

Hardening Borders during the pandemic in the European Union: The Shape of the Schengen Borders Code and the EU Digital COVID Certificate¹

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Abstract

COVID-19 pandemic restricted mobility. Border controls, travel restrictions, bans on entry and exit influenced mobility with implications on EU citizens and third-country nationals. When Member States of the European Union were confronted with COVID-19, the first reaction was to turn to border policy, similarly to the migration crisis in 2015. At the beginning of the pandemic, when the articles of the Schengen Borders Code (SBC) were triggered, workers with certain occupations were exempted from the restrictions, and with the introduction of the EU Digital COVID Certificate, people's mobility was linked to the possession of the health Certificate. This paper presents the multiple layers of free movement and its restrictions. The main aim of the article is to define the scope of the SBC and the EU Digital COVID Certificate that have been used during the crises. The article helps to understand the shortcomings of the EU's crises management by emphasising the problematic points of the application of the Code and the Certificate with a critical analysis of these measures.

Key Words:

European Union, COVID-19, mobility, Schengen Border Code, EU Digital COVID Certificate

1. Introduction

A borderless European Union has been present from the very first moment of the discussions about the Schengen Agreement, but the viability of the principle of free movement was always questioned. While seeing – and wanting – the economic benefits of lifting border checks between Member States, countries were also wary about the security deficit this would create (van der Woude, 2020). By definition, crises should sooner or later come to an end and give space to a period of ‘normality’. In the case of the EU this ‘normality’ did not last very long since the Covid-19 crisis erupted just a few years after the ‘end’ of the Euro area and migration crises and while the Brexit process has not yet been completed (Wolff et al., 2020). The idea of a borderless Europe was suddenly challenged by security procedures and national interests whose guardians seemed to be predominately States (Opilowska 2021). Member States adopted their own different,

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uncoordinated and at times competing national responses according to their distinctive risk analysis frameworks (Alemanno, 2020), and States' efforts to manage the crisis in some cases meant the revival of borders that had been long disregarded or made irrelevant, as well as the creation of new borders where they previously had not been meaningfully present (Radil et al., 2021).

Containing the spread of COVID-19 is an exercise of emergency risk regulation on an unprecedented scale (Paccès et al., 2020). Any decision-making is based on the principle of precaution (whether expressed or otherwise) and it becomes more challenging to identify clear pathways to address the pandemic effectively that also minimise countervailing risks – something that may in itself justify national rather than international approaches, even whilst benefiting from the centralisation and sharing of scientific data (Dobbs, 2020). One of the central pillars of the response to handle the virus was that public officials at national and international levels encouraged social distancing to reduce the infection rate among the population. This principle has been translated into public policy measures that have reduced citizens' mobility, both within and across borders (Zaiotti & Abdulhamid, 2021), whereby the special border corridors, which were set up by some Member States for thousands of seasonal workers significantly departed from the general idea that free movement of persons should be temporarily sacrificed for the benefit of public health (Ramji-Nogales & Goldner Lang, 2020).

The reasons that EU Member States used to justify the reintroduction or prolongation of temporary internal border controls after 2015 reflected a crisis-mode policy-making on migration, asylum and borders (Carrera et al., 2018), and this crisis mode policy-making reappeared when confronted with the pandemic.

This study presents the problematic points during the application of the Schengen Border Code and the EU Digital Certificate. This is realized by two different methodological approaches, namely policy analysis and content analysis. The selected documents, the legislative and policy documents of the EU, supplement the analysis of the legal and policy framework. Moreover, the EURLEX database and secondary sources such as academic literature and research reports complete the analysis.

After this introduction, the first part of the article covers the legal background of the measures, whereas the second part analyses the Schengen Border Code in practice. This is followed by the third part involving the analysis of the EU Digital COVID Certificate, which is succeeded by the conclusion.

2. The Legal Frame of Restrictions

Freedom to cross borders between Member States was an economic objective to promote the free movement of workers. The Treaty establishing the European Economic Community covered the free movement of workers and freedom of establishment, and thus individuals as employees or service providers. The Treaty of Maastricht introduced the EU citizenship enjoyed by every national of a Member State, and it included the right to move and reside freely within the territory of the Member States. Freedom of movement became a fundamental right too, contained in Article 45 of the Charter of Fundamental Rights. But the right to free movement can be subject to limitations and conditions, as stated in article 45 TFEU: public policy, public security or public health are grounds for restrictions on the right of free movement and residence. Secondary legislation addresses the issue of restrictions that need to meet certain requirements, namely, Directive

2004/38/EC. This Directive contains the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and according to it, EU citizens or members of their family may be expelled from the host Member State on grounds of public policy, public security or public health.

Member States maintain the freedom to determine the requirements of public policy and public security in accordance with their national needs through justification for a derogation from the fundamental principle of free movement of persons. But those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions.³ Public policy and public security are Community concepts that cannot be defined solely by the various national systems.⁴ Member States retain the freedom to determine the requirements of public policy and public security in accordance with their needs, which can vary from one Member State to another and from one period to another; but they have to interpret those requirements strictly.⁵ Also, they are not free to interpret the concept of risk to public policy in Article 7(4) of Directive 2008/115 solely according to their national law.⁶ The concept of risk to public policy is neither included in the concepts defined in Art. 3 of Directive 2008/115 nor defined by other provisions of that Directive.⁷

Directive 2004/38/EC also specifies the kind of disease that can justify restrictions. According to this, the only diseases justifying measures restricting freedom of movement shall be diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation or other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

As for internal borders, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (SBC) contains the rules that govern checks on persons on external borders, entry conditions and the conditions of temporary reintroduction of border controls at internal borders⁸ in the Schengen Area⁹. Articles 25, 28 and 29 can be used by Member States for temporarily reintroducing border controls at the internal borders in the event of a serious threat to public policy or internal security but only as last resort for a strictly limited scope and period of time, based on specific objective criteria and on an assessment of its necessity which should be monitored at Union level. A Member State's

³ See, e.g., European Court of Justice (EJU), Judgement of 28/10/1975, *Rutili vs. France*, 36/75, paras. 26 and 27.

⁴ European Court of Justice (ECJ), Judgement of 11/6/2015, *Z. Zh. and I.O., vs. Netherlands*, paras 48 and 54.

⁵ ECJ, *Rutili*, para. 27; Judgement of 27/10/1977, *Bouchereau vs. United Kingdom*, Case 30/77, para. 33; and Judgement of 10/7/2008, *Romania vs. Jipa*, C-33/07, para. 23.

⁶ ECJ, *Z. Zh. and I.O.*, para. 30.

⁷ ECJ, *Z. Zh. and I.O.*, para. 41.

⁸ Common land borders, including river and lake borders, of the Member States; the airports of the Member States for internal flights and sea, river and lake ports of the Member States for regular internal ferry connections

⁹ These are Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland.

decision about the reintroduction of border control cannot be vetoed by the European Commission.

As for public health in the EU primary law, EU actions only complement national policies and support actions taken by Member States. Member States coordinate among themselves their policies and programs in the areas covered by Union action in the field of public health. During the pandemic, the Commission highlighted that short-term and strongly coordinated action to strengthen key areas of preparedness and response will require strong coordination and exchange of information in and between Member States and communities as well as commitment to implement these measures, which are a national competence (European Commission, 2020a).

The EU can adopt health legislation on the ground of protection of public health, e.g., serious cross-border threats to health. In this regard, an important step forward was Decision 1082/2013 on serious cross-border threats to health which applies among others on communicable disease, laying down rules on epidemiological surveillance, monitoring, early warning of, and combating serious cross-border threats to health, including preparedness and response planning related to those activities, in order to coordinate and complement national policies.

3. Restrictions via Schengen

Schengen States have frequently reintroduced temporary border controls with one another, usually under the normal procedure for the purposes of safeguarding international events taking place in their countries, or in attempts to restrict irregular immigration (Guild et al., 2015). Recently, politics producing border security as a suitable response to external threats have directed the COVID response in many States as well. Pandemics, no less than migration waves or terrorist attacks, involve border politics (Kenwick et al., 2020), and while many COVID-19 restrictions are in fact responses to the virus, it is now clear that plenty are being coupled with or use migration enforcement controls (Sanchez et al, 2020). To understand this, we shall analyse the practice of the States using SBC during the pandemic.

While 17 Schengen Countries¹⁰ notified the European Commission the reintroduction of controls at internal borders due to threats related to the spread of Covid-19 in 2020, other Schengen Countries¹¹ introduced restrictions on movement of persons that affected internal borders, such as temporary bans on non-essential travel (Sabbati et al., 2020).

They used either article 25 or 28 SBC depending on their aim: The articles differ from each other in the entry into force, the time period and the obligation of notification. Article 25 contains provisions for foreseeable events and can be used to reintroduce border control, that is to say, border checks and border surveillance. This can be adopted in all or specific parts of internal borders up to 30 days or for the foreseeable duration of the serious threat if it exceeds 30 days. There is the possibility to prolong for renewable periods of up to 30 days with a total maximum period of six months. Article 28 contains provisions for cases requiring immediate border control for up to ten days with renewable periods of up to 20

¹⁰ Belgium, Czechia, Denmark, Germany, Spain, France, Estonia, Hungary, Lithuania, Austria, Poland, Portugal, Slovakia, Finland, Iceland, Switzerland and Norway.

¹¹ Italy, Latvia, Malta, the Netherlands and Slovenia.

days with an overall maximum period of two months.¹² Article 25 (and also Article 26) imposes an obligation for Member States to notify the European Commission and other Member States. This shall be fulfilled at least four weeks before the planned reintroduction except if the circumstances that lead to reintroduced border control become known less than four weeks before the planned reintroduction. Of course, Article 28 imposes no obligation for prior notification, thus it shall be realized parallel to the immediate measure. The notification contains several obligatory parts: a list of information including the reason for the proposed introduction; all relevant data detailing the events that constitute a serious threat to public policy or internal security; the scope of the proposed reintroduction specifying for which parts of the internal borders controls will be introduced; the names of the affected crossing points; as well as the date and duration of the planned reintroduction.

In our case, the States listed not only COVID-19 as the reason for border controls, but interestingly saw it in a broader context. Thus, Hungary linked the epidemic to property security with a declaration of a state of emergency throughout the territory of Hungary in order to protect the health and lives of the Hungarian citizens and to prevent the consequences of the mass epidemic threatening the security of life and property of Hungarian citizens (Council of the European Union, 2020a). Austria linked the reintroduction of border control to migration, namely, that the current measures to combat the COVID-19 crisis might cause migrants getting stranded in the countries of the Western Balkans and, once lifted, will lead to increasing migration pressure. France described the potential terrorist threats, as the vulnerability of States, whose security forces are heavily involved in combating the spread of the COVID-19 pandemic, was conducive to new terrorist plots (European Commission, 2022, September 6; 2022, July 15). All of this points to the fact that States still use migratory movements as base for these restrictions even during the pandemic. This is further strengthened by the notification list's data: Among the States, only France indicates COVID-19 as reason for border control between 01/05/2022- 31/10/2022 (European Commission, 2022, July 15). A further example is Germany, that alternately used pandemic and migratory movement for justifying border controls as can be seen in Table 1 below.

Table 1: Period and Reason for Temporary Reintroduction of Border Controls from the Start of the Pandemic: Germany

Period	Reason
12/11/2019 - 12/05/2020	Secondary movements, situation at the external borders
16/03/2020- 26/03/2020	Coronavirus COVID-19, land borders with Denmark, Luxembourg, France, Switzerland and Austria.
19/03/2020- 29/03/2020	Coronavirus COVID-19, air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea borders with Denmark

¹² According to the Commission's proposal on 14 December 2021 for amending Regulation (EU) 2016/399 (Schengen Border Code - SBC) on the rules governing the movement of persons across borders, when prolonging controls, Member States should first consider using alternative measures and need to provide a risk assessment when prolongations exceed 6 months. If prolongations exceed 18 months, the Commission should issue an opinion on their proportionality and necessity. The maximum duration for internal border controls would be 2 years but with extensions in specific circumstances (see for more: Guillaume, 2022).

26/03/2020- 15/04/2020	Coronavirus COVID-19, internal land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark
15/04/2020-05/05/2020 12/05/2020-11/11/2020	Coronavirus COVID-19, internal land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark Secondary movements, situation at the external borders, land border with Austria
05/05/2020- 15/05/2020	Coronavirus COVID-19, land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark
16/05/2020-15/06/2020	Coronavirus COVID-19, land and air borders with Austria, Switzerland, France, Denmark, Italy and Spain, sea border with Denmark
16/06/2020- 21/06/2020	Coronavirus COVID-19, air borders with Spain (lifting the controls reintroduced on the basis of coronavirus at the borders with Austria, Switzerland, France, Denmark and Italy as of 15 June 2020)
12/11/2020-11/05/2021	Secondary movements, situation at the external borders, land border with Austria
14/02/2021-13/02/2021	Coronavirus COVID-19, land and air border with the Czech Republic, air border with Austria
24/02/2021-03/03/2021	Coronavirus COVID-19, Coronavirus COVID-19, land and air border with the Czech Republic, air border with Austria
04/03/2021-17/03/2021	Coronavirus COVID-19, land and air border with the Czech Republic, air border with Austria
18/03/2021-31/03/2021	Coronavirus COVID-19, land and air border with the Czech Republic, air border with Austria
01/04/2021-14/04/2021	Coronavirus COVID-19, Coronavirus COVID-19, internal borders with the Czech Republic
12/05/2021-11/11/2021	Secondary movements, situation at the external borders, land border with Austria
12/11/2021-11/05/2022	Secondary movements, situation at the external borders, land border with Austria
12/05/2022-11/11/2022	Secondary movements, situation at the external borders, land border with Austria
13/06/2022-03/07/2022	G7 Summit in Elmau; all internal borders

Source: Author's own table, data compiled from the European Commission (2022, July 15).

We shall highlight two elements of the notification procedure that concerns the States' discretionary power because these questions the transparency of decision-making. In connection with the notification, the Member States may, where necessary and in accordance with national law, decide to classify parts of the information although such classification must not preclude making it available to the European Commission and the European Parliament (SCB, art. 27). Another aspect of the SBC that we shall highlight concerns a report that shall be made within four weeks of the lifting of border control by the concerned Member State which has carried out border control. This report has to be submitted to the European Parliament, the Council and the Commission, and contains particularly the initial assessment and the respect of the criteria referred to in Articles 26, 28 and 30, the operation of the checks, the practical cooperation with neighbouring Member States, the resulting impact on the free movement of persons, the effectiveness

of the reintroduction of border control at internal borders, including an ex-post assessment of the proportionality of the reintroduction of border control (SCB, art. 33). These reports are not accessible to the public. For both reasons, the procedure is lacking transparency.

We shall point out that, even though the European Commission underlined that the measures used by the States must not discriminate between Member States' own nationals and resident EU-citizens, also they must not deny entry to EU citizens or third-country nationals residing on its territory and must facilitate transit of other EU citizens and residents that are returning home, these standards were not met, however, by several States' practices. This could be observed in Hungary's case where only Hungarian citizens and EEA nationals holding a permanent residence card were allowed to enter the territory (Governmental Decree no. 81/2020). This led to discrimination and breach of EU law, because the Government granted exemptions to Czech, Slovak and Polish citizens (citizens of the V4 countries) with a negative coronavirus test, but no exemption to other EU nationals with a negative test. Moreover, though entry travel bans are not expressly foreseen by the Code, Hungary's notification stated that persons arriving from the countries most affected by the infection, namely Italy, China, South Korea and Iran would not be allowed to enter at any border crossing point (Council of the European Union, 2020).

The reintroduction of inner border controls in the EU was considered by Member States a necessity to prevent the spread of COVID-19, though at first, the EU emphasised that an effective border management to protect health through health checks of all persons entering the territory of Member States does not require the formal introduction of internal border controls (European Commission, 2020b). Later on, this viewpoint changed, namely, any restrictions should be based on specific and limited public interest grounds, including the protection of public health (Council of the European Union, 2020b). But border policy affected as well the functioning of asylum and reception systems. This was demonstrated at the beginning of the pandemic when the Commission called for a temporary restriction on non-essential travel to the EU and the external EU borders had been closed in March (Schengenvisa.info, 2020). Member States added further steps. E.g., Hungary suspended the admission of illegal migrants to transit zones on 1 May 2020.

4. Restricting or Facilitating with a Digital Certificate?

Did the EU Digital COVID Certificate restrict or facilitate freedom of movement? The answer depends on the viewpoint. The proposal concerning a Digital Green Card aimed to facilitate free movement against States' harsh border policy (European Commission, 2021). However, a critical aspect concerned the timing because the Commission's proposal could be seen again as a step lagging after the States', as experienced already at the beginning of pandemic with States introducing separately border restrictions without an integrated, EU-wide approach. Several States had already launched or were planning to introduce national COVID certificates. Hence, Italy, which was the European centre of the pandemic, introduced a so-called green card, which made it possible for people to move between the red and orange regions and to take part in various events (Bassu, 2021). In Hungary, Government Decree no. 60/2021. (II. 12.) related to the certification of protection against the coronavirus introduced the Hungarian immunity certificate whose delivery to the holders began after 1 March 2021. However, for intra EU movements, for example, it was not sufficient to present the Hungarian immunity certificate, as it did not indicate the data required as a condition of entry (the name of the vaccine and the time of the second dose).

According to the proposal, the digital card intended to facilitate the exercise of the right to free movement in the EU, while at the same time reducing the threat of the coronavirus spreading. The card enabled EU citizens and their family members exercising their right to free movement to certify that they met the public health requirements laid down by the destination country in accordance with Union law. According to this, vaccination, a negative test, and recovery from COVID-19 might de facto prevent or reduce the risk of transmission. Here, we shall point out the wording 'may', the use of the conditional tense, which may have been due to the fact that the World Health Organization opposed the criteria of a vaccination certificate at border crossings when entering another country. The WHO was of the opinion that there were still critical, unanswered questions related to the effectiveness of the vaccination in reducing the spread of the infection. Thus, it recommended that vaccinated individuals should not be exempted from other measures aiming to reduce the risks during travelling (WHO, 2021).

The Regulation (EU) 2021/953 on the European Digital COVID Certificate (EUDCC) entered into force on 1 July 2021 for 12 months with an initial expiry date of 30 June 2022. However, in line with the pandemic situation¹³ the Commission proposed the extension of the Certificate, and it has been prolonged until 30 June 2023.¹⁴ In this regard, we shall point out another concern related to the original Commission proposal on the Digital Green Card: The framework for the issuance, verification and acceptance of vaccination/test/recovery certificates would have been suspended if the WHO Director-General had declared the end of SARS-CoV-2 epidemiological emergency. Thus, originally there was no final date set, and the end of the outbreak would have been linked to a WHO statement.

According to Regulation (EU) 2021/953, the card is valid until 30 June 2023¹⁵ in the 27 EU Member States as well as in Iceland, Liechtenstein, Norway and Switzerland. As for the personal scope, it concerns EU citizens, their family members and third-country nationals who are legally residents or residents in the territory of a Member State and who fulfil one of the following conditions: have been vaccinated, recovered from an illness or have tested negative. Accordingly, the Regulation allows for the issuance, cross-border verification and acceptance of three types of digital certificates, the vaccination card, the test card and the recovery card¹⁶. The EU card contains the name and date of birth of the holder, the date of issue, information on vaccination/testing/recovery and a unique identifier. The certificate has a QR code that is used to verify the data, but no data is transferred or stored. All other health data shall be kept exclusively by the national authority issuing the EU Digital COVID Certificate.

¹³ The European Parliament's Civil Liberties Committee (LIBE) has supported the European Commission's proposal to extend the frame for another year until June 2023. See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/953 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. Brussels, 3.2.2022, COM(2022) 50 final 2022/0031 (COD).

¹⁴ By June 2022, over 1.8 billion Certificates had been issued see (Schengenvisainfo.com., 2022a)

¹⁵ Art. 17.

¹⁶ Ibid. Recovery certificates will be granted for travellers who have tested negative with rapid antigen tests, which has not been possible previously (Schengenvisainfo.com., 2022b).

The regulation seeks to facilitate the application of the principles of proportionality and non-discrimination with regard to restrictions on freedom of movement during pandemics, and to facilitate the exercise of their right to free movement by cardholders. At the same time, it is important to emphasize that the EU Digital COVID Certificate prevents the discrimination of non-vaccinated people and allows them to exercise their right to free movement with a negative COVID test or proof of recovery from the disease. However, we shall point out that there can be also possible discriminations on the basis of nationality because Member States are at different rates of vaccination. As vaccinations become more widely available, vaccination certificates may continue to discriminate on the basis of age or vulnerability, for example, as certain individuals may still not be vaccinated (for example, young children or for health reasons).

The Regulation has a number of objectives, namely to facilitate cross-border free movement and to allow the lifting of stricter national measures, such as travel/entry bans and testing requirements. But the Regulation allows Member States to go beyond the three conditions for cross-border movement during the pandemic and to adopt more stringent measures; it only requires to refrain from imposing further restrictions on free movement. However, it adds that if a Member State imposes stricter conditions on holders of the EU Digital COVID Certificate, it must notify the other Member States and the Commission before introducing such a measure and must determine the reasons, the scope and the duration.

Although the creation of the EU Digital COVID Certificate had the aim to facilitate movements across the EU internal borders, we shall highlight the added advantage that Member States could use the Certificate for purposes other than that. In practice, they utilized it, for example, as a condition for participation in cultural, sporting and social events. Moreover, looking at Member States' practice, in Hungary the EU Certificate was also accepted for outsiders entering public education institutions (Decree 29/2021, IX. 19). Additionally, not only public but private companies, too, could choose to use the EU Digital COVID Certificate for purposes other purposes but only in accordance with national law, EU fundamental rights and the EU legislation on free movement, as well as in line with the principles of non-discrimination and proportionality.

The harmonization of restrictive measures on free movement is underlined by the new Regulation, as we have witnessed free movement restrictions were imposed mostly unilaterally by Member States, without the coordination among them or at EU level. But we shall emphasise that at the same time, we have seen coordination at the EU and Member State level on the issue of the Union's external borders, i.e., restrictions on third-country nationals as mentioned before. This picture is also reinforced by the fact that the European Commission acted extremely quickly in response to the COVID mutation in southern Africa as an emergency brake mechanism was introduced when flights from the concerned African region were stopped and travellers from the region had to stay in strict quarantine. Here, the emergency brake mechanism was used, which did not apply to EU citizens, long-term residents and certain categories of essential travellers. It is important to point out that their national COVID certificates were not taken into account: They were subject to testing and quarantine measures, regardless of whether they received full vaccination or not (The Council of the European Union, 2021).

As mentioned above, the still present Covid-19 virus and certain travel restrictions within the EU led the European Commission to propose to extend the EUDCC regulation with

Regulation (EU) 2022/1034 (Niestadt, 2022) and also to introduce several amendments. First of all, it contained again an obligation for the Commission to submit a detailed report by 31 December 2022 as Regulation (EU) 2021/953 had already obliged the Commission to publish a report.¹⁷ Moreover, it clarified that vaccination certificates should reflect all doses administered, regardless of the Member State where people received their vaccination. It also introduced the expansion of the range of authorised antigen tests used to qualify for a EU Digital COVID Certificate, the possibility to issue a certificate of recovery following an antigen test and the possibility to allow vaccination certificates to be issued to persons participating in clinical trials. A critical aspect of the extension is that no impact assessment had been made beforehand: An assessment would have highlighted the efficiency and proportionality of the measures that impact fundamental rights. This is particularly important as the Certificate requires the processing of personal data to fight COVID-19 (EDPB-EDPS, 1/2022).

5. Conclusion

Based on the analysis, a very complex picture emerges in the area of free movement, Schengen border and public health in the area of Member States' competences and the EU's action. At the beginning of the pandemic, when the articles of the Schengen Borders Code (SBC) were triggered, workers with certain occupations were exempted from the restrictions, and with the introduction of the EU Digital COVID Certificate, people's mobility was linked to the possession of the health Certificate.

On the one hand, the latest approach, the EU Digital COVID Certificate confirms and reinforces the EU's ability to divert States' interests towards an integrated solution. In the event of an epidemic, albeit slowly, a solution acceptable to all Member States has been found. The main advantage of the EU Digital COVID Certificate is that it can exempt from the restrictions on free movement, and generally Member States must refrain from introducing additional travel restrictions for those possessing such a Certificate. The EU allowed exemptions for certain categories of people on the condition that they hold an EU Digital COVID Certificate. In the case of the SBC, such exemptions from restrictions were limited to a narrower group of persons, to certain workers; but, in principal, the Digital Certificate granted all persons entitled the opportunity to exercise their right to free movement within the EU. In this way, the concept of freedom of movement has shifted first towards the free movement of workers with certain occupations and then of persons possessing a specific medical certificate.

On the other hand, in recent years, the European institutions and the major European governments have launched a debate on a possible reform of Schengen. This debate has been intensified by the migration crisis and accelerated by the pandemic, and the need to reforms has been demonstrated again. The closure, control of internal borders depends on the individual Member State, which could lead to the closure of the European borders, undermining one of the foundations of European integration. However, in the case of the pandemic, Member States were open to an integrated approach in order to overcome the crisis. Furthermore, we shall emphasise that some restrictions have been implemented

¹⁷ The report gave an overview among others about the implementation of the Regulation, information on other developments regarding the EU Digital COVID Certificate or the Member States' use of the EU Digital COVID Certificate for domestic purposes (European Commission, 2021b).

by countries with a history of anti-immigrant stance, furthering concerns about their fundamental objectives.

Finally, as almost all EU documents related to the pandemic contain references to the importance of the functioning of the internal market that turned out to be finite due to Member States' own approach to manage the pandemic, the EU Digital COVID Certificate contributes significantly to a more harmonized approach to free movement.

Relevant Legal Sources

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