

The EU Member States' Border Restriction Versus COVID-19¹

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Abstract

Since February 2020, a number of EU Member States and Schengen associated countries have declared emergencies and introduced epidemiological measures. These included restrictions on freedom of movement: border closures, temporary internal border controls or temporary bans on all non-essential travel. The author argues that since the Member States had recently used border restrictions to restrict the (visible) migration, border restriction as means fighting the (invisible) pandemic is only another precedent on behalf of Member States' unwillingness to preserve freedom of movement when it contradicts internal policies, and underlines the need for Schengen's reform. The article argues that although justifying derogations from the principles of border-free area is in the hand of the Member States, the lack of coordination has created the exact the same situation as during the migration crisis. Though the reintroduced border restrictions of 2015 targeted irregular migrants, the present ones affected EU citizens, too. The research aims to analyze the means and margins that the situation created by the pandemic contrasts to the restrictive border measures introduced during the migration crisis. The final research objective is to emphasize the need for cooperation in this policy field and the need of an integrated approach.

Key words: free movement, COVID-19, migration, border restriction, Schengen

JEL Classification: I18, J61, K33

Introduction

"We must look out for each other, we must pull each other through this. Because if there is one thing that is more contagious than this virus, it is love and compassion. And in the face of adversity, the people of Europe are showing how strong that can be" said Ursula von der Leyen, President of the European Commission at the plenary session of the European Parliament in 26 March 2020² when the EU has been confronted with the epidemic. However, as encouraging as these words were, the perils to free movement were and are clearly visible. Scholars have argued against the move for open borders (Meisels, 2009, Nine 2012), even pointing out that a country has the fundamental right to exclude migrants from its territory basing their argument on the political theory of territorial rights (Kukathas 2012). Borders shape identities with belonging and non-belonging somewhere and the question of free movement becomes a question of the problems and possibilities of a global democratic socialism or a similar (as yet unknown) form of political and economic organization (Samers 2003). Border issues are well-researched (Casaglia, Laine 2017), with some pointing out that the open border system

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² Speech by President von der Leyen at the European Parliament Plenary on the European coordinated response to the COVID-19 outbreak. https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_532

has been weakened by the breakdown of trust in multilateralism as an effective way to tackle global challenges, because states have cooperated bilaterally and often on multilateral levels along the lines of security, economy, healthcare amongst others (Omotomilola et al. 2021). *Open borders* between EU member states have been present from the very first moment in the deliberations about the Schengen Agreement, but the viability of the principle of free movement was always questioned. While seeing – and wanting – the economic benefits of border checks lifting between member states, countries were also wary about the security deficit this would create (van der Woude 2020). Even though the European Union, until recently, tried to draw legitimacy by emphasising the notion of a “borderless Europe” while aspiring to be a postnational/post-Westphalian polity (Balibar 2004), the idea of a borderless Europe was suddenly challenged by security procedures and national interests whose guardians seemed to be predominately states (Opilowska 2021). States’s efforts to manage the crisis in some cases has meant the revival of borders that have been long disregarded or made irrelevant, as well as creation of new borders where they previously had not been meaningfully present (Radil et al. 2021). Containing the spread of COVID-19 is an exercise of emergency risk regulation on an unprecedented scale (Paccos et al. 2020). Any decision-making is based on the principle of precaution (whether expressed or otherwise) and it becomes more challenging to identify clear pathways to address the pandemic effectively that also minimise countervailing risks – something that may in itself justify national rather than international approaches, even whilst benefiting from the centralisation and sharing of scientific data (Dobbs 2020).

Albeit, in recent years, the EU has faced several health issues such as the pandemic influenza (H1N1), this time the domino effect of Covid-19³, a worldwide epidemic with serious effects on societies and economics of everyday life, has resulted in never-before-seen protection measures and challenges across the world. As of 27 April 2020, 17 Schengen countries⁴ had notified the European Commission on the reintroduction of controls at internal borders due to threats related to the spread of Covid-19. These countries have notified the Commission about the reintroduction of controls at all or some sections of their internal borders. A number of other Schengen countries⁵ have introduced restrictions on movement of persons that affect internal borders, such as temporary bans on non-essential travel (Sabbati, Dumbrava 2020).

The hypothesis of this article is that although justifying derogations from the border-free area is in the hand of the Member States, the lack of coordination has created exactly the same situation as during the migration crisis, even though the reintroduced border restrictions of 2015 targeted irregular migrants, whereby the present ones affected EU citizens, too. We turn to qualitative research and use text analysis to interpret events and describing actions of Member States and the EU. Member States can rely upon the derogations available under the EU law in this policy field and the research aims to analyze the means and margins, the situation created by the pandemic is contrasted to the restrictive border measures introduced during the migration crisis. The final research objective is to emphasize with this analysis the need for cooperation in this field. Nevertheless, free movement of persons and the limitations have multiple layers which need to be analysed separately, thus the article continues in the following parts. First, we set out the content of the free movement EU law and the public health policy. Then we frame the EU’s role and activity during the restrictions posed by the Member States, which is followed by the analyses of the use of the Schengen Border Code by the Member States in practice. In the article’s final part we shall draw a conclusion.

Free movement and public health

Originally, freedom to cross borders between Member States was intended as an economic objective to promote the free movement of workers, and the 1957 Treaty establishing the European Economic Community covered the free movement of workers and freedom of establishment, and thus individuals as employees or service providers. Free movement of persons is one of the four pillars of the internal market *sans* internal borders. Free movement was furthermore strengthened when the 1992 Treaty of Maastricht introduced the notion of EU citizenship to be enjoyed automatically by every national of a Member State, including a right

³ COVID-19 is the infectious disease caused by the most recently discovered coronavirus. This new virus and disease were unknown before the outbreak began in Wuhan, China, in December 2019. COVID-19 is now a pandemic affecting many countries globally. See WHO, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> accessed on 10.10.2020.

⁴ Belgium, Czechia, Denmark, Germany, Spain, France, Estonia, Hungary, Lithuania, Austria, Poland, Portugal, Slovakia, Finland, Iceland, Switzerland and Norway.

⁵ Italy, Latvia, Malta, the Netherlands and Slovenia.

to move and reside freely within the territory of the Member States. Moreover, freedom of movement is also a fundamental right enshrined in Article 45 of the Charter of Fundamental Rights. Hence, Articles 3(2) TEU, 20 and 21 TFEU and Article 45 of the Charter establish the principle that every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by the Treaties and by the provisions adopted for their application.

There were several legislation and broad case-law regarding free movement of persons, when a comprehensive directive was adopted in 2004. Directive 2004/38/EC was meant to create a coherent legal system and unite the disparate pieces of legislation that dealt with workers and economically inactive EU migrants (Mantu 2013, 454). Directive 2004/38/EC had the objective of encouraging Union citizens to exercise their right to move and reside freely within the Member States, to cut back administrative formalities to the bare essentials, to provide a better definition of the status of family members, and to limit the scope for refusing entry or terminating the right of residence. Free movement of workers is enshrined in Article 45 of the TFEU and is developed by EU secondary legislation and the case-law. According to Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, the EU citizens are entitled to look for a job in another EU country, work without needing a work permit, reside for that purpose and stay there even after the employment has finished. They enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages.

Although the right to free movement may be subject to limitations and conditions, there is no other provision in primary law regarding the restrictions. Only Article 45 TFEU details the grounds for restrictions on the freedom of movement and residence, namely public policy, public security or public health. Indeed, secondary legislation addresses the issue of restrictions but with certain requirements to be met. Thus, Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another. However, the CJEU persistently tries to balance this in its case law stating that for justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions⁶.

According to Directive 2004/38/EC, EU citizens or members of their family may be expelled from the host Member State on grounds of public policy, public security or public health, but the Directive expressly states that these cannot derive from economic reasons, namely, because of the internal economy. The Court pointed out that the concepts of public policy and public security must be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions⁷.

Furthermore, the Directive also specifies the kind of disease that can justify restrictions. Thus, the only diseases justifying measures restricting freedom of movement shall be diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation or other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

The Court's case-law shows the extensive nature of the right to free movement, like in Case Brey, where the Court made a clear distinction between the economic and social context of free movement of persons, the former arising from the movement of workers, the latter arising from the conferral of citizenship rights and all the ancillary benefits stemming from that status⁸.

As for public health in the EU primary law, according to Art. 168 TFEU public health is a competence shared between the European Union and the Member States (TFEU). That is to say Union actions complement national policies and the EU is primarily intended to support actions taken by Member States, as for example to cover monitoring, early warning of, and combating serious cross-border threats to health. Member States coordinate among themselves their policies and programs in the areas covered by Union action in the field of public health. In connection with the recent pandemic this was emphasized by the Commission stating that short-term and strongly coordinated action to strengthen key areas of preparedness and response will require strong coordination and exchange of information in and between Member States and communities as well as commitment to implement these measures, which are a national competence (European Commission 2020a).

⁶ See Case C 33/07 Jipa, para. 23

⁷ See Case C-41/74 van Duyn, 30/77 Bouchereau, C 482/01, C 493/01 Orfanopoulos and Oliveri, C 441/02 Commission v Germany, C 50/06 Commission v Netherlands.

⁸ Case C-140/12 Pensionsversicherungsanstalt v Peter Brey.

Also, the EU can adopt health legislation on the ground of protection of public health e.g. serious cross-border threats to health⁹, and in this regard an important step was Decision 1082/2013 on serious cross-border threats to health, which applies among others on communicable disease¹⁰ too. This decision lays down rules on epidemiological surveillance, monitoring, early warning of, and combating serious cross-border threats to health, including preparedness and response planning related to those activities, in order to coordinate and complement national policies. Also Member States are obliged to coordinate their COVID-19 measures in the so-called EU Health Security Committee, composed of national health ministers and chaired by the Commission¹¹. Moreover, the EU Commission may take any useful initiative to promote the coordination of member States' policies and programs, in particular initiatives aiming at the establishment of guidelines and indicators, the organization of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation and the Council may also adopt recommendations¹².

The EU's role and free movement restrictions

While Member States (hastily) imposed restrictions on free movement, the European Commission used soft-law instruments, thus published several guidelines in the form of recommendation to coordinate those actions. All this being in line with Article 288 TFEU, namely, to exercise the Union's competences the institutions shall adopt regulations, directives, decisions, recommendations and opinions, where recommendations and opinions have no binding force.

Here we shall point out that the Court in its case law underlined that the rights enjoyed by citizens can be restricted for reasons of public interest. Nevertheless, if the rights of workers have to be curtailed then the court must consider whether such obstruction would likely impact the freedom of movement of workers¹³. It was established that workers are favoured citizens because their rights cannot be restricted even under public interest unless such measure is proportionate to the aim pursued, and compatible with the fundamental rights enjoyed by the workers (European Commission Report 2016).

The restrictions introduced by Member States at the beginning of the pandemic were associated with exemptions for certain categories of workers on the ground of economic and social reasons, e.g. seasonal workers in Germany. Here the European Commission acknowledged the importance of the exemptions, took up its role and published Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (European Commission 2020b). In this the EU Commission emphasized the integrity of the internal market and the criteria that must be met for justified restrictions on the right to free movement of workers on the ground of public health, namely the criteria of necessity, proportionality, objectivity and non-discrimination. Also, there was a (not exhaustive) list of workers included whose occupations are of a critical nature and whose free movement is considered to be essential. Among others, the document clarified that Member States should allow frontier workers in general to continue crossing borders if work in the sector concerned is still allowed in the host Member State and should treat cross border workers and national workers in the same manner.

This guideline complemented another one, the Guidelines for border management measures to protect health and ensure the availability of goods and essential services (European Commission 2020c), that intended to set up principles for an integrated approach of the exemptions used by the Member States to an effective border management, to protect health while preserving the integrity of the Single Market. Member States were requested to designate for transport workers "green lane" border crossings for land (road and rail), sea and air transport and urged Member States to allow and facilitate the crossing of frontier workers and not only of those working in the health care and food sector, and other essential sectors.

The non-discrimination principle and the principle of proportionality was emphasized by the Commission. Measures must not discriminate between Member States' own nationals and resident EU-citizens and

⁹ According to Art. 3 of the Decision a 'serious cross-border threat to health' means a life threatening or otherwise serious hazard to health of biological, chemical, environmental or unknown origin which spreads or entails a significant risk of spreading across the national borders of Member States, and which may necessitate coordination at Union level in order to ensure a high level of human health protection,

¹⁰ According to Art. 3 of the Decision a 'communicable disease' means an infectious disease caused by a contagious agent which is transmitted from person to person by direct contact with an infected individual or by indirect means such as exposure to a vector, animal, fomite, product or environment, or exchange of fluid, which is contaminated with the contagious agent

¹¹ Art. 11 of the Decision.

¹² See Art. 168 TFEU.

¹³ C-482/01 Orfanopoulos and Others v Land Baden Württemberg.

Member State must not deny entry to EU citizens or third-country nationals residing on its territory and must facilitate transit of other EU citizens and residents that are returning home. Furthermore, the proportionality of a measure means consulting with the health authorities and having them approve the measure as suitable and necessary to achieve the public health objective. In reality this was not met by several states, e.g. Hungary. According to a governmental decree in March 2020 (Governmental Decree of Hungary 2020), only Hungarian citizens and EEA nationals holding a permanent residence card, were allowed to enter the territory (Hungary, Governmental Decree 2020). There was a clear discrimination between EU citizens and breach of EU law when the Hungarian government granted exemption to Czech, Slovak and Polish citizens in case they present a negative coronavirus test but other EU nationals were not allowed to enter even with a negative test.

The importance of seasonal workers was highlighted again in the Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak (European Commission 2020d). That is to say, in certain circumstances seasonal workers in agriculture perform critical harvesting, planting or tending functions and Member States should treat those workers in the same manner as the workers that exercise critical occupations referred to above. The priority of the EU was underlined in the Joint European Roadmap towards lifting COVID-19 containment measures (European Commission 2020e) published by the Commission. It called on the Member States to coordinate the lifting of the measures, but noted that the protection of public health in the short and long term should remain the primary objective of decisions taken by Member States and that respect and solidarity between Member States remains essential.

Furthermore, on 13th October the Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic was adopted and it declared again that any measures restricting free movement to protect public health must be proportionate and non-discriminatory, and have to be lifted as soon as the epidemiological situation allows. The Recommendation set out four key areas where Member States will coordinate their efforts, like a common mapping system based on a color code (green, orange, red, grey), common criteria for Member States when deciding whether to introduce travel restrictions, more clarity on the measures applied to travellers from higher-risk areas (testing and self-quarantine), providing clear and timely information to the public. Among others it called on the Member States to respect the differences in the epidemiological situation between areas and act in a proportionate manner and in principle they shall not refuse entry to persons travelling from other member states. Those member states that consider it necessary to introduce restrictions could require persons travelling from non-green areas to undergo quarantine or undergo a test after arrival (European Commission 2020f). All this shows that after the sudden chain of events, the EU first tried to follow and then tried to lead and coordinate the separate actions of Member States into a more integrated reaction¹⁴ and that the newest approach, the EU Digital COVID Certificate¹⁵ shows that the EU could lead an integrated approach¹⁶. Those possessing the certificate should in principle be exempt from free movement restrictions: Member States should refrain from imposing additional travel restrictions on the holders of an EU Digital COVID Certificate, unless they are necessary and proportionate to safeguard public health.

Here, we shall point out, that the restrictions on free movement of workers shifting towards the free movement of certain workers imposed by Member States were not regarded as Member States' infringement and the Commission only called for a common approach regarding the categorization of these workers.

Member States and the SBC in practice

Though some have argued already in 2015 that Schengen open borders are here to stay, reports of re-introduction of intra-Schengen border controls are much exaggerated (Guild 2015, 1). Even in 2015, as states like Netherlands have used Article 23 of the SBC (formerly Article 21) as a legal basis to enhance police checks in response to the increasing numbers of migrants, or started building fences as Hungary and Austria, the line between border control and other internal security measures became increasingly blurring (Guild et al. 2016, 54) Nonetheless, the politics that produce border security as a proper response to external

¹⁴ See more https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/timeline-eu-action_en

¹⁵ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (Text with EEA relevance) PE/25/2021/REV/1, OJ L 211, 15.6.2021

¹⁶ The card holder should in principle be exempt from free movement restrictions: Member States should refrain from imposing additional travel restrictions on the holders of an EU Digital COVID Certificate, unless they are necessary and proportionate to safeguard public health.

threats have guided the COVID-19 response in many states as well. In this respect, pandemics – no less than migration waves or terrorist attacks – involve border politics (Kenwick et al. 2020, 2) even though the construction of border fences challenges the very premises of the Schengen Agreement, namely the ‘spirit of Schengen’ which relies on mutual trust and loyal and sincere cooperation (Carrera et al. 2018, 6).

In the EU, the base for border policy rests in Regulation (EU) 2016/399 (European Parliament and Council 2016), known as the Schengen Borders Code (SBC) and contains the rules that govern checks on persons on external borders, entry conditions and the conditions of temporary reintroduction of border controls at internal borders (SBC, art. 2)¹⁷. Thus, in the Schengen Area there is the possibility for a travel ban temporarily prohibiting or banning entry of nationals and residents of another Schengen country: Articles 25, 28 and 29 provide Member States with the capability of temporarily reintroducing border control at the internal borders¹⁸ in the event of a serious threat to public policy or internal security¹⁹.

When we take a look at the list of Member State notifications based on Article 25 (formerly 23) of Schengen, up to 2006, it shows that the reintroduction of internal border controls was used among the Member States on various occasions. These were important high-level meetings like the G7, World Economic Forum, NATO Summit, Nobel Prize ceremonies, visits of the Pope; celebrations of controversial groups (for example the 50th anniversary of ETA – Youth days of radical young Basques); or responses to terror acts, for example the Breivik attacks in Norway on 22 July 2011 (Giuld et al. 2016, 23). In line with this, if we look at the reasons cited recently by the Member States for reintroduction of border controls, they were/are mass migration, refugee movements, the risk of terrorism and coronavirus. And in 2015, Germany, Austria, Slovenia, Hungary, Sweden, Norway, Denmark and Belgium reintroduced internal border controls from September citing an alleged big influx of persons seeking international protection or unexpected migratory flow.

As for the pandemic, Member States turned to the SBC in the “fight” against an invisible enemy, and in this context there are several elements that shall be discussed. First of all, as mentioned before, according to the Code, border control can be reintroduced on the ground of public policy or internal security whereby public health is clearly not included. Although public health is clearly not included, public policy is broadly interpreted in our case. We shall emphasize that according to the Court the concepts of public policy and public security must be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions. It is furthermore stated that while public policy presupposes in any event, the existence – in addition to the disturbance of the social order which any infringement of the law involves – of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Additionally, public security covers both the internal security of a Member State and its external security. Thus, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security²⁰.

We can see that in the development of events when at first glance the EU emphasised in the Guidelines for border management measures to protect health and ensure the availability of goods and essential services (European Commission 2020b), published at the very beginning when Members States hastily introduced restrictive measures, that it intended to set up principles for an integrated approach of the exemptions used by the Member States to an effective border management to protect health it stated that the conduct of health checks of all persons entering the territory of Member States does not require the formal introduction of internal border controls. However, within a short time period this approach was definitely changed and public health was accepted by the EU as we could see among the general principles of Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic: any

¹⁷ The Schengen Agreement was signed in 1985 by France, Germany, Belgium, Luxembourg, and the Netherlands with the aim of the gradual abolishment of the internal borders between countries and extended control of the external borders. In 1990, a Convention was signed for the concrete implementation of the Schengen Agreement. The Schengen Area started to be alive in 1995, when seven Schengen member countries, France, Germany, Belgium, Luxembourg, Netherland, Portugal, and Spain decided to abolish their internal border checks. In 1999, the Treaty of Amsterdam incorporated the agreement into the EU’s legal framework.

¹⁸ According to the SBC, internal borders means the common land borders of Member States, including river and lake borders, the airports of the Member States for internal flights, and sea, river and lake ports of the Member States for regular connections.

¹⁹ Article 29 has been introduced from 2013, after the revision of the SBC, enabling the possible temporary introduction internal borders for up to two years where there are ‘serious deficiencies’ at external borders.

²⁰ See C-304/14 Secretary of State for the Home Department v CS.

restrictions to the free movement of persons within the Union put in place to limit the spread of COVID-19 should be based on specific and limited public interest grounds, namely the protection of *public health* (Council of the European Union 2020a). Thus, in the present pandemic, the reason to reinstate border controls between Member States is that the border controls could help combat threats, either immediate or future, to public health.

But Member States have to meet several requirements when using SBC. The measure used must remain an exception and be used as last resort, taking into consideration the principle of proportionality and necessity. The Commission can use soft-law, namely, issue an opinion with regard to the necessity of the measure and its proportionality, but has no power to veto such a decision if it is taken by a Member State. The proportionality assessment for the reintroduction of intra-Schengen border controls that any Member State seeking to use these provisions must undertake needs to be thorough and complete in light of the fundamental nature of the right to the intra-Schengen free movement of persons without border checks as a part of the internal market (Guild et al. 2016).

In the recent pandemic, we shall point out the different approaches regarding the use of border control. That is to say, Member States turned differently to the SBC as some countries used either Article 25 or Article 28 for justifications. Of course, some might raise the questions why did they use different articles for the same issue. The answers lay in the different approach of the two provisions. The two provisions differ regarding the *entry into force*, the *time period*, the *place of controls* and the *obligation of notification*. But we shall emphasise that Member States can use either only Article 25 or Article 28 SBC, and cannot alternate between the two to extend the time permitted under each provision.

Article 25 can be used for foreseeable events that pose serious threats to public policy or internal security. This measure can be used to reintroduce border control (an activity carried out at the border and consisting of border checks and border surveillance) at all or specific parts of its internal borders. The time frame is for a limited period of up to 30 days or for the foreseeable duration of the serious threat if it exceeds 30 days. It can be prolonged for renewable periods of up to 30 days but the total period shall not exceed six months²¹.

On the other hand, Article 28 is for cases requiring immediate action because of a serious threat to public policy or internal security. Here, the measure immediately reintroduces border control at internal borders, for a limited period of up to ten days, with the possibility to prolong the border control at internal borders for renewable periods of up to 20 days. However, the overall period shall not exceed two months²².

But there are other differences, too. States have an obligation for notification, that is to say they are obliged to notify the Commission and other Member States at least four weeks before the planned reintroduction. But there is still an exception: if the circumstances giving rise to reintroduced border control become known less than four weeks before the planned reintroduction. Contrary to this, because the immediate na-

²¹ Art. 25

1. Where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.

2. Border control at internal borders shall only be reintroduced as a last resort, and in accordance with Articles 27, 28 and 29. The criteria referred to, respectively, in Articles 26 and 30 shall be taken into account in each case where a decision on the reintroduction of border control at internal borders is considered pursuant, respectively, to Article 27, 28 or 29.

3. If the serious threat to public policy or internal security in the Member State concerned persists beyond the period provided for in paragraph 1 of this Article, that Member State may prolong border control at its internal borders, taking account of the criteria referred to in Article 26 and in accordance with Article 27, on the same grounds as those referred to in paragraph 1 of this Article and, taking into account any new elements, for renewable periods of up to 30 days.

4. The total period during which border control is reintroduced at internal borders, including any prolongation provided for under paragraph 3 of this Article, shall not exceed six months. Where there are exceptional circumstances as referred to in Article 29, that total period may be extended to a maximum length of two years, in accordance with paragraph 1 of that Article.

²² Article 28,

1. Where a serious threat to public policy or internal security in a Member State requires immediate action to be taken, the Member State concerned may, on an exceptional basis, immediately reintroduce border control at internal borders, for a limited period of up to ten days.

2. Where a Member State reintroduces border control at internal borders, it shall at the same time notify the other Member States and the Commission accordingly, and shall supply the information referred to in Article 27(1), including the reasons that justify the use of the procedure set out in this Article. The Commission may consult the other Member States immediately upon receipt of the notification.

3. If the serious threat to public policy or internal security persists beyond the period provided for in paragraph 1 of this Article, the Member State may decide to prolong the border control at internal borders for renewable periods of up to 20 days. In doing so, the Member State concerned shall take into account the criteria referred to in Article 26, including an updated assessment of the necessity and the proportionality of the measure, and shall take into account any new elements.

ture of the measure, Article 28 imposes no obligation for prior notification, rather the Commission and Member States shall be informed immediately, parallel to implementing the immediate measure.

As Article 27 contains notification requirement to another EU Member States, the European Commission, the European Parliament and the Council, Article 31 requires Member States and the Commission to promptly inform the European Parliament of any reasons for reintroducing internal border controls. Thus, for example, Belgium notified the Commission on reintroducing controls at all internal borders between 20 March and 8 May, and introduced a ban on non-essential inbound and outbound travel, as of 18 March with exceptions such as with regard to Belgian citizens returning from abroad, cross-border workers (who are advised to carry a certificate from their employer), health staff, and people involved in the transportation of goods. Italy did not notify the Commission when it introduced a ban on non-essential travel in the country, as of 14 March. Persons were allowed to travel abroad, or to return to Italy from abroad, but only for work requirements, health needs or reasons of necessity, or to return home or to their place of residence. Also, Italy established a self-quarantine regime for travellers returning to Italy²³. The notification must include a list of information including the reason for the proposed introduction, including all relevant data detailing the events that constitute a serious threat to public policy or internal security; the scope of the proposed reintroduction specifying for which parts of the internal borders controls will be introduced; the names of the affected crossing points; and the date and duration of the planned reintroduction. Interestingly, some Member States listed not only COVID-19's life threatening nature in their notification as reason for reinstating controls, but approached the pandemic from a wider view. That was the case for example in the notification of the Hungarian Government when it linked the epidemic to property security, noting that the "declaration of a state of emergency throughout the territory of Hungary in order to protect the health and lives of the Hungarian citizens and to prevent the consequences of the mass epidemic threatening the life and property security of our citizens..." (Council of the European Union 2020b). But more interestingly, Austria identified in its notification that "current measures to combat the COVID-19 crisis might cause that migrants get stranded in the countries of the Western Balkans" and, once lifted, will lead to "the migration pressure increase[ing]" while France noted potential terrorist threats, namely the "vulnerability of States whose security forces are heavily involved in combating the spread of the COVID-19 pandemic is conducive to new terrorist plots".

In connection with the notification the Member States may, where necessary and in accordance with national law, decide to classify parts of the information although such classification must not preclude making it available to the European Commission and the European Parliament (SCB, art. 27). However, questions arise about the discretionary and not transparent decision regarding the classification.

Another aspect of the SBC that we highlight is related to a requested report that shall be made within four weeks of the lifting of border control by the concerned Member State which has carried out border control. This report has to be submitted to the European Parliament, the Council and the Commission, and should outline particularly the initial assessment and the respect of the criteria referred to in Articles 26, 28 and 30, the operation of the checks, the practical cooperation with neighboring Member States, the resulting impact on the free movement of persons, the effectiveness of the reintroduction of border control at internal borders, including an ex-post assessment of the proportionality of the reintroduction of border control (SCB, art. 33). However, these reports are not accessible to the public, questioning again the transparency of this procedure.

And although travel bans of entry are not expressly foreseen by the SBC, for example in Hungary's notification we could see that "...In addition to introducing the above listed measures, the entry of persons, regardless of their nationality, arriving from the countries most affected by the infection, namely the Republic of Italy, the People's Republic of China, the Republic of Korea and the Islamic Republic of Iran to the territory of Hungary will be refused at all border crossing points"²⁴.

Conclusions

Until recently only some Member States have reintroduced controls on their internal borders, mainly in response to the influx of migrants in 2015. As we can see, Member States have the autonomy to restrict free movement of persons between Member States, and protecting the public health is a legitimate reason.

²³ The documents are available in the online document register of the EU Council <https://www.consilium.europa.eu/en/documents-publications/public-register/>

²⁴ About the notifications see https://ec.europa.eu/home-affairs/system/files/2021-11/Full%20list%20of%20notifications_en.pdf; and https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en

Public health is a competence shared between the European Union and the Member States, and EU action in this area is primarily intended to support and complement actions taken by individual Member States, e.g. national policies battling cross-border threats to health. The recent pandemic situation allows to diverge from the regular rules, but the pandemic offered another possibility to use public policy and security to follow their national policies.

Protection of public health can lead to different measures but reinstating border control – whether considering the threat as foreseeable or as requiring immediate action – has to meet the criteria of necessity, last resort, proportionality and non-discrimination. It is also important to recognize that administrative obstacles (e.g. lacking trustworthy data to understand the scale of the disease) might lead to late classification of a disease as a pandemic (remember that WHO declaration is needed as a grounds for justifying the restriction of free movement between Member States) and may cause missed opportunities to combat threats.

French President, Emmanuel Macron had voiced his determination to reform Schengen among others with enforcing new security controls for Europe, intensifying common border protection with a real security police force at the external borders of the area under the French presidency of the Council of the EU during the first half of 2022. Also, the European Commission has presented a new strategy to strengthen the Schengen Area with the aim to address issues identified in the pandemic and has the objective for an effective management of the EU's external borders, strengthening internal measures and ensuring robust preparedness and governance. In line with this we shall underline that the separately handed closure of European borders by some Member States undermines one of the building bricks of European integration, the Schengen agreement and the freedom of movement. Internal border closures, controls, and their lifting are based on consideration individually by Member States, but the close coordination between Member States is of utmost importance. Even though past crises offered experiences for future events, the Member States used border policies without taking into consideration an integrated approach, and if they are willing to adopt one the situation created by the 2015 migration crises and the recent pandemic will not repeat again.

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