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Borders and Bordering in the EU in the Time of CoViD-19

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1. Introduction

One of the most significant effects of the CoViD-19 pandemic – besides the impact the health crisis had on the political, social, and economic context in most countries across the world – is the introduction of severe restrictions on both international and intranational mobility. As it is known, many national governments implemented such measures in an effort to curb the spread of the disease. In the context of the European Union, this has equaled to the (momentary) suspension of the Schengen agreements

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as «the majority of Schengen states have partially or totally sealed their land, sea and air borders with the outside world, including to their Schengen/EU partners» (Castan Pinos and Radil 2020). After an initial period of strict lockdown, these measures were loosened (and in some cases re-enacted) according to the evolution of the epidemiological trends. While, at the time of writing, the spread of the pandemic has seemingly begun to slow down in many European countries, international, intranational, and everyday mobility are still subject to (albeit milder) restrictions.

To be sure, if one considers the refugee crisis and the terrorist attacks in many European cities, there is little new in this surge of bordering practices across the European Union (EU). What appears unprecedented is, instead, the actual extent of such measures, as virtually all Member States have resorted to the so-called Schengen prerogative that provides them «with the capability of temporarily reintroducing border control at the internal borders in the event of a serious threat to public policy or internal security»[1].

The aim of this paper is to discuss the implications of the global health crisis on the EU internal and external borders from a political and constitutional perspective.

From a political standpoint, borders (and control thereof) have long become a major theme in the public debate of many (but not exclusively) Western countries over the last twenty years. Furthermore, borders are deeply intertwined with the concept of sovereignty and, conversely, with

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[1] Temporary Reintroduction of Border Control. Retrieved from: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en
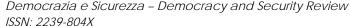
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that of globalization. In other words, borders simultaneously embody a space of *fixity* and one of *crossing* and are thus associated with the idea of *control* and *flow*. On the one hand, borders traditionally define the limits of state sovereignty – hereby intended as «the bundling of rule-making authority within bounded territories» (Hudson 1998) – in the post-World War II international system. On the other hand, in the contemporary context of ever-increasing international economic interdependence among states and global-scale phenomena (such as mass migrations), borders have increasingly become a space of flows in which (de-) regulatory practices systematically occur.

From a constitutional standpoint, freedom of movement – that is, the right of EU citizens to move and reside freely within the territory of the Member States – represents one of the fundamental freedoms of the EU project as well as a subject of the utmost interest in the field of constitutional law. Our argument is twofold and can be summed up as follows: on the one hand, the current pandemic has exposed both the vulnerability and the relevance of borders and border management in our globalizing world; on the other hand, the health crisis has underlined the dual nature of borders in the EU and once more called into question the idea of a borderless European space. Hence, we challenge both a) the 'borderless world' narrative at a theoretical level through a discussion of the concept of borders in the times of CoViD-19 and b) the 'borderless Europe' narrative at an empirical level through a critical review of the legal framework of the European legal space.

As such, in the first section of this essay, we will examine the relationship between borders and globalization in the light of the CoViD-19 pandemic by contrasting the longstanding and widespread discourse on

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globalization as a process leading to the emergence of a 'borderless world'. The global spread of the contagion, as well as the measures adopted by most national governments in order to contain it, reveal the everlasting importance of borders and control thereof, as well as that of states as key-actors in the international scenario, along the lines of international standards to whom Member States have contributed thereof. In the second section, we will discuss the dual nature of borders in the EU, and namely the 'internal' and 'external' borders (and spaces), from a constitutional law standpoint. These, it is argued, simultaneously configure an apparently borderless space (that is, within the Schengen area) *and* an enclosed one (as is the case with the EU external borders and control thereof). In the third and last section, conclusions will be drawn regarding the impact the pandemic had on EU borders and sovereignty of Member States.

2. Borders and globalization at the times of CoViD-19

If there is a place that epitomizes (and highlights the contradictions of) 'globalization' today, such place would probably be the Swiss city of Davos, in which every winter the World Economic Forum (WEF) celebrates its annual meeting to discuss issues of global concern such as capital markets, environmental problems, international conflicts, and global economy, to name but a few. The main by-product of the 2018 meeting was the theme of 'Globalization 4.0: Shaping a New Architecture in the Age of the Fourth Industrial Revolution'. In the words of Klaus Schwab, founder and executive chairman of the WEF, 'globalization 4.0' had already begun

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at that time and, according to his views, the world was largely unprepared to deal with the challenges this new era would bring along[2]. While Schwab's call to arms does not tell us a great deal about the exact meaning of globalization (or of its 4.0 update, for that matter), it is nonetheless quite revealing of the highly (and longstanding) fashionable nature of this buzzword, which works much like an empty signifier.

This, however, is hardly surprising, as the concept of globalization is simultaneously a contested and contextual one. On the one hand, like other concepts that have achieved widespread success in the media and the public, globalization has brought forth a broad range of contrasting (and sometimes overlapping) definitions. On the other hand, any theoretical account of this concept needs to deal with its highly contextual nature: globalization (or the plurality of processes that are often associated with this word) can hardly be considered an evenly unfolding process. In other words, (the meaning of) globalization varies greatly across time and places and is itself a "space-productive" process, in that the expansion of globalized capitalism is simultaneously inclusive *and* exclusive or, as argued by Sloterdijk, «[t]he world interior of capital is not an agora or a trade fair beneath the open sky, but rather a hothouse that has drawn inwards everything that was once on the outside» (Sloterdijk 2013). If globalization has led to unprecedented opportunities of growth and global coordination in some places, it has also brought along «all sorts of inequalities and asymmetries of wealth and power» (Sparke 2013) in others.

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[2] Klaus Schwab, 'Globalization 4.0 – what does it mean?', retrieved from https://www.weforum.org/agenda/2018/11/globalization-4-what-does-it-mean-how-it-will-benefit-everyone/
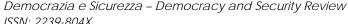
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To be sure, an accurate account of the evolution of (the concept of) globalization throughout the last decades would *sans doute* exceed the scope of our paper[3]. However, notwithstanding the inherent complexity of this concept (as well as the critical approach highlighted above), it should be noted that – still to this day – globalization is often associated with the geopolitical imagination of a process that will ultimately lead to a 'borderless world'. Put most succinctly, in the framework of such narrative globalization can be seen as a word that «evokes images of a world in which goods, services, capital, and information flow across seamless national borders» (Ceglowski 1998) or, in the views of the apologists of globalization, as a process leading to a 'flat world', in which «the global competitive playing field [is] being levelled» (Friedman 2006). The roots of the idea of the 'borderless world' discourse lay in the post-Cold War years. The advent of the end of history, along with that of other endisms, fostered a widespread consensus around the belief that – with the end of Cold War – «the importance of states […] and international borders would be greatly diminished» (Diener and Hagen 2009).

While, as it will be discussed, the actual reach of the borderless discourse can be critically assessed, it should nonetheless be noted that globalization – hereby intended as the complex interplay of flows of commodities, capital, technology, ideas, information, and people at an international scale – did have a major impact on the way borders are perceived, constructed, and handled. Perhaps as a reaction to what sounded much like a self-fulfilling prophecy, the field of border studies underwent a

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[3] For a perspective on the plurality of processes underlying the concept of globalization (especially in the time of CoViD-19), see, *ex multis*, Steger & James (2020).

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'season of renewal', opening to contributions from a wide range of other fields and approaches (Newman and Paasi 1998). While the traditional approach to border studies was by and large rooted in the fields of IR and classic geopolitics, this renewed border studies agenda progressively moved toward an understanding of the multidimensional, contextual, and contested nature of borders and boundaries alike (Newman and Paasi 1998, Newman 2006). In other words, this new theoretical approach understands borders and liminary spaces as the object of constant production and reproduction by a plurality of actors and at different scales than that of the state. As in our contemporary world «borders are often constructed in new ways, in a variety of locations, by diverse types of people» (Rumford 2012), they have not disappeared – they have, indeed, changed. Once deemed the mere 'lines in the sand' that demarcated the limits of state sovereignty, borders today have become, in the words of Balibar, 'invisible', in that they «are dispersed a little everywhere» (Balibar 2004).

The words of Balibar point out how, in a somewhat paradoxical fashion, the practice of bordering has increasingly shifted away from the traditional site of borders themselves (Johnson and Jones 2016, Yuval-Davis et al. 2019). Bordering practices occur today in a plurality of places: border checkpoints can now be found at international airports as well as in train stations or consulates (Agnew 2008, Yuval et al. 2019). This, however, does not imply that 'traditional' national borders have become altogether irrelevant, nor that they are doomed to disappear any time soon. If anything, our contemporary world is still (and perhaps more than before) «a world of compartments and borders which may be more fluid and elastic, easier to cross, than in the past, but they are out there all the same, im-

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pacting upon the minutiae of our daily life practices, identities and affili-ations» (Newman 2006). Instead of the process of deterritorialization of state authority the 'borderless world' discourse predicted, we are now witnessing a wide range of processes of constant reterritorialization in which state borders have become «more complex and differentiated» than before (Popescu 2012).

Hence, in lieu of fading away, borders today hold center stage in the public debate of most Western societies. Ever since the 9/11 terrorist at-tacks in the United States and over the last two decades, borders have become a valuable political currency, as demonstrates the electoral suc-cess of right-wing populist parties in countries on both sides of the ocean. Former US President Donald Trump's electoral campaign, which was largely articulated around the promise to build a wall between Mexico and United States, clearly shows how «rebordering the states has become a symbol of resistance to the pressures that emanate from neoliberal glob-alization» (Yuval et al. 2019), as well as from its negative by-products, such as illegal immigration, drug trafficking, and international terrorism. The reason of this lies in the association between the concepts of a) (con-trol of) borders and b) security, insofar as borders work as performative devices that simultaneously define a «space of security» and a «space of insecurity» (Ritaine 2009), separating 'Us' from the 'Other', the known from the unknown, and what is safe from what is (perceived to be) inher-ently dangerous.

In this sense, it can be argued that the current pandemic has provided (further) concrete evidence on the subject of borders and their relevance in our contemporary, globalizing world, first and foremost in a wide-spread context of emergency. To be sure, the spread of infectious diseases

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across the globe is not something novel *per se*: human history is filled with examples of pandemics having spread on a global scale, especially (albeit not exclusively) by the means of international commerce. What appears new in the current situation is, instead, the global context in which the CoViD-19 pandemic is taking place: to put it in the words of a fact sheet published in 2017 by the United States federal agency 'Centers for Disease Control and Prevention' (CDC), «[i]n today's interconnected world, a disease threat anywhere is a disease threat everywhere»[4]. In our contemporary global village, viruses – like information – spread fast. Hence, infectious diseases – as we learnt by the experience of the current pandemic – have taken the dimension of a global phenomenon and, much like international terrorism and environmental change, belong by and large to the «dark side of globalization» (Heine and Thakur 2011).

From the city of Wuhan – the capital of Hubei Province, China, where the novel strain of coronavirus was first identified in December 2019 – the outbreak quickly began spreading globally. Confronted with the speed at which the contagion progressed in the first months of 2020, most national governments across the world have introduced restrictions to both international and intranational mobility in an attempt to geographically contain the spread of the disease which, in turn, as «a microbial threat […] is inherently transnational in scope» (Enemark 2009). In this sense, the nature of infectious diseases is deeply *spatial*, in that their ability to spread depends on the mobility of their hosts. Hence, human activity plays a crucial role in the spread of the contagion: zoonosis – that is, the transmission

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[4] CDC Global Health Fact Sheet 2017, retrieved from https://www.cdc.gov/glob-alhealth/resources/factsheets/pdf/CDC_Global-Health_Fact_Sheet.pdf.
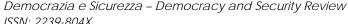
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of an animal virus to a human host – is strictly connected to activities such as industrial animal farming and intensive agriculture. Subsequently, infected individuals become the host through which the infection eventually spreads out. Against this background, it is clear that «borders appear as the primary policy instrument to contain the health risk and to ensure national security» (Radil et al. 2020).

However, although the renewed importance of national borders stands as perhaps one of the clearest effects of the pandemic, the COVID-19 outbreak has equally brought along the resurgence (or the creation altogether) of borders at different scales than that of the state. Throughout the last year and a half, the citizens of many countries have witnessed both a resurgence *and* a proliferation of borders. In other words, depending on where we reside, we now experience and cross – or are prevented from doing so – multiple borders in our day-to-day life, with our households having themselves turned into a potential border. The access to certain places, for instance, is now subject to preventive practices such as temperature screening. In many countries, the introduction of curfews impeded citizens to leave their houses after a certain time, often at night-time, while restrictions were imposed on the activity of traditional places of socialization. Borders that have been long deemed as scarcely relevant and porous – such as the EU internal borders as part of the Schengen Agreements, which will be discussed in the next section – have now been *reterritorialized*.
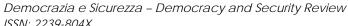
On these grounds, it has been argued that the current situation represents the «revenge of borders» (Bandiera 2020) against the longstanding (and diehard) illusion of a 'borderless world'. Borders of subnational di-

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visions that once barely held any relevance aside from their administrative purpose have now become «akin to a national border» (Radil et al. 2020). As it is known, in late January, the epicenter of the outbreak, the city of Wuhan and the Hubei Province, was placed overnight under lockdown by the Chinese government, resulting in the sudden confinement of over sixty million people. Similar measures, albeit to a much lesser extent, have been taken in other countries as well in the attempt to manage and contrast the spread of the contagion: regions and other administrative divisions have been organized and hierarchized according to the evolution of the pandemic trend. This has given birth to what can be dubbed as a "pandemic cartography", in which political maps are combined with a chromatic scale that symbolizes the level of risk of each and every administrative division, as well as the restrictions into force associated with such level. Hence, in countries such as France and Italy, nationwide lockdown measures gave way to the adoption of differentiated levels of risks on a regional basis.

What strikes the most in the current situation, however, is what can be defined as a process of *hyper-extension of borders*. In this sense, it would appear convenient to recall the concept of 'biometric borders', as developed by Amoore in her discussion on the consequences of the 9/11 attacks on bordering practices in the United States. Biometric borders «extend the governing of mobility into domains that regulate multiple aspects of daily life. Subject to biopower, the crossing of a physical territorial border is only one border crossing in a limitless series of journeys that traverse and inscribe the boundaries of safe/dangerous, civil/uncivil, legitimate traveller/illegal migrant» (Amoore 2006). In other words, borders have become 'portable', in that they extend – as we have discussed above – far beyond

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their traditional site at the edges of state territory, which appear even more clearly in the light of the restrictions adopted to control the spread of CoViD-19. This proliferation of bordering practices both in the EU and in other countries stretches from the enclosure of international borders to that of other subnational divisions and, ultimately, to the individuals themselves (Radil et al. 2020).

In many ways, in this situation individuals have become the privileged site of bordering practices, as social-distancing measures have introduced invisible – and yet perceivable – boundaries between people. Bordering practices now take place up unto the threshold of people's houses in case of suspected or confirmed infections. The access to public places is subject to previous temperature screening, whereas passengers are exclusively allowed onboard on international flights if they provide a negative CoViD-19 test or if they possess a digital certificate that proves the traveler received a full vaccination against the disease. In other words, the pandemic has made the law visible or, as argued by Tedeschi, the current situation offers «a unique opportunity for everyone to become aware of the law, its materiality and spatiality, and the consequences that it can have for people's everyday lives (such as the power to restrict movements), even in normal times and in other contexts» (Tedeschi 2020).

While individuals stand as perhaps the most evident example of this rebordering process, the pandemic equally had significant negative effects on international trade in exporting and importing countries alike, especially throughout the first wave, albeit with heterogenous effects across different productive sectors (Hayakawa & Mukunoki 2021). Within the context of the UE internal market, this has become especially evident with regards to the case of the trade of essential drugs among Member

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States and to the initial lack of EU-level coordination in handling the spread of the pandemic, as it will be discussed in the following sections. Hence, if the borderless world illusion has perhaps untimely celebrated the imminent withering away of the state as a key-actor in global politics (as well as that of international borders), the global health crisis has possibly brought forth an overall redefinition of state-market relationships in many of the countries affected by the disease, in the framework of a situation of «complex intertwining of state, market and society at all levels of the world, from the global to the regional and the local, with no single party able to stay out of the crisis and with causality running in virtually all directions» (Chung et al. 2020).

3. Borders in Europe: between constitutional territory and European legal space

The process of European integration has been co-essential to the globalization process and in some respects an accelerator of it. Both processes pursue, in principle, the facilitation of trade on a supranational and transnational scale, thus directly implying the concept of borders as places of flows and crossings.

Moreover, the European institutions achieve these goals on a strictly legal level since they are endowed, by virtue of the Treaties, with binding powers over the Member States. The European communities were established – and have evolved – primarily to pursue mercantilist goals: with the founding treaties of the 1950s, the founding States set their main objective in the creation of a customs union by dismantling customs borders;

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the Single European Act (1986) marked a decisive step towards the creation of the single market by completing and consolidating the fundamental freedoms of movement of the factors of production (workers, capital, goods, enterprises); the Maastricht Treaty (1992) laid the legal foundations for the creation of monetary union and the adoption of the common currency.

In relation to these goals, attention to social rights and the construction of a European political entity with democratic legitimacy remain, as is well known, at least recessive. Although there have been several efforts in this direction at various times in the evolution of the integration process, the political and social features of the united Europe represent, still nowadays, its most lacking aspects (Farina 2018): if the economic-financial crisis of the last decade shed light on the difficulty of creating popular consensus on the behalf of the technocratic governance of the EU, the current health crisis – despite the attempt to reopen the discussion with the inter-institutional proclamation of the European Pillar of Social Rights in October 2017 – has highlighted the lack of attention to social issues and to the logic of internal solidarity.

With specific regard to the subject of this paper, it could be argued that the mercantilist mark of the EU appears equally evident in the management of borders, both internal and external ones. Under the Treaties, the ways in which the EU can act on borders and freedom of movement can be outlined on two different legal bases: a) the Area of Freedom, Security and Justice (AFSJ); b) free movement of goods, persons, services and capitals.

Under a) we include both the internal borders – which are in principle open – and the coordinated management of the external borders, as well

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as the resulting EU competences on the subject of common asylum and immigration policies. The takeover of the Schengen *acquis* and the replacement of the Schengen Executive Committee by the EU Council is also relevant in border matters. In this regard, it must be remembered that the AFSJ – like the other EU policies that are not typically linked to historically Community economics matters – is still based on the intergovernmental method, which gives the Member States an undisputed pivotal role in the decision-making processes and an equally undisputed primacy over the properly European (non-intergovernmental) institutions, that is, the Commission and the Parliament. In any case, Article 72 of the TFEU requires Title V, concerning the AFSJ, «shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security».

A practical effect of this can be seen in the European reaction to certain phenomena and/or episodes on an supranational scale that are perceived as dangerous for public security and are faced by States re-enforcing their national borders, thus demonstrating the precarious nature of the EU and Schengen 'space without borders': the massive increase in migratory flows from North Africa to Europe as a result of the 'Arab Spring' has found the EU unprepared and incapable of managing its external borders in a coordinated manner, pushing national governments (especially the governments of border countries) to adopt solitary and different solutions (Rinaldi 2016); after the Charlie Hebdo attacks, several countries adopted the procedures provided for by the Schengen legal system to re-establish controls on their national borders (Carrera et al. 2018).
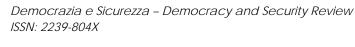
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In short, in the matter of border controls, Europe seems to re-enact old-fashioned dynamics, very similar to those of the times when issues of immigration and asylum were still the object of policies of international cooperation between European governments, with the result that the EU often appears to act as an instrument for the implementation of national policies, rather than as a supranational organization pursuing its own (Favilli 2018).

Yet, precisely because of these transnational phenomena, in recent years the European institutions and the most prominent European governments have begun a debate on the possible reform of the Schengen System, which has been given a decisive acceleration by the pandemic emergency. In particular, three perspectives are being discussed: implementing internal controls by amending the Schengen Borders Code to increase European powers; implementing external border controls by increasing Frontex staff and competences; allowing access and circulation within the Schengen area on condition of good governance practices and participation in the Common European Asylum System (CEAS) (De Somer 2020). We will see in the future which of these perspectives will prevail, but for the moment we can say that all of them keep the basic structural limit of the European border management that, as we will say in the next paragraph, operates through governance mechanisms on non-territorial spatial elements rather than with governance mechanisms on territorial elements.

Point b), on the other hand, concerns the hard core of the Community-based competences of the EU, i.e., the customs union and the single market, which are instrumental to the main political aims of the EU, that is, free competition and price stability. These objectives are also achieved
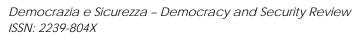
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through the protection of the four fundamental freedoms of movement: workers, establishment, goods, and capitals. The absence of internal borders is needed to create and consolidate the single market, insofar as some typically national prerogatives are not endangered: the Treaties themselves, which enshrine the four freedoms of movement, recognize national powers, as we discussed above, the right to restrict them for reasons of public security, public order and public health (Article 45, paragraph 3: free movement of workers; Article 52, paragraph 1: right of establishment; Article 65, paragraph 1, letter b: free movement of capitals[5]).

With specific reference to the current health emergency, it could be pointed out that the European Commission has tried to claim its own area of action in the fight against contagion and, as far as we are concerned, in the management of borders, both internal and external: firstly, the Commission immediately recommended the Member States to manage their external borders in a coordinated manner, limiting movements from outside the Union[6]; secondly, it addressed the States to manage their internal borders while guaranteeing security and ensuring the free movement of goods[7]. In other areas of policy, the Commission's actions have been more

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[5] Free movement of capitals can be limited by Members States not only on grounds of public security but also «to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information».

[6] See the Communication of the Commission, COM(2020) 115, 16.3.2020, "COVID-19: Temporary Restriction on Non-Essential Travel to the EU".

[7] See the "Guidelines for border management measures to protect health and ensure the availability of goods and essential services" by the Commission, 2020/C 86 I/01.

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significant: thus, in the field of health, the nodal point of the common European response is the vaccination plan; with regard to the economic consequences of the pandemic, the considerable effort linked to the Next Generation EU, which will be discussed later[8].

However, the Commission, more or less rhetorically, has from the very beginning of the emergency justified these actions because it considers them to be functional to the preservation of the single market, the main aim of any EU action. During the session of the European Parliament in March last year, at the height of the crisis, von der Leyen said: «we have no stronger asset for this than our unique Single Market. A successful European response can only be coordinated if our Internal Market and our Schengen area work the way it should»[9].

After all, the ideological foundation of the European integration process (the ordoliberal thought of the Freiburg School) aims to a legally integrated system composed by the EU and Member States that only acts directly to ensure competition and price stability, which should then, in a mediated way, generate widespread social and economic welfare (Somma 2014; Lucarelli 2019).

Even if the Commission is seeking opportunities for autonomous intervention in the management of the pandemic, it is coming up against a) the functional nature of the anti-contagion measures and, more generally, of European policies and actions, and b) the competence and attitude of

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[8] See the actions taken by the Commission under the European common response here: https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response_en.

[9] The full text of the speech is here: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_532.

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States to intervene in the matter in question to protect some specific national assets.

Therefore, we can assume the absence of internal borders in the EU and the Schengen area is only apparent. There is no European space without internal borders, but a European space with suspended internal borders (Tosi 2020). This suspension is temporary, meant to disappear in the face of an emergency. The main response to a transnational emergency is resetting internal borders, but it seems not to be the EU that is closing its internal borders and keeping its citizens at home; it seems is each State that is (re)appropriating its former external border.

These remarks make it possible to shift attention to the declinations of the spatial element on which both the European and the national legal systems operate. These are two very different declinations, since the 'space' of European law is very different from the 'territory' of national law, especially constitutional law.

The European area is, first and foremost, an «area [...] without internal borders» (Article 3, paragraph 2 TEU), essentially instrumental to the single market and free movement: in European law, the concept of the border changes from being a dividing line to a place or opportunity for exchange (Benlolo Carabot 2018), above all an economic exchange but non only. Indeed, over time it has become something more: it is that area of «landless rights» in which the evolution of multi-level protection of rights is able to offer a higher standard of protection than States do on their own territory (Rodotà 2013). However, this is – not by chance – the case for some particularly advanced civil rights, such as privacy (with particular reference to the web), procedural guarantees especially in the criminal law, the rights of LGBTQIA+ people, but not for social rights, with respect

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to which, «the circumstance of being "landless", generally turns into a *deminutio*. Paradoxically, it is precisely those rights that are most threatened by the neo-liberal mainstream». (Salazar 2017, 19-30).

It has been pointed out that, over time, the concept of territory and the concept of border, which is different but instrumental to the physical definition of the first, have become polysemic. Thus, the territory is no longer only a constitutive element of the State, a portion of land that is the subject of State sovereignty, but a value element that is open both to other cultures and to the respect and protection of identity territories within the State itself (Häberle 2000), sublimating towards a less material and more spiritual concept; the border, for its part, is no longer only the demarcation line between two (or more) national territories, but can be declined (among others) in an economic, social, linguistic, ethnic and religious sense, especially in the EU (Benlolo Carabot 2018).

Despite this, the entire European construction remains centered on traditional State schematism; from this perspective, the territory retains its purely national character because it still represents, in the perception of the Member States, the ultimate counter-limit for the preservation of their sovereignty (Tosi 2020). Similarly, the attempt of progressively 'territorialize' the European legal area is weakened by the fact that it is only a process led by courts, which would, instead, require legally, the revision of the Treaties and, politically, the will of the European institutions and the European governments to give a more authentically political content to the Union (Salazar 2018). Not least because, from the perspective of written law, when the Treaties refer to the territory, they are speaking of the territory of the Member States.

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4. The border as an area of sovereignty. Managing the pandemic and the future of the Union

As we have discussed in the first section of this essay, the first reaction of many governments to the spread of CoViD-19 was the implementation of a double category of measures: on the one hand the closure of external and internal borders (both national and intra-national), and on the other the enforcement of lockdown and social distancing and the mandatory use of personal protective equipment (PPE). These measures, first strictly applied in China and Italy and openly opposed by some conservative governments (USA, UK, Brazil), quickly became the only effective tool to prevent the spread of the contagion and were, therefore, widely applied all over the world. Over time, the anti-CoViD measures have been modified several times, sometimes toned down, sometimes tightened according to the evolution of epidemiological trends, but – as we have argued earlier – in any case they still represent the core of the strategy of many governments – especially the European ones – to fight the pandemic emergency.

From the point of view of constitutional law, there are two points that need to be emphasised in relation to these measures: firstly, the measures in issue – although recommended by the WHO – are adopted on their own by each government, not on the basis of an international coordination plan, nor by supranational organisations, above all the EU; secondly, these measures consist in limiting movement rights both objectively (closure of borders) and subjectively (restriction of citizens' movement).

As shown above, the health emergency linked to the CoViD-19 pandemic recalls the centrality – which, to this day, appears inescapable – of

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the nation State as the last and/or first level of security for its citizens and its territory, therefore drawing the attention of scholars of legal science and politics to the *vexata quaestio* of sovereignty in its European dimension.

In fact, on the subject of EU-Member States relations, two different conceptions of border can be highlighted: on the one hand, the 'internal' borders that coincide with the national borders and that still represent the main territorial manifestation of the exercise of the sovereign power of the State aimed at the protection of public order, public safety and public health; on the other hand, the 'external' borders that represent the boundaries of the European legal space and that should be under the competence of the EU as a place of 'shared sovereignty'. However, these two different concepts of borders mark and define two different concepts of the spatial element of public power, the constitutional territory of the State and the European legal space. Thus, the latter, as legal concepts of international law rather than political concepts, is managed at the EU level in terms of definition of common positions benefitting from the EU Member States contribution and support, but in practice is very often managed directly and properly by the border countries whose borders coincide with the external ones of the Union (Sartoretti 2020).

Because of this coincidence, the external borders of the Union become the place where certain purely constitutional contradictions arise, especially in emergency situations, which are in turn connected with the structural features of the European institutions, purposes, and decision-making processes.

The double soul of borders allows first of all to recall the declination of the issue of sovereignty outlined by the Italian Constitution, one 'positive', the other 'negative': Article 1 concerns the democratic and political
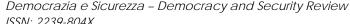
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dimension of sovereignty that belongs to the people and is exercised through the instruments of direct and, above all, representative democracy regulated by the Constitution itself, while Article 11, read together with Article 10, concerns the internationalist dimension of sovereignty that is limited, «on equal terms with other States», for the purpose of building «an order that ensures peace and justice among Nations».

It is well known that Article 11 is closely connected to Italian Membership of the EU, since it has long been identified by the Constitutional Court as the legal foundation that justifies the direct entry of binding European law and its *primauté* over domestic law, well before Parliament amended Article 117, paragraph 1 of the Constitution, which today binds legislative power, among other things, to the «constraints deriving from the Community legal system».

The two different dimensions of sovereignty were not, in the intentions of the Constituent, opposed but were, on the contrary, complementary, and able to balance each other. Above all, they were responding to specific historical and constitutional needs of the moment in which the Constitution was written, that is, on the one hand, to re-found the democratic roots of the State after twenty years of authoritarianism; on the other, to recover legitimacy in the eyes of the international community of liberal-democratic countries after twenty years of autarchy.

The internationalist approach in article 11 of our Constitution was also, not by chance, the main inspiration of the European unitary project in the intentions (and ideologies) of De Gasperi, Schumann and Adenauer, whose main aim was to ensure the liberal-democratic order of European countries against the risk of authoritarian backlash, but also against the revolutionary risk pressing from the east (Guazzarotti 2017).
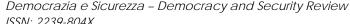
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However, if the issue of sovereignty is first and foremost addressed by written constitutional law, we have to consider that, in practice, it also depends on the evolutions that the process of European integration has undergone over time. The initial internationalist vocation, that was also the hard core of project of the Founding Fathers, has, over time, had to face the ordoliberal twist of the European communities, which have evolved to pursue mercantilist goals, in application of the doctrine of the social market economy (*soziale Marktwirtschaft*). The Union, therefore, has not only received more and more competences from the Member States but, even before that, it has strengthened its ability to influence the decisions of European governments through that informal and technocratic process that is governance, which represents the core of the neo-liberal practices that spread (also in Europe) at the end of the last century (*Ibidem*).

Therefore, it can be said that the twist suffered by the process of European integration since the 1980s and 1990s has progressively eroded the political sovereignty of the Member States, with the special endorsement of both European and national courts, without at the same time constructing a European political sovereignty. In short, the loss of sovereignty is not transferred to the Union (Guazzarotti 2020a), but it is rather dispersed along a process of construction of a sort of financial sovereignty without a state (Lucarelli 2019).
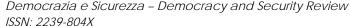
The pandemic, from the point of view of border management, recalls the problem of the declination of sovereignty in the multi-level system of the EU and its members and highlights its limits and contradictions, which lie primarily in the absence of a political sovereignty with a continental dimension. Therefore, with regard to the European reaction to the current health crisis, it has been discussed that it cannot be tackled in a

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«reductionist» sense, as happened with the economic and financial crisis
of 2008-2011, but, on the contrary, in a «para-federal» sense. This means
that the solution cannot be found, once again, in the prevalence of tech-
nology over politics, but in the construction of new spaces for democrati-
cally legitimized political decision-making on a European scale (Guazza-
rotti 2020b). In this sense, the contradiction that emerged with dramatic
clarity during the 2008-2011 crisis between the austerity of European eco-
nomic governance and the need to protect the internal welfare of some
member states can be resolved by taking social constitutionalism as a
point of reference for future reforms of European integration. In other
words, we are not suggesting a restoration of constitutional borders as a
solution to problems that are clearly continental in scale, but that the EU
should take as an example the methods of protection of social rights and
the objectives of substantial equity and equality that are typical of Euro-
pean constitutions with socially advanced content (above all the Italian
Constitution; Gambino 2012).

The European handling of the pandemic has shown some positive
steps in this direction: the recourse to a European debt to finance the Next
Generation EU; the adoption of a formula for the distribution of funds
that differs from the traditional '*juste retour*' and is centered on the needs
of the requesting state; the suspension of the Stability and Growth Pact;
the partial reform of the European Stability Mechanism; the centrality of
the European institutions tout court – that is, non-intergovernmental – in
the approval of the most important plan of the Next Generation EU (the
Recovery and Resilience Facility, RRF) are all evidence of the attempt to
strengthen the European places of political decisions. What is more im-
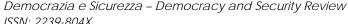portant, this is to be done with the instruments of European law and not

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with international treaties, through a direct intervention of public power in the market arena and, finally, through a reshaping of relations between the Union and the Member States that seems to mind the social needs of the countries most affected by the crisis (Guazzarotti 2020b).

5. Conclusions

Borders still matter, both in our globalizing world and within the supposedly borderless European space. As we have shown through our discussion, the global health crisis has further exacerbated this re-emergence of borders and bordering practice in many of the countries affected by the contagion. This appears perhaps even more clearly when looking at the EU case study. At the time of writing, much like one year ago, restrictions on international and intranational mobility have been currently loosened, even though border-crossing within the EU is still subject to certain regulations and measures. While it is impossible to predict whether the evolution of the pandemic trends will require a re-enactment of such bordering practices in the near future, it appears clear that both internal and external borders (and control thereof) will uphold their relevance. As we have shown, the conceptions of borders (and, therefore, that of space) in the EU can be defined by its paradoxical nature: on the one hand, under provision of the Schengen Agreements, one could be tempted to subscribe to the idea of a 'borderless Europe'; on the other hand, Member States still uphold their prerogatives concerning national (and international) border management, especially in the case of the Union's external frontier.

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Regarding the implications of the global crisis for the EU, we do not mean to return to the issue of the potential modification of European economic governance towards models of government inspired by solidarist and non-competitive, political and non-technocratic logics, a topic we have already discussed in this journal (Dell'Atti 2020). However, it appears clear that the mercantilist and technocratic nature of European economic governance is the main obstacle to the prospect of a social and political Europe: although some possible ways forward have been identified in the current Treaties in the direction of a solidarity-based model of relations, it has been pointed out that solidarity, meant in an equalizing sense, is not yet «an absolute right for States and a corresponding obligation for other States and the EU». It means, according to the Author, that «the Union can only show the solidarity that the Treaties allow it to show and under the conditions laid down, despite the loud calls for solidarity that have been made in recent times». That is because «any hope or "forcing" of the scientific and public debate, although justified by the exceptional nature of the moment, runs the risk of clashing with the strict legal framework» (Morgese 2020, 113).

For these reasons, it is not simply a matter of commenting on the specific instruments with which the EU is managing the extraordinary and exceptional phase linked to the pandemic, which remain, after all, emergency instruments, but, instead, of considering whether and how the EU will ordinarily reform its legal structure, its political objectives and even its aspirations. Hence, the Conference on the future of Europe, which is currently taking its first steps, is an unmissable chance to inscribe the future of the Union in the furrow of democratic and social constitutionalism.

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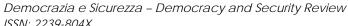
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Abstract

Borders and Bordering in the EU in the Time of CoViD-19

The response of European governments to the CoViD-19 pandemic has been that of reinforcing national borders and restricting citizens' freedom of movement, in continuity with the securitarian policies adopted in past years to react to transnational phenomena such as terrorism and migration flows. This reaction shows the centrality of the role of the State in the management of borders to protect public order, public safety, and public health, and it highlights the weakness of the European legal space, which, on the other hand, is mainly aimed at guaranteeing freedom of movement and the functioning of the single market. After some theoretical considerations on the evolution of the concept of border in the light of the current pandemic, the article focuses on the European understanding of the element of the border by relating the different concepts of constitutional territory and European legal space and by discussing the issue of sovereignty in Europe starting from the concept of border and in the light of the European response to the health crisis.

Keywords: borders; pandemic; sovereignty; territory; space.