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The legal dimension of coordinative Europeanisation – crisis governance between political expedience and normative credence

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I. Introduction

The political agency of the European Union has significantly grown in recent years. Curiously, however, this expansion of political activity did not coincide with a re-design of its constitutional mandate. Rather, crisis responses repeatedly centred on the coordination of national decision-making practices instead, thereby allowing for the pursuit of a common political objective in the absence of formal supranationalisation. While this mode of crisis governance may have produced tangible outcomes, it did not transpire in formal changes to the applicable legal framework at supranational level. Rather, it takes effect through non-binding standards of guidance that streamlines administrative practices at national level – a phenomenon that has been termed 'coordinative Europeanisation' in political science research.2

From the perspective of political expediency, coordinative Europeanisation presents itself as a particularly advantageous form of crisis governance. From a legal perspective, however, it raises significant questions regarding the role that supranational law has to play in crisis. What are the constitutional limits to such a strategy of coordinative Europeanisation? How has it been used in practice and what consequences does it create for supranational law in the long run? By analysing the foundations and repercussions of coordinative Europeanisation from a legal perspective, the following research will reflect on these questions.

In this respect, it argues that coordinative Europeanisation does not, in and of itself, transgress the limits of supranational law, but may undermine its normative credence, nonetheless. By concertedly advancing interpretations of EU law that exhaust the arguably permissible under the current legal

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[2] See Stella Ladi and Sarah Wolff, 'The EU Institutional Architecture in the Covid-19 Response: Coordinative Europeanization in Times of Permanent Emergency' (2021) 59 Journal of Common Market Studies 32.

framework, this form of crisis governance incentivises practices that subjugate supranational law to considerations of political expediency. Against this backdrop, the view will be put forward that coordinative Europeanisation threatens to undermine the notion of legally constituted public power in supranational law.3 To that end, the following investigation will carry out a multiple case study, examining embodiments of coordinative Europeanisation in different substantive fields of EU law. It explores the phenomenon in three constellations: first, with a view to travel bans put into place during the pandemic and, later, against Russian citizens; second, in the field of free movement of EU citizens, specifically, restrictions to cross-border mobility during the pandemic and, third, in relation to concerted efforts of public procurement – initially of vaccines and, more recently, in purchasing military supplies.

The following investigation will explore the reasons, both constitutional and political, for the emergence of this mode of governance, and discuss its legal repercussions. To that end, it combines deductive and inductive reasoning. Deductively, it describes and applies the notion of coordinative Europeanisation to legal arrangements in supranational law, most of which have been the product of recent crises. Inductively, it seeks to explore the repercussions that this mode of governance creates in law. Specifically, it will illustrate how coordinative Europeanisation of that nature may impair the normative credence of EU law.

The following investigation proceeds in four steps. First, it revisits the notion of coordinative Europeanisation, drawing particular attention to the legal designs of such a form of crisis governance (2.). Second, it zooms in on three fields of EU law in which recent crisis responses have prominently included characteristics that may be described in terms of coordinative Europeanisation (3.). Third, it will use these insights to reflect on the consequences that coordinative Europeanisation may have for constituted power and normative credence of EU law in crisis situations (4.), before, fourth, concluding with some general reflections on the implications that coordinative Europeanisation creates in EU law (5.).

I. Coordinative Europeanisation

Coordinative efforts are a prominent trait of EU crisis governance. To pursue a common goal, supranational actors often opt for a mode of coordination of national decision-making practices. As a shorthand, this approach has been termed ‘coordinative Europeanisation’.4 Decision-making at national level is thereby streamlined, albeit in the absence of a formal re-design of supranational law. Accordingly, it is one of the principal advantages of coordinative Europeanisation that it can largely do without amendments to the existing legal framework.

It is a hallmark of coordinative Europeanisation that, throughout the drafting and implementation thereof, Member States do not formally forfeit their ability to act. Rather, coordinative Europeanisation embeds national decision-making practices in common templates, but leaves ultimate decision-making power to national actors.5 The streamlining of national decision-making practices in this regard is thus brought about by ‘discursive coordination and the persuasive power of ideas’ rather than the coercive power of binding laws.6 Accordingly, coordinative Europeanisation seeks to instil a sense of necessity of cooperation among national decision makers, for instance, to attain a common objective or to avoid negative consequences of uncoordinated actions. Characteristically, however, it does so in the absence of norms that would prescribe, in mandatory terms, a specific conduct.

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[3] See similarly for this phenomenon, Poul Kjaer, ‘European Crises of Legally-constituted Public Power: From the “Law of Corporatism” to the “Law of Governance”’ (2017) 23 European Law Journal 417, 425 et seq.
[4] Ladi and Wolff (n 1).
[5] See similarly Jonathan Zeitlin, ‘EU Experimentalist Governance in Times of Crisis’ (2016) 39 West European Politics 1073, 1074.
[6] Ladi and Wolff (n 1) 36., with reference to Vivien Schmidt, ‘European Emergency Politics and the Question of Legitimacy’ (2022) 29 Journal of European Public Policy 979. For the juxtaposition of coercive and coordinative Europeanisation, see Vasilis Leontitsis and Stella Ladi, ‘The Changing Nature of European Governance and the Dynamics of Europeanization’ in Edoardo Ongaro and Sandra van Thiel (eds), *The Palgrave Handbook of Public Administration and Management in Europe* (Palgrave Macmillan 2018) 772 et seq.

Coordinative Europeanisation has gained traction as an epiphenomenon of crises. Actors at EU level may have come to view coordinative efforts as a modus vivendi that allows them to produce significant results, without having to undergo the formal procedures of Treaty reform or amendments to secondary law.7 It bears mentioning that coordination of that nature is no novelty. Rather, scholars have pointed out that several elements of the EU's response to the sovereign debt crisis followed a similar template of coordinating national practices.8 Especially in the context of the European semester, the EU's crisis response largely centred on the streamlining of national decisions-making autonomy. In this sense, earlier crisis responses have already served as a blueprint for measures adopted during later crises. However, coordinative Europeanisation has assumed a particularly prominent role during the pandemic, emerging in various different fields of EU law, including the free movement of persons and goods.9 In this sense, it is not unreasonable to presume that policy makers at supranational level may have discovered coordinative Europeanisation as a go to-option of crisis governance.

II.I. Legal design of coordinative Europeanisation

As a crisis measure, coordinative Europeanisation proffers significant practical advantages. It enables supranational actors to operate in the absence of formal changes to the respective legal framework, thereby permitting them to act promptly in the face of crisis. Whether such a mode of governance is feasible in the first place, however, will depend on the design of the legal framework in place. Specifically, coordinative Europeanisation presupposes that national decision-makers have a minimum measure of flexibility at their disposal. To be sure, this will habitually be the case. Legal systems tend to afford executives relatively vast-ranging powers in crisis situations.10 Yet, in a multi-levelled entity such as the EU, the precise legal arrangements that permit national authorities to exercise such a decision-making autonomy warrant a closer examination.

II.I.I. Discretionary powers and crisis responses

In legal terms, the flexibility afforded to national decision makers in the context of coordinative Europeanisation will routinely take the form of executive discretion. Whereas national legal systems tend to adopt different conceptual understandings of discretion,11 as a legal phenomenon, it is in inextricably linked to some form of deliberative freedom in times of crisis. Most (if not all) modern legal systems provide for such flexibility in times of crisis. Executive authorities are routinely empowered, for instance, to adopt far-reaching measures to combat threats to public health, or through the formal activation of a state of emergency. While such norms reconcile the requirements of the rule of law with the ability of legal systems to duly respond to crisis situations,12 the discretion that is thus afforded to executive actors will habitually be limited in some respects. Standards of proportionality

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[7] See Alberto Alemanno, 'The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?' (2020) 11 European Journal of Risk Regulation 307, 34.
[8] See Valerie D'Erman and Amy Verdun, 'An Introduction: "Macroeconomic Policy Coordination and Domestic Politics: Policy Coordination in the EU from the European Semester to the Covid-19 Crisis"' (2022) 60 Journal of Common Market Studies 3.
[9] See Alessio Pacces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) 11 European Journal of Risk Regulation 283., at 293 et seq. and Alemanno (n 6).
[10] See, among others, Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2021) 19 International Journal of Constitutional Law 1498, 1502 et seq.
[11] See Joana Mendes, 'Administrative Discretion in the EU: Comparative Perspectives' in Susan Rose-Ackerman and Peter Lindseth (eds), *Comparative Administrative Law* (2nd edn, Edward Elgar 2017).
[12] See Joelle Grogan, 'States of Emergency. Analysing Global Use of Emergency Powers in Response to COVID-19' (2020) 22 European Journal of Law Reform 338.

may apply in times of crisis regardless,13 and legal systems often spell out procedural safeguards to delimit the exercise of executive discretion.14

Coordinative Europeanisation does not formally delimit the discretion afforded to national authorities in times of crisis. It does, however, affect the way in which national decision makers exercise it. Oftentimes, coordinative Europeanisation inhibits the conduct of national authorities. It does so through the persuasive power that inheres in coordinative Europeanisation, thus drawing national decision-makers' attention to the negative repercussions that a certain conduct would entail for the attainment of a common objective.15 Conversely, coordinative Europeanisation may likewise assume an enabling (rather than an inhibiting) function. In this vein, it allows for the development of a policy that – in the absence of such coordination – would not have seen the light of day in the first place.16 The EU travel ban during the first phases of the pandemic can serve as a case in point. Given the fact that lack of coordination in this regard would have resulted in a situation in which individuals could have resorted to 'venue shopping', i.e., entering the Schengen area through one of those Member States that still permitted entries, lack of coordination at supranational level would have undermined the common objective of prohibiting 'non-essential' travel to the EU.

II.I.II. Informal and non-binding standards of guidance

Coordinative Europeanisation routinely promotes a system of benchmarks against which national policies may be gauged.17 Yet, the precise design of these templates varies. Supranational coordination may, for instance, set out certain procedures to be followed by the national authority or, substantively, determine the criteria upon which a decision should be based. Either way, supranational efforts of coordination materialise, in large part, in informal or non-binding standards of guidance. Observers therefore acknowledge that the spread of Covid-19 equally spurred the adoption of 'soft law' instruments in the EU.18 Conceptually, however, the term soft law harbours some ambiguity. While it is often used synonymously with non-binding law, it is commonly accepted that non-binding norms may still engender legal effects, thereby calling into question a binary distinction between hard and soft law norms from the get-go.19

Moreover, it is questionable whether soft law equally encompasses informal standards, such as those voiced in the context of press releases, communications, information or awareness campaigns and even the silence of key actors.20 Formally speaking, standards of that nature cannot be viewed as 'law', despite the normativity they entail. Yet, informal norms play a paramount role in crisis governance in

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[13] Although the requirements that flow from the principle of proportionality may differ in times of uncertainty, see insightfully Iris Goldner Lang, '"Laws of Fear" in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19' (2023) 14 European Journal of Risk Regulation 141, 149 et seq.

[14] See Ginsburg and Versteeg (n 9).

[15] See, for this phenomenon, Corina Andone and Florin Coman-Kund, 'Persuasive Rather than "Binding" EU Soft Law? An Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis' (2022) 10 The Theory and Practice of Legislation 22.

[16] For the distinction between inhibiting and enabling function of coordinative Europeanisation, see Jonas Bornemann, 'Of Coordinated Approaches and Fair-Weather Arrangements: The EU Crisis Response to Covid-19 Mobility Restrictions' in Dominik Brodowski, Jonas Nesselhauf and Florian Weber (eds), *Pandemisches virus - nationales Handeln. Covid-19 und die europäische Idee* (Springer VS 2023). Section 2.

[17] For this effect, see Mark Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' (2015) 53 Journal of Common Market Studies 976, 979 et seq.

[18] For empirical evidence of this phenomenon, see in particular Mariolina Eliantonio and Oana Ştefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 European Journal of Risk Regulation 159.

[19] See Oana Ştefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (2020) 5 European Papers Insight 663, 668 et seq., with further references.

[20] See, insightfully, on this point, Barbara Boschetti and Maria Daniela Poli, 'A Comparative Study on Soft Law: Lessons from the COVID-19 Pandemic' (2021) 23 Cambridge Yearbook of European Legal Studies 20, 22.

Europe. For that reason, they will be treated as embodiments of coordinative Europeanisation for the purposes of this investigation, conceptual ambiguities notwithstanding.21

A categorical distinction between soft and hard law furthermore papers over the fact that informal or non-binding standards may often pave the way for the adoption of more formal and coercive norms. In this sense, informality serves as a laboratory. During the Covid 19 pandemic, for instance, the lifting of border controls that had been reintroduced between Member States in March 2020 is characterised by gradual formalisation. Initially, this development was driven by intergovernmental efforts, creating what can be termed regional 'mini-Schengen'.22 These developments were supported and, to some extent, inspired by coordinative efforts at supranational level. The Croatian Council presidency at the time hailed intergovernmental cooperation in this regard as 'the key to success',23 whereas the Commission published a communication drawing up a 'phased and coordinated approach' for restoring control-free cross-border mobility.24 While, accordingly, coordinative efforts at supranational level materialised in informal instruments (a communication), later on, this motivated the Commission to propose formal revision of the Schengen Borders Code.25 This may illustrate how informal instruments of coordination can serve as a source of inspiration for formal changes of binding EU law.

Last, a distinction between hard and soft law may disregard the fact that forms of softer normativity often come in a hard-law format. This effect is aptly illustrated by the measures adopted at supranational level in response to the monetary and banking crisis. Prominently, for instance, the six and two pack measures take the form of regulations and hence, hard law. In substance, however, 'the bulk of these measures … are devoted to establishing a policy coordination process for national fiscal policy', as Dawson highlights.26 This suggests that coordinative Europeanisation can equally be detected in binding instruments of supranational law that seek to streamline – often procedurally rather than substantively – national decision-making practices, without calling into question the authority of national executives to decide in an autonomous fashion.

II.II. A threat to normative credence of supranational law?

It is not difficult to understand why informal and soft law measures emerged as a prominent feature of crisis governance in Europe. They allow for a quick response, largely avoiding lengthy negotiations that formal adoption of binding law would usually entail.27 Moreover, even in the absence of standards coercing national authorities to act in one way or another, such a form of crisis response may produce significant and tangible results in practice. This may reasonably be viewed as enhancing the outcome legitimacy of key political actors and, likely, the polity at large.28 This political expediency notwithstanding, the increased use of informal and non-binding standards of normativity in crises can be cause for criticism. It threatens to upset some of the core characteristics of constituted power in European legal systems.29 It does so, conceivably, in one of three ways.

First, informal standards of normativity threaten to undermine the vertical attribution of competences in the EU. By functionally linking and procedurally requiring supranational and national authorities to

[21] For such a 'broad' understanding, see ibid 22 et seq.
[22] See Daniel Thym and Jonas Bornemann, 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics' (2020) 5 European Papers 1143, 1151.
[23] See Croatian Ministry of the Interiors, 'Comprehensive coordination among EU Member States – the key to success', 28 April 2020.
[24] European Commission, Communication, C(2020)3250, 'Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – Covid-19', 15 May 2020.
[25] European Commission, COM(2021)891 final, Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 14 December 2021.
[26] Mark Dawson, 'Integration through Soft Law: No Competence Needed? Juridical and Bio-Power in the Realm of Soft Law' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart 2017) 242.
[27] See Ștefan (n 18) 664 et seq.
[28] For this phenomenon, see Schmidt (n 5). This should not paper over the fact that the informality of such a form of law-making may equally constitute a source of volatility, see Boschetti and Poli (n 19) 51.
[29] See Kjaer (n 2) 425 et seq.

coordinate their measures with one another, informal normativity defies the formal attribution of competences in the Treaties.30 It permits supranational actors – in cooperation with national decision makers – to develop standards in areas in which they would not otherwise have been competent to act. The 'fusion' of tasks that coordinative Europeanisation entails may therefore be said to tarnish the vertical dimension of competence distribution in the EU.31

Second, informal and soft-law standards are often adopted to complement legal frameworks, thereby catering to the uniform implementation of existing provisions.32 In crisis situations, however, this complementary function of non-binding and informal law may serve the function of purposively retailoring EU law to the needs of crisis governance.33 Admittedly, it is notoriously difficult to draw a line between the interpretation and the creation of law.34 Still, experiences during recent crises illustrate that coordinative Europeanisation tends to promote particularly far-reaching interpretations of supranational law to legally justify the measures taken.

An ostensive example to that effect featured in relation to the reintroduction of internal border controls in the Schengen area during the first phase of the pandemic. While the Schengen Borders Code allows for such controls to be introduced to tackle threats to public order, key actors agreed that this provision could equally apply '[i]n an extremely critical situation' in response to a public health threat.35 On the one hand, this is not an unreasonable interpretation, given that the pandemic may easily have qualified as posing a 'genuine and sufficiently serious threat […] affecting one of the fundamental interests of society.36 On the other hand, the respective provision notably excluded public health from the reasons justifying the reintroduction of border controls. This omission may well have been deliberate, given that public health is mentioned elsewhere in the Regulation.37

Unlike instances in which these standards of informal guidance are drafted unilaterally by an EU institution, coordinated Europeanisation implies that key actors, both at supranational and national level, propose these interpretations concertedly. Especially during a severe crisis, this is likely to blight opposition. Coordinative Europeanisation may sound out those interpretations of supranational law that are politically acceptable for key actors, particularly national governments. In this vein, it paves the way for political solutions that, owing to a commonly accepted extensive reading of EU law, can do without legislative reform or Treaty change.

At the flipside, third, these standards of normativity tend to be created in the absence of meaningful parliamentary involvement.38 In this sense, democratic accountability is often limited at best.39 Coordinative Europeanisation seems to consolidate such an arrangement.40 Especially during the initial shocks of crisis, parliamentary actors may be hesitant to oppose coordination at supranational level, given that this would put them in the unpleasant situation of arguing against a discourse of 'doing

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30 See Dawson (n 25) 245.
31 Lucas Schramm, Ulrich Krotz and Bruno De Witte, 'Building "Next Generation" after the Pandemic: The Implementation and Implications of the EU Covid Recovery Plan' (2022) 60 Journal of Common Market Studies 114, 122., with reference to Wolfgang Wessels, *The European Council* (Bloomsbury 2016).
32 See Joanne Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law' (2011) 48 Common Market Law Review 329.
33 See, for instance, Hanneke Van Eijken and Jorrit Rijpma, 'Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona' (2021) 17 Utrecht Law Review 34, 41.
34 See Eliantonio and Ștefan (n 17) 166.
35 Commission Communication, 'Covid-10 Guidelines for border management measures to protect health and ensure the availability of goods and essential services', 16 March 2020, point 18.
36 ECJ, Case 30/77, *Boucherau*, ECLI:EU:C:1977:172, para. 35.
37 See Thym and Bornemann (n 21) 1148.
38 For this phenomenon in the context of the Covid 19 pandemic, see Jan Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) 8 The Theory and Practice of Legislation 71.
39 See Eliantonio and Ștefan (n 17) 169. This impression is not called into question by the fact that the European Parliament, during the Covid 19 pandemic, had early on advocated for a coordinated approach to combat the pandemic, see Resolution of 17 April 2020 on EU coordinated action to combat the COIVD-19 pandemic and its consequences, P9_TA(2020)0054.
40 This impression is not called into question by the fact that the European Parliament, during the Covid 19 pandemic, had early on advocated for a coordinated approach to combat the pandemic, see Resolution of 17 April 2020 on EU coordinated action to combat the COIVD-19 pandemic and its consequences, P9_TA(2020)0054.

everything necessary to protect citizens'.41 This is not to say, however, that the European Parliament would be side-lined altogether. Rather, it may have gradually found ways to exert influence on EU crisis governance,42 for instance, in the context of the Recovery and Resilience Facility, specifically in the requirement that national programmes should be future-oriented.43

II. Constitutional foundations of coordinative Europeanisation

Coordinative Europeanisation has emerged as a governance method in a variety of different fields of EU law.44 In the following, three instances thereof will be discussed, namely coordination for the purpose, first, of putting into practice entry bans against non-EU-citizens; second, the rolling back of restrictions to free movement of citizens, and third, to initiate joint procurement efforts of goods that have been scarce following a crisis situation. While these examples share several of the characteristics of coordinative Europeanisation, they equally draw attention to significant differences in the legal designs of this mode of crisis governance.

III.I. Entry bans

Coordinative Europeanisation underpinned and enabled policies intended to prevent non-EU citizens from entering the Schengen area. Such an effort first emerged in relation to the Covid-19 pandemic. The idea of coordinating national decision-making practices to slow the spread of Covid 19 was initially brought up during a (virtual) meeting of the European Council.45 Instead of proposing a formal legislative reform, EU-leaders agreed that swift action was needed and that, for that reason, an entry ban of that nature would have to be put into practice through an expansive reading of the existing legal framework, namely, the entry conditions in the Schengen Borders Code.46 Notwithstanding the irony that EU leaders had deplored a similar measure by the Trump administration just days before,47 this allowed national authorities to adopt an unprecedented entry ban, prohibiting vast categories of non-EU citizens to enter the Schengen area.

The expansive interpretation of the Schengen Borders Code was complemented by an intense mode of coordination at supranational level. As the Commission acknowledged in its first communication, such a travel ban 'could only be effective if decided and implemented by Schengen States for all external borders at the same time and in a uniform manner.'48 Accordingly, it sought to streamline administrative practices of national border authorities through another communication published two week later, and a long list of 'frequently asked question'.49 The degree of detail of this instance of supranational coordination was warranted with a view to fact that the entry ban equally had to streamline the practice of granting exemptions. Legally, it was imperative that informal coordination of that nature did not call into question legal safeguards, especially those that individuals derive from fundamental rights protection.

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41 Sarah Wolff, Ariadna Ripoll Servent and Agathe Piquet, 'Framing Immobility: Schengen Governance in Times of Pandemics' (2020) 42 Journal of European Integration 1127, 1129.
42 See Eliantonio and Ştefan (n 17) 165.
43 See Ladi and Wolff (n 1) 39.
44 Ladi and Wolff detect this mode of governance for instance equally in economic crisis response measures, see ibid 36 et seq.
45 European Council, Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, 17 March 2020.
46 Article 14, in conjunction with Art 6, para. 1., let. e) Regulation (EU) 2016/399; see equally Van Eijken and Rijpma (n 32) 36.
47 Joint Statement 20/449 by President von der Leyen and President Michel, 12 March 2020 on the U.S. travel ban.
48 European Commission, Communication, COM(2020) 115, 16 March 2020, at 1.
49 European Commission, Communication C(2020) 2050, 30 March 2020.

The informal nature of the entry ban may be said to tarnish the legal position of individuals. In the light of the right to respect for their family life, for instance, border guards were compelled to consider the individual situation of each person travelling to the Schengen area. On this point, however, the Commission's communication remained decidedly vague. It merely stated that national authorities should consider whether 'imperative family reasons' would speak in favour of authorising entry to a person.[50] This alludes to the fact that supranational coordination may be incapable of instructing in all detail national administrative practices intended to put the entry ban into effect. This may call into question some of the legal safeguards that individuals have at their disposal.[51]

Initially, coordination of national administrative practices in the context of the entry ban was based exclusively on the informal guidance in the Commission's communications. After three months, this strategy of coordination received a formal (albeit non-binding) legal basis in a Council recommendation.[52] In substance, the recommendation allowed the Council to draw up a list of third countries whose nationals should be allowed to enter the EU for the purposes of non-essential travel, given the epidemiological situation in these states. In addition, it reproduced the list of categories of travellers who should be excluded from the entry ban.[53] While this formalisation of the entry ban may have increased legal certainty for individuals concerned, in substance, it still left much room for appreciation, both for the Council who had to assess inter alia the 'overall response' of third states to Covid 19, but likewise for national border guards, who would still have to determine, for instance, whether non-married couples could invoke 'imperative family reasons' to see one another.

It may be worth noticing, however, that following the initial shocks of the pandemic, significant efforts have been undertaken to formalise this mode of coordination. To that end, the Commission proposed the establishment of the so-called Schengen Forum, which institutionalised a biannual meeting between the Commission, Members of the European Parliament, national ministers of justice and home affairs, representatives of the competent EU agencies and national authorities tasked with the practical implementation of the Schengen acquis.[54] This forum was aimed at creating an esprit de corps among national and supranational stakeholders. In this vein, national decision makers may become more aware of the transnational implications of unilateral decisions, not just in the context of the entry ban, but with a view to the Schengen acquis more generally.[55] While it may remain questionable whether biannual meetings of that nature may genuinely inspire a sense of Europeanness among national border authorities, it is true – as the Commission highlights – that the discussions in the Schengen Forum have inspired currently discussed reform proposals of the Schengen Borders Code.[56] Particularly, the Commission has proposed to authorise the Council to adopt such an entry ban on the basis of an implementing regulation.[57] In this sense, the coordination put into practice during the pandemic may have served as a laboratory for coordination that may ultimately feed into formal innovations in supranational law.

III.I.I. Coordination and contestation: the Visa ban against Russia citizens

The coordination of national decision-making practices upon which the entry ban has been based served as a blueprint for later crisis responses. Especially following Russia's war in Ukraine, some Member States proposed to design another travel ban, this time targeted at Russian citizens. It is not unreasonable to presume that this crisis response drew inspiration from experiences during the first phases of the

[50] European Commission, Communication COM(2020)115, at 2.
[51] On this point, see Thym and Bornemann (n 21) 1160.
[52] Council Recommendation (EU) 2020/912 of 30 June 2020.
[53] See particularly Annexes I and II to Council Recommendation (EU) 2020/912.
[54] European Commission, COM(2021) 277 final, at 16.
[55] See Bornemann, Competing Visions and Constitutional Limits of Schengen Reform: Securitization, Gradual Supranationalization and the Undoing of Schengen as an Identity-Creating Project, in: German Law Journal (forthcoming), at Sec. C.II.2.
[56] European Commission, COM(2021) 277 final, at 3.
[57] European Commission, COM(2021) 891 final, Article 21a (2).

Covid pandemic.58 Not unlike responses to the pandemic, it centred on an expansive reading of the existing legal framework, specifically the EU Visa Code, combined with an intense mode of coordination between participating Member States.

In contrast to the Covid entry ban, however, the travel ban against Russian citizens did not find the unequivocal support of all Member States. Quite to the contrary, multiple Member States firmly opposed the idea, both politically and legally. In particular, they took issue with the expansive interpretation of the Visa Code that underpinned the proposal.59 To be sure, the Visa Code affords national authorities wide discretion to reject visa applications where the applicant is considered 'a threat to public policy, internal security or public health […] or to the international relations of any of the Member States'.60 Still, the legal design of the Visa Code centres on individualised assessments, thus requiring rejections of applicants to link to the specificities of the individual applicant.61 A sweeping travel ban, fuelled by a logic of collective retribution, would clearly run counter to the notion of an individualised assessment.62

Actors at supranational level quickly came to realise that some form of coordination would be inevitable in such a situation. Accordingly, the Commission published two communications to provide some guidance on the issuance of visas to citizens of Russia.63 In substance, this form of coordination attempted to walk a tightrope. On the one hand, it sought to streamline national decision-making practices, while ensuring, on the other hand, that the expansive interpretation that underpinned the visa ban did not transgress the limits of the permissible under EU law. In contrast to the Covid 19 entry ban, it was genuinely doubtful whether a nationality-based entry ban could be legally justified in the first place.64 The Commission therefore proposed a reading of the Visa Code that would compel national visa authorities to base their decisions on an individualised assessment, but allowed them to put into practice an 'expansive approach' to determine whether a person could be considered a 'potential threat' to the international relations of a Member State.65

Such an interpretation significantly lowers the bar for national visa authorities to reject visa applications from Russian citizens. It allows them to presume that it is 'highly likely' that such a person would pose a threat to the international relations of a Member State.66 At the same time, the Commission's communications stress the necessity to base such a finding on an individualised assessment. Accordingly, it would furthermore be inevitable, for national authorities, to acknowledge the specificities of each individual case. Whereas Russian citizens travelling exclusively for touristic purposes may have their visa application rejected on the basis of such an interpretation, other specificities of the individual case must be assessed duly.

On an analytical level, this draws attention to the fact that the experiences during one crisis may inspire crisis responses during another, in casu, following the war in Ukraine. In the latter context, however, coordinative Europeanisation emerged as a crisis response that was deemed necessary only by some Member States, while others fervently opposed it. This political opposition of key actors distinguished the case of the entry ban against Russians from many of the steps taken in response to the Covid-19

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58 For such a view, see for instance Daniel Thym, 'Border Closure and Visa Ban for Russians: Geopolitics Meets EU Migration Law' (*EU Immigration and Asylum Law and Policy*, 11 October 2022) <https://eumigrationlawblog.eu/border-closure-and-visa-ban-for-russians-geopolitics-meets-eu-migration-law/>.
59 Pronounced opposition was reportedly voiced by Germany and France, see Reuters, 'Germany and France oppose EU visa ban for Russian tourists, 30 August 2022, available via: https://www.reuters.com/world/europe/germany-france-oppose-eu-visa-ban-russian-tourists-document-2022-08-30/ (last: 30 September 2023).
60 Article 32 (1) Visa Code.
61 See Jonas Bornemann, 'The Guises of and Guidance to Administrative Discretion in the European Court of Justice's Interpretation of EU Immigration Law' [2019] Review of European Administrative Law 97.
62 On this point, see Sarah Ganty, Dimitry Kochenov and Suryapratim Roy, 'Unlawful Nationality-Based Bans from the Schengen Zone: Poland, Finland, and the Baltic States against Russian Citizens and EU Law' (2023) 48 The Yale Journal of International Law Online 1, 29.
63 European Commission, Communication C(2022)6596, 9 September 2022 and European Commission, Communication C(2022)7111, 30 September 2022.
64 See Ganty, Kochenov and Roy (n 61) and Thym (n 57).
65 European Commission, Communication C(2022)6596, 9 September 2022, points 21 and 22.
66 Ibid, point 21.

pandemic. Unlike attempts to coordinate national decision-making practices during the first phase of the pandemic, coordinative Europeanisation as a mode to respond to the war in Ukraine was markedly contested, with only some Member States supporting an expansive reading of existing EU law underpinning such an entry ban.

III.I.II. Coordination as correction? Refuting an over-expansive interpretation of EU law

Disagreement between key actors equally influenced the substance of supranational coordination. In drafting its guidance to national authorities wishing to put into practice the entry ban against Russians, the Commission had to tread cautiously to avoid instigating or vindicating an interpretation of Union law that would have been in violation of the existing legal framework. Instead, coordination of national administrative discretion tried to accommodate two objectives at the same time. On the one hand, it wished to ensure that national authorities could utilise the room for manoeuvre that is afforded to them in the context of thwarting threats in relation to a geopolitical threat, particularly after the intensification of Russia's war on Ukraine. On the other hand, the Commission had to ensure that such a crisis response did not transgress the limits of the arguably permissible under the existing legal framework. In contrast to efforts of coordinative Europeanisation during the Covid 19 pandemic, the questionable lawfulness of a sweeping entry ban against Russians would have been met with opposition by some key actors, including several national governments.

Against that backdrop, the Commission's guidance opted for a compromise solution, allowing national authorities wide discretion, but insisting that even a principled entry ban against Russian citizens would have to be based on a genuine individualised assessment, accordingly, precluding an automatic refusal of visa applications. In legal terms, this form of guidance is resemblant of a typecast individualised assessment.67 Rather than accepting a sweeping travel ban against any Russian citizen, the Commission's coordination ensured that the entry ban did not rely on an interpretation that would have violated the existing legal framework in the Visa Code.68 This suggests that, in this constellation, coordinative Europeanisation was aimed at remedying a potentially over-expansive, contra legem interpretation of EU law by some Member States.

Nonetheless, the Commission's coordination did not decidedly put a halt to national practices of such nature. Rather, its acceptance of an 'expansive approach' signals a principled willingness of supranational actors not to stand in the way of national crisis measures that would have undermined the trust that national audiences vest in supranational and national crisis governance. This entry ban against Russian citizens following the war in Ukraine is a good illustration of that dynamic. At least on paper, however, the Member States that wished to implement such a ban against Russian citizens endorsed the Commission's insistence on an individualised assessment.69

III.II. Free Movement of citizens

It is one of the grand promises of supranational integration that citizens benefit from a particularly privileged mobility regime. EU citizens are allowed to work and travel other Member States as per constitutional right, without the need to acquire prior authorisation. As the Covid 19 pandemic illustrated, however, public health threats may constitute the Achilles heel of free movement guarantees. Under the existing legal framework, Member States may restrict the mobility rights of EU citizens in a

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[67] Jonas Bornemann, 'Heated Tempers and Legal Ambiguities. Some (Second) Thoughts on an All-out Schengen Ban of Russians' (*Verfassungsblog*, 17 August 2022) <https://verfassungsblog.de/heated-tempers-and-legal-ambiguities/>.

[68] See equally Ganty, Kochenov and Roy (n 61) 13.

[69] Joint Statement of the prime ministers of Poland, Estonia, Latvia, Lithuania, 8 September 2023, available at: https://www.gov.pl/web/eu/joint-statement-of-the-prime-ministers-of-estonia-latvia-lithuania-and-poland (last: 30 September 2023).

rather sweeping fashion.70 Article 29 of the Free Movement Directive specifies that limitations to EU citizens' mobility may be imposed by way of response to 'diseases with epidemic potential'.71 Yet, unlike restrictions adopted to safeguard public policy or public security, public health threats are not explicitly made subject to the limitations that follow from the principle of proportionality and the requirement that such measures must be based 'exclusively on the personal conduct of the individual concerned'.72 Against that backdrop, it can be argued that sweeping cross-border mobility restrictions can be justified under the current legal framework.73

Given the sensitivity and paramount role of free movement of citizens in the constitutional preface of the EU, it is not surprising that supranational actors bent over backwards to restore uninterrupted cross-border mobility after the imposition of a wide range of travel restrictions. This was done, once again, through the adoption of non-binding standards of coordination. Accordingly, the Commission adopted a series of Communications aimed at ensuring the integrity of the internal market through the development of an 'integrated approach'.74 Initially, this effort was geared at reducing practical obstacles to some of the fundamental freedoms, including through 'green lanes' allowing for quick border-crossings of lorry transports, and ensuring free movement of workers exercising 'critical occupations'.75 Later on, the Commission's coordination aimed at fully restoring free movement in the EU through a 'phased and coordinated approach'.76 In October 2020, these informal standards of coordination were ultimately formalised (albeit in a non-binding fashion) by a Council recommendation.77

The Council acknowledged the perils of uncoordinated practices at Member State level. It emphasised that unilateral measures could cause significant disruptions for businesses and citizens.78 However, the recommendation moves beyond general statements of such nature. It establishes a set of detailed standards against which the necessity of restrictions to free movement should be gauged. In this vein, Member States are asked to provide relevant data on several key parameters, such as the rate of detected covid cases and the rate of testing in a specific region.79 This data is then processed by the European Centre for Disease Prevention and Control, allowing it to draw up a map of risk areas.

Whereas the Council's recommendation establishes a basis of objective and comparable epidemiological criteria, it does not formally encroach upon Member States' decision-making autonomy to impose mobility restrictions. Rather, it leaves the ultimate decision whether to introduce restrictions to free movement to national authorities. Although, as a rule, Member States 'should not' restrict mobility between areas marked as green,80 the recommendation does not ultimately clarify the legal consequences that should follow from a characterisation of a specific region as yellow or red. This suggests that the traffic light system devised by the Council serves as an empirical benchmark on the basis of which national decision-making practices can be empirically grounded, thus linking restrictions to free movement to epidemiological insight.81 This suggests that the coordination put into place by the Commission and the Council particularly aimed at ensuring that national decisions restricting free movement are merited by the epidemiological situation in a specific region.

In practice, coordination between national authorities was moreover significantly simplified by the establishment of the Digital Covid Certificate.82 Analytically, however, this supranational initiative

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70 See Thym and Bornemann (n 21) 1161 et seq.
71 Article 29 Directive 2004/38/EC.
72 Cf. Article 27 (2) and Article 29 Free Movement Directive.
73 See equally Van Eijken and Rijpma (n 32) 42.
74 European Commission, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 2020/C 86 I, 16 March 2020; Communication from the Commission, 2020/C 102 I, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, 30 March 2020.
75 European Commission, Communication 2020/C 102 I, points 1 et seq.
76 European Commission, Communication C(2020) 3250, 13 May 2020.
77 Council Recommendation (EU) 2020/1475, 13 October 2020
78 Ibid, recital 11.
79 Ibid, points 8 et seq.
80 Ibid, point 12.
81 See Thym and Bornemann (n 21) 1169.
82 Regulation (EU) 2021/953, which was later amended and its validity terminated in June 2023.

may aptly illustrate how the fusion of tasks that coordinative Europeanisation brings about may tarnish the division of competences between the EU and its Member States.83 As highlighted by Goldner Lang, the supranational Covid Certificate existed cheek by jowl with national certificates of a similar nature.84 Unlike the supranational Covid Certificate, which was aimed exclusively at facilitating cross-border mobility, national certificates were based on national competences of public health protection. Yet, from a functional perspective, it made sense to ensure the interoperability of national and supranational certificates and, accordingly, the Regulation permitted national authorities to apply the EU Covid certificate in national contexts as well.85 In practice, this meant that the coordinative effects of the supranational Digital Covid Certificate extended well into the spheres of national law, without necessary having to be viewed as a violation of the vertical competence attribution between the EU and its Member States.86

Not unlike strategies of coordinative Europeanisation in relation to travel bans at the external Schengen border, coordination of national decision-making powers in the field of free movement law may be characterised by a gradual codification and increased adoption of formal and binding norms. The Digital Covid Certificate is a case in point, emerging from binding (that is: 'hard') law, specifically, a Regulation. But coordinative Europeanisation in this field of law may see a more general shift towards instruments of binding legal nature. In this respect, the Commission intends to increase crisis preparedness through a Regulation establishing an emergency framework for the internal market, which would equally affect the freedom of movement of individuals.87 This so-called 'Single Market Emergency Instrument' would vest the Commission with significant powers during a situation of emergency, empowering it to adopt implementing acts with respect to different measures that may have an effect on the smooth operation of the internal market.

In the field of free movement of persons, however, these implementing acts would not ultimately undo the decision-making power of national authorities. On the one hand, the Regulation includes provisions that can reasonably be viewed as restricting Member States decision-making power or empower the Commission to do so during an emergency situation. Article 17 (4) of the proposed Regulation, for instance, stipulates that Member States shall refrain inter alia from prohibiting cross-border travel or imposing restrictions on cross-border workers or service providers. On the other hand, these limitations to Member States' room of manoeuvre are largely undone by the addition that such restrictions could not be taken 'unless to do so in [sic! Read: is] inherent to the nature of the crisis […] and it does not manifestly go beyond what is necessary'.88 This suggests that proportionate national measures restricting free movement of persons during crisis may be legally acceptable, even if a state of emergency would be activated under the SMEI-Regulation.

Accordingly, the substantive limitations to Member States' decision-making autonomy may be marginal. The main impetus of the proposed Regulation, however, would lie in the embedding of national decision-making practice in a dense network of procedural standards. Most notably, the proposed Regulation would make information between Member State authorities and the Commission obligatory, requiring the latter moreover to express its view on the compatibility of national measures with the relevant legal framework.89 On an analytical level, this can be viewed as an example of coordinative Europeanisation. Although coordination in this regard takes the format of hard law, it does not coerce national decision-makers to act in one way or another.90 Rather, the proposal would spell out a mandatory mode of communication between key actors during a crisis, without imposing a duty of national authorities to necessarily follow the assessment of the Commission.91

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83 See *supra* at 2.2.
84 See Iris Goldner Lang, 'EU COVID-19 Certificates: A Critical Analysis' (2021) 12 European Journal of Risk Regulation 298, 306.
85 Explicitly acknowledged in recital 49 Regulation (EU) 2021/953.
86 See Goldner Lang (n 83) 306.
87 European Commission, Proposal for a Regulation establishing a Single Market emergency instrument, COM (2022) 459 final, 19 September 2022.
88 Art 17 (4) lit e., likewise lit. d.
89 Article 19 of the proposed Regulation.
90 This may be likened to the mode of operation under the European Semester, see *supra* at 2.
91 The proposal explicitly adds that this, of course, does not impair the ability of the Commission to initiate infringement procedures, Art 19 (14) proposed Reg.

III.III. Coordination and joint procurement

During the initial phases of the pandemic, mobility of EU citizens was not the only fundamental freedom that was restriction. Rather, multiple Member States equally imposed severe restrictions to the free movement of goods. During the first weeks of the pandemic in particular, some Member States decided to stockpile medical equipment, imposing export bans on products like protective masks, ventilators and testing kits to that end.92 Against that backdrop of an increasing competition for medical equipment between Member States, the Commission saw the need to act resolutely and swiftly. Besides establishing central stockpile locations across Member States, it equally advocated for a strategy of joint procurement, offering to order and acquire the said products on behalf of the Member States.93 In this vein, shortages in medical equipment should be avoided.

The adoption of joint procurement agreements did not have to be designed from scratch during the Covid-19 pandemic. Unlike crisis response measures taken in the field of human mobility, particularly the entry bans against non-EU-citizens, joint procurement of medical products during a public health crisis had already been envisioned during the outbreak of the 2014 H1N1 pandemic.94 Accordingly, Article 5 of the Decision on serious cross-border threats to health spelled out a procedure to that end.95 The legal design of these Joint Procurement Agreements (JPA), however, may raise eyebrows. An agreement of that nature is neither an EU legal act proper, nor an international agreement in the sense of the Vienna Convention on the Law of Treaties.96 Instead, the Commission's explanatory note on this procedure emphasises that it should be viewed as an administrative agreement concluded between the Commission and participating Member States intended to streamline the implementation of Article 5 of Decision 1082/2013/EU.97

In this sense, the Commission's explanatory note likewise stresses that the JPA does not formally give rise to a conferral of power from the Member States to the Commission. Instead, it should be treated as an administrative arrangement that leaves the powers of Member States to regulate in health matters 'absolutely unaffected because the JPA does not create any conferral of public law power at all.'98 This is reflective of the supportive role that supranational actors play in the field of health law. While the Commission assumes coordinating tasks, joint procurement remains fully voluntary and complementary to national procurement procedures.99 In substance, such initiatives can therefore be characterised as being 'aimed at encouraging [Member States] to increase forms of health system cooperation on a voluntary basis to ensure better public health protection at European level'.100

It should be noted, however, that joint procurement may exert informal pressure on Member States, notwithstanding the voluntary nature of such initiatives. While the Commission's coordination of procurement efforts does not formally encroach on Member States competence to regulate the public health field, the practical advantages of joint procurement will habitually sway national decision makers to join initiatives of that nature. Particularly the significant increase in buying power vis-á-vis manufacturers may motivate Member States, especially smaller ones, to join initiatives of joint

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92 See Pacces and Weimer (n 8) 292.
93 See Rebecca Forman and Elias Mossialos, 'The EU Response to COVID-19: From Reactive Policies to Strategic Decision-Making' (2021) 59 Journal of Common Market Studies 56, 60.
94 See Emma McEvoy and Delia Ferri, 'The Role of the Joint Procurement Agreement during the COVID-19 Pandemic: Assessing Its Usefulness and Discussing Its Potential to Support a European Health Union' (2020) 11 European Journal of Risk Regulation 851, 853.
95 Decision 1082/2013/EU, nowadays replaced by Regulation (EU) 2022/2371 on serious cross-border threats to health.
96 See McEvoy and Ferri (n 93) 854.
97 Commission, Explanatory Note on the Joint Procurement Mechanism, 2015, at 8.
98 Commission, Explanatory Note on the Joint Procurement Mechanism, 2015, at 9.
99 See McEvoy and Ferri (n 93) 855.
100 Natasha Azzopardi-Muscat, Peter Schroder-Bäck and Helmut Brand, 'The European Union Joint Procurement Agreement for Cross-Border Health Threats: What Is the Potential for This New Mechanism of Health System Collaboration?' (2017) 12 Health Economics, Policy and Law 43. Cited from McEvoy and Ferri (n 93) 853.

procurement.101 In this vein, it can be argued that supportive or incentivising measures at supranational level can in fact exert a carrot-and-stick-type of conditionality.102 National authorities who refuse to join coordinated procurement may be outperformed by joint procurement initiatives that attain lower prices and preferable delivery arrangements.

Analytically, joint procurement can be said to bear several of the hallmarks of coordinative Europeanisation. It takes effect in the absence of standards of law that would coerce Member States to act in one way or another. Still, the practical advantages of joint procurement (and, at the flipside, the adverse repercussions of non-participation) will often sway Member States to join a coordinated approach.103 While such an initiative does not amount to a formal supranationalisation of procurement tasks in the field of public health, it functionally binds national decision-making practices to the coordination and procedure at supranational level. In this sense, it can be viewed as a form of supranational 'bio-power' that evades a clear-cut vertical competence distribution between supranational and national actors.104

III.III.I. Covid vaccines

Despite earlier initiatives of joint procurement during the Covid pandemic, it may be surprising to note that initial attempts to ensure Covid vaccine availability were undertaken by a group of Member States inter se, outside the institutional framework of joint procurement.105 Soon, however, national attempts of that nature were dropped in favour of a procedure coordinated at supranational level. Specifically, the Commission was eager to coordinate measures of vaccine procurement on behalf of the Member States and advocated strongly for a coordinated approach in this regard, ultimately successfully so. Accordingly, the ESI-Regulation was changed to allow the Commission to provide emergency support to the Member States, inter alia, through joint procurement.106

For the Commission, much was at stake in this regard. Politically, its procurement efforts attained wide public attention, particularly also in comparison to the vaccination policies of other actors, such as the UK or the US. Moreover, the prior funding of research programmes is inherently risky, as this might have yielded no success at all. Nonetheless, with a view to the joint procurement of Covid vaccines, the Commission accepted to take this risk.107 As a corollary, the EU's vaccination strategy equally premised on a mode of coordinative Europeanisation. While the Member States formally remained responsible for the purchasing of vaccines, they entrusted the Commission with the task of negotiating contracts on their behalf. At the same time, the Commission and Member States repeatedly rubbed shoulders to ensure that best practices and information of national authorities would inform the Commission's practices.

On an analytical level, this suggests that coordinative Europeanisation should not be viewed as a phenomenon that manifest exclusively in a top-down fashion. Quite to the contrary, coordinative Europeanisation premises on continuous exchanges between key actors, both at supranational and national level and may therefore often involve bottom-up influences.108 As a corollary, this often leads to a situation in which measures at both levels are functionally intertwined. As the joint procurement of vaccines illustrates, however, this functional connection may detach political responsibility and legal competence. As Calliess had insightfully noted, such an arrangement may lead to a situation in which the EU could be blamed for measures that were not entirely in its control, given the ultimate competence

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101 See Albert Sanchez-Graells, 'Procurement in the Time of COVID-19' 7 Northern Ireland Legal Quarterly 81.
102 See Tamara Hervey and Anniek De Ruijter, 'The Dynamic Potential of European Union Health Law' (2020) 11 European Journal of Risk Regulation 726, 732.
103 See similarly Henning Deters and Federica Zardo, 'The European Commission in Covid-19 Vaccine Cooperation: Leadership vs Coronationalism?' (2022) 30 Journal of European Public Policy 1051, 1057.
104 See Dawson (n 25) 245.
105 See Deters and Zardo (n 102) 1056.
106 Article 4 (5) (b) Regulation (EU) 2016/369, changed 14 April 2020
107 European Commission, Communication Com(2020) 245 final, at 4.
108 See equally, Ladi and Wolff (n 1) 32.

of Member States in this regard.109 Nonetheless, this fusion of tasks is a frequent epiphenomenon of coordinative Europeanisation,110 and one that may be accepted in the light of the practical advantages that such a mode of governance proffers in times of crisis.

III.III.II. Military equipment

As the imposition of an entry ban following Russia's full-scale invasion of Ukraine illustrates, experiences during one crisis may often inform reactions during another.111 The same phenomenon can be detected in relation to coordination of procurement efforts. Strategies of joint procurement during the pandemic have served as a blueprint for measures adopted following Russia's full-scale invasion of Ukraine. To ensure the availability of military supplies for all Member States, a recent initiative accordingly paves the way for such joint procurement efforts. This was done, once again, through a strategy of coordinative Europeanisation.

The initiative for joint procurement projects in relation to military equipment emerged during an informal meeting of Heads of State and government of EU Member States in March 2022. Under the impression of Russia's full-scale invasion of Ukraine, in the 'Versailles Declaration', leaders sounded out options to bolster European defence capabilities, inter alia incentivising joint procurement of defence capabilities.112 In response, the Commission and the High Representative published a joint communication, drawing attention to several gaps in defence investments.113 This communication strongly advocated in favour of joint procurement projects in the field of defence, stressing that the replenishment of equipment 'in a collaborative way … would provide greater value for money, by seizing economies of scale, and enhance interoperability.'114 Especially, such a strategy of coordination would ensure that those Member States that find themselves in direct neighbourhood to Russia would have the opportunity to acquire the supplies and equipment they need.

Consequently, the Commission proposed a Regulation on establishing the European defence industry Reinforcement through common Procurement Act, EDIRPA for short.115 Despite its not-entirely-tacky name, the act can be seen as incentivising joint procurement initiatives. It provides financial support to initiatives that involve at least three Member States.116 While this may encourage coordinated procurement efforts of Member States inter se, the proposal clarifies that these Member States may likewise assign the role of the 'procurement agent' to an EU institution, such as the Commission.117 Terminologically, this arrangement may be reflected in the reference of such initiatives as 'common procurement' (as opposed to 'joint' procurement initiatives in the field of public health). On the one hand, it cannot therefore be a matter of course that common procurement under this instrument would entail coordination at supranational level. On the other hand, the proposal surely does not inhibit Member States from assigning coordinative tasks to EU institutions. Although EDIRPA is meant to function as a short-term instrument, it is designed to pave the way for a program that would allow for more permanent cooperation in procurement of military equipment.118

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109 See Christian Calliess, 'Die Gesundheitspolitik Der EU in Der Corona Krise (Covid-19-Pandemie)' [2021] Berliner Online-Beiträge zum Europarecht 1, 7.
110 See *supra* at 2.2.
111 See *supra* at 3.1.1.
112 Article 9 (b), Informal meeting of the Heads of State or Government, Versailles Declaration, 10 and 11 March 2022.
113 Commission, Joint Communication on the Defence Investment Gaps Analysis and Way Forward, 18 May 2022, JOIN(2022) 24 final.
114 Ibid, at 9.
115 European Commission Communication COM(2022) 349 final.
116 Ibid, Article 4.
117 See Daniel Fiott, 'In Every Crisis an Opportunity? European Union Integration in Defence and the War on Ukraine' (2023) 45 Journal of European Integration 447, 455.
118 See ibid 452 et seq.

III. Consequences for constituted power and normative credence in EU law

The practical advantages of coordinative Europeanisation for crisis governance are rather evident. It permits actors at supranational level to act swiftly during crisis situations and to produce significant outcomes in the absence of major legal reforms. Coordinative Europeanisation allows key actors to endorse an expansive interpretation of the existing supranational legal framework, be it in existing secondary law or in the Treaties, to justify far-reaching measures in response to crises. Close cooperation between national and supranational actors is needed to sound out the availability of a commonly accepted expansive interpretation of EU law provisions in the first place. Once such an interpretation has been agreed, coordination serves the purpose of streamlining the implementation thereof. This effort often takes the form of informal and non-binding standards of normativity rather than supranational law provisions that would coerce national decision makers to act in one way or another.

Despite the significant practical advantages that coordinative Europeanisation proffers, the following section will reflect on the ramifications thereof for constituted power in supranational law. In this vein, it problematises the concerted endorsement of expansive interpretations of supranational law as an alternative to legal reform. It seeks to illustrate how such a practice may have inspired go-it-alone strategies of some Member States. The experience of purposively bending provisions of EU law to the necessities of crises governance may have inadvertently inspired national practices that exceed the arguably permissible and gave rise to pronounced opposition of other key actors (4.1.). On an intermediate level of abstraction, this suggests that the expansive interpretation of EU law may serve as a precedent for strategies that transgress the arguably justifiable. In this vein, it may undermine the normative credence of EU law in the long run (4.2.).

IV.I. Laboratory or cautionary tale?

Coordinative Europeanisation may serve as a laboratory. Tried and tested during crisis, it paves the way for more formal adjustments to the supranational legal framework.[119] This effect is aptly exemplified with a view to the Schengen acquis, where coordinative Europeanisation may be one of the driving forces of current reforms.[120] However, this need not be the case in all instances. Rather, for the purposes of joint procurement during the Covid-19 pandemic, for instance, decision makers could rely on already existent mechanisms, to the effect that coordinative Europeanisation did not form a call to action to reform the existing legal framework.[121]

This suggests that the heritage of coordinative Europeanisation as a crisis governance method often does not transpire in substantive changes to the supranational legal framework. Rather, as the preceding sections illustrate, it tends to pivot, first and foremost, on procedural innovations.[122] Reforms aimed at enhancing the crisis-preparedness of the internal market can serve as a case in point. Specifically, these reforms keep the general structure of restrictions to the free movement of citizens intact but embed national decision-making practices to a dense network of procedural standards.[123] This relates particularly to uninterrupted exchange of information and views. By spelling out procedural safeguards to that end, reforms codify one of the hallmarks of coordinative Europeanisation, namely the continuous exchange of views between key actors. In some instances, this effort has been institutionalised, as in

[119] This certainly is no novelty in the policy making in Europe, see for instance Wolfgang Kerber and Martina Eckhardt, 'Policy Learning in Europe: The Open Method of Co-Ordination and Laboratory Federalism' (2007) 14 Journal of European Public Policy 227.
[120] See Bornemann, Competing Visions and Constitutional Limits of Schengen Reform: Securitization, Gradual Supranationalization and the Undoing of Schengen as an Identity-Creating Project, in: German Law Journal (forthcoming).
[121] See *supra* at 3.3.1.
[122] For such an observation, see Dawson (n 25) 242.
[123] See *supra* at 3.2., with further references.

the 'Schengen forum', whereas, in others, it operates within the existing institutional setting, such as in the field of free movement of citizens.

Analytically, coordinative Europeanisation is primarily discussed as a phenomenon that occurs in situations where key actors unequivocally agree that an expansive interpretation is warranted in the face of a crisis.124 The preceding investigation suggests, however, that this need not always be the case. Most notably, coordinative Europeanisation may equally be put to practice by some Member States, whereas others firmly oppose it. The entry ban against Russian citizens serves as an ostensive example to that effect. It suggests that the experiences during the pandemic have inspired some Member States to employ a similar strategy in other situations as well, albeit without the unequivocal support of all key actors.

This draws attention to some of the pitfalls of coordinative Europeanisation in situations where it materialises without the unequivocal political support of key actors. In such a situation, political and legal opposition converge. Key actors may not just take issue with the fact that Russian citizens are being barred from entering the territory of EU Member States politically, but they may likewise challenge the expansive interpretation underpinning coordinative Europeanisation in this regard. In the context of the entry ban against Russians, this legal opposition centred on the question whether a sweeping entry ban could be reconciled with the requirement of an individualised assessment, and whether it duly safeguards the fundamental rights of individuals concerned. While the Commission decided to adopt a form of coordination that ensured the justifiability of measures in the light of the existing legal framework in EU law,125 this did not ultimately dispel the opposition against such an entry ban on the side of other Member States. In the absence of unequivocal support, the entry ban against Russian citizens furthermore lost much of its effectiveness. In contrast to the entry ban during the Covid pandemic, where the Commission had prominently highlighted that lack of coordination would allow individuals to enter the Schengen are through that Member State that has the most lenient entry requirements, such considerations of coherence were plainly disregarded in the context of the entry ban against Russians.

IV.II. Normative credence of EU law in crisis

At the heart of strategies of coordinative Europeanisation lies an expansive interpretation of supranational law. In the context of entry bans, for instance, such an interpretation supposes that any person travelling to EU Member State territory could qualify as a threat to public health or, respectively, the international relations of a Member State. Public procurement initiatives during the pandemic, even though these were mentioned in secondary law, premised on an understanding that such coordination merely constituted an administrative arrangement that would, in no way, affect the powers of Member States to regulate in public health matters.126

On the one hand, it is not unreasonable to argue that these interpretations are still justifiable under current EU law. Indeed, they may be viewed as a form of 'legal engineering', but lawful conduct, nonetheless.127 On an intermediate level of abstraction, on the other hand, it should be noted that interpretations of that nature – purposively tailored to accommodate the practical necessities of crisis governance – call into question the constituted nature of power in supranational law.

This effect can, first, be detected in relation to the distribution of competences between the EU and its Member States. As the preceding sections indicate, coordinative Europeanisation creates situations that do not neatly fit vertical competence arrangements in supranational law.128 Informal or non-binding standards of normativity designed at supranational level may create effects in fields otherwise reserved for national norms. In the joint procurement of medical equipment, for instance, supranational actions

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[124] See *supra* at 2.2.
[125] See *supra* at 3.1.2.
[126] For this view, see European Commission, Explanatory Note on the Joint Procurement Mechanism, 2015, at 9.
[127] This term is borrowed from Bruno De Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' 58 Common Market Law Review 635.
[128] A similar point is made in relation to informal or non-binding normativity by Dawson (n 25) 245.

are limited by Article 168 (5) to the adoption of supportive or incentivising measures; in the field of entry bans, the EU's ability to act is restricted by the fact that the safeguarding of internal security is a responsibility 'incumbent upon Member States', as Article 72 TFEU indicates.

Still, the fact that coordinative Europeanisation gives rise to informal and non-binding standards to streamline national decision-making practices in these fields need not be viewed as a transgression of supranational competence, an ultra vires act, so to speak. Rather, the expansive interpretation upon which coordinative Europeanisation hinges holds that supranational guidance in these fields of law merely informs national decision-making authority, without any formal exercise of public power by supranational institutions. This functional linkage between supranational guidance and national decision-making authority is a characteristic feature of coordinative Europeanisation and one that tends to evade the formal attribution of competences between the EU and its member States.

As the preceding sections suggest, second, reliance on informal or non-binding standards of normativity during crisis may tarnish the legal position of individuals. This effect can be witnessed in relation to efforts, at supranational level, to put into effect an entry ban in all Member States. In this regard, the Commission rightly acknowledged that such a travel ban 'could only be effective if decided and implemented by Schengen States for all external borders at the same time and in a uniform manner.'129 This is easier said than done. While a sweeping travel would have been feasible to implement in such a manner, the guidance spelled out at supranational level had to ensure that such a measure would respect (fundamental) rights of the persons concerned.

To that end, it was obligatory that supranational coordination equally indicated which categories of individuals may be exempted from the entry ban. In several respects, however, a practice of typecasting persons who may be authorised to enter the Schengen area has its limits. Especially given the requirement flowing from respect for an individual's family life, supranational guidance had to leave some flexibility to national decision makers, necessitating them to exempt persons for 'imperative family reasons'.130 This should not be viewed as a violation of individual rights per se. It still permits individual decision makers to fully respect individuals' rights. Yet, it is not unreasonable to argue that such vague guidance may fail to duly draw national decision makers' attention to the specificities of each individual case before them.

Third, the expansive interpretation upon which coordinative Europeanisation is premised can be viewed as undermining the legally constituted public power of supranational law. While it allows for expedient solutions during crises, it may impair the ability of supranational law to act as a framework for the integration of society in the long run.131 Specifically, a concertedly agreed expansive interpretations of the EU legal framework during crisis may serve as precedent to justify measures that are arguably in violation of existing law later. Instead of having to rally the necessary political support for formal reforms, such a strategy would serve as justification for measures or practices that straddle the permissible. Against this backdrop, it will be important to see whether the Court of Justice will unreservedly accept the interpretations put forward by a strategy of coordinative Europeanisation during recent crises.

V. Conclusion

The preceding investigation puts forward the argument that recent crises have propelled a specific form of crisis governance at supranational level. Instead of formal adjustments to the relevant legal framework, key actors at national and supranational level have repeatedly opted for a strategy of coordinative Europeanisation. This form of crisis governance is characterised by the fact that it leaves national decision-making practices intact but streamlines these decisions through informal or non-binding standards of normativity drawn up at supranational level. In this vein, the collaboration between national and supranational actors has created significant results during recent crisis.

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[129] Commission, communication COM(2020) 115 of 16.3.2020, at 1.
[130] See *supra* at 3.1.
[131] For this phenomenon, see equally Kjaer (n 2) 418.

The preceding investigation, however, suggests that, from a legal perspective, the emergence of coordinative Europeanisation should be taken with a grain of salt. Despite the political expediency of informal guidance, this form of crisis governance may call into question the normative credence of supranational law. Specifically, a practice of concertedly endorsed interpretations of EU law that exhaust the arguably permissible strains the ability of law to act as a veneer for governing future conduct of key actors. In this vein, the experiences during recent crisis may serve as precedent for practices that plainly disregard supranational law. Key actors at national or supranational level may thus decide to justify violations of EU law, bearing in mind the expansive interpretation that underpinned coordinative Europeanisation during crises.