europa.eu\)](#).

The health dimension:

Securing safe and effective vaccines for Europe and the world – e.g.:

- Help companies ramp up their manufacturing capacities at scale and at speed
- Ensure sufficient supplies for its Member States through Advance Purchase Agreements with vaccine producers
 - Ensure flexibility of rules to speed up the development, authorisation and availability of vaccines
 - Supporting research on vaccines (and diagnostics and treatment)
- Coronavirus Global Response (universal access to treatments, tests, and vaccines)

Issuing guidelines on measures to stop the spread of the virus including testing strategies

“First bricks” towards a European Health Union (COM(2020) 724 final):

- A stronger health security framework
- More robust EU agencies (including The European Health Emergency preparedness and Response Authority (HERA) aiming at preventing, detecting and rapidly responding to health emergencies)

Ensuring the working of the internal market – e.g.:

- Ensuring workers' mobility
- Protection of cross-border trade
- EU Digital COVID Certificates

Repatriation of EU citizens stranded abroad

Helping ensure supply of medical equipment, tests and personal protective equipment

Rule of law dimension:

Regulation 2020/2092 of the EP and Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget

Fighting disinformation:

- Contact with social media platforms regarding measures to promote authoritative content, improve users' awareness, and limit coronavirus disinformation and advertising related to it
- Deploying all available tools and to help in the fight against coronavirus-related misinformation and disinformation

European Parliament resolution of 25 March 2021 on the application of Regulation 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP))

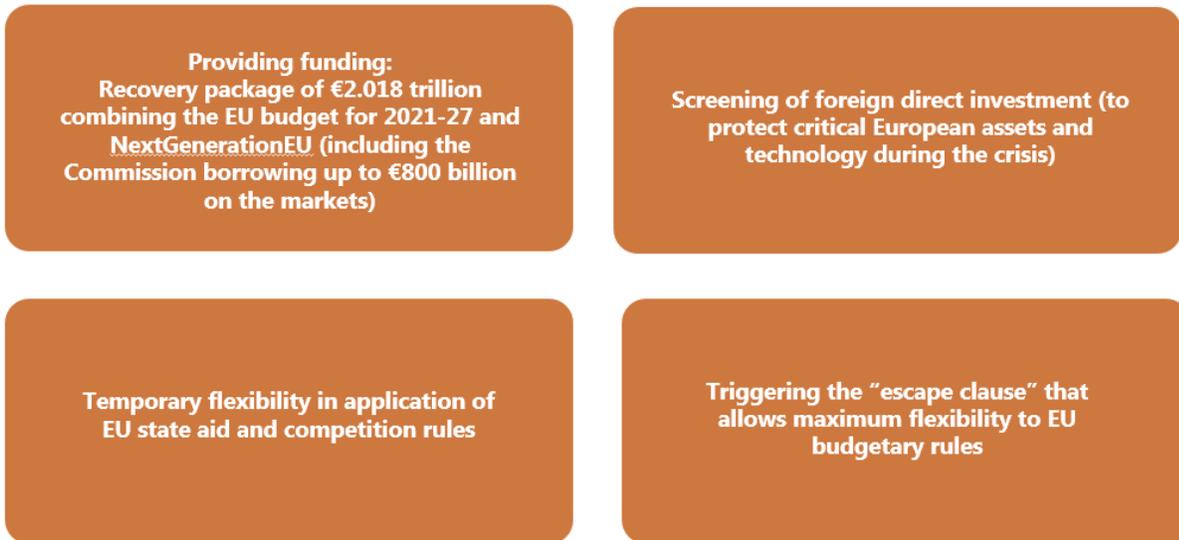
Proposal for a Digital Services Act:

- Setting out rules to ensure greater accountability on how platforms moderate content, on advertising and on algorithmic processes

Proposal for a Democracy Action Plan:

- Protecting free and fair elections
- Strengthening media freedom and pluralism
 - Countering disinformation

Economic dimension:



Among the most significant accomplishments, the common purchase of vaccines, some of the initiatives to protect the internal market, the conditionality mechanism to protect the rule of law and the recovery package should, in particular, be highlighted. Beyond any doubt, an impressive number of responses have been formulated and implemented, several nearly revolutionary in the sense that beforehand not many would have expected such levels of collaborative action. In that respect, solidarity in the shape of common action has indeed been present.

Nevertheless, flaws are also detectable. The following example of interest to the difficulties in the protection of the internal market and free movement is thus intended to give an impression of them.

An example: Closures of Borders in the Three Nordic EU Member States during the COVID-19 Pandemic

With the outbreak of the COVID-19 pandemic, disorder arose. On an unprecedented scale, Member States introduced drastically different responses with respect to travel bans and limitations, border closures and controls, requirements of testing and quarantines, etc.; actions claimed to have been

taken to possibly limit the spread of the virus, but presumably also implemented due to their symbolic nature. At times, it was made almost impossible to cross borders in Europe.

Although in many other respects having pursued rather different approaches to the handling of the pandemic internally in their countries, the Nordic Member States (Denmark, Sweden, and Finland) have in common that they all developed rather strict, yet not identical, approaches regarding their borders. Thus, they all clearly pursued the same kind of pattern of unilateral behaviour, introducing border-related measures and, in fact, seemingly often to a much stronger degree compared with most other Member States. As an example, Danes were from just before Christmas 2020 until Easter 2021 – with a few exceptions – not permitted to enter Sweden through the Danish/Swedish border, but could do so if entering Sweden from e.g., Germany (which would then extend a journey from e.g., Copenhagen by car by about ten hours). As a result, the development of the so-called “Resounds-region” with the bridge between the Danish capital Copenhagen and the Swedish city Malmö as its central anchor, was severely put on hold. As is also the case with many other neighbouring countries, which in earlier times may have been engaged in wars with one another, such measures can be the cause of reintroducing otherwise historical, nationalist tensions and myths that previously had been nearly buried and only kept slightly alive in for instance football matches. This development may have led to a strengthening of the Nation State at the cost of the EU and good neighbourhood and is, in fact, not limited to the Nordic Member States alone.

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Open borders and free movement in the Nordic countries and in the EU had become such a common reality that it today appears nearly unnatural to have had these rights suspended.

Thus, this raised the question why the Commission did not react to the numerous kinds of border measures enacted by Member States throughout, especially the first pandemic year.

Eventually, even citizens started to send complaints, begging it to take action. Then, on 22 February 2021, the Commission finally took the initiative, as it sent administrative letters to six out of twenty-seven Member States, namely Belgium, Denmark, Finland, Germany, Hungary, and Sweden, putting them on notice over curbs to free movement.

None of the three Member States accepted the criticism of the Commission. At the time of writing, the Commission has seemingly not taken any further steps in a potential infringement procedure towards any of these three Member States, and it is very unlikely that it ever will.

The border-related actions of Member States have been taken at the cost of severely disrupting free movement. Thus, the viability of the Internal Market was strongly challenged. Indeed, many of the steps taken by the Member States have been contrary to what EU Law has traditionally been conceived of as allowing, and significantly, the Commission has appeared to be much more tolerant than what would have been expected, perhaps comforted (in its failure to act) by the seriousness of the situation. Along with that, the pandemic has also served as a kind of stress-test for the foundational principles of free movement, which has revealed a fragility in the theoretical foundation of the EU free movement principles and in the willingness to seek them upheld.

The Commission, being the primordial guardian of respect for EU law, through having sent the abovementioned administrative letters, did eventually demonstrate some action. Under all circumstances, there is a profound need for coordination and cooperation, which are aims which have already (to some degree) been expressed in e.g., Recommendation 2020/1475 (as amended), which could constitute a good point of departure, if only respected and developed. The price of diversity of approach otherwise risks becoming too high. Free movement together with a genuine spirit of cooperation and mutual – but definitely not blind – trust, has of course to be balanced against the protection of the health of Europeans as far as this is reasonably done.

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CONCLUSION: MANY ACCOMPLISHMENTS, BUT ALSO IMPORTANT LESSONS

Covid-19 turned Europe upside down. Nevertheless, in the event, one could vest a lot of hope in the EU, as it has, within the prevailing limits, already done quite well in relation to the handling of the pandemic. It is true that the EU's reactions were at first far too slow, which had extremely tragic consequences in some of the Member States and could have been avoided. Subsequently, the necessary reactions came little by little and often in a piecemeal manner and were severely hampered by certain legal powers which were, and in future are, likely to be far too limited for the necessary action to be taken. At the political level, the existence of rather opposing views as to the way forward will not help. Some credit should be afforded to the EU in that, in the event, the EU had been capable of setting up a common action programme in relation to the common EU strategy for COVID-19 vaccines. Also, the Recovery Plan appears to be quite an achievement - some would even say that it is historically outstanding. Furthermore, the conditionality mechanism might prove to be an extremely important tool in combatting the current rule of law challenges in certain Member States. On the other side of the coin, one may wonder why the Commission appears not to have reacted very much to the many extremely wide-reaching restrictions, not least border closures and other limitations, implemented by Member States, strongly impinging on fundamental EU legal principles and rights. This eventually led to the creation of new frontiers in the shape of EU-initiated sanitary passports and new kinds of frontier controls also to some degree against the spirit of the internal market and with certain disruptive effects on its functioning.

Thus, it does not seem fair to say that solidarity in the shape of action has not been there at all. Some of the problems which were seen are to be understood in light of the fact that Member States had formerly not been willing to transfer the necessary competences. That framework will in due course have to be reconsidered but may require fundamental Treaty amendments.

The current war has once again become a gamechanger perhaps also in relation to the pandemic. As a result, the relevance of the Covid-19 crisis and the related problems of increased nationalism, which many until so recently were all quite preoccupied with, have largely lessened. The size of this new challenge is in all likelihood more than gigantic even in comparison with the Covid-19 crisis and, at least in Europe, the pandemic for the time being seems under control due to, for instance, efficient vaccinations and largely attained herd immunity, leading to glimmers of light in a very long pandemic tunnel. But maybe the handling of the pandemic after all can bring hope about the future of Europe because it was capable of handling this new challenge well. In part at least, this seems to be because Europe indeed appears to be more united than ever, in contrast to the situation two years ago.

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NATIONALISM, POPULISM, AND IDENTITIES:

CONTEMPORARY CHALLENGES

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