

## ARTICLE

# Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona

H. van Eijken\* and J.J. Rijpma†

One year down the road, this article evaluates the travel restrictions imposed in response to the Covid-19 pandemic, first, in the light of the rules of the Schengen acquis (controls at the internal and external borders) and, second, under the provisions on the free movement of EU citizens. It will be argued that, as often is times of crisis, the existing legal framework has proven inadequate to respond to unforeseen circumstances. The result has been the primacy of national executive action. Despite the active role of the EU institutions in coordinating national responses and bringing them in line with EU law, ultimately, more binding coordination and regulation is required to ensure legal certainty and manage mobility, especially if the coronavirus is here to stay.

**Keywords:** free movement of persons; Schengen; borders; Covid-19; EU citizenship

## 1. Introduction

Early 2020 the first isolated COVID-19 infections were identified in Europe. At that time, the risk of the novel coronavirus was not yet fully acknowledged. Just days before the World Health Organization (WHO) defined COVID-19 as a *public health emergency of international concern*, the European Centre for Disease Prevention and Control (ECDC), the EU's agency set up in 2004 in the wake of the SARS epidemic to strengthen the EU's preparedness against infectious diseases, still declared that all Member States were sufficiently prepared to prevent or control a possible outbreak.<sup>1</sup> But when on 11 March 2020, the WHO qualified the global spread of the virus as a pandemic, Europe already found itself in the midst of it.

There can be no doubt that the interconnectedness of a globalised world has contributed significantly to the spread of the virus. Following a familiar pattern in the history of contagious diseases, countries across the globe have responded with travel restrictions and entry bans.<sup>2</sup> Especially in the first phase of the pandemic, borders were back with a vengeance, also in Europe. However, once a virus has widely spread amongst a population, borders are of limited use and become mostly symbolic markers of a protective state. In the European Union, they are also a stark reminder that the benefits of European integration should not be taken for granted, as the continent is once again divided along national lines – a tangible symbol of diverging Member State approaches to combating the disease.

Controls at the Member States' internal borders were lifted relatively soon and in a coordinated effort, by mid-June 2020, as the first wave of infections subsided and the pressure mounted to rescue Europe's tourist season.<sup>3</sup> However, free movement within the EU remained subject to a patchwork of national travel

\* H. van Eijken is assistant professor EU law and researcher in RENFORCE, Utrecht University, School of Law, NL. email: [H.vanEijken@uu.nl](mailto:H.vanEijken@uu.nl).

† J.J. Rijpma is Professor of EU law and Jean Monnet Professor at Leiden Law School, NL. email: [j.j.rijpma@law.leidenuniv.nl](mailto:j.j.rijpma@law.leidenuniv.nl).

<sup>1</sup> ECDC, 'Novel coronavirus: Three cases reported in France' (ECDC 25 January 2020) <<https://www.ecdc.europa.eu/en/news-events/novel-coronavirus-three-cases-reported-france>> accessed 1 July 2021.

<sup>2</sup> Regulation (EC) No 851/2004 of 21 April 2004 establishing a European Centre for disease prevention and control [2004] OJ L142/1; UNWTO, 'Tightened Travel Restrictions Underline Current Challenges for Tourism' (UNWTO 8 March 2021) <<https://www.unwto.org/news/tightened-travel-restrictions-underline-current-challenges-for-tourism>> accessed 1 July 2021.

<sup>3</sup> The authors acknowledge that different Member States have experienced different 'waves' at different points in time and of different intensity. Nonetheless, a rough distinction can be made between a first wave at the start of the pandemic until spring

restrictions, including quarantine and test requirements. As new and more contagious strains emerged, Member States continued to restrict mobility within their territories, as well as between them. With the virus continuing to spread globally, non-essential travel to the Schengen area also remained banned for all but a few third countries.

The approval of vaccines from December 2020 onwards, capable of preventing contagion and hospitalisation, proved to be the proverbial game changer. They allowed Member States to progressively ease restrictions as their vaccination campaigns gained momentum. It was in that positive spirit, that the Commission proposed a digital pass that could serve as proof that the holder would no longer pose a risk to public health and that would ensure interoperability of similar initiatives being developed at Member State level.<sup>4</sup> The EU legislator adopted the Regulation on an EU Digital COVID Certificate just in time for the holiday season.<sup>5</sup>

This article evaluates the travel restrictions imposed in response to the pandemic; first, in the light of the rules of the Schengen *acquis* (controls at the internal and external borders) and, second, under the provisions on the free movement of EU citizens. It will be argued that, as often in times of crisis, the existing legal framework has proven inadequate to respond to the challenges posed by the pandemic. The result has been the primacy of national executive action. Despite the active role of the EU institutions in coordinating national responses and bringing them in line with EU law, ultimately, more binding coordination and regulation will be required. Given that COVID-19 is unlikely to disappear in the near future, EU law will need to provide legal certainty in the face of scientific uncertainty if it wishes to effectively safeguard EU's citizens' fundamental freedom of movement and open borders.

## 2. The comeback of borders in Europe

The initial response to the arrival of COVID-19 in Europe was hesitant. In February 2020, Council Conclusions stressed the need for a reinforced coordination between Member States, including, if necessary, measures on travel, but without prejudice to free movement within the EU.<sup>6</sup> Yet, even Prime Minister Conte of Italy, the first Member State to be seriously affected by the virus, initially opposed the introduction of border controls within the Schengen area. European Commissioners Kyriakides (Health) and Lenarčič (Crisis Management) also expressed little support for reinstating border controls, other than on the basis of a thorough risk analysis and scientific advice, stressing that any restriction would have to be proportionate and coordinated.<sup>7</sup> Also with regards to international travel, Commission President von der Leyen and European Council President Michel condemned the United States' decision to impose a travel ban on Europe, stating that 'the Coronavirus is a global crisis, not limited to any continent and it requires cooperation rather than unilateral action.'<sup>8</sup>

However, as the virus spread across Europe, one Member State after the other reintroduced border controls and imposed travel restrictions. On 16 March 2020, the Commission called upon Member States to discourage travel outside their country.<sup>9</sup> It also issued Guidelines on border management in an attempt to avoid disruptions in the functioning of the internal market.<sup>10</sup> Even so, on the 25th anniversary of the

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2020, a second wave starting in autumn 2020 and coinciding with the emergence of new COVID-19 strains, a third wave in early 2021, as the Delta variant became prevalent in continental Europe. Variants were initially referred to by geographical location of their identification; the WHO has since adopted a system of naming new strains with reference to the letters of the Greek alphabet, in order to avoid stigmatization: Frank Konings et al., 'SARS-CoV-2 Variants of Interest and Concern naming scheme conducive for global discourse' (2021) 6 *Nature Microbiology*, 821–823.

<sup>4</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate) COM(2021)130 final, 17 March 2021.

<sup>5</sup> Regulation (EU) 2021/953 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 [2021] OJ L 211/1.

<sup>6</sup> Council of the EU, 'Council Conclusions on COVID-19' 6038/20 conclusion 15b, 13 February 2020.

<sup>7</sup> Sarantis Michalopoulos, 'Commission calls for coordination before any border measures for coronavirus' (Euractiv 24 February 2020) <<https://www.euractiv.com/section/health-consumers/news/commission-calls-for-coordinated-proportional-border-measures-for-coronavirus/>> accessed 1 March 2021.

<sup>8</sup> European Commission, 'Joint Statement by President von der Leyen and President Michel on the U.S. travel ban' (Statement) 20/449, 12 March 2020.

<sup>9</sup> European Commission, 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU' (Communication) COM(2020) 115 final 3, 16 March 2020.

<sup>10</sup> European Commission, 'COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services' (Communication) [2020] OJ C861/1, 16 March 2020.

abolition of border controls at internal borders, more than half of the Schengen countries had reported the reintroduction of internal border controls.<sup>11</sup> These controls at the internal borders were coupled with a ban on non-essential travel from outside the EU at the external borders.

### 2.1. The introduction of a European entry ban

On 17 March 2020, in a video meeting of the European Council, Member States expressed their support for a temporary restriction on non-essential travel from outside the Schengen area.<sup>12</sup> They did so on the proposal of the same Commission that only days before had scolded other countries for banning travel from the EU. The EU's entry ban entered into force on 19 March 2020 for a period of thirty days.

Although described as a European entry ban, it was neither a full closure of the external borders nor a binding act of Union law. It was a coordinated approach by the Member States on the interpretation of the entry conditions on public health and purpose of stay in the Schengen Borders Code (SBC).<sup>13</sup> The Schengen Borders Code exhaustively lists these conditions which are applied by the Member States' border guard authorities when controlling the external border.<sup>14</sup> One should recall that despite the emphasis on a shared responsibility, Member States themselves remain responsible for the management of their respective parts of the external borders.

Although the Schengen Borders Code does not provide any of the EU institutions with a legal basis to impose a generalised closure of Schengen territory, given the existence of common external borders, it is only logical that the Commission took the initiative for coordination at EU level. The fact that it was the European Council, Europe's highest political institution, that ultimately endorsed the coordinated approach, is exemplary for its executive role in times of crisis.<sup>15</sup>

The common approach was followed by all Schengen states, including the Schengen associated countries (Iceland, Norway, Liechtenstein and Switzerland) and the Member States that do not yet fully apply Schengen (Romania, Bulgaria, Cyprus and Croatia). Non-Schengen Member State Ireland, as well as the United Kingdom, then still under the transition period, were invited to adhere, but chose not to do so. The entry ban does not apply to Union citizens, citizens of the Schengen association countries, or their family members. Third-country national holders of an EU long-term resident permit are also excluded. A separate annex lists specific categories of travellers that are excluded from the ban, amongst which frontier workers, travellers in crucial professions, such as the healthcare sector and transportation, passengers with compelling family circumstances, and persons claiming international protection.

The 'entry ban' was extended three times, until 30 June 2020.<sup>16</sup> On that day, the Council adopted a recommendation, based on its general power to adopt recommendations (Article 292 TFEU) and the Union's competence in the field of external borders (Article 77[2][b] TFEU), providing the ban with a, non-binding, basis in EU law. Recommendation 2020/912 aims to ease restrictions on international travel by providing criteria for designating 'safe third countries', with regard to which the Member States should lift restrictions.<sup>17</sup> The Commission simultaneously published guidance on the resumption of visa operations.<sup>18</sup>

The list of safe countries is based on a set of cumulative criteria, which include the epidemiological situation, containment measures in place, social-economic considerations, and is based on reciprocity. It is reviewed every two weeks. The recommendation is not binding, and the list has not been followed by all Schengen states, although none of these non-compliant states has been less restrictive.<sup>19</sup> In response to the emergence of new COVID-19 strains, the Council Recommendation was updated on 2 February 2021,

<sup>11</sup> Directorate General Justice and Home Affairs (EU), 'Temporary Reintroduction of Border Control' <[https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en)> accessed 1 July 2021.

<sup>12</sup> European Council, 'Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19' (Statements and remarks), 17 March 2020.

<sup>13</sup> Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

<sup>14</sup> *ibid.*, Title II; Case C-575/12 *Air Baltic Corporation* ECLI:EU:C:2014:2155, [2014] ECR I-000 [60]–[61].

<sup>15</sup> Liza Waters and Luuk van Middelaar, *Alarums and Excursions. Improvising politics on the European stage* (Agenda Publishing, Newcastle upon Tyne 2019).

<sup>16</sup> European Commission, Communication on the second assessment of the application of the temporary restriction on non-essential travel to the EU, COM(2020)222 final, 8 May 2020, 3.

<sup>17</sup> Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2020] OJ L2081/1, 1–7.

<sup>18</sup> European Commission, 'Guidance for a phased and coordinated resumption of visa operations' (Communication) C(2020) 3999 final 2, 11 June 2020.

<sup>19</sup> In line with Council Recommendation (EU) 2020/912 (n 17), Article 7.

describing in more detail the criteria to be taken into account as regards the epidemiological situation, and allowing Member States to reintroduce restrictions for countries on the list in case of a rapidly worsening epidemiological situation in those countries.<sup>20</sup>

In May 2021, the Council updated the Recommendation once more, adding the progress in vaccinating the population to the criteria.<sup>21</sup> Although this has made it possible to add more countries to the 'safe' list, for the majority of third countries the restrictions remain in effect until today.<sup>22</sup> In view of the continued emergence of new variants, the Council also introduced an emergency break for situations in which the epidemiological situation of a third country quickly deteriorates. In such case, the Member States should, exceptionally, adopt swift travel restrictions into the EU and urgently discuss the matter, meeting in Council, at review the situation at least every fortnight.

### 2.1.1. Third-country nationals at the external border

Under Article 6(1)(a) and (c) SBC, third-country nationals must be able to justify the purpose of their stay and may not be regarded as a threat to public health. Other than what can be inferred from the categories of travellers that are exempt from the ban, it is unclear what should be considered 'essential' for evaluating the nature of the purpose of stay.

The general nature of the restriction on non-essential travel also raises questions as to the requirement of Article 4 SBC that all decisions are 'individual.' Under the Visa Code, the Court of Justice of the European Union (CJEU) has allowed elements related to the country of origin to be taken into account for the application of the public security exception.<sup>23</sup> Under the SCB, the Court has held that the concept of public policy covers 'any threat' to public policy.<sup>24</sup> One could argue that, as long as there is an individual consideration of each traveller's case, the requirement of an individual decision is fulfilled.<sup>25</sup> Interesting, in this regard, is a judgment by the Administrative Jurisdiction Division of the Dutch Council of State that expressly held that the entry ban is not concerned with the danger posed by an individual traveller, but is a measure of general prevention. Therefore, even after quarantine (in border detention) had passed, the initial ground for refusal of entry, the threat to public health, remained valid.<sup>26</sup> Although it seems perfectly reasonable to uphold the initial refusal at the border, as well as the detention that followed for the duration of 14 days, the obligation to return seems disproportionate to the initial aim of protecting public health.<sup>27</sup>

Article 8 SBC regulates checks at the external borders for the purpose of verifying whether someone fulfils the entry requirements of Article 6 SBC. Border guards must ascertain for Union citizens and third-country nationals alike, that they do not constitute a threat to public policy, internal security, public health or the international relations of any of the Member States.<sup>28</sup> The Schengen Borders Code does not specify what sort of public health checks may be carried out. The Council's Recommendation of 30 June 2020 is silent in this regard. Under the Recommendation's updated version of 2 February 2021, Member States should request a recent negative PCR test result.<sup>29</sup>

It is not entirely clear how the Commission's Guidelines of 16 March 2020 should be read in relation to the Council Recommendation or the Schengen Borders Code. Under the Guidelines, the Commission calls for screening for symptoms or exposure to the virus in passengers entering or leaving the country, without distinguishing between EU citizens and third-country nationals. Suspected cases should be isolated,

<sup>20</sup> Council Recommendation (EU) 2021/132 of 2 February 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2021] OJ L41/1.

<sup>21</sup> Council Recommendation (EU) 2021/816 of 20 May 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2021] OJ L182/1.

<sup>22</sup> Under the latest update of the Recommendation, 24 countries have been listed as safe: Council Recommendation amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, Brussels, 30 June 2021, Council document Nr. 10277/21.

<sup>23</sup> Case C-544/15 *Safar Fahimian v. Germany* (2017) ECLI:EU:C:2017:255 [40]–[41].

<sup>24</sup> Case C-380/18 *Staatssecretaris van Justitie en Veiligheid v. EP* (2019) ECLI:EU:C:2019:1071 [42].

<sup>25</sup> Daniel Thym and Jonas Bornemann, 'Schengen and Free Movement Law During the First Phase of the COVID-19 Pandemic: Of Symbolism, Law and Politics' (2020) *European Papers – A Journal on Law and Integration* 1143.

<sup>26</sup> ABRvS 17 February 2021, ECLI:NL:RVS:2021:285 [8.1].

<sup>27</sup> One could wonder to what extent the fear that another outcome would have turned border detention facilities into a free alternative for quarantine hotels played a role in this case.

<sup>28</sup> It should be noted that a threat to public health is also a ground for rejecting a visa application (Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1 Article 21(2)(d).

<sup>29</sup> Council Recommendation (EU) 2021/132 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2021] OJ L41/1.

although Member States would still be able to refuse entry to a non-resident third-country national who poses a threat to public health. Any decision on refusal of entry would also need to be proportionate and non-discriminatory.

Presumably, the Guidelines guide the application of the Schengen Borders Code in relation to the categories of travellers not caught by the Council Recommendation listed in Annex II and those travellers from safe third countries. Even though in relation to public policy the Court has previously held that measures must be taken 'in the light of considerations pertaining to the protection of public policy or public security in the Member State imposing the measure,' the nature of the health hazard posed by the pandemic must mean that isolation and treatment are to be given priority over a refusal of entry.<sup>30</sup>

### 2.1.2. Asylum seekers at the external border

The restriction on non-essential travel does not apply to persons applying for international protection. Seeking asylum is by its very nature 'essential' in line with the rationale of the right to seek asylum. It is also in line with the provisions of the Dublin Regulation and the Procedures Directive, which provide that an application for asylum can be made at the border.<sup>31</sup> Even so, at the start of the pandemic several Member States closed their borders to asylum seekers or suspended procedures.<sup>32</sup> There is no basis for this in European law.<sup>33</sup>

When guarding the external border, a Member State acts within the scope of EU law, since it applies the Schengen Borders Code. It is thus bound by the provisions of the Charter, in particular Article 4 (prohibition or torture and inhuman treatment) and Article 18 (right to asylum), which include the prohibition of *refoulement*. In addition, Article 14 SBC provides that although a person who does not meet the conditions for admission should in principle not be admitted, this does not affect obligations relating to asylum and international protection.

The Commission has indicated that the widespread practice of imposing quarantine measures on asylum seekers has no basis in the Reception Conditions Directive and can therefore only be based on national law in so far as it is reasonable, proportionate, and non-discriminatory.<sup>34</sup> Asylum seekers who present themselves at the border should not be treated differently from other travellers in this respect.<sup>35</sup> Moreover, the Reception Conditions Directive does offer Member States the possibility of requiring asylum seekers to undergo a medical examination for public health reasons which arguably could take place at the external borders as well.<sup>36</sup> Again, these checks should respect fundamental rights, the principle of proportionality, necessity, and non-discrimination, meaning that similar checks would be applied to other travellers.<sup>37</sup>

### 2.1.3. Union citizens at the external border

The ban on non-essential travel does not apply to Union citizens.<sup>38</sup> With regard to Union citizens, the entry criterion that a person may not constitute a threat to public health is defined by reference to the provisions on the free movement of Union citizens, laid down in Article 21 TFEU and worked out in the Citizens

<sup>30</sup> Cf. Case C-33/07 *Jipa* ECLI:EU:C:2008:396, [2008] ECR I-5157 [25] in which the European Court of Justice ruled, with regard to 'public policy', that a public policy measure must be taken 'in the light of considerations pertaining to the protection of public policy or public security in the Member State imposing the measure.'

<sup>31</sup> Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31, Article 3(1); Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96, Article 3(1).

<sup>32</sup> European Council on Refugees and Exiles (ECRE), 'COVID-19 Measures Related To Asylum and Migration Across Europe' (ECRE 8 April 2020) <<https://www.ecre.org/wp-content/uploads/2020/04/COVID-INFO-8-APRIL-.pdf>> accessed 1 July 2021.

<sup>33</sup> Note however Daniel Thym and Kay Hailbronner, 'Grenzenloses Asylrecht? Die Flüchtlingskrise als Problem europäischer Rechtsintegration', *JuristenZeitung*, 71/15–16 (2016), 762–763 who argued that in the context of the refugee crisis that in case of a sudden and massive influx Article 72 TFEU could potentially warrant a border closure.

<sup>34</sup> European Commission, 'COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement 2020/C 126/02' (Communication) [2020] OJ C126/12, 17 April 2020; Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [2020] OJ L180/60.

<sup>35</sup> *ibid.*

<sup>36</sup> Directive 2013/32/EU (n 34), Article 13.

<sup>37</sup> European Commission (n 34).

<sup>38</sup> Not to the citizens of the Schengen Associated countries, to whom either *mutatis mutandis* the provisions of Directive 2004/38/EC apply (EEA countries), or provisions that are similar in content and scope (Switzerland) apply.



Directive (CD).<sup>39</sup> In its Guidelines of 16 March 2020, the Commission explicitly stated this under the heading of internal borders, but it applies equally to Union citizens at the external borders based on Articles 3(a) and 8(6) SBC.<sup>40</sup> The Council's Recommendation (EU) 2020/912 of 30 June 2020 again exempts Union citizens from restrictions on non-essential travel.<sup>41</sup> There is good reason for this, as the refusal of entry of a Union citizen would effectively exclude that person from the territory of the Member States, or, in any case, require them to travel directly to their own Member State.<sup>42</sup>

Article 5 CD states that upon entry a Union citizen may only be subject to verification of their nationality and travel documents.<sup>43</sup> In its early case law, the CJEU held that putting stamps on travel documents or enquiring about the purpose of the journey and the means available is a formality equivalent to asking for a visa and thus forbidden.<sup>44</sup> Any refusal of entry by a Union citizen at the external border constitutes an obstacle to the free movement of Union citizens which must be justified by the Member States. Public health, public order, and public security were already included in the Treaty of Rome as exceptions to the free movement rules. With regard to the free movement of Union citizens, they were developed in the Citizens Directive which, unlike the Schengen Borders Code, does contain a specific provision for the prevention of infectious diseases: Article 29 CD.

Article 29(1) CD provides that measures restricting the freedom of movement are only allowed for 'diseases with epidemic potential as defined by the relevant instruments of the WHO and other infectious diseases or contagious parasitic diseases,' and only if 'protection provisions' apply to the Member States' own nationals as well. The predecessor of the Citizens Directive contained a similar provision, accompanied by an annex listing diseases such as syphilis and tuberculosis, as well as a more general reference to infectious diseases, and 'diseases which might endanger public health.'<sup>45</sup> Given the epidemic nature of COVID-19 and the full application of restrictive measures to Member States' own citizens, it may safely be assumed that the conditions for the application of this article are met.<sup>46</sup> It should be noted that if the disease manifests itself more than three months after arrival, this is no longer a reason for expulsion (Article 29[2] CD).<sup>47</sup>

Article 29(3) CD allows Member States to impose a medical examination free of charge within three months of the date of entry in the case of serious indications. It could be argued that this is also allowed at the border, however the Directive explicitly states that such examinations may not be carried out systematically. Requiring proof of a negative PCR test as a precondition for entry, as prescribed by the latest version of the Council Recommendation runs counter to the wording of Article 29(3) read in conjunction with Article 5 of the Directive. In section 3.1 a closer look will be had at public health as justification for a restriction of the right to move and reside freely on the territory of Member States by EU citizens.

## 2.2. Reintroduction of internal border controls

The Schengen Borders Code allows Member States to temporarily reintroduce border controls at all or parts of their internal borders. Article 33 SBC provides that in such a case, the rules governing the crossing of external borders will apply *mutatis mutandis*. Since the absence of controls at the internal borders is the rule, controls may only be brought back in the event of a serious threat to 'public policy' or 'internal security.'

<sup>39</sup> Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 ('Citizens Directive').

<sup>40</sup> European Commission (n 9) 4.

<sup>41</sup> Alongside third-country nationals who enjoy equivalent free movement rights or who are holders of an EU long-term resident permit: Council Recommendation (EU) (n 17) Recommendation 5.

<sup>42</sup> Under international law a country cannot in principle refuse entry to its own nationals. See: Rutsel Martha and Stephen Bailey 'The right to enter his or her own country' (EJIL:Talk! 23 June 2020) <<https://www.ejiltalk.org/the-right-to-enter-his-or-her-own-country/>> accessed 1 July 2021. The sensitivity of denying a Union citizen access follows from the Ruiz Zambrano case law (Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, [2011] ECR I-01177).

<sup>43</sup> At the external borders, EU citizens may also be subject to a check in relevant databases, SBC, Article 8.

<sup>44</sup> Case C-157/79 *Regina/Pieck* ECLI:EU:C:1980:179, [1980] ECR 2171; Case C-68/89 *Commission v. the Netherlands* ECLI:EU:C:1991:226, [1991] ECR I-02637.

<sup>45</sup> Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56/850, replaced by the Citizens Directive, with reference to the International Health Regulation No 2 of the WHO (1951).

<sup>46</sup> See for an overview of the different national measures: Joelle Grogan, 'Introduction & List of Country Reports' (Verfassungsblog 6 April 2020) <<https://verfassungsblog.de/introduction-list-of-country-reports/>> accessed 1 July 2021.

<sup>47</sup> Given the incubation period of a maximum of two weeks, an infection manifesting itself after that period would need to be considered local.

The reintroduction of internal border controls should be temporary, limited to what is strictly necessary to respond to the serious threat and only as a last resort (Article 26 SBC). In case of foreseeable circumstances, controls may be reintroduced for 30 days or for the foreseeable duration of the threat (Article 25 SBC). This period may be extended by thirty-day periods, up to a maximum of six months. In the event of unforeseeable circumstances, requiring immediate action, controls may be introduced for a period of ten days, renewable with twenty-day periods, up to a maximum of two months (Article 28 SBC).<sup>48</sup> When reintroducing border controls, Member States must inform the other Member States, the Commission, the Council and Parliament in writing, providing 'all relevant data' on the threat (Article 27 SBC).

In response to the COVID-19 crisis, most Member States invoked unforeseeable circumstances, some foreseeable circumstances, and others added COVID-19 as a ground for the prolongation of controls that were already in place at their internal borders.<sup>49</sup> These prior controls were motivated by terrorist threats, secondary movements (arrival of refugees from other Member States), and the situation at the external borders.<sup>50</sup> Importantly, few Member States complied fully with the procedural requirements of Article 27 SBC, confirming once more that Member States consider the reinstatement of controls at the internal borders a 'quasi-sovereign' prerogative.<sup>51</sup>

In the Schengen Borders Code, public health as such is not mentioned as a ground for reintroducing border controls. This may explain why France, in its first notification, referred not only to the fight against further spread of the virus, but also to 'the continuing threat of terrorism and the risk that terrorists would use the health situation to carry out attacks.'<sup>52</sup> Given the logic of this provision, as well as the exceptional and generalised threat to public health, it is not difficult to classify the pandemic as a serious threat to public order. Even under the strict interpretation of free movement law, it would still be possible to speak of a 'genuine, present and sufficiently serious threat' affecting a 'fundamental interest of society' given also the broader societal disruption to which the pandemic has given rise.<sup>53</sup> An additional justification may be found in Article 35 of the Charter, which prescribes that a 'high level of human health protection' be ensured in the implementation of Union policies. Of course, one cannot deny that there is a degree of purposive interpretation involved in accepting that public health concerns are covered by the public policy exception, especially since the EU legislator did include this ground for exceptions at the external borders. Yet, this may exactly be proof of inadequateness of the legislative framework in place. The question is whether, provided that the principles of proportionality and non-discrimination are respected, such interpretation is not to be preferred over a legal vacuum that would result from a strict adherence to the letter of the law.

The Commission in its Guidelines of 16 March 2020, indicated that in an exceptionally critical situation, the risk of a contagious disease would justify the reintroduction of border controls.<sup>54</sup> Given the Commission's earlier reluctance to challenge the quasi-permanent reintroduction of controls since 2015, some expressed their fear the 'worrying political and economic costs of a long-lasting *non-Schengen*.'<sup>55</sup> However, as COVID-19 has now become endemic, the necessity and proportionality of the remaining controls at the internal borders is increasingly questioned.<sup>56</sup> In its Communication of 19 January 2021, the Commission already stated that targeted measures have more impact and cause less disruption than border closures, blanket

<sup>48</sup> The Commission considers both deadlines as cumulative, see: European Commission, 'Proposal for amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders' COM(2017) 571 final, 27 September 2017; Article 29 SBC provides an additional ground for reintroduction, with a maximum of two years, in the event of exceptional circumstances endangering the functioning of Schengen as a result of 'persistent serious deficiencies relating to external border control' and 'insofar as those circumstances constitute a serious threat to public policy or internal security'.

<sup>49</sup> Stefano Montaldo, 'The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste' (2020) *European Papers – A Journal on Law and Integration* 523, 526.

<sup>50</sup> By and large these controls, introduced in the wake of the refugee crisis, have been in place since 2015, based on a back and forth between Articles 28, 25 and 29 SBC, see: Jakub Jasiewicz, 'A not-so-temporary reinstatement of internal border controls?' (LeidenLawBlog, 16 May 2018) <<https://leidenlawblog.nl/articles/a-not-so-temporary-reinstatement-of-internal-border-controls>> accessed 1 July 2021.

<sup>51</sup> Thym and Bornemann (n 25), 1148.

<sup>52</sup> Directorate General Justice and Home Affairs (EU) (n 11).

<sup>53</sup> Citizens Directive, Article 27(2).

<sup>54</sup> European Commission (n 10), 18. See in addition: European Commission (n9).

<sup>55</sup> See in that regard: Sergio Carrera and Ngo Chun Luk, 'Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area' (2020) 04 CEPS Paper in Liberty and Security in Europe 23 and Montaldo (n 50) 529–530.

<sup>56</sup> Jörg Gerkrath, 'The Reintroduction of internal EU Border Controls: a disproportionate, ineffective and illegal instrument of combating the pandemic' (2021) no 47 Weekend edition EU law live.

travel bans or the suspension of traffic connections.<sup>57</sup> Generally, the Commission has become more vocal in its opposition to border controls and has sent letters to six Member States, including Germany, who once again reintroduced border controls in response to new variants of the COVID-19 virus.<sup>58</sup>

Meanwhile, questions on the legality of the prolonged reinstatement of internal border controls pre-COVID have now reached the CJEU, through a preliminary reference from Austria.<sup>59</sup> This case will be important to determine to what extent Member States retain power over their borders under the SBC. It will also shed light on article 72 TFEU, which states that the final responsibility for internal security lies with the Member States, and Article 4(2) TEU which provides that the EU shall respect the exercise by the Member States of essential state functions. Although one could have argued at the start of the pandemic that a collapse of the public health system in a Member State could threaten essential state functions, with a breakdown of public order as consequence, at the current stage of the pandemic, continued controls at the internal borders to counter the spread of COVID-19 cannot be justified.<sup>60</sup>

### 3. Restrictions on the free movement of Union citizens

Border controls may hinder, but do not necessarily block cross-border mobility. The SBC only lays down rules as regards border controls. The Commission in its Guidelines of 16 March 2020 stated that Member States could carry out health checks at the internal borders without having to formally reintroduce border controls, since the purpose of such screening would not be entry control.<sup>61</sup> The Commission also suggested the possibility of police checks based on risk assessments or local police measures as an alternative to internal border controls, which it had previously recommended in the aftermath of the refugee crisis as an alternative to the reinstatement of border controls.<sup>62</sup> Even if one assumes that the reintroduction of border controls is legal, or in any case was at the beginning of the pandemic, the real problem lies with the imposition of travel restrictions.<sup>63</sup>

As early as 2004, Groenendijk noted that the reintroduction of internal border controls often leads to unjustified restrictions on the right of Union citizens to enter and reside in the territory of another Member State.<sup>64</sup> In the early months of the pandemic, a number of internal borders were *de facto* sealed off for anything but essential travel, which constitutes a serious interference with the right to free movement. A similar border closure took place in December 2020, as Member States suspended traffic connections with the United Kingdom in response to the new Alpha strain of the COVID-19 virus. The Commission recognised the need to take 'swift temporary precautionary action,' but underlined that free movement rules still applied during the Brexit transition period, and that therefore Member States should not refuse entry to those benefitting from the right of free movement, provided they undergo a test or quarantine.<sup>65</sup>

<sup>57</sup> European Commission, 'A united front to beat COVID-19' (Communication) COM(2021) 35 final, 19 January 2021.

<sup>58</sup> Joshua Posaner and Hanne Cokelaere, 'Berlin bats away EU concern over "painful" coronavirus border curbs' (Politico, 15 February 2021) <<https://www.politico.eu/article/germany-border-controls-coronavirus-reaction/>> accessed 1 July 2021. These do not appear to have been letters of formal notice within the context of infringement proceedings on the basis of Art. 258 TFEU.

<sup>59</sup> Case C-369/20 *NW v. Bezirkshauptmannschaft Leibnitz*, [2020] OJ C348/8.

<sup>60</sup> The Court has put the bar for recourse to these articles very high: Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v. Poland* (2020) ECLI:EU:C:2020:257 [143]; Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net v. Premier Ministre* (2020) ECLI:EU:C:2020:791 [135].

<sup>61</sup> It should be noted that since the outbreak of the pandemic, and in particular in response to the emergency of new virus strains, numerous Member States have also introduced flight bans, *de facto* closing their air borders. In relation to third countries such bans must be considered within their sovereign prerogative of the Member States, but as regards intra-EU flights this may be different. Pursuant to Regulation (EC) No 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3 Article 21 a Member State may only take proportionate emergency measures involving a limitation of traffic rights 'to resolve sudden short-term problems caused by unforeseeable and unavoidable circumstances.'

<sup>62</sup> European Commission, 'on a New Pact on Migration and Asylum' (Communication) COM(2020) 609 final 15, 23 September 2020; European Commission, 'Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls' (Communication) C(2020) 3250 final 10, 13 May 2020.

<sup>63</sup> Daniel Thym, 'Travel Bans in Europe: A Legal Appraisal (Part I)' (EU Migration Law Blog, 18 March 2020) <<http://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-i/>> accessed 1 July 2021. This is not to argue that the reinstatement of border controls is not problematic in and of itself, see Stefan Salomon and Jorrit Rijpma, GLJ (2021), forthcoming.

<sup>64</sup> Kees Groenendijk, 'Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?' (2004) 10/2 European Law Journal 150.

<sup>65</sup> Commission Recommendation (EU) on a coordinated approach to travel and transport in response to the SARS-COV-2 variant observed in the United Kingdom' C(2020) 9607 final [2020] OJ L436/72, 22 December 2020.



It is important to recall that also less far-reaching measures, such as an active policy of deterrence at the border,<sup>66</sup> restrictions on movement *within* the territory of the Member States,<sup>67</sup> or the urgent advice not to travel outside one's own Member State, constitute impediments to the free movement of Union citizens that will require a justification.<sup>68</sup>

### 3.1. The public health exception

Although it seems far-fetched at the current stage of the pandemic, one could imagine that at the early stages of the pandemic, at the prospect of a full collapse of the public health system, recourse would have been had to the internal market emergency clause of Article 347 TFEU. However, like with Article 4(2) TEU and Article 72 FEU, this would require serious internal disturbances affecting the maintenance of law and order. Instead, recourse was had to the health derogation to justify restrictions to exercise of the internal market freedoms, including the free movement of persons.

The public health exception of Article 29(1) of the Citizens Directive is likely to cover a wide range of Member State measures aimed at containing COVID-19 given the nature of the threat it poses to public health. At the same time, in order to withstand judicial scrutiny, measures have to be proportionate and apply without discrimination. They may also not serve economic ends.<sup>69</sup> This applies to all measures adopted both in the territory and at the border of a Member State.

The Commission's Guidelines of 16 March 2020 indicated that quarantine requirements or similar measures upon arrival from an area affected by COVID-19 would be justified, as long as they would also apply to a Member State's own citizens. In its Communication of 28 October 2020 on additional COVID-19 response measures, the Commission explicitly stated that while restrictions could be justified based on public health, they would have to be proportionate and non-discriminatory, both in law and fact.<sup>70</sup> Interesting in this regard is the ruling of the Higher Administrative Court for the State of North Rhine-Westphalia that struck down mandatory quarantine for all people returning to North Rhine-Westphalia. Since it applied indiscriminately to all people travelling from a risk area outside Germany, but not those staying in Germany – even if at the time parts of Germany experienced high infection rates themselves – it was found to violate the principle of equality.<sup>71</sup> It also found the ban to be disproportionate as it applied generally and did not differentiate between the epidemiological situation in different areas.<sup>72</sup>

Restrictions on grounds of public policy and public security cannot be based on factors that are unconnected to the individual and general preventive measures are prohibited (Article 27[3] Citizens Directive). Article 29 does not contain such specification. However, within the context of the proportionality test, the CJEU has always emphasised the need for an individual assessment. It is submitted that in the case of COVID-19, the generalised risk posed by the virus justifies the need for general preventive measures. It has been observed that the Court itself has at times accepted generalised exceptions to free movement rights.<sup>73</sup>

Unlike with public policy and public security, the case law on the public health exception in the area of free movement of persons is very limited. A rare exception is the *Bressol* case, in which Belgium invoked public health to defend its quota system for medicine and veterinary students from other Member States.<sup>74</sup> As foreign students were expected to return home after completion of their studies, Belgium feared for the quality and continuity of its healthcare system. The CJEU accepted this argument, but did put a heavy burden of proof on the Member States, who had to substantiate their claim with 'objective, detailed analysis, supported by figures.'<sup>75</sup>

As with the free movement of Union citizens, restrictions on the free movement of goods and services can, in principle, be justified on the grounds of public health. In its Communication of 15 May 2020 the Commission stressed that any restriction should remain limited to what is necessary and proportionate. All measures should be duly motivated, transparent, relevant and mode-specific, non-discriminatory, and

<sup>66</sup> On disincentives and restrictions to the free movement of goods, see: Case C-249/81 *Commission v. Ireland* (Buy Irish) [1982] ECLI:EU:C:1982:402, ECR 4005.

<sup>67</sup> Case C-100/01 *Oteiza Olazabal* (2002) ECLI:EU:C:2002:712 [32].

<sup>68</sup> Case C-249/11 *Byankov* (2012) ECLI:EU:C:2012:608.

<sup>69</sup> Article 27(1) Citizens Directive.

<sup>70</sup> European Commission, Communication on additional COVID-19 response measures, COM(2020) 687 final, 28 October 2021, 8.

<sup>71</sup> German Basic Law Article 3; OVG NRW, Beschluss vom 20. November 2020 – 13 B 1770/20.NE –, juris, Rn. paras 40–43.

<sup>72</sup> *ibid* par. 44.

<sup>73</sup> Case C-158/07 *Förster* ECLI:EU:C:2008:630, [2008] ECR I-8507 par. 50, 60; Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597 par. 59.

<sup>74</sup> Case C-73/08 *Bressol* ECLI:EU:C:2010:181, [2010] ECR I-2735.

<sup>75</sup> *ibid* par. 71.

maintain a level playing field in the Single Market.<sup>76</sup> Although the Commission mentions these criteria ‘in addition’ to proportionality, they can actually be considered as part and parcel to it.

In the context of the free movement of goods, there is an abundance of case law on the public health exception. Importantly, the Court has held that proportionality does not require that the same level of measures exist in all the Member States. In a case concerning the supply of medicines by doctors in Hungary, the CJEU stated that it was up to the Member States ‘to decide at what level they wish to ensure the protection of public health, and how this should be done.’<sup>77</sup> Since this level could be different per Member State, they should be granted a margin of discretion.<sup>78</sup> The Court added that the fact that less stringent rules apply in one Member State than in another does not mean that the measures taken by the Member State concerned are disproportionate.<sup>79</sup>

As regards the existence of scientific uncertainty, relevant in the context of a novel virus such as COVID-19, the precautionary principle requires authorities to give precedence to public health over economic interests.<sup>80</sup> Authorities must identify the risk, carry out a risk assessment and determine the level of risk they deem acceptable. In doing so, they must take account, *inter alia*, of the severity of the impact on public health, based on available scientific knowledge. In the face of scientific uncertainty, they are not required to wait for a risk to fully materialise. Based on their risk assessment, authorities may take preventive measures to manage the risk, which includes taking preventive measures which need to be proportionate, non-discriminatory, transparent, and consistent with similar measures already taken.<sup>81</sup> The need for measures to be consistent and systematic, is also present in the case law of the CJEU, in particular in areas where Member States have a margin of discretion, such as gambling law.<sup>82</sup> Policy coherence also links in with the requirement of non-discrimination. If a Member State wishes to restrict travel from (a region of) another Member State due to the epidemiological situation over there, policy coherence would require similar restrictive measures to be applied within the territory of the Member State, in general or from national regions in a comparable situation. Measures will also need to be sufficiently precise to comply with legal certainty, allowing individuals to know the extent of their rights and obligations under the Treaties.<sup>83</sup>

Based on the above, and in the absence of more specific secondary legislation, prescribing a harmonised course of action, Member States had a large leeway in deciding on the course of action they consider best suited in response to the virus, especially in the early phases of the pandemic, given the scientific uncertainty on COVID-19. It is beyond the remit of this article to assess individual Member States’ measures, but notwithstanding this broad discretion, even at a first glance, one can pose questions as regards the proportionality and coherence of some of Member States’ measures, such as blanket advisories against travel to other Member States, or imposition (and subsequent lifting) of restrictions which cannot be explained by reference to the epidemiological situation at the time.<sup>84</sup> As will be discussed below, the first legislative measure adopted in response to the pandemic, the EU Digital COVID Certificate will further limit Member States’ discretion in this regard.

### **3.2. EU coordination to safeguard free movement**

#### **3.2.1. First wave**

On 30 March 2020, the Commission issued guidance on the free movement of workers in cross-border situations, in particular frontier workers, posted workers, and seasonal workers.<sup>85</sup> It stated that the free movement of workers in critical occupations, including frontier workers, should be guaranteed. It provided a non-exhaustive list of critical professions, ranging from healthcare workers to people working on essential infrastructures to transport workers. Seasonal workers should be considered essential workers, in case of

<sup>76</sup> European Commission, ‘Guidelines on the progressive restoration of transport services and connectivity – COVID-19 (2020/C 169/02)’ (Communication) [2020] OJ C169/17, 15 May 2020.

<sup>77</sup> Case C-222/18 *VIPA* ECLI:EU:C:2019:751 [71].

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

<sup>80</sup> See in more detail: Iris Goldner Lang, ‘“Laws of Fear” in the EU: Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19’ [2021] EJRR, 1–24.

<sup>81</sup> Case T-31/07 *Du Pont de Nemours (France) and Others v Commission* EU:T:2013:167, paras 134–149 and the case law cited therein.

<sup>82</sup> Case C-46/08 *Carmen Media Group* ECLI:EU:C:2010:505, [2010] ECR I-08149 [68]; See also: Thym and Bornemann (n 25).

<sup>83</sup> Case C-54/99 *Eglise de scientologie* ECLI:EU:C:2000:124, [2000] ECR I-01335.

<sup>84</sup> See in more detail: Goldner Lang (n 80), 21.

<sup>85</sup> European Commission, ‘Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 102 I/03)’ (Communication) [2020] OJ C 102I/12, 30 March 2020.

critical harvesting. Other frontier workers should be allowed to continue crossing the border to their place of work, if the host Member State still allowed work in their sector. Frontier workers should be able to cross borders quickly, by providing special lanes or distributing stickers. Health checks on this group would be allowed at or after the border, but only in a non-discriminatory way, avoiding a duplication of checks.

Naturally, restrictions imposed at the internal borders also hinder the other internal market freedoms, more specifically goods and services. On 24 March 2020, the Commission issued Guidelines to ensure the continued operation of supply chains and essential services of general interest. It called upon Member States to give priority to freight transport at internal border crossings (e.g. through the use of 'Green Lanes' and transit corridors) and identify all major internal border crossings in the TEN-T network, and to minimise procedures and formalities.<sup>86</sup> In addition, it called on Member States to lift travel restrictions on non-symptomatic international freight transport workers, irrespective of their nationality (i.e. EU citizen or third-country national).

On 8 April 2020, with the situation in Europe significantly improving, Commission President von der Leyen and President of the European Council Michel presented a Joint Roadmap for lifting COVID-19 restrictions.<sup>87</sup> On 13 May 2020, the Commission followed up with a series of communications which, among others, addressed the possibility of gradually restarting tourism. One communication focused specifically on restoring freedom of movement and removing border controls at internal borders, which according to the Commission should be done in a proportionate and non-discriminatory fashion.<sup>88</sup> This would mean in particular that restrictions could not distinguish between a Member State's own citizens and those of another Member State, and that once restrictions would be lifted in relation to one Member State or region, they should be lifted in relation to all Member States or regions in a similar epidemiological situation. The Commission also argued that travel should be possible for personal reasons as well, such as visits to family.

Although previously hesitant about the idea of 'travel bubbles' between Member States, potentially fragmenting the internal market and violating the principle of non-discrimination, the Commission argued that the epidemiological situation in Member States should be leading in lifting restrictions. A second criterion was the extent to which restrictive measures such as social distancing (or physical distancing) could be adhered to during the journey, as well as at the border. Finally, the Commission, for the first time, argued that Member States should also take into account considerations of a socio-economic nature.<sup>89</sup> Whilst most controls at the internal borders were lifted on 15 June 2020, a great variety of Member State measures remained in place, which the Commission make accessible on a website specifically designated for this purpose.<sup>90</sup>

### 3.2.2. Second wave

Towards the end of the summer of 2020, the epidemiological situation started to deteriorate. At hindsight, given the surge in infections following the holiday season, one can conclude Member States had left their guards down too easily. Still hoping to safeguard free movement as much as possible by promoting safe travel and avoiding the reintroduction of internal border controls at all cost, the Commission proposed a Council Recommendation on a coordinated approach to the restriction of free movement in early September 2020, which was adopted a month later.<sup>91</sup> Under Recommendation 2020/1475, the ECDC publishes a weekly map, using a colour code (green, orange, red) to reflect the epidemiological situation in the Member States. The colour is determined using a common methodology, set out in the Recommendation, and based on the figures reported to the Centre by the Member States' health authorities. Member States should not restrict travel between green areas. Restrictions for travel between other areas should be proportionate and take into account the differences in colours. Member States should in principle not refuse entry of

<sup>86</sup> Trans-European Transport Network (TEN-T), 'Green Lanes' (*TEN-T*, 2020) <<https://ec.europa.eu/transport/sites/transport/files/green-lanes.pdf>> accessed 1 July 2021; European Commission, 'on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services' (Communication) C/2020/1897 [2020] OJ C961/1, 24 March 2020.

<sup>87</sup> European Commission, 'Joint European Roadmap towards lifting COVID-19 containment measures' (Communication) C/2020/2419 [2020] OJ C126/1, 17 April 2020.

<sup>88</sup> European Commission (n 62).

<sup>89</sup> For a schematic, albeit rather enigmatic, representation of these criteria, *ibid* 7.

<sup>90</sup> <[reopen.europa.eu/](https://reopen.europa.eu/)> accessed 1 July 2021.

<sup>91</sup> Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2020] OJ L337/3.

persons travelling from other Member States, but could require persons from non-green areas to undergo quarantine/self-isolation or to undergo a health test after arrival.

Travellers with an essential function should not be required to undergo quarantine while exercising their profession.<sup>92</sup> The Recommendation refers specifically to the list of essential workers in its Guidelines on the free movement of workers from 16 March 2020.<sup>93</sup> Restrictions should also not take the form of prohibitions on the operation of certain transport services.<sup>94</sup> The Recommendation extends the treatment of essential workers to travellers with a special need, such as persons travelling for imperative business or family reasons, including members of cross-border families.<sup>95</sup>

Two things are worth noting. First, like previous Commission documents, the Recommendation explicitly refers to travellers irrespective of nationality, meaning that the approach would apply to both EU and third-country nationals. Second, the Council confirmed the regional approach, already advocated by the Commission in its Communication of May 2020. In view of the internal market and the Schengen area as a single territory without internal borders this is fully justified. Indeed, many Member States already adopted a regional approach domestically, and throughout the summer national travel advisories would be adjusted for specific regions based on changes in the epidemiological situation. Regional approaches and differences can only be reflected on the ECDC's map to the extent that Member States themselves adopt such an approach and provide the Centre with regional data. As a result, many restrictions have continued to apply as between Member States, rather than regions.

Following the adoption of the Council Recommendation, the Commission published another Communication, on 28 October 2020, on additional COVID-19 response measures.<sup>96</sup> This may be explained by the need for practical implementation of the Recommendation, but also by rising infections in the weeks following its adoption. Amongst others, the Commission proposed to extend the Green Lane approach, ensuring that multi-modal transport would be allowed to cross borders in under 15 minutes. When Member States impose temporary restrictions at borders or sanitary controls, these should not excessively hamper free movement.<sup>97</sup> It issued further guidelines suggesting that Member States provide derogations for driving restrictions (such as weekend or night bans), exempt transport workers from curfews, and ensure the availability of ancillary services (e.g. refuelling stations, rest areas, etc).<sup>98</sup>

The Council Recommendation and the Commission's Guidelines, could not prevent that the rapid emergence of the Alpha strain resulted in a week of massive disruptions, in particular at the French/British border and the suspension of traffic connections with the United Kingdom. The Commission in response issued additional guidelines calling for transport staff to be exempted from any travel ban across any border, as well as testing and quarantine requirements when travelling across a border to and from a mode of transportation.<sup>99</sup> Nonetheless, the borders were only opened by France on the condition that all travellers, including essential workers, showed a negative test result.

### 3.2.3. Third wave

Early 2021, there was reason for cautious optimism, as new vaccines were receiving market authorisation from the European Medicines Agency (EMA) and vaccination campaigns started to take off. At the same time many Member States were facing a third wave of infections or are imposing strict lockdowns and curfews in an attempt to prevent a surge in cases, mainly due to the Alpha and Beta variants of the virus.

The Commission published a new Communication on 19 January 2021 called 'A united front to beat COVID-19' in view of the video conference of European leaders two days later.<sup>100</sup> On the one hand, the Commission's approach towards border closures and indiscriminate measures seemed more critical than before; on the other hand, it explicitly confirmed the need for continued restrictions, in the light of new virus strains, until vaccination would have sufficiently improved the epidemiological situation.

<sup>92</sup> *ibid* Recommendation 19.

<sup>93</sup> *ibid* Recommendation 19(a).

<sup>94</sup> *ibid* Recommendation 24.

<sup>95</sup> *ibid* Recommendation 19(e) 18.

<sup>96</sup> European Commission (n 70).

<sup>97</sup> *ibid* 10.

<sup>98</sup> European Commission, 'On upgrading the transport Green Lanes to keep the economy going during the COVID-19 pandemic resurgence' (Communication) COM(2020) 685 final, 28 October 2020.

<sup>99</sup> Commission Recommendation of 22 December 2020 on a coordinated approach to travel and transport in response to the SARS-CoV-2 variant observed in the United Kingdom, C(2020) 9607 final.

<sup>100</sup> European Commission (n 57).

The Communication also introduced the novel, and contentious, idea of a common vaccination certificate. Such certificates would in first instance serve health protection, but the Commission did not exclude other future cross-border applications. The idea was clearly an answer to calls from Member States such as Cyprus and Greece, heavily reliant on tourism, to use 'vaccine passports' as a means to kick-start travel. The oral conclusions of President Michel, following the European leaders' video conference in all aspects followed the Commission's Communication.<sup>101</sup> Most importantly, European leaders emphasised the need to speed up vaccinations and agreed to work on a standardised and inter-operable vaccination certificate, without deciding anything on the exact use of such certificate and leaving it to a later stage.

On 2 February 2021, following a proposal by the Commission, the Council updated its Recommendation on restrictions on non-essential travel to and inside the European Union.<sup>102</sup> The Recommendation on Free Movement added a new colour (dark red) to the ECDC's weekly map. Member States should strongly discourage non-essential travel to and from dark red areas, as opposed to merely discouraging non-essential travel to and from red areas. Travellers from dark red areas should be required to undergo a test for COVID-19 infection prior to arrival and quarantine/self-isolate upon arrival. This includes travellers with an essential function or need, unless this would have a disproportionate impact on the exercise of their function or need. Transport workers should in principle not be required to test, and, if they are required to do so, rapid tests should be applied. The same would apply to persons living in border regions who frequently cross the border for purposes such as work, education, family reasons, etc.

Testing and quarantine obligations could also be applied to travellers from areas with a high prevalence of variants of concern. This addition clearly responded to the threat of border closures by Germany in response to the prevalence of the Beta variant of COVID-19 in Tirol, Austria. Member States were also given the option to require travellers from other non-green areas to test prior to departure.

Both updated Council Recommendations were silent on a vaccine certificate. However, the idea steadily gained momentum. On 17 March 2021, the Commission published its Communication on 'A common path to safe and sustained re-opening,' accompanied by a proposal for a Digital Green Certificate based on Article 21(1) TFEU, which provides the legal basis for the facilitation of the right to move of EU citizens. It also announced the establishment of a platform for Member States to exchange data between Passenger Locator Forms systems and an EU digital platform for those Member States without a PLF system in place.<sup>103</sup>

The idea of a EU Digital Vaccination Certificate, and vaccination passports in general, has been criticised on scientific, ethical, technological, as well as legal grounds.<sup>104</sup> From a legal perspective, the three main concerns under EU law are related to the protection of sensitive (health) data, possible discrimination between those vaccinated and those not and the risk that proof of vaccination becomes a prerequisite for the exercise of the fundamental freedom of movement.<sup>105</sup> The Commission proposal itself already addressed some of these concerns, amongst other by proposing that the certificate would be available not only to those vaccinated, but also those that had recovered from a previous infection, as well as those in possession of a negative COVID-19 test result and would not involve the setting up of a centralised database.

With an eye to the upcoming tourist season, and under considerable time pressure, the Regulation on an EU Digital COVID Certificate was adopted on 14 June 2021.<sup>106</sup> Still, some important amendments to

<sup>101</sup> European Council, 'Oral conclusions drawn by President Charles Michel following the video conference of the members of the European Council on 21 January 2021' (Statements and remarks), 21 January 2021.

<sup>102</sup> Council Recommendation (n 21); Council Recommendation amending Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic 5716/21, 28 January 2021.

<sup>103</sup> The processing of personal data through this platform has been given a legal basis in Commission Implementing Decision (EU) 2021/858 of 27 May 2021 amending Implementing Decision (EU) 2017/253 as regards alerts triggered by serious cross-border threats to health and for the contact tracing of passengers identified through Passenger Locator Forms [2021] OJ L188/106.

<sup>104</sup> <<https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>> accessed 9 July 2021.

<sup>105</sup> See i.a. Alberto Alemanno and Luiza Bialasiewicz, 'Certifying Health. The Unequal Legal Geographies of COVID-19 Certificates' [2021] EJRR <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3869090](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3869090)> accessed 1 July 2021; Oskar Josef Gstrein e.a., 'A Terrible Great Idea? COVID-19 'Vaccination Passports' in the Spotlight' (Compas Working Paper 153 March 2021), <<https://www.compas.ox.ac.uk/wp-content/uploads/WP-2021-153-Gstrein-Kochenov-Zwitter-A-Terrible-Great-Idea-Vaccination-Passports.pdf>> accessed 1 July 2021.

<sup>106</sup> Regulation (EU) 2021/953 (n 6). At the same time a Regulation was adopted on an EU Digital COVID certificate for legally residing third country nationals: Regulation (EU) 2021/954 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) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic [2021] OJ L211/24.



the Commission proposal was adopted, which significantly circumscribed the use of the certificate. The Regulation contains a number of improvements compared to the Commission proposal, notably the affirmation in the operative part of the regulation (Article 3[6]) that possession of the certificate is not a precondition for the exercise of free movement rights and that the issuance of a certificate shall not lead to discrimination on the basis of the possession of a specific category of certificate (Article 3[7]). Other amendments include the possibility of the issuance of a paper certificate (Article 9[1][h]) and the inclusion of a sunset clause (12 months after entry into force, Article 17). The data protection provisions in Article 10 clearly limit the use of data to the purpose of facilitating free movement during the COVID-19 pandemic and only for as long as the Regulation is in force. The recitals of the Regulation underline the importance of 'universal, timely and affordable' vaccines and testing, and encourage Member States to provide for such, especially since at the time of entry into force not everyone would have had a chance to receive a vaccine. The European Parliament advocated for free testing, and an eventual compromise with the Council was found in making a 100 million euro available for the purchase of tests under the Emergency Support Instrument.

Member States in Council negotiated that, although in principle they would accept the certificate and refrain from imposing additional restrictions on free movement, they would remain allowed to do so for the purpose of protecting public health, to the extent such restriction is necessary and proportionate. If they impose these measures after entry into their territory, for instance because the situation in the Member State in question deteriorates, they must inform the Commission, if possible 48 hours before entry into force, of their reason, scope and duration. They should also inform the public with 'clear, comprehensive and timely' information. Although, an explicit reference to non-discrimination is lacking, it is clear that these measures cannot single out non-national certificate holders alone, but must apply without distinction.

While Member States are obliged to accept a vaccine approved by the EMA, they have the option, but are not under an obligation, to accept vaccination certificates issued for nationally authorised vaccines or those that have successfully completed the WHO emergency listing procedure. The fact that Member States may deny vaccine certificates for non-EMA approved vaccines such as the Sputnik V or Sinopharm, was fiercely criticized by Kochenov and Veraldi who argue that this hinders rather than facilitates free movement, gives rise to unequal treatment, as well as 'vaccination geopolitics'.<sup>107</sup> Although there is certainly value to the argument that these vaccines were administered in compliance with EU law, it should also be recognised that Member States that authorised the use of non-EMA approved vaccines did so under an emergency procedure for temporary licensing. The question is whether this would justify the imposition of an obligation on Member States to issue a certificate to EU citizens administered with those vaccines, if these countries themselves did not consider them suitable for their own population and protection of public health. Moreover, it is submitted that the EU legislator was allowed to also take into consideration the integrity of the internal market and its licensing system for medicinal product, as well as public health concerns related to trust that EU citizens should have in the safety and reliability of vaccines. Given that the certificate only facilitates the free movement of EU citizens and that the EMA may still approve of these vaccines when submitted for review, justifies the approach taken.

### 3.2.4. The Summer of 2021

With the holiday season about to start, there is once again reason for optimism, as increasingly large numbers of European have received their vaccination. At the same time, available vaccines seem slightly less effective, in particular prior to full vaccination, for the more contagious Delta variant, which is steadily becoming the prevalent strain across the European Union. Although mortality and hospitalisations are unlikely to reach early pandemic levels, the fear of a fourth wave has led Israel to reintroduce face masks, the UK to delay their 'unlock' and Portugal to bring back restrictions, including a curfew. Nonetheless, on 1 July, the day that the EUDCC entered into force, most Member States accepted the presentation of a EUDCC as sufficient prove that an EU citizen does not constitute a threat to public health, even when traveling from an orange Member State.<sup>108</sup>

Despite the fact that the possession of a certificate is not a pre-condition for the exercise of free movement rights, some argue it will nonetheless function as a visa or a passport, and it would be hard not to consider

<sup>107</sup> Dimitry Kochenov and Jacquelyn D. Veraldi, 'The Commission Against the Internal Market and EU Citizens Rights: Trying to Shoot down Sputnik with the 'Digital Green Certificate'? [2021] EJRR <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3826649](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3826649)> accessed 1 July 2021.

<sup>108</sup> The Netherlands e.g. dropped its quarantine requirement for travellers from 'orange' and 'red' countries. Germany however maintained its ban for non-resident travellers from Portugal.

the certificate itself as a restriction, albeit justified for public health reasons, of the free movement of EU citizens. The certificate is likely to play an important role in the practical exercise of these rights, a check of the certificate is more comparable to security checks at airports, than a migration or border control. Absence of a certificate should also not result in an automatic refusal of entry. Arguably, in such case, the Member State should allow the EU citizen to prove that they are not a danger to public health for instance through on-the-spot testing, or requiring quarantine. However, in case of a direct arrival from a 'green' Member State, this could be considered disproportionate.

The EU Digital COVID Certificate will only be able to prove its worth as long as vaccines remain effective against current and new variants of the virus, the immunity of former patients lasts, testing continues to form an effective tool against the spread of COVID-19. Although the Commission has been given the power to adapt non-essential elements of the Regulation under the urgency procedure 'in case of newly emerging scientific evidence or to ensure interoperability with international standards and technological systems,' any truly substantial change in circumstances threatening public health will have to be addressed by the Member States. Nonetheless, without the Commission having included this in its proposal, the Regulation imposes limits on Member States' discretion when introducing additional restrictions on the free movement of EU citizens, which will contribute to the necessity and proportionality of these measures and increases legal certainty for moving EU citizens by imposing information obligations on the Member States in question.

#### 4. The road ahead: What role for the European Union?

The global COVID-19 crisis did not leave a single Member State unaffected. The EU's approach towards managing free movement and borders during the health crisis, has not, unlike during previous crises or the discussions on the Recovery Funds, resulted in major fallouts between Member States or between Member States and the EU institutions. This may be explained by the careful approach adopted by the EU institutions, based on recommendations, guidelines and coordination, and the general consensus over the need to curb the spread of COVID-19.

The primacy of the executive and of coordination over binding rules may feel uncomfortable to lawyers used to a Union based on legal integration. However, it is also a testimony to the resilience of European integration that the EU institutions and Member States have been able to agree swiftly to common approaches on borders and restrictions of free movement. Intense coordination has taken place within the Integrated Political Crisis Response (IPCR) network. The focus on soft law over binding legal obligations may have had the advantage of not antagonising Member States over matters that may seem technocratic and scientific, but are ultimately highly political. Not only may Member States in the wake of scientific uncertainty assess risks differently, in their risk management they will have to weigh competing interests and take account of socio-economic considerations as well. Although the precautionary principle may provide guidance, it does still leave considerable discretion to the Member States which will negatively affect legal certainty and the uniform application of EU law.

Now that the virus is steadily coming under control, it is inevitable that the EU update its legal framework and provide binding rules on travel to and in the European Union, also to prepare for possible future public health threats. It is not so much that there is currently no legal framework, or that the European Union has no competence, but rather that – as was set out above – the existing legal framework was ill-equipped for the type of generalised public health challenge that COVID-19 posed. The European Union has competence to legislate on the crossing of internal and external borders, as it does on the free movement of persons. As such, it may adopt harmonising measures on exceptions and rules on the use of the public health exception in those fields. It is only in the absence thereof that Member States may keep in place their own rules, subject to the principles of non-discrimination and proportionality.

As regards the rules on border controls at the external and internal borders, the Future Strategy on Schengen, first announced in the Commission's 2021 Pact on Migration and Asylum,<sup>109</sup> recognises 'the need for a "the need for a stable framework for coordination and decision-making."'<sup>110</sup> This touches however on the fundamental question of who has the ultimate say over borders, both internal and external: the Member States or the Union as a whole.

<sup>109</sup> European Commission (n 62).

<sup>110</sup> European Commission, 'A strategy towards a fully functioning and resilient Schengen area' (Communication) COM(2021) 277 final, 17.

For the external borders, the methodology for determining which third country should be listed as safe could be included in the SBC, granting the Council implementing powers to adapt this list.<sup>111</sup> Rather than obliging Member States to follow this list, it could be done – comparable to under Article 29 SBC – in the form of a Council Recommendation. However, it would also be necessary to put a safeguard in place – again comparable to Article 29 SBC – recommending Member States to reintroduce internal border controls when a Member State refuses to comply with the Council Recommendation. Indeed, the new Schengen strategy notes in this regard the divergences in the implementation of Council Recommendation (EU) 2020/912 by Member States and the need for a ‘flexible framework’ to respond to crises.<sup>112</sup>

In relation to the reintroduction of controls at the internal borders, including public health as an explicit ground for this, could be easily introduced in the SBC. However, following the Commission’s reasoning that health controls are not border controls, one could also imagine the introduction of a new provision excluding health controls at the internal borders from the scope of the SBC, comparable to controls in the territory under Article 23 SBC, as long as they do not have an effect equal to border controls. At the same time, it is hard to imagine how conditions such as limiting the intensity and frequency of these checks, which are imposed on police controls, could be applicable to such health checks.<sup>113</sup> The Schengen Strategy announces a proposal based on the experience with COVID-19 and the discussions in relation to an earlier proposal that provided for longer periods of reinstatements of border controls in case of prolonged threats to public policy or national security.<sup>114</sup> The Commission’s Communication on in its Communication on the early lessons from the COVID-19 pandemic states that in line with the Schengen strategy, it will ‘propose initiatives to put in place a stable framework for EU coordination of internal and external border control measures, as well as a contingency plan for transport and mobility, building on the Green Lanes experience.’<sup>115</sup>

Finally, it is clear that the public health exception in the Citizens Directive requires updating, in particular as regards situations posing a generalised risk to public health. Specific new provisions could be included on an autonomous definition of who qualifies as an essential worker, what constitutes essential travel, and what the implications of such classifications are under EU free movement law.<sup>116</sup> The relation between the EU Digital Corona Certificate and the prohibition on systemic health checks in the Citizens Directive should be clarified. The methodology applied by the ECDC to determine the colour code of a Member State, and the consequences of designating these colour codes, should be given a legal basis in secondary legislation.

At an institutional level, one could envisage a more steering role of the ECDC, much like the European Food Safety Agency formed a response to the BSE crisis.<sup>117</sup> The Agency’s role in monitoring the health situation globally and in Europe should be strengthened further. The Commission indeed proposes to reinforce the crisis response mandate of both the ECDC and the EMA, in addition to the appointment of a European Chief Epidemiologist and the establishment of a corresponding governance structure.<sup>118</sup>

The freedom to travel freely in Europe has rightly been characterised as one of the most important and most tangible results of European integration. Freedoms cannot be taken for granted and care should be had that the current restrictions will not have lasting effects that go beyond the current health emergency. Restrictions that may have been justified in the early stages of the pandemic, should now come under closer scrutiny to ensure their genuinely proportionate and non-discriminatory nature. The epidemiological situation permitting, EU institutions and the Member States should do their utmost to prevent a further fragmentation of the internal market along national lines.

In order to enable a Europe with internal free travel, a Europe that is also open to the outside world, Member States will have to accept a greater control of the Union institutions over their internal as well

<sup>111</sup> Thym and Bornemann (n 25).

<sup>112</sup> European Commission (n 110), 18.

<sup>113</sup> Joined Cases C-412/17 and C-474/17 *Touring Tours* (2018) ECLI:EU:C:2018:1005 and the case law cited therein.

<sup>114</sup> European Commission (n 110), 18.

<sup>115</sup> European Commission (n 110), 19.

<sup>116</sup> This would be in line with the autonomous meaning given to terms such as ‘worker’ within EU free movement law. In line with the principle of subsidiarity, rather than providing a fixed list of professions as currently attached to Recommendation xxx, the EU legislator could also decide on general conditions, allowing Member States to notify the Commission of what they consider essential workers and essential travel.

<sup>117</sup> Ellen Vos, ‘The EU Regulatory System on Food Safety: Between Trust and Safety’ in Michelle Everson and Ellen Vos, *Uncertain Risks Regulated* (Routledge London 2009) 253. See also Alberto Alemanno, ‘Towards a European Health Union: Time to Level Up’ [2020] EJRR, 721 and Peter Van Elsuwege, ‘Naar een Europese gezondheidsunie: de impact van Covid-19 op het EU-beleid inzake volksgezondheid’ [2021] SEW 9.

<sup>118</sup> European Commission, Drawing the early lessons from the COVID-19 pandemic (Communication), COM(2021) 380 final, 15 June 2021, par. 7.

as external borders. Contentious as this may be, Member States will have to agree on a more harmonised approach to the management of public health risks, in order to end the patchwork of national measures which creates legal uncertainty for both EU citizens and third country travellers, and prejudices the uniform application of EU law to a degree that cannot be justified by public health concerns. That this necessarily implies that the Union will make more a more extensive use of its competences in fields that touch upon sensitive issues such a public health, will be a small price to pay for a reopened Europe.

### Competing Interests

The authors have no competing interests to declare.

### Author Information

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