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INSIGHT

COUNCIL RECOMMENDATION FOR PROMOTING COOPERATION AND SOLIDARITY AMONGST THE MEMBER STATES: A FAR ENOUGH STEP?

KATE SHAW* AND PAVEL REPYEUSKI**

ABSTRACT: The COVID-19 pandemic has prompted many EU Member States to introduce unilateral and diverse travel restriction measures and border controls. European Treaties do allow the Member States to derogate from free movements on the grounds of public health, however, the imposition of inconsistent and diverse restrictions threaten the integrity of the Union. The European Commission and Council have an important role to play promoting cooperation and solidarity amongst the EU Member States and safeguarding the Union. A recent Council Recommendation¹ for a coordinated approach to measures restricting free movement is an example of the EU's response, but does it go far enough? For it is important to acknowledge that a Recommendation is not a legally binding instrument. This *Insight* analyses the Council Recommendation and its role in promoting a coordinated response to the COVID-19 pandemic by the EU Member States.

KEYWORDS: COVID-19 – free movement – travel restriction diversity - public health derogation – cooperation – solidarity.

I. INTRODUCTION

The COVID-19 pandemic sweeping across Europe during 2020 is the most serious public health crisis the European Union has ever faced in its history. Following the large numbers of COVID-19 cases during 2020 and 2021,² European Union Member States (MS) have im-

* Former senior lecturer, Leeds Beckett University, katherineshaw@btinternet.com. The authors would like to thank the European Papers and the anonymous reviewer for their feedback.

** Senior Lecturer, Leeds Beckett University, p.repyeuski@leedsbeckett.ac.uk.

¹ Council of Europe, Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic of 13 October 2020 as amended by Council of Europe, Recommendation (EU) 2021/119 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic of 1 February 2021.

² The latest statistics are provided by European Centre for Disease Prevention and Control, *COVID-19 situation update for the EU/EEA, as of 7 May 2021*, www.ecdc.europa.eu.



posed a range of temporary travel restrictions in order to help reduce the risk of COVID-19 transmission.³ These restrictions are threatening to undermine the key aims and principles of the European Union, namely internal market and free movement of persons,⁴ and run counter to the EU's values of cooperation and solidarity.⁵ Even though the Member States do retain some competences to deal with public health emergencies, and EU law permits Member States to derogate from free movement of persons rules on the grounds of public health, the measures are supplemented by the Union's policy and actions⁶ and any restrictions are to be time limited, suitable, necessary and proportionate.⁷

II. DIVERSITY IN MEMBER STATES' APPROACH TO COVID-19 RELATED TRAVEL RESTRICTIONS

Simple analysis reveals that there is a considerable diversity in Member States' approach to COVID-19 related travel restrictions.⁸ Indeed, throughout the pandemic, many EU countries have introduced various travel restrictions and measures against COVID-19, which diversify greatly in the type, scope and degree of application. These measures ranged from, somewhat more common and less extreme restrictions, such as border controls,⁹ pre-departure or border testing, periods of quarantine upon arrival to rather severe and

³ See E Han, MMJ Tan, E Turk, D Sridhar, GM Leung, K Shibuya, N Asgari, J Oh, AL García-Basteiro, J Hanefeld, AR Cook, L Yang Hsu, YY Teo, D Heymann, H Clark, M McKee and H Legido-Quigley, 'Lessons Learnt from Easing COVID-19 Restrictions: An Analysis of Countries and Regions in Asia Pacific and Europe' (2020) *The Lancet* 1525.

⁴ Art. 3 TEU.

⁵ For further discussion of the EU values see J Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) *European Papers* www.europeanpapers.eu 255; L Cicchi, P Genschel, A Hemerijck and M Nasr, 'EU Solidarity in Times of COVID-19' (2020) *European Governance and Politics Programme*; C Beaucillon 'European Solidarity in Times of Emergency: an Introduction to the Special Focus on COVID-19 and the EU' *European Papers* (European Forum Highlight of 25 April 2020) www.europeanpapers.eu 687.

⁶ Art. 168 TFEU.

⁷ See, for example, art. 45(3) TFEU; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, arts 27-29. The derogations by a Member State on the grounds of public health traditionally have been subject to close scrutiny by the Court of Justice of the European Union (CJEU). See P Koutrakos, NN Shuibhne and P Syrpis, *Exceptions to Free Movement Law. Derogation, Justification and Proportionality* (Hart 2016) for a general discussion of the free movement derogations. For a discussion of the CJEU interpretation of the derogations see T Kostakopoulou and N Ferreira, 'Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship' (Legal Studies Research Paper 18-2013).

⁸ For a helpful overview of various types of restrictions with examples see M Dawson and P Thielbörger, 'EU Law in the "First Wave": The Legality of National Measures to tackle the COVID-19 crisis' (8 December 2020) *Greens/EFA extranet*.greens-efa-service.eu.

⁹ For latest information on the temporary reintroduction of border controls see Migration and Home Affairs, *Temporary Reintroduction of Border Control* ec.europa.eu.

extreme measures, such as travel bans and general border closures to all other EU states, supplemented with very limited and vague exceptions to the said restrictions.¹⁰

To illustrate the extent of this diversity, the Commission has indicated in its note “As of 7 April [2020], Ireland is still the only Member State that has not introduced border restrictions or border closures. 11 Member States have fully closed their borders and a further 15 Member States have partially closed their borders. Airports are currently open in nine Member States, while the remaining Member States have implemented restrictions on arrivals and flights”.¹¹

Recent literature¹² too has explored not only the extent of diversity of restriction measures,¹³ but also how imposition of such measures by the Member States has a potential to pose a risk to the freedom of movement of persons, as well as the fundamental rights and even the rule of law.¹⁴

III. THE EU INSTITUTIONS’ RESPONSE TO THE IMPLICATIONS OF MEMBER STATES IMPOSING DIFFERING COVID-19 TRAVEL RESTRICTIONS

The EU institutions themselves are also concerned about the implications of Member States unilaterally imposing differing COVID-19 travel restrictions, as the lack of collective action in this context runs counter to the EU’s key principles of solidarity and loyal cooperation.¹⁵ This is evidenced most recently by the European Parliament’s resolution,¹⁶ which states that going forward, “cooperation, confidence and solidarity are the only way to overcome this crisis”¹⁷ and that any restrictive measures adopted by the Member States on the grounds of public health must not only be proportionate, but also time lim-

¹⁰ M Dawson and P Thielbörger, ‘EU Law in the “First Wave”: The Legality of National Measures to tackle the COVID-19 crisis’ cit., 14-15.

¹¹ Information Note from the European Commission of 8 April 2020 on Novel Coronavirus (COVID-19) Crisis State of Play of Measures Taken by the Commission.

¹² S Carrera and N Luk, ‘Love thy Neighbour? Coronavirus Politics and their Impact on EU Freedoms and Rule of Law in the Schengen Area’ (CEPS Policy Brief 04-2020).

¹³ O Omran and S Mavrommati, ‘COVID-19 and Free Movement in the EU: Things to consider for a workable framework’ (20 April 2021) DLA Piper www.dlapiper.com.

¹⁴ For further discussion of the rule of law implications arising from the Covid 19 crisis see A Paccès, M Weimer, ‘From Diversity to Coordination: A European Approach to COVID 19’ (2020) *European Journal of Risk Regulation* 283; C Fatovic, ‘Emergencies and the Rule of Law’ (23 May 2019) *Oxford Research Encyclopedia of Law* oxfordre.com.

¹⁵ P Zerka, ‘In sickness and in health: European cooperation during the coronavirus crisis’ (8 July 2020) *European Council on Foreign Relations* ecfr.eu.

¹⁶ European Parliament Resolution 2616 of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences.

¹⁷ Resolution 2616 (2020) cit. para. 5.

ited and in line with the rule of law.¹⁸ A recent communication from the Commission to the European Parliament and Council also further emphasises the importance of coordination at the EU level and Member State alignment with the EU measures in helping to improve the pandemic response and “mitigating cross-border issues”.¹⁹

With this context in mind, this overview assesses whether the adoption of the recent Council Recommendation for a coordinated approach to measures restricting free movement of people in the EU in response to the COVID-19 pandemic²⁰ is a far enough step in helping to promote a coordinated approach for any restrictions the Member States might want to implement during the pandemic.

IV. COUNCIL RECOMMENDATION ON A COORDINATED APPROACH TO MEASURES RESTRICTING FREE MOVEMENT IN RESPONSE TO THE COVID-19 PANDEMIC

The Recommendation on a coordinated approach to measures restricting free movement in response to the COVID-19 pandemic was first adopted by the Council on 12 October 2020²¹ and then further amended on 1 February 2021.²² On one hand, the text of the Recommendation emphasises the fundamental importance of free movement and travel rights for EU citizens. It includes references to the key citizenship provisions in both, art. 21(1) TFEU²³ and recital 2 to the Citizenship Directive 2004/38,²⁴ as well as art. 45 of the Charter of Fundamental Rights²⁵ (the right to move and reside freely).

On the other hand, the Recommendation clearly acknowledges in recital 3 the importance of maintaining high level of health protection in all Union policies and activities pursuant to art. 168(1) TFEU,²⁶ as well as the recent declaration of health emergency pandemic by the World Health Organisation (WHO) in recital 4 and the varying measures already adopted by Member States to address the pandemic in recital 5. Recital 7 stresses how there is now a need for more coordination regarding the restriction of travel and free movement within the EU to protect public health on account of the

¹⁸ For further discussion of the implications of COVID-19 politics on the rule of law see S Carrera and N Luk, ‘Love thy Neighbour? Coronavirus Politics and their Impact on EU Freedoms and Rule of Law in the Schengen Area’ cit.

¹⁹ Communication COM(2020) 786 final from the Commission to the European Parliament and Council of 2 December 2020 Staying Safe from COVID-19 during winter.

²⁰ Recommendation (EU) 2020/1475 cit.

²¹ *Ibid.*

²² Council of Europe, Recommendation (EU) 2021/119 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic of 1 February 2021.

²³ Art. 21(1) TFEU.

²⁴ Recital 2 Directive 2004/38 cit.

²⁵ Art. 45 of the Charter of Fundamental Rights of the European Union [2012].

²⁶ Art. 168(1) TFEU.

COVID-19 pandemic. Member States are also reminded in recital 10 that they should respect the European Union principles, such as proportionality and non-discrimination, when restricting free movement.²⁷

V. STRIKING A BALANCE BETWEEN RESPECT FOR MEMBER STATES COMPETENCE IN PROTECTING PUBLIC HEALTH AT NATIONAL LEVEL AND COMBATING THE RISKS TO EUROPEAN UNITY AND FREEDOMS FROM MEMBER STATES IMPOSING DIFFERING RESTRICTIVE MEASURES

Crucially, the Recommendation is more than merely aspirational in that a key purpose of this document is actually to provide practical guidance about how Member States can cooperate and act in solidarity throughout the EU, by advising as to what sort of data, trends etc should be relied upon by the Member States to justify free movement and travel restrictions in COVID-19 context. So, for example, recital 12 provides that Member States should try and apply restrictions on a regional basis, rather than to the whole Member State territory. Other recitals highlight how the Recommendation sets out various practical details of a coordinated approach and how Member States can best restrict travel and free movement of citizens based on applying a set of common criteria, data and mapping of COVID-19 transmissions based on an agreed colour code produced by the European Centre for Disease Prevention and Control.²⁸ All this should help ensure that any public health restrictions brought in by the Member States are informed by a common set of data/trends and are applied in a more coordinated manner, only to the extent which is strictly necessary to restrain the free movement.²⁹ Understandably, Member States are under considerable pressure from their own populace to bring in border controls and may be reluctant to follow the Commission's advice. Such reluctance was evidenced recently by the German Interior Minister's Horst Seehofer response to the EU officials in relation to the EU Commission's suggestion to temporarily reinstate controls on its borders with Austria and the Czech Republic: "the EU Commission should support us and not put spokes in our wheels with cheap advice".³⁰

However, the inclusion of these recitals in the Recommendation illustrates how the Council is trying to strike a balance between the need to, firstly, respect Member States competence in protecting public health at national level, and, secondly, help combating

²⁷ Recommendation (EU) 2020/1475 cit., recital 3-10.

²⁸ *Ibid.* recital 12-13.

²⁹ On the threat of the public health restrictions pose to fundamental freedoms see I 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' (2021) European Journal of Risk Regulation.

³⁰ C Gonzalez 'Seehofer rebuffs EU criticism of new German border controls' (13 February 2021) Politico www.politico.eu.

the risks to European unity from Member States imposing differing restrictive measures based on differing types of data and analysis.

VI. THE COUNCIL RECOMMENDATION'S TIMELY AND USEFUL GUIDANCE AND RECOMMENDATIONS

A common thread running through the articles of the Council Recommendation is to advise the Member States on how solidarity and loyal cooperation can be achieved in practice by providing some timely and useful guidance.

a) Firstly, the Recommendation sets out various general principles, which Member States should follow when imposing travel restrictions and/or measures restricting free movement to help limit the spread of COVID-19.³¹ Crucially, any such restrictive measure must be compliant with the general principles of EU law and be non-discriminatory.³² However, as the Council Recommendation is not a legally binding instrument, it is for the Member States to give effect to the Recommendation including ensuring that the restrictive measures do not discriminate between Member State's nationals and other EU citizens. In practice, however, national border control measures and entry restrictions do not always apply equally. Some Member States (for example, Denmark in January 2021)³³ had restricted entrance of nationals from some "banned" or "red" EU countries, unless EU citizens are able to comply not only with testing and isolation requirements (that apply to the returning Dutch citizens as well)³⁴ but also having to prove a legitimate purpose³⁵ to enter Denmark, which is only required of non-Dutch nationals. Even though, reasons such as work or exceptional private matters are recognised as legitimate by the Dutch officials, Directive 2004/38³⁶ guarantees free right of entry to all EU citizens into any Member State. Of course, such right can be restricted by public health exception³⁷ in case of epidemic, such as COVID-19, but only subject to protection provisions applying equally to nationals of the host Member State. Thus, one would argue that whilst COVID-19 testing and isolation requirements are proportionate (and apply to all EU citizens), an additional requirement to have a legitimate purpose to enter a Member State is not, as it is applied to non-nationals only, thus is discriminatory.

³¹ Recommendation (EU) 2020/1475 cit., arts 1-7.

³² *Ibid.* art. 3.

³³ See Irish Department of Foreign Affairs www.dfa.ie.

³⁴ For further details of Member State requirements in this context see European Travel information and Authorisation System (ETIAS) *PCR and COVID Testing to travel to Europe: latest updates* www.etiasvisa.com.

³⁵ See list of legitimate reasons provided by the Nationalt Kommunikations Partnerskab COVID-19, *Entry into Denmark* en.coronasmitte.dk.

³⁶ Directive 2004/38 cit., art. 5.

³⁷ *Ibid.* art. 29.

b) Secondly, the Recommendation sets common criteria that Member States should consider when considering the introduction of any restrictive measures, including notification rate, test positivity rate and testing rate.³⁸

c) Thirdly, the Recommendation provides for the Member States to submit various COVID-19 data to the European Centre for Disease Prevention and Control, so that the Centre can provide a mapping of risk areas across the EU Member States.³⁹ Such a colour coded⁴⁰ mapping is based on the level of COVID-19 infection rate and how well the disease is being managed in a particular region/Member State. The green colour is used to indicate the lowest level of COVID-19, then an orange level, then red for the highest level of COVID-19 infection. The mapping is updated weekly. This provides a current data and evidence source for Member States to be able to rely upon when imposing travel restrictions and/or measures restricting free movement.⁴¹ However, as the Recommendation is not a legally binding instrument, Member States are recommended, but not obliged to follow this advice.

d) Fourthly, art. 12 of the Recommendation sets out common thresholds for Member States when considering free movement restrictions on public health grounds with reference to the mapping of risk areas.⁴² Again, the Recommendation is not legally binding, so it only advises that Member States should take into account the severity of risk, as well as any other additional criteria/trends and which are identified by the European Centre for Disease Prevention and Control. However, the question is whether following such common thresholds should be mandated by the European Union (rather than just encouraged), as unilateral imposition of varying restrictive measures by the Member States can significantly curtail citizens' rights. On a separate note, following the common thresholds (even if only voluntarily) would help providing evidence of proportionality⁴³ to support any Member States' argument before the Court of Justice of the European Union in case the countries are challenged on bringing in individual travel restrictions.

e) Finally, art. 14 recommends that Member States should inform other Member States about any restrictive measures they introduce, and art. 25 of the Recommendation includes that Member States should regularly submit information to both, relevant stakeholders and the public, about any measures that they put in place and which pose a restriction to the free movement of persons on the grounds of public health. This has the advantage of assuring some transparency for businesses and travellers and the EU

³⁸ Recommendation (EU) 2020/1475 cit., art. 8.

³⁹ *Ibid.* art. 9.

⁴⁰ World Health Organisation (WHO), *European Centre for Disease Control* www.euro.who.int.

⁴¹ Recommendation (EU) 2020/1475 cit., arts 10-11.

⁴² *Ibid.* art. 12.

⁴³ For further discussion of how the CJEU has interpreted proportionality: see W Sauter, 'Proportionality in EU law: A Balancing Act?' (2017) CYELS 439; K Shaw, *The Court of Justice of the European Union: Subsidiarity and Proportionality* (Brill 2018).

institutions have a duty not only to protect and uphold the fundamental free movement of persons,⁴⁴ but also help disseminating information about restrictions imposed by the Member States across the Union.

VII. THE RECOMMENDATION'S LACK OF CONSIDERATION OF OTHER INTERNATIONAL PUBLIC HEALTH BODIES

The COVID-19 pandemic is a global phenomenon. It is, therefore, regrettable that the Recommendation does not include more consideration of how other international bodies involved in public health development in Europe, such as the World Health Organisation (WHO) and the European Centre for Disease Prevention and Control (ECDC), could work together in this context and especially where rapid responses are required.⁴⁵ Furthermore, there is nothing in the Recommendation or the EU coordinated approach on consideration of the WHO advice regarding COVID-19. For example, the European Union does not appear to provide an easily accessible guidance on when the infection rate becomes dangerous, even though there is a WHO document, which includes considerations for implementing and adjusting public health and social measures in the context of COVID-19 pandemic. Nor is there any acknowledgement of how any restrictions by Member States need to be balanced with the effect these measures may have on the general welfare of society and individuals (which is considered by the WHO in their interim guidance).⁴⁶

In light of the above, one would wonder whether a common approach for free movement restrictions promulgated by the European Union in the Recommendation is going far enough and whether it is effective? So far, the EU Member States had agreed not to introduce any restrictions for green zone only - so, for orange zone upwards they may (but not necessarily will) restrict the free movement. This has a potential to create inconsistencies between the Member States, as the range of the restrictive measures which may be introduced by EU Member States can be very diverse. The recent full closure of the border between UK and France for four days following the discovery of the new COVID-19 variant in the UK in December 2020⁴⁷ is a good example of the circumstances where a rapid coordinated response by the Union is particularly needed. Of course, the European Union can only act within the limits of their competences and lack of the full exclusive competences in this area makes introducing rapid coordinated response measures by the Union very challenging.

⁴⁴ Recommendation (EU) 2020/1475 cit., arts 14 and 25.

⁴⁵ World Health Organisation, *European Centre for Disease Control* cit. there is a joint coordination group between WHO and ECDC, but only meets once a year, so not there for any rapid responses.

⁴⁶ World Health Organisation, Interim guidance Considerations for implementing and adjusting public health and social measures in the context of COVID-19 of 4 November 2020 www.who.int.

⁴⁷ 'Covid-19: More than 40 countries ban UK arrivals' (21 December 2020) BBC www.bbc.com.

Is there a way to avoid inconsistency of the restrictive measures in circumstance like these? Of course, as the EU is unable to mandate the health restrictions for the Member States, it is difficult to see how the Union could consider a harmonising document of a greater legal force than just a Recommendation. However, perhaps, there is a scope for creating a set of guidance (backed up by the WHO and ECDC) which would suggest the appropriate set of measures to use for the Member States? For example, when one is trying to prevent the spread of the new COVID-19 variant onto the continental Europe, temporarily suspending the flights from the UK (as it was introduced by the Netherlands) to stop people travelling may well be proportionate, but completely closing down the borders to all accompanied goods and traffic (haulage in trucks and lorries) may not be, as truck drivers delivering goods from other Member States do not mix with the country's population and there is an extremely low risk of the virus transmission.⁴⁸

Additionally, there are other legal instruments available which could be further utilised. For example, there is the Schengen Borders Code,⁴⁹ which mandates for the derogations to the common rules on movement of people within the Schengen area (this covers most of the EU countries, but not all - UK, Cyprus, Ireland, Croatia, Vatican are all excluded). The Borders Code does allow the Member States to have some border control measures to prevent threats to public health,⁵⁰ however, any decision to reintroduce border control should be taken in accordance with commonly agreed criteria and should be duly notified to the Commission or be recommended by an EU institution. There is also a time limit for the restrictions: usually, up to 30 days and not exceeding two months – and the restrictions should be the last resort, limited and proportionate to the threat.⁵¹ Of course, it can be suggested that the Schengen Borders Code focuses more on the technicalities of crossing borders rather than a substantive right to cross a border, thus the Council Recommendation makes no reference to it. Yet, the Code could be a useful tool in harmonising various restrictions, even if in technical or practical terms.

VIII. FINAL REMARKS

Concluding, it is hard to deny that the COVID-19 pandemic exposed how dependent EU Member States and institutions are on each other's effectiveness.⁵² Consequently, although the Recommendation is a positive step in encouraging Member States to coop-

⁴⁸ In fact, out of more than 15000 tests carried out on Dover bound lorry drivers, there were just 26 positive COVID-19 cases. See 'Kent lorry chaos: Manston airport cleared of lorries' (26 December 2020) BBC www.bbc.co.uk.

⁴⁹ Regulation (EU) 2016/399 of European Parliament and Council of 9 March 2016 on a Union Code governing the movement of persons across borders (Schengen Border Code).

⁵⁰ Regulation 2016/399 cit. para. 6.

⁵¹ *Ibid.* paras 23-28.

⁵² See P Zerka, 'In sickness and in health: European cooperation during the coronavirus crisis' cit.

erate with each other in dealing with COVID-19, the EU needs to step up its approach in addressing the pandemic.

Firstly, it needs to consider and further draw upon the advice from the WHO in relation to new variants and vaccines as well as other ring-fenced measures introduced by the ECDC, namely as the colour system, maps, the Reopen EU portal⁵³ and the EU Open Data portal,⁵⁴ which contains an EU COVID-19 Policy Watch Database.⁵⁵ This will help preventing Member States from unilaterally bringing in the COVID-19 restrictions measures un-coordinated and excessively, without proper justification, will is liable to undermine the key Union's freedoms.

Secondly, the Union needs to more carefully identify the areas of where it should be proactive and act strategically, such as helping Member States to ensure that any COVID-19 related restrictions are applied in a proportionate and non-discriminative way, as well as providing financial support for the Member States and EU citizens who are disadvantaged by the COVID-19 restrictions.

Thirdly, the Union should enhance its awareness of what is happening at local level in the Member States in terms both, the restrictive measures Member States introduce, but also in identifying which of the Member States are experiencing the most devastation from the local pressures of the COVID-19 crisis and thus may need further help and support.

In stepping up its approach the EU is yet again⁵⁶ to have a powerful role in helping to rebuild a post-COVID Europe and rekindle solidarity and cooperation between the Member States following the economic and health devastation of the pandemic.

⁵³ European Union, *Re-open EU* reopen.europa.eu.

⁵⁴ European Data Portal, *EU Open Data Portal* data.europa.eu.

⁵⁵ European Foundation for the Improvement of Living and Working Conditions, *COVID-19 EU Policy Watch: Database of national-level responses* static.eurofound.europa.eu.

⁵⁶ See Declaration following the devastation caused by the second world war: European Union, The Schuman Declaration – 9 May 1950 europa.eu.