Regulation for Governance: The Commission's Response to Member States' Demands

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Abstract

This paper first sets out the channels of influence that stakeholders and Member States as well as the European Parliament in particular, can use in order to provide input to the Commission as it sets its policy agenda, decides its work programme and shapes its concrete policy and legislative initiatives. It then reports, by way of two case-study examples, on the interaction that has taken place between the Member States and the Commission in specific policy areas closely connected to sovereignty claims made by the Member States, namely asylum and migration, including Schengen, on the one hand, and travel restrictions during the COVID pandemic on the other hand. The examples suggest that the paradigm of *positive integration* has gained greater weight in recent times, that policy areas marked by national sovereignty claims are closely interconnected with the core EU objective of free movement of persons, and that there are ever stronger horizontal interdependencies between Member States. Finally, some factors are identified that prove essential for the resilience of the EU legal order in the current times of crises.

1. Introduction: Regulation for Governance

The topic of this article could in principle give rise to discussing a wide range of issues. Bearing in mind that this impulse is one of three introducing a broader, multi-disciplinary discussion on *Sovereignty and Legitimacy vs. Commission and Court of Justice*, this paper describes how, in practice, the Commission is listening and responding to policy demands and expec-

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tations formulated by Member States, as it develops its policy and legislative proposals in certain areas particularly close to traditional notions of national sovereignty. Thus, this impulse will not look at how national positions that Member States claim to be linked to their sovereignty have been considered in the case law of the Court of Justice, nor in the Commission's pleading in cases before the Court.

This paper comprises two parts:

A first section sets out, in a more general overview, channels of influence that stakeholders in general and Member States as well as the European Parliament in particular, can use in order to provide input to the Commission as it sets its policy agenda, decides its multiannual and annual work programme (thereby also initiating the Union's programme, see Article 17 (1) TEU) and shapes its concrete policy and legislative initiatives.

A second section will report, by way of case-study examples, on the interaction that has taken place between the Member States and the Commission in two specific policy areas closely connected to sovereignty claims made by the Member States, namely asylum and migration on the one hand and travel restrictions during the COVID pandemic on the other. We are deliberately using the term "sovereignty claim" for both areas. Indeed, both these areas are not at all characterised by an *absence* of Union competence; on the contrary the Commission has been able to rely on clear legal bases under the Treaties. Still, both areas are marked by an interplay between EU competences and strong aspects of national responsibility.

2. Channels for Input to the Commission's Legislative Work Programme

It should first be recalled that, contrary to how the EU's political process is sometimes misleadingly portrayed, while the Commission disposes of a monopoly of initiative under the Treaties, in setting its (multi)annual agenda and preparing its concrete initiatives, this political institution does not put forward ideas conceived by some isolated bureaucrats working in a vacuum in Brussels. On the contrary, the Commission's policy initiatives and proposals are the result of an elaborate process, in which all relevant stakeholders provide input under modern standards of better law-making surpassing those existing in most democracies at national level.[1] In reality,

1 For an up-to-date overview, see the Commission's communication "Better regulation: joining forces to make better laws" of 29 April 2021, COM(2021) 219 final. Under

in most cases the Commission takes up regulatory needs only once it is clear that they are being carried by strong political forces across Europe, so that its proposals have a realistic chance of being adopted by the EU's co-legislator. In this context, the voices of Member States and of the European Parliament (as a whole or of its political groups) quite obviously carry special weight. That is also in keeping with the principle of representative democracy (Article 10 (2) TEU). This is why in this section, we will now focus on input channels that Member States are using, also in comparison with those at the disposal of the European Parliament.

A first, formal set of rules on interinstitutional cooperation on setting the EU's multiannual and annual agenda has, since 2016, been agreed in the Interinstitutional Agreement on Better Law-Making, implementing Article 17 (1) TEU as introduced by the Lisbon Treaty.[2] These rules are the first to be considered in terms of channels of influence for the Member States (through the Council) and the Parliament.

As regards the multiannual level, the Interinstitutional Agreement is relatively rudimentary and only addresses what happens *following* the appointment of a new Commission, where the three institutions will exchange views on their principal policy objectives and priorities for the new term and may as appropriate draw up joint conclusions.[3] This, in itself, is far from telling the full story. At the latest since *José Manuel Barroso's* second election in 2009, the Commission's – and in a sense the EU's – central multiannual policy strategy document has been the 'Political Guidelines' which the new candidate for Commission President, once nominated by the European Council, has issued before, and in view of, his/her election by the European Parliament. In establishing these Political Guidelines, the candidate needs, on the one hand, to take due account of policy demands and expectations made to him/her by the European Council and by individual Member States at Head of State or Government level. The European Council has developed the practice of adopting, every five years "in the context of the European elections and ahead of appointment of the new

previous mandates, the Commission had already paid attention to better law-making standards and procedures, see, e.g., the communications "Better regulation for growth and jobs in the European Union" of 2005 (COM(2005) 97), and "Better Regulation: Delivering better results for a stronger Union" of 2016, COM(2016) 615.

2 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, 1–14.

3 See point 5 of the Interinstitutional Agreement.

Commission", a "Strategic Agenda" for the EU.[4] This document is, in practice, adopted at the June European Council meeting, a moment normally coinciding with the proposal of a candidate of Commission President, and while of undeniable importance it is nonetheless much more abstract than the 'Political Guidelines' of the designated Commission President. During the process of election of President *Ursula von der Leyen* in 2019 and again in 2024, her Political Guidelines had been strongly informed by her intense consultations with the various political groups in the European Parliament that took place before the election.[5] It is hence fair to say that the Political Guidelines are a moment offering a particularly strong channel of influence exercised from the Parliament on the Commission's five-year agenda.

When it comes to the Commission's annual work programme, input to be provided by the Parliament and the Council, and interaction with them, is now governed in some detail in points 6 to 8 of the Interinstitutional Agreement. These provisions set up an elaborate annual process for interinstitutional dialogue. In practice, a key moment triggering each year this process is the 'State of the Union' address which the Commission President delivers in the European Parliament Plenary in mid-September.[6] There he/she announces his/her political priorities for the year ahead, and these are, more operationally, detailed in a 'letter of intent' which the President, together with the Commissioner in charge of interinstitutional relations sends to the Parliament and the Council at the same time.

On this basis, still in September or in early October the President meets the European Parliament's Conference of Presidents. The Commission also takes into account the views of the European Parliament's Conference of Committee Chairs; it hears the views of the European Economic and Social Committee and the Committee of the Regions, and in mid-October it adopts its annual work programme and presents it in the European Parliament and to the other institutional partners. On the basis of that work programme, the Commission, the European Parliament and the Council

4 European Council, *Strategic Agenda 2024–2029* (2024) <https://www.consilium.europa.eu/en/european-council/strategic-agenda-2024-2029/> accessed 11 February 2025.

5 European Commission, *Europe's Choice – Political Guidelines for the next European Commission 2024–2029* (18 July 2024) <https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ff-b2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf> accessed 11 February 2025.

6 The first State of the Union address was delivered by *José Manuel Barroso* in September 2010.

establish a Joint Declaration on the EU legislative priorities[7], usually in mid-December.

But how can the various actors, and in particular the political forces in Parliament and the Member States, influence the political priorities which the Commission President unveils in his/her annual State of the Union Address? Obviously, parliamentarians on the one hand and Member States on the other hand use manifold occasions to get their demands across the individual Commissioner responsible for a policy area and who attend Parliament Committee meetings or meetings of the various Council formations, be it orally or through letters addressed to Commissioners or the President him/herself. Such letters carry special weight when they are signed on behalf of an entire political group in the Parliament or by several Member States – the larger the group the stronger the message. Moreover, for Member States in particular, a channel of influence not to be underrated lies in the many experts of "comitology" committees in which, on a daily basis, officials from the national ministries meet senior Commission officials. All this input provided to the Commission informs also the President's own deliberations ahead of each State of the Union address.

One channel of input for Member States' demands of highest importance that has steadily grown in importance are the meetings of the European Council, of which the Commission President is him/herself a member. The European Council has, since the Lisbon Treaty, held regular formal meetings at least four times a year, plus at least two informal meetings. But in reality it has met much more often, not least due to the multiple crises the Union has had to handle. The European Council conclusions regularly formulate the Member States' most important expectations towards the Commission as regards policy assessments or initiatives to bring forward, often with a concrete timetable. Moreover, in the margins of a European Council meeting, the Commission President has many bilateral meetings with his/her peers, the Heads of State or Government, where these can express their wishes for, or their reservations against, envisaged Commission action. As we will see below in the context of migration, the Commission President has recently adopted a practice of addressing formal letters to the European Council ahead of the latter's meetings.

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7 European Commission, *The Joint Priorities of the EU Institutions for 2021–2024* (2024) <https://commission.europa.eu/strategy-and-policy/joint-priorities-eu-institutions-2021-2024_en> accessed 11 February 2025.

Finally, one should not forget one formal right, given by the Treaties both to the European Parliament and the Council in Articles 225 and 241 TFEU respectively, to request the Commission to submit a proposal. These requests are not binding, given the Commission's monopoly of initiative. However, in relation to the European Parliament, in 2019 President *von der Leyen* made the political pledge to respond to every resolution adopted by the European Parliament pursuant to Article 225 TFEU in principle with a legislative act, qualifying however her commitment in the sense that the Commission will do so in full respect of the proportionality, subsidiarity and better law making principles.[8] This further reinforced the commitments already contained in the Framework Agreement between the European Parliament and the Commission of 2010.[9] Interestingly, the Parliament makes much more frequent use of this Treaty right to request a Commission proposal than the Council, whose formal requests pursuant to Article 241 TFEU have remained very rare, even though only a simple majority in the Council suffices to adopt such a request.[10] Apparently, Member States find the various other channels at their disposal, not least via the European Council, more efficient to present the Commission with their demands.

8 European Commission, *Political Guidelines for the Next Commission 2019–2024* (2019) <https://commission.europa.eu/document/download/063d44e9-04ed-4033-acf9-639ecb187e87_en?filename=political-guidelines-next-commission_en.pdf> accessed 11 February 2025, 20.

9 See point 16 of the Framework Agreement (OJ L 304, 20.11.2010, p. 47): "The Commission shall commit itself to report on the concrete follow-up of any request to submit a proposal pursuant to Article 225 TFEU (legislative initiative report) within 3 months following adoption of the corresponding resolution in plenary. The Commission shall come forward with a legislative proposal at the latest after 1 year or shall include the proposal in its next year's Work Programme. If the Commission does not submit a proposal, it shall give Parliament detailed explanations of the reasons." – This topic is likely to be included in the upcoming next revision of the Framework Agreement, see point 8 of the Joint Statement by Presidents *von der Leyen* and *Metsola* of 21 October 2024.

10 In the term 2019–2024, the European Parliament adopted 25 resolutions pursuant to Article 225 TFEU, whereas the Council adopted only three requests to the Commission pursuant to Article 241 TFEU.

3. Case Studies in Areas Close to Member States' Sovereignty Claims

3.1 Migration, Asylum and Border Controls

The policy area of migration, asylum and border controls is one where the EU has been active already since the Treaty of Maastricht, when the intergovernmental 'Third Pillar' of the EU on Justice and Home Affairs was introduced to cover that area. In the Amsterdam Treaty, now more than 25 years ago, this area was 'communitarised': the traditional Community method of decision-making became applicable with clearly defined competences. These were again enlarged and consolidated in Title V of the TFEU through the Lisbon Treaty, which enshrined a Common European Asylum System, an integrated external border management system and a common integration policy (Articles 77–80 TFEU). Ultimately, a common European asylum system is a necessary corollary of the EU's historic achievement of abolishing internal border controls in the Schengen area, launched already in 1985. It should also be clear that only a united EU can hope, in today's globalised, crises-ridden world, to manage migration flows efficiently in accordance with its values and interests. Nonetheless, against the background of the general right of States to control access of persons to their territory, until today the Union's action in this area is perceived as affecting national sovereignty claims. What is more, at the latest since 2015, when the refugee crisis became acute, finding common responses to the challenges of managing an ever stronger migration pressure towards Europe has become an existential question for the EU.

It is thus easy to understand that the Commission, in all its action deployed over the last 10 years to tackle the huge policy challenges in this area, has been eager to take the Member States' policy demands, positions and expectations fully into account, while striving to develop policies in the Union's general interest and acting in partnership also with the European Parliament given the latter's prerogatives as co-legislator. At the same time, migration has proven to be amongst the most divisive policy areas, with marked splits in the respective national interests of Member States, which has made the Commission's listening and responding to Member States' conflicting demands even more demanding.

Against this backdrop, it is only natural that, whenever the Commission has prepared major legislative initiatives in this area during the last 10 years, it has devoted even more energy and care than in other areas to consulting

the Member States informally before it adopted its proposals. Perhaps the most striking example for this attitude was the process of preparation of the Commission's package of proposals of 23 September 2020 forming a "New Pact on Migration and Asylum"[11]. After this initiative had been announced by President *von der Leyen* in her Political Guidelines of July 2019, Vice-President *Margaritis Schinas* and Commissioner *Ylva Johansson*, spent, on request of the President, the first nine months of their mandate almost entirely with intense bilateral consultations of all the Member States (but also with the political groups in the European Parliament and with other stakeholders), in order to calibrate a balanced overall package, in the 'New Pact' proposals, that would stand a chance of being acceptable for all. Nonetheless, following the Commission's presentation of its package of proposals in September 2020, it then still took three years of intense negotiations with, among and within the two co-legislators to pave the way for a final political agreement in December 2023, leading to formal adoption in May 2024 of 10 legislative acts which entered into force on 11 June 2024.[12] While those negotiations were challenging in all aspects, including within the Parliament and in the trilogues, by far the most difficult stage was to reach a sufficient agreement amongst the Member States, crystallised in the 'general approaches' reached in the Council on the various elements in the course of 2023.[13]

Both the general approach and the final adoption were possible in the Council only through a vote by qualified majority, with Hungary and Poland voting against all acts.[14] The persistent divergences of views between Member States may explain that, during the entire negotiation process 2020–2023, the European Council as such – acting by consensus – was able only to give relatively limited impulses towards a compromise on this matter. It had become clear that the European Council had sent an unfortunate

11 All components of the "Pact" as proposed can be accessed here: Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020 – European Commission.

12 All ten acts were published in the L series of the OJ on 22 May 2024 (Official Journal L series daily view – EUR-Lex).

13 For the most significant breakthrough in the Council, see the Council's press release of 8 June 2023 (Migration policy: Council reaches agreement on key asylum and migration laws – Consilium).

14 Moreover, the Czech Republic and Slovakia abstained (which counts like a vote against), and Austria voted against one element of the package, i.e. the "crisis regulation" 2024/1359.

message when, in its conclusions of October 2017[15], it had seemed to imply a need for consensus amongst all Member States on asylum reform, contrary to the voting rules in Article 78 TFEU. True, the European Council did show its capacity of defining policy direction as regards the external aspects of migration, on which it deliberated and concluded repeatedly since 2021, and this contributed to more favourable conditions for political agreement also on the EU's internal legislative reforms. Moreover, throughout this period the European Council meetings offered manifold opportunities for highest-level contacts between the Commission President and Heads of State or Government facilitating the way towards overall agreement. Significantly, it is specifically on migration that President *von der Leyen* developed a new practice of addressing, since 2022 at least, very detailed letters to the Members of the European Council ahead of each meeting. In these letters, she has been reporting in a holistic way on the Commission's ongoing various policy action and showing the way on whatever further need she sees for cooperation between Member States to tackle Europe's migration challenges. While these letters have typically had a strong focus on operational action needed in respect of the various migration routes, on EU financial support available and on cooperation with countries of origin and transit, they have also sometimes offered the President's strategic vision on possible further steps including further reform of the legal framework.[16] Also this practice underlines how the European Council serves as a privileged channel for interaction between the Commission and the Member States.

A further telling example for the Commission's particular attention to Member States' demands is how it prepared its proposal for rather substantial amendments to the Schengen Borders Code tabled in December 2021 and how it then negotiated that package up to its formal adoption in May 2024.[17] The key elements of that proposal, be it on the exceptional possibilities to introduce and maintain internal border controls, on police controls that are possible near internal borders or on transfer of persons apprehended in internal border areas (an entirely new provision), can only

15 See point 8 of the conclusions (document EUCO 14/17).

16 Note, in particular, the last three letters: of 25 June 2024, Letter-from-President-von-der-Leyen-to-EU-leaders-on-migration-EUCO-June-2024.pdf; of 14 October 2024, October-2024-EUCO-Migration-letter.pdf, and of 16 December 2024, Letter-from-President-UvdL-on-Migration_EUCO-December-2024.pdf.

17 See Regulation 2024/1717 amending Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders.

be properly understood as the result of intense bilateral consultations of the Commission particularly with those Member States who had resorted to repeated reintroductions of internal border controls since September 2015 and those who had been most affected by these controls. The agreement eventually reached by the co-legislators on new rules in the Schengen Borders Code, thanks not least to strong efforts invested by the Commission in identifying common ground between the Member States, is a highly welcome achievement, not least against the backdrop of worrying difficulties experienced in recent years by several Member States in abiding with the Schengen acquis[18], which had the potential of undermining citizens' trust in this core element of *European integration*.

3.2 Travel Restrictions During the COVID Pandemic

A second recent case-study example on the Commission's interaction with Member States is derived from how the extremely sensitive issue of travel restrictions was handled during the COVID pandemic in 2020 and 2021. This area is again characterised by a special mix between well-rooted EU policies and principles on the one hand and a strong sovereignty claim by Member States on the other. Concretely, two different types of travel were at stake during that time: first, how should *external* travel be regulated after the outbreak of the pandemic, i.e. which persons should at all still be admitted to enter the Schengen area from a third country; and second, what about limits to *free movement of persons within the EU*? Both issues were strongly connected to fundamental EU norms: the Schengen Borders Code as regards external travel, and the fundamental freedoms under the Treaty, in particular free movement of persons[19] as regards internal travel. That said, the pandemic caused sudden and unprecedented dangers to public health in the Member States, an area strongly dominated by

18 See the judgment of 26 April 2022 in case C-368/20, NW v Landespolizeidirektion Steiermark, ECLI:EU:C:2022:298, concerning repeated reintroduction of internal border controls by Austria; see the judgment in case C-444/17, Arib, concerning a migrant apprehended by the French authorities in the immediate vicinity of the French/Italian border, and positions such as expressed by Presidential candidate Michel Barnier in September 2021 calling for "judicial sovereignty" over judgments of the European Court of Justice in the area of migration.

19 See Article 21 TFEU and the Free Movement Directive 2004/38, in particular its Article 29 on restrictions due to public health risks.

national competence.[20] Starting in March 2020, their governments were developing and implementing very different policies aiming at containing the pandemic, notably through severe limitations to personal freedoms such as social distancing rules and lockdowns. More or less simultaneously in March 2020 the EU Member States *collectively* felt the need to protect themselves and the EU against the virus by closing their borders rigorously for travellers coming from third countries, and *individually* also started to shield themselves from each other by restricting movements across internal EU borders. This markedly 'anti Community' reflex was, notably in the beginning, motivated by strong variances of infection rates between Member States.

The Commission was in constant touch with Member States' administrations in its attempts both to coordinate the latter's responses to the pandemic and to uphold the EU's fundamental freedoms, in the interest of all persons and families severely affected in their daily lives. Moreover, it quickly became clear that purely unilateral internal border closures by Member States would have disastrous economic consequences which would only further aggravate the severe economic consequences of the pandemic.[21] As regards *external* travel, Member States understood quickly that only coordinated action at all external borders would allow them to protect the Schengen area. The Commission used a number of fora for its daily crisis management action in this field, but one channel became particularly important: the integrated political crisis response (IPCR) arrangements within the Council.[22]

Looking back to this particular field of common crisis management by Member States and Commission to address an existential health threat, one may distinguish three phases, characterised by different modes of operation and legal instruments:

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20 Pursuant to Article 6 TFEU, EU competence in this area is limited to supporting, coordinating or supplementing Member State action. Pursuant to Article 168 (7) TFEU, Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.

21 On this aspect, see the Commission's "Green Lanes" initiative in two communications, C(2020) 1897 of 23 March 2020 and COM(2020) 685 of 28 October 2020.

22 The IPCR has legally been established by Council Implementing Decision 2018/1993 of 11 December 2018; it was fully activated on account of the Covid outbreak on 2 March 2020 by the Council Presidency, COVID-19 outbreak: the presidency steps up EU response by triggering full activation mode of IPCR – Consilium.

A first phase, starting in March and extending to the beginning of the summer 2020, was marked by coordination through purely political instruments such as joint statements, conclusions of the European Council and Council and communications of the Commission, whereas concrete action on the ground was determined, legally, only by the Member States. This approach became manifest, first, as regards restrictions of external travel from third countries to the EU: only one week after the US administration had enacted a unilateral travel ban affecting also travel from the EU, the EU – Commission and Member States – realised that a unified response of similar scale would be essential. Already on 16 March 2020, in a communication[23] to the other institutions, the Commission recommended a coordinated decision by the Heads of State or Government of the EU plus the associated Schengen States to restrict (i.e., ban) all 'non-essential travel' from third countries into the EU+ area for 30 days, specifying that EU citizens and legal residents returning home should be exempted and listing other travellers with an essential function or need who should also not be affected. It justified the need for instant coordinated action as follows:

> "Any action at the external border needs to be applied at all parts of the EU's external borders. A temporary travel restriction could only be effective if decided and implemented by Schengen States for all external borders at the same time and in a uniform manner. Uncoordinated travel restrictions by individual Member States for their parts of external borders risk being ineffective. Any unilateral decision of a Schengen State to apply a temporary travel restriction at its own part of the external borders could be easily undermined by those who would enter the Schengen area at another part of the external borders: likewise a coordinated decision requires the participation of all."[24]

Already the day after, the members of the European Council, meeting via videoconference, agreed to follow the approach recommended by the Commission, which was communicated through conclusions of the President of the European Council. Legally speaking, this politically coordinated joint line had to trickle down via instructions of each Minister of the Interior to the respective Border Guards – in those dramatic days the Commission services had concluded that the Schengen Borders Code, while not address-

23 European Commission, 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU' (Communication) COM(2020) 115 final.

24 European Commission, see n. 23, 1.

ing the situation directly, must be interpreted as allowing a Member State administration not only to adopt ad hoc individual entry bans, but also to decide a generalised prohibition of entry to entire categories of persons. The same restrictions of non-essential travel were extended several times until end of June 2020 through the same technique of politically coordinated action by Member States following a Commission communication. As regards limitations to internal free movement within the EU, the Member States' action in the first months of the pandemic was less coordinated: while all Member States, virtually at the same moment, started imposing restrictions to cross border traffic, immediately triggering Commission communications calling on Member States to let pass at least the most essential travel, the Commission's and European Council Presidents' 'joint Roadmap' of 15 April 2020 towards lifting the COVID containment measures were implemented gradually and in a different way by the various Member States until summer 2020, when the infection rates were clearly going down – before they again increased, prompting Member States to reintroduce restrictions to free movement.[25]

The Union entered into a *second phase* from summer 2020 onwards, when Member States and the Commission realised that it would be advantageous to set out a uniform policy on restrictions of non-essential travel into the Schengen area in a more formal and transparent way. To achieve this, the Council, acting upon a Commission proposal, adopted a formal Recommendation addressed to all Schengen States.[26] This Recommendation contained a list of those third countries whose residents should be exempted from the restrictions, given their favourable epidemiological situation, and a methodology for gradually adapting that list to changing circumstances. It also defined those categories of essential travellers who should in any case be allowed to enter the Schengen area. While formally non-binding, this Recommendation, iteratively amended by the Council, remained for almost two years the tool governing the Schengen area's policy on the matter. It had been devised following a call from the Commission to the Member States. Very pragmatically and in deviation from its

25 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2020] OJ L337/3.

26 Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2020] OJ L208I/1.

normal institutional position, the Commission even agreed to allow the Council to amend the Recommendation, as regards adding or removing individual third countries from the 'blacklist',[27] without acting upon a formal Commission proposal each time. As regards free movement *within* the EU, in autumn 2020 when COVID infection rates went up drastically again and new lockdowns became necessary, the Commission and the Member States decided to follow the same institutional pattern: a flexible but transparent framework for a coordinated approach to the restriction of free movement was set up via a Council Recommendation.[28] It contained general principles and common criteria guiding Member States' decisions, a 'traffic light' system to indicate risk areas across the EU on a map (which was published every week by the European Centre for Disease Prevention and Control) and indicative rules as regards testing and quarantine to be observed by persons crossing internal borders. This Recommendation left more leeway to Member States than Recommendation 2020/912, and while it proved useful in establishing a coordination framework, it did not entirely prevent a patchwork of diverging rules and decisions by Member States as regards testing and quarantine affecting all persons who needed or wished to exercise their basic free movement rights, up until the moment when vaccination against COVID became widely available. Therefore, during this entire period, the pragmatic coordination between Member States and the Commission needed to be complemented by the Commission's vigilance, as guardian of the Treaties, towards potentially discriminatory or excessive restrictions of free movement. At times, the Commission had to recall the possibility of infringement proceedings, and it succeeded in convincing Member States to end or amend the most problematic schemes.

The *third stage* was reached in 2021 when COVID vaccinations became available. It was marked by the "Digital Covid Certificate",[29] which fortunately brought back free travel within the EU to vaccinated people from summer 2021 onwards. As of February 2021, the Member States' and the

27 Council Recommendation (EU) 2020/1475, see n. 25.

28 Council Recommendation (EU) 2020/1475, see n. 25.

29 This proposal led to 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, based on Article 21 (1) TFEU (the free movement legal basis). For technical-legal reasons linked to the specificities of the Schengen acquis, that Regulation was complemented by a "twin Regulation" (EU) 2021/954 based on Article 77(2)(c) TFEU.

Commission's experts started working feverishly on a common digital certificate, which would enable each EU citizen and resident easily to prove his or her vaccination status digitally, when crossing borders but then also for various domestic purposes (such as admissions to restaurants) regulated at national level. Timewise, it became clear that the certificate imperatively had to be up and running before the start of the summer 2021 holiday season. At first, the Member States governments supposed that setting up this digital certificate would again be realised through informal cooperation amongst them, with technical assistance by the Commission, and that perhaps its most important features might be contained in another Council Recommendation. But then, the Commission – upon personal instigation by her President – took the decision to make a legislative proposal for a regulation establishing the Digital Covid Certificate.[30] This rather courageous and at first controversial move was prompted by the observation that the two Council Recommendations, due to their non-binding character, had not fully prevented Member States from at times unilaterally breaking off from the discipline they had agreed, and also by the consideration that the data protection dimension of the certificate would require a binding regulation. However, the big question was whether the European Parliament and the Council would really reach agreement on this important, far-reaching regulation within only three months, also bearing in mind that the Commission's proposal, mainly based on the free movement legal base of the Treaty, nonetheless had clear repercussion on the Member States' health policies and related sovereignty claims. Remarkably, the three institutions working together with the necessary political will did manage to adopt this regulation in record time, thus giving the citizens the tool they needed to travel unhindered again within Europe (and gradually also beyond).[31] Here, Member States in the Council let themselves be convinced by the Commission on the need for a binding EU instrument.

Moreover, the Commission, perhaps counterintuitively but wisely, defined the legal effect of the Digital Covid Certificate regulation in a modest way: the regulation as such only required Member States to recognise the certificates issued by another Member State for what the certificate stated, namely the fact of COVID vaccination, testing or recovery. The EU legisla-

30 Regulation (EU) 2021/953, see n. 29.

31 The Digital Covid Certificate Regulation contained a mechanism for recognising interoperability with vaccination certificates issued by third countries. Many third countries used this possibility and obtained an interoperability recognition.

tor did *not* oblige individual Member States to draw precise consequences from that fact for their decisions on free movement – it did not prohibit any restrictions for vaccinated people.[32] The assumption was that Member States would quickly lift such restrictions anyway, and it proved right. The approach of the EU Digital Covid Certificate worked extremely well and is widely regarded, together with the Commission's and Member States' coordinated purchases of vaccines for the EU's entire population, as a major EU policy success during the COVID pandemic.

Looking back at these three stages, it is interesting to see a gradual move from an entirely intergovernmental approach, via the intermediate step of Council Recommendations, towards the application of the Community method through the adoption of the Digital Covid Certificate Regulation, adopted in record time and establishing a key instrument with the necessary legal certainty. This gradual move was the result of an approach of extremely close and constant cooperation between the Commission and the Member States, where the Commission listened carefully to the Member States demands but at the same time performed its role to safeguard free movement and facilitate together with Member States a proper management of the Schengen area. It was a collective learning process that ultimately showed the merits of the Community method, which was successfully applied to the benefit of citizens despite the strong health policy dimension on which Member States had strong sovereignty claims.

4. Conclusion

This paper aimed to give an updated overview of the Commission's standards and practices that allow Member States, together with other stakeholders, to feed their input into the Commission's shaping of policy and legislative initiatives, and to give concrete insights through two recent case-study examples on how the Commission has been listening to Member State demands in areas deemed particularly close to the latter's sovereignty claims. For the more general discussion on an updated *integration through law* theory and on the necessary legitimacy for the EU's supranational

32 The Regulation only set up an information exchange mechanism for Member States' decisions on free movement restrictions, see Article 11. Legally speaking, according to the Commission's conviction the EU's competence under Article 21 TFEU would have extended also to obliging Member States to lift free movement restrictions for vaccinated persons, but this was contested by some Member States.

institutions, the overview and examples given here may serve to illustrate four points:

First, it appears that, in the last two decades, the *relative weight*, in the EU's political reality, of *positive integration* (i.e. through positive action of the EU's political institutions) *has increased* over that of *negative integration* (through case law limits for Member State freedom derived from EU primary law). *Positive integration* has often taken the form of important legislation in large packages, e.g. the comprehensive reform of the EU's asylum laws adopted in 2024, but, particularly since 2010, crisis management through operative action has been just as important and it is often interlinked with legislative action. Such crisis management can only succeed where the Commission and Member States work hand in hand together. Examples for such cooperative, non-legislative action include the intense work that has been done towards and with third countries of origin and transit in order to manage migration, or the Commission's interaction with Member States' governments during the pandemic. In this context, it is telling that, in a mutual 'learning process' between Member States and EU institutions during the pandemic, the benefits of the Community method have gradually become clear again.

Second, both case studies concern policy areas where free movement of persons – as an original, core objective of *European integration* from its beginnings – has become inextricably connected with further areas of EU policies such as migration and public health on which Member States have strong sovereignty claims. The Schengen area, with its promise of an area without internal borders, cannot be sustained without a functioning common European asylum system. In the pandemic, national decision-makers were, domestically, themselves competent for the hardest choices of public health policy, as regards lockdowns and social distancing. However, the measures they had to take would have been inefficient in protecting the European population from the virus without coordinated restrictions of inward travel at the EU's external borders. Moreover, but for the close cooperation promptly established between them and the Commission, those measures could easily have ended up eliminating the basic virtue of free movement within the EU, with disastrous human and economic repercussions.

Third, the two case-studies also illustrate just how much in recent times *horizontal interdependencies* between the Member States, created through EU legal regimes, have become more and more important and need to

be better taken into account in any updated discussion on legitimacy of the European project as a whole.[33] From the first days of the pandemic, it had become clear that the commonly decided restrictions of travel from third countries into the EU would only work to protect Europeans' health if all Schengen States implemented them rigorously at the external borders. One vulnerability in the external border would potentially have undermined public health everywhere. Similarly, in the common European asylum system, deficient implementation by one Member State, for example by omitting to practise Eurodac fingerprinting on third country nationals arriving at an external border or by refusing to cooperate on Dublin transfers, has the potential of undermining citizens' trust in the whole system. Furthermore, only a common asylum system with built-in mechanisms of solidarity, offering concrete help to frontline Member States where most asylum seekers reach the EU's external borders, will be accepted as fair and legitimate by the citizens in those Member States. These horizontal interdependencies were very much in the mind of all actors when the EU's asylum rules were reformed. This factor explains why the Commission spent so much time in listening to all Member State governments before tabling its proposals on the "New Pact on Migration and Asylum" in September 2020, and why finding agreement within the Council on a comprehensive package, which would be workable for all was the hardest nut to crack.

Fourth and lastly, the case-studies bear out some factors that prove essential for the resilience of the EU legal order in these times of crises: Preparing EU initiatives through state-of-the-art procedures of better lawmaking; listening carefully to Member States' positions in particular when fundamental EU values and objectives are intertwined with strong national sovereignty calls; resorting to the Community method wherever possible, since it ensures efficiency, legitimacy and uniform application of laws; and proving in practice that close cooperation between the Commission and the Member States based on trust does work to tackle crises which are perceived as existential by Europeans.

33 See in detail on this point, S. Schmidt's contribution to this volume, *Legitimacy dynamics in the multilevel EU — analysing integration through law at the member-state level*, section 3.2.