

The borders of the European Union in the context of the States' response to the pandemic threat and the legal framework for the actions taken

Grzegorz Balawajder¹

<https://doi.org/10.25167/brs4523>

Submitted: 13 Sep 2021; Accepted: 2 Oct 2022; Published: 15 Mar 2023

Abstract:

The article aims to discuss the institutional and legal solutions that have emerged in connection with the development of the COVID-19 pandemic, concerning the rules of crossing internal borders in the EU+ area. The author, relying on a descriptive and empirical method, emphasizes that the development of the pandemic means that a solution must be found to preserve the freedom of movement in the EU+ area. Therefore, an important direction in this context is the fact that, in the conditions of increasing prevalence and development of vaccination in the European Union and the Schengen area, it was possible to establish and implement a common framework for issuing, verifying and mutual recognition of interoperable certificates of vaccination, test results and recovery in connection with COVID-19. This allowed for the introduction and issuing of EU digital certificates (EU Covid Certificate), commonly referred to as a „covid passport”.

Keywords:

borders of the European Union, Schengen area, Covid-19 pandemic, free movement of people, state security, EU Covid certificate.

Citation (APA):

Balawajder, G. (2022). The borders of the European Union in the context of the States' response to the pandemic threat and the legal framework for the actions taken. *Border and Regional Studies*, 10,4, 249-271.

Introduction

The subject of the article are considerations regarding the functioning of the European Union's borders in the conditions of the COVID-19 pandemic development. The author explains what the border in the area of the European Union and the Schengen area is, emphasizing its importance for the free movement of people, goods, services and capital. At the same time, the article highlights that the pandemic development observed since 2020 is another major challenge for the

1 Grzegorz Balawajder, Ph.D. (ORCID: 0000-0002-9397-4095) – assistant professor in Department of European Studies, Institute of Political Science and Public Administration, University of Opole; e-mail: bogrze23@gmail.com

Schengen area after the migration crisis. It shows that in conditions of significant threats to the security of their citizens, the European Union and the Schengen area countries, guided by a kind of state egoism and *raison d'état*, demand greater freedom in deciding on the reintroduction and extension of border controls, which undoubtedly restricts one of the key freedoms: the free movement of persons.

The aim of the article is to analyse the problem of the functioning of borders in the European Union and the Schengen area in the context of actions of states limiting the freedom to cross borders in the conditions of pandemic development. A question that arises here is: to what extent will this situation cause changes in the border order in the European Union and the Schengen area, which will constitute another challenge for the freedom of movement, which is crucial from the point of view of an EU citizen.

The author puts forward the following hypothesis: the development of the COVID-19 pandemic brings the need to find an optimal solution that will allow the freedom of movement within the European Union and the Schengen area to be maintained in the conditions of crossing internal borders.

The main research question posed by the author requires an answer to the following question: Will the European Union countries, having previously experienced the migration crisis, strive to reform the Schengen system and introduce greater rigors in the field of crossing internal borders in the conditions of the development of the pandemic and its subsequent „waves”? And if so, what is the possible alternative range of solutions?

The discussed issues are innovative, although they are part of the research area related to the functioning of the borders of the European Union and the Schengen area. Many publications have been devoted to the problem of borders itself, and there is a large body of work in this area. However, the specific reference of the pandemic crisis to the functioning of borders is, due to the development of the phenomenon from 2020, a new research topic, gradually undertaken by various authors (Gajda 2020, Jańczak 2020, Opiłowska 2021, Szachon-Pszenny 2020), representing various disciplines (law, sociology, political science). The author uses descriptive and empirical methods. Based on these methods EU legal regulations (COVID-19 Guidelines, Recommendations, Communications, Regulations) issued between March 2020 and June 2021 (EU COVID Certificate) as well as the actions of states related to their implementation and protection of internal borders were analysed.

Legal basis for actions restricting the freedom of crossing borders in the context of COVID-19

The crisis caused by the COVID-19 coronavirus epidemic is a new challenge for the security of European Union countries, on the one hand in terms of the health of the population, and on the other - in terms of avoiding disruptions to the free movement of people, goods and services throughout their territories. In the Communication adopted on March 16, 2020, the European Commission emphasized that the external border of the Union must act as a security zone for all Schengen states (COM [2020] 115). This is due to the common interest of these countries and is an expression of shared responsibility. In a situation where the pandemic threat has spread throughout the territory of the European Union, the system of external borders makes it possible for Member States to take joint action to limit the global spread of the virus. Thus, in the Communication, the Commission instructed the European Council to take action by the heads of the Member States belonging to the Schengen area, together with their counterparts in the countries associated with the Schengen area, in order to quickly coordinate the decision to introduce a temporary restriction on other than necessary travel from third countries to the area defined as European Union+ (EU+) (COM [2020] 115 final).

The Communication states that all actions taken at the external borders must be adjusted to the same extent at all sections of the external borders of the Union. At the same time, the Communication emphasized that a temporary travel restriction can only be introduced if a decision on this matter is taken and implemented by the Schengen states with regard to all external borders at the same time and in a uniform manner. Thus, it was pointed out that any uncoordinated travel restrictions that individual Member States would try to introduce on their own external border sections will be ineffective. Indeed, any unilateral decision by a Schengen State to apply a temporary travel restriction at its external borders will have potentially limited effectiveness, as it may still be possible to enter the Schengen area at other sections of the external borders. Hence the need for coordinated action by all states. According to the European Union law, decisions concerning the rules of crossing external borders fall solely within the competence of the EU bodies, and therefore require the consent of the Member States.

In turn, individual Member States with internal borders can decide to impose control measures on their own. According to the Schengen Borders Code, Member State governments can reintroduce internal border controls when a serious threat to internal security arises, this instrument always being a „measure of last resort” (Official Journal [EU] 2016. L 77).

According to the Schengen Borders Code, Member States may maintain such controls in connection with the events of the projected timeframe (e.g. sports events, international conferences, etc.) for a period not exceeding six months, or up to two years in exceptional circumstances. The pandemic crisis undoubtedly creates the legal basis for the introduction of restrictions within the internal borders by the countries of the European Union and the Schengen area.

The introduction of restrictions at internal borders to prevent the spread of the virus is undoubtedly one of the forms of protection of internal security. However, these measures may pose a serious threat to the functioning of the single market, due to the strong degree of economic integration of the EU and the Schengen area, to which the process of crossing internal borders is related.

Therefore, the Communication underlines that coordinated actions of states at the external borders of the Union and the Schengen area may contribute to the lifting of control measures at internal borders. Therefore, temporary travel restrictions should apply to all non-essential travel from third countries to EU+. On the other hand, nationals of all European Union Member States and Schengen associated countries returning to their place of residence should be exempted from temporary travel restrictions.

The communication constituted an important reference of the European Commission to the situation which, from the perspective of March 2020, was already developmental. Through the Communication, the Commission asked the European Council to take action towards rapid adoption (by the Heads of State or Government of the Member States and Schengen associated countries) of a decision to introduce restrictions on non-essential travel from third countries to EU+, with immediate effect, on all external borders of the Schengen area.

Another important document on border management during the pandemic crisis was adopted by the European Commission on March 16, 2020. Guidelines: COVID-19. Guidelines on border management measures to protect health and ensure the availability of essential goods and services (Official Journal [EU] 2020. C 861/1).

This document emphasizes that in the conditions of the crisis caused by the coronavirus epidemic, significant threats have emerged that hinder the free movement of people, goods and services within the European Union. Hence, in order to avoid shortages and the deepening of social and economic difficulties in the countries of the Union, it is crucial to keep the functioning of the single market. Therefore, EU countries should not take actions that threaten the integrity of the single market for goods. This means that as part of activities for internal security,

the Member States of the European Union cannot restore the barrier dimension with regard to the economic and customs functions of the border at their internal borders. At the same time, the guidelines refer to border management, stressing that coordination at the level of all European Union countries is of key importance.

With regard to external borders, the Guidelines contain instructions that all persons, i.e. citizens of the European Union and third-country nationals, crossing the external borders in order to enter the Schengen area, are subject to systematic checks at border crossing points. These checks may include a health screening to assess the presence of symptoms or exposure to COVID-19 in travellers arriving from affected areas or countries. Therefore, Member States may refuse entry to non-resident third-country nationals who show significant symptoms or who have been particularly at risk of infection and who have been identified as a risk to public health.

Regarding internal borders, the Guidelines underlined that each Member State may temporarily reintroduce internal border controls if it is justified in terms of public policy or internal security. In a particularly difficult situation, a Member State may indicate the need to reintroduce border controls as a response to the threat posed by a communicable disease. When border controls are reintroduced, the member states must notify the other states of this fact in accordance with the Schengen Borders Code. In such a situation, the Guidelines indicate that controls should be applied in a proportionate manner and with due regard to the health of the persons concerned. Persons who are clearly ill should not be refused entry but should receive appropriate healthcare. At the same time, it was emphasized that conducting health checks on all persons staying on the territory of the Member States does not require the formal introduction of internal border controls.

The Guidelines devote a lot of attention to the issue of guaranteeing the citizens of the European Union the right to free movement. The need to ensure non-discrimination between nationals of a given Member State and citizens of the Union who are residents of that Member State is stressed. A Member State may not refuse entry to EU nationals or third-country nationals who are residents in that Member State. It must also facilitate transit for other Union citizens and residents returning home. However, Member States may take appropriate measures, such as imposing an obligation on persons entering their territory to self-isolate or similar measures upon return from the affected country, provided that they impose the same requirements on their own nationals as well. In the case of border controls, it was indicated that when introduced at internal borders, they should be organized in a way that prevents large gatherings, as they could increase the risk of spreading the virus. Another provision in the Guidelines concerns the authorization of a

Member State to cross the border by frontier workers, especially those working in the healthcare and food sectors, as well as in other basic services (e.g. childcare, elderly care) so as to ensure the continuity of their professional activities. Member States, in particular neighbouring Member States, should cooperate closely and coordinate their actions at the EU level to ensure that the measures are effective and proportionate.

The Guidelines also put a significant emphasis on the functioning of internal borders within which, according to the Schengen Borders Code, a given country may restore control. The European Commission, seeing on the one hand the justification for the purpose of such a step, at the same time noticed the danger related to the fact that in some EU countries (e.g. Italy, France), populist parties started attacking the Schengen Agreement, demanding the restoration of „hard” borders (Wójcik 2020). Such a long-term situation would undoubtedly significantly limit the freedom of movement which is one of the pillars of the European Union. Hence, the Guidelines on Internal Borders insist that the measures adopted by the states to reintroduce control should not be as rigorous in restricting the freedom of movement.

The Guidelines on Border Management Measures, adopted by the European Commission on 16 March 2020, emphasize the principle that all internal borders of the European Union should remain open to goods and that the continuity of supply for basic products should be guaranteed. Maintaining the free movement of goods in this emergency, in the interest of all Member States and their citizens, required Member States to respect and fully implement the issues discussed in the Guidelines at all border crossing points that constitute internal borders.

In order to facilitate the implementation of these arrangements by the Member States, the European Commission adopted on March 24, 2020, a Communication (Official Journal [EU] 2020. C 96 I/1). In line with the assumptions of this document, its purpose was to enable the Member States to implement the Guidelines in relation to the privileged corridors. These activities concerned the launch of a process based on cooperation between all EU countries so as to ensure that all goods, including, in particular, basic ones (food, medical supplies) reach their destination without any delays. Therefore, in the Communication, the European Commission, in order to ensure continuity of supplies within the European Union and ensure the functioning of the single market for goods, called on those Member States with internal border controls to immediately designate appropriate border crossing points at internal borders. These crossings are to operate within the European Transport Network (TEN-T). The Commission also indicated the need to designate additional crossing points, to the extent necessary,

as border crossing points along the privileged land, sea and air transport corridors. Within these crossings, conditions should be created to ensure the least nuisance when crossing internal borders. The Communication also states that the crossing of these border points, including all controls and health checks of transport workers, should not take more than fifteen minutes within land borders. Border crossing points along the priority corridors should be open to all vehicles engaged in any freight transport. In turn, the Member States of the European Union have been obliged to take measures to temporarily suspend all types of traffic restrictions in force within their territory, such as, for instance, traffic bans on weekends, traffic bans at night or bans relating to specific industries in relation to transport freight and the necessary free movement of transport workers. With regard to transport workers, regardless of their nationality and place of residence, the Communication stressed the need to ensure that this group has the freedom to cross external borders. In this regard, it is advisable to lift restrictions such as travel restrictions or compulsory quarantine.

In order to detail how to deal with the situation of frontier workers as well as seasonal and posted workers who need to be able to continue their core activities while avoiding further spread of the virus, the European Commission published on March 30, 2020 a Communication containing Guidelines on the use of the free movement of employees during the COVID-19 epidemic (Official Journal [EU] 2020. CI 102/12). This document encourages the Member States of the European Union to take specific measures to ensure a coordinated approach in this regard to workers who have to cross the border in order to reach their workplace, due to the fact that their professions belong to a category of particular importance for the performance of activities. related to basic services. This should also apply in cases where visiting, seasonal or posted workers use a Member State only as a transit country to reach another Member State.

The guidelines were an important instructions for European Union countries to minimize the restriction of the right to free movement of workers in order to preserve the single market; they also addressed the issue of supporting countries with personnel with qualifications particularly important in the period of a pandemic threat.

Based on the Communication to the European Parliament, the European Council and the Council of March 16, 2020 on the introduction of a temporary non-essential travel restriction to the European Union due to COVID-19 and the correlated Commission's Guidelines of March 16, 2020, on border management measures to protect health and ensure the availability of goods in the conditions of the deepening coronavirus epidemic, the European Union prepared and published

on 30 March 2020 a Communication, in order to support protective measures at the external border. The Communication contained guidance on the implementation of the interim restrictions on non-essential travel to the European Union (Official Journal [EU] 2020. CI 102/3). The study was based on information provided by the European Border and Coast Guard Agency (Frontex) with the support of the European Centre for Disease Prevention and Control (ECDC) and Europol. The guidelines also follow the joint statement of the members of the European Council of 26 March 2020, which stressed the need to intensify efforts to bring back home the EU citizens who are „stuck” in third countries and want to return to their place of residence (www.consilium.europa.eu/2020/03/26). The guidance provides advice and practical instructions on the implementation of measures adopted by the Schengen Member and Associated States.

From the point of view of crossing the borders, it is important to refer to the first area, which is a temporary travel restriction. In this regard, the COVID-19 Commission Communication refers to the Schengen Borders Code and national legislation adopted in order to ensure coordinated action to combat the pandemic, according to which entry may be refused to non-resident third-country nationals who show significant symptoms or were particularly exposed to the risk of infection and thus considered a risk to public health.

The Communication reiterates that any decision to refuse entry must be proportionate, non-discriminatory and executed in a manner which respects the human dignity of the persons concerned.

The regulations on temporary travel restrictions set out two categories of travellers who are allowed to cross the external borders when entering the territory of the European Union:

1/ Citizens of the European Union (citizens of Schengen associated countries and members of their families, irrespective of their citizenship, citizens of third countries with a residence permit and their dependents). This also applies to the citizens of San Marino and the Vatican. All persons (both EU citizens, Schengen associated countries and third country nationals) are subject to systematic checks at border crossings when crossing the external borders to enter the Schengen area. These checks may include health checks.

2/ Other third-country nationals who may be allowed to enter the EU despite the closure of the external border of the Union. This applies to people travelling for a necessary purpose or in connection with their work.

These persons, upon entering the EU+ area, should be subject to coordinated and intensified health checks. In this regard, the Guidelines

recommend that national authorities strictly enforce the Schengen Borders Code when carrying out border checks on travellers allowed to cross the external borders. This applies in particular to checking that the passports proving identity are authentic. National authorities are required to enforce systematic data checks in the Schengen Information System (SIS) to protect the Schengen area from potential terrorist threats or cross-border crime. Passports of third-country nationals must be stamped. The Member States and Schengen associated countries may limit the number of border crossing points that remain open to this category of travellers who can still enter the Schengen area.

There is a suggestion here that this measure could help ensure the full use of public health measures related to COVID-19 and the conduct of enhanced and targeted external border controls. This gives the possibility for Member States to concentrate human resources at those designated border crossing points that are adequately equipped to ensure full compliance with the Schengen Borders Code and specific sanitary measures. Member States and Schengen associated countries were obliged to submit the list of border crossings to the COVID-19 Commission by April 1, 2020.

In order to increase security in the context of the protection of external borders, the Commission Communication COVID-19 also states that, if necessary, Europol is ready to call for the deployment of additional guest officers from Member States to carry out the necessary security checks in the relevant databases such as the Schengen Information System (SIS II), the Europol Information System or Interpol. At the request of a Member State, cross-border police cooperation may also be increased if this proves necessary to fight or prevent crime. In this respect, the Commission Communication refers to the Prüm Convention, which is the legal basis for cross-border cooperation in connection with mass events related to natural disasters and in connection with serious accidents, as part of the prevention of crime and the protection of order and public safety. The provisions of the Convention make it possible in this case to delegate officers, experts and advisers as well as to provide equipment at the request of the Member State in which the event occurs. Support in this regard may also be provided by Europol, through assistance in combating terrorism, organized crime and other serious crimes posing a threat to public order and security. Member States were obliged to grant access to the information systems or the common framework for information exchange and to use at the external borders the Schengen Information System (SIS II), the Visa Information System (VIS) and the Eurodac system. In addition, countries should use other systems outside the EU, such as the Interpol database for stolen or lost travel documents.

The document also highlights the particular importance of additional security checks with respect to high-risk profiles. In this regard, Member States should continue to cooperate and exchange information to ensure optimal use of Europol, SIS and Interpol data. They should also strive for a more systematic use of indicators provided by Europol and Frontex to identify high risk profiles. To this end, countries should implement a consistent three-tier approach to the provision of information, in particular with regard to foreign terrorists, as SIS II checks do not cover the full range of data on suspects from outside the European Union. In turn, to improve security checks, Member States may request Europol's support in the area of data sharing and analysis, including the Europol Information System, in order to use its data management capabilities and other forensic capabilities and tools.

With regard to people leaving the European Union, in line with the Commission's COVID-19 Communication, Member States and Schengen associated countries have the right to limit the number of border crossings that remain open to outgoing travellers. In exceptional circumstances, if travellers appear spontaneously and, in the case where a neighbouring third country of destination receives travellers entering at a given border crossing point, travellers may still be allowed to proceed through each land or sea border crossing point. In such circumstances, Member States and Schengen associated countries are invited to agree with neighbouring third countries which land or sea border crossing points remain open for entry and exit checks.

In view of the possibility for Member States to limit the number of border crossing points open to travellers at the external borders, Member States may invoke Art. 9 of the Schengen Border Code (simplification of border checks), according to which it is possible to grant entry checks a higher priority than exit checks. In line with the Code, border checks at the external borders may be temporarily simplified due to exceptional and unforeseeable circumstances causing such traffic congestion that waiting times at the border crossing point become unnecessarily long and all resources in terms of staff, equipment and organization have been exhausted.

An important area of action included in the Communication is the ordinance on transit and post-repatriation transit facilitation. The aforementioned statement by members of the European Council concerned the return home of European Union citizens. In this context, Member States are required to facilitate the transit of EU citizens and their family members, irrespective of their nationality, as well as of third-country nationals holding a residence permit and their dependents who return to their Member State of nationality or where

they reside. This is especially true for EU citizens and their family members who remained abroad and currently intend to return to the EU, whether they arrive on a commercial, charter or domestic flight. On the other hand, citizens of Serbia, North Macedonia, Montenegro and Turkey (i.e. countries associated with the European Union) should be treated on an equal footing with citizens of Member States and Schengen associated countries, within the scope of applying the specified in the Communication temporary restrictions on non-essential travel to the Union, if they return to their countries of origin as part of repatriation operations under the EU Civil Protection Mechanism (Official Journal [EU] 2013. L 347/924).

Hence, the transit of citizens of the EU Member States, Schengen Associated Countries, the United Kingdom and the other countries participating in the EU Civil Protection Mechanism and their families, from the Member State in which they crossed the external border to their place of origin, should be ensured.

In the context of the spread of the COVID-19 pandemic, most Schengen countries, wishing to limit this process, suspended processing short-stay visa applications for journeys that are not essential. However, the Commission communication encourages the consular authorities of the Schengen countries to use the „minimum processing” guidelines for the processing of visa applications for certain categories of visa applicants during the pandemic. In this regard, the general rules for processing visa applications are recommended. Before issuing a visa, the Requested Member State should contact the Member State of destination. Visa holders should also be systematically reminded that they will be required to justify their travel purpose and provide supporting documents at the border crossing point. They must be informed that they will undergo all sanitary checks and may be subject to compulsory self-isolation.

The stay of persons with a visa and residing in the Schengen area, who cannot leave before the short-stay visa expiry date, may be extended to a maximum of 90 - 180 days or to a date set by the authorities of the Member States. If the visa holder has to stay in the Schengen area for longer than the extended period, the competent national authorities should issue them with a national long-stay visa or a temporary residence permit. On the other hand, if a third-country national exempted from the visa requirement has to stay in the Schengen area longer than the extended period, the national authorities should issue them with a national long-stay visa or a temporary residence permit. At the same time, Member States are encouraged to lift administrative or other penalties imposed on third-country nationals who are unable to leave their territory due to travel restrictions. Also, when considering future visa applications, an overstay due to travel restrictions should not be taken into account.

The above regulations related to the period associated with the development of the pandemic in March 2020, when a systematic increase in the number of infections was recorded in individual European Union countries. In this situation, each European Union country, including those belonging to the Schengen area, could, based on the analysis of the state of internal security of the country and the provisions of the Schengen Border Code, decide to limit the freedom of movement within internal borders. In this regard, each state made a sovereign decision, taking into account the internal situation of a given country and the resulting consequences. The analysed documents show that the recommendations or guidelines issued in this regard, with regard to the crossing of internal borders, contained indications concerning the creation of conditions for the functioning of the single market, including ensuring the free movement of goods, services and employees. In turn, with regard to crossing the external borders, all the European Union and the Schengen area countries were obliged to adopt top-down regulations, which assumed that until June 15, 2020, entry from outside the European Union would not be possible, except for persons belonging to the so-called 'basic staff', who will justify the trip and confirm this justification with relevant documents.

In April and May 2020, the European Commission and Member States increased the scope for coordination, joint activities and information exchange. This helped to alleviate the effects of the restrictions introduced and allowed the restoration of certain areas of the functioning of the single market, in particular with regard to the supply of basic goods and services throughout the European Union, and to maintain the principle of freedom of movement for the necessary cross-border travel.

When in May 2020 the pandemic development situation in Europe began to stabilize, there were reasons and suggestions to return to unlimited, free movement and restore the integrity of the Schengen area. The existing restrictions on free movement and the reintroduction of internal border controls have clearly shown that they pose a threat to the single market and the smooth functioning of the internal trade in goods. The lifting of the restrictions was therefore of key importance for the economic recovery. It also seemed important to restore the freedom of movement of people, which is a special value of the European integration process.

European Action Plan

As early as on 15 April 2020, the President of the European Commission, Ursula von den Leyen, and the President of the European Council, Charles Michel, announced the European Action Plan, leading to the end of containment measures for the spread of COVID-19 (Official Journal [EU] 2020. C 126). The plan contained numerous recommendations to Member States regarding the phasing out of the restrictive measures introduced and called for a staged approach leading to the restoration of unrestricted freedom of movement and the abolition of temporary internal border controls introduced by most European Union Member States. The plan also provided for the lifting, subsequently, of restrictions on non-essential travel to EU countries through the external border, though the position of the European Commission and the current situation assessments were of key importance in this respect.

In correspondence to the Joint Action Plan, in order to encourage Member States to engage in the process of restoring unrestricted movement, the European Commission issued on 15 May 2020 a Communication „A coordinated staged approach to restore freedom of movement and remove internal border controls - COVID-19” (Official Journal [EU] 2020. C 169/30).

The Communication contains instructions (guidelines) on how the gradual lifting of national and cross-border restrictions, in accordance with the principle of non-discrimination, should contribute to the gradual restoration of the free movement of European Union citizens by lifting internal border controls. It was agreed that the lifting of travel restrictions and internal border controls must be based on a careful analysis of the epidemiological situation in Europe and in individual Member States.

The Council Recommendations of 30 June 2020 also acknowledge that when deciding whether a temporary restriction on non-essential travel to the EU applies to a given third-country national, the deciding factor should be residence in a third country (and not nationality) for which non-essential travel restrictions have been lifted. Due to the fact that the epidemiological situation in a given country is dynamic, it was agreed that every two weeks the list of countries included in Annex I should be reviewed and, depending on the situation, updated by the Council, after consulting the Commission and relevant EU organizations and authorities. This means that travel restrictions may be fully or partially lifted or reintroduced for a particular third country already listed in Annex I, depending on an assessment of the epidemiological situation. If temporary travel restrictions continue to apply to the third country concerned, the following shall be exempted from such restrictions:

- citizens of the European Union and nationals of third countries who, under agreements between the Union and its Member States on the one hand, and between those third countries on the other, enjoy the right to free movement, equivalent to the right of citizens of the Union, as well as members of their families (Official Journal [EC] 2000. L 158),
- third-country nationals who are long-term residents under the Long-Term Residence Directive (Official Journal [EC] 2004. L 16), persons whose right of residence derives from other EU Directives or national law or who hold national long-stay visas, and their family members.

The second wave of the COVID-9 pandemic, which began at the end of August 2020, made it necessary to take new measures to contain the spread of the virus. As a result, Member States have adopted various measures, some of which, for example entry restrictions or quarantine requirements for travellers and cross-borderers, impacted the right of Union citizens to move and reside freely within the territory of the Member States. At the same time, these states, invoking the protection of public health, may take measures restricting the free movement of persons within the Union. However, it should be noted that when adopting and applying restrictions on free movement, Member States should respect the principles of European Union law, in particular the principles of proportionality and non-discrimination. Therefore, with the onset of the second wave of the pandemic, the adoption of the new Recommendation was crucial.

On 13 October 2020, the Council of the European Union adopted a new Recommendation on a coordinated approach to restricting free movement in response to the COVID-19 pandemic (Official Journal [EU] 2020. L 337.3). The Recommendation aims at assisting Member States in taking decisions based on the epidemiological situation in each region. The Recommendation sets out common criteria that should be taken into account when considering a restriction on free movement. They concern:

- the number of newly reported COVID-19 cases per 200,000 inhabitants in the last 14 days in the region,
- 'positive test rate', which describes the percentage of positive COVID-19 tests carried out in the past week,
- test performance ratio, which includes the number of positive tests per 100,000 inhabitants carried out in the past week.

Based on this data, the European Centre for Disease Prevention and Control (ECDC) should publish a weekly map of the European Union Member

States by region, showing the situation with regard to the above-mentioned criteria, in order to facilitate decision-making by the Member States. This map should also contain data from Iceland, Liechtenstein, Norway and also from Switzerland. On this map, areas should be marked with the following colours:

a/ green, if the 14-day reported COVID -19 rate is less than 25 and the test positive rate is less than 4 percent.

b/ orange, if the 14-day cumulative reported rate is less than 50 but the test positive rate is 4 percent or higher, or if the 14-day cumulative reported COVID-19 rate is between 25 and 150 but the test positive rate is less than 4 percent.

c / red, if the 14-day reported rate is 50 or more and the test positive rate is 4 percent or more, or if the 14-day reported rate is greater than 150 per 100,000 inhabitants.

d / grey, if the information necessary to assess the above-mentioned criteria is not available or if the rate of conducted tests is 300 or less per 100,000 inhabitants.

In the Recommendation, ECDC was required to publish separate maps for each key indicator from which a cross-sectional map was developed: the 14-day rate of reported cases at regional level, as well as the rate of testing performed and the rate of positive test results at national level over the past week. In addition, updated versions of maps and underlying data should be published on a weekly basis.

In the conditions of the worsening epidemiological situation at the turn of 2020 and 2021, related to the emergence of new, mutant variants of the COVID-19 virus, it was necessary to update the criteria and thresholds set out in Council Recommendation 2020/912 of 30 June 2020. An important reason for these changes was the publication on 21 January 2021 of the theses of the European Centre for Disease Prevention and Control regarding the latest (updated) risk assessment related to the spread of new, worrying variants of the COVID-19 virus. For this purpose, on February 2, 2021, a Recommendation amending the previous Council Recommendation on the temporary restriction of non-essential travel to the European Union and the possible removal of this restriction was issued (Official Journal [UE] 2021. L 41). The Recommendation focuses on emphasizing that in order to identify third countries for which existing restrictions on non-essential travel to the EU should be lifted, both the epidemiological situation in those countries and the following criteria should be taken into consideration:

- 14-day cumulative COVID-19 reporting rate taking into account the total number of reported cases per 100,000 inhabitants in the last 14 days.

- the current trend of new cases over the same period compared to the previous 14 days, which should be stable or declining,
- the rate of COVID-19 tests carried out within 7 days per 100,000 inhabitants,
- the rate of positive tests carried out in the last 7 days,
- the type of the virus present in the country.

The recommendation emphasizes that in order for a given third country to be included in the list of third countries for which European Union countries could gradually lift external border travel restrictions (so-called Annex 1), it must meet the following threshold requirements:

- the 14-day total COVID-19 reporting rate of up to twenty-five cases,
- the rate of COVID-19 tests carried out in the last 7 days must be higher than 300,
- the rate of positive test results not exceeding 4%.

The above regulations clearly confirm that the rules of crossing the borders of the EU Member States are subject to specific regulations. In the case of external borders, these rules fall under the category of common policies, which means that under the current conditions, the existing border regime is the exclusive competence of the European Union bodies. Thus, the rules for crossing external borders will primarily result from the Recommendations adopted by the Council of the European Union and the Guidelines and Communications issued by the European Commission, and they will be binding on all European Union countries. On the other hand, with regard to internal borders, these regulations will be binding recommendations, assuming that all border crossing restrictions at internal borders result from the competences of the Member States. This was reflected in a situation when, on the basis of the Communication from the Commission to the European Parliament, the European Council and the Council of March 16, 2020, on March 17, 2020, the European Union officially closed the external borders of the Schengen area, where twenty-one out of twenty-six Schengen Member States introduced internal border controls and restricted the entry of foreigners to their territories. Only Belgium, Iceland, Sweden, Liechtenstein and Luxembourg did not close their borders at that time (<https://www.schengenvisainfo.com/news>).

The functioning of the Schengen area in the conditions of the development of the COVID-19 pandemic

The rules for the functioning of the Schengen area are defined in the Schengen Borders Code (Title IV of the Schengen Borders Code, Articles 25,

26 and 28). In the light of these regulations, the countries of the Schengen area (twenty-two EU countries plus Switzerland, Liechtenstein, Norway and Iceland) have the power to temporarily reintroduce internal border controls in the event of special threats to internal security and public order. At the same time, the Code stipulates that the reintroduction of internal border controls must be an exception, and the application of this instrument must comply with the principle of proportionality. This means that the application of this measure must be treated as a final action relating to the existing risk. The scope and duration of its application are also limited in the light of the Code.

As the COVID-19 pandemic unfolds, Schengen states repeatedly use the option of temporarily reintroduced border control at internal borders in order to limit the spread of the virus. This was particularly evident during the first phase of the pandemic development (March - June 2020, when 117 notifications were submitted to the European Commission regarding the intention to temporarily reintroduce internal border controls). At the turn of the summer and autumn months of 2020, when the pandemic slowed down somewhat, there was a tendency to restore the freedom to cross borders. However, with the development of the so-called second and third waves of the pandemic, i.e. from November 2020, it was possible to notice renewed efforts to limit the freedom to cross internal borders. Nevertheless, despite the higher incidence rates, Schengen countries approached the application of these restrictive measures, on the one hand, following the Recommendations, which in this respect considered these restrictive measures to be final, and on the other, bearing in mind that excessively strict application of these measures, including the constantly extended dates of their application, constitute a significant threat to the functioning of the Schengen area.

The actions taken by the Schengen area states were an expression of their sovereign competence in the application of the provisions of the Schengen Border Code with regard to the possibility of reintroducing controls at internal borders, which, however, could have serious consequences for the free movement of goods, workers, and, consequently, for the proper functioning of the internal market of the European Union. Therefore, in response to the first cases of detection of the coronavirus on the territory of the EU, some heads of state and government of the Union declared their reluctance to introduce controls inside the Schengen area, recognizing that due to the specificity of the virus transmission, the closure of the borders will not limit its spread. However, as a result of the development of the pandemic, especially due to the dynamic increase in infections and diseases in Italy, most countries introduced border protection measures through increased sanitary controls, as well as by refusing entry to their territory to nationals of Member States,

thus restricting the free movement of people in the European Union. Starting from March 2020, there was a gradual introduction of restrictions in this regard. The first country to apply the restrictions was Slovenia, which on March 11, 2020, introduced the obligation to present a certificate of a negative coronavirus test result at border crossings with Italy. However, it has not formally notified the reintroduction of Schengen border control, in line with the Schengen Border Code. In this respect, it referred to security considerations related to the development of the epidemic on the basis of a special procedure provided in the event of sudden events threatening the security of the entire Schengen area (Art. 28).

Based on the same legal grounds resulting from Art. 28 of the Schengen Border Code, checks at the land border with Italy were introduced by Austria which extended their scope to the borders with Liechtenstein and Switzerland. As a consequence, countries such as Hungary, Switzerland, the Czech Republic, Poland, Germany, Portugal and Estonia then used this option and introduced controls at selected sections of their borders. In turn, Lithuania, Norway, Spain and Belgium decided to close all borders, while Finland, referring to Art. 25 and 27 of the Schengen Border Code, reserved the possibility of border controls for a longer period (Art. 25 and 27).

The above-mentioned actions by countries that introduced severe restrictions on the internal borders of the European Union resulted in serious disruptions in border traffic on most of the borders within the Schengen area, where the waiting time for crossing certain borders was several hours. This situation gave rise to increased tensions between the EU countries, which resulted, among other things, in the difficulties in the return of citizens of given states to their countries (Szymańska 2020).

This situation, particularly affecting the relations of states in the Schengen area, made it necessary to take top-down measures. A consequence of this state of affairs was the adoption of the Guidelines, applicable from March 16, 2020, on border management measures to protect health and ensure access to basic services. This document, in order to ease the rigors at internal borders, proposes the use of preventive measures in the form of checking the health of travellers as a measure alternative to restoring full controls at the internal borders of Schengen, and to enable the return of European Union citizens to their countries through transit via other Member States. It should be emphasized once again that an important provision of the Guidelines was the instruction to ensure the free movement of transport workers, especially those related to the transport of necessary goods, such as food, medical equipment or protective equipment. To ensure the effectiveness of these activities, the countries of the European Union and the Schengen area

were asked to indicate the appropriate border crossing points at internal borders within the Trans-European Transport Network (TEN-T).

It can therefore be assumed that the actions of the Council of the European Union and the European Commission were aimed, on the one hand, at ensuring a package of measures aimed at protecting health, and, on the other hand, at avoiding the collapse of the common market, the functioning and prospects of which depend on the functioning of the Schengen area. This is important because the crisis related to the COVID-19 pandemic is not the first challenge for the functioning of the Schengen area. Already during the recent migration crisis, when various concepts of „Schengen reform” emerged and Member States began to demand more control and freedom in deciding on the reintroduction and extension of border controls, the European Commission warned that the reintroduction of full internal border controls would have serious economic consequences. Hence, the top-down Recommendations and Guidelines were to introduce regulations that would cause states to take action to smooth traffic at border crossings and shorten the clearance time.

That is why it was so important to create conditions to restore the possibility of free movement of citizens during the pandemic. The prevalence and development of vaccination in the European Union and the Schengen area countries resulted in many Member States taking initiatives and related activities to issue certificates of vaccination against COVID-19. Bearing in mind, however, that for such certificates to be used effectively in a cross-border context by Union citizens exercising their right to free movement, they must be fully interoperable, compatible, secure and verifiable. This, in turn, meant that the Member States had to adopt a common position on the content of the EU vaccination certificates.

The need for such a common approach of individual Member States to this issue results from their experience so far, which shows that unilateral measures taken and applied by states to limit the spread of the COVID-19 virus may seriously disrupt the exercise of the right to free movement; they can also hinder the proper functioning of the internal market. This situation results from the fact that various entities providing services of a tourist nature, as well as in the field of passenger transport (airlines, rail, coach and ferry carriers) would have to deal with different, non-standardized formats of documents containing vaccination certificates or health information, which would hinder their universal acceptance.

Therefore, in order to facilitate the exercise of the right to free movement and residence within the territory of the Member States, it has become necessary to establish and implement a common framework for the issuing, verification

and mutual recognition of interoperable vaccination, test result and recovery certificates for COVID-19.

EU COVID Certificate

The key regulation in this regard is Regulation No. 2021/953 of the European Parliament and of the Council of 14 June 2021 on the framework for issuing, verifying and recognizing interoperability of vaccination, test results and recovery certificates in connection with COVID-19 (EU digital COVID certificate) to facilitate free movement during the COVID-19 pandemic (Official Journal [EU] 2021. L 211).

This regulation sets out the framework and rules governing the issuance, validation and recognition of vaccination, test result and recovery certificates for COVID-19 to help holders exercise their right to free movement during a pandemic. In addition, this document is intended to facilitate the gradual lifting of restrictions on free movement introduced by the Member States in accordance with EU law, in order to limit the spread of the pandemic in a manner coordinated by the states. The regulation also constitutes the legal basis for the processing of personal data necessary to issue EU digital COVID certificates and the legal basis for the transmission and processing of information necessary for verification and for confirming the authenticity and validity of such certificates.

The aim and the main intention of the Regulation is to facilitate the application of the principles of proportionality and non-discrimination with regard to restrictions on the freedom of movement during a pandemic, while ensuring a high level of protection of public health. By issuing the EU digital COVID certificate, conditions are created for a gradual departure from restrictions on the freedom of movement of citizens and transport services - both within the EU and in the Schengen area. At the same time, Member States that have exclusive competence to impose restrictions at their internal borders of the Union and the Schengen area are encouraged to refrain from imposing further restrictions unless absolutely necessary and proportionate to the situation. In this context, the Regulation obliges Member States to refrain from introducing and applying additional entry restrictions to persons holding the EU digital COVID certificate (the so-called „covid passport”), such as quarantine or the need to conduct more examinations or tests. Such additional measures can be imposed on EU COVID certificate holders only if an increased number of COVID-19 infections have been identified in the traveller’s country of departure. In such cases, Member States are required to notify the Commission 48 hours in advance of taking the additional measures.

The analysed Regulation applies to citizens of the European Union and citizens of the Schengen area. It also contains a provision for the issuance of certificates constituting the EU digital COVID certificate to citizens of Andorra, Monaco, San Marino and the Vatican.

On the other hand, with regard to third-country nationals who legally stay or reside in the territory of a Member State, Regulation No. 2021/954 of the European Parliament and of the [EU] Council of June 14, 2021 on the framework for issuing third-country nationals legally residing the territories of the Member States during the COVID-19 pandemic, interoperable vaccination, test result and COVID-19 recovery certificates (EU COVID certificate) and the verification and recognition of such certificates is applied (Official Journal [EU] 2021 L 211).

The regulation provides that if Member States recognize the proof of vaccination for the purpose of exempting EU nationals from travel restrictions under Union law (Regulation 2021/953), the same rules apply to third-country nationals who are legally staying or residing in their territory and are entitled to travel to other Member States in accordance with Union law. Thus, the Regulation in question extends the adopted common framework also to those third-country nationals who legally live or reside in the Schengen area, and in this respect it is an act constituting a development of the Schengen acquis, as it also includes in the EU digital COVID certificate the nationals of non-EU countries which are members of the Schengen area (Iceland, Norway, Switzerland and Liechtenstein).

It can therefore be assumed that the development of the COVID-19 pandemic is another, after the migration crisis, significant challenge for the Schengen area. The migration crisis has already shown that, in the face of certain threats, the countries of the European Union and the Schengen area, guided by a specific state egoism, motivated by particular reasons of state, demand greater freedom in deciding on the reintroduction and extension of border controls, which not only significantly restricts the free movement of people, but will also have an impact on the functioning of the internal market.

The remedial measures included in the Recommendations and Guidelines adopted by the European Commission and the Council of the European Union in relation to the development of the pandemic are intended to limit the effects of chaos and uncertainty caused by individual decisions of states to reintroduce border control. It can be assumed that the current crisis will be another major challenge for the future of the Schengen area. It will show to what extent the tendency to unilaterally reintroduce border controls and to extend them beyond the period necessary to eliminate the threat will be strengthened. If the intention of states for change prevails in this respect, it may in the future result in a kind of

„reform of the Schengen area”, the consequence of which will be an amendment to the Schengen Border Code. This, however, may result in a restriction of the freedom of movement, which, from the point of view of a citizen of the European Union, may be a waste of one of the greatest achievements of integration.

The actions of the Schengen area countries related to the protection of their territory against the spread of the COVID-19 virus also prove that the sanitary function of the border continues to play an important role while the internal borders tend to disappear. And it is precisely this function, despite the fact that in the process of integration the political, legal, economic and customs functions have definitely departed from the barrier dimension, that retains the most restrictive character.

Literature

Gajda, A. (2020). Funkcjonowanie strefy Schengen w warunkach pandemii koronawirusa SARS-COV-2. In U. Kurczewska (ed.), *Jaka przyszłość Unii Europejskiej? Wyzwania, problemy, szanse*, Warszawa, pp. 87-102.

Jańczak, J. (2020). Re-bordering in the EU under Covid-19 in the First Half of 2020: A lesson for Northeast Asia? *Eurasia Border Review*, vol. 11, 2-16.

Opilowska, E. (2021). The Covid-19 crisis: the end of the borderless Europe? *European Societies* vol. 23, No S1, 589-600.

Szachoń-Pszenny A. (2020). Granice strefy Schengen w warunkach pandemii koronawirusa – zasady prawne i możliwe scenariusze w 2020 roku. *Krytyka Prawa*, 12(4), 142-160.

Szymańska, J. (2020). Strefa Schengen w dobie pandemii COVID-19 (Schengen zone in the time of the COVID-19 pandemic). *Bulletin of the Polish Institute of International Affairs* No. 62 of 01/04/2020.

Wójcik, Ł. (2020). Granice zaufania (Boundaries of Trust), *Polityka*, No. 11.

Official Journal [EU] 2013. L 347/924 of 20/12/2013.

Official Journal [EU] 2016. L 77 of 23.03.2016, pp. 1-52.

Official Journal [EU] 2020. C 169/30 of 15/05/2020.

Official Journal [EU] 2020. C 861/1 of 16/03/2020.

Official Journal [EU] 2020. C 96 I/1 of 24/03/2020.

Official Journal [EU] 2020. C 126 of 17/04/2020, pp. 1-11.

Official Journal [EU] 2020. CI 102/12 of 30/03/2020

Official Journal [EU] 2020. CI 102/3 of 30/03/2020

Official Journal [EU] 2020. L 337.3.

Official Journal [EU] 2021. L 41 of 04/02/2021, pp. 1-5.

Official Journal [EU] L 211 of 15/06/2021, pp. 1-22.

Official Journal [EU] L 211 of 15/06/2021, pp. 24-28.

Official Journal [EC] 2000. L 158 of 30/04/2000, p. 77.

Official Journal [EC] 2004. L 16 of 23.01.2004, p. 44.

Schengen Border Code.

Communication from the Commission to the European Parliament, the European Council and the Council. Brussels 16/03/2020 COM [2020] 115 final.

Source: <https://www.schengenvisainfo.com/news/21-26-schengen-countries-have-already-closed-borders-while-ec-still-mulls-schengen-suspension-idea/>.
Access: 02/02/2021.

Source: www.consilium.europa.eu/en/meetings/european-council/2020/03/26.
Access: 10/04/2020.



© 2022 by the author. Published by University of Opole.
This work is an open access article licensed and distributed under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License (CC-BY-NC-SA).